

OREGON COASTAL Notes

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Shellfish testing program still in limbo after hearings

Two proposals that seek to establish a stable, fee-based funding source for a shellfish toxin testing program slated for elimination from the Health Division's budget face an uncertain future after representatives from commercial shellfish growers and businesses that rent equipment to recreational harvesters opposed the measures in hearings last week.

The measures, House Bill 2331 and Senate Bill 632, would each impose license fees on recreational harvesters and commercial growers to pay for estimated program costs of \$552,000 per biennium. The House version would charge residents \$5 and non-residents \$10 for an annual license for the recreational harvest of clams, crabs, molluscs and other shellfish, while proposed amendments to the Senate version would charge \$3 and \$6, respectively. Both bills would also impose a fee schedule on commercial shellfish growers, shippers and harvesters, with charges that vary depending on which activity the business engages in and, in proposed amendments to SB 632, on the size of the operation.

HB 2331

Following plaudits for the testing program's importance and effectiveness from Health Division and Department of Fish and Wildlife (ODFW) representatives at a House Water Subcommittee hearing Tuesday, Shirley and Janice Laviolette, owners of a Nehalem Bay marina which rents crabbing equipment to recreational harvesters, objected in sharply worded testimony to the imposition of a recreational harvest fee they said would shut their business down.

The marina owners told the committee that they depended on recreational crabbing to tide them over in the face of steadily declining charters and equipment rentals for fin-fishing. A fee for crabbing, Janice Laviolette said, would hit marina owners with a "double whammy" and counter state efforts to develop a viable tourist industry on the Oregon coast. Regular out-of-state customers have told her

that such a fee would be the "last straw" on top of overburdening user fees and room taxes, she added.

Rather than imposing a fee on an "unsuspecting public" the state should investigate how to cut the cost of administering the testing program, perhaps by eliminating duplicated functions among state agencies with responsibility for shellfish testing or by contracting with private laboratories, Janice Laviolette said. With steep declines in the fishing resource, ODFW could afford to cut unnecessary positions and use the money saved to pay for testing, she added.

"If fishing is going to curtail dramatically, then there shouldn't be a need for so many

employees at the ODFW," Janice Laviolette said. "Don't let this become just another tax spent frivolously to keep government officials employed."

The Laviolette's testimony prompted a rejoinder from Rep. Tim Josi (D-Bay City), who told them that an interim legislative committee had already explored many of the cost-cutting and funding options they proposed and had settled on a license fee as the only practical funding method for the program. If marina owners agreed that the testing program is necessary, Rep. Josi said, they should cooperate in finding ways to fund it.

"Am I in favor of 2331? Probably not," he

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Water Resources says application flood built dam in water right permit stream

A drought-induced jump in the number of residential appropriators eager to lock in rights to their water use, challenges from public interest groups and a recent change in the rules governing the permit process have all contributed to a two-year average delay in issuing water right permits, Water Resources Department officials told House Water Subcommittee members at a Thursday hearing.

Of these causes, the "biggest single factor" in the backlog is the dawning realization, particularly in western Oregon, that not enough water exists to meet everybody's needs, Water Resources representative Reed Marbut said. That realization, driven home by several successive years of drought, has led to a scramble to stake claims on what water remains, Marbut added. "Browned lawns in Portland have done more for our traumas than anything before," he said.

Department Director Martha Pagel told the committee that she has made processing the backlog the department's first priority, shifting some staff and resources and seeking

out volunteers to help evaluate applications. Marbut estimated the number of applications awaiting departmental action at some stage of the permit process at approximately 3,800, 900 of which are applications for instream flow rights from other state agencies. Although the average wait for application processing comes close to two years, he added, that figure includes both highly controversial applications for natural streamflow diversions and requests to withdraw groundwater from isolated aquifers, which attract little attention or opposition.

Marbut noted that a Washington State survey in which Oregon participated found the backlog problem common among western states faced with competing demands for scarce water resources. Water allocation decisions in these states, historically based on the "first-in-time, first-in-right" prior appropriation doctrine, have begun to yield to calls for active government intervention and management, Marbut said.

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Water groups blame change in rules for delay

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In Oregon, litigation over the water right permitting process brought both by public interest groups and water users prompted Water Resources to revamp its guidelines for receiving, evaluating and granting water rights and to specify how public interest groups can participate in the process, Marbut said. The result now, he said, is a more predictable process that should result in fewer delays in application processing from last-minute challenges or court action.

