



Oregon

COASTAL NOTES

February 17, 1989

SB 41-2: The Legislature Takes a Second Look at Fisheries Enhancement...by Onno Husing, Legislative Fellow

This past week the Oregon Legislature produced its own version of SB 41, a bill which would assess sport and commercial salmon users for a program aimed at restoring and enhancing the state's salmonid fisheries.

The old bill— introduced by the Oregon Department of Fish and Wildlife— would have raised money for hatchery improvements and habitat enhancement exclusively from increased license fees and poundage surcharges. The new fisheries enhancement package, SB 41-2, still proposes to raise license fees and poundage assessments but would lower the proposed increases by 25% across the board.

To make up the shortfall the lowering of fee increases would create, SB 41-2 would boost the amount of money anticipated to come from lottery dollars— which was previously only 250,000 dollars— raising that figure up to 2,250,000 dollars. If successful, SB 41-2 would enhance the enhancement bill a million dollars above the original funding level sought.

Another major feature of the new SB 41-2 is the call for the establishment of a "Restoration and Enhancement Board". This board would consult with the ODFW concerning how and where the money gathered would be spent. Under this proposal, (in part a reaction to Senator Bradbury's concerns voiced at an earlier hearing that under the old bill there was little control or direction over

how monies would be spent) the ODFW could not spend any fisheries enhancement monies without the approval of the Restoration and Enhancement Board. At present, SB 41-2 grants the Governor the authority to appoint the board. However, based on early reaction to the proposal the issue of appointment appears unresolved.

In addition, SB 41-2 directs the Board to "encourage projects to be implemented by the salmon and trout enhancement program and nonprofit organizations engaged in approved restoration and enhancement efforts", and, "approve projects so as to match equitably the anticipated harvest benefits of the project with the source of funds".

These provisions go a long way toward bringing together the disparate elements of the recreational and commercial fishing industries so that a consensus on such a bill can be reached. Witnesses of the earlier and protracted "fish wars" in the state and the Northwest would truly marvel at the emerging unity this new package has encouraged. If successful, then this measure would do more than enhance fisheries— it could very well promote more cooperation among people.

Another work session on SB 41-2 is scheduled on February 28 in the Senate Committee on Agriculture and Natural Resources. Senators Bradbury and Brenneman are members of the Committee.

CORRECTION

OCZMA meets in Salem on March 9-10, 1989

You would think that with all the meetings, bills and hearings taking place or scheduled, your own Associations's meeting would be crystal-clear.

Not so! Last week I mistakenly listed OCZMA's March meeting for the 2nd and 3rd. The correct dates are the 9-10. Details of the meeting will be in next week's edition of *Coastal Notes*. — Jay L. Rasmussen, Executive Director, OCZMA

Bogging Down in Oregon? The Twilight Zone of Wetlands Management...by Onno Husing, Legislative Fellow

This article is the second in a series of articles devoted to wetlands management in Oregon. Last week's piece concluded that the sheer number of different federal agencies and statutes dealing with wetlands has promoted a system often criticized for its capricious process and uncertain results. To illustrate how this phenomenon manifests itself at the state and local level, we will briefly explore the Botts Marsh case.

Botts Marsh is located in the Nehalem estuary on the north side of the City of Wheeler. The project's applicant proposed to build a marina-hotel complex providing space for commercial fishing boats, sport fishing boats, pleasure boats and some year-round moorage space. In association with these facilities, the applicant anticipates building a boat storage parking area, a gazebo, an R-V park, a parking lot, a picnic area and a camping area. In addition to the marina, other pile-supported structures would include a restaurant, public dock and a commercial fishery facility.

To achieve their goal, the developers propose to dredge approximately 270,000 cubic yards of material from Botts Marsh thereby creating a channel depth of 14 feet. To control erosion, the project would entail using 13,000 yards of rock riprap. The length of the proposed marina would be 2,660 linear feet of river frontage running north to south. As a consequence of this development, an estimated 23.1 acres of salt water marsh would be altered — the remnants of a defunct log pond.

In order to mitigate the impact of the project, the applicant proposed to convert a nearby fresh water wetland of comparable dimensions into a saltwater marsh.

The applicant was successful in gaining approval of the project at the local level, through a rigorous "exceptions" process for Goal 16, Estuarine Resources. In addition, LCDC reacted positively to the proposal by acknowledging Tillamook County's comprehensive plan relating to the marina development. Litigation followed these actions and in early 1987, the Oregon Supreme Court gave its blessing to a lower court's decision backing LCDC's actions on the project.

