

DIVISION OF
STATE LANDS

STATE LAND BOARD

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The Oregon State Land Board met in regular session on June 11, 1996 in the Land Board Room of the State Lands Building, 775 Summer Street N.E., Salem, Oregon 97310.

Present were:

John Kitzhaber	Governor
Phil Keisling	Secretary of State
Jim Hill	State Treasurer

<u>Assistants</u>	<u>Staff</u>	<u>Dept. of Justice</u>
Paula Burgess	Paul Cleary	Bill Cook
Cynthia Griffin	John Lilly	
Rollie Wisbrock	Steve Purchase	
	Gary Van Horn	
	Jenifer Robison	
	Gail Lowry	
	agency staff	

Governor Kitzhaber called the meeting to order at 9:45 am. The topics discussed and the results of those discussions are listed as follows. Further details of the discussions may be obtained in the written transcript of the meeting available at the Division of State Lands, 775 Summer Street N.E., Salem, Oregon 97310 (phone: (503) 378-3805).

Removal-
Fill

Request for authorization to develop legislation necessary to apply for assumption of the federal Section 404 permitting program and for a State Program General Permit pursuant to HB 2785 (1995).

Director Cleary said this item is not a request for approval to assume 404, but rather for authorization to continue evaluating the potential assumption of the Section 404 permitting program and an effort to keep the Board informed of the process.

Cleary said some potential benefits of assumption would be a simplified process, with reduced duplication, enhanced state control, and the ability to integrate with our natural resource planning. He said there is continued skepticism because of potential costs, increased staff and funding needs, and concern over potentially decreased resource protection if the state reduces its commitment. He said skeptics want an assurance that Oregon's wetlands and waterways will receive as much protection as they receive currently under the dual permitting program.

Cleary said that unless the agency assumes the program by June 30, 1997 (as specified in current legislation), it will be banned from issuing permits wherever the Corps of Engineers issues individual permits, which would essentially take the state out of the process on large projects. Cleary said that a debate needs to take place over the level and source of funding for assumption of the program, since permitting fees currently only support 10-20 percent of the program on an annual basis, with the rest of the program funding coming from the statutory waterway lease revenue, including sand and gravel.

The proposal is to work with stakeholders to develop draft legislation that would revise statutes to 1) make them consistent with the federal Clean Water Act requirements, 2) change the trigger date for the required assumption to June 30, 1999 (rather than June 30, 1997), and 3) trigger the fiscal note that would assess the potential funding and position authorities necessary to operate an expanded program. Cleary said this draft legislation would be returned to the Board in December for review. If the Board approves, the legislation would be introduced. He stressed that the proposal is a wait-and-see posture on the 404 assumption issue--to see what the costs and benefits are and to ensure it has the support necessary to go through the Legislature.

Eric Metz, Wetlands Policy analyst working on the 404 assumption, reviewed the range of options, explaining how the options differ in such areas as service delivery, cost, and resource protection.

Director Cleary said the agency's recommendation would be to continue evaluation of all options, get stakeholder responses and comments, and return to the Board in December with the legislative concepts and further analysis of alternatives for the Board's direction.

Lyn Mattei, representing the Oregon Chapter of the Sierra Club and the Northwest Environmental Advocates, said both organizations are committed to working with the Division and others to identify and resolve the issues.

She voiced concern that, even after attending the workshops, the public doesn't understand what is involved in state assumption, since the issue is so complicated. She added that the potential loss of protection has not been highlighted enough. She disagrees that the public meetings showed an overwhelming support of state assumption and SPGPs. She stressed the need for more discussion about protecting the wetlands, rather than just streamlining the process.

Mattei said the EPA is ready to waive its federal review process without having seen Oregon's track record. She would rather they wait for the reports the agency must submit before waiving the review.

Another concern she expressed was that the category of activities used in the SPGP permit will be very broad and could violate Section 404-E of the Clean Water Act.

She stated that by taking away all the federal laws, agencies and support that now apply when the Corps issues wetlands permits, then taking away the Division's individual permit review and replacing that with a lot of General Authorizations, you could end up with the worst of both federal and state programs.

