WATER LEAGUE

Water League engages the public in water stewardship.

P.O. Box 1033
Cave Junction, OR
97523

chris@waterleague.org
(541) 415-8010

February 19, 2025

To: House Committee On Agriculture, Land Use, Natural Resources, and Water

Representative Ken Helm, Co-Chair
Representative Mark Owens, Co-Chair
Representative Sarah Finger McDonald, Vice-Chair
Representatives Court Boice, Annessa Hartman, Bobby Levy, Pam Marsh, Susan McLain, Anna Scharf

RE: Water League opposes HB 3364 as proposed.

Dear Co-Chairs Helm and Owens, Vice-Chair Finger McDonald, and committee members,

While there are some improvements to the Water Project Feasibility and Water Project grants in this bill, Water League opposes HB 3364 because it weakens public oversight and accountability in water project funding by loosening application requirements, reducing public comment time, diminishing the emphasis on public benefit, and potentially circumventing legislative intent regarding community engagement funding, ultimately favoring developers over the public interest.

In general, we reject the premise that the public agrees to greater exposure to harm in trade for increased supplies of water. We understand there will always be downsides to perceived benefits -- in this case, negative impacts resulting from water projects. However, removing reasonable existing public benefit and interest standards under the pretense of streamlining water project developments at the feasibility and development stages is a regressive policy move.

HB 3364 removes standards that ensure the ability of the state to hold the public's funds and their water in trust when granting and giving money related to water projects. The streamlining effort has the effect of an affirmative action program, which would be fine if it did not come at the expense of the public health, safety, and welfare.

The following comments are in sequential order following the sections of the bill. If we do not comment on a section, then we are neutral on that topic.

Feasibility Study Grants

Section 1:

(1) We agree that aligning feasibility projects with development projects is good policy. We presume an applicant could apply for a feasibility grant, and if the project is feasible, they could apply for a water project development grant. To the extent possible, a two-step process such as this could be incentivized.

(4) Removing the $500,000 cap on a feasibility project size reduces the number of projects OWRD can leverage at a time when there are constant concerns about a lack of state funding for OWRD and all other natural resource agencies. Reducing the matching funds from 50% to 25% means that the cash-strapped OWRD will be faced with the option of permitting fewer projects. The combined effect of these two proposals restricts projects to larger systems that will use up most of the available feasibility funds. What is driving this change? Does the legislature have specific feasibility projects or project types in mind that it wants OWRD to fund?

The proposal to increase funding and decrease the match pushes the public-private partnership more towards a public sector activity, which more closely resembles a *competitive bidding process*. This proposed change begs the question of why OWRD doesn't do the projects themselves, or whether OWRD should be more direct in making a list of the types of projects it wants done, and then solicit interest in a competitive bidding process.

We oppose removing the cap and reducing match without an increased appropriation to the feasibility grant program to preserve smaller projects, and we request clarity on precisely what projects the state has in mind that need so much more free money.

We also oppose these changes without increased accountability: we have concerns about how grantees may not be qualified to do studies. For example, OWRD approved the City of Silverton to drill two wells for $500,000 and now it turns out the grantee misunderstood the economics of the project and the current economic conditions to such an extent, that not only did they miss the funding mark by 100%, but they also need an extra 10% more funds to do half as much work as planned. By all accounts, such mismanagement is grossly incompetent if not negligent, and the perception that such a project would not be canceled for lack of sufficient planning perpetuates some of the worst stereotypes of "$600" hammers and other misuses of public funds.

HB 3364 ought to incorporate more stringent requirements for applicants and require that all projects not go over budget by 10% or all public funds must be retracted. Insofar as feasibility goes, the one good thing that the City of Silverton proved is that only half as much work is feasible; that is a data point worth considering. Feasibility is in the failure as well, and pulling back funds for such a failure is a good deal to learn a hard lesson.

Section 2:

(1)(p) Dam safety should not be a grant program activity, feasibility or otherwise. Grant-funded programs are prone to failure and have what we believe is an unacceptable failure rate. Dam safety should be either a fully state-controlled engineering process with sufficient funding or a rigorous competitive bidding process with stringent standards to ensure near-absolute success. Grants, with matching funds, are reasonable funding sources for non-critical infrastructure and dance companies, but they are not acceptable funding streams for analyzing dam safety and evaluating actions to address safety deficiencies. Would the City of Silverton be eligible to apply for a grant if it had a dam that needed an evaluation of its safety and deficiencies?

(1)(r) "Analyses of impacts of a project on environmental justice communities and ways to minimize impacts on environmental justice communities." We object to the water feasibility project grant applicants being the entities in charge of conducting analyses of the impacts their proposals have on environmental justice communities because the grant applicants are incapacitated by an inescapable conflict of interest to ensure their projects proceed as planned. Any such analysis risks minimizing the objective facts related to impacts on EJ communities. **(*An in-depth discussion is appended at the end of this document.)**

We call into question the legislative integrity of the "2(1)(r)" fix because it enables a serious error that we allege in the OWRD rulemaking for the proposed Division 601 rules.

