

SENATE COMMITTEE ON WATER POLICY

March 18, 1993 Hearing Room 137 3:00 p.m. Tapes 23 - 24

MEMBERS PRESENT: Sen. Bill Dwyer, Chair Sen. Bob Kintigh,
Vice-Chair Sen. Wes Cooley

Sen. Frank Roberts Sen. Tricia Smith

MEMBERS EXCUSED: None

VISITING MEMBERS: Rep. Dave McTeague

STAFF PRESENT: Lisa Zavala, Administrator Pamella Andersen,
Committee Clerk

MEASURES CONSIDERED: SB 92-3 SB 440 SB 441

[--- Unable To Translate Graphic ---] 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 23, SIDE A

004 CHAIR DWYER: Calls the meeting to order at 3:14 p.m. - Welcomes Representative McTeague.

PUBLIC HEARING ON SB 440 - EXHIBITS A through I

WITNESSES: David Moon, Water for Life Jill Zarnowitz, Department of Fish and Wildlife Neil Mullane, Department of Environmental Quality Doug Myers, WaterWatch Jim Myron, Oregon Trout Louise Bilheimer, The Pacific Rivers Council Joni Low, League of Oregon Cities Cathryn Collis, Oregon Association of Clean Water Agencies Kip Lombard, Water Resources Congress Martha Pagel, Water Resources Department

ADMIN. ZAVALA: Reviews the purpose of the bill. - It was introduced by Senator Hannon at the request of Water for Life. - The bill defines in-stream flow.

CHAIR DWYER: Tell us why this bill is good public policy.

021 DAVID MOON: (introduces EXHIBIT A) The bill is necessary to define in-stream flow. - Many applications are filed for optimum amounts of water. - It should be made clear that applications should be for the minimum

amounts of water that are necessary to support the public uses.

030 SEN. COOLEY: Joins the meeting.

SEN. SMITH: Would you review the other things the bill does?

MOON: Begins review of the bill on page 2, line 1. - In examining the

draft we did see that some things need more work,

one of which was in the pollution abatement area. - Pollution problems should be addressed at the source rather than

simply throwing water on them. - Gives illustration of Idaho's state water plan with respect to

pollution. - Diluting pollution does not abate it. - We would like to encourage people to develop plans for pollution

abatement.

069 CHAIR DWYER: Most of the State's streams are over-appropriated. If everyone that has a water right took their water, there would be no

water left. On page 2, line 8, why do you mention an earlier priority date?

MOON: That bold language could be deleted without any problems.

077 SEN. SMITH: Leaves the meeting.

CHAIR DWYER: Why would we want to have an interstate compact control as mentioned on page 2, lines 35 and 36?

MOON: It would basically control the situation. - It shouldn't make that much difference. - I think the language should remain so we have no control questions.

CHAIR DWYER: Shouldn't the compact say what controls?

093 MOON: If there was a conflict. - We have some compacts that are already in existence that may not deal with specific problems that might arise. - The purpose is clarification so there are no fights over a particular issue.

101 REP. MCTEAGUE: Under section 2 (2), what is "methodology most widely used" to which you refer?

MOON: The reason that was included is a rash of applications were recently submitted that were based on the old basin investigations which used the Oregon Method. - The trouble with the Oregon Method is it is outdated and relies on

outdated information. All the original data has been lost or

destroyed. - We are left to accept numbers which we don't know are reliable. - In many cases they are excessive. - They represent flow figures that historically have never been

available. 145 - Rather than using those, we should have in-stream flows that are based on up-to-date methodologies that are accepted in the 1990's.

REP. MCTEAGUE: Have you made recommendations or do you have

alternative methodology? - Are these affordable, obtainable, reliable, useable, functional?

MOON: No, we have not made specific recommendations. - IFIM's (incremental flow methodology) are the clear example, but they are expensive.

SEN. ROBERTS: Looking at lines 9 and 10, are these three descriptions redundant? - Current; up-to-date; and most widely used.

MOON: "Most widely used" is insufficient alone.

SEN. ROBERTS: Why don't you eliminate that if it is not to be the criteria?

MOON: That's a possibility. You may be right in saying it is redundant.

SEN. ROBERTS: It may not be redundant but mutually exclusive. - "Current" is not very good language. Does it mean widely used or that which is being practiced? - "Up-to-date methodology" would appear to be the best criteria to use. - Serious consideration should be given what appears to be ambiguity.

CHAIR DWYER: How many verifiable methodologies are there?

MOON: I don't know. - IFIM is most widely accepted.

CHAIR DWYER: How does that methodology work? Does it use gauges or flow meters?