She added that she is concerned with losing DEQ and the expertise that it brings that the Division is lacking, such as in areas of toxins, contaminants and water quality. Also, the expertise of the USFWS and the NMFS will be lost. They will be able to comment only as individuals after state assumption. She fears that much of the needed expertise will have to come from ODFW, which she says is currently understaffed, under budgeted and incapable of filling the gap created by losing the federal resource agencies.

Pete Test, Oregon Farm Bureau, said they support the efforts of the Division in the assumption process. He said any effort to streamline the fill and removal and wetlands permitting processes will be of benefit to agriculture.

Test shared some of the Farm Bureau's concerns with assumption, such as the loss of the 50-cubic yard removal-fill threshold, which he said is critical for landowners and should remain in place.

He expressed his appreciation of the Division staff for keeping the Bureau informed and said they are willing to work toward answers to their concerns.

Alan Willis, Port of Portland, said they have supported the Division's assumption of the Federal 404 program related to removal-fill. He said the concept offers a number of protective and processing advantages over the existing structure for wetland and waterway permitting. They support the staff recommendation and will work within the stakeholder process to address the issues.

Bob Ferguson, President of the Waldo Mining District, voiced his concerns regarding various agencies needing additional funds to implement this program. He would like to see one-stop shopping for a permit. He stressed the need for the soil, water and conservation districts, local watershed councils and local governments to have a greater role in the permitting process.

Gary Voerman, Region 10 Program Director for EPA, presented a letter to the Board from the Regional Administrator of the EPA with comments regarding the 404 program assumption. He introduced Joel Schaich and Adrian Allen from the EPA. Voerman said the federal Clean Water Act provides for and encourages, where appropriate, states to take a lead role in water quality and aquatic habitat, to add more protection of the resources and to eliminate some duplication of permitting requirements. He said the EPA monitors the state's program to ensure they are meeting the minimum federal requirements. He added that EPA also provides technical and financial assistance to states considering assumption.

Joel Schaich said the EPA will retain some of their authority, such as the authority to veto any fill or removal project if it will cause significant degradation to waters of the United States, or the ability to elevate permit decisions. He said they will coordinate federal agency review of major actions and monitor and review state program performance to ensure it meets federal requirements. During the initial stages after an assumption, he said the oversight would be substantial, but then would lessen as the state is established in the program.

Schaich reviewed the EPA's experiences with New Jersey and Michigan, both states that have assumed the 404 permitting program, saying the vast majority of the projects in those states don't meet the threshold for federal review. He expects to find the same in Oregon.

He said EPA is working with the Division on the legal requirements for assumption, and is providing grant funds both in 1995 and 1996 to support the process of consideration of assumption. The staffing levels will be reviewed and a process developed to coordinate on endangered species issues.

Governor Kitzhaber asked whether cumulative impacts are being given consideration in states that have assumed, where only one percent of the projects qualify for federal review. Schaich responded by saying the annual review takes the cumulative impact of all these smaller projects into account.

Governor Kitzhaber asked how much money the EPA is currently spending for permitting projects. Schaich said they have one and one-half FTE for reviewing Oregon's removal-fill projects.

Governor Kitzhaber said there are many issues and questions that need fleshing out. He encouraged stakeholders to continue to participate with the Division, as they continue studying the potential assumption of the program.

He said he will not support any streamlining proposal unless it clearly demonstrates benefits for both resource protection and the people of the state.

Secretary of State Keisling moved the Board approve continuing the process of reviewing the potential assumption of the federal 404 permitting program. State Treasurer Hill seconded the motion and the approval was unanimous.

Budget Request for approval of the Division of State Lands' proposed 1997-99 budget request.

Director Cleary said the budget has been developed with a focus on 1) managing and protecting the state's educational legacy, the Common School Fund and related assets, and 2) protecting the state's environmental legacy, the wetlands and waterways and lands we regulate and manage.

Cleary gave a general overview of the budget. He explained that the agency is requesting only two additional positions, both related to essential salmonid habitat and the coastal coho restoration effort. He said no program expansions have been proposed in the Division's budget.

Governor Kitzhaber said he appreciated the prioritization process that Director Cleary and the agency went through. He added that he believes it is a good, tight budget that responds to the requirements of our coastal coho salmon initiative.

