

D R A F T

SUMMARY

Directs State Department of Fish and Wildlife to adopt by rule and administer program for authorizing voluntary projects for stream restoration and habitat improvement through construction of environmental restoration weirs.

Exempts authorized projects from removal-fill permit. Exempts authorized projects from fish passage requirements in certain circumstances. Authorizes department to require fish passage as part of authorized project in certain circumstances. Authorizes department to require third-party monitoring of authorized projects. Provides that certain riparian work as part of authorized project is not subject to riparian management requirements under Oregon Forest Practices Act.

Requires department to adopt rules establishing program in time for rules to become operative no later than one year after effective date of Act.

Requires department to submit, no later than December 31, 2026, report to interim committees related to environment and natural resources of Legislative Assembly on extent and impact of program.

Requires department to submit, no later than September 15, 2031, report to interim committees related to environment and natural resources of Legislative Assembly on environmental and economic impacts of program and make recommendations for legislation.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to voluntary stream restoration; creating new provisions; amending
3 ORS 196.921 and 509.585; and declaring an emergency.

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

5 **SECTION 1. Sections 2 and 3 of this 2020 Act are added to and made**
6 **a part of the wildlife laws.**

7 **SECTION 2. The Legislative Assembly finds and declares that:**

8 **(1) Many small streams in eastern Oregon were historically inhab-**

1 ited by beaver populations and strongly influenced by beavers' unique
2 ability to modify their physical surroundings. Beaver dams had the
3 effect of slowing the flow of water, allowing for natural overflow onto
4 surrounding ancient floodplains and providing many positive benefits
5 to stream ecosystems and to the hydrologic functioning of streams and
6 adjacent water tables.

7 (2) Due, in part, to the near eradication of the once prevalent
8 beaver populations, many stream systems have become severely de-
9 graded during the past century, developing deeply eroded and incised
10 stream channels that have lost connectivity with the natural ancient
11 floodplain. These changes to the stream systems have resulted in ad-
12 verse environmental and economic impacts.

13 (3) The public policy of the State of Oregon is to encourage and
14 support a program for voluntary stream restoration actions by land-
15 owners that can help restore both environmental and economic health
16 to eastern Oregon through the construction of environmental resto-
17 ration weirs, provided that the voluntary stream restoration actions
18 do not have significant adverse consequences for the environment or
19 existing water rights.

20 (4) Environmental restoration weirs constructed pursuant to sec-
21 tion 3 of this 2020 Act may provide benefits to stream restoration that
22 include:

- 23 (a) Improving habitat conditions;
- 24 (b) Slowing stream runoff;
- 25 (c) Decreasing the chance of catastrophic wildfire;
- 26 (d) Improving carbon sequestration; and
- 27 (e) Improving economic productivity of the adjacent ancient
28 floodplain.

29 **SECTION 3.** (1) As used in this section and section 2 of this 2020
30 Act:

- 31 (a) "Ancient floodplain" means channel adjacent areas and surfaces

1 **constructed by fluvial processes that functioned as floodplains or areas**
2 **for overbank deposition prior to channel incision.**

3 **(b) “Environmental restoration weir” means one or more structures**
4 **that are constructed:**

5 **(A) For the purpose of delaying or slowing, but not preventing,**
6 **streamflow to promote restoration of stream and habitat conditions;**

7 **(B) Such that the structures do not store or appropriate water in**
8 **a manner that would require a permit from the Water Resources De-**
9 **partment; and**

10 **(C) To be no larger than necessary to cause overbank flooding onto**
11 **the lands constituting the ancient floodplain during ordinary periods**
12 **of high streamflow.**

13 **(c) “Healthy native migratory fish population” means a population**
14 **of native migratory fish that, as determined by the State Department**
15 **of Fish and Wildlife:**

16 **(A) Demonstrates appropriate life stages throughout the year; and**

17 **(B) Reproduces at sufficient levels to be a self-sustaining population**
18 **into the foreseeable future.**

19 **(d) “Incised or eroded stream” means a stream that has been**
20 **scoured by erosion to the extent that the channel bed elevation has**
21 **lowered relative to its ancient floodplain and the stream has lost**
22 **connectivity with the ancient floodplain, as characterized by:**

