

OREGON COASTAL Notes

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Endangered species act changes prompt clash in House

In an encounter that could presage this Friday's Northwest Forest Summit Conference, antagonists in the battle over the future of Oregon's forests squared off last week on opposing sides of a slate of proposals before the House Agriculture and Forestry Subcommittee that would modify provisions of Oregon's endangered species act.

At a hearing Friday whose tone alternated between decorous respect and icy politeness — with occasional spates of ill-concealed hostility — representatives from timber organizations, fishing advocacy groups, scientific associations and the environmental community sparred with each other and with committee members over six House bills and two House joint memorials that proposed actions ranging from a thorough revamping of the Fish and Wildlife Commission's listing process for all threatened and endangered species to the de-listing of the northern spotted owl. Committee chair Rep. Liz VanLeeuwen (R-Halsey) said the bills would likely be combined into one measure, possibly House Bill 2927, after further hearings and work sessions.

Timber advocates Mike Miller of Oregon Associated Loggers and Greg Miller of the Oregon Forest Industries Council told the committee that they requested the introduction of HB 2927 after learning that the federal recovery plan for the northern spotted owl assumed that harvest restrictions on 7.5 million acres of federal forest land would be sufficient to ward off the owl's extinction, without the need for corresponding restrictions on state forest land.

"The thought that occurred to us was that if it took 7.5 million acres of federal lands to recover this species, would it not be a bit impractical to assume that ... state forest lands could play any kind of realistic role in the recovery of such a wide ranging species as the spotted owl?" Mike Miller said. "If we locked up all the state's habitat that even came close to being owl habitat, it would likely have little

effect [on owl recovery]."

Current Oregon law which lists the spotted owl on its own register of threatened species has substantially reduced harvest activities on state timber lands which supply half the revenue to the Common School Fund, Greg Miller added, a problem the state could avoid by adopting the federal recovery plan as its own. HB 2927 would limit the state to adopting plans that do not go beyond the mandates of federal programs, Greg Miller said.

The bill would also set a two-year deadline for the Fish and Wildlife Commission to establish recovery programs for threatened and endangered species and would subject the decision to list a species to review every five years to determine the need for reclassification or de-listing, Greg Miller said. If the commission fails to come up with a recovery plan within two years, the commission can no longer treat the species as threatened or en-

dangered and must begin rulemaking to de-list it, he added. Similarly, if the commission does not complete a reclassification review within one year, the species is automatically de-listed, he said.

Other bill provisions would require the commission to make listing decisions that consider only the effects of human activities, as distinct from disease or predation, on a species' population decline and that minimize economic impacts on people and ecological impacts on native wildlife populations. Where a species has sufficient numbers outside Oregon to prevent its extinction, recovery actions within the state may consist of voluntary agreements only, and when the Department of Fish and Wildlife determines that an action will harm a species it may merely advise other state agencies of that fact rather than require specific actions, the bill says.

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Revamped bill would form voluntary councils to coordinate watershed management efforts

A compromise measure to set up a voluntary program for local watershed management under the general direction of the Strategic Water Management Group (SWMG) will go to the full House Natural Resources Committee this week after unanimous approval in the House Water Subcommittee Thursday.

House Bill 2215, substantially revised after extensive work group deliberations, would authorize SWMG to cooperate with the Governor's Watershed Enhancement Board (GWEB) to "focus state resources on the achievement of sustainable watershed health" using pilot projects and in accordance with a "partnership process" outlined in a SWMG report entitled *Proposal: A Watershed Management Strategy for Oregon*. The bill would also encourage local governments to form watershed councils using the same partnership pro-

cess and would authorize SWMG to work cooperatively with any councils that do form.

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The compromise shrank the bill from 14 sections of detailed statutory prose to a single page consisting mainly of policy directives. In the process, however, the work group eliminated a number of nettlesome issues in the original bill, including a requirement that SWMG approve the composition of the local councils to ensure a balanced representation from local government entities, private landowners, local industries, Indian tribes, public interest groups and the academic and scientific community.

