



WaterWatch of Oregon

Protecting Natural Flows In Oregon Rivers

HB 3097

Testimony of WaterWatch of Oregon

by Kimberley Priestley

House Committee on Agriculture, Land Use, Natural Resources and Water

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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 and aquifers to sustain fish, wildlife, recreation and other public uses of Oregon's waters. 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 has concerns with HB 3097 as drafted

What HB 3097 does: HB 3097 expands the existing pool of applicants who could use the expedited in-conduit hydro process from water right holders who own the underlying conveyance system, or conduit, to include municipal corporations (which includes cities, counties, special districts, schools, etc) and people's utility districts that do not own the conveyance system or hold the underlying right.

Background on the expedited process for in-conduit hydro: Oregon hydroelectric statutes have long allowed in-conduit hydro under ORS 543. This is not a new concept, nor are there any limitations on who can pursue in-conduit hydro; entities just have to go through the regular hydro statutes, which include a process to protect Oregon's natural resources, including fish and wildlife.

In 2007, HB 2785 changed existing law to allow an "expedited" path for in-conduit hydro development that allowed the water right holder who owned a conveyance system to avoid the hydro statute's more rigorous environmental reviews, but only if some key resource protections, such as fish passage and screening, were required. WaterWatch negotiated these standards in the original bill.

A key tenant of the 2007 law was that the expedited process was limited to the underlying holder of the right who owned the conveyance system (except in one limited circumstance). The rationale was that this simply added an additional use to their existing right, that could not expand diversion of water or otherwise affect water delivery to the underlying use and that, importantly, in choosing to use the expedited process, the new use would bind the underlying water right as far as new required conditions of use--- including the requirements for fish passage, fish screening, measurement and reporting of water use, and any other condition the OWRD determined was necessary to protect the public interest.

Within two sessions of passage of the bill, user interests who had negotiated the original bill came back to try to strip the requirement for fish passage from this bill. After those attempts failed, a workgroup was convened by Governor Kitzhaber in 2012, which WaterWatch served on. In 2013 a bill passed that allowed payment in lieu of fish passage if funds were deposited in an ODFW fish passage fund to address high priority fish passage projects. Proponents of this change argued that this change would result in significant funds to advance high priority fish passage projects. A 2018 Report to the Legislature made clear that this program was not working as intended.

The 2013 change to the expedited process did not change requirements that to qualify for the expedited process the underlying right holder would have to measure and report their use, would have to provide fish screening and would have to conform with any other condition of use the OWRD imposed to ensure protection of the public interest.

Concerns with HB 3097 as drafted

Fish passage: WaterWatch has concerns with expanding the pool of hydro projects that can skirt the more rigorous hydroelectric statutes, that among other things, would require fish passage. As noted, the expedited process allows payment into a fish passage fund in lieu of providing fish passage. This program has failed to live up to representations that were made to the legislature to advance the change to the original law. If the expedited process is to be expanded to even more users, we would ask the legislature to unwind the 2013 law to return the program to its original construct, which would require fish passage as a condition of the application.

Fish Passage Fund: If the legislature is unwilling to unwind the 2013 law so fish passage is required; we would ask the legislature to increase the fees that have to be paid into the fish passage fund so that the alternate to providing fish passage will actually result in meaningful progress forward on priority fish passage projects.

Efficiency Standards for the underlying use: One of the outstanding issues related to in-conduit hydro is the potential of these projects to perpetuate inefficient water uses. In the 2013 workgroup, a number of workgroup members suggested that to help ensure that in-conduit hydro projects did not end up having the unintended consequence of perpetuating inefficient uses of water, the program should be amended to institute standards into the in-conduit hydro statute that would require that the underlying water right meet efficiency standards. For instance, municipalities that have, for examples sake, a 10% or less leakage rate could utilize the statute. If the legislature is going to alter the existing program, we would urge attention to this issue.

Clarifying management of the two disparate water rights: Under this bill the new hydro certificate will not be connected to the underlying right by virtue of ownership of the underlying right or the conveyance system. Under the expedited process, it is the underlying right that must measure and report water use, provide fish screening, provide fish passage or payment, and adhere to any public interest condition the OWRD attaches. If these conditions are not met, then the underlying certificate, not the hydro certificate, is subject to regulation. The existing statute requires that the underlying right receive a superseding certificate altering their underlying water right to add the required conditions (ORS 543.765(6)). As we read HB 3097, this still applies, however, how it will interact with the hydro certificate is less clear given this bill disconnects the underlying right from the hydro right. For clarity of purpose and effect, we would suggest the bill be clarified to make this nuance crystal clear in a dedicated subsection. Moreover, again, to add clarity, we would suggest Section 1(b) of the bill be amended to make clear that the holder of the underlying right will not only have to agree to the use of the hydroelectric right (current language) but they acknowledge that they will be subject to a superseding certificate that will require screening, fish passage or payment, measurement and reporting, and any other condition the OWRD deems fit to protect the public interest. Without this clarity, there is a risk the bill could lead to regulatory problems in the future.

Conclusion: WaterWatch does not believe that HB 3097 is needed. Municipal corporations and people's utility districts can already put in conduit hydro projects on canals, they simply have to go through the regular hydro process. That said, if the committee chooses to move forward with this concept, we would urge it to first address the concerns raised in this testimony so that the green power provided by in conduit hydro is actually green, and that there is a clear management structure in place to ensure regulatory efficiency.

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