



Oregon

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Date: April 2, 2019
To: The Honorable Brad Witt, Chair
House Committee on Natural Resources

House Bill 3132
Shannon Hurn, Deputy Director for Fish and Wildlife Programs
Bill Ryan, Deputy Director for Department of State Lands

House bill 3132 (HB 3132) directs the Department of Fish and Wildlife (ODFW) to adopt by rule, a program for authorizing the construction of environmental restoration weirs (ERW) in qualifying streams, as defined in the bill, without fish passage. The bill also exempts qualifying projects from removal-fill permits authorized by the Department of State Lands (DSL). It is also unclear what recourse downstream water right holders may have if ERW's impede surface flow and delivery of allocated waters. The following outlines specific concerns State agencies have with this bill as currently written:

Department of Fish and Wildlife

Fish passage, per ORS 509.585, is required at artificial obstructions in all waters of the state currently or historically containing native migratory fish. Under existing fish passage law, projects may only be exempt from providing fish passage if commensurate mitigation in lieu of fish passage (waiver) is provided, or if providing fish passage would not result in an appreciable benefit to native migratory fish (exemption). Current bill language would allow for ERW to be constructed, without fish passage, in locations where native fish would benefit from and in many cases, depend on fish passage for survival. Redband trout east of the Cascades have adapted to the drastic and often harsh conditions present in streams, including seasonally dry streams, by migrating as needed to find suitable habitats to complete their life history needs. ERW's constructed without fish passage, while potentially having other restorative benefits, may block access to spawning or rearing habitats that are essential for survival of desert redband trout. This may lead to reduced population viability, or in locations where already depressed populations exist, extirpation of local populations. In addition, some streams within the geographic scope of this bill contain non-salmonids that are ecologically

important and in some cases listed as threatened or endangered by federal and/or state endangered species acts. This bill does not recognize, or take into account potential impacts of ERW construction to these species. ODFW recommends that existing rules and statutes for fish passage and fish passage exemptions be followed for all projects.

Bill language does specify, that in specific circumstances, ODFW may require that fish passage be constructed as a part of the ERW project. However, these circumstances include requirements that the cost of providing fish passage to the ERW project installer does not exceed 10% of the total project cost, and that the remainder of the cost for installing fish passage be paid by ODFW through the Fish Passage Fund established by ORS 497.139. ODFW fish passage funds are limited, and with over 50,000 artificial obstructions to fish passage in the State (thousands of which currently block or impede fish passage), funds are focused on providing fish passage at existing high priority artificial obstructions. Fish passage funds are not available to fund voluntary ERW projects, and therefore it is unlikely that ODFW can require fish passage through this program as the bill is currently written. ODFW recommends HB 3132 adopt current standards for requiring fish passage, which include fish passage exemptions.

The bill exempts ERW projects from DSL removal/fill permits. ODFW values DSL's input and review of projects that fill or remove materials from waters of the State. Without this regulatory oversight it is possible that unintended consequences of ERW projects could result in detrimental impacts to native fish and wildlife habitats that include, but may not be limited to, water quality/quantity impacts and habitat alterations. For example, ERW construction could have an unintended consequence of eliminating or altering existing habitat to the detriment of fish present in a stream reach. This bill assumes that incised streams provide poor habitat for fish, which may not always be the case. Current bill language is unclear how ODFW or other agencies, could provide oversight to avoid unintended consequences of ERW projects. ODFW recommends that the current removal/fill process be followed, which could include future adoption of a general permit (GP) for construction of ERWs.

Department of State Lands

DSL shares the concerns expressed by ODFW, especially regarding fish passage and the exemption from the Removal-Fill permitting process. Construction of ERWs can result in improved hydrology, water quality and habitat conditions. However, ERWs may also result in adverse effects including increased water temperatures, disruption of downstream sediment and organic matter transport, and decreased late summer/fall flows due to increased evapotranspiration. Whether a particular restoration project using ERWs results in an overall benefit or detriment to the local environment depends upon many variables. It is important to monitor project outcomes, identify modifications needed to better meet project goals, and to implement those modifications. Third party verification is essential to ensure this occurs. The limited framework for monitoring and maintenance provided in Section 3 (4) and (5) does not appear adequate to address this need. Also, the 5% cap on the cost to the project proponent of meeting requirements is potentially problematic for ensuring appropriate monitoring and maintenance is occurring.

Monitoring, analysis and reporting to ensure the new program, rather than individual restoration projects, meets the program goals and does not result in unintended adverse effects is another significant concern. HB 3132 requires ODFW to provide a report addressing those issues in 2028.

The work to perform that monitoring and analysis in a way that provides meaningful results will need to be a multi-year effort addressing pre- and post-project site conditions. ODFW should be given the resources and explicit authority to perform that analysis and the adaptive management needed to ensure program success.

Our agency submitted testimony in 2015 on a similar bill, HB 3217 (Testimony of Bill Ryan, Assistant Director, March 31, 2015) and those comments are incorporated by reference in their entirety. DSL commented that the concept of reintroducing beaver and construction of structures that function like beaver dams to restore historical hydrology and riparian vegetation is something that DSL believes warrants further implementation and study. As the agency that regulates and permits removal and fill in waters of the state, we are continually looking for ways to support voluntary restoration efforts that will improve the state's wetlands and waterways. DSL has authority to create both General Authorizations (GAs) and General Permits (GPs) for removal-fill activities with minimal, predictable effects.

Following the 2015 legislative session, DSL engaged in a rulemaking effort to allow ERW-type structures under a General Permit. That effort was not completed but did result in draft rules that could serve as a starting place for a new rulemaking effort.

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