

House Bill 2873

Sponsored by Representative CLEM (Pre-session 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**.

Provides that hydroelectric projects exempted from federal regulation and located within existing artificial delivery systems are not subject to additional requirements for fish screens, by-pass devices or fish passages if projects do not create change in stream conditions that adversely affects fish. Limits additional requirements for fish screens, by-pass devices or fish passages for other hydroelectric projects exempted from federal regulation and located within existing artificial delivery systems.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to fish supportive measures for hydroelectric projects located within artificial delivery
3 systems; creating new provisions; amending ORS 509.585 and 543.765; and declaring an emer-
4 gency.

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

6 **SECTION 1.** ORS 509.585 is amended to read:

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

14 (2) Except as otherwise provided by this section or ORS 509.645, a person owning or operating
15 an artificial obstruction may not construct or maintain any artificial obstruction across any waters
16 of this state that are inhabited, or historically inhabited, by native migratory fish without providing
17 passage for native migratory fish.

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

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 quently than once every five years.

2 (4) A person owning or operating an artificial obstruction shall, prior to construction, funda-
3 mental change in permit status or abandonment of the artificial obstruction in any waters of this
4 state, obtain a determination from the department as to whether native migratory fish are or his-
5 torically have been present in the waters. **Except as provided in subsection (10) of this section,**
6 if the department determines that native migratory fish are or historically have been present in the
7 waters, the person owning or operating the artificial obstruction shall either submit a proposal for
8 fish passage to the department or apply for a waiver pursuant to subsection (7) of this section. Ap-
9 proval of the proposed fish passage facility or of the alternatives to fish passage must be obtained
10 from the department prior to construction, permit modification or abandonment of the artificial ob-
11 struction.

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

18 (6) The department shall submit a proposed determination of the required fish passage or alter-
19 natives to fish passage to the commission for approval. The determination may be the result of the
20 negotiations described in subsection (5) of this section or, if no agreement was reached in the ne-
21 gotiations, a determination proposed by the department. **Subject to subsection (10) of this section,**
22 if a protest is not filed within the time period specified in ORS 509.645, the proposed determination
23 shall become a final order.

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

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

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

- 36 (A) The geographic scope in which alternatives must be conducted;
- 37 (B) The type and quality of habitat;
- 38 (C) The species affected;
- 39 (D) The status of the native migratory fish stocks;
- 40 (E) Standards for monitoring, evaluating and adaptive management;
- 41 (F) The feasibility of fish passage and alternatives to fish passage;
- 42 (G) Quantified baseline conditions;
- 43 (H) Historic conditions;
- 44 (I) Existing native migratory fish management plans;
- 45 (J) Financial or other incentives and the application of incentives;

1 (K) Data collection and evaluation; and

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

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

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

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

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

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

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

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

20 **(10)(a) A person who owns or operates an existing artificial delivery system may obtain**
21 **department approval for a hydroelectric project described in ORS 543.765 (6)(a)(A) without**
22 **submitting a proposal for fish passage to the department and without applying for a waiver**
23 **under subsection (7) of this section. The person may construct and operate a hydroelectric**
24 **project described in ORS 543.765 (6)(a)(A) using the same fish passage facilities or alterna-**
25 **tives that would apply to the artificial delivery system if the hydroelectric project did not**
26 **exist.**

27 **(b) For a hydroelectric project described in ORS 543.765 (6)(a)(B), the terms and condi-**
28 **tions of a final order under subsection (6) of this section may not impose fish screen, by-pass**
29 **device or fish passage requirements that exceed the limitation on fish screen, by-pass device**
30 **and fish passage requirements described in ORS 543.765 (6)(a)(B) for a hydroelectric certif-**
31 **icate issued under ORS 543.765.**

32 [(10)] (11) If the fundamental change in permit status is an expiration of a license of a federally
33 licensed hydroelectric project, the commission's determination shall be submitted to the Federal
34 Energy Regulatory Commission as required by ORS 543A.060 to 543A.410.

35 [(11)] (12) To the extent that the requirements of this section are preempted by the Federal
36 Power Act or by the laws governing hydroelectric projects located in waters governed jointly by
37 Oregon and another state, federally licensed hydroelectric projects are exempt from the require-
38 ments of this section.

39 [(12)] (13) A person subject to a decision of the commission under this section shall have the
40 right to a contested case hearing according to the applicable provisions of ORS chapter 183.

41 **SECTION 2.** ORS 543.765 is amended to read:

42 543.765. (1) Notwithstanding ORS 537.145 and ORS chapter 543, the holder of a water right may
43 apply to the Water Resources Department for a certificate to use water for hydroelectric purposes
44 within an artificial delivery system under the applicant's existing water right. If the proposed hy-
45 droelectric project qualifies for a Federal Energy Regulatory Commission exemption, the applicant

1 may use the expedited application process under this section.

2 (2) An application, which shall be on a form provided by the department, for a hydroelectric
3 certificate under this section must include:

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

6 (b) A copy of a Federal Energy Regulatory Commission exemption application, if applicable.

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

9 (d) A statement by the applicant that the amount of water used by the proposed hydroelectric
10 project will not exceed the amount authorized and used under the applicant's existing water right
11 for beneficial use without waste.

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

13 (f) An application processing fee of \$500. The department shall deposit fees collected under this
14 section into the Water Resources Department Hydroelectric Fund established pursuant to ORS
15 536.015.

16 (g) A map or drawing and all other data concerning the proposed hydroelectric project, as may
17 be prescribed by the department. The map or drawing must be of sufficient quality and scale to es-
18 tablish the location of the existing point of diversion and the proposed location of the hydroelectric
19 facility.

