

# Enrolled House Bill 2294

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Pre-session filed (at the request of Governor Theodore R. Kulongoski for State Department of Fish and Wildlife)

CHAPTER .....

## AN ACT

Relating to fish screening; creating new provisions; amending ORS 196.810, 314.752, 315.138, 496.085, 496.303, 498.306, 498.316, 498.336, 498.341, 498.346, 509.910, 540.525 and 540.532; and repealing ORS 315.138, 498.311, 498.331 and 509.615.

### Be It Enacted by the People of the State of Oregon:

**SECTION 1.** ORS 498.306 is amended to read:

498.306. (1) Any person who diverts water[, *at a rate of less than 30 cubic feet per second,*] from any body of water in this state in which any fish, subject to the State Fish and Wildlife Commission's regulatory jurisdiction, exist may be required to install, operate and maintain screening or by-pass devices to provide adequate protection for fish populations present at the water diversion in accordance with the provisions of this section.

(2)(a) The State Department of Fish and Wildlife shall establish a cost-sharing program to implement the installation of screening or by-pass devices on not less than [75] **150** water diversions **or 150 cubic feet per second of diverted water** [*referred to in this section*] per [year] **biennium**. The department shall select the water diversions to be screened from the priority listing of diversions established by the department and reviewed by the Fish Screening Task Force. The installation of a screening or by-pass device may be required only [*when*] **if**:

- (A) **The water diversion is 30 cubic feet per second or more;**
- (B) **A new water right is issued for the water diversion;**
- (C) **The point of water diversion is transferred as described in ORS 540.525;**

[(A)] (D) Fewer than [75] **150** persons per [year] **biennium** volunteer to request such installation on the diversions for which they are responsible; or

[(B)] (E) The Fish Screening Task Force has reviewed and approved the department's request to require installation of screening or by-pass devices in order to complete the screening of a stream system or stream reach.

(b) The limitations on the number of diversions **or cubic feet per second of diverted water** to be screened as provided in this section do not prevent the installation of [*fish*] screening and by-pass devices for diversions by persons responsible for diversions who are willing to pay the full cost of installing [*fish*] screening and by-pass devices.

(c) **Cost-sharing program funds may not be provided under this subsection for screening or by-pass devices on a water diversion involving water rights issued on or after January 1, 1996, unless the Fish Screening Task Force finds there is good cause to allow an exception. The department shall give preference to diversions of 30 cubic feet per second or less when making cost-sharing program funds available.**

(3) When selecting diversions to be equipped with screening or by-pass devices, the department shall attempt to solicit persons who may volunteer to request the installation of such devices on the diversions for which they are responsible. When selecting diversions to be equipped with screening or by-pass devices, the department shall select those diversions that will provide protection to the greatest number of indigenous naturally spawning fish possible.

(4) If the department constructs and installs the *[by-pass or]* screening **or by-pass** device, a fee shall be assessed against the person responsible for the diversion in an amount that does not exceed *[\$5,000 or]* 40 percent of the construction and installation *[cost of the devices, whichever amount is the lesser]* **costs of the device**. The fee shall be paid into the Fish Screening Subaccount. If the person responsible for the diversion constructs and installs the by-pass or screening device, the person shall be reimbursed from the Fish Screening Subaccount **or other state funds** in an amount that does not exceed *[\$10,000 or]* 60 percent of the actual construction and installation costs of the device, *whichever amount is the lesser*.

(5) The department's cost of major maintenance and repair of screening or by-pass devices shall be paid from the Fish Screening Subaccount.

(6) The department is responsible for major maintenance and repair of screening or by-pass devices **at water diversions of less than 30 cubic feet per second**, and if failure by the department to perform major maintenance on or repair such devices results in damage or blockage to the water diversion on which *[the devices have]* **a device has** been installed, the person responsible for the water diversion shall give written notice of such damage or blockage to the department. If within seven days of the notice, the department fails to take appropriate action to perform major maintenance on or repair the *[devices]* **device**, and to repair any damage that has occurred, the person responsible for the water diversion may remove the device. If an emergency exists that will result in immediate damage to livestock or crops, the person responsible for the water diversion may remove the screening or by-pass device. A person required to comply with this section is responsible for minor maintenance and shall, in a timely manner, notify the department of the need for activities associated with major maintenance.

**(7) A person who diverts water at a rate of 30 cubic feet per second or more is responsible for all maintenance of an installed screening or by-pass device.**

*[(7)]* **(8)** A person required to comply with this section may design, construct and install screening or by-pass devices adequate to prevent fish from leaving the body of water and entering the diversion or may request the department to design, construct and install such devices. However, if a person required to comply with this section fails to comply within 180 days after notice to comply by the department, the department shall design, install, *[and]* operate **and maintain** on that person's water diversion appropriate screening or by-pass devices and shall charge and collect from the person the actual costs thereof in an amount not to exceed the average cost for diversions of that size.

*[(8)]* **(9)** If the diversion requiring screening or by-pass devices is located on public property, the department shall obtain from the property owner approval or permits necessary for such devices. Activities of the department pursuant to this section *[shall]* **may** not interfere with existing rights of way or easements of the person responsible for the diversion.

*[(9)(a)]* **(10)(a)** The department or its agent has the right of ingress and egress to and from those places where screening or by-pass devices are required, doing no unnecessary injury to the property of the landowner, for the purpose of designing, installing, inspecting, performing major maintenance on or repairing such devices.

(b) If a screening or by-pass device installed by the department must be removed or replaced due to inadequate design or faulty construction, the person responsible for the diversion shall bear no financial responsibility for its replacement or reconstruction.

(c) If a screening or by-pass device installed by the person responsible for the diversion must be removed or replaced due to faulty construction, the person shall bear full financial responsibility for its replacement or reconstruction.

(d) If the person responsible for a diversion on which a screening or by-pass device is installed fails to conduct appropriate inspection and minor maintenance, the department may perform such activities and charge and collect from the person responsible a fee not to exceed [25] **\$150** for each required visit to the location of the screening or by-pass device.

