

HOUSE COMMITTEE ON WATER POLICY

June 5, 1997 Hearing Room D

3:00 P.M. Tapes 87 - 88

**MEMBERS PRESENT: Rep. Ken Messerle, Chair**

Rep. Tim Josi, Vice-Chair

Rep. Jo Ann Bowman

Rep. Tony Corcoran

Rep. Steve Harper

Rep. Jeff Kruse

Rep. Jim Welsh

**STAFF PRESENT: Pat Zwick, Policy Analyst**

Rebecca M. Scott, Administrative Support

**MEASURE/ISSUES HEARD: HB 3720 Public Hearing and Work Session**

**SB 417-A Public Hearing and Work Session**

**SB 712 Public Hearing and Work Session**

**These minutes are in compliance with Senate and House Rules. Only text enclosed in quotation marks reports a speaker's exact words. For complete contents, please refer to the tapes.**

<b>Tape/#</b>	<b>Speaker</b>	<b>Comments</b>
<b>TAPE 87, A</b>		
006	Chair Messerle	Calls meeting to order at 3:17 p.m.
<b><u>HB 3720</u></b> <b><u>PUBLIC</u></b> <b><u>HEARING</u></b>		
010	Chair Messerle	Opens public hearing on HB 3720.
012	Pat Zwick	Policy Analyst, submits -2 amendments. <b>(EXHIBIT A)</b>
020	Jill	Assistant Director, Oregon Department of Fish and Wildlife (ODFW),

	Zarnowitz	submits and reviews testimony in support of HB 3720. <b>(EXHIBIT B)</b>
029	Chair Messerle	Asks if the fiscal impact statement was prepared by ODFW or by Legislative Fiscal.
032	Zarnowitz	ODFW provides information to Legislative Fiscal who in turns provides it to the committee.
036	Zarnowitz	Continues review.
070	Chair Messerle	Asks if ODFW has been in contact with the Governor's office.
073	Zarnowitz	Have been in contact with the Governor's office, but the Department of Environmental Quality (DEQ) probably has had more contact.
082	Lydia Taylor	<p>Deputy Director, Department of Environmental Quality. Have looked at the -2 amendments. Concerned about the addition of "hydroelectric power" under beneficial uses of water. It may be so, but the quotation is directly from the Clean Water Act, and the Department would prefer to keep it that way. The words "hydroelectric power" was an addition that was not expected. Aside from that, the -2 amendments are very palatable to the department. It gives the department the opportunity to move forward in developing a healthy streams criteria.</p> <p>Conversations with the Governor's office have related to whether they could support a bill. It was key that all parties agree with the results, especially the environmental community. However, DEQ and the Governor's office have not discussed the specific details of this measure.</p>
100	Rep. Josi	Asks if the addition of hydroelectric power as a beneficial use would create additional work.
106	Taylor	The whole development of the standard needs to take into account the beneficial use. The department would look at the beneficial uses of water and protect for the most sensitive beneficial use. The concern with the wording is something that has not been in state or federal statute.
114	Rep. Josi	Asks who inserted "hydroelectric power" to the amendment.
115	Taylor	Does not know.
117	Chair Messerle	Asks if there is a problem with "hydroelectric power" being included.
120	Taylor	Yes, because it expands beyond the wording that was taken directly from the Clean Water Act. It would be appropriate to have a much longer discussion about that before changing the statutes that relate to the protection of water quality in the state of Oregon. Water quantity may be a different issue, and it may be in those statutes.
125	Rep. Bowman	Asks if the addition of "hydroelectric power" also increases the cost of what DEQ is being required to do.
127	Taylor	That is not known, but it may imply that there was an equal value to all of these things, and the department does not wish to imply that.
134	Rep. Bowman	Asks if the Governor is aware of the cost of this proposed legislation.

