



Oregon

# COASTAL NOTES

Vol. 3 No.15

Published by the Oregon Coastal Zone Management Association, Inc.

May 17, 1991

## In This Issue:

Oregon shellfish  
 National Wetlands  
 Coastal Caucus  
 R&E bill passes  
 OCZMA, Inc.

## Ocean Policy Advisory Council bill heard

The House Water Policy Committee held a public hearing Thursday, May 9, on SB 162 which creates an Ocean Policy Advisory Council to work on management plans for Oregon's Territorial Sea.

Representative Larry Sowa (D-Oregon City) expressed concerns about the representation on the Policy Council, which as currently written, would have 21 members, including two from the commercial fishing industry and one from the sport fishing industry.

Amendments are expected to be brought before the Water Policy Committee, but the next work session has yet to be scheduled.

# The Coast and instream water rights

The Oregon legislature passed the Instream Water Right Act in 1987, providing a mechanism for balancing fish and wildlife habitat needs and recreational interests with traditional water uses which have mostly focused on out of stream withdrawals.

This is the first of a two-part background paper on the history, process and coastal issues involved in instream water rights in Oregon and serves as an introduction for an OCZMA workshop being planned on this issue.

The issues and concerns generated by this change in the law are being expressed throughout the state; questions are being raised about the law's affect on prior appropriations, future development, and basin planning and watershed management generally. These questions have been voiced at meetings with the Water Resources Department in many parts of the state.

While each region, including the coast, may have particular concerns unique to the watersheds in that area, the major facts and issues created by the instream water rights legislation are applicable everywhere. The coast shares similar concerns with other rural counties and regions in the state over how the increased instream needs will impact future development. Additionally, coastal streams will undoubtedly be impacted by changes in water rights management due to protection or enhancement of endangered species of anadromous fish.

This paper attempts to provide some background information on the instream water rights issues generally, so that people finding themselves involved in instream water right issues will have a place from which to start following future changes in the law and the implementation of administrative rules in compliance with the laws.

### The water budget

In an overly simplified water budget, input from precipitation and atmospheric moisture is balanced by evaporation outflow from rivers and streams into the ocean. In addition to the natural water budget, other factors act to take water out of stream such as diverting water for irrigation, manufacturing, steam electrical generation, and domestic and municipal uses. Since 1955, Oregon has had legislation requiring a minimum perennial stream flow to remain in the water basin.

This amount has been determined either by the "Oregon Method" for determining the optimum needs of fish and wildlife or through measuring techniques used by the U.S. Geological Survey and the Water Resources Department. Examples of instream water uses are hydroelectric power generation, support of aquatic life, navigation and waste water treatment and dilution.

These instream activities utilize water without removing it from the source of flow. Out of stream uses are withdrawal and consumption of water out of the stream channel or groundwater aquifer through which it naturally flows.

In addition to concerns about stream flow, groundwater depletion is a serious problem. As a consequence of low water tables, and reduced stream flows problems such as saltwater intrusion into aquifers, an increased threat of other aquifer contaminants, land subsidence, interference with drainage and sewers, and an increased threat of flooding are possible. (Source: *America's Water: Current Trends and Emerging Issues*; The Conservation Foundation, Washington D.C.; 1984.)

Continued next page...

# Instream water rights

Continued from Page One...

## Clean Water Act

On the federal level, the amendments to the Federal Water Pollution Control Act in 1972 were a reflection of changes in historical values for water resource development. Traditional values associated with management of water resources were focused on "efficiency" both in the sense of economic efficiency, and also in terms of being able to appropriate as much water as possible so it is not "lost" or "wasted" by being left to flow freely into the ocean.

Changes in public values have resulted in consideration of equity of uses, and environmental quality, for example, which contributed to the provisions in the Clean Water Act. Regional economic development has also been a federal concern; water development resulting in the generation of benefits for one region may not be newly created benefits but rather may be shifted from another region.

