

House Bill 3132

Sponsored by Representative HELM, Senator DEMBROW, Representative SMITH DB; Representatives FINDLEY, MCLAIN, Senator BENTZ

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**.

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 voluntary projects authorized under program from removal-fill permit and fish passage requirements. Authorizes department to require fish passage as part of authorized voluntary project in certain circumstances. Provides that certain riparian work as part of authorized voluntary 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 this Act.

Requires department to submit, no later than September 15, 2028, report to Legislative Assembly on environmental and economic impacts of program.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to voluntary stream restoration; creating new provisions; amending ORS 196.905 and
3 509.585; 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 2019 Act are added to and made a part of the wildlife**
6 **laws.**

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

8 (1) **Many small streams in eastern Oregon were historically inhabited by beaver popu-**
9 **lations and strongly influenced by beavers' unique ability to modify their physical sur-**
10 **roundings. Beaver dams had the effect of slowing the flow of water, allowing for natural**
11 **overflow onto surrounding ancient floodplains and providing many positive benefits to stream**
12 **ecosystems and to the hydrologic functioning of streams and adjacent water tables.**

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

18 (3) **The public policy of the State of Oregon is to encourage and support a program for**
19 **voluntary stream restoration actions by landowners that can help restore both environ-**
20 **mental and economic health to eastern Oregon through the construction of environmental**
21 **restoration weirs.**

22 (4) **Environmental restoration weirs constructed pursuant to section 3 of this 2019 Act**
23 **are substantially similar in nature, do not result in long-term harm to water resources of**
24 **this state and provide co-benefits to stream restoration that include:**

25 (a) **Improving habitat conditions;**

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 (b) Slowing stream runoff;
- 2 (c) Decreasing the change of catastrophic wildfire;
- 3 (d) Improving carbon sequestration; and
- 4 (e) Improving economic productivity of the adjacent ancient floodplain.

5 **SECTION 3.** (1) As used in this section and section 2 of this 2019 Act:

6 (a) “Ancient floodplain” means channel-adjacent areas and surfaces constructed by
7 fluvial processes that functioned as floodplains or areas for overbank deposition prior to
8 channel incision.

9 (b) “Environmental restoration weir” means one or more structures constructed for the
10 purpose of delaying or slowing, but not preventing, water flow, in order to raise the water
11 table and water surface elevations within incised or eroded streams up to or near the level
12 of the ancient floodplain, and to promote restoration of stream and habitat conditions.

13 (c) “Healthy salmonid population” means a population of salmonids that, as determined
14 by the State Department of Fish and Wildlife:

15 (A) Demonstrates appropriate life stages throughout the year;

16 (B) Reproduces at sufficient levels to be a self-sustaining population into the foreseeable
17 future; and

18 (C) May be sufficiently abundant to be subject to harvest.

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

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

23 (B) The absence of overbank flooding or deposition;

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

25 (D) The presence of invasive dry land species that have encroached from adjacent up-
26 lands, including but not limited to sagebrush, bunch grass, juniper and pine.

27 (e) “Qualifying stream” means an incised or eroded stream, a designated reach of an
28 incised or eroded stream or a designated set of adjacent reaches of an incised or eroded
29 stream that, prior to commencement of a project authorized pursuant to subsection (2) of
30 this section:

31 (A) Has an average stream flow of less than three cubic feet per second during at least
32 two months of each year;

33 (B) Has not had a healthy salmonid population for at least three years; and

34 (C) Is incised or eroded to the extent that either:

35 (i) The channel bed elevation has lowered by two feet or more relative to the elevation
36 of the ancient floodplain; or

37 (ii) The ancient floodplain has been scoured out to a rocky bottom.

38 (f) “Reach” means a section of a stream that is similar in flow topography and habitat
39 characteristics and is between 50 and 500 feet in length.

40 (g) “Summit of the Cascade Mountains” has the meaning given that term in ORS 321.805.

41 (2) The State Department of Fish and Wildlife shall adopt by rule and administer a pro-
42 gram for authorizing voluntary projects for stream restoration and habitat improvement
43 through the construction of environmental restoration weirs. The department may only au-
44 thorize a project under the program if the project involves construction of environmental
45 restoration weirs on one or more qualifying streams located in any closed basin:

1 (a) From which water does not flow to the Pacific Ocean; and

2 (b) That is located east of the summit of the Cascade Mountains.

3 (3) Rules adopted under subsection (2) of this section shall identify criteria for evaluating
4 voluntary projects undertaken pursuant to the program.