136	Taylor	Yes. Paula Burgess expressed concern that DEQ already has a "hole in its budget," and does not want to see that get worse. This committee would need to know to look at the whole picture when considering funding for this activity.
146	Chair Messerle	Communicates his intention to delete Sections 7 and 8, and refer the measure to Ways and Means.
149	Taylor	Comments on budget issue.
162	Chair Messerle	Puts committee at ease at 3:28 p.m.
165	Chair Messerle	Recesses committee at 3:34 p.m.
165	Chair Messerle	Calls meeting to order at 3:43 p.m.
168	Rep. Josi	Asks if funding use attainability analysis and the other components will result in streams be removed from the 303 (d) list.
177	Taylor	It would cost about \$350,000 to develop the healthy streams criteria, then there are two other sections which ask the department to do use attainability analysis. These are the things that could result in streams being removed from the list if the use isn't there. Without resources, this could not be done. It may be completed over a ten year period during the development of total maximum daily loads (TMDLs). In section 5, the grants to people to collect data would not be possible.
189	Rep. Josi	Asks the value of developing the criteria without the follow-through.
191	Taylor	The value of developing the criteria is that it would be a different approach than the temperature standard for protecting water quality. This could be an opportunity to develop a holistic approach that will allow a better translation for people who manage land, to make a direct connection to their activities. There is a separation between those two categories.
200	Rep. Josi	Asks what can be expected from DEQ for the next two years, if the measure were fully funded.
216	Taylor	In the development of the healthy streams water quality criteria there is not a direct relationship to whether or not the stream is listed. It is just a different approach to looking at stream health. The other two items are aimed at a quicker return to whether the streams should be listed or not. If DEQ had the resources indicated, ten stream segment use attainability analyses could be completed. If Section 5 were funded, 200 stream segments which are currently listed for exceeding the temperature standard based on drought year data, would be reassessed with data from non-drought years. If the non-drought year data showed that those streams were in compliance, the streams would probably be removed from the list.
242	Rep. .Josi	Asks the earliest date for removing a stream from the list.
244	Taylor	If data from July, August, and September showed a trend that those streams were in compliance with water quality standards and an equivalent amount of data was what put them on the list, the earliest would be in

		April of 1998. It should be clear that all those streams were not listed because of drought year data, there are some which would remain on the list because they still exceed the standard.
254	Chair Messerle	Asks what would DEQ do in the next biennium if this measure was non-existent and it was suspected that the data base was faulty,.
260	Taylor	DEQ would begin to do the TMDL development on the sub-basins which are prioritized under the healthy streams partnership, and the streams where DEQ is currently under court order for the completion of TMDLs. Expect to complete about 10 percent of the streams on DEQ's list each year.
276	Chair Messerle	Asks if there are expected difficulties with the data base in the coastal region.
278	Taylor	It is an assumption that many of the streams with drought year data would be on the east side of the mountains.
282	Chair Messerle	Asks if this measure was not passed, when would work begin on the streams on the east side.
285	Taylor	The assessment of which streams to target would be made sometime during the next biennium. During this biennium, DEQ is committed to the coastal salmon and the lawsuit which has to be completed. Toward the end of the biennium, DEQ would have to inform the Environmental Protection Agency (EPA) what is targeted for the next biennium. There are many factors which could affect the targeted streams, such as a steelhead listing.
300	Chair Messerle	Asks if the east side of the Cascades would not have any activity until 1999 to 2001.
304	Taylor	Currently, DEQ is working in the Grande Ronde, Umatilla, and Klamath Falls Basins.
309	Bob Baumgartner	Department of Environmental Quality. Working also on the Columbia Slough and three basins in the Coast Range and in the Tualatin.
315	Chair Messerle	Asks if those waterbodies would be impacted by drought year data.
319	Baumgartner	They could be impacted by the drought, but the data base would not be impacted by the drought. There is more extensive data than just the drought years. The waterbodies in eastern Oregon which may be influenced by the drought were not ones which were not prioritized for work during this biennium.
326	Chair Messerle	Asks if the streams which have faulty data are not going to be worked on until the next biennium. Asks how that would impact the other agencies and the work that they need to complete.
333	Taylor	It would be better to ask the Department of Agriculture regarding how they will approach implementation of the Healthy Streams Partnership.
		Assistant Director, Department of Agriculture (DOA). The department's priority list for streams is very similar to DEQ's list. There are a couple of exceptions where agricultural issues may have a higher priority. The order

