

# House Bill 3217

Sponsored by COMMITTEE ON RURAL COMMUNITIES, LAND USE, AND WATER

## 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**.

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 509.585; and declaring  
3 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 inhabited by beaver popu-**  
7 **lations and strongly influenced by beavers' unique ability to modify their physical sur-**  
8 **roundings. Beaver dams had the effect of slowing the flow of water, allowing for natural**  
9 **overflow onto surrounding floodplains and providing many positive benefits to stream**  
10 **ecosystems and to the hydrologic functioning of streams.**

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

16 (3) **The public policy of the State of Oregon is to encourage and support a program for**  
17 **voluntary stream restoration actions by private landowners that can help restore both en-**  
18 **vironmental and economic health to eastern Oregon through the construction of artificial**  
19 **beaver dams.**

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

21 (a) **"Artificial beaver dams" means a series of low-profile structures constructed for the**  
22 **purpose of delaying or slowing, but not preventing, water flow to raise the water table and**  
23 **water surface elevations within incised or eroded streams, and to promote restoration of**  
24 **stream and habitat conditions suitable for beaver recovery.**

25 (b) **"Game fish" has the meaning given that term in ORS 496.009.**

26 (c) **"Historic floodplain" means channel-adjacent areas and surfaces constructed by**  
27 **fluvial processes that functioned as floodplains or areas for overbank deposition prior to**  
28 **channel incision.**

29 (d) **"Incised or eroded stream" means a stream that has been scoured by erosion to the**  
30 **extent that the channel bed elevation has lowered relative to its historic floodplain and the**

**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 stream has lost connectivity with the historic floodplain, as characterized by the loss of na-  
2 tural wetland, riparian and meadow conditions in the adjacent surfaces, the absence of  
3 overbank flooding or deposition, the loss of diversity of fish and animal species or the pres-  
4 ence of invasive dry land species, including but not limited to sagebrush, bunch grass, juniper  
5 and pine, that have encroached from adjacent uplands.

6 (e) "Qualifying stream" means an incised or eroded stream, or a designated reach of an  
7 incised or eroded stream, that, prior to commencement of a restoration project:

8 (A) Has average stream flows of less than three cubic feet per second during at least two  
9 months of each year;

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

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

12 (2)(a) The Department of State Lands shall by rule establish a pilot program for volun-  
13 tary stream restoration and beaver recovery through the construction of artificial beaver  
14 dams on qualifying streams located in the Malheur Lake drainage basin.

15 (b) The pilot program adopted under this subsection shall provide for general authori-  
16 zation pursuant to ORS 196.850 or another form of general permitting under ORS 196.600 to  
17 196.905 for voluntary projects to construct artificial beaver dams.

18 (c) The pilot program shall include a requirement for monitoring and shall identify cri-  
19 teria for evaluating the pilot program.

20 (3)(a) Voluntary restoration projects authorized pursuant to subsection (2) of this section  
21 are exempt from fish passage requirements under ORS 509.585.

22 (b)(A) Notwithstanding paragraph (a) of this subsection, a landowner participating in  
23 voluntary stream restoration under a general authorization shall work collaboratively with  
24 the State Department of Fish and Wildlife to provide appropriate fish passage for any game  
25 fish or redband trout populations that return to the incised or eroded stream due to the  
26 voluntary restoration project.

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

30 (4) Removal of brush and trees from stream banks and riparian areas as part of a vol-  
31 untary restoration project authorized under subsection (2) of this section are not subject to  
32 riparian management requirements established under the Oregon Forest Practices Act.

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

34 509.585. (1) It is the policy of the State of Oregon to provide for upstream and downstream  
35 passage for native migratory fish and the Legislative Assembly finds that cooperation and collab-  
36 oration between public and private entities is necessary to accomplish the policy goal of providing  
37 passage for native migratory fish and to achieve the enhancement and restoration of Oregon's native  
38 salmonid populations, as envisioned by the Oregon Plan. Therefore, except as provided in ORS  
39 chapter 509, fish passage is required in all waters of this state in which native migratory fish are  
40 currently or have historically been present.

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

45 (3) The State Department of Fish and Wildlife shall complete and maintain a statewide inventory

1 of artificial obstructions in order to prioritize enforcement actions based on the needs of native  
2 migratory fish. This prioritization shall include, but need not be limited to, the degree of impact of  
3 the artificial obstruction on the native migratory fish, the biological status of the native migratory  
4 fish stocks in question and any other factor established by the department by rule. The department  
5 shall establish a list of priority projects for enforcement purposes. Priority artificial obstructions  
6 are subject to the State Fish and Wildlife Commission's authority as provided in ORS 509.625. Unless  
7 requested by persons owning or operating an artificial obstruction, the department shall primarily  
8 direct its enforcement authority toward priority projects, emergencies and projects described in  
9 subsection (4) of this section. The priority project list shall be subject to periodic review and  
10 amendment by the department and to formal review and amendment by the commission no less fre-  
11 quently than once every five years.