**(e) If the department determines that a person must install, operate, maintain, repair or replace a screening or by-pass device under this section, the department shall notify the person, by registered mail, of the specific action the person is required to take. The person may request a contested case hearing before the State Fish and Wildlife Commission, to be conducted as provided in ORS chapter 183.**

[(10)] (11) [No] A person [shall] **may not** interfere with, tamper with, damage, destroy or remove in any manner not associated with regular and necessary maintenance procedures any screening or by-pass devices installed pursuant to this section.

[(11)] (12) The department may maintain an action to cover any costs incurred by the department when a person who is required to comply with this section fails to comply. Such action shall be brought in the circuit court for the county in which the [water diversion is] **screening or by-pass device is** located.

[(12)] (13) Upon receiving notice from the department to comply with this section, a person responsible for a water diversion may be excused from compliance if the person demonstrates to the Fish Screening Task Force that:

(a) The installation and operation of screening or by-pass devices would not prevent appreciable damage to the fish populations in the body of water from which water is being diverted.

(b) Installation and operation of screening or by-pass devices would not be technically feasible.

(c) Installation of screening or by-pass devices would result in undue financial hardship.

[(13)(a)] (14)(a) Not later than January 1, 1996, the department, with the assistance of the Fish Screening Task Force and the Water Resources Department, shall establish and publish an updated priority listing of 3,500 water diversions in the state that should be equipped with screening or by-pass devices. Changes may be made to the list whenever deletions are made for any reason. The priority listing shall include the name and address of the person currently responsible for the water diversion, the location of the diversion, size of the diversion, type of screening or by-pass device required, estimated costs for construction and [the] installation of screening or by-pass devices for the individual diversion and species of fish present in the water body. When developing the priority listing, the department shall base priorities for the installation of screening or by-pass devices on unscreened diversions on the following criteria:

(A) Fish species status.

(B) Fish numbers.

(C) Fish migration.

(D) Diversion size.

(E) Diversion amount.

(F) Any other criteria that the department, in consultation with the Fish Screening Task Force, considers appropriate.

(b) Criteria identified in this subsection shall be given appropriate consideration by the department when updating its priority listing. The priority [list] **listing** will be updated to give the highest priority to those diversions that save the greatest number of fish and simultaneously protect the greatest number of threatened or endangered fish species.

(c) After the priority [list] **listing** has been updated, the persons responsible for the diversions on the list shall be notified that their diversions appear on the list. Such persons also shall be furnished a description of the fish screening **cost-sharing** program.

(d)(A) The department shall notify, by means of registered mail, each person responsible for the first 250 diversions on the priority listing on or before January 1, 1996. The department shall furnish information regarding the fish screening **cost-sharing** program to each person responsible for a diversion included in the first 250 diversions on the priority listing on or before January 1, 1996.

[No] A person [shall] **may not** be required to install a screening or by-pass device unless previously notified by the department of the requirement to install such devices.

(B) On January 1 of each even-numbered year, the department [will] **shall** notify each person responsible for a diversion included in the first 250 diversions on the priority listing. However, the department is not required to notify in a subsequent year any person previously notified. The department shall include with such notification[,] information regarding the fish screening **cost-sharing** program [to each person responsible for a diversion included in the first 250 diversions on the priority listing].

(C) Before any person is required to install a screening or by-pass device [on a diversion of less than 30 cubic feet per second], the department shall confirm the need for the [screening] device through a visual, on-site inspection by appropriate staff of the fish screening division of the department, or a district biologist of the department.

[(14)] **(15)** As used in this section:

(a) "Behavioral barrier" means a system that utilizes a stimulus to take advantage of natural fish behavior to attract or repel fish. A behavioral barrier does not offer a physical impediment to fish movement, but uses such means as electricity, light, sound or hydraulic disturbance to move or guide fish.

(b) "Body of water" includes but is not limited to irrigation ditches, reservoirs, stock ponds and other artificially created structures or impoundments.

(c) "By-pass device" means any pipe, flume, open channel or other means of conveyance that transports fish back to the body of water from which the fish were diverted but does not include fishways or other passages around a dam.

(d) "Fish screen" means a screen, bar, rack or other barrier, including related improvements necessary to ensure its effective operation, to provide adequate protection for fish populations present at a water diversion.

(e) "Major maintenance" means all maintenance work done on a [fish] screening or by-pass device other than minor maintenance.

(f) "Minor maintenance" means periodic inspection, cleaning and servicing of [fish] screening or by-pass devices at such times and in such manner as to ensure proper operation of the screening or by-pass device.

[(g)] "Screening device" means a fish screen or behavioral barrier.]

[(h)] **(g)** "Person" means any person, partnership, corporation, association, municipal corporation, political subdivision or governmental agency.

**(h) "Screening device" means a fish screen or behavioral barrier.**

**SECTION 2.** ORS 315.138 is amended to read:

315.138. (1) There shall be allowed a credit against tax due under ORS chapter 316, or if the taxpayer is a corporation, under ORS chapter 317, for taxpayers that install [fish] screening devices, by-pass devices or fishways, [when required to do so by] **pursuant to** ORS 498.306[ 498.311 (1),] **or** 509.585 [or 509.615 (1)], and the diversion is not part of a hydroelectric project required to be licensed under the Federal Energy Regulatory Commission. Except as allowed in subsection (4) of this section, the credit shall be taken in the tax year in which the final certification is issued under subsection (10) of this section.

(2) The credit shall be equal to 50 percent of the taxpayer's net certified costs of installing a [fish] screening device, by-pass device or fishway. The total credit allowed shall not exceed \$5,000 per device installed.

(3) The credit allowed in any one year shall not exceed the tax liability of the taxpayer.

(4) Any tax credit otherwise allowable under this section which is not used by the taxpayer in a particular tax year may be carried forward and offset against the taxpayer's tax liability for the next succeeding tax year. Any credit remaining unused in such next succeeding tax year may be carried forward and used in the second succeeding tax year. Any credit remaining unused in such second succeeding tax year may be carried forward and used in the third succeeding tax year. Any credit remaining unused in such third succeeding tax year may be carried forward and used in the

fourth succeeding tax year. Any credit remaining unused in such fourth succeeding tax year may be carried forward and used in the fifth succeeding tax year, but may not be used in any tax year thereafter.

(5) The credit provided by this section shall be in addition to and not in lieu of any depreciation or amortization deduction to which the taxpayer otherwise may be entitled with respect to the installation of a [*fish*] screening device, by-pass device or fishway. The taxpayer's adjusted basis for determining gain or loss shall not be further decreased by any tax credits allowed under this section.