217 MOON: I believe that is based on study of the stream to determine what flows are necessary for that stream and its corresponding fisheries. - It would take into account the habitat necessary and the available

flows. - The Oregon Method never considers the historic flows of a stream.

REP. MCTEAGUE: My understanding is the Water Resources Department does the water availability analysis using their laundry list of 10 different techniques.

MOON: I assume you mean the estimated average natural flow (ENAF). - Yes, the department is supposed to perform a review to see if the request exceeds ENAF. - Where they don't, they are usually approved. - ENAF doesn't consider any diversions whatsoever. CHAIR DWYER: On line 7, why are lakes mentioned?

MOON: This is to try and conform to what already exists. - There are laws that already mention lake levels. - Notes minimum levels varying for differing uses. 286 - In our bill we are addressing minimum seasonal levels.

JILL ZARNOWITZ: (introduces EXHIBIT B) Offers testimony on SB 440. - It is unclear whether section 2 allows the new in-stream flow designation. - In section 3, "minimum seasonal quantity of water flow" is mentioned

but not defined. 337 - In-stream water rights should apply for the amount necessary for the particular use of the in-stream water right. - In sections 4 and 5, beneficial uses for which agencies may apply are changed. - Several minimum perennial stream flows were established for water

quality purposes, which then support populations of fish and wildlife. - If the Parks Department is only allowed to apply for benefits to fish and wildlife, that leaves flows helpful to hunting and fishing out of the picture. - In page 2, section 4, line 8, we agree with the removal of the bolded language. - Gives example of Siletz River anadromous fish which would be impacted if the minimum perennial stream flow were made subordinate to junior water rights. 393 - Notes concerns with language in section 6 relative to interstate compacts.

REP. MCTEAGUE: What is the Oregon Method?

ZARNOWITZ: Explains the specifics of the Oregon Method.

425 SEN. SMITH: Rejoins the meeting.

ZARNOWITZ: In some cases, the flows determined necessary to fill a certain habitat may be more than the actual flow of the stream. - The Department of Water Resources develops their hydraulic model of the estimated average natural flow. - We then work with them to determine if our flow is higher or lower, and what should be done in response.

CHAIR DWYER: What are the primary distinct differences between the two methods?

ZARNOWITZ: The Oregon Method is an empirical method, requiring the gathering of measurements which are then calculated. - This was used prior to the age of computers. - The other is a model, requiring the taking of field measurements

which you model on the computer. 477 - The IFIM can come up with a whole range of numbers as opposed to the Oregon Method which can only come up with minimum or optimum numbers based upon the percentage of the habitat you are seeking to cover.

TAPE 24, SIDE A

REP. MCTEAGUE: Are you trying to cover the habitat for a specific species?

ZARNOWITZ: We are trying to cover the habitat for a particular species during a specific life stage.

REP. MCTEAGUE: If the Oregon Method numbers give us an inflated amount, why does that impact the stream health issue? - A healthy stream will not indicate the need for higher flows. - An unhealthy stream is where the Oregon Method produces excessive numbers.

ZARNOWITZ: Mentions the Tenant Method. - Notes the IFIM method is used in major developments but is expensive.

037 NEIL MULLANE: (introduces EXHIBIT C) Lists concerns his department has with the bill. - There are conflicts between different sections of the bill, and how

the bill actually describes the implementation of the water quality

program. - The primary intent appears to be to limit the department to apply for in-stream water rights for pollution control. - It appears that this would result in us applying for more water than

we would currently. - The department has to use this tool in a long term program as part of a pollution abatement plan. 053 - The department has developed an extensive program with respect to in-stream water rights. - It is not using the in-stream water rights to dilute untreated waste

water. - In terms of priority streams, we are looking at both non-point and

point sources. - We are looking at these sources in connection with use of advanced

waste water treatment. - Section 3, does not define "minimum seasonal quantity." - States their method: using the average of the lowest flow of 7 days

in 10 years. - There are conflicts between sections 2 and 3, that would not allow us to use our methodology. 096 - We agree with Mr. Moon on the temporary nature of this. - We don't see an opportunity to use these until we have an abatement

plan in place. - We are encouraging people to look at this as a potential opportunity

to solve part of their problems. - Gives example of waste water treatment in the Tualatin Basin.

112 DOUG MYERS: (introduces EXHIBIT D) WaterWatch does not support SB 440. - It will severely weaken Oregon's in-stream flow protection program

when we can least afford it. - We have specific objections to page 1, sections 2 and 3, lines 9, 10, 17 and 18 because a huge burden is placed on the State when it

attempts to protect public water for public in-stream uses. - The bill would tie the State's hands by not allowing it to protect

the public's uses of the resources if it lacks the funds to use the

most up-to-date methodologies for determining flow needs. - The bill would place a greater burden on the State. - On page 1, lines 11 and 12, we agree the base line studies are good

to have, but requiring them for one use and not another, makes no sense.

