WATER LEAGUE

Water League engages the public in water stewardship.

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April 1, 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 generally supports HB 3544-3, which aims to streamline the contested case process to accelerate the processing of water right transaction-related cases.

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

Water League generally supports HB 3544-3 because we agree that contested cases should not be unreasonably stalled by inefficient procedures and the tactics used by those who exploit weaknesses in the Administrative Procedures Act (APA). We appreciate the efforts to revise this bill, from the first iteration as a legislative concept (LC 3657) through the -2 amendment to the current -3 revision. The -3 revision limits, by degrees, how legitimate activities designed to protect the public interest could be caught up in the streamlining process alongside illegitimate activities that unreasonably stall and obstruct the contested case process. Parts of this bill are, however, are still unreasonably restrictive.

Below, we discuss our comments on numerous sections of HB 3544-3 and note a few consequential typographical errors. Our comments are sequential except for when we reference themes. We are neutral on the sections of the bill we do not comment on.

1) Section 2(3) states that: "The Water Resources Commission and the Office of Administrative Hearings shall establish a uniform process for hearing contested cases..."

We suggest "... shall establish **in rule** a uniform process..." to ensure that the Water Resource Commission (WRC) and the Office of Administrative Hearings (OAH) jointly adopt administrative rules on this specific process.

2) Section 2(4) states that: "The Water Resources Department, in consultation with the Office of Administrative Hearings, shall establish one or more default hearing schedules..."

We suggest that "... shall establish **in rule** one or more..." to ensure that the WRC and the OAH jointly adopt administrative rules on this specific process.

3) Section 2(4) states that: "... from a referral for a hearing to a completion of the hearing..."

We suggest the phrase be reworded as: "... from **the** referral for a hearing to **the** completion of **a** hearing..."

4) Section 2(5) refers to the discretion of the Administrative Law Judges (ALJ) in extending the contested case hearing schedule.

When can protestants present arguments to the ALJs for extending the contested case schedule? Does the process to make that request (a motion) need to be written in rule to ensure uniform standards? We assume the authority of the ALJs to reject spurious motions would protect the intent of this subsection (5); however, guidance in rule on the illegitimacy of such claims may be warranted if not already protected elsewhere.

5) Section 2(9) refers to the grounds on which parties may file exceptions, which is limited to "the interpretation of a statute and rule."

We suggest including policy decisions to the allowable exceptions when parties allege that the department exceeded its discretion under the law, a common concern among protestants. The WRC and the OAH should jointly adopt rules to clarify potential ambiguities between what are legal *interpretations* and policy *discretion* to prevent agencies and parties from conflating the two. Permitting protestants to file exceptions based on

improper discretion will address a widespread concern and disentangle discretion from interpretation.

6) Section 2(11) states that: "The commission may adopt rules necessary to implement this section."

We suggest language that states: "The commission **and the Office of Administrative Hearings shall jointly** adopt rules necessary to implement this section," to ensure that the WRC and OAH clarify the vagaries in HB 3544-3. On a more general note throughout HB 3544-3: the legislature must be unambiguous and deliberate in authorizing state agencies to write administrative rules to prevent spurious challenges alleging that rules are illegitimate. Attacks on agency rulemaking are increasing not only at the federal level but also at the state level. The legitimacy of agency experts refining and streamlining statutes is a valuable public service because legislators are expected to pass laws on countless topics about which they do not possess professional qualifications. Important details understood by experts need to be elucidated. (There are also instances of legislators interjecting their business interests into laws to supersede rules, but that is a topic for another day.)

7) Section 3(1)(c)(C) states that filed protests must: "Include a description of the protestant's interest in the proposed final order and, if the protestant claims to represent the public interest, a precise statement of the public interest represented."

Must the public interest conform with ORS 537.170(7) of this act (currently, it is ORS 537.170(8)); if so, does the statutory reference to "ORS 537.170(7) of this act" need to be stated? The WRC and OAH should also establish in rule a general reference to the public interest to define the general parameters to ensure a clear distinction with individual interests.

8) Section 3(1)(c)(D) refers to the "protestant's interest."

Are there limits to what is admissible related to the "protestant's interest?" If so, rules should specify guidelines as noted above in comment #7 to distinguish *the protestant's interests* from *the public interest*.

9) Section 3(2) states: "If a protest is submitted as described in subsection (5) of this

section..."

Is the subsection reference supposed to be **subsection (1)**?

10) Section 3(2)(a) states that: "Any person who supports the proposed final order may file a request for party status..."

This language (copied from ORS 537.153(5)) is more restrictive than in other parts of the code and administrative rules, such as in Chapter 183 and OAR 137 Division 3. HB 3544-3 sponsors should permit less restrictive language, such as that found in OAR 137-003-0535 *Participation as Party or Limited Party*, which informs who may file for party status. That rule states that "(2) Persons who have an interest in the outcome of the agency's contested case proceeding or who represent a public interest in such result may request to participate as parties or limited parties." We acknowledge that agencies limit who can be parties and request that limitations not be written in statute.

Why explicitly limit party status to those who support the Proposed Final Order (PFO), when the state enjoys the power to write and interpret the statutes and rules, apply agency discretion, appoint ALJs, and set policies related to the contents of contested cases? Preventing those who file protests (and are subject to all of the above) from enjoying similar support does not seem equitable. While concerned citizens could submit independent protests to any given order, the contested case process could, instead, be streamlined by facilitating party status for those whose interests align with existing protestants. We note that HB 3544-3 Section 3(2)(a)(B) requires parties to "Meet all requirements established in rule by the Water Resources Commission." Is that bar insufficient to limit spurious party crashers? Perhaps protestants who attract legitimate party support may stand out from the lone wolves seeking to obstruct the contested case process illegitimately.