State Treasurer Hill moved the Board approve submission of the Division's proposed 1997-99 budget to the Department of Administrative Services. Secretary of State Keisling seconded the motion and the approval was unanimous.

Consent Agenda

- Waterway Leasing** Request for approval of appointments to the Waterway Leasing Task Force and endorsement of the Task Force goal statement.
- Scenic Waterways** Request for approval of various scenic waterway permits for recreational placer mining activities located within state scenic waterways.
- Removal-Fill** Request for approval of modified administrative rules for general authorizations controlling the following types of removal-fill activities: a) erosion control, b) road construction, c) fish habitat enhancement, and d) wetland restoration and enhancement.
- Scenic Waterway** Request for approval of an emergency removal-fill permit issued to ODOT for stabilizing an existing landslide area and replacing the washed-out highway embankment of Oregon Forest Highway, also known as the Clackamas Highway, within the quarter-mile corridor of the Clackamas River State Scenic Waterway.
- Scenic Waterway** Request by Irene Keerins for approval to place 225 cubic yards of rock in the South Fork of the John Day River Scenic Waterway to construct 5 rock barbs for erosion control.
- Minutes** Request for approval of minutes of April 9, 1996 State Land Board meeting.

Director Cleary asked that Item 1d on the Consent Agenda regarding the approval of appointments to the Waterway Leasing Task Force be amended to request two additional members from the education community, to add a beneficiary voice on the Task Force. The Governor noted that amendment to the item.

Governor Kitzhaber asked that Item 4d be separated from the Consent Agenda at the request of Randy Roop, to be handled separately for additional discussion on the item.

Cleary gave a quick overview on the rest of the items on the Consent Agenda. Secretary of State Keisling moved that the Consent Agenda (with the amendment to Item 1d and the exception of Item 4d) be approved. State Treasurer Hill seconded the motion and the approval was unanimous.

**Scenic
Waterway**

Request for approval of a scenic waterway emergency removal-fill permit issued to the Oregon Department of Transportation for work adjacent to Clackamas River.

As Director Cleary introduced this issue, it became clear that Roop wished to speak on navigability as a larger issue, rather than this particular item. Secretary of State Keisling moved the item be approved. State Treasurer Hill seconded the motion and the approval was unanimous.

Navigability

Request for adoption of administrative rules governing the process for making waterway navigability determinations pursuant to HB 2697 (1995).

Governor Kitzhaber said he would count the number of individuals wanting to testify on the navigability issue and divide them by the hour and a half available for the remainder of the meeting.

Director Cleary explained this item is a request for approval of administrative rules governing the process for making waterway navigability determinations. These rules were developed pursuant to HB 2697 (adopted by the 1995 Legislature), and establish a formal process for navigability studies with extensive public and landowner notification and opportunities for comments and hearings.

Cleary said requests for navigability studies will be examined to see whether the request meets the two tests for 1) significant economic justification as related to the Common School Fund, and 2) whether there is broad and substantial public interest for engaging in the study. He said requests will also be reviewed to determine whether there are other ways to resolve the conflicts without incurring the time and expense of a navigability and ownership study.

Cleary said in the past, if the Division felt it had sufficient evidence to assert ownership and sustain a claim, the agency just started acting as owners. Until the late 1970s and early 1980s, when the Big Book and the Blue Book were created, there was no specific process for initiating a navigability study. There was no specific landowner or public notice process, no comment or public hearing process, and no statutory direction. He said in 1992, the Board approved a policy developed by the Division that was based on these past practices. HB 2697 mandated that administrative rules be developed to formally outline the process for making navigability determinations.

John Lilly, Assistant Director for Policy and Planning, said the nine hearings held throughout the state were well attended. Lilly shared some of the concerns the public expressed during those hearings. He said staff will continue to work with the public regarding their concerns.

Hazel Stevens, representing Friends of Barton Park and the Eagle Creek CBO, requested the Board deny any navigability claim to the Clackamas River since it is an important river for domestic water supply for the county and Metro from the area below the dams, an important salmonid habitat area, and a heavily-used recreational river year-round. She said they believe a floatage easement would be an excellent alternative to navigability status and would save the state millions of dollars.

Governor Kitzhaber asked if there is a proposed navigability study on the Clackamas River. Cleary answered that there is not. Cleary said the action in front of the Board today is just to adopt the rules to establish the process for handling requests to do navigability studies.

