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LEGAL AID FOR THE ENVIRONMENT SINCE 2001

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June 23, 2021

House Democratic Leader Barbara Smith Warner, Chair
House Committee on Rules
900 Court Street NE, Room 453
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Submitted via Oregonlegislature.gov:
<https://olis.oregonlegislature.gov/liz/2021R1/Testimony/HRULES>

Re: SB 857 – Provides that maximum loading weight of motorboat must be less than 5,000 pounds to obtain towed watersports motorboat certificate.

Dear Chair Smith Warner and Members of the Committee:

This office represents the Oregon River Safety & Preservation Alliance (ORSPA). Our clients asked us to analyze the status of the implementation of HB 2351 (2019) and HB 2352 (2019), legislation enacted to address the impacts of boat wake energy and related safety and environmental impacts, and how these bills would be supported by the passage of SB 857. We have reviewed the legislation, legislative history, and related policy and rule-making efforts that have occurred since the enactment of these important bills. At the request of our clients, we provide you with the following summary of our analysis.

The Legislature enacted HB 2351 to *require and empower* the Oregon State Marine Board (OSMB) to adopt special regulations to manage boat wake energy within the Willamette River Greenway for the protection of shoreline, property, habitat, and vegetation. HB 2351 was meant to fill a clear natural resource and river safety policy gap by requiring the OSMB to consider the ecological impacts caused by the increasingly larger wakes generated by wake sports boats. As then Representative Gorsek said in his floor speech, the necessity for HB 2351 “arose as the result of homeowners, farmers, business people, and stewards of the public lands having to increase the amount of investment to preserve property and the ecosystem of the Willamette River against the increasing energy of much larger water sports boat wakes.” See HB 2351A, 80th Leg. Assemb., 2019 Reg. Sess. (Or. 2019). HB 2351 passed the House 50-10 and the Senate 21-6. HB 2352, a companion bill, was intended in part to address safety certification requirements for towed water sports. HB 2352 passed the House 39-20 and Senate 21-6. Both bills became effective on January 1, 2020.

HB 2351 was endorsed by our clients ORSPA as well as several other organizations, including 1000 Friends of Oregon, Calm Water Coalition, Friends of Historic Butteville, Oregon Property Owners Association, Willamette Riverkeeper, and Willamette Greenway Alliance.



Members of ORSPA spent significant time and effort to provide testimony in support of HB 2351 and HB 2352. They did so with the understanding that, consistent with statements made on the House Floor, both bills would work together to close the policy gap by providing the OSMB with the authority to address shoreline erosion and other impacts in the Willamette River Greenway, as well as a mandate to collect the information required to do so effectively.

In October 2019, the OSMB adopted rules, effective January 1, 2020, imposing a maximum loading weight limit (defined by the Board as the sum of the boat's dry weight and the boat's factory ballast capacity) of 10,000 lbs. on wake boats in the Newberg Pool as a requirement to obtain a towed watersports endorsement under HB 2352. The Board also considered the adoption of zonal regulations related to wake sports within the Newberg Pool at its April 2020 meeting, and adopted rules at that time shrinking the number of zones where wakesurfing was allowed from five to two. However, based on our review, it appears that the OSMB failed to meaningfully consider its obligations under HB 2351 and Statewide Planning Goal 15 (Goal 15) when adopting the 10,000 lbs. limit under HB 2352. Further, the zonal rules themselves appear to be inconsistent with the Board's mandate under HB 2351, given their tendency to concentrate boat wakes in certain areas. Further, the OSMB's rulemaking activities implicate the statutory duties of several state and federal agencies. OSMB's current regulatory framework for wake sports appears to ignore both state and federal water quality criteria regarding turbidity. Although HB 2351 did not directly address turbidity, Oregon's turbidity criteria and other state and federal water quality standards, including the Clean Water Act (CWA), are generally applicable.

Finally, there are several species listed under the Endangered Species Act (ESA) that utilize the Newberg Pool section of the Willamette for critical parts of their lifecycles. The National Marine Fisheries Service (NMFS) and other federal agencies have numerous ongoing projects and investments in critical habitat areas of the Willamette that are geared toward recovery. As you know, the state of Oregon has a duty to avoid taking those species through allowance of practices that result in harm, harassment, or inhibit recovery, and the OSMB should not be encouraging or allowing activities that threaten or interfere with NMFS' ESA obligations. In January 2020, NMFS sent a letter to warn the OSMB of the latter, and to express the belief that OSMB's work to date on the justification for wake sport regulation has "***paid little attention*** to the impacts that wake sports have on aquatic life, including salmon and steelhead species designated as threatened under the [ESA], and their critical habitats." See NMFS Letter to OSMB, 1-2 (Jan. 16, 2020) (emphasis added) [*hereinafter* NMFS Letter].

