



**Testimony of WaterWatch of Oregon  
HB 2099A  
Senate Committee On Environment and Natural Resources  
May 31, 2017**

**WaterWatch opposes HB 2099A as drafted. Development of municipal water supplies can be compatible with maintaining imperiled fish and ensuring water conservation. The bill unnecessarily rolls back existing law that has proven workable for more than a decade.**

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 to sustain fish, wildlife, recreation and other public uses of Oregon’s rivers, lakes and streams. 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 2099A as drafted.**

**The issue:** Cities across Oregon hold dormant, undeveloped municipal water permits that were issued many decades ago without modern public interest review—including any review of impacts to fish. When cities seek to finally develop these old permits, we often find imperiled fish species listed under state and federal laws in these rivers. These listed fish could be severely impacted if the municipal water development is not undertaken carefully.

A compromise reached in 2005 (HB 3038) protected the cities’ ability to develop these old undeveloped municipal water permits while applying exceedingly reasonable fish and water conservation standards when extensions of time to develop the permits are issued by the Water Resources Department. The existing standards have been in place for more than a decade and cities across Oregon are developing old water permits in accordance with these standards—and it’s working. Approximately 130 permits have already gone through the process successfully and the results have proven workable for the cities while providing important safeguards for Oregon’s imperiled fish—including our iconic salmon and steelhead.

**What HB 2099A does:** HB 2099A would roll back the existing fish review requirements for certain municipal water permits, overturning a 2013 Oregon Court of Appeals’ decision that confirmed how the fish persistence standards in the existing law are applied. It would also weaken the filing requirement for Water Management and Conservation Plans by weakening the important trigger for timely filing of the plans—the prohibition

in current law on diverting the undeveloped portion of the permit prior to approval of a conservation plan. These fish review and water conservation standards have been implemented since 2005 and have proven workable. The bill erodes these existing, workable protections for imperiled salmon and steelhead and weakens the requirements for filing Water Management and Conservation Plans.

**WaterWatch urges the Committee to vote no on HB 2099A for the following reasons**

**HB 2099A would undo years of compromise:** HB 2099A seeks to overturn several years of deliberation and compromise. The standards it seeks to rollback were part of a compromise bill in 2005 (HB 3038) agreed to by at least some of the current proponents of HB 2099A. The 2005 HB 3038 was negotiated by the League of Oregon Cities, individual cities, the Water Resources Department, WaterWatch and others. The existing law allows development of old undeveloped permits by validating permits where failure to meet construction deadline requirements called them into question, while requiring the permits be developed in a way that maintains the persistence of imperiled fish and also requiring cities—through adoption of Water Management and Conservation Plans—to implement basic, proven water conservation measures.

HB 2099A would undo the compromise negotiated by the cities and others in 2005 by rolling back the fish protection requirements and weakening the filing requirements for the water management and conservation plans, while keeping in place the legislative validation of the dormant, undeveloped permits. The existing standards have been in place for more than a decade and cities across Oregon are developing old water permits in accordance with these standards—and it’s working. Approximately 130 permits have successfully gone through the process and the results have proven workable.

**HB 2099A Section 1 and Section 2<sup>1</sup> would exempt certain water diversions from the extremely workable fish persistence protections in existing law, and overturn a recent Oregon Court of Appeals’ decision.**

HB 2099A Sections 1 and 2 would exempt certain municipal water diversions from the existing requirement that they be conditioned to maintain the persistence of listed fish in the affected waterway, as determined by the Oregon Water Resources Department and the Oregon Department of Fish and Wildlife. Specifically, for water that cities diverted prior to the Court of Appeals’ decision (December 11, 2013), the bill would replace the existing modest fish persistence requirement with an untested and unclear requirement that the permit holder and personnel from the Oregon Water Resources Department and Oregon Department of Fish and Wildlife develop “strategies for voluntary action” (see Section 3 discussion below).

Exempting these diversions from the fish persistence standards would overturn a 2013 Oregon Court of Appeals’ decision. In 2013, the Oregon Court of Appeals issued a

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<sup>1</sup> Section 1 (which would amend ORS 537.230) applies to surface water permits; Section 2 (which would amend ORS 537.630) applies to groundwater permits. The sections contain parallel language and amendments.

decision upholding application of the fish protection and water conservation standards to the portion of a municipal water permit not diverted at the time the permit last expired. *WaterWatch of Oregon, Inc. v. Water Resources Department*, 259 Or App 717, 316 P3d 330 (2013), *rev dismissed as improvidently allowed* (by order dated February 5, 2015). The decision pertained to a water permit held by the City of Cottage Grove, which delayed processing of its water permit extension application while it doubled its diversion and then claimed its permit was exempt from the fish review and water conservation plan standards. The city petitioned the Oregon Supreme Court of Oregon for review and the court initially took the case. However, after briefing and oral argument, the Oregon Supreme Court dismissed the city’s appeal allowing the Oregon Court of Appeals’ decision to stand. By exempting water diverted prior to 2013, HB 2099A would reward conduct designed to evade the law and authorize a loophole that would benefit the City of Cottage Grove and, potentially, other permit holders that engaged in the same conduct.