Water Project Grants and Loans

Section 8:

(1) States that "Applications for a loan or grant from the Water Supply Development Account must: **(b)** "Include any information required by the department." This seven-word statement replaces 16 detailed application criteria written in statute. Section 8 should state that "The WRC shall adopt rules to set requirements for all applications for a loan or grant from the Water Supply Development Account." If these detailed requirements are taken out of statute, then they should be required in rules; otherwise, there is a near certain chance pressure will be put on OWRD staff on a case-by-case basis to permit weak criteria. Such pressure has been rampant over decades in many areas at the department; leaving funding discretion open to the wild is asking for corruption in the grant-making and loan process. If the grant application criteria that legislators thought were important enough to inscribe in ORS 541.666 is removed, then the HB 3364 revision should require rulemaking as a backstop to ensure order.

Section 9:

(1) Notably, HB 3364 preserves the statutory requirement that "The Water Resources Commission shall adopt rules establishing a system for evaluating projects to determine which projects are to be awarded loans and grants from the Water Supply Development Account." We see no reason why the application criteria would not be held to the same standard in Section 8(1).

We oppose removing evaluation standards that set "minimum criteria designed to achieve the outcomes described in ORS 541.677." Removing minimum criteria undermines the integrity of the grant-making process and sets a new standard for lowering the bar. Not only is such a move highly unprofessional, it has the air of a scandal. (See our comments on Section 11(1) for more details related to our concerns.)

(6) & (7): We oppose cutting in half the time for public comment from 60 days to 30 days. What legitimate concerns are legislators addressing with this reduction in public comment

time? What benefit do legislators envision from minimizing public interest?

Section 10:

(1) This section takes a requirement that "funding from the Water Supply Development Account **shall be evaluated** based upon the public benefits of the project" and waters down the public benefit requirement for applicants to "**include an evaluation** of the public benefits of the projects, along with other factors determined by the Water Resources Department."

The language in 10(1) went from projects "being evaluated" to the actual projects themselves "including an evaluation." The full sentence reads: "Projects applying under ORS 541.669 for funding from the Water Supply Development Account shall include an evaluation of the public benefits of the projects, along with other factors determined by the Water Resources Department." That turns the grant application review process on its head. It is the purview of the OWRD to evaluate the public benefit of proposed grant projects, not the grant applicants. Turning over the responsibility for evaluations of the public benefit from OWRD to the applicant could create a conflict of interest where the applicants will be incentivized to conflate their special interests with the public interest when the two are far apart.

We also wonder what other factors are there besides the public benefit. If the public benefit provision is to be weakened, then at the very least, these unacknowledged "other factors" must be listed to determine if they are in the public interest and do not impair or harm the public health, safety, and welfare. Who's going to benefit from weakening the public benefit requirement? Will they be those pressuring the OWRD staff to allow these unacknowledged "other factors" to secure funding that is not otherwise a public benefit? How *ad hoc* will the inclusion of "other factors" be?

(4) We oppose removing this requirement: "The commission shall award loan and grant funding from the account to the projects that have the greatest public benefit and will best achieve the outcomes described in ORS 541.677." What is the justification for using the public's funds to pay for water development projects that use the public's water for projects that are not a public benefit? The so-called "other factors" in subsection (9) discussed above, if not a public benefit, then leave open the opportunity to use the public's funds and their water for special interest benefits, which is a breach of the public trust if those special interest benefits conflict with the public interest. Removing the requirement to assess this

circumstance suggests the strategy is to allow undisclosed "other factors" to control the allocation of public resources.

(5), (6), (7) We oppose loosening the requirements to economic, environmental, and social benefits in subsections (5), (6), and (7), respectively. These successive revisions to the statutes strategically weaken the grant and loan system by enabling a loose-money system. Why do legislators want to remove standards that help ensure water use is an economic, environmental, and social public benefit? Who gains from this regression in policy?

The pattern shown here -- from Section 8 through Section 10 of HB 3364 -- is an attempt to free up public funds by removing application criteria from the statute, reducing public comment time, removing minimum criteria, and weakening the public benefit standard. Who else but prospective water project grantees with political connections would support such a regressive policy proposal?

Section 11:

(1) We oppose the removal of "minimum criteria for the project scoring and ranking." What good comes from removing minimum criteria when the public's funds and water are concerned? HB 3364 is an affirmative action program for water project developers; in addition to freeing up public funds by removing application criteria from statute, reducing public comment time, and weakening the public benefit standard, there is also this proposal to remove minimum criteria. We oppose this affirmative action plan for prospective water project grantees who, by all accounts, would enjoy privileges through regressive policy proposals that would no longer sufficiently hold the public's water and funds in trust. The enjoyment of such privileges at the expense of the public trust could be unconstitutional.

