



## **WaterWatch of Oregon**

### **Protecting Natural Flows In Oregon Rivers**

#### **Testimony of WaterWatch of Oregon (Brian Posewitz) on HB 3132**

#### **House Committee on Natural Resources**

**April 3, 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 3132 because: (a) it has insufficient safeguards to protect the environment; and (b) it attempts to reinvent the wheel by ignoring a detailed set of draft rules developed in 2016-17 by the Department of State Lands with a diverse group of stakeholders and technical experts.

HB 3132 is the latest in a long string of attempts to reduce environmental safeguards on what are variously called "artificial beaver dams," "beaver dam analogues," "restoration check dams" and (now) "restoration weirs." While these all purport to do more or less the same thing (slow river flow to restore floodplains), the terms represent techniques ranging from low-impact fence posts with willow weaves to high-impact rock and dirt dams that completely span a stream channel. We have followed this issue for several years, have observed many examples of the various techniques (including those at Silvies Valley Ranch), and have consulted with numerous organizations and individuals attempting to implement the techniques. What we have learned is that these structures need to be carefully defined, with careful sideboards, to prevent them from doing more harm than good.

Under any name, dams across stream channels have enormous potential to harm the environment (not to mention upstream landowners and downstream water right holders). They can block or impede fish passage, which is critical to protecting and restoring fish populations. They can change the hydrology of a stream in unpredictable ways (included reduction of downstream flows at critical time). They can harm downstream water quality by warming the water and introducing pollutants from associated land use.

These are among the reasons we have laws to require fish passage at dams and require a permit before "filling" a stream. Setting these laws aside, as this bill would do, for anything meeting the bill's broad definition of an "environmental restoration weir" on the bill's broad range of

“qualifying stream[s]” would put many valuable streams and fish populations at high risk of serious damage.

To the extent there is a need to streamline permitting in this area, the legislature should simply encourage adoption, in a limited geographic area, of the administrative rules prepared by DSL in 2016-17 using a rules advisory committee. The committee, led by DSL and a hired facilitator, held approximately five half-day meetings and provided ongoing written comments on successive drafts of proposed rules. The committee included legislators, agency representatives, representatives of multiple stakeholders and experts in the field of small dams as a restoration technique. (See Attachment 1 – committee roster.)

The work of the rules advisory committee culminated in draft rules sent out for public comment, (see Attachment 2 – rulemaking notice), and revised based on public comment, (Attachment 3 – draft rules after changes based on public comments).<sup>1</sup> In summary, the proposed rules would have provided a “general permit” from DSL for so-called “beaver dam analogues” statewide and for so-called “restoration check dams” in the Malheur Lakes Basin. The rules were far from perfect from our perspective, too, but they at least provided a reasonably informed compromise.

The rules were on the verge of being adopted when the Oregon Coastal Caucus sent DSL a letter expressing concern about impacts in coastal areas.<sup>2</sup> (Attachment 4.) As a result, the rulemaking was put on hold indefinitely.

HB 3132 would essentially toss out all the work of the rules advisory committee and start over. It would attempt to thread the needle on a very complicated public policy issue in a rushed legislative process without the benefit of thorough stakeholder involvement or thorough input of experts working in this field. That seems to us like a bad idea.

Thank you for considering our comments.

Contact: Brian Posewitz, WaterWatch of Oregon, 503-295-4039 x 2, [brian@waterwatch.org](mailto:brian@waterwatch.org).

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<sup>1</sup> WaterWatch received a set of the draft rules for public comment and then a “track changes” version to show the expected changes after public comment. Attachment 3 is a copy of that document with the changes “accepted.”

<sup>2</sup> Our understanding is that the Coastal Caucus objections were inspired by objections from the Oregon Farm Bureau and the Oregon Water Resource Congress.



**Rulemaking for Stream Restoration Actions Mimicking Beaver Dams  
OR Administrative Rules 141-089 and/or 141-093  
Rules Advisory Committee Roster**

11.25.15

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The Department of State Lands has initiated rulemaking to create a new removal-fill General Permit (OAR 141-093) for certain activities involving the placement of materials or structures in waterways for the purpose of promoting the reconnection of waterways with their historic floodplains.

