

HOUSE COMMITTEE ON NATURAL RESOURCES ENVIRONMENT AND ENERGY SUBCOMMITTEE

March 24, 1993      Hearing Room D 1:30 p.m.      Tapes 55 - 56

MEMBERS PRESENT:    Rep. Bob Repine, Chair Rep. Marilyn Dell, Vice-Chair  
Rep. Bill Fisher Rep. Carl Hosticka Rep. Dennis Luke Rep. Ray Baum

MEMBER EXCUSED:    Rep. Sam Dominy Rep. Bill Markham Rep. Nancy Peterson

VISITING MEMBER:    Rep. Tim Josi

STAFF PRESENT:            Kathryn Van Natta, Committee Administrator Karen  
McCormac, Committee Clerk

MEASURES CONSIDERED:            Public Hearing - HB 3328 - HB 3502

WITNESSES:                    JERRY SCHMIDT, Oregon Association of Realtors  
KEN BIERLY, Division of State Lands MIKE PROPST, Polk County  
Commissioner, Associated

Oregon Industries JACK BROOME, The Wetlands Conservancy LIZ FRENKEL,  
Sierra Club RUBY RINGSDORF, Oregon State Grange LARRY TROSI, Oregon Farm  
Bureau

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These minutes contain materials which paraphrase and/or summarize  
statements made during this session. Only text enclosed in  
quotation marks report a speaker's exact words. For complete contents  
of the proceedings, please refer to the tapes. [--- Unable To Translate  
Graphic ---]

TAPE 55, SIDE A

005 CHAIR REPINE: Calls meeting to order at 1:38 p.m. Informs  
committee of the postponement of the public hearing for HB 3502 due to  
the absence of the bill's sponsor.

OPENS PUBLIC HEARING ON HB 3328

015 KATHRYN VAN NATTA, Committee Administrator: Introduces  
meeting materials, including a Preliminary Staff Measure Summary  
(EXHIBIT A) and a Revenue Impact Analysis (EXHIBIT B) showing no  
revenue impact. We

have not yet received a fiscal impact statement. We have also included  
copies of Chapter 196 from the Oregon Revised Statutes regarding  
wetlands.

030 REP. DELL: House Bill 3328 was developed to resolve the  
confusion regarding the definition of wetlands. It will not loosen nor  
tighten

wetlands control, but does stipulate the useage of one specific definition.

045 JERRY SCHMIDT, Oregon Association of Realtors: Presents written testimony (EXHIBIT C) in support of HB 3328.

097 REP. JOSI: Does the U.S. Army Corps of Engineers (USACE) currently use the 1987 Wetlands Delineation Manual?

102 SCHMIDT: Yes. Confusion regarding the year occurred when legal counsel from the USACE cited the 1989 manual as the manual in use. The 1989

Wetlands Delineation Manual is out of print and currently unavailable.

135 REP. LUKE: This bill identifies a specific cite (Y-87-1) for defining wetlands. If this cite changes, could statutes be changed without

legislative approval?

145 SCHMIDT: I don't believe so.

155 CHAIR REPINE: In my county, there is some confusion about wetlands. Have some areas in Oregon attempted to redefine wetland areas?

160 SCHMIDT: County commissioners here today will testify to some of the local problems in delineating wetlands. Even when using the same

yardstick, people may use different interpretations.

190 KEN BIERLY, Division of State Lands: Presents written testimony (EXHIBIT D) in opposition to HB 3328.

273 REP. HOSTICKA: Mr. Schmidt implied that all federal agencies agreed to use the definition from the 1987 manual.

277 BIERLY: No. It was developed independently by the Waterways Experiment Station in 1987. In February 1993, the Environmental Protection Agency

adopted the 1987 manual, by memorandum agreement with the USACE. The primary regulatory agencies now also use the 1987 manual.

It is our position that this legislation is unnecessary and could have adverse consequences. Because of an ongoing study by the National

Academy of Sciences, there will likely be changes, and if we are tied by statute to a specific methodology, we will be out of sync with future

federal action. During the last year and a half that we have been using the 1989 manual, and the USACE was using the 1987 manual, we have not

had any significant problems which affected any project. It is true that these manuals are voluminous and technical. The

predominant differences are regarding agricultural land. For undisturbed sites, the 1989 manual was derived from the 1987 manual, and uses the same parameters.

