



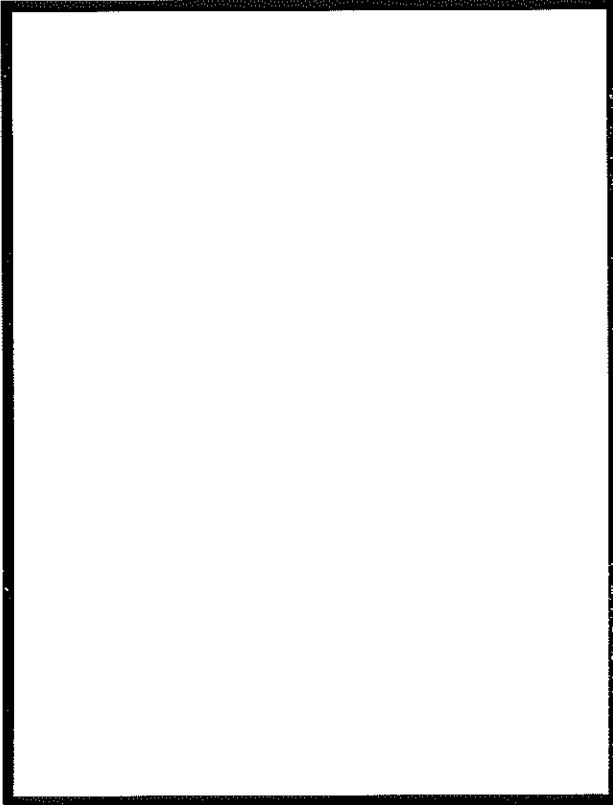
Oregon

COASTAL NOTES

February 10, 1989

State Wetlands Mangement Changes Being Considered

Whats Happening...by Onno Husing, Legislative Fellow



(The following article is the first in a "Wetlands Issues" series)

Botts Marsh. Sound familiar?

No, Botts Marsh is not the latest Stephen King thriller. Rather, Botts Marsh is the leading test case that has come to symbolize the state of Oregon's wetlands mangement system. As such, due to the importance of wetlands to the coastal environment and the headaches development in wetlands present to local and state officals, *Coastal Notes* will feature a series of articles on this complex subject. This first article briefly describes the history of wetlands protection. Next week's article will take a first cut at

looking at how the current system operates (the laws and the state and federal agencies involved). *A future article will focus on the content of reform measures as well as the prospects for new state wetlands legislation.*

To some degree Oregon has been in the business of regulating wetlands since 1961 when concern over removal of gravel from Oregon's rivers sparked the passage of the Fish Spawning Gravel Act. The act was broadened in 1967 to include removal of fill generally and the Division of State Lands was placed in control of the program (previously the Fish Commission and the Game Commission jointly ran the program). Then, in 1972, the Oregon Legislature further amended the act to include the regulation of fill in estuaries. It is interesting to note that both these state measures predated federal initiatives in this area.

Enter the Feds. In 1972, Congress enacted the Federal Water Pollution Control Act, or, as it is more commonly known, the Clean Water Act (CWA). Like all federal statutes, since the CWA focuses on the same problems ad-

See "Wetlands" continued on Page Two

In This Issue:

- And Introducing
- Land Use Legislative Issues
- Legislative Quotes of the Week

"Wetlands" continued from Page One

CWA focuses on the same problems addressed by these two state statutes, the CWA preempted these two Oregon statutes and therefore Oregon must follow federal law. A principal feature of the CWA is Section 404, which directs the Army Corps of Engineers to establish a permit program to regulate dredging and filling activities for the nation's waters.

For the first five years of the program the Corps largely ignored section 404 by narrowly applying section 404 only to "navigable waters"—which as a practical matter means only the nation's rivers and bays. The Corps' reluctance to undertake the 404 program is understandable. After all, for most of their history, the Corps had been responsible for maintaining the nation's waterways and building and running large hydroelectric projects. Then, suddenly, in 1972 with the 404 program, Congress casted the Corps in the highly unaccustomed role of being an environmental watchdog!

The Corps' reluctance to assume this new role led to litigation in 1975 and further Congressional action in 1977 to amend the CWA. As a result, with the 1977 amendments to the CWA, Congress clearly established that wetlands protection is an integral part of the 404 permit program—whether the Corps liked it or not.

At this stage things become more complicated. First, under the CWA, Congress divided the authority to regulate dredge and fill activities between the Corps and the Environmental Protection Agency (EPA). Again, under the act the Corps has the responsibility to issue permits and to enforce the program. However, the CWA also directs EPA to develop guidelines—called 404(b)(1) guidelines—that determine the standards for selecting WHERE dredge and fill materials

will be placed in the waters of the United States.