**CAPTION:** Establish a Removal-Fill General Permit for Certain Activities Promoting Waterway-Floodplain Connectivity

**SUMMARY:** This rule would establish a General Permit for certain restoration activities (“beaver dam analogues” and “restoration check dams”) that promote connectivity between incised waterways and their floodplains. This rulemaking reflects the Department’s interest reducing regulatory barriers for landowners and conservation interests that seek to voluntarily improve conditions within incised waterways to promote reconnection with their historic floodplains and that may simultaneously improve the economic capacity of adjacent lands. The Department proposes this General Permit as a 10-year pilot to assess the efficacy of the rule in promoting that interest.

**The Department also specifically requests public comment on whether other options should be considered for achieving the rule’s substantive goals while reducing the negative economic impact of the rule on business pursuant to ORS 183.335(2)(b)(G).**

**WEBSITE:** The Notice of Proposed Rulemaking Hearing, Statement of Need and Fiscal Impact, and the Proposed Rules are available at: <http://www.oregon.gov/dsl/Pages/Rulemaking-Activity.aspx>

**RULEMAKING HEARING:** You are invited to attend an upcoming rulemaking hearing:

Friday Dec. 16, 2016; 4:00 - 5:30 PM City of Pendleton, Community Room, 500 SW Dorion Ave., Pendleton, OR

Monday, Dec. 19, 2016; 4:00 – 5:30 PM Harney County Courthouse, Basement Meeting Room, 450 N Buena Vista, Burns, OR

Tues. Dec. 20, 2016; 4:00 – 6:00 PM Dept. of State Lands, Land Board Room, 775 Summer St. NE, #100, Salem OR

Thurs. Jan. 12, 2017; 2:00 – 3:30 PM Anne Basker Auditorium, 600 NW 6th St. Grants Pass OR

**HOW TO COMMENT:**

Submit comments by mail to:

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Department of State Lands  
775 Summer Street N.E., Ste 100  
Salem, Oregon 97301-1279

Or via email: [rules@dsl.state.or.us](mailto:rules@dsl.state.or.us)

COMMENT DEADLINE: Public comment will be accepted until 5:00 PM on Friday, January 20, 2017.  
Note the public comment period begins December 1, 2016



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## **State General Permit for Certain Activities Promoting Waterway - Floodplain Connectivity**

### **141-093-0285**

#### **Purpose**

(1) This General Permit authorizes removal-fill activities related to promoting waterway-floodplain connectivity for ecologically beneficial outcomes including elevated water tables, restoration of historic natural flooding on the floodplain, sediment deposition and soils improvement, increased channel complexity, riparian vegetation recovery and slow-water aquatic habitat development.

(2) This General Permit is established as a 10-year pilot reflecting the Department's interest in reducing regulatory barriers for landowners to implement restoration actions that can also provide economic benefits to those landowners.

### **141-093-0290**

#### **Definitions**

The following definitions are used in this General Permit in addition to those in OAR 141-085-0510.

(1) "Beaver dam analogue" means a low-profile structure within a waterway constructed from organic material, and which may be supplemented by material from the stream bed and banks, in a manner designed to mimic the hydrological, geomorphological and ecological functions of natural beaver dams.

(2) "Historic floodplain" means the waterway-adjacent surface elevation that water reached during ordinary high flows prior to incision.

(3) "Incised waterway" means the portion of a waterway that has been scoured by erosion to the extent that the channel bed elevation has lowered relative to its historic floodplain and the waterway has significantly reduced ecological functionality because it has lost connectivity with the historic floodplain, as characterized by conditions such as: water table or water surface elevation lowering, the loss of natural wetland, riparian and meadow conditions in the adjacent surfaces, reduction in over-bank flood frequency or sediment deposition, the loss of diversity of fish and other animal species or the presence of dry land species that have encroached from adjacent uplands.

(4) “Low-profile” means no more than the height necessary to cause overland flow onto the historic floodplain during ordinary high flow periods and in no case exceeds 18 inches above the historic floodplain elevation as measured immediately adjacent to the incised waterway channel.

(5) “Native migratory fish” has the meaning defined in ORS 509.580.

