



OREGON
ASSOCIATION OF
NURSERIES

**Testimony before the House Committee on Energy and Environment
House Bill 3430, relating to stays of final orders
(Oregon Water Resources Department – ORS 536.075)**

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Chair Helm, Vice-Chairs Reschke and Schouten, members of the committee, my name is Caylin Barter. I am a water lawyer at Jordan Ramis PC, and I serve as outside counsel for the Oregon Association of Nurseries. Thank you for the invitation to provide comments on House Bill 3430, which proposes to eliminate the automatic stay of final orders issued by the Oregon Water Resources Department (OWRD) guaranteed by ORS 536.075. HB 3430 would eliminate one of the pillars of certainty in Oregon’s water rights regulatory structure, which is why the OAN opposes the bill.

The Economic Footprint of the Nursery and Greenhouse Industry

The nursery and greenhouse industry is the state’s second largest agricultural sector, and the industry ranks third in the nation, with over \$886 million in sales annually to customers in Oregon, the rest of the United States, and abroad. In fact, nearly 75% of the nursery stock grown in our state leaves our borders – with over half reaching markets east of the Mississippi River. The nursery industry employs over 22,000 full time workers with an annual payroll over \$327 million. We send ecologically friendly green products out of the state, and bring traded sector dollars back to Oregon.

Nursery association members represent wholesale plant growers, Christmas tree growers, retailers, and greenhouse operators. Our members are located throughout the state, with our largest nursery growing operations found in Clackamas, Marion, Washington, Yamhill and Multnomah Counties.

Water is our lifeblood.

The OAN's Investment in Oregon Water Policy

The OAN has been deeply involved in state water policy for decades and appreciates the complexities involved in any proposed change to the state's water laws. We pride ourselves on working across sectors and ideologies to find common ground on challenging water issues. We frequently partner with conservation groups, municipal interests, and other members of the agricultural water user community to sponsor water legislation and to advocate for OWRD's budget.

In particular, we were deeply involved in 2013's groundbreaking SB 839, which created the Water Supply Development Account and directed state investment in water resource projects that deliver environmental, social, and economic benefits. We value the opportunity to share our perspective whenever changes are proposed to our state's water laws, as this kind of dialogue is vital in order to understand the potential risks, benefits, and unintended consequences of any legislative action related to the administration of Oregon's water rights.

The Importance of the Automatic Stay

As Oregon's largest agricultural sector, Oregon's nurseries rely on the predictable administration of the state's water resources. Without secure and reliable sources of water, our industry ceases to exist. A stable water supply is an essential component of our ability to produce the diverse and high quality nursery products for which Oregon has gained world-wide recognition.

When OWRD regulates water rights, it curtails a water user's ability to divert and apply water. This can be catastrophic in the middle of a hot summer for a grower who has invested time, money, blood, sweat, and tears into producing a crop. When the Department issues a regulation order, the automatic stay may be the only protection between a landowner and financial ruin.

The automatic stay exists to preserve the status quo until an impacted party has an opportunity to challenge the order and present evidence to a neutral factfinder. Water regulation frequently involves highly technical or factual matters that deserve full consideration before a water user's water supply is shut off. The stay affords the time necessary to consider these complex matters.

But the stay is not without sideboards. It is important to note that the stay only goes into effect if the aggrieved party spends the time and money to file a petition for judicial review—essentially an appeal of the Department's order. Moreover, where there is a compelling countervailing interest in allowing the Department's order to stand, ORS 535.075(5) already contains a relief valve and allows the Department to deny the stay if substantial public harm would otherwise result.

This Issue is a Piece in a Large and Complex Water Law Puzzle

Oregon's water code is more than 100 years old and its origins go back to the time of statehood. It is a complex and intertwined set of statutes. For that reason, any proposal to change water rights regulation should be carefully evaluated to ensure that the "fix" to a particular problem doesn't end up causing a chain reaction of additional problems. Moreover, statutory changes should be evaluated in light of over 100 years of reliance on this long-established system of laws.

In the water world, many of the water problems we encounter are regional in nature. Throughout the water code, we find instances where the legislature has acknowledged that regional problems can be well-served by regional solutions. As the Klamath Tribe's one-pager identifies, the problem that has brought us all here today is deeply regional in character, involving judicial challenges of shutoff notices issued to water users in the Klamath Basin.

You have heard today that this legislation is needed to protect the interests of senior water right holders. But that position takes an artificially narrow view of the proposed legislation – legislation that seeks to fundamentally change the procedural rights that the legislature guaranteed to petitioners under ORS 536.075 nearly 35 years ago. The OAN is concerned that the bill attempts to fix a regional enforcement problem but would have statewide impact.

When OAN convenes stakeholders to tackle complex water issues, we start with two questions: 1st, "What exactly is the problem we are trying to solve?" and 2nd, "Where do we want to end up?" While the problem HB 3430 purports to solve is narrow, the solution as drafted is sweeping. And the place HB 3430 would take us is one that is fundamentally different from what the legislature envisioned in 1985 when it authorized the automatic stay provision.

The OAN recognizes that the spike of litigation over enforcement in the Klamath since 2015 is stretching the Department's budget and diverting staff time from the day-to-day work of water rights administration. To that end, the OAN supports significant increases in investment in OWRD, not only to reduce application backlogs but to allow the Department to complete the hydrologic studies that are necessary for future resource planning and regulation.

The OAN also supports good-faith discussion on where legislation can achieve greater efficiencies in the administration of water rights. However, the OAN believes the legislation being discussed today is a major assault on the procedural rights that since 1985 have attached to all final orders, not just shut-off orders, and the OAN cautions that any change to the automatic stay provision merits significant study so that the legislature may make an informed decision about whether the existing law actually needs fixing, especially given the "substantial public harm" exception already written into ORS 536.075.

If the committee takes away one thing from OAN's testimony here today, it is this: broad legislative solutions aren't generally well-suited to solving regional water problems because they create unintended ripple effects for every water right across the state. We encourage the legislature to think about the issue it is being asked to solve, and to think about where that solution should take us. We remain open to engaging in that process with you to craft water policy that benefits the entire state of Oregon for the next 100 years.

Thank you for your time and consideration as well as the invitation to speak to you today. We appreciate the opportunity to participate in this informational hearing and look forward to working with the legislature to protect our water resources and the people who rely on them.

I will be happy to answer any questions you may have.