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Environmentalists condemn endangered species act shifts

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Mike Miller noted that the bill would still permit the commission to list and adopt a recovery plan for species not listed by other states or by federal agencies.

"We firmly believe we should do all that is practical to save and recover any species that is native to Oregon and that society views as a desirable part of the human experience," he said, adding that despite the changes HB 2927 brings to the process it "does not in any way, shape or form attempt to weaken the current state law on [endangered species protection]."

Shooting the messenger

But Oregon Natural Resources Council Conservation Director Andy Kerr, in testimony that served as a contentious centerpiece to the hearing, emphatically disagreed, calling the proposals "remarkably short-sighted, undoubtedly ineffective and incredibly stupid." Rather than choosing to deal with the causes of population decline among forest species, Kerr said, the legislature would prefer, with these bills, to "shoot the messenger" and pander to timber communities seeking a long-term solution to economic dislocation.

"The timber industry's supply hasn't run up against an owl, it has run up against the Pacific Ocean," Kerr said. "The fact is, there are virtually no more ancient forests left to clear cut."

Kerr's testimony, which responded to questions ranging over much of the familiar landscape of the Northwest forest debate, raised the ire of some committee members, including Rep. VanLeeuwen, who said she was "insulted" by his characterization of the aims of the measures and from Rep. Sam Dominy (D-Cottage Grove), who asked Kerr whether he could truthfully say that the environmental community has not used forest issues for its own political gain.

Rep. Ray Baum (R-LaGrande) told Kerr that frustration in timber communities stems in part from the perception that there can be no certainty in timber supplies because environmentalists never seem satisfied with their gains. Kerr replied that the environmental community has not changed its aims, but has taken advantage of new scientific knowledge to refine how it measures progress toward those aims.

"There is a frustration out there that the environmentalists keep moving the goalposts," Kerr said. "I understand this frustration, but we haven't moved the goalposts — we've

always wanted functioning ecosystems that can sustain human activities."

Fishing perspective

One example of a human activity that depends on a functioning ecosystem is commercial fishing, the "number two forest-dependent industry" in the state, Pacific Coast Federation of Fishermen's Associations (PCFFA) Regional Director Glen Spain told the committee. The state must ultimately realize that its environment is the only real source of its economic wealth, Spain said, and take steps to protect that asset. As things stand, Spain said, "we're dealing with an ecosystem unraveling right before our eyes."

For that reason the PCFFA opposes any alteration of existing protections for the forest ecosystem and would prefer to see state endangered species law strengthened, a move that would protect fishing jobs in the long run,

Spain said.

"If you tamper with these acts you can kiss those jobs good-bye," Spain said. "You can kiss this industry good-bye."

But Rep. Dominy questioned whether commercial harvesters would willingly pay increased prices for utility service, paper products and other forest commodities and Rep. Dennis Luke (R-Bend) asked whether commercial harvesters would forego harvesting salmon for a year to help with their recovery.

Spain noted that commercial harvesters have already taken "a substantial hit in this state" and may face another zero-catch season this year because of salmon declines. The PCFFA has done what it can to volunteer needed harvest cutbacks, he said, but most of the activity that affects salmon habitat takes place on land.

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House Endangered Species Bills

HB 2924 would, notwithstanding any contrary provisions of law, immediately remove the northern spotted owl from Oregon's threatened species list and prohibit its re-listing until the Fish and Wildlife Commission undertakes another rulemaking procedure

HB 2927 would make a number of changes to Oregon threatened and endangered species law. These include: changing the definition of threatened and endangered species to encompass only native wildlife; decoupling state listings from federal listings and allowing the commission to refuse to list a species if it is "secure" outside the state or if it is not of cultural, scientific or commercial interest within the state; setting a two-year deadline for the Fish and Wildlife Commission to adopt recovery programs for listed species or risk the species' immediate de-listing; requiring a five-year review of the program's progress and setting a one-year deadline to complete that review or risk the species' immediate de-listing; establishing a permit system for incidental take of listed species; prohibiting other than cooperative or voluntary recovery programs for species secure outside the state; and requiring listing decisions to account only for human causes for a species' population decline and to consider the social and economic consequences of listing