In addition, the U.S. Attorney General ruled in 1979 that EPA has responsibility for construing the term "navigable waters" and for making interpretations of the scope of the 404(f) exemptions under the act. Included among these exemptions are: "normal" agriculture, forestry, or ranching, the maintenance of dikes, dams, breakwaters, causeways, and some other activities. Furthermore, in addition to these siting guidelines, the EPA also has the authority to veto Corps permit decisions if the EPA determines the use of a particular site to dispose of dredge material has an "unacceptable" impact on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreation areas.

As if that were not enough oversight, under the CWA, the Congress also requires several other "resource agencies" (such as the Fish and Wildlife Service and the National Marine Fisheries Service) to provide the Corps with feedback on how a proposed activity affects their agency's interests. This feedback and comments from interested parties, state government and other sources constitute part of a "public interest review" process. Under this system the Corps is directed to balance the benefits of a proposal against the reasonably foreseeable costs of a proposal. The upshot of this system is that when making such determinations, the Corps must rely on highly subjective cost/benefit analyses and what is very often self serving commentary from interested parties.

The goal of this public interest review process is clear—to bring as much information from effected interests and agencies to bear on 404 permit decisions and to try to ensure that federal agencies don't work at cross

See "Wetlands" continued on Page Four

Land Use Legislative Issues - by Paul Benson, OCZMA Land Use Specialist

Several Land Use Bills Reviewed

After a week's delay due to the relocation of the Arctic Circle, here is a summary of additional land use bills which should be carefully reviewed. The first bill filing deadline has already passed in the House and a Senate bill filing deadline on February 14th is fast approaching. With the legislature apparently determined to move issues on a "fast track" this session, we can look forward to bills being in the hopper early and Committee hearings being scheduled soon.

•**HB 2285** filed at the request of the Joint Legislative Committee on Land Use (JLCLU) for the Department of Revenue, is a result of interim study by the JLCLU's subcommittee on the property tax issues related to the Goal 3 and Goal 4 requirements for zoning of resource lands. The bill would disqualify from assessment at true cash value for farm use, land that has been excluded from a farm use zone due to an exception to Goal 3, whether or not it is used exclusively for farm use.

Importantly, language in the bill will enable the land to be withdrawn from the farm use assessment without having to pay back taxes and interest to the date of the farm use assessment first being granted. (See bill Section 3(2) and Section 4(3)(b)). This new ability to take land out of farm use assessment without immediate financial penalty, may be the incentive needed to help eliminate the "special privilege" status of land for which a goal exception has been granted yet the farm use assessment benefit has been maintained.

•**HB 2287** filed at the request of the Joint Legislative Committee on Land Use for the Department of Land Conservation and Development, would require the Land Conservation and Development Commission to adopt model land use hearing procedures and procedural standards for hearings. Further it would require local governments to meet the adopted procedural standards and to demonstrate during periodic review that the adopted procedural standards were being met. LCDC is required to report to JLCLU on its progress in meeting this requirement by September 30, 1990. Finally, LCDC is given a safety valve that if DLCD has no funds available to develop model land use hearing procedures, they are not required to be adopted.

The usual "kicker" remains, however. The procedural standards for local government must be adopted by LCDC and they must be met by local government. So once again the thrust is to place the burden on local government with

no financial assistance offered, while letting the State potentially "off the hook" if there are no dollars available.

•**HB 2288** filed at the request of JLCLU for DLCD, would establish a "raise it, waive it" standard at all levels of land use appeals, clarify the definition of a land use decision, establish procedures for post-acknowledgement enforcement orders and clarify and streamline LUBA procedures. This bill once again reflects the extensive "legalization" of Oregon's land use program. At each session voluminous bills are introduced trying to correct the problems which have shown up during the previous two years of LCDC and LUBA procedural "trial and error". In 1991 will we be faced with a 20 page bill declaring a "use it or lose it" standard?

Two brief comments for this review:

1. On page 19, lines 2-5 should be deleted from the bill. This is the escape hatch for state agencies to deny projects which have been approved in acknowledged local comprehensive plans. Unfortunately, it was added to Chapter 197 in the 1987 session. With this bill, there is a new opportunity to get it out. If state agencies believe they must deny a project that has been locally approved let them justify that action under their own laws and rules, not under Chapter 197.
2. The final new procedural requirement contained in the bill is on page 20, lines 26-28. It states, "An amendment to an acknowledged comprehensive plan or land use regulation is not acknowledged unless it has been submitted to the director as required by ORS 197.610 to 197.625".

