



Oregon

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DATE: November 5, 2009

TO: Land Conservation and Development Commission (LCDC)

FROM: Paul Klarin, Marine Affairs Coordinator

SUBJECT: **Agenda Item 5, November 5-6, 2009, LCDC meeting**

FINDINGS ON THE ADOPTION OF PROPOSED ADMINISTRATIVE RULE TO AMEND THE TERRITORIAL SEA PLAN

I. AGENDA ITEM SUMMARY

The Territorial Sea Plan review requirements are prescribed under ORS 196.471(1). The statute requires the Land Conservation and Development Commission (LCDC) to review amendments recommended by the Ocean Policy Advisory Council (OPAC) and make findings that those amendments carry out the policies of ORS 196.405 to 196.515 and are consistent with applicable statewide planning goals, emphasizing the coastal goals, prior to adopting them as part of the plan. In this instance, Goal 19 Ocean Resources, OAR 660-015-0010(4), contains the applicable policies and implementation requirements.

For more information about this agenda item, contact Paul Klarin at (503) 373-0050 ext. 249, or by e-mail at paul.klarin@state.or.us.

II. SUMMARY OF RECOMMENDED ACTION

The department recommends that the commission make a finding that the proposed amendment to the Territorial Sea Plan, Part Five: Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities, carries out the policies of ORS 196.405 to 196.515 and is consistent with the applicable statewide planning goals, specifically Goal 19 Ocean Resources.

III. BACKGROUND AND HISTORY

Governor Kulongoski issued Executive Order No. 08-07, instructing the department to seek recommendations from OPAC concerning the appropriate amendments to Oregon's Territorial Sea Plan (TSP) reflecting comprehensive plan provisions on wave energy siting projects, and that the final amendment recommendations are provided to LCDC on or before December 1, 2009. OPAC established a Territorial Sea Plan Workgroup to consider

the proposed amendment in late 2008 and forwarded a draft version of the amendment to the department on May 15, 2009.

On December 5, 2008, the commission appointed the Territorial Sea Plan Advisory Committee (TSPAC) to assist the department in the development and to recommend an amendment to the TSP for renewable energy development in the territorial sea. Based on the draft amendment provided by the OPAC workgroup, TSPAC developed a final draft version of the amendment, Part Five of the Territorial Sea Plan: Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities. On September 11, 2009, TSPAC unanimously recommended that draft for consideration by the commission. OPAC conducted their final review of the proposed amendment at its meeting in Florence on October 23, 2009, and recommended that the commission adopt the amendment.

IV. ANALYSIS OF THE PROPOSED RULE TO AMEND THE TERRITORIAL SEA PLAN

The proposed rule amends OAR chapter 660, division 36, Ocean Planning, by creating a new section to the rule numbered 660-036-0005. The text of the proposed rule will incorporate a new part into the State of Oregon Territorial Sea Plan by reference as follows:

The Land Conservation and Development Commission adopts as part of the Oregon Coastal Management Program, and herein incorporates by reference, an amendment to the Territorial Sea Plan entitled Part Five: Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities, that the Ocean Policy Advisory Council recommended on October 23, 2009.

The proposed rule represents the first of two phases to amend the TSP. The map portion of the plan, which will identify areas within the territorial sea that are appropriate for renewable energy development, will be submitted as a recommended amendment at a later date. OPAC and the department will conduct the same type of development and review process followed to produce the text portion Part Five for the data compilation and spatial analysis that is needed to produce the maps. Pursuant to ORS 196.485, upon adoption and incorporation into the plan, state agencies must apply the new requirements of the TSP. Further, upon federal approval, Part Five becomes applicable as state enforceable policies under the NOAA rules (15 CFR Part 930) implementing the federal consistency provisions of the Coastal Zone Management Act. (16 USC §§ 1451 to 1465).

The following analysis of Part Five is divided into the four sections of the new chapter; (A) Renewable Energy Facilities Development, (B) Implementation Requirements, (C) Operation Plan Development, and (D) Northwest National Marine Renewable Energy Center Mobile Test Berth Site. Part Five also includes Appendix A: Definitions and Terms and Appendix B: Endnotes, both of which contain references for the specific statutory and rule text that are used in the document.

