



## WaterWatch of Oregon

### Protecting Natural Flows in Oregon Rivers

#### Testimony of WaterWatch of Oregon on House Bill 3544-2 House Committee on Agriculture, Land Use, Natural Resources and Water

March 11, 2025

Chairs Helm and Owens, Vice Chair Finger McDonald, and Members of the Committee:

Founded in 1985, WaterWatch is a non-profit river conservation group dedicated to the protection and 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.

HB 3544-2 would make major changes to the process under which citizens and organizations can challenge proposed decisions by the Water Resources Department (WRD).

While WaterWatch supports efforts to improve the efficiency of the process for making water resources decisions, WaterWatch has significant concerns about HB 3544-2:

- HB 3544-2 would make it more difficult for non-applicants representing public interests to file, prepare and present their cases, which would be harmful to the public interest in management of Oregon's water resources.
- HB 3544-2 proposes sweeping changes to a complex system that has evolved over many years to balance efficiency and due process rights, with significant potential for unintended consequences.
- HB 3544-2 would not solve the problem it is intended to address – i.e., the “backlog” of contested cases at WRD.

WaterWatch provides further detail on these points below.

#### **Background: Contested Cases**

Contested cases are not unique to WRD. They are the general means for providing due process, including the right to a hearing, to people and organizations affected by the actions of state agencies. *See* ORS 183.310(2)(a); ORS 183.411 to ORS 183.471. Contested cases are like court cases but take place before an administrative law judge with the Office of Administrative

Hearing (OAH). Like court cases, they involve exchange of relevant documents and other information (“discovery”); motions to resolve issues such as what discovery will be provided, what issues require a hearing, and what evidence will be admitted in the case; and a trial-like hearing of witness testimony, exhibits and arguments. The administrative law judge issues a proposed agency order. The parties can then file “exceptions” to the proposed order. The agency then issues a final order. The final order is subject to “judicial review” by the Court of Appeals, which can set it aside, but only for limited reasons. ORS 183.482.

Contested cases are important to WaterWatch’s work to advocate for the public interest in water resource decisions. Contested cases give WaterWatch a chance to demonstrate, through evidence and argument, when a proposed use of water is not in the public interest, and when it is. Contested cases can involve highly significant proposals for new water use, dams to store water and other important matters.

Currently, WRD contested cases are governed by lengthy provisions in two sets of statutes – ORS chapter 183, relating to agency actions generally, and ORS chapters 536 through 543, relating to water resources management – and two sets of administrative rules – OAR chapter 137, Division 003 (Department of Justice Rules on contested cases generally) and OAR Chapter 690, Division 002 (WRD rules). HB 3544-2 would make wholesale revisions to the process established by these statutes and rules, primarily by directing WRD to write new rules, some of which are prescribed and some of which are open-ended.

### **Support and Opposition for Particular Provisions**

HB 3544-2 has many provisions WaterWatch supports, many it doesn’t and many that WaterWatch believes need more work. HB 3544 also fails to include several things that it should include if it is going to solve the problem it is meant to address.

Among the things WaterWatch supports are an increased emphasis on settlement, advanced notice of referrals to contested case, a streamlined method for seeking party status to support a proposed order, and uniformity in process for different types of agency decisions.

Among the things WaterWatch opposes are the maximum time that would be allowed for a contested case, regardless of its complexity and the significance of issues; inadequate provisions for obtaining necessary information from other parties (i.e., “discovery”); strict requirements for identifying all issues and arguments in detail within 45 days (or less if WRD decides) of notice of a proposed action, without any opportunity to add detail based on information learned in discovery; and limitations on “exceptions” to proposed orders and final orders, both in substance and length, regardless of the issues involved in the case, the length of the order and the need to preserve arguments for appeal.

Among the things that WaterWatch believes need more work are provisions on remote v. in-person hearings, written testimony v. live testimony, motions for summary determination, and selection and compensation of settlement judges.

Among the things HB 3544-2 fails to address but should are the time between filing of a protest and referral to contested case, and the criteria and order for referral of protests to contested case.

### **Concern for Mistakes and Unintended Consequences**

HB 3544-2 proposes major and extensive changes to detailed, complex and longstanding processes for protecting public rights to challenge agency actions. To ensure adequate consideration of these changes, including their interaction with other statutes and rules (including changes proposed by other bills this session), legislation on the subject should not be adopted without a facilitated work group of all stakeholders to find areas of agreement, identify areas of disagreement, and fully consider the potential for unintended consequences from various proposed changes. Consideration also should be given to whether revisions to the contested case process should be considered for all agencies and not just WRD.

In 2023, HB 3346 proposed a task force like the one WaterWatch suggests now. WaterWatch supported that bill. The bill was amended to direct that WRD alone consider the issues, and it died in Ways & Means. The original idea should be resurrected now instead of trying to make major changes to a significant and complex process under the pressures of legislative deadlines.

### **Solutions for Backlog**

As representatives from water-user groups have agreed, the contested case “backlog” results primarily from the time it takes WRD to refer a contested case to OAH for hearing, not the time it takes to resolve a contested case after it is referred. The backlog therefore is not a justification for the significant changes being proposed to the contested case process, especially if it comes at the expense of due process for parties who may disagree with proposed agency actions.

WRD attributes delays in referral to not having resources to staff the contested cases and pay its attorneys and the OAH. However, WRD allows applicants to keep protested applications on “administrative hold” indefinitely if the applicants are not prepared for contested case. If all protests were referred to hearing on a neutral basis (first-in, first-out being the most obvious), many applications and/or protests would be withdrawn, and significant progress could be made in reducing the backlog.

For the above reasons, we oppose HB 3544-2. Instead, we suggest a facilitated interim work group to more fully address the issues raised by the bill.

Thank you for considering our comments.

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