12 (4) A person owning or operating an artificial obstruction shall, prior to construction, funda-  
13 mental change in permit status or abandonment of the artificial obstruction in any waters of this  
14 state, obtain a determination from the department as to whether native migratory fish are or his-  
15 torically have been present in the waters. If the department determines that native migratory fish  
16 are or historically have been present in the waters, the person owning or operating the artificial  
17 obstruction shall either submit a proposal for fish passage to the department or apply for a waiver  
18 pursuant to subsection (7) of this section. Approval of the proposed fish passage facility or of the  
19 alternatives to fish passage must be obtained from the department prior to construction, permit  
20 modification or abandonment of the artificial obstruction.

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

27 (6) The department shall submit a proposed determination of the required fish passage or alter-  
28 natives to fish passage to the commission for approval. The determination may be the result of the  
29 negotiations described in subsection (5) of this section or, if no agreement was reached in the ne-  
30 gotiations, a determination proposed by the department. If a protest is not filed within the time pe-  
31 riod specified in ORS 509.645, the proposed determination shall become a final order.

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

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

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

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

45 (B) The type and quality of habitat;

- 1 (C) The species affected;
- 2 (D) The status of the native migratory fish stocks;
- 3 (E) Standards for monitoring, evaluating and adaptive management;
- 4 (F) The feasibility of fish passage and alternatives to fish passage;
- 5 (G) Quantified baseline conditions;
- 6 (H) Historic conditions;
- 7 (I) Existing native migratory fish management plans;
- 8 (J) Financial or other incentives and the application of incentives;
- 9 (K) Data collection and evaluation; and
- 10 (L) Consistency with the purpose and goals of the Oregon Plan.

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

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

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

- 19 (A) Finds that a lack of fish passage has been effectively mitigated;
- 20 (B) Has granted a legal waiver for the artificial obstruction; or
- 21 (C) Finds there is no appreciable benefit to providing fish passage.

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

28 (10) If the fundamental change in permit status is an expiration of a license of a federally li-  
 29 censed hydroelectric project, the commission's determination shall be submitted to the Federal En-  
 30 ergy Regulatory Commission as required by ORS 543A.060 to 543A.410.

31 (11) To the extent that the requirements of this section are preempted by the Federal Power  
 32 Act or by the laws governing hydroelectric projects located in waters governed jointly by Oregon  
 33 and another state, federally licensed hydroelectric projects are exempt from the requirements of this  
 34 section.

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

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

38 509.585. (1) It is the policy of the State of Oregon to provide for upstream and downstream  
 39 passage for native migratory fish and the Legislative Assembly finds that cooperation and collab-  
 40 oration between public and private entities is necessary to accomplish the policy goal of providing  
 41 passage for native migratory fish and to achieve the enhancement and restoration of Oregon's native  
 42 salmonid populations, as envisioned by the Oregon Plan. Therefore, except as provided in ORS  
 43 chapter 509, fish passage is required in all waters of this state in which native migratory fish are  
 44 currently or have historically been present.

45 (2) Except as otherwise provided by this section[, *section 2 of this 2015 Act*] or ORS 509.645, a

1 person owning or operating an artificial obstruction may not construct or maintain any artificial  
2 obstruction across any waters of this state that are inhabited, or historically inhabited, by native  
3 migratory fish without providing passage for native migratory fish.

4 (3) The State Department of Fish and Wildlife shall complete and maintain a statewide inventory  
5 of artificial obstructions in order to prioritize enforcement actions based on the needs of native  
6 migratory fish. This prioritization shall include, but need not be limited to, the degree of impact of  
7 the artificial obstruction on the native migratory fish, the biological status of the native migratory  
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16 (4) A person owning or operating an artificial obstruction shall, prior to construction, funda-  
17 mental change in permit status or abandonment of the artificial obstruction in any waters of this  
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39 (b) Net benefit to native migratory fish is determined under this subsection by comparing the  
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45 (c) The State Fish and Wildlife Director shall develop rules establishing general criteria for

1 determining the adequacy of fish passage and of alternatives to fish passage. The general criteria  
 2 shall include, but not be limited to:

- 3 (A) The geographic scope in which alternatives must be conducted;
- 4 (B) The type and quality of habitat;
- 5 (C) The species affected;
- 6 (D) The status of the native migratory fish stocks;
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- 8 (F) The feasibility of fish passage and alternatives to fish passage;
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35 (11) To the extent that the requirements of this section are preempted by the Federal Power  
 36 Act or by the laws governing hydroelectric projects located in waters governed jointly by Oregon  
 37 and another state, federally licensed hydroelectric projects are exempt from the requirements of this  
 38 section.

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

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

44 **SECTION 5. The Department of State Lands shall report to the Legislative Assembly on**  
 45 **the identified environmental and economic impacts resulting from the pilot program required**

1 under section 2 of this 2015 Act no later than January 1, 2025.

2 SECTION 6. Sections 1 and 2 of this 2015 Act are repealed on January 2, 2027.

3 SECTION 7. The amendments to ORS 509.585 by section 4 of this 2015 Act become oper-  
4 ative on January 2, 2027.

5 SECTION 8. This 2015 Act being necessary for the immediate preservation of the public  
6 peace, health and safety, an emergency is declared to exist, and this 2015 Act takes effect  
7 on its passage.

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