20 (h) If the water to be used for the proposed hydroelectric project is delivered by a public entity
21 other than the applicant for a certificate under this section, a statement from that entity that the
22 entity will be able to deliver water as described in the application.

23 (i) Evidence that the water has been used over the past five years according to the terms and
24 conditions of the applicant's existing water right described in paragraph (a) of this subsection.

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

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

28 (b) The Water Resources Department may issue a final order and certificate to use water for
29 hydroelectric purposes upon making a final determination that the proposed hydroelectric use does
30 not impair, or is not detrimental to, the public interest in the manner provided in ORS 537.170 (8).

31 (4) If the Water Resources Department determines that public interest issues have been identi-
32 fied, the department shall issue a final order denying the application. The department shall also is-
33 sue a final order denying the application if the department identifies issues related to the public
34 interest. If the applicant does not appeal the final order as provided in ORS chapter 183 and, within
35 one year of the department's final order denying the applicant's application, files an application with
36 the department for a preliminary permit to operate a hydroelectric project as provided in ORS
37 537.130 and 543.210, the applicant shall receive a credit toward the applicant's application fees in
38 the amount of \$500.

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

40 (a) **Except as provided in subsection (6) of this section,** fish screens, by-pass devices and fish
41 passages as required by the State Department of Fish and Wildlife.

42 (b) That use of water be limited to periods when the applicant's existing water right is put to
43 beneficial use without waste and that the amount used is not greater than the quantity of water
44 diverted to satisfy the authorized specific use under the existing water right described in subsection
45 (2)(a) of this section.

1 (c) That use of water be limited by rate, duty, season and any other limitations of the applicant's
2 existing water right described in subsection (2)(a) of this section.

3 (d) That the applicant measure and report the quantity of water diverted.

4 [(e) Any other conditions the Water Resources Department deems necessary to protect the public
5 interest.]

6 [(f)] (e) That the restrictions established in ORS 543.660 shall apply as conditions of use to a
7 certificate issued under this section to a district as defined in ORS 543.655.

8 [(g)] (f) That a certificate issued under this section shall be invalidated upon a change in the
9 point of diversion of the existing water right described in subsection (2)(a) of this section.

10 [(h)] (g) **That** the Water Resources Department shall conduct a review of certificates issued
11 under this section and shall issue a final order and a superseding certificate that corresponds to any
12 changes or adjustments made to the applicant's existing water right described in subsection (2)(a)
13 of this section.

14 [(i)] (h) That the right to use water under a certificate issued under this section is invalidated
15 if the Federal Energy Regulatory Commission exemption related to the certificate is canceled or
16 invalidated.

17 (i) **Any other conditions the Water Resources Department deems necessary to protect
18 the public interest.**

19 (6)(a) **Except as provided in paragraph (b) of this subsection:**

20 (A) **A certificate described in subsection (5) of this section may not require the installa-
21 tion of fish screens, by-pass devices and fish passages if the proposed hydroelectric project,
22 as described in the application, will not create a change in stream conditions that adversely
23 affects fish at the point of diversion for the artificial delivery system.**

24 (B) **If an application demonstrates that the proposed hydroelectric project will create a
25 change in stream conditions that adversely affects fish at the point of diversion for the ar-
26 tificial delivery system, a certificate described in subsection (5) of this section may require
27 the installation of fish screens, by-pass devices and fish passages only to the extent neces-
28 sary to offset the adverse effect at the point of diversion that will directly result from the
29 hydroelectric project.**

30 (b) **Paragraph (a) of this subsection does not cancel or reduce any requirement regarding
31 fish screens, by-pass devices or fish passages that would apply to a point of diversion or ar-
32 tificial delivery system in the absence of a hydroelectric project.**

33 [(6)] (7) A certificate issued under this section may not have its own priority date. The depart-
34 ment may not regulate for or against any certificate issued under this section based on the priority
35 date of the certificate.

36 [(7)] (8) A certificate issued under this section does not grant a right to divert water for hy-
37 droelectric purposes.

38 [(8)] (9) A certificate issued under this section may not be included in the determination of in-
39 jury to other water rights pursuant to ORS chapter 540.

40 [(9)] (10) A certificate issued under this section is subject to review 50 years after the date of
41 issuance and pursuant to the terms described in this section.

42 [(10)] (11) Failure to fully develop and put to use a certificate issued under this section within
43 five years of issuance invalidates the hydroelectric certificate.

44 [(11)] (12) If a certificate under this section is issued, the certificate holder must pay fees con-
45 sistent with the fees described in ORS 543.078. Failure to pay a required fee invalidates a certificate

1 issued under this section.

2 [(12)] (13) The department shall issue invoices for fees required under this section, and the state
3 shall have a preference lien for delinquent fees, as provided in ORS 543.082.

4 [(13)] (14) An applicant for a certificate issued under this section must provide evidence of a
5 Federal Energy Regulatory Commission exemption before a certificate can be issued, if applicable.

6 [(14)] (15) Nothing in this section shall alter the preference of municipalities in ORS 543.260 (3)
7 and 543.270.

8 **SECTION 3. The amendments to ORS 509.585 and 543.765 by sections 1 and 2 of this 2011**
9 **Act apply to hydroelectric projects for which an application for a hydroelectric certificate**
10 **under ORS 543.765 is filed with the Water Resources Department on or after the effective**
11 **date of this 2011 Act.**

12 **SECTION 4. This 2011 Act being necessary for the immediate preservation of the public**
13 **peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect**
14 **on its passage.**

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