23 **(A) The loss of natural wetland, riparian or meadow conditions in**
24 **the adjacent surfaces;**

25 **(B) The absence of overbank flooding or deposition during ordinary**
26 **periods of high streamflow;**

27 **(C) The loss of diversity of fish or other species; or**

28 **(D) The presence of invasive dry land species that have encroached**
29 **from adjacent uplands, including but not limited to sagebrush, bunch**
30 **grass, juniper and pine.**

31 **(e) “Native migratory fish” has the meaning given that term in ORS**

1 **509.580.**

2 (f) **“Qualifying stream” means an incised or eroded stream, a des-**
3 **ignated reach of an incised or eroded stream or a designated set of**
4 **adjacent reaches of an incised or eroded stream that, prior to com-**
5 **mencement of a project authorized pursuant to subsection (2) of this**
6 **section:**

7 (A) **Has an estimated median monthly natural streamflow of less**
8 **than one cubic foot per second during at least two months of the year;**

9 (B) **Has not had a healthy native migratory fish population for at**
10 **least three years prior to the time of authorization; and**

11 (C) **Is incised or eroded to the extent that the channel bed elevation**
12 **has lowered by two feet or more relative to the elevation of the ancient**
13 **floodplain.**

14 (g) **“Reach” means a section of a stream that is similar in flow to-**
15 **pography and habitat characteristics and is between 50 and 500 feet in**
16 **length.**

17 (h) **“Summit of the Cascade Mountains” has the meaning given that**
18 **term in ORS 321.805.**

19 (2) **The State Department of Fish and Wildlife shall adopt by rule**
20 **and administer a program for authorizing voluntary projects for**
21 **stream restoration and habitat improvement through the construction**
22 **of environmental restoration weirs. The department may only au-**
23 **thorize a project under the program if:**

24 (a) **The project involves construction of environmental restoration**
25 **weirs on one or more qualifying streams located in any closed basin:**

26 (A) **From which water does not flow to the Pacific Ocean; and**

27 (B) **That is located east of the summit of the Cascade Mountains;**
28 **and**

29 (b) **Construction of the environmental restoration weirs will be**
30 **completed no later than July 1, 2031.**

31 (3) **Rules adopted under subsection (2) of this section shall identify**

1 **criteria for evaluating voluntary projects undertaken pursuant to the**
2 **program.**

3 **(4) If the department determines that native migratory fish are**
4 **present in a qualifying stream prior to the date of construction of**
5 **environmental restoration weirs, the person engaging in the proposed**
6 **voluntary project shall provide fish passage pursuant to ORS 509.585.**

7 **(5)(a) If the department determines that native migratory fish are**
8 **not present in a qualifying stream prior to the date of construction**
9 **of environmental restoration weirs, the person engaging in the pro-**
10 **posed voluntary project is exempt from meeting the requirements of**
11 **ORS 509.585.**

12 **(b) If, after construction of environmental restoration weirs, the**
13 **department determines that native migratory fish have returned to**
14 **the qualifying stream, the department may require the person engag-**
15 **ing in the authorized voluntary restoration project to:**

16 **(A) Provide fish passage that:**

17 **(i) Is economically practicable to the person engaging in the vol-**
18 **untary restoration project; and**

19 **(ii) Can be constructed from locally available natural materials; or**

20 **(B) Provide mitigation that, as determined by the department, pro-**
21 **vides a net benefit to native migratory fish.**

22 **(6) For a period of up to 10 years after construction of the envi-**
23 **ronmental restoration weirs is complete, the department:**

24 **(a) Shall require the person that engaged in an authorized volun-**
25 **tary project to maintain the environmental restoration weirs for their**
26 **stream restoration and habitat improvement values;**

27 **(b) May require the person to engage in photo monitoring of the**
28 **environmental restoration weirs; and**

29 **(c) May, subject to subsection (8) of this section, require the person**
30 **to allow a third party to engage in monitoring of the environmental**
31 **restorations weirs.**

1 **(7) The department shall, in coordination with the Water Resources**
2 **Department, require the person to modify the environmental restora-**
3 **tion weirs if the environmental restoration weirs are found:**

4 **(a) By the Water Resources Department to result in injury to an**
5 **existing water right; or**

