



WaterWatch of Oregon
Protecting Natural Flows In Oregon Rivers

HB 2437-3

Testimony of WaterWatch of Oregon
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House Committee on Agriculture and Land Use
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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 -3 amendments

While WaterWatch understands the desire for a removal/fill process for drainage activities that will lead to a more workable process and increased compliance; we have significant concerns with the HB 2437-3 amendments.

In a nutshell, despite messaging surrounding this bill that would lead one to believe that the proposed program is simply a ditch maintenance bill that will allow farmers to unclog their ditches¹; in fact this bill will allow a wholesale undermining of existing laws as they related to removal and fill of materials in Oregon's waters for maintenance activities.

Notably, this bill is not limited to "ditches" as most might envision from testimony submitted on the original bill, but will allow the removal of up to 3,000 cubic yards per linear mile from intermittent, and even perennial, streams.

While we appreciate that the -3 amendments do exclude Essential Salmon Habitat (one of the many concerns we raised in our testimony on the original bill) we still have major concerns with the -3 amendments as outlined below:

- 1. Removal of up to 3,000 cubic yards of material:** The -3's still allow the removal of up to 3,000 cubic yards of material per linear mile over a five year period (this is permanent change, not a pilot as some have advocated for). This is a 5,900% increase over current law. This is a huge amount of material; with absolutely no documentation on the record as to the need for farmers to move this large amount of material for so called "maintenance" activities. This could have devastating effects on Oregon's streams and wetlands. -3, Section 5(1)(a).

¹ NOTE: Current law already allows farmers an exemption for ditch maintenance, in other words farmers already have authority to maintain clogged ditches, if they are true ditches.

2. **Intermittent streams:** This bill includes intermittent streams in its definition of “historically maintained channels”. Intermittent streams are defined by Oregon statute as any stream which flows during a portion of every year and which provides spawning, rearing or food-producing areas for food and game fish—in other words, they do provide important ecological values. See ORS 196.800(6). EPA estimates that of the 300,878 miles of linear streams in Oregon, 71 percent (213,327 miles) are intermittent or ephemeral. Oregon estimates that of the intermittent streams that that are completely in Oregon, not transboundary, 193,547 miles are intermittent which equates to 61% of total streams in Oregon. While the -3 amendments do strip out Essential Salmonid Habitat (ESH), ESH only covers approximately 8.1% of intermittent streams. This leaves approximately 92% of intermittent streams at risk under the -3 amendments. Moreover, EHS does not overlay all salmon bearing streams², nor does it account for intermittent streams that provide habitat for other important species such as state sensitive redband trout or lamprey. -3, Section 3(5).
3. **Perennial streams:** This bill includes perennial streams in its definition of “historically maintained channels”. Given repeated assurances that this bill is only about maintenance of “dry ditches” this term has no place in this bill. -3, Section 3(5).
4. **Placement of 3,000 cubic yards on wetlands:** This would allow the placement of up to 3,000 cubic yards of material removed during maintenance on any wetland for up to one year. This is not limited to “converted wetlands” (current law) but includes any vibrant, thriving wetland. This undermines decades of work to strengthen Oregon’s wetland laws, regulations and wetland restoration work. -3, Section 5(1)(b).
5. **Inadequate authority granted to ODFW to protect important ecological values (-2, Section 6):** Bill proponents will likely tout that the -3’s set up a robust process that allows for ODFW to condition maintenance activities to protect ecological values, primarily geared at endangered species. While it might appear so at first glance, one only need to sort through the many layers to see that this process as currently in the -3’s is set up to fail. Specifically, there is a very tight timeline that will be very hard for the three coordinating agencies to meet, and regardless, the -2’s allow DOA and DSL to trump ODFW recommendations.

All in all there is a 45 day timeline for three agency coordination. The -3s require DOA to give ODFW notice of a filing within five days of receiving notice from a landowner, then ODFW has 30 days to provide a response to DOA in which they can provide conditions in addition to Section 5 conditions. That said, DOA does not in fact have to require the conditions requested by ODFW. Rather, the -3 amendments allow that if ODA (an agency whose mission is directly tied to the promotion of agriculture) disagrees with conditions crafted by ODFW (the agency charged with protecting Oregon’s fish and wildlife and their habitats) then DOA can go to DSL for final determination as to what conditions are necessary. DSL has only five days to turn this around. That leaves ODA only five days to meet the forty-five day deadline to respond to the landowners notice (45 days from the date the landowner submitted notice). If ODA fails to meet this deadline, then the applicant can go ahead with the project without any of the ODFW recommended conditions whatsoever. This is an untenable timetable and is crafted to ensure failure.

