

From The Desk of Rep. Deborah Boone
Deborah Boone



Vote YES on HB 2099A

On December 11, 2013, the Oregon Court of Appeals handed down a ruling that changed everyone's understand of when "fish persistence conditions" should be applied to pre-1998 municipal water rights. HB 2099 partially restores that understanding and is a matter of fairness to 10 to 15 communities that have developed water to meet their growth since the 1990s.

HB 2099-A was introduced at the request of League of Oregon Cities and the Special Districts Association of Oregon in order to provide for a legislative fix to the court's decision which retroactively applied what are known as fish persistence conditions to the undeveloped portion of pre-1998 municipal water right permits. Without a legislative fix, the court's decision will likely result in a reduction of available water for approximately 10-15 municipalities have been using the water in question since the 1990's (despite fish persistence conditions not having been adopted into statute until 2005 through passage of HB 3038).

What the bill does:

- The bill sets a bright-line date of December 11, 2013 (the date of a court of appeals decision) which means any water that was being used as of that date, as a community's drinking water supply, will continue to be available to them for existing and future needs.
- Any water that the community was not using under their permit as of December 11, 2013, will be subject to curtailment conditions that will be determined by the Oregon Department of Fish & Wildlife.
- The bill will require all of the impacted communities to develop a Water Management & Conservation Plan to implement conservation strategies.
- The bill also requires impacted communities to meet with the Oregon Department of Fish & Wildlife to better understand available data and thus being able to develop strategies on how to minimize impacts to fish.
- The bill specifies that **none of the language in HB 2099-A exempts a permit holder from any obligation under the federal Endangered Species Act.** The ESA prohibits "take" or harm to threatened and endangered species or jeopardizing species' habitat.
- Fish persistence conditions are not the only fish protection requirement that municipalities are subject to - many of the communities have already adopted Water Management Conservation Plans, have habitat conservation plans, or have undergone federal permit review and are subject to federal conditions to address potential impacts to fish.

Background:

This bill addresses a complex municipal water issue that has been resulting in uncertainty and confusion for over 20 years. This issue has gone through three work groups since 2015 including two legislative work groups and one headed by the Governor's Office.

In 1998, approximately 200 municipal water permits were placed on administrative hold in order to pursue new rules intended to make the extension process for municipal water suppliers more efficient. In 2005 HB 3038 corrected a judicial ruling permitting municipal water suppliers to have more time to develop their water. One of the provisions in bill allowed ODFW to condition the undeveloped water under those permits for the “persistence of fish species” if the permittee filed for an extension of time. The problem, it turns out, is that provision was never clear about when those conditions were to begin.

In 2006 the Water Resources Department adopted rules to apply the conditioning of the permits in a prospective manner – meaning – when a municipality applied for its first post-2005 extension of time, the ODFW would apply the conditions to the *undeveloped* water at the time of the extension application. That means any water not put to use as of the extension was made subject to the ODFW conditions. By 2013, about 140 of those permits had been processed by the Water Resources Department.

But in late 2013 an Oregon Court of Appeals ruling changed everyone’s understanding of when the conditions were to be placed on those remaining unprocessed permits.

In that ruling the court indicated that fish persistence conditions should have been applied as of the date of the *last* approved extension of time. For many of these pre-1998 permit holders, this would mean that conditions would be applied retroactively to the 1990s, when the municipality last had an extension processed by OWRD (prior to when extensions were put on hold by OWRD in 1998) and prior to the conditions being placed in ORS in 2005!

HB 2099 impacts about 10 to 15 of the approximately 60 unprocessed permits because they developed water between 1993 and 2013 yet the department had not processed their permit for an extension of time.