The effort to look at a larger picture in terms of water resource management, and to incorporate new values into a well established water right system, has generated a controversy of interests between the various instream and out of stream uses, as well as questions of efficiency of use.

## Oregon Water Code

Oregon water laws were enacted in 1909. These first laws provided a procedure for making determinations and keeping records of the water rights to the surface waters of the state that were initiated prior to February 24, 1909. These were called vested water rights. The Doctrine of Prior Appropriation is known throughout Western water law: First in time is the first in right given that the water has been used in a beneficial manner. (From WRD Biennial Report 87-88)

With respect to water rights, Oregon's water code centers on four major premises:

1. Surface or groundwater may be legally diverted for use only if used for a beneficial purpose;
2. The more senior the water right, the longer water is available in a time of shortage;
3. A water right is attached to the land where it was established, as long as the water is used; if the land is sold, the water right goes with the land to the new owner; and,
4. A water right is valid as long as it is used at least once every five years; after five consecutive years of non-use, the right is considered forfeited.

There are some uses of water, however, that do not require water rights. These are called "exempt uses." Exempt uses of surface water include the landowner's use of a spring which does not naturally flow off of the property from which it comes from. Stock watering is also an exempted use if the water originates at a surface source which has not been otherwise changed. Salmon and Trout Restoration and Enhancement Program (STEP) egg incubation activities are also exempt.

In a dispute over whose right to appropriate water will be honored, several issues are crucial. The most important factor is the

relative date of priority — who was granted the water right first. Other considerations are the quantity of water appropriated and the use to which the water has been applied. Also significant in the dispute, is the land to which the water is appurtenant.

The Water Resources Department makes "findings of fact" and "orders of determination" which are finally upheld or modified by the circuit courts. Vested rights on small streams flowing into the Columbia River, and all streams flowing directly into the ocean (except the Rogue River), remain undetermined. 1987 law required a registration statement of claim to an undetermined vested surface right be filed with WRD before Dec. 1, 1992.

## Recent Oregon legislation

The 1987 Legislature created a state instream water right program.

**SB 140:** SB 140 required the Water Resources Commission to convert existing minimum streamflows to instream water rights. Instream water rights are different from minimum stream flows in that they cannot be waived by WRC during a time of water shortage. This new law allows the Department of Fish and Wildlife, and Department of Environmental Quality and Parks and Recreation to request instream water rights from the Commission.

Under SB 140, public uses of water can be protected by the issuance of water rights. Instream water rights are held in trust by the Water Resources Department for the benefit of the people of Oregon. Public uses are broadly defined to include conservation, maintenance and enhancement of fish and wildlife and aquatic life, fish and wildlife habitat and any other ecological values. Public benefit also includes recreation, pollution abatement and navigation. Public benefit means a benefit that accrues to the public at large rather than to a person, a small group of persons or to a private enterprise.

The bill calls for all existing minimum stream flows to be converted to instream water rights. The bill also establishes a process for reserving water for future out of stream use for economic development.

An instream water right does not diminish the public ownership of the waters of the state, nor shall an instream water right take away or impair any permitted, certificated, or decreed water use right vested prior to the date of the instream water right.

The Department of Fish and Wildlife has the authority to request certificates for instream water rights in which there are public uses relating to the conservation, maintenance and enhancement of fish and wildlife or fish and wildlife habitat.

The Department of Environmental Quality may be granted a water right to protect and maintain water quality standards. The Parks and Recreation Department may request a certificate for instream rights to state waters in which there are public uses relating to recreation and scenic attraction.

SB 140 allows a person to purchase or lease existing water right or portion of a water right or accept a gift of a water right for conversion to an instream water right. Any water right purchased pursuant to the 1987 Act will retain the priority date of the water right purchased, leased or received as a gift. Any person may lease an existing water right for use as an instream water right for a specified period without losing the original priority date.

Continues on facing page...