•**SB 309** filed by JLCLU for several individuals, would modify uses of land in EFU zones, establish procedures for dealing with violations of the mining use provision and define "suitable for farm use" regarding residence dwellings. However, the bill does not appear to do precisely what this printed summary says. As I read the bill it would do the following:

1. Describes more flexibly the permission for a relative to occupy a dwelling which has been designated for farm use.
2. Does establish procedures for dealing with mining operations which have been undertaken in an EFU zone without prior land use approval.
3. In connection with approval of non-farm dwellings in EFU zones, establishes stricter standards for determining

See "Land Use" continued on Page Four

Please mark your calendars—

OCZMA's next meeting will be held on March 2 & 3, 1989 in Salem. Location to be announced at later date.

Legislative Quotes of the Week:

This week two quotes come from Representative Bill Dwyer of Springfield.

While testifying before the Senate Agriculture and Natural Resources Committee on Tuesday concerning banning log exports of timber from state forest lands, Representative Dwyer criticized the State's reliance on an Attorney General's opinion (which are just that, merely opinions that do not have the force of law) as a basis for state log export policy stating:

"You know, these Attorney General opinions are like eyeballs, everybody's got a couple."

During the same emotionally charged hearing Dwyer also ventured to say that if Oregon continues to allow log exports, "Maybe we should mine the harbor at Coos Bay".

Later that week as the winter storm gripped Salem, during his weekly television taping for local cable television Senator **John Brenne-**man— wrapped in a muffler and a hat— began his program with the quip, "It was so cold in Salem this week that for once the Legislators had their hands in their own pockets!"

"Land Use" continued from Page Three

whether a parcel of land is "suitable for farm use". These include:

- a. A "substantial majority" of the parcel must be found to be unsuitable.
- b. A parcel cannot be declared unsuitable based solely on size or location if it can "reasonably" be put to farm use in conjunction with other land.
- c. Parcels which are composed of Class I - IV soils in Western Oregon or Class I - VI soils in Eastern Oregon and parcels used within the last three years as part of a farm operation with gross farm sales of \$40,000 or more are considered presumptively suitable for farm use.

The message in this bill seems to be, "If you're really farming it's okay to be out there, but if you're not, get inside that UGB where you really belong."

In upcoming issues: More bill reviews; a further look at Goal 3 - Goal 4 - Secondary Lands (latest draft due any day); a look at ocean resources and at economic development.

"Wetlands" continued from Page Two

purposes. While in theory that makes a lot of sense, one effect of this process is that the Corps must always look over its shoulder to ensure its actions are in line with EPA and other agencies. As a result, the Corps loses flexibility. From a state's perspective, then, at times the Corps may appear to bully state and local governments.

Next week we will take a closer look at the Botts Marsh case to ascertain if, under the current system, developers in Oregon enter a twilight zone of uncertainty when they apply for a permit to develop on or near a wetland. Therefore, for those pushing for reform of the state's wetlands policy, this overwhelming sense of unpredictability constitutes the major flaw of the system— not necessarily the concern that the program is too tough or lax.

And Introducing...by Onno Husing, Legislative Fellow

Bills Introduced Before the Oregon Legislature — A two week backlog brought up to date