HB 2930 would require the Fish and Wildlife Commission to perform its listing duties in a manner it determines will have the least impact on people, industries and communities and to take action only after it has determined that the need for listing significantly outweighs the economic consequences. The measure would also require legislative approval of any listings via joint resolution

HB 2980 would prohibit any reduction in timber supply as a result of the listing of the northern spotted owl pending the adoption of a federal recovery plan. The bill would also require the Department of Fish and Wildlife to conduct an inventory of the spotted owl population on non-federal land

HB 2985 would require the Fish and Wildlife Commission to determine the economic and social impacts of listing a species as threatened or endangered and balance this finding against findings that argue for listing

HB 3274 is identical with HB 2930

HJM 9 calls upon the U.S. Fish and Wildlife Service to make no further listings of threatened or endangered species without giving consideration to the human and fiscal impacts of the listing at least equal to that given other factors

HJM 10 calls upon the U.S. Fish and Wildlife Service to remove the northern spotted owl from the federal list of threatened species

Local councils may take charge of watershed planning

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Opponents of the bill as originally drafted also objected to the mandatory character of some of the provisions governing local watershed council responsibilities and invoked fears of an "LCDC-style" oversight commission that would use state regulation to restrict land use in areas it identified as critical watersheds.

The new bill places the burden for watershed management on the local councils and casts state agencies in a backup role, responding to local council requests for assistance on the basis of "whether the requesting organization reflects the interests of the affected watershed and the potential to protect and enhance the quality of the watershed in question." But, like the original measure, the new language says nothing about funding management efforts, an issue that had concerned local government witnesses in earlier hearings.

In final hearings during work session Thursday, however, none of the witnesses mentioned funding as they each came before the House Water Subcommittee to voice support

for the compromise. Committee members, for their part, directed their questions to the composition of the councils, asking who would have ultimate authority to decide who should sit on them.

Water Resources Department representa-

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tive Becky Kreag said the new proposals suggested that the formation and governance of the councils should follow the recommendations for membership distribution outlined in the *Watershed Management Strategy* report, but that local governments would be free to decide the composition of the councils themselves, with no oversight beyond an informal SWMG review. Department director Martha Pagel added that local governments would have to negotiate among themselves for representation on the councils when the boundaries of the watershed cross county or municipal lines.

House Water Subcommittee chair Rep. Chuck Norris (R-Hermiston), who had pushed for consensus from work group participants, told committee members he was pleased with the outcome.

"I personally thought this was a very important bill," Rep. Norris said. "I know there's been hours and hours devoted to this by people on the work group."

Although most of the work group participants who testified supported the compromise version, with varying degrees of enthusiasm, WaterWatch representative Doug Myers broke ranks with fellow environmental representatives from the Sierra Club and the Pacific Rivers Council to tell the committee that he could not. The new version contains no statewide standards for watershed management and relies on vague promises of cooperation among state agencies and local councils, Myers said. He added that WaterWatch would still prefer the original draft of the measure or additions to the current draft that would set stricter standards.

Private property lobby says measures need more teeth

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"The piper has to be paid whether it comes out of your pocket, my pocket or society's pocket," Spain said. "If saving these species means keeping jobs, our guys are willing to pay that price."

Stiffer controls needed

Private landowners, however, would rather not pay the price of species protection, according to Oregonians in Action Executive Director Larry George, who said he "applauded" the intent of the legislation but thought it did not go far enough to protect private interests. The restrictions proposed for the Fish and Wildlife Commission should apply equally to other state agencies, such as the Land Conservation and Development Commission and the Department of Forestry, which have regulatory power to restrict land use, George said. Furthermore, the state should pay compensation to or obtain a conservation easement from landowners forced to abide by regulations devised to protect listed species, George said.

"We find [the bills'] principles laudable," George said. "Our objections are predicated on the fact that these bills don't further those principles in any concrete fashion."