359	Phil Ward	which the department approaches dealing with stream segments corresponds very closely to the priority list that DEQ has identified for their process. Have set a goal of four years for the completion of the agricultural part of this program. Department is committed to working toward that goal. It will be very important that the department be involved in the consultative role which HB 3720 identifies for DOA. It is the goal of DOA, when working through the agricultural management plans, that the result will fit with what comes out of the healthy streams criteria development.
<b>TAPE 88, A</b>		
010	Chair Messerle	Asks if it would make more sense to focus energy and resources on assisting DEQ in doing the studies and improving the data base.
017	Ward	Given the legal actions pending in the state of Oregon, it is necessary to be able to say that the schedules which have been set are being met. It is important that the department's effort dovetails with what DEQ is doing.
027	Chair Messerle	Not suggesting a move in a different direction without the approval of EPA or the National Marine Fisheries Service (NMFS), but if there was a situation where the state was not being very efficient, it may be valuable to ask those federal agencies if they would approve a change of plan.
031	Ward	If something arises where it is necessary to take different action, then it would be valuable to ask for assistance. It is the feeling of the department that it is time to move forward.
037	Jim Myron	Representing Oregon Trout. It was very helpful to have a discussion about the expectations of DEQ over the next couple of years. Concurs with DEQ's recommendation to remove the reference to hydroelectric power. Suggests language changes. DEQ concurs with these changes. After the word "manner" in line 9 of page 2, add "that protects the most sensitive use, and that takes into consideration". Wants to clarify the intent of this section.
075	Chair Messerle	Asks for clarification on suggestion made by Mr. Myron.
078	Myron	Reiterates proposed changes.
081	Rep. Harper	Asks how "sensitive" is defined.
083	Myron	The language was taken directly from the Clean Water Act. Does not know how EPA designates which are the most sensitive uses in a particular stream or reach.
089	Rep. Harper	Asks if there is some established criteria.
090	Myron	Can't answer.
092	Jeff Curtis	Director, Water Watch of Oregon. Agrees with Mr. Myron's testimony. The issue is not so much the language in the measures, but the expectations that this language is going to set up. The Clean Water Act says that the most sensitive use must be protected.
		Executive Director, Oregon Environmental Council. Agrees with the

124	Gayle Killam	points brought up in Section 3 about sensitive beneficial uses. In addition to what is happening with the water quality area management plans and the TMDLs, this measure refers to developing the healthy stream criteria, completing use attainability analysis, and follow up assessments on streams with faulty data bases. As all those things are happening at once, there may be some overlap. Concerned about how the use attainability analysis will occur where best management practices have not been put in place yet.
154	Chair Messerle	If talking to the landowners, they will want to have an idea as to what is attainable before they put forth the effort.
166	Joe Rohleder	Representing the Association of Northwest Steelheaders, et al. Participated in the discussions of the amendments for this measures and am now confused. The idea is good, but very concerned about the fiscal impact. Also concerned about the fact that a temperature standard is easy to measure. Alternative criteria is being suggested which require judgment. Raising expectations that there may be a standard that is easier to attain, but it will be harder to decide if that standard is being met or not. This may not be where the state wants to go.
196	Rep. Welsh	Asks for clarification.
200	Rohleder	Don't want to be in a situation where either one or two things happen. Either the person on the ground thinks that by changing the standard, he changes the expectation. The expectation is still that there will be a place where fish can live. He won't have to change what he is doing to make it get to a point where fish can live, because the standard will be changed. Don't want to be where the standard is met, and fish can live, but it can't be proven because there aren't four engineering consultants and three range management scientists that can swear to it.
213	Chair Messerle	Asks if Mr. Rohleder thinks that this is getting the state to the point where the criteria can be developed.
215	Rohleder	If people have to think about all the things they have to do so fish can live in their stream, they will educate themselves, and they will feel better about it. It is worth the fiscal impact.
226	Bob Hall	Representing Portland General Electric (PGE). Responsible for the addition of hydroelectric power to the amendments. There was concern with the language and what the Environmental Quality Commission was required to do. The uses which were listed did not include hydroelectric power, and it raised the concern that there could be regulations against how the facilities have traditionally been used. If hydroelectric is included within the term "industrial and or other uses," that would be a different issue. Would like to be certain that the passage of this measure would not affect PGE's ability to continue operating their hydros pursuant to existing license.
255	Chair Messerle	Asks if testimony from DEQ and the definition from EPA alleviates those concerns.
		Yes. Had a discussion with Carolyn Young and Lydia Taylor of DEQ about this. It would not affect existing operations pursuant to PGE's