(6) In the case of a credit allowed under this section for purposes of ORS chapter 316:

(a) A nonresident shall be allowed the credit in the same manner and subject to the same limitations as a resident. However, the credit shall be prorated using the proportion provided in ORS 316.117.

(b) If a change in the taxable year of a taxpayer occurs as described in ORS 314.085, or if the Department of Revenue terminates the taxpayer's taxable year under ORS 314.440, the credit allowed by this section shall be prorated or computed in a manner consistent with ORS 314.085.

(c) If a change in the status of a taxpayer from resident to nonresident or from nonresident to resident occurs, the credit allowed by this section shall be determined in a manner consistent with ORS 316.117.

(7) To qualify for the credit the taxpayer must be issued a certificate by the State Department of Fish and Wildlife.

(8) To obtain credit under subsection (1) of this section, any person proposing to apply for certification of a [*fish*] screening device, by-pass device or fishway, before installing the [*fish*] screening device, by-pass device or fishway, shall file a request for preliminary certification with the State Department of Fish and Wildlife. The request shall be in a form prescribed by the State Department of Fish and Wildlife. The following conditions shall apply:

(a) Within 30 days of the receipt of a request for preliminary certification, the State Department of Fish and Wildlife may require, as a condition precedent to issuance of a preliminary certificate of approval, the submission of plans and specifications. After examination thereof, the State Department of Fish and Wildlife may request corrections and revisions to the plans and specifications. The State Department of Fish and Wildlife may also require any pertinent information necessary to determine whether the proposed [*fish*] screening device, by-pass device or fishway is in accordance with State Department of Fish and Wildlife requirements.

(b) If the State Department of Fish and Wildlife determines that the proposed [*fish*] screening device, by-pass device or fishway is in accordance with State Department of Fish and Wildlife requirements, it shall issue a preliminary certificate approving the [*fish*] screening device, by-pass device or fishway. If the State Department of Fish and Wildlife determines that the [*fish*] screening device, by-pass device or fishway does not comply with State Department of Fish and Wildlife requirements, the State Department of Fish and Wildlife shall issue an order denying certification.

(c) If within 90 days of the receipt of plans, specifications or any subsequently requested revisions or corrections to the plans and specifications or any other information required pursuant to this section, the State Department of Fish and Wildlife fails to issue a preliminary certificate of approval and the State Department of Fish and Wildlife fails to issue an order denying certification, the preliminary certificate shall be considered to have been issued. The capital investment must comply with the plans, specifications and any corrections or revisions thereto, if any, previously submitted.

(d) Within 30 days from the date of mailing of the order, any person against whom an order is directed pursuant to paragraph (b) of this subsection may demand a hearing. The demand shall be in writing, shall state the grounds for hearing and shall be mailed to the State Fish and Wildlife Director. The hearing shall be conducted in accordance with the applicable provisions of ORS chapter 183.

(9) [*Any fish*] **A screening device, by-pass device or fishway that is installed by the State Department of Fish and Wildlife pursuant to [ORS 498.311 (2)] ORS 498.306 (8) in response to**

**noncompliance by the person responsible for the water diversion** is not eligible for the credit provided in subsection (1) of this section.

(10) Upon completion and pursuant to application for final certification, final certification shall be issued by the State Department of Fish and Wildlife if the [*fish*] screening device, by-pass device or fishway was constructed and installed in accordance with State Department of Fish and Wildlife requirements. Final certification shall include a statement of the costs of installation as verified by the State Department of Fish and Wildlife. The credit allowed under this section shall be claimed first for the tax year of the taxpayer in which final certification is issued.

(11) Pursuant to the procedures for a contested case under ORS chapter 183, the State Department of Fish and Wildlife may order the revocation of the certificate issued under this section of any taxpayer, if it finds that:

(a) The certificate was obtained by fraud or misrepresentation; or

(b) The holder of the certificate fails to meet State Department of Fish and Wildlife requirements.

(12) As soon as the order of revocation under this section has become final the State Department of Fish and Wildlife shall notify the Department of Revenue of such order.

(13) If the certificate of a [*fish*] screening device, by-pass device or fishway is ordered revoked pursuant to subsection (11) of this section, all prior tax relief provided to the holder of the certificate by virtue of the certificate shall be forfeited and the Department of Revenue shall proceed to collect those taxes not paid by the certificate holder as a result of the tax relief provided to the holder.

(14) If the certificate of a [*fish*] screening device, by-pass device or fishway is ordered revoked pursuant to subsection (11) of this section, the certificate holder shall be denied any further relief provided under this section in connection with the [*fish*] screening device, by-pass device or fishway, as the case may be, from and after the date that the order of revocation becomes final.

(15) In the event that the [*fish*] screening device, by-pass device or fishway is destroyed by flood, natural disaster or act of God before all of the credit has been used, the taxpayer may nevertheless claim the credit as if no destruction had taken place.

(16) [*Fish*] Screening devices, by-pass devices or fishways that are financed by funds obtained from the Water Development Fund, pursuant to ORS 541.700 to 541.855, shall not be eligible for the credit under any circumstances.

(17) The State Department of Fish and Wildlife shall adopt rules for carrying out the provisions of this section and report to the interim committee created under ORS 171.605 to 171.640 to make studies of and inquiries into state revenue matters.

**SECTION 2a. ORS 315.138 is repealed.**

**SECTION 2b. The repeal of ORS 315.138 by section 2a of this 2007 Act becomes operative on January 2, 2014.**

**SECTION 3.** ORS 496.303 is amended to read:

496.303. (1) The Fish and Wildlife Account is established in the State Treasury, separate and distinct from the General Fund. All moneys in the account are continuously appropriated to the State Fish and Wildlife Commission. The Fish and Wildlife Account shall consist of the moneys in its various subaccounts and any moneys transferred to the account by the Legislative Assembly. Unless otherwise specified by law, interest earnings on moneys in the account shall be paid into the State Treasury and credited to the State Wildlife Fund.

(2)(a) The Fish Screening Subaccount is established in the Fish and Wildlife Account. The subaccount shall consist of:

(A) All penalties recovered under ORS 536.900 to 536.920.

