



HB 2437

Testimony of Kimberley Priestley WaterWatch of Oregon

House Committee on Agriculture and Land Use January 31, 2019

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 2437 as drafted

WaterWatch understands the desire for a removal/fill process for drainage activities that is workable and will lead to increased compliance; however we have grave concerns with HB 2437 as written. This bill will allow a wholesale undermining of existing laws as they related to removal fill of materials in Oregon's waters for maintenance activities related to agricultural drainage, including removal of material from both intermittent and perennial streams. Important habitat values, such essential salmonid habitat, are not protected under this bill. This is not a pilot, but a permanent change. Our concerns with the bill include, but are not limited to, the following (noted in order of bill presentation):

Section 3: Definitions

There are a number of key terms that are either not defined in HB 2437, or as defined are unclear and/or of concern. Terms that should be defined but currently are not include "agricultural drainage" (or "drainage"), "maintenance activities" and "regionally dry maintenance time period". The importance of having clear definitions cannot be understated; these terms are used in the bill to direct allowed activities, but because they are not defined in the bill leave room for various interpretations, which could impact scope/application/enforcement.

As to definitions that are included in the bill, terms that raise questions and/or concern include:

- Section 3 (3) definition of "Dry" (page 2, lines 23-29) does not clarify if these are naturally dry or dry because of human diversions, nor is there clarity as to what the statement "other than small quantities of water that many become retained in lows areas of the channel" means. Moreover, streams that are tidally influenced should not be included as they are not "dry".
- Section 3(4) definition of "Traditionally maintained channels" (page 2, lines 30-34) raises a number of questions/concerns. For instance, without a clear definition of "drainage" it is difficult to assess the effect of the inclusion of intermittent streams and/or perennial streams. Moreover, the definition should include exclusions for essential salmonid habitat, tidal

waterways, state scenic waterways, federal wild and scenic waterways and/or Oregon outstanding waters. And, importantly, given that this program is aimed at “dry” channels, perennial streams should not be included in the definition at all.

We are happy to provide the Committee suggested language on all these terms if it is of interest.

Section 4 (page 2, line 35 through page 4, line 30): This section of the bill grants an exemption to ORS 196.810 which governs removal fill activities on the banks and beds of Oregon’s waters, and instead sets up a process for a person to file a “notice of maintenance activities” with Department of Agriculture for activities that fall under and/or are conditioned as outlined in Section 4. We have numerous concerns with this section, but will only note those of most concern.

Section 4(4)(a) allows the removal of up to 3,000 cubic yards per linear mile of traditionally maintained channel over the course of the five year period. As it relates to streambeds, this is a huge deviation from current removal fill law. This would allow removal of enormous amounts of stream habitat without any environmental review. This bill not only fails to include any review of the environmental effects of this activity on the impacted stream, but also fails to provide for key “no touch” segments, such as essential salmon habitat. This could have devastating effects on Oregon streams and their inhabitants.

Section 4(4)(b) allows the spreading of up to 3,000 cubic yards of presumably any material on wetlands without any environmental assessment of the wildlife, habitat and/or other ecological values that that wetland serves. To make it even worse, Section 4(5)(i) also allows the placement of up to 3,000 cubic yards of material that is removed from a channel to be “temporarily” placed on a wetland for up to one year, again, without any environmental review to understand what habitat values and/or wildlife would be impacted by this action. And, as with bill’s approach to stream channels, this bill does not provide any no touch wetlands (those that are home to sensitive species, for instance).

Section 4(6)(a) opens the exception even more. This section allows the Department of Agriculture (ODA) or the Department of State Lands (DSL) to, by rule, modify the volume limits of Section 4(4) for removal activities and also modify any and all conditions that apply to maintenance of traditionally maintained channels. In other words, this section of statute allows ODA or DSL to drop any/all conditions and allow an unlimited amount of material to be removed from “traditionally maintained channels”. So, the 3,000 cubic yard ceiling in Section 4(4) is no ceiling at all as this provision allows ODA or DSL to increase the volume limit to 100,000 cubic yards, 500,000 cubic yards, anything. This, clearly, raises concerns as to effects on instream habitat and the species that depend on these streams for survival.

In addition to these major concerns with Section 4, this section contains many terms and/or conditions that are not defined with any degree of certainty. Concerns/questions apply to Section 4(5), (5)(a), (5)(b), (5)(d), (5)(e), (5)(f), (5)(g),(5)(i), (5)(k) and (5)(l).

Section 7 (page 5, lines 14-25). Currently, removal/fill law allows the removal of no more than 100 cubic yards of material from waters of this state, including in essential indigenous anadromous salmonid habitat, for the purpose of maintaining drainage and protecting agricultural lands. This bill would allow an expansion of this to any amount as it relates to “traditionally maintained channels” (which includes both intermittent and perennial streams) where flowing or standing water is present. So, while narratives around this bill are centering on removal fill activities in “dry” streams; in fact this bill also opens up removal fill activities in wet or flowing streams. This section of bill does not set a ceiling, the

result being that removal of material for drainage activities from Oregon's streams that landowners consider "traditionally maintained channels" is unfettered as to amount or conditions. This raises significant resource concerns.

Sections 8 through 12: These sections of the bill call for a number of studies and reports; however, given that this program is not a pilot program, it is unclear what purpose they would serve. If, however, this program were to be adopted as a "pilot" these activities would have more value as they would, presumably, trigger decision points.

The Wetland Workgroup: WaterWatch did not serve on the "Wetland Workgroup" as we understood the focus of that group to be wetlands, not streams. That said, we have reviewed both the Report of the Agricultural Channel Maintenance Subgroup, and the comments of workgroup members to that Report, and the record is very clear that there was no consensus within the workgroup on number of issues, including but not limited to: legislative findings, waterway scope, how to describe "dry", timing of work, removal volume, pilot program and wet conditions. Importantly, we could not find any documentation in this Report of discussions relating to the wholesale removal of any volume limit whatsoever, as would be allowed under Sections 4(6) and Section 7.

Conclusion: In conclusion, we urge that the Committee not support this bill as drafted. It opens up removal fill activities for undefined drainage activities on both wet and dry streams, with, in the end, no limits on volume whatsoever (when the bill is read as a whole). There are no protections for ecologically important stream habitats or wetlands. This would be a permanent change, not a pilot. This could have devastating impacts to Oregon's streams, with no provisions for unwinding.

Thank you for this opportunity to comment.

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