259	Hall	license. As long as this is true, PGE would not want to create a problem, because this legislation is very important, but PGE must also maintain its system.
272	Pete Test	Representing Oregon Farm Bureau. Addresses testimony given by Mr. Rohleder. Understands that this is potentially a two-edged sword. But there is legislative oversight to make sure that this does not get off the track. This could work for, or against, the agricultural community, but this might be the only way. This problem exists in every other state right now, and Oregon is the only one willing to take the risk. The 64 degree standard is what is causing the problem, and could "butcher" the hopes of having the Healthy Streams Partnership work. The key is to set up a translation from the 64 degree standard to give the landowner the opportunity and the ability to look at the problem and make a plan to alleviate it. Granted, it will be difficult to put this into a form for regulators to measure. The assessments are important, and they will be expensive, but it will be the only way to get streams off the list because the list is tied to the use, not the standard. The standard is there because of the use. If the use changes, then the standard can be changed.
367	Chair Messerle	Asks if he is suggesting that the -2's be adopted.
371	Test	Suggests the deletion of "hydroelectric power" and Sections 6 and 7.
382	Rep. Bowman	Asks for clarification on his support or opposition of the measure.
388	Test	Supports the measure, but Mr. Rohleder has some valid points. Those concerns exist among the supporters also. This is a major problem which needs to be remedied, but it won't be easy. This measure is Oregon's best chance.
<b>TAPE 87, B</b>		
008	Stephen Kafoury	Representing American Fisheries Society. Agrees with Mr. Test's testimony. The message to the committee is: "Don't oversell this bill." No one is getting off the hook, but people are going to have to do land management.
018	Chair Messerle	Closes public hearing on HB 3720.
<b><u>HB 3720</u></b> <b><u>WORK</u></b> <b><u>SESSION</u></b>		
019	Chair Messerle	Opens work session on HB 3720.
021	Chair Messerle	Proposes conceptual amendments to the -2 amendments.
031	Rep.	Proposes additional conceptual amendments to the -2 amendments.

	Bowman	
051	Rep. Josi	<b>MOTION: Moves to ADOPT HB 3720-2 amendments dated 06/05/97 and that the amendment be FURTHER AMENDED on page 1, line 12, by inserting "and /" after "with" and on page 2, line 9, by inserting "that protects the most sensitive use, and " after "manner" and on page 2, line 12, by deleting "hydroelectric power".</b>
	Chair	Hearing no objection, declares the motion <b>CARRIED.</b>
054	Rep. Josi	<b>MOTION: Moves HB 3720 BE REFERRED to the committee on Ways and Means with a DO PASS AS AMENDED recommendation.</b>
056	Rep. Corcoran	Concerned about the response of Ways and Means to this measure if this was a matter of trading revenue currently dedicated, and replacing some other worthwhile program with this worthwhile program. Wants it understood that this is not to replace any existing budget item that has made it through the process.
067	Chair Messerle	There have been discussions with Legislative Fiscal and Leadership about how to handle the fiscal part of this measure. The conclusion was that it did not make sense at this level because DEQ has so many problems right now. They are in a better position to coordinate the full-time employees and all the commitments made with the Salmon Plan.
078	Rep. Bowman	Shares Rep. Corcoran's concern. At the current budget level, this measure should not be supported.
088	Chair Messerle	It does have a fiscal impact. Basically, Ways and Means and the co-chairs are going to have to work out where the funds will be found. This is a role that cannot be played at this level.
092	Rep. Bowman	Asks if this is the same fiscal impact which was already released.
095	Chair Messerle	Have not seen a fiscal breakdown.
103		<b>VOTE: 6-1</b> <b>AYE: 6 - Corcoran, Harper, Josi, Kruse, Welsh, Messerle</b> <b>NAY: 1 - Bowman</b>
	Chair	<b>The motion CARRIES.</b>
108	Chair Messerle	Closes work session on HB 3720.
<b><u>SB 417-A</u></b> <b><u>PUBLIC</u></b> <b><u>HEARING</u></b>		
112	Chair Messerle	Opens public hearing on SB 417-A.
116	Pat Zwick	Policy Analyst, summarizes SB 417-A.