6 **(b) By the State Department of Fish and Wildlife to be having a**
7 **significant detrimental impact on native migratory fish.**

8 **(8) If the State Department of Fish and Wildlife requires third-party**
9 **monitoring of environmental restoration weirs under subsection (6)(c)**
10 **of this section:**

11 **(a) The third party must be chosen through mutual agreement be-**
12 **tween the person engaging in the voluntary restoration project and the**
13 **department;**

14 **(b) The person engaging in the voluntary restoration project may**
15 **not unreasonably withhold consent for the third party to engage in**
16 **monitoring;**

17 **(c) The third-party monitoring may not result in a financial cost**
18 **to the person engaging in the voluntary restoration project; and**

19 **(d) The third party engaging in the monitoring must be covered by**
20 **sufficient liability and casualty insurance.**

21 **(9) Planting or removal of brush and trees from stream banks and**
22 **riparian areas as part of an authorized voluntary project are not sub-**
23 **ject to riparian management requirements established under the**
24 **Oregon Forest Practices Act.**

25 **(10) Nothing in this section creates any new requirement or ex-**
26 **emption with respect to obtaining a permit or certificate to use, store**
27 **or appropriate water.**

28 **SECTION 4.** ORS 196.921 is amended to read:

29 196.921. (1) Nothing in ORS 196.600 to 196.921 applies to filling the beds
30 of the waters of this state for the purpose of constructing, operating and
31 maintaining dams or other diversions for which permits or certificates have

1 been or shall be issued under ORS chapter 537 or 539 and for which prelim-
2 inary permits or licenses have been or shall be issued under ORS 543.010 to
3 543.610.

4 (2) Nothing in ORS 196.600 to 196.921 applies to removal of materials from
5 the beds or banks or filling of the waters of a nonnavigable natural
6 waterway, or any portion thereof, in this state, if:

7 (a) Such waterway or portion is situated within forestland; and

8 (b) Such removal or filling is directly connected with a forest management
9 practice conducted in accordance with ORS 527.610 to 527.770, 527.990 and
10 527.992.

11 (3) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or
12 both, on converted wetlands for normal farming and ranching activities such
13 as plowing, grazing, seeding, planting, cultivating, conventional crop rota-
14 tion or harvesting.

15 (4) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or
16 both, on lands zoned for exclusive farm use as described in ORS 215.203 for
17 the following activities:

18 (a) Drainage or maintenance of farm or stock ponds; or

19 (b) Maintenance of farm roads in such a manner as to not significantly
20 adversely affect wetlands or any other waters of this state.

21 (5) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or
22 both, for subsurface drainage by deep ripping, tiling or moling on converted
23 wetlands that are zoned for exclusive farm use pursuant to ORS 215.203.

24 (6) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or
25 both, for any activity defined as a farm use in ORS 215.203, on lands zoned
26 for exclusive farm use pursuant to ORS 215.203, if the lands are converted
27 wetlands that are also certified as prior converted cropland by the Natural
28 Resources Conservation Service of the United States Department of Agri-
29 culture, or its successor agency, so long as commercial agricultural pro-
30 duction on the land has not been abandoned for five or more years.

31 (7) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or

1 both, for the reestablishment of crops under federal conservation reserve
2 program provisions set forth in 16 U.S.C. 3831 as in effect on January 1,
3 2010.

4 (8) The exemptions in subsections (3) to (7) of this section do not apply
5 to any fill or removal that involves changing an area of wetlands to a non-
6 farm use.

7 (9) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or
8 both, for the maintenance or reconstruction of structures such as dikes,
9 dams, levees, groins, riprap, tidegates, drainage ditches, irrigation ditches
10 and tile drain systems, provided that:

11 (a) The structure was serviceable within the past five years; and

12 (b) Such maintenance or reconstruction would not significantly adversely
13 affect wetlands or other waters of this state to a greater extent than the
14 wetlands or waters of this state were affected as a result of the original
15 construction of those structures.

16 (10) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or
17 both, for maintenance, including emergency reconstruction of recently dam-
18 aged parts, of currently serviceable roads or transportation structures such
19 as groins and riprap protecting roads, causeways and bridge abutments or
20 approaches.