(6) “Restoration check dam” means a low-profile, permeable structure within a waterway and may extend onto the historic floodplain, constructed from organic and/or non-manufactured inorganic material (e.g., dirt, rock, gravel) in a manner designed to raise the water table and water surface elevations to the level of the historic floodplain by slowing, but not preventing water flow.

### **141-093-0295**

#### **Eligibility Requirements**

(1) All Projects. To be eligible for this General Permit, all projects must meet the following:

(a) Non-tidal waters. The project must be located in non-tidal waters only.

(b) Fish passage. All structures associated with a waterway that is inhabited, or was historically inhabited, by native migratory fish must comply with fish passage requirements of ORS 509.580 through 509.910.

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(2) Restoration Check Dams. To be eligible for this General Permit, restoration check dam projects must meet the following:

(a) Project sites are limited to incised waterways within the following watersheds: Harney-Malheur Lakes (HUC 17120001), Silvies (HUC 17120002) and Silver (HUC 17120004).



(b) Project sites are limited to waterways that are not inhabited, or historically inhabited, by native migratory fish unless the lack of current habitation is due entirely to habitat degradation and not, in part or in its entirety, to artificial obstructions that prevent fish passage.

## **141-093-0300**

### **Application Requirements**

(1) Eligibility Criteria Met. The application must include maps, data and other information necessary to demonstrate that the proposed project meets the eligibility requirements specified in OAR 141-093-0295 including how project site conditions meet the definition of incised waterway.

(2) Rationale for Proposal. The application must include a clear rationale for the number, spacing and lineal extent of all proposed structures.

(3) Drawings. The application must include scaled plan view, cross-section and longitudinal drawings illustrating the proposed dimensions of the structures relative to ordinary high water elevation and historic floodplain elevations. Drawings must show the approximate outline of the floodplain that is available to be inundated after project completion. Plan view drawings must identify proposed spacing between structures and any infrastructure, water diversion or drainage systems or other property improvements within the area expected to be affected by the reach of water after project construction.

(4) Material Sources. The application must identify proposed sources for construction materials.

(5) Vegetation Management Plan The application must include a riparian area planting or vegetation management plan considering current vegetation conditions, land uses, the expected reach of water, likelihood of volunteer native plant recruitment, and potential for spread of invasive species within the riparian area at the project site. The plan must describe protection measures for planted or naturally occurring native woody vegetation within the riparian area The plan must additionally include and describe the land management practices to be used to support the purposes of this General Permit as identified in OAR 141-093-0285.

(6) Fish Exclusion Plan. If stream de-watering is proposed during construction, the application must include a description of the methods to be used to de-water and exclude fish from the work area. Fish salvage must be performed by a qualified person in possession of a valid Oregon scientific take permit.

(7) ODFW Determination. The application must include documentation from the Oregon Department of Fish and Wildlife stating that it has approved the project for fish passage (i.e., approval, waiver, or exemption).

(8) OWRD Assessment. The application must include the Oregon Water Resources Department's assessment of whether the proposed project will require water storage permit(s). Unless stated explicitly, assessments provided by OWRD are advisory and preliminary, and do not constitute final orders by OWRD.

(9) Affected Owners Identification. For any lands expected to be affected by the reach of water, the application must identify the owners of those lands and their mailing addresses. In addition, the application must identify the waterway landowners and owners of any water diversion or drainage structures within one-half mile upstream and downstream of the project site and their mailing addresses. DSL will elevate an application to individual permit status (OAR 141-085) if a risk of significant adverse effect is identified by an affected owner that cannot be resolved within the General Permit application processing timeline.

**141-093-0305**

**Authorized Activities**

(1) Beaver Dam Analogues. Up to 100 cubic yards below the ordinary high water elevation per authorization.

(2) Restoration Check Dams. Up to 200 cubic yards below the ordinary high water elevation per authorization.

**141-093-0310**

**General Permit-Specific Conditions**

(1) All Projects. All projects must meet the following specific conditions:

(a) All requirements, procedures and conditions set forth in OAR 141-093-0135 (General Conditions) apply to this General Permit.

(b) Structures cannot unreasonably interfere with use of the waterway for navigation, fishing or recreation.