5 (4) For a period of up to ten years after construction of the environmental restoration
6 weirs is complete, the department:

7 (a) Shall require the person that engaged in an authorized voluntary project to maintain
8 the environmental restoration weirs for their stream restoration and habitat improvement
9 values; and

10 (b) May require the person to engage in photo monitoring of the environmental restora-
11 tion weirs.

12 (5) A person's total costs for meeting requirements for a voluntary project to be au-
13 thorized under the program may not exceed five percent of the total cost of constructing the
14 environmental restoration weirs.

15 (6)(a) Except as provided under paragraph (b) of this subsection, a voluntary restoration
16 project that is authorized by the department pursuant to the program is exempt from fish
17 passage requirements under ORS 509.585.

18 (b)(A) A person engaging in a voluntary project authorized under the program shall work
19 collaboratively with the department to provide appropriate fish passage for salmonid on a
20 qualifying stream if:

21 (i) A healthy salmonid population will likely develop in the qualifying stream as a result
22 of the voluntary restoration project; and

23 (ii) The healthy salmonid population will only return if appropriate fish passage is in-
24 cluded in the voluntary restoration project.

25 (B) The department may only require construction of appropriate fish passage under this
26 paragraph subject to available funding for the construction in the Fish Passage Fund estab-
27 lished under ORS 497.139 and as provided by the person engaging in the voluntary project.
28 The total direct costs to a person engaging in the voluntary project, not including funding
29 provided from the Fish Passage Fund, for constructing required appropriate fish passage as
30 part of the voluntary project may not exceed 10 percent of the total cost of constructing the
31 environmental restoration weirs.

32 (7) Planting or removal of brush and trees from stream banks and riparian areas as part
33 of a voluntary project authorized under subsection (2) of this section are not subject to
34 riparian management requirements established under the Oregon Forest Practices Act.

35 **SECTION 4.** ORS 196.905 is amended to read:

36 196.905. (1) Nothing in ORS 196.600 to 196.905 applies to filling the beds of the waters of this
37 state for the purpose of constructing, operating and maintaining dams or other diversions for which
38 permits or certificates have been or shall be issued under ORS chapter 537 or 539 and for which
39 preliminary permits or licenses have been or shall be issued under ORS 543.010 to 543.610.

40 (2) Nothing in ORS 196.600 to 196.905 applies to removal of materials from the beds or banks
41 or filling of the waters of a nonnavigable natural waterway, or any portion thereof, in this state, if:

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

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

45 (3) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, on converted

1 wetlands for normal farming and ranching activities such as plowing, grazing, seeding, planting,
 2 cultivating, conventional crop rotation or harvesting.

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

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

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

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

11 (6) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for any activity
 12 defined as a farm use in ORS 215.203, on lands zoned for exclusive farm use pursuant to ORS
 13 215.203, if the lands are converted wetlands that are also certified as prior converted cropland by
 14 the Natural Resources Conservation Service of the United States Department of Agriculture, or its
 15 successor agency, so long as commercial agricultural production on the land has not been aban-
 16 doned for five or more years.

17 (7) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the reestablish-
 18 ment of crops under federal conservation reserve program provisions set forth in 16 U.S.C. 3831 as
 19 in effect on January 1, 2010.

20 (8) The exemptions in subsections (3) to (7) of this section do not apply to any fill or removal
 21 that involves changing an area of wetlands to a nonfarm use.

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

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

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

29 (10) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for maintenance,
 30 including emergency reconstruction of recently damaged parts, of currently serviceable roads or
 31 transportation structures such as groins and riprap protecting roads, causeways and bridge abut-
 32 ments or approaches.

33 (11) Nothing in ORS 196.600 to 196.905 applies to removal or filling, or both, within the beds or
 34 banks of any waters of this state conducted as part of a surface mining operation, that is the subject
 35 of a memorandum of agreement between the Department of State Lands and the State Department
 36 of Geology and Mineral Industries in which the State Department of Geology and Mineral Industries
 37 is assigned sole responsibility for permitting as described in ORS 517.797.

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

41 (13) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for a change in the
 42 point of diversion to withdraw surface water for beneficial use if the change in the point of diversion
 43 is necessitated by a change in the location of the surface water and authorized by the Water Re-
 44 sources Department.