Randy Roop, Friends of Barton Park, brought up some removal-fill issues dealing with the Clackamas River. Secretary of State Keisling stressed the fact that many people came a distance today to testify regarding the navigability issue at hand. Director Cleary said he would be glad to meet with both Stevens and Roop after the meeting to discuss their removal-fill concerns and other issues not on the agenda today.

Roop said he agreed that a flotation easement would be the way to go on the Clackamas River.

Jon Justesen, landowner from Central Oregon, commended Jeff Kroft and John Lilly for their work at the public meetings that were held. Justesen stated that he doesn't believe the issue is a question of navigability, but is a recreational access issue in his area. He said the state has a hard time managing the lands they currently have. He said declaring a river navigable increases conflict. He stated that a river bank is not a trail, and in most cases a recreationist is forced to trespass on private property, since most river banks are impassable to the normal high water mark.

He said to allow easier access to the river will not protect the fish habitat or the riparian areas. He asked the Board to take the lead and stop any further "takings" in the state that degrade property rights and allow more pressure on the wildlife.

Phillip Krouse, property owner on the Applegate River, said he attended a meeting the previous night where Josephine County property owners were scared, concerned, and quite angry over the possibility of the state, with the stroke of a pen, taking into state ownership lands that have been in private ownership (in some cases) for over a hundred years.

Krouse voiced his concerns over the sewage problems that would arise if the state declares navigability on some of the rivers, without providing restroom facilities within the banks of the river.

He discussed his financial concerns regarding the costs involved in the studies, lawsuits, and loss of taxable income. In conclusion, he said the state would cause many more problems than they solve by declaring navigability ownership on these rivers.

John Urquhart, Sandy River, said the fairest and most cost-effective way to resolve the present public/private conflicts would be to legislatively confirm and settle existing titles to waterway lands, subject to a statutorily defined and expanded public floatage easement that specifically provides for recreation.

He stated he didn't believe HB 2697 went far enough in that it doesn't address vested property interests. He said that, while state parks are being closed for lack of funds, the Division is embarking on a course of action that may add severe economic consequences for the state and its taxpayers.

Urquhart said he supports the Division's recommendation proposing legislation that would define and clarify the public's rights to use of the waterways under the floatage easement. He said a study of existing state and federal laws governing the public's right under the common law floatage easement and the Public Trust Doctrine would be a good starting point.

He said what he and other landowners adjacent to the waterways want is certainty. He proposed a legislative concept that would make the mean high waterline, which he said is readily determined, the ownership line.

Kathy Amundson, Sandy River property owner, suggested the Board should go back to the Legislature to ask what was meant by "broad and substantial public interest and significant economic justification."

She said the rulemaking hearings the Division had were flawed, due to insufficient notice. She said the entire process should be redone by a group independent of the Division. She asked how the State Land Board could justify taking on more property that they can't afford to maintain. She suggested the property be left to the owners and a floatage easement be given to the public.

Amundson referenced a 1972 biennial report to the State Land Board which studied navigable rivers. She said the Sandy River was surveyed prior to statehood and found not navigable by any type of boat or canoe.

Lynette Kerslake, Sandy River property owner, said the Division has taken 57 acres of her family's land without due process of the law or notification. She expressed her belief that the entire navigability process is an attempt to take away people's

constitutional rights. She summarized by stating that a floatage easement would be a more democratic way of solving the problem and would save the taxpayers money.

Beverly Jones, Sandy River property owner, said the Division took 33 acres of her land in 1992. She said the Division is starting with the Sandy River, but has a list of over 300 rivers they are going to go after. She suggested the problem could be solved with a statewide floatage easement act.

Bob Ferguson, President of the Waldo Mining District, said he's concerned this will be used as a club to declare federal mining claims null and void, and to force private landowners into doing what the recreational groups want them to do.

Greg Leo, Oregon Farm Bureau, distributed written testimony to the Board. He said the Legislature's definition of "sufficient economic interest" is a subjective kind of determination and needs to be changed to include a more objective standard.

He said the latest draft has omitted the study requestor's affirmation or sworn statement under oath that information contained in the request was accurate and truthful, and he feels that is important to be included.

