

# D R A F T

## SUMMARY

Requires Department of State Lands to adopt pilot program for providing general authorization for voluntary stream restoration and beaver recovery through construction of artificial beaver dams. Requires department to report on program to Legislative Assembly on or before January 1, 2025.

Sunsets program January 2, 2027.

Declares emergency, effective on passage.

## A BILL FOR AN ACT

1  
2 Relating to artificial beaver dams; creating new provisions; amending ORS  
3 509.585; and declaring an emergency.

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

5 **SECTION 1. The Legislative Assembly finds and declares that:**

6 **(1) Many small streams in eastern Oregon were historically inhab-**  
7 **ited by beaver populations and strongly influenced by beavers' unique**  
8 **ability to modify their physical surroundings. Beaver dams had the**  
9 **effect of slowing the flow of water, allowing for natural overflow onto**  
10 **surrounding floodplains and providing many positive benefits to**  
11 **stream ecosystems and to the hydrologic functioning of streams.**

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

18 **(3) The public policy of the State of Oregon is to encourage and**

1 support a program for voluntary stream restoration actions by private  
2 landowners that can help restore both environmental and economic  
3 health to eastern Oregon through the construction of artificial beaver  
4 dams.

5 **SECTION 2. (1) As used in this section:**

6 (a) “Artificial beaver dams” means a series of low-profile structures  
7 constructed for the purpose of delaying or slowing, but not preventing,  
8 water flow to raise the water table and water surface elevations within  
9 incised or eroded streams, and to promote restoration of stream and  
10 habitat conditions suitable for beaver recovery.

11 (b) “Game fish” has the meaning given that term in ORS 496.009.

12 (c) “Historic floodplain” means channel-adjacent areas and surfaces  
13 constructed by fluvial processes that functioned as floodplains or areas  
14 for overbank deposition prior to channel incision.

15 (d) “Incised or eroded stream” means a stream that has been  
16 scoured by erosion to the extent that the channel bed elevation has  
17 lowered relative to its historic floodplain and the stream has lost  
18 connectivity with the historic floodplain, as characterized by the loss  
19 of natural wetland, riparian and meadow conditions in the adjacent  
20 surfaces, the absence of overbank flooding or deposition, the loss of  
21 diversity of fish and animal species or the presence of invasive dry  
22 land species, including but not limited to sagebrush, bunch grass,  
23 juniper and pine, that have encroached from adjacent uplands.

24 (e) “Qualifying stream” means an incised or eroded stream, or a  
25 designated reach of an incised or eroded stream, that, prior to com-  
26 mencement of a restoration project:

27 (A) Has average stream flows of less than three cubic feet per sec-  
28 ond during at least two months of each year;

29 (B) Does not provide spawning, rearing or food producing areas for  
30 game fish; and

31 (C) Is not utilized by native redband trout.

1       **(2)(a) The Department of State Lands shall by rule establish a pilot**  
2 **program for voluntary stream restoration and beaver recovery**  
3 **through the construction of artificial beaver dams on qualifying**  
4 **streams located in the Malheur Lake drainage basin.**

5       **(b) The pilot program adopted under this subsection shall provide**  
6 **for general authorization pursuant to ORS 196.850 or another form of**  
7 **general permitting under ORS 196.600 to 196.905 for voluntary projects**  
8 **to construct artificial beaver dams.**

9       **(c) The pilot program shall include a requirement for monitoring**  
10 **and shall identify criteria for evaluating the pilot program.**

11       **(3)(a) Voluntary restoration projects authorized pursuant to sub-**  
12 **section (2) of this section are exempt from fish passage requirements**  
13 **under ORS 509.585.**

14       **(b)(A) Notwithstanding paragraph (a) of this subsection, a land-**  
15 **owner participating in voluntary stream restoration under a general**  
16 **authorization shall work collaboratively with the State Department**  
17 **of Fish and Wildlife to provide appropriate fish passage for any game**  
18 **fish or redband trout populations that return to the incised or eroded**  
19 **stream due to the voluntary restoration project.**

20       **(B) The construction of fish passage structures under subparagraph**  
21 **(A) of this paragraph may only be required by the State Department**  
22 **of Fish and Wildlife subject to available funding for the construction**  
23 **in the Fish Passage Fund established under ORS 497.139.**

24       **(4) Removal of brush and trees from stream banks and riparian**  
25 **areas as part of a voluntary restoration project authorized under sub-**  
26 **section (2) of this section are not subject to riparian management re-**  
27 **quirements established under the Oregon Forest Practices Act.**

28       **SECTION 3.** ORS 509.585 is amended to read:

29       509.585. (1) It is the policy of the State of Oregon to provide for upstream  
30 and downstream passage for native migratory fish and the Legislative As-  
31 sembly finds that cooperation and collaboration between public and private

1 entities is necessary to accomplish the policy goal of providing passage for  
2 native migratory fish and to achieve the enhancement and restoration of  
3 Oregon's native salmonid populations, as envisioned by the Oregon Plan.  
4 Therefore, except as provided in ORS chapter 509, fish passage is required  
5 in all waters of this state in which native migratory fish are currently or  
6 have historically been present.