21 (11) Nothing in ORS 196.600 to 196.921 applies to removal or filling, or
22 both, within the beds or banks of any waters of this state conducted as part
23 of a surface mining operation, that is the subject of a memorandum of
24 agreement between the Department of State Lands and the State Department
25 of Geology and Mineral Industries in which the State Department of Geology
26 and Mineral Industries is assigned sole responsibility for permitting as de-
27 scribed in ORS 517.797.

28 (12) The Department of State Lands may adopt a rule that exempts from
29 the requirement to obtain a permit under ORS 196.800 to 196.900 voluntary
30 habitat restoration projects that have only minimal adverse impact on waters
31 of this state.

1 (13) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or
2 both, for a change in the point of diversion to withdraw surface water for
3 beneficial use if the change in the point of diversion is necessitated by a
4 change in the location of the surface water and authorized by the Water
5 Resources Department.

6 (14) Unless otherwise provided in a proposed order or in a final order is-
7 sued in a contested case, nothing in ORS 196.800 to 196.900 applies to re-
8 moval or filling, or both, originally intended or subsequently used for the
9 establishment, repair, restoration, resumption or replacement of the follow-
10 ing uses, if the use was established on or before January 1, 2017, on lands
11 zoned for exclusive farm use, forest use or mixed farm and forest use:

12 (a) A dwelling:

13 (A) Described in ORS 215.213 (1) or (3) or 215.283 (1);

14 (B) Established subject to county approval under ORS 215.402 to 215.438;

15 or

16 (C) Lawfully established on or before December 31, 1973;

17 (b) An agricultural building as defined in ORS 455.315; or

18 (c) Activities that:

19 (A) Are associated with a dwelling or agricultural building described in
20 this subsection;

21 (B) Have received county approval, if necessary, under ORS 215.402 to
22 215.438; and

23 (C) Are located on the same lot or parcel as the dwelling or agricultural
24 building.

25 **(15) Nothing in ORS 196.800 to 196.921 applies to removal or filling,**
26 **or both, as part of a voluntary project for stream restoration and**
27 **habitat improvement authorized by the State Department of Fish and**
28 **Wildlife under section 3 of this 2020 Act.**

29 [(15)] (16) As used in this section:

30 (a) "Converted wetlands" means agriculturally managed wetlands that,
31 on or before June 30, 1989, were brought into commercial agricultural pro-

1 duction by diking, draining, leveling, filling or any similar hydrologic ma-
2 nipulation and by removal or manipulation of natural vegetation, and that
3 are managed for commercial agricultural purposes.

4 (b) “Converted wetlands” does not include any stream, slough, ditched
5 creek, spring, lake or any other waters of this state that are located within
6 or adjacent to a converted wetland area.

7 (c) “Replacement” means the construction of a new structure that is
8 substantially similar in size, sited in a substantially similar location and
9 constructed in place of a previously existing structure.

10 **SECTION 5.** ORS 196.921, as amended by section 6, chapter 516, Oregon
11 Laws 2001, section 13, chapter 253, Oregon Laws 2003, section 4, chapter 342,
12 Oregon Laws 2009, section 2, chapter 16, Oregon Laws 2011, section 4, chap-
13 ter 406, Oregon Laws 2011, and section 2, chapter 428, Oregon Laws 2017, is
14 amended to read:

15 196.921. (1) Notwithstanding the exemptions in subsections (3) to (8) of
16 this section, a permit under ORS 196.600 to 196.921 is required for any fill
17 or removal of material in or from the waters of this state when:

18 (a) The fill or removal is a part of an activity whose purpose is to bring
19 an area of state waters into a use to which it was not previously subject;
20 and

21 (b)(A) The flow or circulation of the waters of this state may be impaired;
22 or

23 (B) The reach of the waters may be reduced.

24 (2) Nothing in ORS 196.600 to 196.921 applies to removal of materials from
25 the beds or banks or filling of the waters of a nonnavigable natural
26 waterway, or any portion thereof, in this state, if:

27 (a) Such waterway or portion is situated within forestland; and

28 (b) Such removal or filling is directly connected with a forest management
29 practice conducted in accordance with ORS 527.610 to 527.770, 527.990 and
30 527.992.