The legislation also drew qualified support from Dave Schmidt, a Linn County commis-

sioner and the vice-chair of the Council of Forest Trust Land Counties, who said he supported improvements to the process of protecting native wildlife species, but had concerns about HB 2927's two-year recovery plan deadline, which could force the Fish and Wildlife Commission to rush an ill-conceived recovery plan to completion. The Council took no position on HB 2980's mandate that no reductions in timber supply result from the listing of the spotted owl, Schmidt said.

Home rule

In a point echoed in testimony by environmental groups, Wildlife Society representative and conservation biologist David Marshall said weakening state endangered species protection could actually slow down the recovery of listed species and invite tighter federal control over land management. Section 6 of the federal Endangered Species Act provides for cooperative federal-state conservation of endangered species so long as the state has an acceptable conservation regime for such species, Marshall said. If the legislature passes the bills before it the federal government may find Oregon's endangered species protections inadequate, he said, which could force resource managers to deal with more restrictive federal standards rather than a state agency that bet-

ter understands local concerns.

"If you want to have federal control, gut the state act," Marshall said. "If you want a cooperative agreement, keep the state act."

Sierra Club representative Daniel Stotter also stressed the importance of cooperative species protection efforts between federal and state agencies, noting that much of the frustration landowners experience in dealing with government regulation comes from contradictory agency policies.

"There needs to be a greater interface between the feds and the state," Stotter said. "You need to have similar standards so you don't get a green light from the state and a red light from [federal agencies]."

State and federal consistency issues aside, Stotter said, the proposals to amend Oregon endangered species law are flawed because they would "eliminate Oregon's effective management of wildlife" and prevent the state from taking needed preventative measures against species extinctions.

"If we as a state are to maintain healthy salmon runs and migratory birds and other species, we cannot allow species extinction," Stotter said. "In some respects, the protection of threatened and endangered species is the real bottom line."

Fish screen tampering could close water supply gates

A measure that would cancel the water right permit of any person caught tampering with, damaging or destroying a fish screening or fish bypass device located in a water diversion or impoundment project prompted a chorus of disapproval from water user interests at a Senate Water Policy Committee hearing Tuesday.

Water users told committee members that the proposed penalty is too broad, unduly harsh, and might violate constitutional due process rights for water permit holders.

But Senate Majority Leader and bill author Sen. Dick Springer (D-Portland), while acknowledging that the bill might need revision, said the state's existing enforcement and civil penalty provisions are not enough to deter intentional violations of water law that do severe damage to fishery resources.

"Some businesses just see civil penalties as a cost of doing business," Sen. Springer said, citing an incident near Umatilla where, he said, a careless employee propped open a fish screening device just before a downstream smolt migration, killing about 44,000 of the tiny salmon. Given the expense of the state and regional effort to restore salmon runs, he added, the state should ensure that water users do not sabotage its programs, either intentionally or inadvertently.

"This bill is aimed at providing a deterrent I hope will never need to be used," Sen. Springer said. "I feel that this is a wake-up call. I don't know how many more times we can sound it, but we've gone past [needing] band-aids when we're talking about shutting down fisheries. This is the kind of sanction we need to show that we're serious."

Committee members, however, expressed some skepticism, noting that the bill as drafted could penalize an individual or business performing routine maintenance on screening devices. Sen. Wes Cooley (R-Powell Butte) said he agreed with Sen. Springer's intent but that he wanted to see some flexibility in the process.

"I think there are shades of gray many times in this area," Sen. Cooley said. "We need to have some sort of appeals process here."

Committee chair Sen. Bill Dwyer (D-Springfield) told Sen. Springer that his bill could have unintended implications for third parties, including banks, Farmers Home Loan mortgagors and other lenders and lien-holders whose secured interest in their borrowers' lands could plummet in value with the cancellation of a water right permit. Sen. Springer said he thought adequate precedent existed in law for creditors to intervene in cancellation proceedings that would affect their interests.

More important, however, the threat of permit cancellation might force lenders to closely supervise the activities of borrowers, much as they have when dealing with potential releases of hazardous waste, he said.