324 CHAIR REPINE: I notice that the internal memo from the Director of State Lands which directs staff to use the 1987 manual is dated March 1, 1993. Is there a correlation between the memo and the date HB 3328 was

drafted?

331 BIERLY: The memo was drafted when the EPA and the USACE both began using the 1987 manual. Before then, both federal agencies reviewed the

same kinds of projects using different methodologies. We had been using the 1989 manual for a year and a half, so there was no rationale to change until these agencies became consistent.

354 MIKE PROPST, Polk County Commissioner, Associated Oregon Industries: Presents written testimony (EXHIBIT E) in support of HB 3328.

421 REP. LUKE: When evaluating wetlands within Polk County, how do you handle stock ponds?

423 PROPST: Depending upon its depth, a stock pond may or may not be a wetland. If it is a shallow stock pond, both 1987 and 1989 manuals

define it as a wetland. We do not have the technical background to determine whether an area qualifies as a wetland.

TAPE 56, SIDE A

019 REP. HOSTICKA: Since federal regulations continue to change, is it better to direct our agencies to use definitions which are consistent

with federal definitions?

023 PROPST: If it can be done without being more restrictive. A state can be more restrictive than federal government, but cannot be less

restrictive. It could become very complicated if the army USACE is using a federal definition, and a state agency is using a state definition.

037 REP. HOSTICKA: It would make more sense to amend the law by adding something like "follow rules consistent with federal regulations."

049 PROPST: That makes more sense to me, too. I'm not sure why legislative counsel recommended the specific citing.

045 REP. FISHER: If the federal government writes a new definition, and Oregon doesn't keep up with it, what happens? Does it go into effect

anyway, since a federal law supersedes a state law?

054 CHAIR REPINE: When federal laws change, states have an opportunity to adjust within the normal cycle of the legislative process.

066 REP. FISHER: The previous witness said that in his experience, there was difference in judgment calls in using the 1987 or 1989 definition.

You seem to have a different opinion.

074 PROPST: He was referring to technical applications on the ground, and he is the expert on that subject. Under Goal 5, counties must designate these lands and map them so the public knows whether or not they are

designated wetlands. Currently, counties cannot determine what should and should not designated wetlands.

082 REP. FISHER: Is the federal government hazy on whether to tighten or relax the definition. Is that part of the problem?

089 PROPST: Yes. When a federal agency which provides us with area mapping is foggy about whether an area should be considered wetlands, it

certainly complicates the process for us. The EPA and the USACE are now using the same definition, and I am assuming that other federal agencies will follow suit.

119 JACK BROOME, The Wetlands Conservancy: Testifies in opposition to HB 3328. Due to the tremendous groundswell for the protection of wetlands

in this country, memorializing the 1987 manual would be a mistake, since it allows no flexibility. We prefer the recommendation made by Rep.

Hosticka today.

169 REP. HOSTICKA: What differences do you see between the 1987 and 1989 manuals?

174 BROOME: The 1987 manual was used by the USACE, but not used by the EPA or the Soil Conservation Service. I understand it is more limited, and

does not include any agricultural wetlands. There apparently was a problem when the 1989 manual attempted to address so-called agricultural wetlands. Mr. Bierly could probably provide more information.

185 KEN BIERLY, Division of State Lands: There is not much difference between the two manuals. One of my responsibilities is

to review

technical delineations done by consultants for government, industry and private citizens who are applying for permits with my agency. We review those applications to determine whether they comply with the criteria we're utilizing at the time. After reviewing over 250 applications, there was only one instance in which there was a difference, which was really an error in judgment on the part of the person who did the delineation.

There have not been significant differences on the ground. A lot of fuss has been made by people who do not use these technical manuals. In fact, the first thing we did in 1990 when the USACE went back to the 1987 manual was create a comparison sheet between the 1987 and 1989 manuals. The primary difference was that the 1987 manual had specific criteria to be met, which included criteria regarding hydrology, vegetation, soils, etc. The 1989 manual uses "best professional judgment."

233 REP. DELL: You referred to SB 3 in 1989.

236 BIERLY: I believe it's in ORS 196.600. One of the policy statements had to do with acting consistently with federal requirements. We feel

it is important to act in a consistent manner on both a federal level and a local community level. For example, we are providing training for city planners in the use of the 1987 manual.

252 REP. DELL: You testified that we are likely to have another definition because the National Academy of Sciences is working on a study, and that when that study is completed, your agency will assess the applicability of those results to Oregon. It sounds as though there is still some

discretion within your agency regarding the wetlands definition. This bill attempts to pinpoint one definition. Does your agency have to use the federal definition?