# Oregon shellfish issues update

## Shellfish Program

**Oregon Health Division:** At this time, the Shellfish Program in the Health Division of the Department of Human Resources for monitoring estuarine water quality for shellfish growing is still waiting in Ways and Means for a possible add-back to the overall budget for the Department.

**Oregon Department of Fish and Wildlife:** ODFW's Shellfish Program has been proposed to be funded through sale of general recreational fishing licenses to recreational shellfish harvesters. This bill, SB 247, has passed the Senate and is waiting for action on the House side.

The Shellfish Program of the Oregon Department of Fish and Wildlife (ODFW) focuses on monitoring, research and inventory of marine invertebrate populations in Oregon. This includes commercial shellfish species such as pink shrimp and dungeness crab, as well as sea urchins and clams. Recreational shellfish research includes clams, crabs, and mussels. The Department also reviews activities with respect to crab resources including monitoring ocean crab resources and working to resolve coastwide management issues. Bay crab resource work includes assessing the economic evaluation of the recreational crab fishery. The Department also monitors the recreational clam fishery through spawning stock

surveys and also works on enhancement activities such as introducing new species.

## National shellfish pollution indicator study

The Oregon Health Division as well as the Oregon shellfish industry have been active in planning the National Shellfish Pollution Indicator Study, which is funded by the National Oceanic and Atmospheric Administration (NOAA), and managed by the Louisiana Universities Marine Consortium (LUMCON).

Netarts Bay in Oregon was chosen as a pristine site for collection of baseline data. The National Shellfish Study involved work on developing new indicators of human fecal pollution in shellfish, which also has implications for improved management of drinking water and waste water. After extensive field studies to test the effectiveness of several new techniques for making water quality assessments, results and recommendations will be presented to the National Shellfish Sanitation Program. Tim Smith, Director of the Pacific Coast Oyster Growers Association, who spoke early in the session to the Coastal Caucus, is one of the advisors to the study.

—Mara Brown  
Legislative Fellow

## Instream water rights

Continued from facing page...

The bill also specifies that the use of state waters for multipurpose storage or municipal uses or by a municipal applicant for a hydroelectric project shall take precedence over an instream water right with review by the Commission, except if the instream water right was converted from minimum stream flow requirements, or resulted from a lease or transfer of an existing water right.

Any state agency may request the Water Resources Commission to reserve unappropriated water for future economic development. Review of the application shall be conducted at the time of the reservation and at the time the reserved water is applied to consumptive or out of stream uses.

**SB142:** Senate Bill 142 passed by the 1987 Legislature requires water use reporting by public agencies, including irrigation districts.

The bill requires that any governmental agency that holds a water right shall submit an annual report to the Water Resources Department. This report shall include the amount of water used by the governmental entity, the period of use and the categories of beneficial use to which the water is applied. This includes any state or federal agency, local government, irrigation district and water control district.

—Mara Brown  
Legislative Fellow

Next week, further legislation in 1987, current agency responsibilities and activities, and pending legislation

## National Wetlands Month

May is National Wetlands Month. Upcoming activities around Oregon include:

### Friday, May 24

Tillamook Chamber of Commerce Meeting with Don Thompson, Wastewater Wetland Specialist, talking on Cannon Beach wastewater treatment system, noon. Contact Sallie Jacobson, State Parks, 842-5501.

### Saturday, May 25

Wetlands Tour of South Slough National Estuarine Reserve, Charleston. 1:00 - 4:00 p.m. Contact Mary Giles; 888-5558.

Wetland Displays will be featured throughout the month of May at the Hatfield Marine Science Center in Newport, daily 10:00 a.m. - 4:00 p.m., and at the Division of State Lands, 775 Summer Street NE, Salem, Monday - Friday 8:00 a.m. - 5:00 p.m.

More information on National Wetlands Month, is available from Emily Roth, Division of State Lands at: 378-3805, or from the Wetlands Hotline: 1-800-832-782

## Coastal Caucus Breakfast

On Monday, May 13th, June Carlson, planner for Highway 101 with the Highway Division of the Oregon Department of Transportation (ODOT) briefed the Coastal Caucus on the status of plans to work on the Coast Highway. Carlson was joined by Don Byard and John Rist of the Department.