31 (3) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or

1 both, on converted wetlands for normal farming and ranching activities such
2 as plowing, grazing, seeding, planting, cultivating, conventional crop rota-
3 tion or harvesting.

4 (4) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or
5 both, on lands zoned for exclusive farm use as described in ORS 215.203 for
6 the following activities:

7 (a) Drainage or maintenance of farm or stock ponds; or

8 (b) Maintenance of farm roads, provided that:

9 (A) The farm roads are constructed and maintained in accordance with
10 construction practices designed to minimize any adverse effects to the
11 aquatic environment;

12 (B) Borrow material for farm road maintenance does not come from wa-
13 ters of this state unless authorized by the Department of State Lands; and

14 (C) Maintenance activities are confined to the scope of construction for
15 the original project.

16 (5) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or
17 both, for any activity defined as a farm use in ORS 215.203, on lands zoned
18 for exclusive farm use pursuant to ORS 215.203, if the lands are converted
19 wetlands that are also certified as prior converted cropland by the Natural
20 Resources Conservation Service of the United States Department of Agri-
21 culture, or its successor agency, so long as commercial agricultural pro-
22 duction on the land has not been abandoned for five or more years.

23 (6) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or
24 both, for the reestablishment of crops under federal conservation reserve
25 program provisions set forth in 16 U.S.C. 3831 as in effect on January 1,
26 2010.

27 (7) The exemptions in subsections (3) to (6) of this section do not apply
28 to any fill or removal that involves changing an area of wetlands or con-
29 verted wetlands to a nonfarm use.

30 (8) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or
31 both, for the maintenance or reconstruction of structures such as dikes,

1 dams, levees, groins, riprap, tidegates, drainage ditches, irrigation ditches
2 and tile drain systems, provided that:

3 (a) The structure was serviceable within the past five years; and

4 (b) Such maintenance or reconstruction would not significantly adversely
5 affect wetlands or other waters of this state to a greater extent than the
6 wetlands or waters of this state were affected as a result of the original
7 construction of those structures.

8 (9) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or
9 both, for temporary dams constructed for crop or pasture irrigation purposes
10 that are less than 50 cubic yards, provided the following conditions are sat-
11 isfied:

12 (a) The removal or filling is conducted during periods that minimize ad-
13 verse effects to fish and wildlife in accordance with guidance provided by the
14 State Department of Fish and Wildlife;

15 (b) The removal or filling does not jeopardize a threatened or endangered
16 species or adversely modify or destroy the habitat of a threatened or endan-
17 gered species listed under federal or state law; and

18 (c) Temporary fills are removed in their entirety and the area is restored
19 to its approximate original elevation.

20 (10) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or
21 both, for maintenance, including emergency reconstruction of recently dam-
22 aged parts, of currently serviceable roads or transportation structures such
23 as groins and riprap protecting roads, causeways and bridge abutments or
24 approaches.

25 (11) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or
26 both, for the maintenance of access roads constructed to move mining
27 equipment, subject to the following conditions:

28 (a) The access roads are constructed and maintained in accordance with
29 construction practices that minimize adverse effects to the aquatic environ-
30 ment;

31 (b) Borrow material for access road maintenance does not come from

1 waters of this state unless authorized by the Department of State Lands; and

2 (c) Maintenance activities are confined to the scope of construction for
3 the original project.

4 (12) Nothing in ORS 196.600 to 196.921 applies to removal or filling, or
5 both, within the beds or banks of any waters of this state conducted as part
6 of a surface mining operation that is the subject of a memorandum of
7 agreement between the Department of State Lands and the State Department
8 of Geology and Mineral Industries in which the State Department of Geology
9 and Mineral Industries is assigned sole responsibility for permitting as de-
10 scribed in ORS 517.797.

11 (13) The department may adopt a rule that exempts from the requirement
12 to obtain a permit under ORS 196.800 to 196.900 voluntary habitat restoration
13 projects that have only minimal adverse impact on waters of this state.

14 (14) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or
15 both, for a change in the point of diversion to withdraw surface water for
16 beneficial use if the change in the point of diversion is necessitated by a
17 change in the location of the surface water and authorized by the Water
18 Resources Department.