7 (2) Except as otherwise provided by this section, **section 2 of this 2015**  
8 **Act** or ORS 509.645, a person owning or operating an artificial obstruction  
9 may not construct or maintain any artificial obstruction across any waters  
10 of this state that are inhabited, or historically inhabited, by native migratory  
11 fish without providing passage for native migratory fish.

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

27 (4) A person owning or operating an artificial obstruction shall, prior to  
28 construction, fundamental change in permit status or abandonment of the  
29 artificial obstruction in any waters of this state, obtain a determination from  
30 the department as to whether native migratory fish are or historically have  
31 been present in the waters. If the department determines that native migra-

1 tory fish are or historically have been present in the waters, the person  
2 owning or operating the artificial obstruction shall either submit a proposal  
3 for fish passage to the department or apply for a waiver pursuant to sub-  
4 section (7) of this section. Approval of the proposed fish passage facility or  
5 of the alternatives to fish passage must be obtained from the department  
6 prior to construction, permit modification or abandonment of the artificial  
7 obstruction.

8 (5) Consistent with the purpose and goals of the Oregon Plan, the de-  
9 partment shall seek cooperative partnerships to remedy fish passage prob-  
10 lems and to ensure that problems are corrected as soon as possible. The  
11 department and the person owning or operating the artificial obstruction are  
12 encouraged to negotiate the terms and conditions of fish passage or alter-  
13 natives to fish passage, including appropriate cost sharing. The negotiations  
14 may include, but are not limited to, consideration of equitable factors.

15 (6) The department shall submit a proposed determination of the required  
16 fish passage or alternatives to fish passage to the commission for approval.  
17 The determination may be the result of the negotiations described in sub-  
18 section (5) of this section or, if no agreement was reached in the negoti-  
19 ations, a determination proposed by the department. If a protest is not filed  
20 within the time period specified in ORS 509.645, the proposed determination  
21 shall become a final order.

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

26 (b) Net benefit to native migratory fish is determined under this sub-  
27 section by comparing the benefit to native migratory fish that would occur  
28 if the artificial obstruction had fish passage to the benefit to native migra-  
29 tory 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  
31 provided by the artificial obstruction with fish passage. The net benefit to

1 fish shall be determined based upon conditions that exist at the time of  
2 comparison.

3 (c) The State Fish and Wildlife Director shall develop rules establishing  
4 general criteria for determining the adequacy of fish passage and of alter-  
5 natives to fish passage. The general criteria shall include, but not be limited  
6 to:

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

8 (B) The type and quality of habitat;

9 (C) The species affected;

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

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

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

13 (G) Quantified baseline conditions;

14 (H) Historic conditions;

15 (I) Existing native migratory fish management plans;

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

17 (K) Data collection and evaluation; and

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

19 (d) To the extent feasible, the department shall coordinate its require-  
20 ments for adequate fish passage or alternatives to fish passage with any  
21 federal requirements.

22 (8) A person owning or operating an artificial obstruction may at any  
23 time petition the commission to waive the requirement for fish passage in  
24 exchange for agreed-upon alternatives to fish passage that provide a net  
25 benefit to native migratory fish as determined in subsection (7) of this sec-  
26 tion.

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

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

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

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

1 (b) The commission shall review, at least once every seven years, the ar-  
2 tificial obstructions exempted under this subsection that do not have an ex-  
3 emption expiration date to determine whether the exemption should be  
4 renewed. The commission may revoke or amend an exemption if it finds that  
5 circumstances have changed such that the relevant requirements for the ex-  
6 emption no longer apply. The person owning or operating the artificial ob-  
7 struction may protest the decision by the commission pursuant to ORS  
8 509.645.

9 (10) If the fundamental change in permit status is an expiration of a li-  
10 cense of a federally licensed hydroelectric project, the commission's deter-  
11 mination shall be submitted to the Federal Energy Regulatory Commission  
12 as required by ORS 543A.060 to 543A.410.