45 (14) Unless otherwise provided in a proposed order or in a final order issued in a contested case,

1 nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, originally intended or sub-
 2 sequently used for the establishment, repair, restoration, resumption or replacement of the following
 3 uses, if the use was established on or before January 1, 2017, on lands zoned for exclusive farm use,
 4 forest use or mixed farm and forest use:

5 (a) A dwelling:

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

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

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

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

10 (c) Activities that:

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

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

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

14 **(15) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, as part of a**
 15 **voluntary project for stream restoration and habitat improvement authorized by the State**
 16 **Department of Fish and Wildlife under section 3 of this 2019 Act.**

17 [(15)] (16) As used in this section:

18 (a) "Converted wetlands" means agriculturally managed wetlands that, on or before June 30,
 19 1989, were brought into commercial agricultural production by diking, draining, leveling, filling or
 20 any similar hydrologic manipulation and by removal or manipulation of natural vegetation, and that
 21 are managed for commercial agricultural purposes.

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

24 (c) "Replacement" means the construction of a new structure that is substantially similar in size,
 25 sited in a substantially similar location and constructed in place of a previously existing structure.

26 **SECTION 5.** ORS 196.905, as amended by section 6, chapter 516, Oregon Laws 2001, section 13,
 27 chapter 253, Oregon Laws 2003, section 4, chapter 342, Oregon Laws 2009, section 2, chapter 16,
 28 Oregon Laws 2011, section 4, chapter 406, Oregon Laws 2011, and section 2, chapter 428, Oregon
 29 Laws 2017, is amended to read:

30 196.905. (1) Notwithstanding the exemptions in subsections (3) to (8) of this section, a permit
 31 under ORS 196.600 to 196.905 is required for any fill or removal of material in or from the waters
 32 of this state when:

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

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

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

37 (2) Nothing in ORS 196.600 to 196.905 applies to removal of materials from the beds or banks
 38 or filling of the waters of a nonnavigable natural waterway, or any portion thereof, in this state, if:

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

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

42 (3) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, on converted
 43 wetlands for normal farming and ranching activities such as plowing, grazing, seeding, planting,
 44 cultivating, conventional crop rotation or harvesting.

45 (4) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, on lands zoned for

1 exclusive farm use as described in ORS 215.203 for the following activities:

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

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

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

6 (B) Borrow material for farm road maintenance does not come from waters of this state unless
7 authorized by the Department of State Lands; and

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

9 (5) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for any activity
10 defined as a farm use in ORS 215.203, on lands zoned for exclusive farm use pursuant to ORS
11 215.203, if the lands are converted wetlands that are also certified as prior converted cropland by
12 the Natural Resources Conservation Service of the United States Department of Agriculture, or its
13 successor agency, so long as commercial agricultural production on the land has not been aban-
14 doned for five or more years.

15 (6) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for the reestablish-
16 ment of crops under federal conservation reserve program provisions set forth in 16 U.S.C. 3831 as
17 in effect on January 1, 2010.

18 (7) The exemptions in subsections (3) to (6) of this section do not apply to any fill or removal
19 that involves changing an area of wetlands or converted wetlands to a nonfarm use.

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

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

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

27 (9) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for temporary dams
28 constructed for crop or pasture irrigation purposes that are less than 50 cubic yards, provided the
29 following conditions are satisfied:

30 (a) The removal or filling is conducted during periods that minimize adverse effects to fish and
31 wildlife in accordance with guidance provided by the State Department of Fish and Wildlife;

32 (b) The removal or filling does not jeopardize a threatened or endangered species or adversely
33 modify or destroy the habitat of a threatened or endangered species listed under federal or state
34 law; and

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

37 (10) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for maintenance,
38 including emergency reconstruction of recently damaged parts, of currently serviceable roads or
39 transportation structures such as groins and riprap protecting roads, causeways and bridge abut-
40 ments or approaches.

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

43 (a) The access roads are constructed and maintained in accordance with construction practices
44 that minimize adverse effects to the aquatic environment;

45 (b) Borrow material for access road maintenance does not come from waters of this state unless

1 authorized by the Department of State Lands; and

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

3 (12) Nothing in ORS 196.600 to 196.905 applies to removal or filling, or both, within the beds or
 4 banks of any waters of this state conducted as part of a surface mining operation that is the subject
 5 of a memorandum of agreement between the Department of State Lands and the State Department
 6 of Geology and Mineral Industries in which the State Department of Geology and Mineral Industries
 7 is assigned sole responsibility for permitting as described in ORS 517.797.

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

11 (14) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, for a change in the
 12 point of diversion to withdraw surface water for beneficial use if the change in the point of diversion
 13 is necessitated by a change in the location of the surface water and authorized by the Water Re-
 14 sources Department.