SENATE

- Senate Joint Resolution 8** This resolution proposes an amendment to the Constitution of the State of Oregon, upon voter approval, to prohibit sale or export of timber from state lands unless the timber is processed in Oregon.
- SB 353** (filed at the request of the Joint Interim Committee on Environment and Hazardous Materials) Prohibits purchase of polystyrene foam food packaging products by state agencies (and for those leasing space from a state agency or for activities requiring a state permit) and provides for exemptions if no acceptable alternative exists.
- SB 360** (at the request of Senator Glenn Otto) Would “repeal” the scheduled repeal on July 1, 1989 of a prohibition against a city annexing specified class of property (mostly light industrial).
- SB 391** (sponsored by the Senate Committee on Agriculture and Natural Resources) Repeals the criminal penalty for pesticide use violation and substitutes a civil penalty instead. SB 391 also provides for notice, hearing and judicial review provisions. Directs all moneys recovered from civil penalties be paid into the State Treasury and credited to the General Fund.
- SB 423** (filed at the request of the Department of Environmental Quality [DEQ]) This measure would establish a state-wide ground water protection program and requires the Strategic Water Management Group to present an annual report. SB 423 also directs the Water Resources Commission to coordinate activities with the DEQ.
- SB 424** (filed at the request of the DEQ) Establishes requirements for local governments conducting collection programs for household or small quantity generators of hazardous waste. The bill requires DEQ to conduct pilot programs for collection of household hazardous wastes and exempt small quantity generators of hazardous waste and defines “household hazardous wastes”. In addition, SB 424 authorizes DEQ to impose an annual solid waste disposal site fee and specifies the uses and distribution of moneys collected, and creates an Oregon recycling account.
- SB 477** (sponsored by the Committee on Agriculture and Natural Resources) This measure prohibits the State Fish and Wildlife Commission from establishing by rule seasons and bag limits for hunting, angling or trapping unless investigation of supply and condition of wildlife has first been conducted.
- SB 481** (sponsored by Senators Brenneman, Bunn, Kintigh, Bradbury, Kennemer, Timms and Representative Hanneman— at the request of Helen Corwin) Requires a lot or parcel of forest land that is within two or more code areas but is or may be described by one tax lot number to be considered one lot or parcel for the purposes of forest protection assessment.
- SB 482** (sponsored by Senators Brenneman, Bradbury, Representatives Hanlon, Rijken— at the request of the Florence Rotary Club) SB 482 would prohibit the use of waste tires in construction of artificial reefs in ocean waters and removes the reference to the use of waste tires in artificial fishing reefs.
- SB 487** (sponsored by Senator Bradbury, Representatives Schroeder, Whitty— at the request of STEP) This bill would prohibit the taking of shad or sturgeon for commercial purposes from waters of the Coquille River.
- SB 488** (sponsored by Senators Bradbury, Brenneman, Representatives Hanlon, Schroeder, Whitty— at the request of Edward Ostrolenke) SB 488 exempts from the angling license requirement those persons angling from a jetty, beach, pier, dock or shoreline in the Pacific Ocean for certain bottom fish.
- SB 492** (sponsored by Senators Bradbury, Dukes, Representatives Schroeder, Whitty) Increases the board of commissioners for the Oregon International Port of Coos Bay from five to seven permanent members.

See "Introducing" continued on Page Six

"Introducing" continued from Page Five

- SB 492** (sponsored Bradbury, Brenneman, Dukes, Representatives Hanlon, Hanneman, Rijken, Schroeder, Whitty) Requires the State Fish and Wildlife Commission to provide a system for accepting voluntary contributions at the time of sale of a salmon-steelhead tag to provide funds for salmon and trout enhancement projects.
- SB 508** (sponsored by Senator Bradbury, Representative Roberts— at the request of Edward Ostrolencke) Modifies the definition of a disabled person for the purpose of obtaining a special angling license and authorizes the issuance of a special hunting license for disabled persons.
- SB 527** (sponsored by Senators Timms, Brockman, Grensky, Kennemer, Kintigh, Otto, Phillips, Representatives Agrons, Baum, Hanneman, D.E. Jones, Nelson, Norris, Parkinson, Schroeder, Whitty, Young) Deletes poundage fee for carp taken for commercial purposes.
- SB 539** (sponsored by Senators Kintigh, Brenneman, Brockman, Bunn, Grensky, Hannon, Houck, Kennemer, Representatives Clarno, Hanneman, Schroeder, Shiprack— at the request of the Oregon Small Woodlands Association) SB 539 prohibits the interpretation or implementation of statutes and land use goals in a way that would deprive a landowner of all reasonable economic use without compensation. The bill also establishes procedures for civil suits to determine if a landowner has been deprived of use without compensation. As a practical matter, this "reasonable use" standard is identical to the U.S. Constitutional standard for "takings" of private property by a government entity without just compensation provided for under the 5th amendment. It is worth noting this standard always begs the question of what constitutes "reasonable economic use". For instance, one Florida court narrowly applied the federal "takings" test to the owner of submerged property wanting to fill his property for developmental purposes. That court ruled that since the owner could conceivably use the property as a glass bottom boat viewing area the landowner's takings challenge was denied. The moral of the story is that even though this bill sounds good, it does not appear to provide landowners with any more protection than they already enjoy under the 5th amendment.