(1) This subsection also states that "The Water Resource Commission shall adopt rules to establish the evaluation system described in ORS 541.669 to (a) Issue grants or loans only to projects that provide benefits in each of the three categories of public benefit described in ORS 541.673." A plain reading of this text means that Section 10(1), with the tagline "along with other factors determined by the Water Resources Department" is irrelevant; or, in the strategic weakening of the grant funding program, legislators overlooked the need to coordinate Section 11(1)(a) with Section 10(1).

(2) This subsection states that the WRC shall periodically review the grant funding program

to assess the extent to which the "loan and grant program is achieving desired outcomes and providing public benefits." How are "achieving desired outcomes and providing public benefit" not the same thing? Perhaps the so-called "other factors" proposed in Section 10(1) are also these "desired outcomes." What are the "desired outcomes," and whose benefit are they if not the public's benefit? Who decides what those "desired outcomes" are, and what criteria those outcomes must meet?

The grant-making sector -- public and private foundations across the state -- would be dismayed by the regressive provisions in HB 3364. Legislators should have conferred with experts from the grant-making field for guidance in revising the statutes in HB 3364. Given the pressure OWRD staff experience from legislators, unaffiliated professional foundation specialists should provide guidance to correct HB 3364.

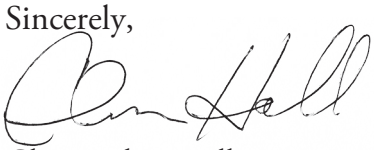
Section 13:

(2) We oppose removing the minimum standards language in this subsection, which states: "The description of public benefit requirements in subsection (1) of this section does not exempt any project from meeting the minimum criteria designed by the Water Resources Commission under ORS 541.677." (See our comments in Sections 9(1) and 11(1) for more details related to our concerns.)

Section 14:

(1) This subsection should include a reference to ORS 541.551 since it is closely associated with the rest of these statutes.

Sincerely,



Christopher Hall
Executive Director

*HB 3364 Section 2(1)(r) background discussion:

One aspect of the HB 3364 testimony relates to the appearance of legislators fixing the statutes around proposed administrative rules (OAR 690-601) that are currently under revision (OWRD just reopened public comment on the proposed rules from February 14 to 24, 2025, related, in part, to this issue). Not only is this backward, since rules are meant to help serve statutory provisions, but it also calls into question the separation of powers and the legislative process. The convoluted issue centers around Chapter 541 funding for water projects and subsequent needs to fund community engagement around those water projects due to inherent negative impacts to "disproportionately impacted communities" resulting from these state-funded water projects' unintended consequences (e.g., side effects or collateral damage).

Here is the context:

ORS 541.561-541.581 and OAR 690-600 fund water project "Feasibility Grants" and ORS 541.651 - 541.696) and OAR 690-093 fund the actual development of water projects, called "Water Project Grants." To date, the state has funded almost $10 million to feasibility projects, and an order of magnitude more to the development of water projects -- $100 million. In 2021, legislators passed HB 3293, which became ORS 541.551, a statute permitting state funding for communities to address the imposition and impacts these water projects have (e.g., the negative side effects and collateral damage).

The legislative intent of HB 3293 is clear: fund local organizations and governments to conduct community engagement to ensure "meaningful involvement" of "disproportionately impacted communities." Both quoted terms are statutory language; the latter is described in detail under Section 1(b) of ORS 541.551. The testimony by the bill's sponsor, OWEB's director, the Governor's natural resource advisor, and two leaders in the non-profit sector that work with communities all clearly stated that there is a great need to engage communities and that such work must come from within those communities because the water project developers are not inclined nor have the time to do the work, nor do they have the expertise to conduct community engagement that requires neutrality, open-processes, and other qualifications -- think Oregon Consensus, Willamette Partnership, Oregon Kitchen Table, Sustainable Northwest, etc. that do possess these qualifications.

But something went awry: when OWRD began the Division 601 rulemaking process in

2024 (OAR 690-601) to flesh out ORS 541.551, the department turned the statute on its head and proposed administrative rules that restricted funding to the water project developers, who by all accounts, are the interested parties in water projects that pose the negative side effects (collateral damage) to the "disproportionately impacted communities." Now, as the rules have been proposed, the water project developers can apply for additional funding to conduct community engagement in the areas where they propose to work. The effect is no longer providing funds to local organizations and local governments to "meaningfully involve" the "disproportionately impacted communities." Rather, the effect of this funding enables water project developers to manufacture the consent of these communities since the interests of the water project developers (*who are not inclined nor have the time to do the work, nor do they have the expertise*) is to build their projects as they envision them. The proposed Division 601 rules amount to little more than extra grant funding to pay for elaborate public relations and marketing schemes under the political cover of "10 Best Practices" in community engagement.