Sen. Springer's position found favor with Water Watch representative Audrey Simmons, who praised the bill's "succinct" drafting and "teeth." She said she watched the Water Resources Commission "cave in" during a penalty hearing where the people accused of tampering with a screening device pleaded hardship. "There's been a cavalier attitude toward this issue," Simmons said.

Oregon Trout representative Jim Myron said he also supported the bill's concept, but acknowledged under questioning that the bill might need revisions to exclude instances where employees conduct maintenance or clearing operations on the screens. He said the committee should make certain to draft any exclusions it granted carefully so as to not allow genuine instances of tampering.

But the bill drew only lukewarm support from the agencies charged with enforcing existing penalties for fish screen tampering. Water Resources Department representative Bev Hayes said it would give the department an additional tool to use, but that the department would prefer to have the power to restrict a permittee's water use or to seek additional civil penalties, thereby avoiding a "time consuming, costly and possibly unsuccessful contested case process." Hayes said she also anticipates that the bill could prompt additional allegations of tampering, which could increase the amount of money and staff time the department spends on field investigations.

Department of Fish and Wildlife representative Jill Zarnowitz said she supported the bill's intent, but thought it might need amendments to exempt water users cleaning fish screens the department could not tend and to ensure that emergencies, such as floods, would result in no liability to water users. Zarnowitz said she thought her department could benefit far more from clear civil penalty authority than from an ability to cancel a user's water right.

Oregon Water Resources Congress attorney Kip Lombard endorsed the expansion of civil penalty authority, noting that a proposal

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Water Resources gets House committee nod on proposal to negotiate Indian water rights

The House Water Subcommittee Tuesday passed on to the full House Natural Resources Committee a measure that would permit the Water Resources Department to negotiate water right allocations with any federally recognized Indian tribe.

Committee chair Rep. Chuck Norris (R-Hermiston) called the measure, HB 2109, timely and said it would enable the state to avoid the protracted litigation that has often marked water right disputes with tribal governments, such as that involving the Klamath Tribe near the south coast.

The legislation passed over the objections of Water for Life, whose representative called the measure premature and said it does not do enough to prevent one party

from circumventing the negotiation process and resorting to litigation. Because the preparation for negotiations takes at least two years, it would be better to await the outcome of pending litigation to sort out the relevant law, the representative said.

But Water Resources Department Adjudication Section head Reed Marbut told the committee that while the department can begin some prefatory informal negotiations, it needs this legislation to begin formal negotiations with the Confederated Tribes of the Umatilla Reservation, who have expressed interest in the process. The Umatillas would need about two years for their own internal preparations, Marbut

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Groundwater exemptions divide work group members

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to take away a water use permit could potentially infringe on a user's property rights and thereby run afoul of constitutional due process concerns. A civil penalty, by contrast, would have no constitutional problems and could be adjusted to serve as a substantial deterrent to intentional violators, Lombard said.

Lombard also noted that cancelling a water right for an irrigation district or another governmental or quasi-governmental body because of an employee's negligence would penalize innocent users who depend on the district for their water supply.

"I think the remedy is to make the civil penalties stick — to make them substantial," Lombard said. "This would have the same hammer effect and would be much easier to enforce."

Lombard also said he thought the bill should specify that the Department of Fish and Wildlife would have the authority to enforce whatever strictures against tampering the committee decides to adopt, as the Department of Water Resources does not have the necessary expertise in fisheries issues to make a proper determination of what constitutes tampering.

Sen Dwyer said the bill will go to a work group to deal with concerns brought up at the hearing.

In other developments, committee members heard from a work group charged with fashioning a compromise over Senate Bill 90, which would allow the Water Resources Commission to adopt rules to exempt certain groundwater uses that do not withdraw more than 5,000 gallons per day from the need to obtain water right permits and to require such permits from users applying for certain groundwater uses now exempt, if necessary to protect groundwater resources.

In part because of the latter provision, the work group reported back not with consensus, but with four versions of bill language. Work group members then lined up to testify as to which version each preferred, to the apparent annoyance of Sens. Cooley and Dwyer, who chastised the participants for stubbornness.