- On page 1, sections 2 and 3, lines 7, 8, 17 and 18 the limit imposed is opposite of what is needed. - The State has issued over 70,000 in-stream water rights with

virtually no information, no base line studies or no analysis. - There are only 542 in-stream water rights, today. - Publicly valued uses of this resource should receive legal protection in-stream.

168 JIM MYRON: (introduces EXHIBIT E) Oregon Trout supports WaterWatch's testimony and opposes this bill. - We believe it is an attempt to stop State agencies from applying for

in-stream water rights. - Water Resource Department administrative rules have recently been

revised so that in-stream and out-of-stream applications are subject to the same review. - This bill would thwart any attempt to put equity into this system. - The Department of Fish and Wildlife applies for optimum fish flows.

This is between the minimum or maximum. - We believe this bill would thwart the original intent of the

Legislature when the In-Stream Water Right Act was passed in 1987 and would further over-allocate Oregon streams for consumptive uses.

193 LOUISE BILHEIMER: (introduces EXHIBIT F) We are strongly opposed to SB 440. - We believe this bill is an attempt to gut the In-Stream Water Rights

Act. - The bill ignores that Oregon's in-stream values are declining

rapidly. - Sufficient in-stream flows are now unavailable to meet scenic

waterway needs under the established Diack flows. - Language of the bill would remove the ability of State Parks to apply for in-stream water rights for recreational uses. - Protection is less costly than restoration. - Many of the 542 existing water rights are only such on paper as there is not enough water to fulfill them since we have appropriated those streams for out-of-stream uses. - I would support doubling DEQ's budget so that they can actively

pursue non-point source polluters.

236 JONI LOW: (introduces EXHIBIT G) The League is opposed to SB 440. - We are concerned with the provisions relating to dilution of

pollution in sections 4 and 5. - Existing pollution facilities have been constructed to meet the

federal standard and would have to be modified at great expense

should this bill pass. - The bill apparently would eliminate return flows, resulting in even

less available water.

267 CATHRYN COLLIS: (introduces EXHIBIT H) Offers testimony in opposition to SB 440 in its current form. - Elaborates on the agencies she represents. - The bill precludes the long term use of in-stream water rights for

pollution abatement. - This bill would require all discharges be treated to a level equal to or exceeding the quality of the stream, ignoring assimilative

capacities of the water body. - Lists various practices that would have to be treated to the same

high quality, causing enormous expenditures.

305 - A fundamental premise of the current regulatory framework for water quality management is that the discharge of constituents in

non-polluting amounts does not warrant highly advanced levels of

treatment. - We are opposed to the bill and request it be rejected in its current

form.

316 KIP LOMBARD: Our members support, in section 2 of the bill, the concept of employing the most current and widely used methodology. - They are concerned that methodology now used is not accurate. - As far as this bill addresses that issue, we would like to see it go

forward. - In the last section, the amendment to ORS 537.343 requires a public

hearing. - Presently, public hearings are at the discretion of the department.

350 MARTHA PAGEL: (introduces EXHIBIT I) Offers testimony on SB 440. - We are charged with protection of the public interest with respect to all the state's water resources. - Included in that charge are specific provisions relating to the

establishment of in-stream water rights. - This bill would affect the method by which we establish those water

rights and their effectiveness once established. - Priority dates are of the most concern to our department, and this

measure would disrupt the current equity. - The second major concern relates to methodology. - The Water Resources Commission has spent much time in the last year

developing new procedural rules for how in-stream water rights are to be handled. - Those procedures remain untested.

415 CHAIR DWYER: Closes the public hearing on SB 440. - Opens the public hearing on SB 441.

PUBLIC HEARING ON SB 441 - EXHIBITS J through M

WITNESSES: David Moon, Water for Life Jim Myron, Oregon Trout Louise Bilheimer, The Pacific Rivers Council Jerry Schmidt, Oregon Association of Realtors

410 ADMIN. ZAVALA: This bill was introduced at the request of Senator Hannon on behalf of Water for Life. - Notes what the bill will do.

TAPE 23, SIDE B

DAVID MOON: (introduces EXHIBIT J) Water for Life developed this bill on ponds as there is a major concern by water users relative to stock water ponds. - Many existing stock water ponds would be considered illegal under the current rules. - Most people were unaware that a permit was required for small stock

water ponds. - The bill exempts those existing stock water ponds, as they fulfill

several purposes.