Water project developers will likely contract out the job of community engagement to companies that specialize in public relations, and there is zero chance that the contractor will work at cross purposes of their client and prioritize the interests of the "disproportionately impacted communities" who will raise objections, seek changes, and even propose suspending or abandoning the project. In an early document that OWRD promoted, the department acknowledged that "It is important to consider that some water projects are not suitable for all communities, and this may result in some projects needing to be placed on hold, delayed, or halted to achieve the best interests of the larger community." (Pg. 7, 10 Best Practices in Community Engagement around Water Projects_ORS 551.441 multiagency document)

What changed? Why is OWRD turning the statute on its head and restricting funding to those interests who don't want their projects changed, delayed, or halted? One possibility is that the statute (ORS 541.551) is inherently flawed because the state could end up inadvertently funding unsavory organizations, lobbyists, and obstructionists with agendas. Water League presented a lengthy critique of the problems that could arise in its initial comments on July 30, 2024 (incorporated here by reference). The articulated problems are obvious enough for all to see and it is possible that OWRD had to figure out a way to resolve them.

Water League wrote a further critique on OWRD's attempt to resolve the problems inherent

in the statute (ORS 541.551) (incorporated here by reference), demonstrating the legislative intent of HB 3293 by pulling in all the records on the committee hearings and laying out the reasons why limiting community engagement funding to water project developers takes a bad situation the statute sought to fix and makes it worse. This critique is an in-depth review of the problem.

Back to the present when it turns out the OWRD plan -- arguably *ad hoc* -- runs into problems. To limit funding to water project developers, OWRD had to declare that community engagement funding under ORS 541.551 would only be available to those who are applicants or grantees to water project "Feasibility Grants" (ORS 541.561-541.581 and OAR 690-600) and the actual development of water projects, called "Water Project Grants" (ORS 541.651 - 541.696 and OAR 690-093). But, neither of those programs currently allow for funding community engagement activities; rather, they only fund water projects. To fix that limitation, there is now, in the 2025 legislative session, a subsection paragraph that was inserted into HB 3364; it is Section 2(1)(r), "Analyses of impacts of a project on environmental justice communities and ways to minimize impacts on environmental justice communities." This provision would become one among other activities a water feasibility project applicant can spend their money on. If this bill passes with this provision intact, then legislators will have fixed the statute (ORS 541.566) around (and to enable) the proposed administrative rules (Division 601) that currently are unworkable.

The possibility of fixing statutes around rules, which is the opposite of the norm, is a policy innovation that needs scrutiny. If proposed rules are out of line with the statutes, such as how a key element of the proposed Division 601 rules is with ORS 541.551, and then other statutes (ORS 541.566) are revised to make that incongruence feasible, what does that say about the legislative process?

Notably, the "Water Project Grants" (ORS 541.651 - 541.696 and OAR 690-093) can't be so easily fixed. "Water Project Grants" are funded by state lottery dollars, which do not permit the use of those funds for community engagement activities. Therefore, a similar fix for ORS 541.656 (adding a provision similar to the "Section 2(1)(r)") cannot be made because such a workaround is blatantly unconstitutional (e.g., Article XV, Section 4b of the Oregon Constitution). OWRD just reopened the public comment period on their Division 601 proposed rules because they had to make this awkward announcement -- that OWRD will not be able to issue community engagement grant funds for "Water Project Grants." This revelation speaks to the *ad hoc* nature of the decision to limit community

engagement funding established under ORS 541.551 to the water project developers. Note that it is well-established that Measure 76 Lottery Funds in Article XV Section 4b of the Oregon constitution cannot fund community engagement activities, so clearly, the planning and execution of the OWRD proposed rulemaking for Division 601 was not well thought through.

This conundrum speaks to how the separation of powers between the legislature and the executive branch that oversees the state agencies ranges from the gauzy to a brick wall. As it stands, legislators can only accede to fixing ORS 541.566 around the Division 601 rules to assist "Feasibility Grants;" whereas, it cannot do so for the "Water Project Grants," which, by comparison, are an order of magnitude more funding.

We request that legislators write laws to provide funding for community engagement that empowers communities -- especially "disproportionately impacted communities," and that funding goes to them and not to the entities who are causing the impacts. While water projects may have public benefits, they also have side effects that cause harm -- that is the premise of HB 3293 and ORS 541.551. Giving community engagement funding to the water project proponents instead of directly to the impacted communities is an Orwellian form of subterfuge that will result in manufacturing the consent of those communities, which is the exact opposite (*down is up*) intention of the documented legislative intent of HB 3293 and ORS 541.551.