(B) All moneys received pursuant to ORS 498.306.

(C) All gifts, grants and other moneys from whatever source that may be used to carry out the provisions of ORS 498.306[, 498.311 and 509.615].

(D) All moneys received from the surcharge on angling licenses imposed by ORS 497.124.

(b) All moneys in the subaccount shall be used to carry out the provisions of ORS 315.138, 498.306[, 498.311, 509.615] and 509.620. However, moneys received from the surcharge on angling licenses imposed by ORS 497.124 shall be expended only to carry out the provisions of law relating to the screening of water diversions [*at a rate less than 30 cubic feet per second*].

*[(c) Of the moneys in the subaccount budgeted for administrative expenses, up to 50 percent of that amount may be expended for activities associated with the screening of diversions over 30 cubic feet per second and for fish passages issues.]*

(3) The Fish Endowment Subaccount is established in the Fish and Wildlife Account. The subaccount shall consist of transfers of moneys authorized by the Legislative Assembly from the State Wildlife Fund and gifts and grants of moneys from whatever source for the purpose of paying the expense of maintaining fish hatcheries operated by the department.

(4) The Migratory Waterfowl Subaccount is established in the Fish and Wildlife Account. All moneys received by the commission from the sale of art works and prints related to the migratory waterfowl stamp shall be deposited in the subaccount. Moneys in the subaccount may be expended only for activities that promote the propagation, conservation and recreational uses of migratory waterfowl and for activities related to the design, production, issuance and arrangements for sale of the migratory waterfowl stamps and related art works and prints. Expenditures of moneys in the subaccount may be made within this state, in other states or in foreign countries, in such amounts as the commission determines appropriate. Expenditures in other states and foreign countries shall be on such terms and conditions as the commission determines will benefit most directly the migratory waterfowl resources of this state.

(5) The Halibut Research Subaccount is established in the Fish and Wildlife Account. Based on the annual number of recreational halibut anglers, a portion of the moneys derived from the sale of the salmon, steelhead trout, sturgeon and halibut tag pursuant to ORS 497.121 shall be credited to the subaccount. Moneys in the subaccount may be expended only for halibut population studies and other research.

(6) The Upland Bird Subaccount is established in the Fish and Wildlife Account. All moneys received by the State Fish and Wildlife Commission from the sale of upland bird stamps, from the sale of any art works and prints related to the upland bird stamp and from private hunting preserve permit fees shall be deposited in the subaccount. Moneys in the subaccount may be expended only for promoting the propagation and conservation of upland birds and the acquisition, development, management, enhancement, sale or exchange of upland bird habitat, and for activities related to the design, production, issuance and arrangements for sale of the upland bird stamps and related art works and prints. Expenditures of moneys in the subaccount shall be made for the benefit of programs within this state in such amounts and at such times as the commission determines appropriate to most directly benefit the upland bird resources of the state.

(7)(a) The Fish and Wildlife Deferred Maintenance Subaccount is established in the Fish and Wildlife Account. Interest earnings on moneys in the subaccount shall be credited to the subaccount. The subaccount shall consist of moneys authorized by the Legislative Assembly from the State Wildlife Fund and moneys obtained by gift, grant, bequest or donation from any other public or private source.

(b) The principal in the subaccount may be utilized only as provided in paragraph (c) of this subsection. Interest earnings on the moneys in the subaccount may be expended only for the maintenance of fish hatcheries and State Department of Fish and Wildlife facilities other than administrative facilities located in [*Portland*] **Salem**.

(c) The department may borrow funds from the principal of the subaccount to maintain adequate cash flow requirements. However, moneys borrowed from the principal must be repaid to the subaccount:

(A) Within six months from the date on which the moneys were borrowed.

(B) With interest at the standard rate that the State Treasurer charges to state agencies for other loans. Interest paid under this subparagraph shall be paid to the subaccount.

(d) For purposes of this subsection, “principal” means moneys authorized by the Legislative Assembly for transfer to the subaccount from the State Wildlife Fund, including any assignment of earnings on moneys in the fund and other moneys obtained by gift, grant, bequest or donation deposited into the subaccount.

(8) The Access and Habitat Board Subaccount is established in the Fish and Wildlife Account. The subaccount shall consist of moneys transferred to the subaccount pursuant to ORS 496.242. Moneys in the subaccount may be used for the purposes specified in ORS 496.242.

(9) The Marine Shellfish Subaccount is established in the Fish and Wildlife Account. Interest earnings on moneys in the subaccount shall be credited to the subaccount. All moneys received by the commission from the sale of resident and nonresident shellfish licenses pursuant to ORS 497.121 shall be deposited in the subaccount. Moneys in the subaccount shall be used for the protection and enhancement of shellfish for recreational purposes, including shellfish sanitation costs and the cost of enforcement of wildlife laws pertaining to the taking of shellfish. The State Fish and Wildlife Director, or a designee, the Director of Agriculture, or a designee, and the Superintendent of State Police, or a designee, shall jointly make a recommendation to the Governor for inclusion in the Governor’s budget beginning July 1 of each odd-numbered year.

(10)(a) The Mountain Sheep Subaccount is established in the Fish and Wildlife Account, consisting of moneys collected under ORS 497.112 (2)(a) to (c).

(b) All moneys in the subaccount shall be used for the propagation and conservation of mountain sheep, for research, development, management, enhancement and sale or exchange of mountain sheep habitat and for programs within the state that in the discretion of the commission most directly benefit mountain sheep resources of this state.

(11)(a) The Antelope Subaccount is established in the Fish and Wildlife Account, consisting of moneys collected under ORS 497.112 (2)(a) to (c).

(b) All moneys in the subaccount shall be used for the propagation and conservation of antelope, for research, development, management, enhancement and sale or exchange of antelope habitat and for programs within the state that in the discretion of the commission most directly benefit antelope resources of this state.

(12)(a) The Mountain Goat Subaccount is established in the Fish and Wildlife Account, consisting of moneys collected under ORS 497.112 (2)(a) to (c).

(b) All moneys in the subaccount shall be used for the propagation and conservation of mountain goats for research, development, management, enhancement and sale or exchange of mountain goat habitat and for programs within the state that in the discretion of the commission most directly benefit mountain goat resources of this state.