Carlson, who was born in Tillamook, highlighted the multi-faceted nature of the "Corridor Study" referring to 101 in Oregon. The study looks at traditional elements of highway planning, the location of right of ways, for example, as well as non-traditional elements, such as how land use planning affects highways and vice versa. As members of the Coastal Caucus are very aware, the highway is a focus of often conflicting uses. The inclusion of an environmental impact assessment as well as a consideration of the highway's impact on economic development and tourism are part of the study, reflecting the importance of working out any conflicts early on in the planning stages of highway improvement.

The corridor study also includes a look at the structure and capacity of bridges, incorporating a multi-modal transportation system (bicycles, public transportation, etc), visual resources and parallel or secondary street planning.

The key to planning the future of the highway as a whole system rests on the ability to implement the changes at different times and in different locations along the coast, without losing sight of the unified corridor concept. Several demonstration projects are underway for Bandon and Lincoln City to see how the concept can work in different coastal communities in the state, and also to serve as an example of the integration of local, state and federal planning efforts.

John Rist spoke a bit about the coordination of Oregon's planning study with Washington and California, and the possibility

of receiving federal funding for the planning as part of the Surface Transportation Act of 1991. Rist noted the importance of maintaining high priority status for the Pacific Coast Highway on the federal level and having this support continue throughout the process, especially when actual construction begins.

Representative Tim Josi (D-Bay City) asked June Carlson whether she was aware of any problems with undergrounding utility lines on the coast. Carlson was not aware of any, but told the Caucus that undergrounding power and telephone lines was part of the planning in certain areas.

The Coastal Caucus did not bring up many concerns; coastal legislators may be waiting until the Highway 101 Conference planned for September 5-6, 1991 in Newport, sponsored by ODOT and OCZMA.

### Restoration and Enhancement bill passes both Houses

The Restoration and Enhancement bill did not receive too much attention or deliberation this session, probably because all the wrinkles had been worked out during the 1989 session, when this fund to restore Oregon fisheries was established and because of its operation and project success.

Last session's bill included a sunset provision to 1991, which will be extended to 1997.

SB 246 passed the Senate floor in a swift vote of concurrence to minor amendments made in the House, and should have no delay in being signed into law by the Governor.

### OCZMA, Inc.

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. 313 SW 2nd Street, Suite #C, P.O. Box 1033, Newport, Oregon 97365, (503) 265-8918, FAX (503) 265-5241

#### Association Officers:

**Gordon Ross** • Chairman

Coos County Commissioner

**Ellie Dumdi** • Vice Chair

Lane County Commissioner

**Nancy Leonard** • Secretary-Treasurer

Lincoln County Commissioner

#### Association Staff:

**Jay Rasmussen** • Executive Director

**Georgia York** • Executive Assistant

**Mara Brown** • OCZMA/OSU Legislative Fellow

### Membership:

Port of Bandon	Clatsop County
Port of Garibaldi	Coos County
Port of Brookings Harbor	Curry County
Oregon International	Douglas County
Port of Coos Bay	Lane County
Port of Gold Beach	Lincoln County
Port of Nehalem	Tillamook County
Port of Newport	City of Brookings
Port of Port Orford	City of Coos Bay
Port of Sluslaw	City of Depoe Bay
Port of Tillamook Bay	City of Florence
Port of Umpqua	City of Garibaldi
Clatsop S.W.C.D.	City of Lakeside
Coos S.W.C.D.	City of Nehalem
Curry S.W.C.D.	City of Newport
Lincoln S.W.C.D.	City of Reedsport
Sluslaw S.W.C.D.	City of Rockaway Beach
Tillamook S.W.C.D.	City of Yachats
Umpqua S.W.C.D.	Port of Astoria