**HB 2099A Section 3 replaces (for certain diversions) existing fish protection requirements with untested and unclear “strategies for voluntary action.”** (Section 3(2)). Specifically, for permits needing an extension of time, for any amount of water diverted prior to December 11, 2013, HB 2099A replaces fish persistence conditions with a requirement that the permit holder and personnel from the Oregon Water Resources Department and Oregon Department of Fish and Wildlife develop “strategies for voluntary action” to avoid or minimize effects on fish. (Section 3(2)). While WaterWatch is not opposed in principal to finding a creative alternative to fish persistence conditioning for these specific water diversions, it is absolutely critical that the process and goals be very clear and that the strategies be meaningful for fish and be improved if not effective. Unfortunately, Section 3 does not contain the process, goals or standards to ensure that fish are meaningfully protected and, as a result, WaterWatch cannot support the strategy process in Section 3.

For example, Section 3 requires that the permit holder “confer” only once (within one-year of the date of the final order) with the agencies with evidence that the “strategy for voluntary action” has been implemented. (Section 3(1)(a)). Beyond that one-year check-in point, the process is unclear or non-existent.

This rollback has important consequences for Oregon rivers—for example, on Lake Branch Creek and the West Fork of the Hood River where, for a significant amount of water, fish persistence conditions would be replaced with voluntary action with no process to ensure that such voluntary strategies are implemented or effective.<sup>2</sup> Oregon’s imperiled salmon and steelhead require more.

**HB 2099A Section 4 fails to ensure that extension applications are timely processed or to close the loophole that has allowed cities to delay processing of extension requests.** Section 4 would require Oregon Water Resources Department to give processing priority to extension applications affected the fish persistence standard and

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<sup>2</sup> The full extent of the impacts of using the 2013 date on these rivers, and other affected rivers, is not known with certainty. In several cases, conflicting data exists and it is, in any case, subject to change when the extension application is processed while in others, data is not available.

this bill—but only if the permit holder so requests. Section 4 would also allow those permit holders to continue to request that the Department place their extension applications on “administrative hold”—these holds further delay processing of the extensions. Part of the reason this issue has become so thorny is that permits that expired long ago still lack the legally required extension orders. What is needed is a commitment to expeditiously process all the pending (and past due) extension applications affected by the fish persistence standard through the system. Section 4 simply does not do this and instead continues to allow delays in processing of extension applications.

**HB 2099A Section 6 is a special carve-out for the City of Hood River that goes beyond the cities’ stated rationale for rolling back the fish protection requirements and would have dire consequences for critical fish runs in the West Fork of the Hood River and Lake Branch Creek.**

HB 2099A does not stop at addressing the cities’ stated concerns that fish persistence review applies to water diverted since the permits expired. Instead Section 6 of the bill would exempt any water that fits into a pipe installed by City of Hood River from fish persistence review. In other words, Section 6 would exempt a large amount of City of Hood River diversions from fish persistence review that may not be diverted for decades to come. This exemption would have significant impacts on the West Fork of the Hood River and its critical cold water tributary, Lake Branch Creek, and on listed Spring Chinook, coho and steelhead. Importantly, the city was planning, securing funding for and/or building this pipe while it knew it needed to secure extension of time orders from the state allowing it to further develop the old water permits at issue, even as the city had requested that the state delay processing of its extension applications. Section 6 is a clear over-reach with severe consequences for listed Chinook, coho and steelhead that should be rejected.

**Conclusion**

The fish protection and water conservation standards have proven workable. Numerous permits (approximately 130) held by municipal water providers large and small, all across the state, have been extended under the current law. Permit holders have worked through the process and received permit extensions that include reasonable and workable conditions to protect imperiled fish and undertake water conservation planning. Exempting water diverted up until December 11, 2013 from fish protection conditions for cities that have not gone through the process yet creates an uneven standard, while rewarding cities which intentionally delayed processing of their extension application. Replacing these exceedingly workable fish protection conditions with unclear, ill-defined alternative strategies—with unclear implementation requirements or effectiveness measures—will only cause further confusion while placing an untenable risk on the fish.

WaterWatch urges the Committee to oppose HB 2099A as drafted. Advancing HB 2099A is an inadequate solution to the issues. Oregon’s rivers, imperiled salmon and steelhead and cities deserve better.

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