(13)(a) The commission shall keep a record of all moneys deposited in the Fish and Wildlife Account. The record shall indicate by separate cumulative accounts the sources from which the moneys are derived and the individual activity or programs against which each withdrawal is charged.

(b) Using the record created pursuant to paragraph (a) of this subsection, the commission shall report, in the budget documents submitted to the Legislative Assembly, on the application of investment and interest earnings to the maintenance of fish hatcheries and other State Department of Fish and Wildlife facilities.

**SECTION 4.** ORS 196.810 is amended to read:

196.810. (1)(a) Except as otherwise specifically permitted under ORS 196.600 to 196.905, no person or governmental body may remove any material from the beds or banks **of any waters of this state** or fill any waters of this state without a permit issued under authority of the Director of the Department of State Lands, or in a manner contrary to the conditions set out in the permit, or in a manner contrary to the conditions set out in an order approving a wetlands conservation plan.

(b) Notwithstanding the permit requirements of this section and notwithstanding the provisions of ORS 196.800 (5) and (13), if any removal or fill activity is proposed in essential indigenous anadromous salmonid habitat, except for those activities customarily associated with agriculture, a permit is required. “Essential indigenous anadromous salmonid habitat” as defined under this sec-



tion shall be further defined and designated by rule by the Department of State Lands in consultation with the State Department of Fish and Wildlife and in consultation with other affected parties.

(c) No person may be required to obtain a permit under paragraph (b) of this subsection for prospecting or other nonmotorized activities resulting in the removal from or fill of less than one cubic yard of material at any one individual site and, cumulatively, not more than five cubic yards of material within a designated essential indigenous anadromous salmonid habitat segment in a single year. Prospecting or other nonmotorized activities may be conducted only within the bed or wet perimeter of the waterway and may not occur at any site where fish eggs are present. Removal or filling activities customarily associated with mining require a permit under paragraph (b) of this subsection.

(d) No permit may be required under paragraph (b) of this subsection for construction or maintenance of fish passage and fish screening structures that are constructed, operated or maintained under ORS [498.311,] **498.306**, 498.316, 498.326 or 509.600 to 509.645.

(e) Nothing in this section limits or otherwise changes the exemptions under ORS 196.905.

(f) As used in paragraphs (b) and (c) of this subsection:

(A) "Bed" means the land within the wet perimeter and any adjacent nonvegetated dry gravel bar.

(B) "Essential indigenous anadromous salmonid habitat" means the habitat that is necessary to prevent the depletion of indigenous anadromous salmonid species during their life history stages of spawning and rearing.

(C) "Indigenous anadromous salmonid" means chum, sockeye, Chinook and Coho salmon, and steelhead and cutthroat trout, that are members of the family Salmonidae and are listed as sensitive, threatened or endangered by a state or federal authority.

(D) "Prospecting" means searching or exploring for samples of gold, silver or other precious minerals, using nonmotorized methods, from among small quantities of aggregate.

(E) "Wet perimeter" means the area of the stream that is under water or is exposed as a non-vegetated dry gravel bar island surrounded on all sides by actively moving water at the time the activity occurs.

(2) No governmental body may issue a lease or permit contrary or in opposition to the conditions set out in the permit issued under ORS 196.600 to 196.905.

(3) Subsection (1) of this section does not apply to removal of material under a contract, permit or lease with any governmental body entered into before September 13, 1967. However, no such contract, permit or lease may be renewed or extended on or after September 13, 1967, unless the person removing the material has obtained a permit under ORS 196.600 to 196.905.

(4) Notwithstanding subsection (1) of this section, the Department of State Lands may issue, orally or in writing, an emergency authorization for the removal of material from the beds or banks or filling of any waters of this state in an emergency, for the purpose of making repairs or for the purpose of preventing irreparable harm, injury or damage to persons or property. The emergency authorization issued under this subsection:

(a) Shall contain conditions of operation that the department determines are necessary to minimize impacts to water resources or adjoining properties.

(b) Shall be based, whenever practicable, on the recommendations contained in an on-site evaluation by an employee or representative of the department.

(c) If issued orally, shall be confirmed in writing by the department within five days.

**SECTION 5.** ORS 196.810, as amended by section 2, chapter 516, Oregon Laws 2001, and section 97, chapter 14, Oregon Laws 2003, is amended to read:

196.810. (1)(a) Except as otherwise specifically permitted under ORS 196.600 to 196.905, a person or governmental body may not remove any material from the beds or banks **of any waters of this state** or fill any waters of this state without a permit issued under authority of the Director of the Department of State Lands, or in a manner contrary to the conditions set out in the permit, or in a manner contrary to the conditions set out in an order approving a wetlands conservation plan.

(b) A permit is not required under paragraph (a) of this subsection for prospecting or other nonmotorized activities resulting in the removal from or fill of less than one cubic yard of material at any one individual site and, cumulatively, not more than five cubic yards of material within a particular stream segment in a single year. Prospecting or other nonmotorized activities may be conducted only within the bed or wet perimeter of the waterway and may not occur at any site where fish eggs are present. Removal or filling activities customarily associated with mining require a permit under paragraph (a) of this subsection.

(c) A permit is not required under paragraph (a) of this subsection for construction or maintenance of fish passage and fish screening structures associated with irrigation ditches or the maintenance of drainage ditches that are constructed, operated or maintained under ORS [498.311,] **498.306**, 498.316, 498.326 or 509.600 to 509.645.

(d) Nothing in this section limits or otherwise changes the exemptions under ORS 196.905.

(2) A governmental body may not issue a lease or permit contrary or in opposition to the conditions set out in the permit issued under ORS 196.600 to 196.905.

(3) Subsection (1) of this section does not apply to removal of material under a contract, permit or lease with any governmental body entered into before September 13, 1967. However, a contract, permit or lease may not be renewed or extended on or after September 13, 1967, unless the person removing the material has obtained a permit under ORS 196.600 to 196.905.

(4) Notwithstanding subsection (1) of this section, the Department of State Lands may issue, orally or in writing, an emergency authorization for the removal of material from the beds or banks or filling of any waters of this state in an emergency, for the purpose of making repairs or for the purpose of preventing irreparable harm, injury or damage to persons or property. The emergency authorization issued under this subsection:

(a) Shall contain conditions of operation that the department determines are necessary to minimize impacts to water resources or adjoining properties.