Committee administrator Lisa Zavala briefed committee members on the four options, noting these differences:

- **Option 1** would permit the commission to exempt by rule any groundwater use that does not exceed 5,000 gallons per day and would permit the commission to issue a limited license, in accordance with statutory law

governing surface water use, for non-exempt groundwater uses, including firefighting, stock watering, road construction and maintenance, aquifer testing, pumping for drainage during construction, and certain other purposes. The commission may also require permits for groundwater uses now exempted from permit requirements where necessary to protect the resource;

- **Option 2** would permit the commission only to issue a limited license for non-exempt uses. It would not permit the commission to either exempt new groundwater uses or require permits for now-exempt uses;

- **Option 3** would permit the commission to exercise all the authority given in option 1 except the ability to require permits for now-exempt uses; and

- **Option 4**, the original bill, would allow the commission to exercise the authority given in option 1 except the ability to grant limited licenses for non-exempt uses.

Oregon Water Resources Congress representative Kip Lombard told the committee he favored option 2, noting that allowing the expansion of exempt uses could add up to a large cumulative impact that would eventually cause an administrative headache and have an impact on those with water right permits.

"We'd prefer that additional exemptions not be granted without some sort of registration process so we can keep track of the uses," Lombard said. "If we continue to expand the exempt categories we simply won't be able to manage it."

Water for Life and the Association of Oregon Realtors (AOR) backed option 2 or 3. AOR representative Jerry Schmidt told the committee that allowing the commission to require water permits for exempted groundwater uses would interfere with local land-use decisions. He cited as an example a situation where a builder might win approval from the Land Conservation and Development Commission to build on a lot, only to have that approval essentially overturned by the Water Resources Commission when it denies a water right.

But Sen. Tricia Smith (D-Salem) pressed Schmidt for a way to regulate withdrawals from already overextended aquifers.

"I'm one of those radicals that thinks that adequate water is necessary for the development of land," Sen. Smith said. "That's not how it works now — your philosophy seems to

be 'let's do it [groundwater withdrawals] until we can't do it any more.'"

Schmidt replied that he might support putting some restrictions on the commission's ability to require licenses, but that he remained opposed to giving the commission unlimited authority.

Water Resources Department Director Martha Pagel told the committee that she preferred the original bill, but could support adding the limited license provisions outlined in option 1 and placing limits on the commission's ability to require permits for exempt uses.

Sen. Dwyer said he would continue to hold off on the bill pending an agreement in the work group on the specific provisions to be included in it.

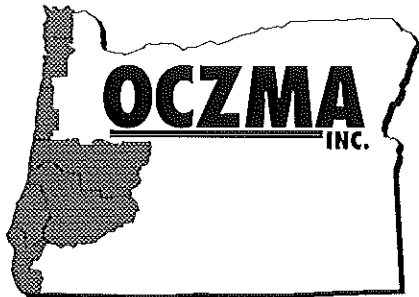
House water panel endorses negotiations to settle water rights

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said, but the department already has the necessary staff and capability.

Marbut also noted that the tribes would retain the right to pull out of negotiations at any time and seek redress through the courts, at their option, no matter what the legislation said. But, he added, the state would benefit from negotiated settlements as much as the tribes do if it means avoiding litigation that would not only cost the state money, but that might lead to an adjudicated settlement giving the tribes senior water rights over existing state and private appropriators. On the other hand, some tribal governments have said they would subordinate water rights they negotiate to existing state law, Marbut said.

Rep. Bill Markham (R-Riddle) asked Marbut if permitting the Water Resources Department to act as an agent for the state in negotiations with tribal governments would set a national precedent. Marbut replied that states commonly assign such responsibilities to administrative agencies, reserving legislative approval only for proposals not covered under existing state water law, such as the decision by the Cheyenne tribe in Wyoming to begin marketing water. The Legislative Assembly would still have to approve any proposal that would change Oregon water law, Marbut said.



The Oregon Coastal Zone Management Association, Inc. (OCZMA) is a voluntary association of coastal counties, cities, ports and soil & water conservation districts established to provide a forum for the resolution of issues of particular concern to the local governments of the coast and the people they represent.

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