



March 11, 2021

The House Committee on Economic Recovery and Prosperity: HB 2334

Testimony from David Moskowitz, Executive Director, The Conservation Angler

Chair Lively, Vice-Chair Cate, Vice-Chair Kropf, and Members of the Committee:

The Conservation Angler (TCA) is a nonprofit organization that works in Oregon's political process to ensure our wild fish and wild river resources are protected and that they provide multiple benefits for all Oregonians including present and future generations.

TCA regularly participates in agency rulemaking proceedings related to fish and wildlife management. We have multiple concerns about House Bill 2334.

HB 2334 would elevate the specific considerations that businesses receive in the agency rulemaking process. In addition to requiring an economic impact statement for temporary rules, rules which may be necessary to respond to an emergency, HB 2334 would repeal ORS 183.540 (Section 4) and replace it with importantly different language (Section 2(3)). This new language would require agencies to address a finding of significant adverse effect on small business in at least three ways instead of allowing agencies to address the impact in one of five ways. (Looking at HB 2334 Section 2(3) compared to ORS 183.540; please note that "and" would replace "or" in a critical place.) The result is that if a rule could not use objective criteria for standards," HB 2334 would require the agency to exempt small business from the rule or adopt "a less intrusive or less costly rule."

Economic impacts to small businesses are important considerations in agency rulemakings. These considerations also need to be balanced with other important considerations – including long-term survival and productivity of Oregon's fish and wildlife, protection of the natural environment and protection of clean air and water for communities throughout Oregon.

However, economic impacts on business already receive explicit special consideration under the statutes that govern the agency rulemaking process, which is not the particular case for many other interests. In our experience, TCA finds state agencies and their rulemaking commissions are already sympathetic to small business interests. TCA does not agree that a need exists to provide those interest a higher priority than they already receive under existing law. HB 2334 will likely prevent adoption of important, time-sensitive, and necessary rules aimed to address compelling statewide and local non-business priorities.

For example, the Oregon Department of Fish and Wildlife (ODFW) must regularly adopt what are called "in-season" rules during various fishing and hunting seasons. There are no doubt situations when such adoption affects small businesses. However, ODFW's mission is to prevent the serious depletion of any indigenous species of wildlife (ORS 496.012). This overriding, preeminent duty provides the Commission and ODFW with a guiding light for rule consideration and adoption.

Other concerns with HB 2334 are numerous:

1. HB 2334 does not foresee or account for any economic benefits that may accrue to some small businesses from rule adoption.
2. HB 2334 does not recognize the complexity of economic analyses required to determine whether a rule has economic impacts – positive or negative – and HB 2334 does not address the additional capacity required by all state agencies to acquire the necessary staff or have the funds to seek contracts analyzing economic effects of rules. HB 2334 will have a large fiscal impact.
3. Many of the examples provided during oral testimony related to COVID-19 pandemic response business impacts. While 2020 was indeed impactful for small businesses, the need for the state to react quickly to protect overall public health was an overriding circumstance necessary for the health and well-being of the entire state – including small businesses. Further, many federal and state government programs enacted during the COVID-19 crisis (still on-going) provided financial assistance meant to help alleviate the financial impact of doing business during a public health emergency. While these programs may have been slow to develop and may have left some individuals and businesses behind, the requirements envisioned in HB 2334 would create even more obstacles in the future.

TCA deals with temporary rules monthly with ODFW. The temporary rulemaking authority is delegated from the Commission to the ODFW Director. The Commission's should retain the right – as should the public – to have a chance to review and comment on temporary rules and their impact on a case-by-case basis. This access should be addressed by the OR Administrative Procedures Act, rather than making it more difficult for an agency to adopt temporary rules that are often critical for mission-related duties.

TCA assumes the statement of economic impact is omitted from the notice requirements for temporary rules because those rules often must be adopted in an emergency fashion for a specific and critical public need – therefore making preparation of a business impact statement impractical, especially since temporary rules are limited in duration to 180 days, after which a complete analysis and impact statement could be developed as part of a regular rulemaking process. While many spoke of temporary rules often becoming the exact language of permanent rules, this only happens after a full rulemaking process during which Commissions hear from the affected public about the various impacts (good and bad). TCA does believe that the APA and its procedural requirements can be improved to engage the affected public more deeply, HB 2334 is not the proper vehicle to accomplish this task.

As a final consideration, TCA believes that this committee should consider wholesale repeal of the requirement for economic analysis of adverse business impacts for state rulemaking to revamp the requirement in a manner that addresses the greater public need for rules that balance the costs (or benefits) to small business verses the greater public benefit that agency rules also provide. The provisions adopted in 2005 were not holistic enough to truly benefit the entire state of Oregon.

Sincerely,

David A. Moskowitz (submitted electronically on March 12, 2021)

David A. Moskowitz

The Conservation Angler * 3241 NE 73rd Ave * Portland, OR 97213 * david@theconservationangler.org