(c) Placement of inorganic material is limited to the quantity necessary to prevent under-scour of structure and manage pore flow sufficient to ensure adequate over-topping flow and side flow to facilitate fish passage where required.

(d) In addition to any other design parameters necessary to meet fish passage requirements, and at the time of construction, structures must provide for a water surface differential of no more than one-foot at low flows, or otherwise provide a clear path for fish passage over, through or around the structure via side channels during low flows, unless otherwise approved by ODFW..

(e) Material used must be similar to materials currently or historically found naturally in the project area, except as otherwise allowed in OAR 141-093-0310(2)(f).

(f) No cabling, wire, mortar or other materials that serve to affix the structure to the bed, banks or upland is allowed.

(g) This general permit does not authorize appropriation or storage of water. If a water right is required by the Oregon Water Resources Department then the appropriate water authorization must be obtained prior to beginning project construction.

(h) No water may be diverted from the waterway for a beneficial use within the area in which flow is delayed or slowed by the project without the appropriate water use authorization.

(i) Native woody vegetation must be preserved to the maximum extent practicable. When not practicable, woody vegetation must be knocked-down to allow re-sprouting rather than removed.

(j) Any machinery operated below ordinary high water line must use vegetable-based hydraulic fluids, be steam cleaned and inspected for leaks prior to each use, and be diapered to prevent leakage of fuels, oils, or other fluids. Any equipment found to be leaking fluids must be immediately removed from and kept out of ordinary high water until repaired. Equipment staging, cleaning, maintenance, refueling, and fuel storage must be separated from waters of this state at a sufficient distance to prevent contaminants from entering waters of this state.

(2) Beaver Dam Analogues. Beaver dam analogue projects must meet the following specific conditions:

(a) Structures must be no more than one-foot thick at the top as measured parallel to waterway flow and at the time of construction.

(b) Weaves must be sufficiently loose, at the time of construction, to allow fish passage through the structure while maintaining fish rearing habitat in the delayed water area upstream of the structure.

(c) To the extent practicable, river-run gravels or cobbles must be used where rock is warranted to prevent under-scour.

(d) To the extent practicable, posts must be driven to a depth at least 1.5 times the expected scour depth of the waterway with a minimum one foot clear space between posts.

(e) Post driving using hydraulically-operated equipment must use vegetable-based hydraulic fluids, be conducted during low flow conditions and otherwise minimize operation of equipment within the wetted channel.

(f) Wooden posts must be untreated and may be of species not naturally found within in the project site.

(3) Restoration Check Dams. Restoration check dam projects must meet the following specific conditions:

(a) Only erosion-resistant rock from local upland sources may be used. Rock size is limited to the size necessary to prevent mobilization during high flow periods. To the extent practicable, rock must be placed, not dumped, from above the top of the bank.

(b) To the extent practicable, natural materials must be incorporated to encourage vegetation growth on the structures.

(c) Structures must ensure sufficient fine material in the backwater area to prevent waterway from going entirely sub-surface.

## **141-093-0315**

### **Monitoring and Reporting Conditions**

(1) Post-Project Reporting. Upon completion of the project, the project must be reported to the Oregon Watershed Enhancement Board at <http://www.oregon.gov/OWEB> by completing the Oregon Watershed Restoration Inventory (OWRI) form. The DSL authorization number must be included on the reporting form.

(2) Monitoring and Reporting. Permittee shall submit to the Department monitoring reports using a template provided by the Department. The first report is due December 31 of the year following project construction and will continue biennially thereafter for a total of three reports. Reports must include, at a minimum:

(a) Pre-construction photographs at representative locations upstream and downstream of each placement site. Fixed photo-monitoring points must be used for pre- and post-construction photographs.

(b) Post-construction photographs during ordinary high flow and ordinary low flow periods upstream and downstream of each placement site.

(c) Any deviations in the location, number of structures, volume or type of materials used or design as described in application (first year report only).

(d) Description of waterway response including but not limited to observations of stream bed aggradation or degradation, incised channel widening, increased channel complexity, any observed changes in downstream flow quantity, any observed changes in downstream flow duration, and elevated water tables in the floodplain.