Section (A) Renewable Energy Facilities Development

This section of Part Five contains (A) (1) Background information and (A) (2) Policies. The background information establishes the context for Part Five and provides that the policies and implementation requirements are mandatory “notwithstanding Part One, paragraph F.1.b” of the Plan which address Mandatory or Discretionary Provisions of the Plan.

The Policies of Part Five are derived directly from those already established by Goal 19, Ocean Resources, the Territorial Sea Plan, Part One, section (G) Ocean Management Goals and Policies, and ORS 196.420. Those policies are predicated on the protection and conservation of renewable marine resources (i.e. living marine organisms) and ecosystem function and integrity for the long-term ecological, economic and social values and benefits. All three prioritize the protection of renewable resources over non-renewable resources. Goal 19 and the TSP, Part One, section (G) provide specific standards for achieving those policies, which are incorporated into the policies under Part Five as follows:

a. Maintain and protect renewable marine resources (i.e. living marine organisms), ecosystem integrity, marine habitat and areas important to fisheries from adverse effects that may be caused by the installation or operation or removal of renewable energy facility by requiring that such actions:

1.) Avoid adverse effects to the integrity, diversity, stability and complexity of the marine ecosystem and coastal communities, and give first priority to the conservation and use of renewable marine resources;

2.) Minimize effects by limiting the degree or magnitude of the action and its implementation;

3.) Rectify or mitigate the effects that occur during the lifetime of the facility by monitoring and taking appropriate corrective measures through adaptive management; and

4.) Restore the natural characteristics of a site to the extent practicable when the facility and structures are decommissioned and removed.

b. Protect marine renewable resources, the biological diversity and functional integrity of marine ecosystem, important marine habitat, areas important to fisheries, navigation, recreation and aesthetic enjoyment as required by Statewide Planning Goal 19.

Goal 19, Implementation Requirements, (2) Management Measures (d) and (f) and the Territorial Sea Plan, Part One, section (G) Policy 3: Management Measures (5), (6), and (7), require coordination between state and federal agencies and the involvement of local governments and stakeholders, and are incorporated as follows into the Part Five, section (A)(2) Policies under:

- c. Promote direct communication and collaboration between an applicant for a state or federal authorization for the siting, development and operation of renewable energy facilities and affected ocean users and coastal communities to reduce or avoid conflicts. Agencies will strongly encourage applicants to engage with local, state and federal agencies, community stakeholders, tribal governments and affected ocean users in a collaborative agreement-seeking process prior to formally requesting authorization to initiate a project. (endnote omitted).*

Goal 19, Implementation Requirements (2) Management Measures (a) and (g) and the Territorial Sea Plan, Part One, section (G) Policy 3: Management Measures (2), (3), and (8), require taking a precautionary approach and the use of adaptive management and conditional approvals to ensure the protection of ocean resources, and are incorporated as follows into the Part Five Policies under:

- d. Limit the potential for unanticipated adverse impacts by requiring, as necessary, the use of pilot projects and phased development to collect data and study the effects of the development on the affected marine resources and uses.*

Goal 19 and the TSP both seek the use of marine resources for the purpose of providing long-term ecological, economic and social value and benefits. The policies articulated under ORS 196.420(5) specifically “encourages research and development of new, innovative marine technologies to study and utilize ocean resources.” These policies are incorporated as follows into the Part Five Policies under:

- e. Facilitate the research and responsible development of ocean-based renewable energy sources including wave, tidal and wind, that meet the state’s need for economic and affordable sources of renewable ocean energy.*

Section (B) Implementation Requirements

This section of the plan replaces the use of Territorial Sea Plan Part Two: Making Resource Use Decisions, sections (A) and (B) for the review and approval of renewable energy facility developments by state and federal agencies. Section (B) subsections 1 through 4 are related to the scope of authority, state agency review process, intergovernmental coordination, and resource inventory and effects evaluation. This section is a further enunciation of those existing requirements, and also incorporates policies under Goal 19, Implementation Requirements (2) Management Measures and the Territorial Sea Plan, Part One, section (G) Policy 3: Management Measures, for application of a cumulative effects assessment, adaptive management and the precautionary approach to resource management.