But water user interest group representatives disagreed, citing the rule change itself as one of the principle causes for the backlog. Oregon Water Resources Congress Executive Director Jan Boettcher said the rules permit too long a comment period and require too little evidence from interest groups challenging permit applications. Groups such as WaterWatch, which routinely appeal every permit application with computer-generated form letters, can automatically add two months to the permit process by finding technical flaws in the applications themselves, rather than by addressing substantive issues, Boettcher said. She recommended narrowing the criteria for challenging a permit application on public interest grounds, requiring chal-

lenges to include clear and convincing evidence of injury to the public interest, and creating the rebuttable presumption that applications which comply with the department's water basin program process are in the public interest.

"We think the problem is more serious than the department can [solve] by throwing money and staff time at it," Boettcher said. "We need changes in the process."

Water for Life attorney David Moon said the department's decision to apply its new rules retroactively would unfairly penalize permit applicants who relied on earlier standards when they sought a water right. Where before the department would have routinely granted permits when it found that sufficient streamflow existed to meet demand 50 percent of the time — a "50 percent exceedence standard" — it now requires an 80 percent exceedence standard, Moon said, which means the department will deny many of the applications now pending.

Moon said he agreed with many of Boettcher's suggestions for reforming the department's permit process and would urge the legislature to require the department to drop the 80 percent exceedence standard and to evaluate pending applications according to

the rules in effect at the time of application.

"I would hope the backlog doesn't disappear simply by the Water Resources Department finding that no water is available," Moon said. "But I'm afraid this will happen."

Oregon Groundwater Association representative Steve Schneider added to the list of reform suggestions, calling on the department to require that fees accompany challenges to permit applications and on the legislature to change the composition of the Water Resources Commission to include more scientists and representatives from the regulated community. The fees should cover the costs of processing the challenge documents and dissuade people from protesting permit applications, Schneider said, while a change in the composition of the commission would allow water allocation decisions to be made on the basis of "science and economics instead of politics and emotion."

Schneider said allowing public interest groups to challenge water right permit grants subverts the prior appropriation doctrine, which is based on the assumption that water management agencies will routinely grant permits for beneficial uses and then rely on self-policing by permit holders to ensure the proper allocation of water resources. Where there are conflicts, the doctrine grants the full measure of their rights to senior rights holders, while those who hold water rights with later priority dates simply do without, Schneider said.

But WaterWatch representative Karen Russell told the committee that Oregon water law has required public interest determinations for water right applications since the 1950s and that backlogs in application processing have occurred many times in the state's history. The Water Resources Commission adopted its most recent rule change governing the manner in which the department must conduct such reviews at the recommendation of a committee made up of a broad range of interests, Russell said. The process is fair and the legislature should give the department time to use it to deal with the backlog, Russell said.

Russell also replied to criticism directed at WaterWatch's practice of objecting to water right applications and technical reviews issued by the department, saying that the organization carefully reviews each basin and considers each application before filing objections.

Representatives from resource management agencies oppose proposal to charge for instream right requests

A proposal that would require state agencies applying for instream water rights to pay application fees based on the amount of water they "divert" for instream flows will go back to the House Natural Resources Committee with no recommendation from the House Water Subcommittee after a Tuesday hearing.

Instead, the committee recommended, the House Speaker's Office should re-refer the bill to the House Appropriations committee for consideration because the measure would involve a substantial fiscal impact on state resource management agencies.

Testimony during the hearing was uniformly negative, with the exception of a favorable recommendation from Scott Ashcom, who represented the Oregon Association of Nurserymen and the Oregon Farm Bureau. Ashcom told the committee that the bill would cover the costs of diverting Water Resources Department staff and funding to process agency applications for instream wa-

ter rights, which he estimated at about \$1,000 per application for initial costs and \$200 per application once the department had established a system for efficient processing. The resources diverted to deal with instream right applications take away resources needed to process the backlog of other pending water right applications, Ashcom said.

But representatives from the Department of Fish and Wildlife, the Department of Environmental Quality and the Department of Parks and Recreation told the committee that requiring fees based on the amount of second-foot of water diverted for instream uses would impose a crushing fiscal burden on agency programs.

"The fiscal impacts of this bill would be extreme," Parks Department representative Steven Brutscher said. "The fees this bill would require for instream water right applications just on existing state scenic waterways would exceed \$2 million."

Health Division balks at program transfer to Agriculture

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said. "But I will vote for it ... Ways and Means is looking for general fund money, and if they find it I'd be delighted, but until then [the program] may need some [other] tools."

Tillamook County Commissioner Jerry Dove agreed, telling committee members in testimony as pointed as the Lavolettes' that he resented seeing recreational clammers enjoying for free a resource he supports with his tax dollars, especially since he has paid license fees for hunting and fishing since his teens.

"My feeling is that if you're going to play, you've got to be willing to pay," Dove said. "Why should the taxpayers pay to have someone else play?"