13 (11) To the extent that the requirements of this section are preempted by  
14 the Federal Power Act or by the laws governing hydroelectric projects lo-  
15 cated in waters governed jointly by Oregon and another state, federally li-  
16 censed hydroelectric projects are exempt from the requirements of this  
17 section.

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

21 **SECTION 4.** ORS 509.585, as amended by section 3 of this 2015 Act, is  
22 amended to read:

23 509.585. (1) It is the policy of the State of Oregon to provide for upstream  
24 and downstream passage for native migratory fish and the Legislative As-  
25 sembly finds that cooperation and collaboration between public and private  
26 entities is necessary to accomplish the policy goal of providing passage for  
27 native migratory fish and to achieve the enhancement and restoration of  
28 Oregon's native salmonid populations, as envisioned by the Oregon Plan.  
29 Therefore, except as provided in ORS chapter 509, fish passage is required  
30 in all waters of this state in which native migratory fish are currently or  
31 have historically been present.

1 (2) Except as otherwise provided by this section[, *section 2 of this 2015*  
2 *Act*] or ORS 509.645, a person owning or operating an artificial obstruction  
3 may not construct or maintain any artificial obstruction across any waters  
4 of this state that are inhabited, or historically inhabited, by native migratory  
5 fish without providing passage for native migratory fish.

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17 authority toward priority projects, emergencies and projects described in  
18 subsection (4) of this section. The priority project list shall be subject to  
19 periodic review and amendment by the department and to formal review and  
20 amendment by the commission no less frequently than once every five years.

21 (4) A person owning or operating an artificial obstruction shall, prior to  
22 construction, fundamental change in permit status or abandonment of the  
23 artificial obstruction in any waters of this state, obtain a determination from  
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11 The determination may be the result of the negotiations described in sub-  
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14 within the time period specified in ORS 509.645, the proposed determination  
15 shall become a final order.

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25 provided by the artificial obstruction with fish passage. The net benefit to  
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27 comparison.

28 (c) The State Fish and Wildlife Director shall develop rules establishing  
29 general criteria for determining the adequacy of fish passage and of alter-  
30 natives to fish passage. The general criteria shall include, but not be limited  
31 to:

- 1 (A) The geographic scope in which alternatives must be conducted;
  - 2 (B) The type and quality of habitat;
  - 3 (C) The species affected;
  - 4 (D) The status of the native migratory fish stocks;
  - 5 (E) Standards for monitoring, evaluating and adaptive management;
  - 6 (F) The feasibility of fish passage and alternatives to fish passage;
  - 7 (G) Quantified baseline conditions;
  - 8 (H) Historic conditions;
  - 9 (I) Existing native migratory fish management plans;
  - 10 (J) Financial or other incentives and the application of incentives;
  - 11 (K) Data collection and evaluation; and
  - 12 (L) Consistency with the purpose and goals of the Oregon Plan.
- 13 (d) To the extent feasible, the department shall coordinate its require-  
14 ments for adequate fish passage or alternatives to fish passage with any  
15 federal requirements.
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17 time petition the commission to waive the requirement for fish passage in  
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  - 24 (B) Has granted a legal waiver for the artificial obstruction; or
  - 25 (C) Finds there is no appreciable benefit to providing fish passage.
- 26 (b) The commission shall review, at least once every seven years, the ar-  
27 tificial obstructions exempted under this subsection that do not have an ex-  
28 emption expiration date to determine whether the exemption should be  
29 renewed. The commission may revoke or amend an exemption if it finds that  
30 circumstances have changed such that the relevant requirements for the ex-  
31 emption no longer apply. The person owning or operating the artificial ob-

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7 (11) To the extent that the requirements of this section are preempted by  
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9 cated in waters governed jointly by Oregon and another state, federally li-  
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11 section.

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

15 **SECTION 4. The Department of State Lands shall adopt rules and**  
16 **begin administration of the pilot program required under section 2 of**  
17 **this 2015 Act no later than one year after the effective date of this 2015**  
18 **Act.**

19 **SECTION 5. The Department of State Lands shall report to the**  
20 **Legislative Assembly on the identified environmental and economic**  
21 **impacts resulting from the pilot program required under section 2 of**  
22 **this 2015 Act no later than January 1, 2025.**

23 **SECTION 6. Sections 1 and 2 of this 2015 Act are repealed on Jan-**  
24 **uary 2, 2027.**

25 **SECTION 7. The amendments to ORS 509.585 by section 4 of this**  
26 **2015 Act become operative on January 2, 2027.**

27 **SECTION 8. This 2015 Act being necessary for the immediate pres-**  
28 **ervation of the public peace, health and safety, an emergency is de-**  
29 **clared to exist, and this 2015 Act takes effect on its passage.**

30