(b) Shall be based, whenever practicable, on the recommendations contained in an on-site evaluation by an employee or representative of the department.

(c) If issued orally, shall be confirmed in writing by the department within five days.

(5) As used in this section:

(a) "Bed" means the land within the wet perimeter and any adjacent nonvegetated dry gravel bar.

(b) "Prospecting" means searching or exploring for samples of gold, silver or other precious minerals, using nonmotorized methods, from among small quantities of aggregate.

(c) "Wet perimeter" means the area of the stream that is under water or is exposed as a non-vegetated dry gravel bar island surrounded on all sides by actively moving water at the time the activity occurs.

**SECTION 5a.** ORS 496.085 is amended to read:

496.085. (1) There is established within the State Department of Fish and Wildlife the Fish Screening Task Force consisting of seven members appointed by the State Fish and Wildlife Commission.

(2) Three members shall be appointed to represent agricultural interests, three shall be appointed to represent fishing or fish conservation interests and one member shall be appointed to represent the public. Members of the task force shall serve for two-year terms. No member of the task force shall serve for more than three consecutive two-year terms.

(3) A member of the task force shall receive no compensation for services as a member. However, subject to any applicable law regulating travel and other expenses of state officers and employees, a member shall be reimbursed for actual and necessary travel and other expenses incurred in the performance of official duties from such moneys as may be available therefor in the State Wildlife Fund.

(4) The task force shall meet at such times and places as may be determined by the chair or by a majority of the members of the task force.

(5) The duties of the task force are:

(a) To advise the department in the development of a comprehensive cost-sharing program for the installation of fish screening or by-pass devices in water diversions.

(b) To advise the department in establishing a stable and equitable funding system for the installation and maintenance of fish screening and by-pass devices.

(c) To advise the department in identifying sources and applying for grants from local, state and federal governmental agencies for funding the installation and maintenance of fish screening and by-pass devices.

(d) To advise the department in monitoring fish screening programs.

(e) To advise the department in a survey and study of fish screening technology to determine the most cost-effective alternatives for screening in the various situations that may be encountered in the implementation of fish screening in this state.

(f) To advise the department in preparing a report on the capital costs and effectiveness of the program provided in ORS 498.306.

(g) To advise the department on the creation of the priority criteria and the priority listing referred to in ORS 498.306 [(13)(a) or (d)] **(14)(a) or (d)**.

**SECTION 6.** ORS 498.316 is amended to read:

498.316. ORS 498.306 [and 498.311 do] **does** not require the installation of [*fish*] screening or by-pass devices in those water diversions for which the State Fish and Wildlife Commission, by contract or other form of agreement with the person diverting the water, has made such other provision as the commission determines is adequate for the protection of the game fish in the body of water from which water is being diverted.

**SECTION 7.** ORS 498.341 is amended to read:

498.341. Notwithstanding the [*limitation on the number of diversions to be screened as provided in*] **limitations imposed by** ORS 498.306, if sufficient funds are made available in the Fish Screening Subaccount of the Fish and Wildlife Account, by allocation from the Administrative Services Economic Development Fund or from other sources, the State Department of Fish and Wildlife may provide financial assistance for construction and installation of screening or by-pass devices on [*an*] additional [250] water diversions.

**SECTION 8.** ORS 498.346 is amended to read:

498.346. The State Fish and Wildlife Commission may maintain a suit to enjoin any person, including governmental agencies of this state and political subdivisions of this state, from violating the provisions of ORS 498.306 [*or 498.311*]. The circuit court for any county in which are situated any waters in which any such violations are threatened has jurisdiction of the suit authorized by this section.

**SECTION 9.** ORS 498.336 is amended to read:

498.336. Nothing in ORS 498.306[, 498.311,] **or** 509.585 [*or 509.615*] shall be construed:

(1) To limit the eligibility of a person required to install and operate [*fish*] screening or by-pass devices to obtain funding from the Water Development Fund pursuant to ORS 541.700 to 541.855.

(2) To limit the acquisition or acceptance of any federal funds available for the installation, operation, maintenance, improvement or repair of [*fish*] screening or by-pass devices on water diversions in this state[, *regardless of the size of the diversion*].

**SECTION 10.** ORS 509.910 is amended to read:

509.910. (1) The State Fish and Wildlife Commission may maintain an action for an injunction to enjoin and restrain any person, municipal corporation, political subdivision or governmental agency of this state from violating any of the provisions of ORS 509.130, 509.140, 509.505, 509.585, 509.610[, 509.615] and 509.625.

(2) Any action authorized by this section shall be tried in the circuit court of the county in which the violation occurs or in Marion or Multnomah County.

(3) If the defendant is a corporation with its principal office and place of business in a county other than in which the waters flow or are situated, such action shall be deemed an action of local nature and service of summons made on a corporation in any county where the corporation has its principal office and place of business. If it is a foreign corporation, service may be made on the

statutory agent but if there is no such statutory agent then upon the Secretary of State as in other cases provided by law.

**SECTION 11.** ORS 540.525 is amended to read:

540.525. (1) Upon receipt of an application for a change in the point of diversion under ORS 540.520, the Water Resources Department shall consult with the State Department of Fish and Wildlife to determine whether the diversion is:

(a) Equipped with an appropriate fish screening or by-pass device; or  
(b) Included on the priority list of screening projects established pursuant to section 8, chapter 933, Oregon Laws 1989.

(2) If the original point of diversion is included in the priority list of screening projects established pursuant to section 8, chapter 933, Oregon Laws 1989, the department, after consulting with the State Department of Fish and Wildlife, may require the installation of an appropriate fish screening or by-pass device at the new point of diversion.

(3) When consulting with the State Department of Fish and Wildlife, the department shall determine whether the installation of an appropriate fish screening or by-pass device is necessary to prevent fish from leaving the body of water and entering the diversion.

(4) Any individual who is required to install a fish screening or by-pass device under this section at a point of diversion [*for a diversion of under 30 cubic feet per second*] may participate in the State Department of Fish and Wildlife's [*cost sharing*] **cost-sharing** program for the installation of screening or by-pass devices.