Common sense would dictate that once an applicant got by the county planners, LCDC, the Oregon Court of Appeals and then finally the Oregon Supreme Court— they would be in business. This, however, was not the case due to the Federal 404 process (see last week's issue of *Coastal Notes*) which ultimately controls state action on wetlands.

During the period of time the Botts Marsh case was working its way through Oregon's legal and regulatory system the Corps had already advised the applicant they could not support the project unless the project was "substantially revised". Oregon's Division of State Lands (DSL) also expressed its reservations over the proposed development in Botts Marsh. For the DSL there are six "critical issues" facing development in an estuary stemming from a 404 review: (1) the public need purpose of the project, (2) the

Land Use Legislative Issues...by Paul Benson, OCZMA

Action on Secondary Lands Imminent

Final action on the Goal 3, Goal 4 and Secondary Lands proposals is due to be taken by the Land Conservation and Development Commission on February 22 at its meeting in Portland. Although not yet a legislative issue, it was reported by the Association of Oregon Counties (AOC) in its January 27 legislative report that legislators concerned about the heavy opposition to the proposal are considering a bill to direct LCDC to address only secondary lands and prohibit changes in Goals 3 and 4. The bill would essentially provide for the program to be optional for counties and would clarify the intent of the 1985 and 1987 legislation which directed LCDC to address secondary lands.

AOC has also indicated that it may file a lawsuit against LCDC if it adopts the program as now proposed with only a limited number of counties included on a mandatory basis. The suit would argue that such rules did not constitute a "statewide" program under the goals and was therefore discriminatory and invalid. As an additional step, AOC is compiling data from counties on projected costs of administration of the proposed changes, as a basis for legislators to request a change in LCDC's budget to cover such costs.

Although the final draft of the proposals has not yet come out through DLCD's normal distribu-

"Land Use" from Page Two

tion channels, it is likely that it will be quite close to the draft that was prepared by the "Rural" Lands Working Group and distributed under the date of January 9, 1989.

In commenting on the proposals, Vic Affolter, Tillamook County Planning Director, was quoted in the Tillamook Headlight-Herald stating, "These new zones provide very little, if any, benefit in our county; they are very costly to develop and apply; and they would renew uncertainty about how land could be used. I believe that we are much better off if we stick with our current program, concentrating our limited resources on trying to make this program work as well as possible." The program would not be mandatory in Tillamook County under the proposal.

It is interesting to note that the December 8th memo from Jim Ross, former DLCDC Director, which summarized the first round of LCDC hearings statewide, also presented Department recommendations for a strictly optional program (except for changes in Goal 4 needed because of the Lane County Supreme Court decision.) After both Ross and former LCDC chairman Stan Long left in mid-December, a new memo and draft proposal was issued by DLCDC on December 30 which returned the probable mandatory requirements under Goal 3 for ten counties. A variety of other restrictions were reintroduced into the proposals under DLCDC's December 30th draft.

The January 9th working group draft established three categories to determine whether county coverage under revised Goal 3 requirements would be mandatory or optional. These were: (1) Mandatory, based on adverse performance review of existing land use decisions within EFU zones; (2) Mandatory, based on adoption of secondary lands program linked to

performance review of land use decisions within EFU zones; (3) Optional, secondary lands designation permitted with existing administration of Goal 3 lands considered satisfactory or of no danger to Goal 3 objectives.

At its November 1988 meeting in Newport, OCZMA unanimously voted a recommendation to LCDC that the proposals currently before it be tabled and that efforts be continued to develop a proposal that can be mutually acceptable to local and state government, interest groups and private property owners. Such a consensus has not yet been reached.

Three More Bills

HB 2484, filed by two legislators at the request of Western Display Fireworks Ltd., would allow storage of fireworks in EFU zones as a conditional use.

Although a required bill, the mandatory language lists "storage of fireworks" next after "destination resorts," we would hope that in any particular location, a destination resort and a fireworks storage bunker would not have to be next door neighbors. What can you really say about a bill like this: "plenty of fireworks already regarding EFU zones?"

HB 2507, filed by one legislator at the request of the Bull Run Coalition, would require the State Health Division to identify and protect municipal watersheds of the State.