²A Trout Unlimited Report (Rising to the Challenge) notes that in Oregon 45% of stream miles within salmon/steelhead range are classified as intermittent/ephemeral https://www.tu.org/sites/default/files/TU_Rising_to_the_Challenge_print.pdf

All in all, while we appreciate that ODFW is given the chance to recommend additional conditions, in the end not only can ODA and DSL trump the conditions recommended by the state agency charged with protecting fish and wildlife, but if the agencies fail to meet the very short timelines then the applicant can go ahead without any ODFW conditions applying.³

6. **Statutory loopholes:** The -3's do not fix the problems of the original bill with regards to statutory loopholes we noted in our original testimony. Notably, Section 6(8)(a)(A) and (B) will still allow DSL to lift the 3,000 cap and/or any conditions required under the bill. If this bill goes forward, this section should be limited so that the volume can only be adjusted down, and the conditions can only be strengthened. As is, this loophole undercuts any requirements that are found in the bill.

Section 9 allows DSL, by rule, to lift the current 100 cubic yard limit for work in waters of the state where the work is for historically maintained channels in "flowing" streams. In other words, despite testimony and assurances that this bill only touches dry streams, this provides a gaping loophole with no cap whatsoever for removal of material from "wet" streams, including Essential Salmonid Habitat.

7. **No public notice and comment allowed:** The -3 amendments do not allow public notice and comment. Again, this bill is not limited to ditches but allows the removal of up to 3,000 cubic yards (or more under the loophole) from Oregon's intermittent streams. This material can be dumped on ecologically important wetlands for up to a year. The waters of this state belong to all citizens of Oregon, but this process ensures that citizens have no voice in the possible destruction of our state's most treasured resources.
8. **Definitions are lacking and/or inadequate (Section 3):** While we appreciate that some definitions were clarified since the original bill, the -3 amendments still lack adequate definitions in a number of areas:
 - a. **Drainage:** The most basic of terms needed for statutory interpretation of this bill is still not defined in the -3's. While common sense and agricultural group testimony would lead one to believe that drainage, as used in this statute, is limited to drainage "off" the land; this is not in fact captured in statutory language. One only need to look at the statutory duties that "drainage districts", for instance, count as drainage to see that things like diverting water for irrigation and/or storage counts as drainage. Adding to our concern is the fact that the -3's have added language pertaining to water rights, indicating that this might in fact be what is intended (Section 5(1)(d)). If this bill is limited to drainage off the lands; there is no plausible reason for excluding defining this in the statute.
 - b. **Serviceable:** The ability to use this statute hinges, in part, on whether the "traditionally maintained channel" has been serviceable for facilitating drainage within the past five years. Serviceable is not defined in the -3s. This needs to be clarified.

³ Note the deadlines in the -2 amendments are not delineated as business days, so if an applicant submits a notice on a Friday of a three day holiday weekend, DSL will have to resolve the disputed conditions by Wednesday, meaning they really have two business days. And/or if either the DSL or ODA staff that is subject to the five day response time is on a weeklong vacation, ODFW is out of luck as far as conditioning the activity to protect Oregon's fish and wildlife. That is not a good process, to say the least.

- c. Dry: Under the current definition, if a stream is “dry” because an agricultural interest is diverting all the water out of the stream, then work can commence. Dry should be limited to naturally dry conditions.
 - d. Maintenance: While we appreciate the addition of this definition to the -3 amendments; the definition needs to be strengthened to ensure that it clearly prohibits work that will result in channel straightening. Section 5(1)(n) does restrict applicant from wholly “moving” a channel, but not from straightening it. This should be clarified.
9. **Evidentiary requirements of landowner notice to DSL are non-existent:** Piecing the definitions together, it appears that this statute is supposed to be limited to allowing maintenance on traditionally maintained channels (i.e. ditches, intermittent and perennial streams) that have been routinely subject to maintenance in the past and have been serviceable for facilitating drainage in the past five years; that said, the notice that is required to be filed with DOA does not require any proof whatsoever of either past maintenance and/or serviceability within the past five years. Without proof, there is no way for the agencies to determine if the basic threshold of this statutory exemption is even met.

Conclusion: HB 2437’s purported purpose is to create a workable program for ditch maintenance that also that protects, maintains or improves ecological functions of channels (stated purpose, Section 2). The bill fails to achieve this. Instead, this HB 2437 grants monumental changes to the benefit of landowners (in the order of a 5,900% increase in exemption amounts) without also providing adequate protection of Oregon’s streams and wetlands.

Despite many concerns filed on the record, the -3 amendments still allow the removal of up to 3,000 cubic yards not only from ditches (as currently exempted) but also from intermittent and perennial streams. Placement of material is not limited to converted wetlands, but any wetland (a big change in law). This is not a pilot, but would be permanent with no provisions for unwinding. And while ESH is excluded, 92% of Oregon’s intermittent streams are not protected under that. And finally, the bill not only fails to require documentary evidence to prove these are “historically maintained channels” but there is absolutely no provision for public notice and comment to help ensure accountability of the program. While WaterWatch does not object to a creating a more workable program, this bill is not it.

We urge the Committee to reject this bill. Thank you for this opportunity to comment.

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