(e) Description of vegetation response in riparian zone and historic floodplain as compared to pre-construction condition.

(f) Description of any unexpected adverse effects to the waterway or historic floodplain (e.g., waterway going entirely subsurface, unanticipated bank erosion, or proliferation of invasive species).

## **141-093-0320**

### **Review and Expiration**

(1) Review. Pursuant to the requirements of ORS 183.405 and OAR 141-093-0103(3), the Department will review this rule within five years of the adoption date using the evaluation criteria defined in statute.

(2) Expiration. Notwithstanding the provisions of OAR 141-093-0120(1), this General Permit will expire 10 years after the original effective date, provided that the Department may, by subsequent rulemaking, extend any aspect of the General Permit. The Department's considerations to extend this General Permit will include: the review standards set forth in ORS 196.600 through 196.905, whether the General Permit has resulted in long-term benefits or harm to water resources of this state, biennial reporting results, other data or information that may be submitted to the Department, and the Department's own investigations.



## Oregon Coastal Caucus

Sen. Jeff Kruse, Chair  
Rep. Caddy McKeown, Vice Chair  
Sen. Betsy Johnson  
Sen. Arnie Roblan  
Rep. Deborah Boone  
Rep. David Gomberg  
Rep. David Brock Smith

June 27, 2017

Mr. Jim Paul, Director  
Department of State Lands  
775 Summer Street NE, Suite 100  
Salem, Oregon 97301

**RE: Division 93 Rulemaking for a State General Permit for Certain Activities Promoting Waterway – Floodplain Connectivity**

Dear Director Paul,

The Coastal Caucus, a bipartisan bicameral group of elected representatives, are writing to express our concern about the Department of State Land's decision to proceed with the creation of a statewide general removal-fill permit for artificial beaver dams, referred to as beaver dam analogues (BDAs). We urge you not to adopt this permit for the coastal regions.

While we are longtime supporters of Oregon's investment in conservation and salmon recovery in the coastal regions, we have concerns that this rulemaking is being undertaken without a sufficient understanding of the potential negative impacts from BDAs on roads, drainage infrastructure, cities, and rural landowners.

The coastal communities we serve receive significant rainfall each year, with most parts of the coast averaging between 75-85 inches of rain annually. In record-setting years like 2017, higher than average rainfall can cause significant damage to coastal communities. While beaver dams can be beneficial to salmonid habitat in key areas, can cause flooding, changes in streamflow and stream channel location, and can wash out and cause significant damage downstream. We also recognize that many of our constituents have long needed to remove beavers and beaver dams to prevent significant damage to the land and infrastructure they manage.

Oregon's coastal regions have long managed beaver and their dams, we do not think it is appropriate to encourage landowners to build artificial beaver dams without going through the full individual permitting process to evaluate impacts on hydrology, land, and infrastructure. While we fully support and encourage efforts to improve fish habitat and invest in conservation, such efforts need to be undertaken in a thoughtful manner with a complete understanding of the potential impacts of the conservation work on existing land and infrastructure within a community. We do not think DSL has demonstrated that it understands or has evaluated the potential consequences of a statewide general permit for BDAs on communities that receive significant rainfall and flooding.

We encourage DSL not to adopt a statewide general permit for beaver dam analogues. Instead, DSL should continue to permit these projects in our region through the individual permitting process, where impacts and effects can be more fully considered and interested landowners, infrastructure managers, and communities can receive notice of the project.

We appreciate your consideration of our request. It is essential that conservation work on the coast appropriately balance habitat restoration goals and the needs of local landowners and communities.




# Oregon Coastal Caucus


Sen. Jeff Kruse, Chair  
Rep. Caddy McKeown, Vice Chair  
Sen. Betsy Johnson  
Sen. Arnie Roblan  
Rep. Deborah Boone  
Rep. David Gomberg  
Rep. David Brock Smith

Sincerely,


  
\_\_\_\_\_  
Senator Jeff Kruse, Chair


  
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Caddy McKeown, Vice Chair

  
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Senator Betsy Johnson

  
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Senator Arnie Roblan

  
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Representative Deborah Boone

  
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Representative David Gomberg

  
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Representative David Brock-Smith