15 (15) Unless otherwise provided in a proposed order or in a final order issued in a contested case,
 16 nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, originally intended or sub-
 17 sequently used for the establishment, repair, restoration, resumption or replacement of the following
 18 uses, if the use was established on or before January 1, 2017, on lands zoned for exclusive farm use,
 19 forest use or mixed farm and forest use:

20 (a) A dwelling:

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

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

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

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

25 (c) Activities that:

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

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

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

29 **(16) Nothing in ORS 196.800 to 196.900 applies to removal or filling, or both, as part of a**
 30 **voluntary project for stream restoration and habitat improvement authorized by the State**
 31 **Department of Fish and Wildlife under section 3 of this 2019 Act.**

32 ~~[(16)]~~ (17) As used in this section:

33 (a)(A) “Converted wetlands” means agriculturally managed wetlands that, on or before June 30,
 34 1989, were brought into commercial agricultural production by diking, draining, leveling, filling or
 35 any similar hydrologic manipulation and by removal or manipulation of natural vegetation, and that
 36 are managed for commercial agricultural purposes.

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

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

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

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

45 (B) Rock crushing activities that result in the loss of natural drainage characteristics, the re-

1 duction of water storage and recharge capability, or the overburdening of natural water filtration
2 capacity.

3 (d) "Replacement" means the construction of a new structure that is substantially similar in
4 size, sited in a substantially similar location and constructed in place of a previously existing
5 structure.

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

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

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

16 (2) Except as otherwise provided by this section or ORS 509.645 **or section 3 of this 2019**
17 **Act**, a person owning or operating an artificial obstruction may not construct or maintain any ar-
18 tificial obstruction across any waters of this state that are inhabited, or historically inhabited, by
19 native migratory fish without providing passage for native migratory fish.

20 (3) The State Department of Fish and Wildlife shall complete and maintain a statewide inventory
21 of artificial obstructions in order to prioritize enforcement actions based on the needs of native
22 migratory fish. This prioritization shall include, but need not be limited to, the degree of impact of
23 the artificial obstruction on the native migratory fish, the biological status of the native migratory
24 fish stocks in question and any other factor established by the department by rule. The department
25 shall establish a list of priority projects for enforcement purposes. Priority artificial obstructions
26 are subject to the State Fish and Wildlife Commission's authority as provided in ORS 509.625. Unless
27 requested by persons owning or operating an artificial obstruction, the department shall primarily
28 direct its enforcement authority toward priority projects, emergencies and projects described in
29 subsection (4) of this section. The priority project list shall be subject to periodic review and
30 amendment by the department and to formal review and amendment by the commission no less fre-
31 quently than once every five years.

32 (4) A person owning or operating an artificial obstruction shall, prior to construction, funda-
33 mental change in permit status or abandonment of the artificial obstruction in any waters of this
34 state, obtain a determination from the department as to whether native migratory fish are or his-
35 torically have been present in the waters. If the department determines that native migratory fish
36 are or historically have been present in the waters, the person owning or operating the artificial
37 obstruction shall either submit a proposal for fish passage to the department or apply for a waiver
38 pursuant to subsection (7) of this section. Approval of the proposed fish passage facility or of the
39 alternatives to fish passage must be obtained from the department prior to construction, permit
40 modification or abandonment of the artificial obstruction.

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

1 ation of equitable factors.

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

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

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

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

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

20 (B) The type and quality of habitat;

21 (C) The species affected;

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

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

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

25 (G) Quantified baseline conditions;

26 (H) Historic conditions;

27 (I) Existing native migratory fish management plans;

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

29 (K) Data collection and evaluation; and

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

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

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

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

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

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

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

42 (b) The commission shall review, at least once every seven years, the artificial obstructions ex-
43 empted under this subsection that do not have an exemption expiration date to determine whether
44 the exemption should be renewed. The commission may revoke or amend an exemption if it finds
45 that circumstances have changed such that the relevant requirements for the exemption no longer

1 apply. The person owning or operating the artificial obstruction may protest the decision by the
2 commission pursuant to ORS 509.645.

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

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

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

12 **SECTION 7. The State Department of Fish and Wildlife shall adopt rules under section**
13 **3 of this 2019 Act in time for the rules to become operative no later than one year after the**
14 **effective date of this 2019 Act.**

15 **SECTION 8. No later than September 15, 2028, the State Department of Fish and Wildlife**
16 **shall submit a report, in the manner provided by ORS 192.245, to the interim committees of**
17 **the Legislative Assembly related to environment and natural resources on the identified en-**
18 **vironmental and economic impacts of voluntary projects authorized under the program es-**
19 **tablished by the department pursuant to section 3 of this 2019 Act.**

20 **SECTION 9. This 2019 Act being necessary for the immediate preservation of the public**
21 **peace, health and safety, an emergency is declared to exist, and this 2019 Act takes effect**
22 **on its passage.**

23 _____