In the bill, "watershed" is defined as "the entire land area drained by a stream or system of connected streams, such that all stream flow originating in the area is discharged through a single outlet from which drinking water is supplied." The bill would give the Health Division

See "Land Use" Page Five

"Wetlands" from Page Two

extent of dredging and filling in a wetland, (3) whether there exists practicable on-site or off-site alternatives, (4) whether the project is "water-dependent", (5) whether any endangered species are found at the site, and (6) mitigation measures.

By the time the project was denied by the DSL, Botts Marsh only passed one of these tests—the public need test and that only because of considerable work by state agencies, the Governor's office and OCZMA.

Given this regulatory context, for Botts Marsh and for other projects considered by DSL, the central challenge confronting the agency is to identify those elements of a project that are: "permissible" by the State (which means permissible according to the Corps' 404 program and the EPA's 401 program), economically feasible, minimizes impacts, and that is acceptable to the owner.

Again, the Botts Marsh case typifies the regulatory difficulty when it comes to development in estuaries.

In addition to those problems, a new set of problems are created for individuals striving to develop in freshwater wetlands. Principal among these issues are the elementary questions of what constitutes a wetland and how will an applicant know if their property is classified as a wetland. With respect to estuaries, this problem of identification is uncontroversial because it is usually apparent whether or not a piece of property borders an estuary. However, with a freshwater wetland—for instance, those wetlands behind the dike—the issue of whether or not a wetland exists is far from clear. For

See "Wetlands" Page Four

And Introducing... by Onno Husing, Legislative Fellow

The Following Bills Were Introduced Before the Oregon Legislature

•**SB 567** (sponsored by Senators Houck, Brenneman, Brockman, Grensky, McCoy, Timms, and Representative Schroeder) permits suspension or revocation of a fishing license or permit if the owner discharges wastes into the waters of the state.

•**SB 576** (sponsored by the Committee on Agriculture and Natural Resources— at the request of the Solar Energy Association of Oregon) requires the Department of Energy to develop a strategy to reduce emissions in the state of gases that cause global warming and sets limits of reduction.

•**Senate Joint Resolution 14** (sponsored by Senators Houck, Bradbury, Brenneman, Brockman, Dukes, Grensky, McCoy, Representatives Hanneman, Schroeder, and Senator Timms) directs law enforcement agencies to vigorously enforce statutes prohibiting discharge of plastic debris into territorial waters of the state. The bill also requires the Superintendent of State Police to report results of enforcement efforts to the Sixty-Sixth Legislative Assembly.

•**HB 2269** (filed at the request of the Joint Interim Committee on Judiciary for the Office of State Court Administrator) makes certain jurisdictional procedures changes in land use proceedings. HB 2269 eliminates redundant procedures and limits the distribution of copies of petition of appeal to adverse parties in proceedings before LUBA.

•**HB 2578** (sponsored by Representatives Kotulski, Burton, Calhoon, Cease, Dix, Dominy, Dwyer, McTeague, Peterson, Roberts, Shiprack, Sowa, Wehage; Senators Fawbush, L. Hill, Kerans, Otto, Roberts— at the request of the Oregon

State Tenants Association, Earl Whetzell, President) requires mobile home landlords to give a reason for rent increases and requires a refund of rent increase if a mobile home park sale occurs within six months.

•**HB 2579** (sponsored by Representatives Kotulski, Calhoon, McTeague, Sowa, Senators L. Hill, Roberts— at the request of the Oregon State Tenants Association, Earl Whetzell, President) would remove local rent control prohibition with respect to mobile home parks.

•**HB 2676** (sponsored by the Committee on Trade and Economic Development at the request of the Oregon Public Ports Association) allows a port to receive a loan for a port development project when a port has no more than \$1.5 million, rather than \$750,000, in outstanding loans from the Oregon Port Revolving Fund. In addition, the bill allows EDC to establish a rate of interest for a loan payment after taking specified criteria into consideration and deletes the current rate of interest for such a repayment.

•**HB 2697** (sponsored by the Committee on Intergovernmental Affairs— at the request of the Special Districts Association of Oregon) excludes domestic water supply districts and sanitary districts from a provision that provides for automatic withdrawal of territory from districts on the date of annexation of that territory to the city.

•**HB 2604** (sponsored by Representatives Kotulski, Calhoon, Dix, Dominy, Ford, Wehage, Young) would create an office of Mobile Home Park Ombudsman and establishes that offices' duties and powers.

•**HB 2618** (sponsored by Representa-

tive Roberts— at the request of Ron McCarty) imposes a severance tax on harvest of timber from publicly owned lands. Distributes revenues from the tax to the Common School Fund.