HOUSE

- House Joint Memorial 1** (sponsored Dwyer, Baum, Burton, Calhoon, Calouri, Dominy, Edmunson, Ford, Gershon, Mannix, McTeague, Nelson, Rijken, Sowa, Stein, Vanleeuwen, Young, Cease, Dix; Senators Bradbury, Bunn, Fawbush, L.Hill, Jolin, Kerans, Springer, Kennemer, Yih) This proposal memorializes the U.S. Congress to authorize states to regulate their own timber exports.
- House Joint Resolution 6** (sponsored by Markham, Dwyer, Gershon, Hanneman, Hosticka, Hugo, D. Jones, D.E. Jones, Kotulski, Parkinson, Repine) This resolution proposes to amend the Oregon Constitution, upon voter approval, to prohibit the sale of export timber from state lands unless such timber is processed in Oregon.
- HB 2452** (sponsored by Representatives Dwyer, Calhoon, Dix, Dominy, Edmunson, Gershon, Mannix, McTeague, Nelson, Rijken, Sowa, Stein, Young, Senators Bradbury, Fawbush, L. Hill, Jolin, Kerans, Springer) HB 2452 prohibits exporters of timber in log form from bidding for or purchasing forest products from lands managed by the State Forester. Subjects violations to racketeering statutes. HB 2452 would become effective on the date that federal legislation authorizes states to regulate log exports.
- HB 2477** (sponsored by the Committee on Agriculture, Forestry and Natural Resources, at the request of the State Forester) This measure revises the authorization procedure for national forest land acquisitions and exchanges. Places final approval required under the Weeks Law with affected counties. The bill also requires copies be sent to the State Forester.
- HB 2483** (filed at the request of the DEQ) This bill would establish priorities for the management of hazardous waste and requires Oregon generators of Hazardous waste to develop and implement waste minimization programs. HB 2483 also directs the Department of Environmental Quality to provide advisory, technical and planning assistance to generators of hazardous waste.

See "Introducing" continued on Page Seven

"Introducing" continued from Page Six

- HB 2484** (sponsored by Representative Shprack, Senator Kintigh (at the request of the Western Display Fireworks, Ltd.) HB 2484 would allow the storage of fireworks in exclusive farm use zones as a conditional use.

- HB 2490** (sponsored by Representative Cease) This bill prohibits a city or a county from imposing, collecting or apportioning a fee, excise, surcharge or tax relating to solid waste generated within the boundaries of metropolitan service district. The bill also requires an authorized state agency which does so to specify how a metropolitan service district is to distribute such proceeds and limits the use of such moneys.

- HB 2507** (sponsored by Representative Kotulski, at the request of the Bull Run Association) HB 2507 requires the Health Division to identify and protect the municipal watersheds of the state. The proposal allows the Health Division to prohibit or restrict activities in municipal watershed and requires the Division to post restricted areas, establish criteria for requiring filtration of public waters supplies and establishes a time period for compliance. In addition, the bill allows citizen suits to protect municipal watershed, confers jurisdiction to circuit court in county where violation occurred, and prescribes a penalty for a violation.

- HB 2530** (sponsored by Representatives Peterson, Agrons, Bauman, Calhoon, Hosticka, Johnson, Repine, Rijken, Vanleeuwen and Senator Hannon) HB 2530 includes land lying idle while a farmer recovers from illness in description of farm use and requires the Department of Revenue to adopt rules.

- HB 2585** (sponsored by the Intergovernmental Affairs— at the request of the Oregon State Tennants Association, Mobile Home Owners Association) This measure expands the procedures for maintenance of mobile home parks.

- HB 2586** (sponsored by Representative Cease) This bill would establish a policy for the use and protection of wetlands and requires the DSL to study the wetlands issues and report findings of the study. *It is important to note that this wetlands bill should NOT be confused with a the DSL's wetlands bill which is expected to be filed soon. The DSL bill would eclipse Representative Cease's bill.*

- HB 2589** (sponsored by Representative Bauman) HB 2589 declares that the reduction of the homelessness should be a state-wide goal and would require the Adult and Family Services Division to develop model projects. The bill also appropriates moneys from thye General Fund to the Adult and Family Services Division for biennial expenses.

- HB 2600** (sponsored by Representative Roberts— at the request of Frank McCool) HB 2600 calls for the modification of the definition of a disabled person for the purposes of a special hunting license for disabled persons.

Salmon Users to Convene

Discussion of pre-seasons options for Oregon's ocean troll and recreational salmon fisheries will take place on March 1, 1989 hosted by OCZMA and the Oregon Department of Fish and Wildlife.

Areas to be covered include: a review of the 1988 season, Klamath Management Zone, and the negotiated south of Falcon coho allocation plan; 1989 abundance estimates for coho and chinook; and, 1989 management strategies, sport and troll options and the Oregon position.

The meeting will begin at 8:30 a.m. at the Hatfield Marine Science Center in Newport. For further information, contact OCZMA (265-8918).

CORRECTION:

This following information was erroneously listed in previous issues of *Coastal Notes*:

Rep. Hedy Rijken,
P.O. Box 576
 Newport, OR 97365

Salem telephone number: (503) 378-8040
 Additional Legislative Assistant: James Jones
