

**Comment by Jas. Adams on HB 2351**  
**To Oregon House Committee on Natural Resources**  
**(For the record at the public hearing scheduled for March 7, 2019)**

My name is Jas. Adams, residing in Portland, Oregon. I am both a non-motorized boater (two canoes & dinghy) as well as a motorized boater (Mariner 28 sailboat).

I was the previous Attorney-in-Charge or Assistant AIC of Natural Resources at the Oregon Department of Justice from 2005 until June 2014; I also taught Wildlife Law and Oregon Administrative Law at Willamette University College of Law (2001-16), and I served as a board member of the Oregon State Marine Board (OSMB) in 2015-16. The following are my comments made in an individual capacity on HB 2351.

**1. HB 2351 adds substantively to existing statutory authority.**

At the public hearing on HB 2351 held on February 14, 2019 in the House Committee on Natural Resources, it was suggested by more than one legislator that the statutory authority conferred by HB 2351 may be already reflected in existing statute, with the possible implication that the Oregon State Marine Board (OSMB) could manage boat wakes as provided in HB 2351 without the need to actually enact that bill.

ORS 830.175 currently authorizes the OSMB to adopt:

1. Rules that relate to boat operation and that are consistent with *safety* and property rights of the *public*, or when traffic conditions cause *excessive congestion*.
2. Upon application by a political subdivision, rules that relate to designation of *moorage areas on lakes or reservoirs* within a public agency's jurisdiction or *operation* of boats within the territorial limits of a political subdivision.
3. At the request of the Oregon Department of Fish & Wildlife, rules that establish designated speeds or prohibit motorboats for protection of game and game fish or to carry out the federal Wild & Scenic Rivers Act and the Oregon Scenic Waterways Act.

ORS 830.175(1-3). Those existing provisions authorize rules to address safety, public property rights, and excessive congestion of river traffic. They allow political subdivisions to apply for special moorage rules and ODFW to request rules to protect game and game fish.

HB 2351 adds substantively to those existing provisions by:

- a. Providing explicit authority for the Marine Board to adopt special regulations without the prerequisite of an application from a political subdivision or at the request of ODFW.
- b. Expanding the interests to be protected beyond safety and property rights of the public to include the "shoreline," both public and "private property," "fish and wildlife habitat," and "vegetation."
- c. Explicitly mentioning "methods to manage boat wake energy."
- d. Requiring the Marine Board in its rulemaking under the bill at least to take into consideration the Willamette River Greenway Plan, the statewide land use goals relating to the Willamette River Greenway (Goal 15), and guidelines adopted by the Land Conservation and Development Commission (DLCD).

Without actual enactment of HB 2351 by this legislature, the promulgation of administrative rules by the OSMB that attempted to implement all elements of HB 2351 arguably could incur the risk that the rules might be invalidated in a rule challenge focused on existing statutory authority.

## **2. There has been a shift away from a statewide approach to boat wake regulations.**

HB 2351 is expressly limited to the Willamette River Greenway. As statutorily defined, the Willamette River Greenway extends from the mouth of the Willamette River to Dexter Dam on the main stem and the Coast Fork to Cottage Grove

Dam. See ORS 390.310(3); ORS 390.318. The rules authorized by HB 2351 thus are not statewide in scope.

But it bears noting that a statewide rule would not be appropriate for special regulations authorized by ORS 830.175(1-3) to address traffic conditions, extreme congestion, designated marinas, prohibition of motorboats, and waterbodies designated as federal Wild and Scenic Rivers or State Scenic waterways. In a shift away from a statewide solution to boat wake issues, the OSMB recently promulgated rules on wake management specific to a portion of the Willamette River in Clackamas County. See OAR 250-020-0032 (effective 2-1-2019).

### **3. The Willamette River Greenway Plan is relevant for the OSMB's consideration of boat access and boating facilities when regulating recreational boat wakes.**

As noted, Oregon statutes defining the Willamette River Greenway establish the portions of the Willamette River within the scope of HB 2351. The Feb 14 public hearing before the House Natural Resources Committee included testimony to the effect that planning for the Willamette River Greenway stops at the water's edge. Although that may be true in a general sense, Statewide Planning Goal 15 (Willamette River Greenway) requires planning under Goal 15 to provide public access to the river: "Adequate public access to the river shall be provided for, with emphasis on urban and urbanizable areas." OAR 660-015-005(C)(3)(c). And the Oregon State Marine Board not only regulates recreational boating on the water but is also authorized to "study, plan and recommend the development of boating facilities throughout the state which will promote the safety and pleasure of the public through boating" and to make grants for boating facilities for that purpose. See ORS 830.110(6) & (8); 830.137; 830.150(2)(b)(A).

HB 2351 appears to facilitate coordination between land use planning along the Willamette River Greenway and the OSMB's regulation of recreational boating with respect to boat wakes by requiring the OSMB at least to give consideration to the

Willamette River Greenway Plan, including planning for public access to boating along the Willamette River Greenway.

**4. HB 2351 would benefit from including direct or incorporated reference to the boating safety, traffic conditions and excessive congestion aspects set forth in ORS 830.175(1) as basic components of the OSMB's regulation of boat wakes along the Willamette River Greenway.**

I suggest clarifying HB 2351 by including or incorporating by reference consideration of boating safety, traffic conditions and excessive congestion, aspects currently listed only in subsection (1) of ORS 830.175, which certainly bear on the OSMB's regulation of recreational boating to manage the impacts on boat wakes, in addition to the impact on designated resources within the Willamette River Greenway.

**5. HB 2351 is independent of HB 2352 with one point of potential conflict.**

HB 2351(boat wake rules for Willamette River Greenway) and HB 2352 (towed watersports program) focus on different aspects of recreational boating. HB 2351 confers statutory authority on the OSMB to promulgate administrative rules to manage the impacts of boat wakes on specified resources along the Willamette River Greenway. HB 2352 establishes for the OSMB a detailed statewide towed watersports program, including safety education, a license ("endorsement") to operate towing watersports boats, a license fee, decals for the boat reflecting license, ownership and payment of license fee, data regarding ballast capacity, minimum competency standards, enforcement, and authority to require licenses in congested waters designated by the Board in rules. Thus HB 2351 appears to be largely independent of HB 2352.

There is one point of potential overlap between the two bills. HB 2351 directly authorizes rulemaking by the Marine Board to manage boat wakes along the Willamette River Greenway. HB 2352 provides that the towed watersports program "shall address wave energy management techniques and operator responsibilities for accident and property damage prevention." Section 2(1)(e). Having the program

contemplated in HB 2352 address those issues implies a grant of rulemaking authority, with the caveat that actually *deciding* operator responsibility for damage would be more properly allocated to a tribunal than to a public body with only rulemaking authority. I suggest Section 2(1)(e) be deleted from HB 2352 to avoid potentially conflicting with HB 2351, should both bills go forward.

Respectfully submitted,

Jas. Adams