



SB 431

Testimony of WaterWatch of Oregon Senate Committee on Environment and Natural Resources

February 19, 2019

Founded in 1985, WaterWatch is a non-profit river conservation group dedicated to the protection and restoration of natural flows in Oregon's rivers. We work to ensure that enough water is protected in Oregon's rivers to sustain fish, wildlife, recreation and other public uses of Oregon's rivers, lakes and streams. We also work for balanced water laws and policies. WaterWatch has members across Oregon who care deeply about our rivers, their inhabitants and the effects of water laws and policies on these resources.

WaterWatch opposes SB 431 as drafted.

While WaterWatch supports measures necessary to reduce flooding and protect public safety in Multnomah County, we have a number of concerns with the bill as drafted.

An overarching concern is that the bill does not appear to match the publically stated purpose of the Levee Ready Columbia workgroup. Levee Ready's public materials state that the group will make the most of opportunities to improve the environmental and recreational values of the region while maintaining or reducing the risk of flooding. The group's public website commits, in numerous areas, including its posted legislative agenda, to "modernizing the century old governance structure". In a nutshell, public messaging focuses largely on flood control, public safety and improving environmental conditions in a way that "modernizes" oversight and funding. We do not believe that this bill achieves these goals. As drafted, the bill not only fails to incorporate available modern day environmental goals and/or tools, but it incorporates into its "modern" governance structure archaic powers granted to Drainage Districts in 1917 that could, if utilized, undermine important twenty first century values associated with public lands and environmental resources (water, streams, habitat).

Concerns include but are not limited to:

Purposes and definitions (Sections 1, 2, 3): The purposes, when read in light of the definitions, allow much broader power than flood control, protection of people and property from floods, and improvement of water quality and habitat values. Specifically, the District authority also allows for the funding and managing of a broad array of "works" that include things such building dams and/or storage reservoirs to supply water to irrigation, or for any other purpose whatsoever. Also, the purposes and works do not incorporate robust direction and/or definitions with regards water quality and habitat improvement. For instance, green infrastructure and other floodplain restoration tools are not included. The purposes and the definitions (Sections 1, 2 and 3) need significant work to ensure that the purposes of the District adhere to the publically stated goals.

Broad power of condemnation (Sections 9(4), 9(12) and 10): The bill imports language from current law adopted in 1917 that allows for broad condemnation powers over both private and public lands both within and outside of the managed floodplains, and even outside of the district boundaries (Section 9(4), 9(12) and Section (10)). These condemnation powers are not limited to the narrow scope of public safety and/or protection from floods. For instance, under Section 10, the district's authority to condemn property includes property already devoted to a public use, if the district board determines that the current use of the property is "less necessary" than the use for which the use is required by the district. Given that the purposes of the District under this bill as currently drafted are not limited to flood control and/or environmental protection (and specifically mentions dams/reservoirs for irrigation), this leaves much room for mischief in relation to the many treasured public lands within Multnomah County¹.

All in all, the powers of condemnation granted to this new District far exceed the purported purpose of the Levee Ready group and in no way adhere to public values of the twenty first century: in other words, the bill misses the mark with regards to "modernizing" its governance structure. We would urge the committee to direct that these broad condemnation powers be greatly curtailed (via amendments) so that this power could only be used in the rare instances it is needed for flood control purposes.

Construction on public land/water course (Section 16): Similarly, Section 16 allows construction of works (which again, is not currently limited to works necessary for flood control/safety but is very broad) across and along any stream or watercourse, and over any public lands. While this provision notes that construction must comply with permitting requirements, it does not require compliance with other protective overlays such as Goal five, ODFW Wildlife Areas and/or state scenic waterway regulations/guideline, nor does it allow review (beyond permitting) by agencies such as Oregon Department of Fish and Wildlife, Oregon Department of Parks and Recreation and/or Oregon Department of Environmental Quality.

Water Rights: There are a number of provisions relating to water rights in this bill. Section 3(3) states that the Act may not be construed to affect, amend or repeal any other Oregon law or impair the vested rights of any person or public body to the use of water or vested right in the use of water. What we read this to mean is that the intent of this new District is not to affect or otherwise change existing rights or law.

That said, Section 9(10) grants the District the power not only to appropriate and acquire water and water rights, but to "sell, lease or deliver water for irrigation and other purposes both inside and outside of the boundaries of the District". This broad authority has nothing to do with flood control or public safety. Moreover, it is also unclear what the reach of this statement is given that all cities within the noted boundaries become part of the District. And, it is an expansion of current power for at least three of the four districts. In a nutshell, depending on the water right at issue, this broad authority to sell, lease or deliver water for irrigation and other purposes that have nothing whatsoever to do with flood control, both inside and outside of the district, could run afoul of the underlying terms and conditions of the water right (type of use, appurtenancy requirements, etc.). To adhere to the statement in Section 3(3), Section 9(10) should be struck. There are similar problems with Section 13(3).

¹ See attached 2016 Oregonian article (Farmer vs. Farmer) that is illustrative of the types of problems that can arise from archaic condemnation powers of drainage districts, irrigation districts and special districts.

It is important to note that this new district can take advantage of existing Oregon water laws just like any other person and/or government agency, thus if the intent is to preserve existing water rights and adhere to existing laws (Section 3(3)), the district can simply follow processes allowed under law. As such, there is no reason for special carve outs. We would suggest deleting all provisions relating to water rights outside of Section 3.

Watershed Improvement (Section 13): While we appreciate that SB 431 includes a section on “watershed improvement”, because the definition of “works” as currently drafted is focused largely on non-natural structures, this section does not appear broad enough to encourage or allow habitat improvements that are more natural in application. Moreover, while maybe not intentional, this section’s guidelines appear to be more focused on preserving the non-ecological “natural resource needs” of the district as opposed to the habitat/water/land needs that might be desired by the public. And finally, this section of the bill appears to allow only “broad, general plans of watershed improvement”, rather than allowing for site specific watershed improvements. As a whole, Section 13 should be reworked to provide for meaningful planning and implementation measures.

1917 Drainage District Laws (Section 9(12)): The 1917 Drainage District laws are outdated in many respects. The need for the broad revamping of these laws was part of the conversation around HB 2277 which passed into law in 2015 (which allowed Multnomah County Drainage District the authorities they stated they needed to move forward on levee repair). The Ready Levee states in their materials that their legislative effort is to modernize governance. Yet, SB 431 Section 9(12) governing general power of the district grants all existing drainage district powers to this new district so that they can “do such other acts and things as may be necessary or proper for the exercise of the powers granted to the district, including, without limitation, the exercise of all the powers of a drainage district under ORS 547.063 to 547.083, 547.305, 547.310, 547.315, 547.405, 547.410, 547.425, and 547.430 and the board of directors of a corporation for drainage under ORS 554.110.” In other words, this bill imports all the archaic laws that need to be modernized. This is not consistent with the public messaging on this bill and does nothing to fix long-standing problems with existing law.

Conclusion: In conclusion, while we appreciate the need to keep the people of Multnomah County safe from floods, this bill grants very broad authorities that go far beyond that purpose. Moreover, it imports archaic laws rather than “modernizing” them. And finally, it fails to provide for a structure for meaningful improvement of the environmental and recreational values of the region, which, as we understand it from the Levee Ready public face, is part of the group’s goal. In short, this bill needs more work.

Contacts:

Kimberley Priestley, WaterWatch of Oregon, kjp@waterwatch.org
Jack Dempsey, jack@dempseypublicaffairs.com