

A-Engrossed
Senate Bill 837

Ordered by the Senate April 22
Including Senate Amendments dated April 22

Sponsored by Senator JOHNSON

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.

Creates Fish Passage Restoration Subaccount within Fish Passage Fund. Dedicates subaccount moneys to certain projects benefiting fish passage.

Allows certificate for installation of hydroelectric power generation on or in certain conduit delivery systems to provide for annual payments to subaccount in lieu of installing fish passages.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to fish protection; creating new provisions; amending ORS 543.765; and declaring an emer-
3 gency.

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

5 **SECTION 1. (1) There is created a Fish Passage Restoration Subaccount within the Fish**
6 **Passage Fund established under ORS 497.139. Fees described in ORS 543.765 (14) shall be paid**
7 **into the subaccount. The State Department of Fish and Wildlife may solicit and accept ad-**
8 **ditional moneys for crediting to the subaccount, including but not limited to federal funds,**
9 **appropriations, donations, grants from nongovernmental entities and moneys from other**
10 **public or private sources. Any interest earned by moneys within the subaccount shall be**
11 **credited to the subaccount.**

12 **(2) The department shall use the subaccount moneys to fund priority fish passage resto-**
13 **ration projects. The department shall give priority to the funding of projects on the statewide**
14 **inventory of artificial obstructions priority list described in ORS 509.585, with an emphasis**
15 **on those statewide priority list projects that also pay fees under ORS 543.765 (14), and give**
16 **priority to projects that have the ability to leverage matching dollars. The department may**
17 **not use subaccount moneys to fund culvert projects or projects that are state-owned struc-**
18 **tures. The department may not expend more than six percent of the annual contributions**
19 **to the subaccount to pay staffing costs associated with the advancement of capital projects**
20 **funded by the subaccount.**

21 **SECTION 2. (1) The Fish Passage Task Force established pursuant to ORS 509.590 shall**
22 **provide advice to the State Department of Fish and Wildlife regarding the projects to be**
23 **funded and the expenditures to be made from the Fish Passage Restoration Subaccount**
24 **created under section 1 of this 2013 Act.**

25 **(2) The department shall maintain a record of all moneys deposited to or expended from**
26 **the subaccount. The department shall make an annual report of the deposits and expen-**

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 ditures available to the public on the department's website.

2 **SECTION 3.** (1) The Water Resources Department and the State Department of Fish and
3 Wildlife shall jointly review the adequacy of the amount and structure of the annual fee de-
4 scribed in ORS 543.765 (14) in achieving the dual in-conduit energy development and fish
5 passage restoration objectives of ORS 543.765 and review the functionality of the Fish Pas-
6 sage Restoration Subaccount and expenditures made from the subaccount. The departments
7 shall consult with relevant interested parties in conducting the review.

8 (2) The departments shall commence the review described in subsection (1) of this section
9 five years after the effective date of this 2013 Act. Upon completing the review, the depart-
10 ments shall report any findings and recommendations regarding the adequacy of the fee
11 amount and structure or the functionality of the subaccount or expenditures made from the
12 subaccount, including any recommendations for legislation, to an interim committee of the
13 Legislative Assembly dealing with natural resources no later than October 1, 2018.

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

15 543.765. (1) Notwithstanding ORS 537.145 and ORS chapter 543, the holder of a water right may
16 apply to the Water Resources Department for a certificate to use water for hydroelectric purposes
17 within an artificial delivery system under the applicant's existing water right. If the proposed hy-
18 droelectric project [*qualifies*] **meets the applicable capacity limitation under this subsection and**
19 **meets the qualifications** for a Federal Energy Regulatory Commission exemption **from licensing**,
20 the applicant may use the expedited application process under this section **regardless of which**
21 **federal agency is responsible for authorizing the project. To qualify under this subsection:**

22 (a) **For a project that is to be built as part of an existing dam, the capacity may not ex-**
23 **ceed five megawatts. Subsection (5)(b) of this section does not apply to a project described**
24 **in this paragraph.**

25 (b) **For in-conduit projects, the capacity may not exceed 15 megawatts for a nonmunicipal**
26 **facility or 40 megawatts for a municipal facility. Projects described in this paragraph must**
27 **comply with subsection (5)(b) of this section.**

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

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

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

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

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

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

39 (f) An application processing fee of \$500. The department shall deposit fees collected under this
40 section into the Water Resources Department Hydroelectric Fund established pursuant to ORS
41 536.015.

42 (g) A map or drawing and all other data concerning the proposed hydroelectric project, as may
43 be prescribed by the department. The map or drawing must be of sufficient quality and scale to es-
44 tablish the location of the existing point of diversion and the proposed location of the hydroelectric
45 [*facility*] **project.**

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

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

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

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

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

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

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

21 (a) Fish screens[,] **and** by-pass devices [*and fish passages*] as required by the State Department
22 of Fish and Wildlife.