**SECTION 12.** ORS 540.532 is amended to read:

540.532. (1) Notwithstanding ORS 537.797, 540.510, 540.520 and 540.530, an individual may request a change in the point of diversion to reflect the historical use of water at a point of diversion other than that described in the water right certificate or decree if the individual complies with the provisions of subsection (2) of this section.

(2) An individual may request a change in the point of diversion under subsection (1) of this section if:

(a) The actual, current point of diversion has been in use for more than 10 years;  
(b) The Water Resources Department has received no claim of injury as a result of the use of water from the current point of diversion prior to the request for the change of diversion;  
(c) The individual requesting the change provides written notice to any other affected water right holder, as identified by the Water Resources Department, and the Water Resources Department provides notice of the request in the department's public notice of water right applications; and

(d) The individual provides a map of sufficient detail and clarity to identify the true point of diversion including but not limited to:

(A) The county tax lot number, township, range and section, and to the nearest quarter-quarter section or latitude and longitude as established by a global positioning system; and

(B) The locations of the point of diversion as specified in the water right certificate or decree and the actual, current point of diversion.

(3) Upon receipt of a request for a change in the point of diversion under subsection (1) of this section, the Water Resources Department shall consult with the State Department of Fish and Wildlife to determine whether the historical point of diversion is:

(a) Equipped with an appropriate fish screening or by-pass device; or  
(b) Included on the priority list of screening projects established pursuant to section 8, chapter 933, Oregon Laws 1989.

(4) If the historical point of diversion is included in the priority list of screening projects established pursuant to section 8, chapter 933, Oregon Laws 1989, the Water Resources Department, after consulting with the State Department of Fish and Wildlife, may require the installation of an appropriate fish screening or by-pass device at the point of diversion.

(5) When consulting with the State Department of Fish and Wildlife, the Water Resources Department shall determine whether the installation of an appropriate fish screening or by-pass device is necessary to prevent fish from leaving the body of water and entering the diversion.

(6) Any individual who is required to install a fish screening or by-pass device under this section at a point of diversion [*for a diversion of under 30 cubic feet per second*] may participate in the State Department of Fish and Wildlife's cost-sharing program for the installation of screening or by-pass devices.

**SECTION 13.** ORS 314.752 is amended to read:

314.752. (1) Except as provided in ORS 314.740 (5)(b), the tax credits allowed or allowable to a C corporation for purposes of ORS chapter 317 or 318 shall not be allowed to an S corporation. The business tax credits allowed or allowable for purposes of ORS chapter 316 shall be allowed or are allowable to the shareholders of the S corporation.

(2) In determining the tax imposed under ORS chapter 316, as provided under ORS 314.734, on income of the shareholder of an S corporation, there shall be taken into account the shareholder's pro rata share of business tax credit (or item thereof) that would be allowed to the corporation (but for subsection (1) of this section) or recapture or recovery thereof. The credit (or item thereof), recapture or recovery shall be passed through to shareholders in pro rata shares as determined in the manner prescribed under section 1377(a) of the Internal Revenue Code.

(3) The character of any item included in a shareholder's pro rata share under subsection (2) of this section shall be determined as if such item were realized directly from the source from which realized by the corporation, or incurred in the same manner as incurred by the corporation.

(4) If the shareholder is a nonresident and there is a requirement applicable for the business tax credit that in the case of a nonresident the credit be allowed in the proportion provided in ORS 316.117, then that provision shall apply to the nonresident shareholder.

(5) As used in this section, "business tax credit" means a tax credit granted to personal income taxpayers to encourage certain investment, to create employment, economic opportunity or incentive or for charitable, educational, scientific, literary or public purposes that is listed under this subsection as a business tax credit or is designated as a business tax credit by law or by the Department of Revenue by rule and includes but is not limited to the following credits: ORS 285C.309 (tribal taxes on reservation enterprise zones), ORS 315.104 (forestation and reforestation), ORS 315.134 (fish habitat improvement), [*ORS 315.138 (fish screening, by-pass devices, fishways)*], ORS 315.156 (crop gleaning), ORS 315.164 and 315.169 (farmworker housing), ORS 315.204 (dependent care assistance), ORS 315.208 (dependent care facilities), ORS 315.213 (contributions for child care), ORS 315.254 (youth apprenticeship sponsorship), ORS 315.304 (pollution control facility), ORS 315.324 (plastics recycling), ORS 315.354 and ORS 469.207 (energy conservation facilities), ORS 315.507 (electronic commerce), ORS 315.511 (advanced telecommunications facilities), ORS 315.604 (bone marrow transplant expenses) and ORS 317.115 (fueling stations necessary to operate an alternative fuel vehicle).

**SECTION 14.** ORS 496.303, as amended by section 3 of this 2007 Act, is amended to read:

496.303. (1) The Fish and Wildlife Account is established in the State Treasury, separate and distinct from the General Fund. All moneys in the account are continuously appropriated to the State Fish and Wildlife Commission. The Fish and Wildlife Account shall consist of the moneys in its various subaccounts and any moneys transferred to the account by the Legislative Assembly. Unless otherwise specified by law, interest earnings on moneys in the account shall be paid into the State Treasury and credited to the State Wildlife Fund.

(2)(a) The Fish Screening Subaccount is established in the Fish and Wildlife Account. The subaccount shall consist of:

(A) All penalties recovered under ORS 536.900 to 536.920.

(B) All moneys received pursuant to ORS 498.306.

(C) All gifts, grants and other moneys from whatever source that may be used to carry out the provisions of ORS 498.306.

(D) All moneys received from the surcharge on angling licenses imposed by ORS 497.124.

(b) All moneys in the subaccount shall be used to carry out the provisions of ORS [315.138,] 498.306 and 509.620. However, moneys received from the surcharge on angling licenses imposed by ORS 497.124 shall be expended only to carry out the provisions of law relating to the screening of water diversions.

(3) The Fish Endowment Subaccount is established in the Fish and Wildlife Account. The subaccount shall consist of transfers of moneys authorized by the Legislative Assembly from the State Wildlife Fund and gifts and grants of moneys from whatever source for the purpose of paying the expense of maintaining fish hatcheries operated by the department.