- If these ponds were eliminated, stock would be watered directly from the streams. - This is the primary focus of this bill.

044 CHAIR DWYER: There is one pond bill making its way through the House right now.

MOON: The bill also includes provision for emergency fire fighting uses, fish passage structures and forest and rangeland management.

ADMIN. ZAVALA: There are several House bills covering these issues. - I believe they are seeking to consolidate those into one bill.

062 JIM MYRON: (introduces EXHIBIT K) Oregon Trout does not support this bill. - The bill appears to apply to existing and future stock ponds. - The ten acre feet amount is excessive. - The cumulative effect of uses to occur without permitting is

disastrous for Oregon's watershed.

073 LOUISE BILHEIMER: (introduces EXHIBIT L) We are also opposed to this bill. - We participated on the work group that developed the concepts for HB

2153. - That bill deals with existing ponds, 5 acre feet and under. - SB 441 goes beyond that, addressing all ponds existing and in the

future, double the size of HB 2153. - No one knows how many ponds, or how much water this would cover. - To begin looking at exempting out-of-stream uses from the water right process and the public interest determination puts us in a precarious position.

098 SEN. COOLEY: The entire state is photographed continually by the federal government. - Those photographs reveal where every stock pond is. - Those are well determined and well defined.

BILHEIMER: Testimony by the department in the House indicated that in tree-covered areas, ponds cannot be seen.

SEN. COOLEY: The height and angle of the photographs allow them all to be seen; however, it is true the depth cannot be determined.

128 SEN. KINTIGH: In western Oregon, cattle are not grazed in tree cover. - Would you rather see cattle watered in a stream?

BILHEIMER: No.

SEN. KINTIGH: What about emergency fire uses?

BILHEIMER: That is addressed in the House bill.

CHAIR DWYER: The bill passed out last session was a lot better vehicle than this vehicle.

147 JERRY SCHMIDT: We support the bill and we would like to somehow resolve this issue. If this bill is the way to do it, great. We would like to

see an end to this.

SEN. SMITH: Is your concern existing or future ponds?

SCHMIDT: The concern is that we aren't micro managing our resource, getting into small, di minimus uses and preventing the department from focusing on the macro resources.

SEN. SMITH: Do you have research data on how much water or ponds exist to conclude it is a minimal impact?

SCHMIDT: I have seen aerial photos but don't have any other information than has been mentioned here, today.

SEN. SMITH: We don't know the impact on existing or future ponds?

SCHMIDT: If you have a pond in the forest or in the desert, it is

difficult to see how it could impact in-stream water rights.

CHAIR DWYER: This problem is in an area where this committee can alleviate many problems that exist. - Gives examples of what this would help. 196 - Senator Johnson has a bill that addresses this in a little way.

MARTHA PAGEL: We do have a working group that includes the interest parties that have submitted these bills. We will be meeting and would be happy to report back on the results of that meeting.

216 CHAIR DWYER: Closes the public hearing on SB 441. - Opens the work session on SB 92.

WORK SESSION ON SB 92-3

ADMIN. ZAVALA: SB 92-3 amendments and the hand-engrossed version have been distributed. - The amendments have been changed since their return from Legislative Counsel's office. - These reflect a consensus, although WaterWatch's attorney has not seen them, only her co-worker, Doug Myers.

SEN. KINTIGH: Who is in the group?

ADMIN. ZAVALA: Lists group participants. - References the amendments adopted by the Committee the previous week.

241 CHAIR DWYER: Closes the work session until the new amendments are received from Counsel. - Adjourns the meeting at 4:35 p.m.

Submitted by,

Reviewed by,

Pamella Andersen

Lisa Zavala Clerk

Administrator

EXHIBIT LOG:

A Testimony on SB 440, David Moon, 1 page B Testimony on SB 440, Jill Zarnowitz, 2 pages C Testimony on SB 440, Neil Mullane, 4 pages D Testimony on SB 440, Doug Myers, 4 pages E Testimony on SB 440, Jim Myron, 2 pages F Testimony on SB 440, Louise Bilheimer, 1 page G Testimony on SB 440, Joni Low, 1 page H Testimony on SB 440, Cathryn Collis, 2 pages I Testimony on SB 440, Martha Pagel, 2 pages J Testimony on SB 441, David Moon, 1 page K Testimony on SB 441, Jim Myron, 1 page L Testimony on SB 441, Louise Bilheimer, 1

page M Testimony on SB 440 and 441, Jim Myron, 1 page N
Testimony on SB 440 and 441, Ken Rocco, 1 page