19 (15) Unless otherwise provided in a proposed order or in a final order is-
20 sued in a contested case, nothing in ORS 196.800 to 196.900 applies to re-
21 moval or filling, or both, originally intended or subsequently used for the
22 establishment, repair, restoration, resumption or replacement of the follow-
23 ing uses, if the use was established on or before January 1, 2017, on lands
24 zoned for exclusive farm use, forest use or mixed farm and forest use:

25 (a) A dwelling:

26 (A) Described in ORS 215.213 (1) or (3) or 215.283 (1);

27 (B) Established subject to county approval under ORS 215.402 to 215.438;

28 or

29 (C) Lawfully established on or before December 31, 1973;

30 (b) An agricultural building as defined in ORS 455.315; or

31 (c) Activities that:

1 (A) Are associated with a dwelling or agricultural building described in
2 this subsection;

3 (B) Have received county approval, if necessary, under ORS 215.402 to
4 215.438; and

5 (C) Are located on the same lot or parcel as the dwelling or agricultural
6 building.

7 **(16) Nothing in ORS 196.800 to 196.921 applies to removal or filling,**
8 **or both, as part of a voluntary project for stream restoration and**
9 **habitat improvement authorized by the State Department of Fish and**
10 **Wildlife under section 3 of this 2020 Act.**

11 [(16)] (17) As used in this section:

12 (a)(A) “Converted wetlands” means agriculturally managed wetlands that,
13 on or before June 30, 1989, were brought into commercial agricultural pro-
14 duction by diking, draining, leveling, filling or any similar hydrologic ma-
15 nipulation and by removal or manipulation of natural vegetation, and that
16 are managed for commercial agricultural purposes.

17 (B) “Converted wetlands” does not include any stream, slough, ditched
18 creek, spring, lake or any other waters of this state that are located within
19 or adjacent to a converted wetland area.

20 (b) “Harvesting” means physically removing crops or other agricultural
21 products.

22 (c) “Plowing” includes all forms of primary tillage, including moldboard,
23 chisel or wide-blade plowing, discing, harrowing or similar means of breaking
24 up, cutting, turning over or stirring soil to prepare it for planting crops or
25 other agricultural products. “Plowing” does not include:

26 (A) The redistribution of soil, rock, sand or other surface materials in a
27 manner that changes areas of waters of this state into dry land; or

28 (B) Rock crushing activities that result in the loss of natural drainage
29 characteristics, the reduction of water storage and recharge capability, or
30 the overburdening of natural water filtration capacity.

31 (d) “Replacement” means the construction of a new structure that is

1 substantially similar in size, sited in a substantially similar location and
2 constructed in place of a previously existing structure.

3 (e) "Seeding" means the sowing of seed or placement of seedlings to
4 produce crops or other agricultural products.

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

6 509.585. (1) It is the policy of the State of Oregon to provide for upstream
7 and downstream passage for native migratory fish and the Legislative As-
8 sembly finds that cooperation and collaboration between public and private
9 entities is necessary to accomplish the policy goal of providing passage for
10 native migratory fish and to achieve the enhancement and restoration of
11 Oregon's native salmonid populations, as envisioned by the Oregon Plan.
12 Therefore, except as provided in ORS chapter 509, fish passage is required
13 in all waters of this state in which native migratory fish are currently or
14 have historically been present.

15 (2) Except as otherwise provided by this section or ORS 509.645 **or sec-**
16 **tion 3 of this 2020 Act**, a person owning or operating an artificial ob-
17 struction may not construct or maintain any artificial obstruction across any
18 waters of this state that are inhabited, or historically inhabited, by native
19 migratory fish without providing passage for native migratory fish.

20 (3) The State Department of Fish and Wildlife shall complete and main-
21 tain a statewide inventory of artificial obstructions in order to prioritize
22 enforcement actions based on the needs of native migratory fish. This
23 prioritization shall include, but need not be limited to, the degree of impact
24 of the artificial obstruction on the native migratory fish, the biological sta-
25 tus of the native migratory fish stocks in question and any other factor es-
26 tablished by the department by rule. The department shall establish a list
27 of priority projects for enforcement purposes. Priority artificial obstructions
28 are subject to the State Fish and Wildlife Commission's authority as pro-
29 vided in ORS 509.625. Unless requested by persons owning or operating an
30 artificial obstruction, the department shall primarily direct its enforcement
31 authority toward priority projects, emergencies and projects described in

1 subsection (4) of this section. The priority project list shall be subject to
2 periodic review and amendment by the department and to formal review and
3 amendment by the commission no less frequently than once every five years.