•**HB 2619** (sponsored by Representative Roberts— at the request of Ron McCarty) apportions federal forest reserve receipts 75% to schools and 25% to roads for fiscal years beginning on or after July 1, 1990.

See "Introducing" Page Five

"Wetlands" from Page Three

the coast this problem is particularly nettlesome because a substantial number of coastal farms comprise or include acreage that was formerly a freshwater wetland or an estuary. The trickiest issue arises when a dike is breached (through a storm or neglect or on purpose) and a parcel of previously improved farmland quickly re-assumes the characteristics of a fresh or a salt water wetland.

Those responsible for wetlands management are acutely aware of these problems and a great deal of the recent efforts at reform are aimed at establishing the means to compile an inventory of the state's wetlands. Such an inventory would take a lot of the guesswork out of the current system which currently runs essentially on an ad hoc basis.

Next week we will explore how such an inventory would operate and examine other changes proposed for wetlands management.

"Land Use" from Page Three

jurisdiction over watershed areas with the ability to prohibit or restrict access to such areas for a wide variety of recreational or resource removal purposes. The Division would also have additional powers to require filtration treatment of drinking water supplied from such surface water sources. Provisions is also made for persons to be able to institute civil suits against violators of the rules and requirements established by rule by the Health Division. The bill contains a special section which states, "Any person whose drinking water supply may be adversely affected by an activity in the Bull Run or Little Sandy River watershed may bring an action..... to prevent the activity within the watershed."

While the bill appears to be generated from a particular interest group, its potentially broad scope and coverage needs to be carefully evaluated. There is no requirement for coordination with an acknowledged county comprehensive plan, yet implications for land use planning in specific areas and jurisdictions is obvious.

SB 539, filed by 12 legislators at the request of the Oregon Small Woodlands Association, would prohibit interpretation or implementation of statutes and land use goals in a way that deprives a landowner of all reasonable economic use of any portion of the landowner's property without compensation. It would also establish procedures for civil suits to determine if the landowner was deprived of such use without compensation.

As pointed out by Onno Husing, in his listing of this bill in last week's issue, the bill would, in large degree, duplicate the constitutional guarantee against the taking of property without just compensation now provided under the Fifth Amendment to the U.S.

Constitution. However, from the property owner's standpoint, there may be benefit in establishing a legal mechanism at the State level to pursue a "taking" allegation. Further comment on this bill and the "taking" issue will be included in a future issue.

Coming up

A look at economic development bills and bills involving ocean resources management; also, land use bills still to come.

"Introducing" from Page Four

•**HB 2698** (sponsored by the Committee on Intergovernmental Affairs— at the request of Lane County) allows the county to enter into long term leases affecting county land formerly designated as a forest, park or recreational area.

•**HB 2682** (pre-session filed at the request of the Oregon Farm Bureau Federation) revises the requirement that land zoned for exclusive farm use be used primarily for the purpose of obtaining a profit in money. This measure includes certain activities related to raising horses and control of weeds in the description of "current employment" of land for farm use.

•**HB 2639** (sponsored by Representative Gilmour) allows certain room and board arrangements in exclusive farm use zones.

•**HB 2712** (filed at the request of the Governor's Task Force on Corrections Planning) requires LCDC to implement a long term land use siting process recommendations of the Governor's Task Force on Corrections Planning and requires the Commission to report on plans to meet the implementation requirement by September 30, 1990.

•**HB 2713** (filed at the request of the Governor's Task Force on Corrections Planning). establishes a corrections siting procedure to be in effect until local governments provide for siting of correctional facilities in acknowledged comprehensive land use plans.

•**HB 2714** (filed at the request of Jim Hill, Project Director, Clatsop Economic Development Commission; Fisheries Project, Astoria) removes areas adjacent to the mouth of Gnat Creek from the list of areas closed to commercial fishing.

•**HB 2716** (sponsored by Representatives Hanlon, Hanneman, McTeague, Shiprack, Whitty; Senators Bradbury, Breneman, Dukes) would prohibit the State Fish and Wildlife Commission from delegating to the State Fish and Wildlife Director or any employees of the State Department of Fish and Wildlife the authority to prescribe seasons for angling or commercial fishing.

•**HB 2717** (sponsored by Representative Hugo— at the request of the Save Opal Creek Council) designates Opal Lake and Opal Creek as scenic waterways.

•**HB 2735** (sponsored by Representative McTeague) revises duties of private salmon hatchery permittees.