(4) The Migratory Waterfowl Subaccount is established in the Fish and Wildlife Account. All moneys received by the commission from the sale of art works and prints related to the migratory waterfowl stamp shall be deposited in the subaccount. Moneys in the subaccount may be expended only for activities that promote the propagation, conservation and recreational uses of migratory waterfowl and for activities related to the design, production, issuance and arrangements for sale of the migratory waterfowl stamps and related art works and prints. Expenditures of moneys in the subaccount may be made within this state, in other states or in foreign countries, in such amounts as the commission determines appropriate. Expenditures in other states and foreign countries shall be on such terms and conditions as the commission determines will benefit most directly the migratory waterfowl resources of this state.

(5) The Halibut Research Subaccount is established in the Fish and Wildlife Account. Based on the annual number of recreational halibut anglers, a portion of the moneys derived from the sale of the salmon, steelhead trout, sturgeon and halibut tag pursuant to ORS 497.121 shall be credited to the subaccount. Moneys in the subaccount may be expended only for halibut population studies and other research.

(6) The Upland Bird Subaccount is established in the Fish and Wildlife Account. All moneys received by the State Fish and Wildlife Commission from the sale of upland bird stamps, from the sale of any art works and prints related to the upland bird stamp and from private hunting preserve permit fees shall be deposited in the subaccount. Moneys in the subaccount may be expended only for promoting the propagation and conservation of upland birds and the acquisition, development, management, enhancement, sale or exchange of upland bird habitat, and for activities related to the design, production, issuance and arrangements for sale of the upland bird stamps and related art works and prints. Expenditures of moneys in the subaccount shall be made for the benefit of programs within this state in such amounts and at such times as the commission determines appropriate to most directly benefit the upland bird resources of the state.

(7)(a) The Fish and Wildlife Deferred Maintenance Subaccount is established in the Fish and Wildlife Account. Interest earnings on moneys in the subaccount shall be credited to the subaccount. The subaccount shall consist of moneys authorized by the Legislative Assembly from the State Wildlife Fund and moneys obtained by gift, grant, bequest or donation from any other public or private source.

(b) The principal in the subaccount may be utilized only as provided in paragraph (c) of this subsection. Interest earnings on the moneys in the subaccount may be expended only for the maintenance of fish hatcheries and State Department of Fish and Wildlife facilities other than administrative facilities located in Salem.

(c) The department may borrow funds from the principal of the subaccount to maintain adequate cash flow requirements. However, moneys borrowed from the principal must be repaid to the subaccount:

(A) Within six months from the date on which the moneys were borrowed.

(B) With interest at the standard rate that the State Treasurer charges to state agencies for other loans. Interest paid under this subparagraph shall be paid to the subaccount.

(d) For purposes of this subsection, "principal" means moneys authorized by the Legislative Assembly for transfer to the subaccount from the State Wildlife Fund, including any assignment of earnings on moneys in the fund and other moneys obtained by gift, grant, bequest or donation deposited into the subaccount.

(8) The Access and Habitat Board Subaccount is established in the Fish and Wildlife Account. The subaccount shall consist of moneys transferred to the subaccount pursuant to ORS 496.242. Moneys in the subaccount may be used for the purposes specified in ORS 496.242.

(9) The Marine Shellfish Subaccount is established in the Fish and Wildlife Account. Interest earnings on moneys in the subaccount shall be credited to the subaccount. All moneys received by the commission from the sale of resident and nonresident shellfish licenses pursuant to ORS 497.121 shall be deposited in the subaccount. Moneys in the subaccount shall be used for the protection and enhancement of shellfish for recreational purposes, including shellfish sanitation costs and the cost of enforcement of wildlife laws pertaining to the taking of shellfish. The State Fish and Wildlife Director, or a designee, the Director of Agriculture, or a designee, and the Superintendent of State Police, or a designee, shall jointly make a recommendation to the Governor for inclusion in the Governor's budget beginning July 1 of each odd-numbered year.

(10)(a) The Mountain Sheep Subaccount is established in the Fish and Wildlife Account, consisting of moneys collected under ORS 497.112 (2)(a) to (c).

(b) All moneys in the subaccount shall be used for the propagation and conservation of mountain sheep, for research, development, management, enhancement and sale or exchange of mountain sheep habitat and for programs within the state that in the discretion of the commission most directly benefit mountain sheep resources of this state.

(11)(a) The Antelope Subaccount is established in the Fish and Wildlife Account, consisting of moneys collected under ORS 497.112 (2)(a) to (c).

(b) All moneys in the subaccount shall be used for the propagation and conservation of antelope, for research, development, management, enhancement and sale or exchange of antelope habitat and for programs within the state that in the discretion of the commission most directly benefit antelope resources of this state.

(12)(a) The Mountain Goat Subaccount is established in the Fish and Wildlife Account, consisting of moneys collected under ORS 497.112 (2)(a) to (c).

(b) All moneys in the subaccount shall be used for the propagation and conservation of mountain goats for research, development, management, enhancement and sale or exchange of mountain goat habitat and for programs within the state that in the discretion of the commission most directly benefit mountain goat resources of this state.

(13)(a) The commission shall keep a record of all moneys deposited in the Fish and Wildlife Account. The record shall indicate by separate cumulative accounts the sources from which the moneys are derived and the individual activity or programs against which each withdrawal is charged.

(b) Using the record created pursuant to paragraph (a) of this subsection, the commission shall report, in the budget documents submitted to the Legislative Assembly, on the application of investment and interest earnings to the maintenance of fish hatcheries and other State Department of Fish and Wildlife facilities.

**SECTION 15. The amendments to ORS 314.752 and 496.303 by sections 13 and 14 of this 2007 Act become operative on January 2, 2014.**

**SECTION 16. ORS 498.311, 498.331 and 509.615 are repealed.**

**SECTION 17. The amendments to ORS 315.138 by section 2 of this 2007 Act apply to tax credits for screening devices, by-pass devices and fishways first claimed in tax years beginning on or after January 1, 2008, and before January 1, 2014.**

**Passed by House May 24, 2007**

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Chief Clerk of House

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Speaker of House

**Passed by Senate June 14, 2007**

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President of Senate

**Received by Governor:**

.....M,....., 2007

**Approved:**

.....M,....., 2007

.....  
Governor

**Filed in Office of Secretary of State:**

.....M,....., 2007

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Secretary of State