269 BIERLY: The Removal Fill Permit Program administered by the Division of State Lands is established by the legislature, and is a state mandate.

Our authority does not stem from the federal government, although we attempt to act compatibly. Policy developed in Washington, D.C. more

often reflects the eastern shores of Chesapeake. For example, the average annual rainfall in Washington, D.C. and in Salem, Oregon are the same. However, the time at which that precipitation falls is radically different. It is our experience that serious considerations have not been given to regional differences.

316 REP. DELL: We want a definition which works for Oregon. What do you recommend?

318 BIERLY: We do not have an option regarding the definition we must use. The definition is in ORS 196.800 (14), and is word-for-word identical to the one in the federal regulations adopted by the USACE and the EPA in

1977. However, the methodological approach has never been adopted by federal regulation. The corps manual was developed by the Waterways Experiment Station of the USACE, and is not an adopted federal regulation.

365 REP. DELL: When the National Academy of Science study is completed, and presents a new definition which your agency finds appropriate, could you implement that new definition before it was adopted by the EPA?

368 BIERLY: We could act independently of the EPA, but it would be foolish to do so. We would most likely try to see what is adopted by the

federal agencies. If there is stabilization, we would go through a rule-making process to adopt that methodology, which would include public input.

381 REP. LUKE: How are counties doing in their inventory of wetlands?

383 BIERLY: In the last three years, Oregon has made over \$360,000 available to local communities to do inventories. Many of Oregon's

counties are larger than some states on the east coast. In many counties, the land-use patterns are large parcels, so detailed planning for wetlands is not high on their priorities. Because the Goal 5 responsibilities for planning have a couple of options for local governments to not do planning due to insufficient information, it is more problematic within cities wherein there is development pressure.

The counties are basically deferring most of the inventory and planning responsibilities because they don't have the information available to

them and have no source of funding for that effort.

432 REP. LUKE: How many counties have done this planning?

433 BIERLY: I'm not aware of a single county that has done detailed planning for wetlands.

TAPE 55, SIDE B

003 CHAIR REPINE: Do counties have an option for their comprehensive plans? 007 BIERLY: No. Under Goal 5, if counties do not have enough information on the location, quality and quantity of the resource, they can avoid

the planning process for that resource.

010 REP. HOSTICKA: Maybe we can call back the bill sponsors who thought there was a great deal of difference between the 1987 and 1989 versions of the manual. Testimony so far indicates otherwise.

011 REP. DELL: Consistency is all we were after. It doesn't matter which version is selected.

036 LIZ FRENKEL, Sierra Club: Testifies in opposition to HB 3328. There is confusion between the definition versus the delination of wetlands.

Delineations are made by consultants and techno-crats. There probably isn't a wetlands delineator in Oregon who doesn't know how to delineate wetlands. In Benton County, there is an urban growth boundary in some areas, but in other areas there are wetlands, but no urban growth boundary. The city and county have been working together, and many people are beginning to understand the difference between a delineation and a definition.

088 RUBY RINGSDORF, Oregon State Grange: The West Eugene Wetlands Plan follows the 1989 definition. Last November, we were in a midwest state

in which there was a lot of development. This area included hills and wetlands. We asked City Hall employees if they had a delineation or mitigation bank, and they didn't know what we were talking about. Why are we the only ones in the country who place these types of restrictions on our land?

119 LARRY TROSI, Oregon Farm Bureau: Testifies in support of HB 3328. We support the premise behind the bill, which is the coordination between

state and federal agencies.

144 CHAIR REPINE: CLOSES PUBLIC HEARING ON HB 3328

Adjourns meeting at 3:22 p.m.

Submitted by:

Reviewed by:

Karen McCormac  
Administrator

Kathryn Van Natta Assistant

EXHIBIT LOG:

A - HB 3328 Preliminary Staff Measure Summary - Staff - 1 page B  
- HB 3328 Revenue Impact Analysis - Staff - 1 page C - HB 3328  
Testimony - Jerry Schmidt - 2 pages D - HB 3328 Testimony - Ken  
Bierly - 4 pages E - HB 3328 Testimony - Mike Propst - 1 page F -  
HB 3328 Hand-Engrossed with HB 3328-1 Amendments (LC3327) dated  
3-23-93 - Staff - 3 pages