



House Committee on Energy, Environment and Water

Testimony on HB 2873

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By David Filippi

The Oregon Water Resources Congress (OWRC) is a trade association representing irrigation districts, water control districts, and other water delivery organizations throughout Oregon. On behalf of OWRC, I appreciate the opportunity to provide comments on HB 2873.

This bill provides that hydroelectric projects exempted from federal regulation and located within existing artificial delivery systems will not be subject to additional requirements for fish screens, by-pass devices or fish passages if these renewable energy projects do not create changes in stream conditions that adversely affect fish. HB 2873 is intended to promote renewable energy projects that have little, if any, environmental impacts, by avoiding costly conditions that may render many such projects uneconomical.

I. Background

* Incentive to use water twice: In 2007, the Oregon legislature created an expedited process for securing the right to use water under existing water right certificates for certain hydroelectric projects. Such “in-conduit” hydroelectric projects generate electricity after water has already been diverted from the natural waterway, while it is being delivered for irrigation purposes. Consistent with the statewide policy to encourage and incentivize the development of renewable resources, HB 2785 (2007) created a new process for holders of existing water rights to obtain a secondary authorization to make use of water for hydroelectric purposes where water is already being diverted for other beneficial uses without waste.

* Water for in-conduit hydro does not create a new diversionary right: The process is limited to those projects that qualify for a Federal Energy Regulatory Commission exemption, and the legislation is clear that the secondary authorization for hydro use does not have its own priority date, that OWRD will not regulate in favor of the secondary use, and that the new hydroelectric certificate does not grant a right to divert water solely for hydroelectric purposes.

* Fish conditions were intended to address potential impacts: HB 2785 included a series of conditions that must appear in the new authorization for the secondary use of water for hydroelectric purposes. Among other things, HB 2785 provides:

“At a minimum, a certificate issued under this section must contain the following conditions: (a) Fish screens, by-pass devices and fish passages as required by the State Department of Fish and Wildlife.” *** ORS 543.765(5).

Thus, ODFW was given discretion to require fish screens, by-pass devices, and “fish passages” as a condition of these projects.

* ODFW has exercised its discretion to require fish passage even where projects do not adversely affect passage: While the legislative intent was clearly to enable ODFW to require fish passage where the proposed hydroelectric project would have some actual adverse impact to fish, ODFW has exercised its discretion by requiring fish passage when proposed projects will do nothing but add instream flow at the point of diversion to benefit fish, which in these instances, only brought instream flows closer to ODFW instream flow targets.

* HB 2873 aligns the conditioning authority of ODFW to the impacts of in-conduit projects: ODFW's approach of demanding fish passage for in-conduit projects is not only contrary to ODFW's fish passage statutes and regulations that guide ODFW's decisions for imposing passage, but ODFW's approach is disincentivizing efforts to conserve water and place such water instream for fish. Moreover, the specter of having to install or upgrade fish screens for in-conduit projects, again, when water will be diverted for the underlying irrigation use regardless of whether an in-conduit project is added, makes many of these small renewable hydro projects infeasible. HB 2873 is aimed at rectifying this consequence of HB 2785, and better aligning the conditioning authority of ODFW to the impacts of a given project.

II. Fish Screens, By-pass Devices, and Fish Passages Should Not Be Required For In-Conduit Hydro Projects that Do Not Affect Fish at the Point of Diversion

* Oregon's fish passage law: As a starting point, Oregon has established the general policy that "fish passage is required in all waters of this state in which native migratory fish are currently or have historically been present." ORS 509.585(1). In implementing this policy, the fish passage requirement is triggered where four key requirements are met. There must be (1) construction, a fundamental change in permit status, or abandonment of (2) an artificial obstruction, that (3) crosses "waters of this state" (4) where native migratory fish are or historically have been present. See ORS 509.585(4); OAR 635-412-0020(2).

* Permit status change as a fish passage trigger: As relevant to the secondary water rights for in-conduit projects authorized under HB 2785, ODFW has asserted that it has discretion to condition the water right and require passage because the secondary water right amounts to a "fundamental change in permit status." As defined in statute and by rule, this term means "a change in regulatory approval for the operation of an artificial obstruction where the regulatory agency has discretion to impose additional conditions on the applicant, including but not limited to licensing, relicensing, reauthorization or the granting of new water rights, but not including water right transfers or routine maintenance permits." ORS 509.580(4); OAR 635-412-0005(25).

* ODFW is improperly applying the trigger: While ODFW readily concedes that in-conduit projects are good for fish where they result in new instream flows, ODFW has nevertheless taken the position that the secondary authorization for hydroelectric use from OWRD amounts to a fundamental change in permit status at the dam. This position is fundamentally flawed for two reasons:

* First, while the projects do seek to secure certificates from OWRD to use water for hydroelectric purposes (pursuant to ORS 543.760 et seq.), the certificates do not amount to "a change in regulatory approval FOR THE OPERATION OF AN ARTIFICIAL OBSTRUCTION" (Emphasis added.) Rather, the regulatory approval being sought is for the secondary use of water, often *many miles* "down canal" from the diversion point on the natural waterway.

* Second, while the definition of “fundamental change in permit status” includes the “granting of new water rights,” the definition also expressly excludes “water right transfers.” The authorizations being sought under ORS 543.760 et seq. are much closer conceptually to a water right transfer than a new water right, as the process essentially only adds a secondary use to the existing, underlying water right. As defined by Oregon water statutes, a water right transfer includes a change in use. Otherwise, for the new hydroelectric use, there is no change to the point of diversion, rate, duty, season, priority date, etc. of the underlying right. Diversion of water at the natural waterway will be exactly the same both before and after approval of the secondary use, as required by existing law.

* By-pass devices and fish screens: Similarly, in-conduit hydro projects should not be an independent trigger for ODFW to require by-pass devices or fish screens. As with passage, districts are not fundamentally opposed to these concepts by any means. In fact, the Oregon Water Resources Congress has long been a leading advocate for securing funds that enable the installation of fish screens throughout the state. In particular, OWRC has been instrumental in successful efforts to fund the U.S. Fish and Wildlife Service’s Fisheries Restoration and Irrigation Mitigation Act (FRIMA) (PL 106-502), which make funds available on a cost-share basis to districts for new and upgraded screens. At the same time, tacking on by-pass or screening requirements to a down-canal in-conduit project only burdens the very project that may help to generate the funds necessary to provide matching dollars for fish improvement projects in the first place.

III. Summary

* HB 2873 ends ODFW’s efforts to over-reach. There is no justification for imposing a requirement for fish passage, by-passes, or screens on an in-conduit project where there is no physical or operational change to the dam or the diversion point itself. While the districts pursuing in-conduit projects are by no means opposed to enhancing protective measures for fish (and in fact, the Oregon Water Resources Congress has been a leading advocate on various state and federal initiatives to secure funding for new fish screens), such requirements should not be tacked on to renewable energy projects that on one hand have no adverse effect on fish, and on the other hand will maximize the potential use of water for renewable energy projects where the water is already authorized for diversion for another purpose. ODFW’s current approach is unfairly and unjustifiably punishing the very renewable energy efforts that we believe our new Governor and the legislature want to encourage.

The Oregon Water Resources Congress appreciates this opportunity to provide this written testimony.

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