11) We note that the previous version of the bill, HB 3544-2, had a Section 3 (3)(f) that stated: "A ruling in a previous final order must be treated as controlling precedent by an administrative law judge..." and went on to discuss at length in five subparagraphs (A through E) guidelines on the nature of the precedent and its use.

We strongly support the use of precedent to streamline contested cases. The claims that "every water right is different" by those who oppose the use of precedents are unjustified

because water law and water use issues are not special or so distinct from all other aspects of law and regulatory orders that precedents cannot reasonably apply to contested cases relating to water right transactions. The use of precedents is one of the best tools available to move along contested cases, the likes of which, have been heard before.

12) Section 3(7) states that: "The Water Resources Commission may adopt rules necessary to implement this section." We suggest that "The Water Resources Commission **shall** adopt rules necessary to implement this section." Please see our comment #6 above on the need for the legislature to explicitly and unambiguously require rulemaking.

13) Section 5(2)(b)(A) states that: "The specific public interest under ORS 537.170 [(8)] **(5)** that would be impaired or detrimentally affected..."

Isn't the new reference in HB 3544_3 supposed to refer to subsection (7)? Shouldn't the paragraph state: "The specific public interest under ORS 537.170 [(8)] **(7)** that would be impaired or detrimentally affected..."?

If so, then the same correction needs to be fixed in Section 27 (2), Section 30 (1)(c), and Section 32 (4)(b).

14) Section 5(7)(a) appears to strengthen OWRD's power to reject protests, other than those filed by the applicant, summarily.

The logic, drawn from ORS 537.153(8), is regressive and should not be further ensconced by HB 3544-3.

If the OWRD files a PFO, the department believes the application is acceptable. In this case, wouldn't all non-applicant protests be summarily rejected under this authority? Or, presumably, just reading a non-applicant protest may, in some cases, be sufficient for OWRD to acknowledge its errors, and in so doing, schedule a contested case? In general, we think not because non-applicant protests are foreseeable, if not predictable. ORS 537.153(8) injects politics into the decision-making about whether any given OWRD Director will agree with non-applicants. Under one Governor appointee, there may be more non-applicants successfully lodging protests against in-stream water right PFOs; under another, non-applicants may grind to a halt water right transfers. The history of OWRD Directors has spanned this spectrum. Section 5(7) in HB 3544-3 should be

tightened to hedge against the politicization of scheduling contested cases instead of solidifying it.

15) Section 5(7)(b) states: "Schedule a contested case hearing if a protest has been submitted."

This sentence should only state: "Schedule a contested case hearing" because Section 5 Subsection (7) has already established that "a protest was timely submitted."

16) Section 5(7)(c) could become a subparagraph of Section 5(7)(b), such as:

Section 5(7)(b)(A) "Provide any person who timely submitted a protest or request for party status with an estimate of the timing of referring the contested case to the Office of Administrative Hearings for a hearing and notice that parties may provide settlement proposals."

17) Section 5(7)(c) states: "... referring the contested case..."

Subsection (7)(b) uses the term *schedule*, and (7)(c) uses the term *referring*. Should one of the words be chosen to apply in both instances?

18) The comments above numbered 13 through 16 also apply to HB 3544-3 Section 16(8) on groundwater as ORS 537.621 relates to contested cases.

19) Section 6(1) refers to ORS 543.017 twice. Are these legacy references that should have been deleted? Were they specific to impacts hydroelectric systems may have on in-stream water rights?

20) Section 6(4) states that: "An interlocutory appeal under ORS 183.480 (3) is not allowed in a contested case proceeding under this section."

Is the correct terminology, consistent with Chapter 183, supposed to be: "Interlocutory relief under ORS 183.480 (3) is not allowed in a contested case proceeding under this section."?

If so, then this comment also applies to the entirety of Section 17.

21) Section 6(6) refers to "... as described in ORS 537.153 (6)(a)..."

Is not the correct reference supposed to be ORS 537.153 **(7)**(a)?

22) Section 19(2) states that: "In any event the department [shall] **may** not approve the application for more ground water than is applied for or than can be applied to a beneficial use."

This subsection (2) is a non-sequitur in the context of HB 3544-3, which is a bill about contested cases. We reject the change of language from *shall* to *may*, and the pretense that because of the presence of legitimate deletions of language related to contested cases in Section 19, the *shall-to-may* change in subsection (2) is justified.

23) Section 28(1) states: "A proposed final order issued under ORS 537.170 [(6)] **(3) or (5)** for an in-stream water right certificate..."

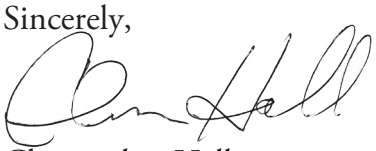
We flag this reference for review as to whether "ORS 537.170 **(3) or (5)**" is correct.

24) Section 31(1) and subsection (5) refer to: "...for a new hydroelectric project under ORS 537.140 to 537.320..."

In the spirit of non-sequiturs, we request that HB 3544-3 sponsors add groundwater statutes ORS 537.525 to 537.635 to Section 31(1) and (5) to account for impacts to groundwater by pumped storage hydroelectric systems.

We also request in the newly added Section 6, which states: "If applicable, an application to appropriate water for the generation of electricity submitted under ORS 537.140 shall be included in the consolidated review and hearings process under this section," that HB 3544-3 sponsors add a reference to ORS 537.615 related to groundwater applications.

Sincerely,



Christopher Hall
Executive Director