23 **(b) Except as provided in this paragraph, fish passages as required by the State Depart-**
24 **ment of Fish and Wildlife. If the application is for a hydroelectric project that is to be in-**
25 **stalled in or on a conduit delivery system, the certificate does not need to include a**
26 **requirement for fish passage at the diversion point for the conduit delivery system if:**

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

28 **(B) The hydroelectric generating equipment for the project is installed within or at the**
29 **end of a conduit delivery system;**

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

32 **(D) Except as provided in subsection (15) of this section, the certificate includes a con-**
33 **dition for the making of annual payments under subsection (14) of this section.**

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

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

40 [(d)] (e) That the applicant measure and report the quantity of water diverted.

41 [(e) *Any other conditions the Water Resources Department deems necessary to protect the public*
42 *interest.*]

43 (f) That the restrictions established in ORS 543.660 shall apply as conditions of use to a certif-
44 icate issued under this section to a district as defined in ORS 543.655.

45 (g) That a certificate issued under this section shall be invalidated upon a change in the point

1 of diversion of the existing water right described in subsection (2)(a) of this section.

2 *[(h) The Water Resources Department shall conduct a review of certificates issued under this sec-*
3 *tion and shall issue a final order and a superseding certificate that corresponds to any changes or*
4 *adjustments made to the applicant's existing water right described in subsection (2)(a) of this section.]*

5 *[(i) (h) That the right to use water under a certificate issued under this section is invalidated*
6 *if the [Federal Energy Regulatory Commission exemption] federal exemption or authorization re-*
7 *lated to the certificate is canceled or invalidated.*

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

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

14 **(7) Subsection (5)(b) of this section does not affect any requirement for fish passage ap-**
15 **licable to a project that is otherwise required by law.**

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

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

23 *[(7)] (10) A certificate issued under this section does not grant a right to divert water for hy-*
24 *droelectric purposes.*

25 *[(8)] (11) A certificate issued under this section may not be included in the determination of*
26 *injury to other water rights pursuant to ORS chapter 540.*

27 *[(9)] (12) A certificate issued under this section is subject to review 50 years after the date of*
28 *issuance and pursuant to the terms described in this section.*

29 *[(10)] (13) Failure to fully develop and put to use a certificate issued under this section within*
30 *five years of issuance invalidates the hydroelectric certificate.*

31 **(14)(a) If a certificate contains a condition described in subsection (5)(b) of this section**
32 **for annual payments, the payment shall be collected as provided in paragraph (c) of this**
33 **subsection. Except as provided in paragraph (b) of this subsection, the annual payment**
34 **amount must be:**

35 **(A) Except as provided in subparagraph (D) of this paragraph, for the first five years,**
36 **four times the base hydropower fee amount assessed for the project under ORS 543.078 for**
37 **the year.**

38 **(B) Except as provided in subparagraph (D) of this paragraph, for the 6th through 10th**
39 **years, eight times the base hydropower fee amount assessed for the project under ORS**
40 **543.078 for the year.**

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

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

1 **(b) If the certificate is for a hydroelectric project that will operate on a partial-year ba-**
2 **sis, the fee shall be three-fifths of the amount established in paragraph (a) of this subsection.**

3 **(c) The Water Resources Department shall collect the fee on behalf of the State De-**
4 **partment of Fish and Wildlife and forward the fee moneys for crediting to the Fish Passage**
5 **Restoration Subaccount created under section 1 of this 2013 Act.**

6 **(15)(a) Notwithstanding subsection (14) of this section, a certificate for a project to install**
7 **hydroelectric generating equipment as described in subsection (5)(b) of this section may**
8 **provide for the termination of annual payments being made under subsection (14) of this**
9 **section if, after the date the project commences operation:**

10 **(A) The project provides for fish passages;**

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

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

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

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

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

21 **[(11)] (16) If a certificate under this section is issued, the certificate holder must pay fees con-**
22 **sistent with the fees described in ORS 543.078. Failure to pay a required fee invalidates a certificate**
23 **issued under this section.**

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

26 **[(13)] (18) An applicant for a certificate issued under this section must provide evidence of a**
27 **Federal Energy Regulatory Commission exemption or treatment under a similar commission**
28 **process before a certificate can be issued, if applicable.**

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

31 **SECTION 5. The amendments to ORS 543.765 by section 4 of this 2013 Act apply to hy-**
32 **droelectric projects for which a certificate application is filed under ORS 543.765 on or after**
33 **the effective date of this 2013 Act.**

34 **SECTION 6. This 2013 Act being necessary for the immediate preservation of the public**
35 **peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect**
36 **on its passage.**

37