He said there should not be any navigability determinations that predate these rules--the agency should start with a clean slate regarding previous determinations.

He stressed the importance of the Board or the Division not pushing or pursuing the expansion of the list of navigable waterways. He said the legislation intended this to be complaint driven and not an advocacy process. He said when considering a request, it is important that a determination be made regarding the effect on the local economy. He added that a floatage easement is an idea with merit. He said the Farm Bureau is pleased to be a continued stakeholder in the process.

Sue Hallett, Oregon Independent Miners, said they are concerned with the fate of the federal mining claims once navigability is established. She asked whether the state will recognize these mining claims as valid once a court rules state ownership of a particular waterway. She stated that these claims are considered real property, can be bought and sold, and can be left in wills.

W.A. Montgomery, houseboat owner, asked to speak regarding the Waterway Task Force appointments. He shared his concerns regarding adding two educators to the Task Force, which he said will just make things more complicated. Secretary of State Keisling said it was at his recommendation that two educators be added to the Task Force, helping to give everyone from a broad group a stake in the outcome and to provide a Common School Fund beneficiaries' viewpoint.

Governor Kitzhaber announced that a number of natural resource graduate students from Oregon State University were in the meeting, from a class of Professor Geoff Huntington.

Governor Kitzhaber said he believes Jon Justesen touched on the real navigability conflict as being a recreational conflict issue. He said the navigability studies are one way of clarifying the disputes, but there are a number of questions involved with doing a navigability study. He said the idea of a floatage easement for recreational users is probably a good way to go, before initiating a navigability study.

He said he is comfortable with adopting the rules, but wanted the record to reflect that his actions were to comply with the Legislative mandate that rules be developed and adopted by July 1, 1996. He said the interested parties should work actively and aggressively to develop a floatage easement, then bring it to the Board again prior to the 1997 Legislative session.

Secretary of State Keisling referred to an earlier testimony regarding the high cost of litigation in these navigability cases. He reminded everyone that the federal courts ultimately have the decision in these cases--they can rule a waterway navigable, even if the state has determined it nonnavigable.

Keisling said the administrative rules will be a vast improvement to the navigability determination process that the agency had before. He said the floatage easement should strike the best balance within the existing law. He said it is a commitment to try to keep these issues out of the courts. He agrees with the plan to move ahead with this issue, working with the 1997 Legislature to clear up some of the areas that were vague in the legislation.

State Treasurer Hill said this is an attempt to have an open, inclusive policy, with no hidden agendas. He said it is important for the Land Board to know if the public feels they aren't allowed the type of input they should have on these difficult issues.

Secretary of State Keisling moved the item be approved. State Treasurer Hill seconded the motion.

Governor Kitzhaber commented that prior to a final ruling on the issue, he wanted to stress that his interest is not in rushing forward and studying streams for navigability--his concern rather is trying to develop a floatage easement or whatever it takes to resolve these conflicts, not impinging upon the stewards of the land that live there. He stressed that a navigability study is a tool of last resort.

Secretary of State Keisling asked Cleary about the oath or sworn statement from an individual requesting a navigability study that was removed from the original rules, as described by Greg Leo. Cleary said each request will be evaluated to ensure it is based on fact. If it is not, the agency will recommend the Board not initiate the study. Cleary said in a study request such as this, a sworn testimony is usually not required. Governor Kitzhaber asked whether someone could request a study anonymously. Cleary responded that the requestor could not and that they must present various pieces of information, so the request can be evaluated by the Division prior to coming to the Board.


Cleary said when the agency returns to the Board in December, they will be reporting on the study requests received, the agency's recommendations and priorities and an estimate of the staff costs, as well as alternatives to doing the studies.


Governor Kitzhaber asked that the motion be amended to say that the agency will return to the Board in December with this issue and will include legislative concepts for a floatage easement, as well as any changes or modifications needed to the original legislation language. This amendment was approved as being added to the original motion. The original motion and the amendment were then approved.

Salmon Update on measures for Coastal Salmon Restoration Initiative.

This issue was not discussed, but written materials were made available to the Board during the meeting.

The meeting was adjourned at 11:50 am.


Paul R. Cleary, Director


John A. Kitzhaber, Governor