



WaterWatch of Oregon

Protecting Natural Flows In Oregon Rivers

HB 3211 Testimony of WaterWatch of Oregon by Kimberley Priestley

House Committee on Agriculture, Land Use, Natural Resources and Water February 21, 2023

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 opposes HB 3211 as drafted

What this bill does: While the language is not explicit, the effect of this bill would be to allow the City of Newport to transfer the location of its water rights for its two existing Big Creek dams to a single point where it plans to build one larger replacement dam.

Transfer law as it relates to storage projects: In 2018 the Oregon Department of Justice advised the Oregon Water Resources Department (OWRD) that existing statutes did not grant the Department authority to allow transfers of storage rights, including changes to location or point of diversion. Since then, the issue of the OWRD's authority to process transfers of storage, as well as appropriate environmental sideboards, has been discussed extensively in workgroups and through legislative proposals. In 2021 the legislature provided funding for the OWRD to engage a professional facilitator to lead stakeholder discussions. Before these discussions could take place, litigation was filed related to the OWRD's authority to process an application to transfer the point of diversion of a storage right. The Marion County Circuit Court recently issued an opinion letter, the result of which is that the court determined that the OWRD has the authority to transfer both the point of diversion and the location of storage. That said, the OWRD has indicated to stakeholders that it is going to appeal that decision to the Court of Appeals. In sum, there are still outstanding questions as to the state's authority to allow transfers of storage locations or point of diversion, though the state can at this point accept applications for changes to location and point of diversion of storage.

It should also be noted that a transfer of the location and point of diversion of their storage right (either under existing statutes or under this bill) is not the City's only option. The City could apply for a new water right to store water at the new dam location. It is not completely clear to us why they are not pursuing this option.

WaterWatch concerns with the bill as written: As written, we have the following concerns:

- **Clarity as to scope:** The bill is not transparent in its intent to only allow this change for the City of Newport. While the bill's sideboards will likely limit this transfer only to the Big Creek Dams, we would suggest amendments that would make it crystal clear, either by explicitly naming the city's Big Creek Dams, or by limiting the scope to the dams' township/range/section and tax lot (for example, see HB 2616 (2021 session)).

- **Protection of Siletz River Flows:** It is our understanding that the City has made statements in public forums that the building of this larger dam would allow the City of Newport to stop diversions from the Siletz during the low flow months¹. The bill should require that this commitment be captured as a condition of use for the certificate that is granted as a result of the transfer. Similarly, use should be conditioned so that the City could not transfer or sell water to other cities, unless they too were limited to taking water from the Siletz in the high flow months.
- **Environmental sideboards:** Allowing the City to transfer its storage project under HB 3211 would allow it to skirt environmental sideboards that would otherwise attach to the water right if the City were to apply for a new right. A new water right would be subject to a public interest review, including standards to protect threatened, endangered or sensitive species. This type of review is specific to water rights so will not otherwise be addressed in a transfer proceeding, or other permitting needed for the project. Given the magnitude of this project, we would request that the legislature require the dam adhere to modern day environmental sideboard, including:
 - **Fish passage** (which would require fish passage or mitigation if they go through the waiver process)
 - **Bypass flows and/or other measures** as determined by ODFW
 - **Protection of seasonally varying flows** as determined by ODFW
 - **ODFW determinations to ensure no loss of fish and wildlife habitat:** Ensuring that the new dam will cause no more harm than the original dams should be a bedrock sideboard of this bill.
- **Clarity as to effect:** Section 1(1) reads that transfers of location of storage are allowed under Oregon law, as opposed to directing it comply with transfer standards allowed for other types of transfers (change in use, location, point of diversion of non-storage projects). Given the outstanding legal questions on this issue, WaterWatch and the City of Newport agreed to amendment language that would have clarified that the City would need to go through the transfer process, not that it was allowed by the transfer statutes. It is unclear why this amendment has not shown up on OLIS.
- **Unintended consequences of select sideboards:** If it is limited to the City of Newport, then sideboards that we believe could have unintended consequences as far as precedent should be deleted as they would not be needed to narrow effect, specifically Section 1(1)(c) relating to instream water rights and 1(1)(e) relating to OWRD's water supply fund.

Conclusion: As noted, the City can apply for a new water right for its new dam. However if the Legislature chooses to move HB 3211 forward, we would ask that it amend the bill to ensure that the new dam adhere to modern day environmental standards that are specific to water storage. At a minimum, we would request that the Legislature ensure that representations by the City as to the benefits of this dam to the environment (e.g. halting withdrawals on the Siletz) be captured as conditions of use under the water right, and that coastal fisheries are protected via fish passage and any other measure ODFW determines is necessary to protect coastal fisheries into the future. The bill should also be narrowed in scope to the City of Newport Big Creek Dams only. These amendments would address our concerns with the bill.

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¹ See e.g. page 70 of <https://newportoregon.gov/dept/pwk/documents/bc/BigCreekDamsPresentation-ChamberLuncheon-6-7-19.pdf>. The City's website notes that sustaining the environment is a critical component of its solution and that it can meet its water supply goals while enhancing natural habitat and lessening its reliance on already stressed water resources.