Dove added that imposing a fee would discourage harvesters from wasting shellfish. He said he has seen roadways and beaches strewn with whole, uncooked crab carcasses left by careless recreational harvesters who took more than they could eat. Anytime people have free access to a resource, they will take too much of it, Dove said, whereas putting a price on the resource may make them think about how they use it. Dove also lauded the testing program, estimating the cost to the Tillamook County economy from a program shutdown in the millions of dollars.

Shellfish Industry Steering Committee representative Paul Hanneman agreed on the need for the testing program, which implements federal Food and Drug Administration (FDA) rules governing shellfish exporting and sales, but said the fee aimed at commercial shellfish growers would add a tremendous burden to operations already staggering from fees they must pay to lease state submerged lands and to receive marketing and extension services from the Department of Agriculture. He urged the committee to seek alternative funding sources, including a combination of user fees, general fund money, federal funds and other revenues.

Water Subcommittee chair Rep. Chuck Norris (R-Hermiston) delegated the task of finding an acceptable compromise on the measure to Rep. Josi, but did not indicate when, or if, the bill would return to the committee for another hearing.

SB 632

License fee proponents and opponents split in much the same way at a Senate Agriculture and Natural Resources Committee hearing on SB 632 the following morning, but a provision in the Senate bill that would transfer

the testing program from the Health Division to the Department of Agriculture pushed the division—a staunch supporter of HB 2331—into the opposing camp and led ODFW to take a cautiously neutral stance.

Sen. Joan Dukes (D-Svensen), the bill's sponsor, told committee members that while she believed the Health Division had done a creditable job with the shellfish testing program, cutbacks in the state's budget have forced the division to balance the need for the testing program against other pressing health needs. In such an equation, Sen. Dukes said, the testing program will inevitably lose when the alternative is to cut back programs that benefit sick children. But even if the Health Division received a stable source of fee money to pay for program costs, Sen. Dukes said, it would still make sense to consolidate all regulatory authority over shellfish cultivation and harvesting in one agency. The Department of Agriculture, which now has responsibility for leasing state lands to shellfish cultivators and already handles some phases of the division's testing program, is the logical candidate, Sen. Dukes said.

But Health Division Director Michael Skeels said moving the program would be expensive and inefficient, and would mean abandoning the public-health orientation the program now has under the division's oversight. The Department of Agriculture would have to install new lab capacity and train its personnel in FDA-approved procedures for conducting the tests, Skeels said, whereas the Health Division has experience with the FDA techniques, has formed good relationships with commercial industry and local health departments and can share lab facilities with its other public-health monitoring programs at a considerable economy of scale. Furthermore, he added, the division's public-health mission would lead it to favor protecting public health over protecting the shellfish industry should the two goals conflict.

"The only thing 'broken' about this program is the funding source," Skeels said. "I'm struck by comments here that treat this problem as if it were the responsibility of agency heads, when in fact this is a legislative policy decision."

Skeels found cautious support for his position from ODFW representative Rod Ingram, who said the potential disruption of the cooperative relationship between Fish and Wildlife and the Health Division in the collection

of shellfish samples and the sharing of other biological information concerned him. ODFW does, however, support the bill's license fee provisions, Ingram said.

Senate President Bill Bradbury (D-Bandon), who joined Sen. Dukes at the witness stand to testify for the measure, told committee members that imposing a user fee on those who benefit from the resource to pay for the costs of protecting that resource made sense, especially when lean state budgets may force the state to abandon the program altogether.

"It's really clear to me that there's a real direct benefit to the commercial harvesters and to the recreational user," Sen. Bradbury said.

But close questioning from Sen. Jim Bunn (R-McMinnville) focused on how the program distributes benefits between commercial shellfish cultivators and recreational users. Although it provides the majority of its benefits to commercial shellfish producers, who need Health Division certification to sell their products out of state, the testing program relies on license fees from recreational harvesters for a majority of its funding, Sen. Bunn said, which seems inequitable. He asked witnesses from ODFW and the shellfish industry to provide the committee with figures showing the total volume of the shellfish harvest and the relative proportion of the harvest that goes to public and private harvesters.

Shellfish Industry Steering Committee representatives Ron Phillips and Paul Hanneman told the committee that even if harvest numbers show that industry operations account for the majority of the state's shellfish harvest, the 20 or so producers in the industry would not be able to pay for the proportionate costs of operating the program. The fee structure proposed in SB 632 already amounts to a 2.5 percent tax on shellfish sales, which is higher than any other ad valorem tax charged on other commercial fisheries and is much more than the industry can afford, Phillips said. He added that the testing program serves as an "environmental barometer" for water quality, which provides a substantial public health benefit beyond the aid it provides to commercial producers.

But Sen. Bunn remained skeptical, noting that about half of the shellfish harvested by the public in the state are crabs, which do not suffer from the same paralytic shellfish poisoning problems as clams and mussels.



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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