Although the OSMB may not have had much time to consider NMFS' letter before voting to move ahead with developing further rules for wake sports in the Newberg Pool in April 2020, it is likely that the Board members had at least seen the letter prior to that meeting and has reviewed said letter in subsequent meetings. Thus, the fact that the Board moved forward with rulemaking and continues to do so is concerning given NMFS' finding that:

[w]ake sports are likely to have a significant adverse impact on those listed species and their critical habitats by injuring and killing individual fish when, for example, the surge



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and wakes caused by artificial waves from passing boat and wake sport participants wash juvenile fish onto the shore, or otherwise modify or degrade PBFs (physical and biological features) in ways that injure or kill fish by significantly impairing their essential behavior patterns.

NMFS Letter, 2. Like NMFS, our clients continue to be concerned that the OSMB's current regulatory framework for wake sports within the Newberg Pool threatens species recovery inconsistent with the NMFS' obligations under the ESA. Further, as NMFS' letter stated, through the ESA, "Congress has made the *public at large responsible* for avoiding harm" to listed species. *See id.*

SB 857 has the potential to help avoid potential violations of the aforementioned state and federal statutes while the OSMB undertakes the scientific study to determine how boat weight impacts both water quality and species/habitat issues. It will work in conjunction with the existing HB 2351 and 2352.

Our clients understand that protecting shorelines, habitats, water quality, property, and river safety while ensuring that diverse recreational opportunities are enhanced on the Willamette River are top priorities for you, and are essential to Oregonians' quality of life. Please do not hesitate to contact us if you have any questions.

Sincerely,

Anuradha P. Sawkar

Meriel Darzen

Attorneys for Oregon River Safety and Preservation
Alliance

Encl.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
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January 16, 2020

Chairwoman Val Early
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SENT VIA U.S. MAIL AND ELECTRONIC MAIL TO marine.board@oregon.gov

Re: Effects of Wake Boat Activity on ESA-Protected Fish and Designated Critical Habitat

Dear Chairwoman Early:

National Marine Fisheries Service (NMFS) recently became aware that the draft agenda for the January 22, 2020 meeting of the Oregon State Marine Board (OSMB) will include an update from the Newberg Rule Advisory Committee (RAC) regarding the OSMB's options to regulate wakeboard or wake surfing in the Newberg Pool, and that a second RAC is examining this issue in the Lower Willamette River.

Moreover, we understand that work to date by the OSMB and the RACs on the justification for wake sport regulation has focused on impacts to boating congestion and private property damage, but has paid little attention to the impacts that wake sports have on aquatic life, including salmon and steelhead species designated as threatened under the Endangered Species Act (ESA), and their critical habitats. NMFS encourages OSMB and the RACs to add consideration of ESA protected resources to their list of concerns regarding wake sports, and offer the following comments in support of that approach.

Two ESA-listed species and their critical habitat occur in the mainstem of the Willamette River above Willamette Falls, including the Newberg Pool: Upper Willamette River (UWR) Chinook salmon and UWR steelhead. Three additional ESA-listed species from the Lower Columbia River (LCR) region and their critical habitat also occur in the Willamette River below Willamette Falls: LCR Chinook salmon, LCR coho, and LCR steelhead. All five species are listed as "threatened" under the ESA. Individual fish from each of these species use critical habitat within the affected reaches to complete essential life history functions related to freshwater migration and rearing, and their ability to do so depends on the presence and quality of specific physical and biological features (PBFs) that include, but are not limited to, freedom from obstructions (which may include artificial noise or excessive sediment), floodplain connectivity, forage (adequate food quantity and quality), natural cover, and water quality.

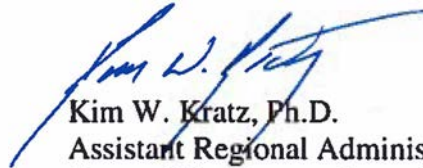
In NMFS' experience, noise and wave actions are frequently a threat to juvenile salmon and steelhead. Therefore, we expect that wake sports are likely to have a significant adverse impact on those listed species and their critical habitats by injuring and killing individual fish when, for example, the surge and wakes caused by artificial waves from passing boat and wake sport participants wash juvenile fish onto the shore, or otherwise modify or degrade PBFs in ways that injure or kill fish by significantly impairing their essential behavior patterns (see Williams and Holmes 2019, and literature cited therein, and additional citations below).

NMFS has a responsibility under the ESA to protect and recover threatened and endangered species, and we have a long history of working with state and local agencies in Oregon to restore salmon and steelhead populations and their habitat. We also have a responsibility to enforce the prohibitions of the ESA, which makes it unlawful for any person to harm threatened salmon and steelhead, through activities which injure or kill protected fish or interfere with the function of their habitat. Through the ESA, Congress has made the public at large responsible for avoiding harm to these species, and NMFS is offering to work proactively with the Board to minimize these concerns in the course of its review of wake sports.

Before the OSMB approves rules that authorize wake sports in the Willamette River that are likely to affect ESA-listed species or their critical habitats, it should ensure that it or the applicant will comply with the ESA either by avoiding the kinds of harm described above, or by showing that any harm that will occur is subject to an exception or exemption under the ESA.

I hope this letter gives the OSMB the information it needs to clearly understand NMFS' views on the wake sports in the Willamette River. My staff and I stand ready to work with the OSMB in any way necessary to comply with the ESA.

Sincerely,



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