136	Martha Pagel	Director, Water Resources Department, submits and reviews testimony in support of SB 417-A. <b>(EXHIBIT C)</b>
155	Jan Lee	Executive Director, Oregon Water Resources Congress, submits and reviews testimony in support of SB 417-A. <b>(EXHIBIT D)</b>
162	Chair Messerle	Closes public hearing on SB 417-A.
<b><u>SB 417-A</u></b> <b><u>WORK</u></b> <b><u>SESSION</u></b>		
164	Chair Messerle	Opens work session on SB 417-A.
165	Rep. Bowman	<b>MOTION: Moves SB 417A to the floor with a DO PASS recommendation.</b>
		<b>VOTE: 6-0-1</b>  <b>AYE: In a roll call vote, all members present vote Aye.</b>  <b>EXCUSED: 1 - Josi</b>
	Chair	<b>The motion CARRIES.</b>  <b>REP. CORCORAN will lead discussion on the floor.</b>
175	Chair Messerle	Closes work session on SB 417-A.
<b><u>SB 712</u></b> <b><u>PUBLIC</u></b> <b><u>HEARING</u></b>		
178	Chair Messerle	Opens public hearing on SB 712.
180	Pat Zwick	Policy Analyst, summarizes SB 712.
190	Reed Marbut	Water Resources Department (WRD), submits and reviews testimony in support of SB 712. <b>(EXHIBIT E)</b>
224	Rep. Corcoran	Asks for practical example of a situation that would clarify the intent of this measure.
232	Marbut	During the Warm Springs negotiation process, a public advisory group was included. It was of vital interest to that community to understand how recognition of a federal reserved water right for the Warm Springs Reservation would impact their future water use. Federal reserved rights date from the date of creation of the reservation. In the case of the Warm Springs Reservation, that would be 1855. In the case of the Klamath Tribes, the date would be 1864. By superimposing these early water rights into a community, all other rights are made junior. During negotiations, it

		is possible to create a settlement agreement which would minimize that impact. In the Warm Springs proposed settlement there is a clause which states that all future tribal rights would be subordinated to existing state rights. In the Klamath, most of the rights are vested (prior to 1909), and if this measure did not pass, those holding those rights would not have the opportunity to come forward and file for an exception.
269	Rep. Bowman	Asks what this would do to the rights that the Indians have had since 1855 or 1864.
277	Marbut	The tribal rights are there. The process of the adjudication and the negotiation is to quantify and define what those rights are. It is a very complex process based on state and federal law. The particular parameters of those rights will have to be carefully defined. This will not change the priority date, but it will define how it will fit in the scheme of allocation of water. The tribes have generally articulated that their rights are protected and recognized as treaty water rights. If agreement cannot be met, this will go to litigation and the court will make the determination based on the law. Cites the Big Horn River (Wyoming) adjudication case. The negotiation process is a very viable process for settling these rights.
311	Rep. Bowman	Asks what has changed since the last time there were negotiations, that requires the passage of this measure.
324	Marbut	Nothing has changed in the process, but the status of the existing water rights in the basin is different in the Klamath. This is one of the few unadjudicated basins in the state. The rights are vested, but are not adjudicated and certificates have not been issued.
338	Chair Messerle	Closes public hearing on SB 712.
<b><u>SB 712 WORK SESSION</u></b>		
339	Chair Messerle	Opens work session on SB 712.
340	Rep. Harper	<b>MOTION: Moves SB 712 to the floor with a DO PASS recommendation.</b>
		<b>VOTE: 7-0</b>
		<b>AYE: In a roll call vote, all members present vote Aye.</b>
	Chair	<b>The motion CARRIES.</b> <b>REP. HARPER will lead discussion on the floor.</b>
354	Chair Messerle	Closes work session on SB 712.
	Chair	

Submitted By, Reviewed By,

Rebecca M. Scott, Pat Zwick,

Administrative Support Policy Analyst

**EXHIBIT SUMMARY**

**A - HB 3720, -2 Amendments dated 06/05/97, Staff, 4 pp.**

**B - HB 3720, Written Testimony, Jill Zarnowitz, 2 pp.**

**C - SB 417-A, Written Testimony, Martha Pagel, 2 pp.**

**D - SB 417-A, Written Testimony, Jan Lee, 1 p.**

**E - SB 712, Written Testimony, Reed Marbut, 1 p.**