4 (4) A person owning or operating an artificial obstruction shall, prior to
5 construction, fundamental change in permit status or abandonment of the
6 artificial obstruction in any waters of this state, obtain a determination from
7 the department as to whether native migratory fish are or historically have
8 been present in the waters. If the department determines that native migra-
9 tory fish are or historically have been present in the waters, the person
10 owning or operating the artificial obstruction shall either submit a proposal
11 for fish passage to the department or apply for a waiver pursuant to sub-
12 section (7) of this section. Approval of the proposed fish passage facility or
13 of the alternatives to fish passage must be obtained from the department
14 prior to construction, permit modification or abandonment of the artificial
15 obstruction.

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

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

30 (7)(a) The commission shall waive the requirement for fish passage if the
31 commission determines that the alternatives to fish passage proposed by the

1 person owning or operating the artificial obstruction provide a net benefit
2 to native migratory fish.

3 (b) Net benefit to native migratory fish is determined under this sub-
4 section by comparing the benefit to native migratory fish that would occur
5 if the artificial obstruction had fish passage to the benefit to native migra-
6 tory fish that would occur using the proposed alternatives to fish passage.
7 Alternatives to fish passage must result in a benefit to fish greater than that
8 provided by the artificial obstruction with fish passage. The net benefit to
9 fish shall be determined based upon conditions that exist at the time of
10 comparison.

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

- 15 (A) The geographic scope in which alternatives must be conducted;
- 16 (B) The type and quality of habitat;
- 17 (C) The species affected;
- 18 (D) The status of the native migratory fish stocks;
- 19 (E) Standards for monitoring, evaluating and adaptive management;
- 20 (F) The feasibility of fish passage and alternatives to fish passage;
- 21 (G) Quantified baseline conditions;
- 22 (H) Historic conditions;
- 23 (I) Existing native migratory fish management plans;
- 24 (J) Financial or other incentives and the application of incentives;
- 25 (K) Data collection and evaluation; and
- 26 (L) Consistency with the purpose and goals of the Oregon Plan.

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

30 (8) A person owning or operating an artificial obstruction may at any
31 time petition the commission to waive the requirement for fish passage in

1 exchange for agreed-upon alternatives to fish passage that provide a net
2 benefit to native migratory fish as determined in subsection (7) of this sec-
3 tion.

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

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

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

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

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

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

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

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

29 **SECTION 7. The State Department of Fish and Wildlife shall adopt**
30 **rules under section 3 of this 2020 Act in time for the rules to become**
31 **operative no later than one year after the effective date of this 2020**

1 **Act.**

2 **SECTION 8. (1) No later than December 31, 2026, the State Depart-**
3 **ment of Fish and Wildlife shall submit a report, in the manner pro-**
4 **vided by ORS 192.245, to the interim committees of the Legislative**
5 **Assembly related to environment and natural resources that provides**
6 **information summarizing the extent to which voluntary projects have**
7 **been commenced and completed under the program established by the**
8 **department pursuant to section 3 of this 2020 Act, and any known**
9 **preliminary impacts of the voluntary projects.**

10 **(2) No later than September 15, 2031, the State Department of Fish**
11 **and Wildlife shall submit a report, in the manner provided by ORS**
12 **192.245, to the interim committees of the Legislative Assembly related**
13 **to environment and natural resources on the identified environmental**
14 **and economic impacts of voluntary projects authorized under the**
15 **program established by the department pursuant to section 3 of this**
16 **2020 Act. The report shall include recommendations, which may in-**
17 **clude recommendations for legislation, regarding potential amendment**
18 **of section 3 (2) of this 2020 Act to allow the department to authorize**
19 **voluntary projects in which construction of environmental restoration**
20 **weirs will commence on or after January 2, 2035.**

21 **SECTION 9. This 2020 Act being necessary for the immediate pres-**
22 **ervation of the public peace, health and safety, an emergency is de-**
23 **clared to exist, and this 2020 Act takes effect on its passage.**

24