Subsection 1, “Siting: areas designated for renewable energy facilities development,” establishes the scope of the area to which the TSP applies consistent with Goal 19 Ocean Resources, and reiterates the authority of the Department of Land Conservation and Development under ORS 196.435(1) in the application of the federal consistency provisions of the federal Coastal Zone Management Act to federal activities related to these projects.

Subsection 2: State Agency Review Process, establishes the process by which state agencies will coordinate their activities related to regulating ocean renewable energy development through a joint agency review team (JART), and contains the authorization for that process within the section as:

“Pursuant to ORS 196.485 and ORS 197.180, state agencies shall apply the policies and provisions of the Oregon Ocean Resources Management Plan and Territorial Sea Plan, and Goal 19 Ocean Resources as required to conform with State Agency Coordination Programs (OAR chapter 660, divisions 30 and 31).”

Subsection 3: Project Review Process and Coordination articulates the function and scope of the JART process and establishes the requirement for an applicant to communicate and coordinate their efforts with local communities and stakeholders. This requirement is based on the Goal 19, Implementation Requirements (2) Management Measures (e) and (f) and the Territorial Sea Plan, Part One, section (G) Policy 3: Management Measures (6) and (7), both of which provide for Regional Cooperation and Governance and Public Involvement.

Subsection 4: Resource Inventory and Effects Evaluation Standards, contains standards for conducting a resource inventory and effects evaluation that are specifically designed to address the full range of potential effects that may be associated with the development and operation of a renewable energy facility in the territorial sea. The inventory criteria and evaluation standards contained in Section (B) are derived directly from Part Two of the Territorial Sea Plan and the Goal 19, Implementation Requirements (1) Uses of Ocean Resources, which details the marine resources, functions, uses and values that are protected.

The inventory content standards of this subsection include: the facility operational footprint including associated structures and utilities; the physical properties of the development location; bathymetry and topography; geologic structure; biological features; cultural, economic and social uses; historic, cultural or archeological resources; and other data as determined necessary to evaluate the particular proposed project.

Subsection (e), the written evaluation, provides the standard for preparing an analysis of the inventory content information that describes the potential short and long term effects of the proposed development. The categories of potential effects that an applicant must evaluate are the biological and ecological effects; current uses; natural and other hazards; and cumulative effects.

This section also provides an opportunity to proceed with pilot projects or phased development to obtain information when there is a lack of data available to address those potential effects. This subsection applies the Goal 19 and TSP management measures that require the use of adaptive management, precautionary approach, as well as those that allow for conditional approvals and actions.

Section (C) Operation Plan Development

This section establishes a requirement for applicants to provide specific plans for the development and operation of a proposed renewable energy facility as a condition of

obtaining state permit, license, lease or authorization. Applicants are required to provide plans for: each phase of the development; facility design and construction; facility operation and maintenance; emergency contingency; safety inspection; monitoring environmental effects; adaptive management; facility decommissioning , financial assurances; and agreements with other ocean users and stakeholders. The underlying authority for this set of requirements is derived from the Goal 19, specifically those under Implementation Requirements (1) Uses of Ocean Resources; (2) Management Measures; and, (3) Contingency Plans; and from the Territorial Sea Plan, Part One, section (G) Policy 3: Management Measures (1) Cumulative Effects Assessment, (2) Adaptive Management, (3) Conditional Approvals or Actions, (8) Contingency Plans and (9) Precautionary Approach.

Section (D) Northwest National Marine Renewable Energy Center Mobile Test Berth Site. This section is specifically designed to accommodate the siting and use of this national research center. ORS 196.420(5) specifically “encourage[s] research and development of new, innovative marine technologies to study and utilize ocean resources.” The requirements of Goal 19 and the TSP will apply to the siting and permitting of any uses within the test berth site. The use a the test berth site for research is compliant with Goal 19 Implementation Requirements (2)(c) Special Management Area Plans and Territorial Sea Plan, Part One, section (G) Policy 3: Management Measure (4) Special Area Management Plans.

Appendix A: Definitions and Terms

The definition of an “applicant” for a state permit, lease or license, and the definition for a “renewable energy facility” are provided in this section. All other terms listed in the section are derived from the definitions already given them in the TSP or in Goal 19 Ocean Resources.

Local Comprehensive Plan Compatibility

The Territorial Sea Plan, Part One, paragraph (F)(1)(b), and ORS 196.465, require that this Part Five amendment is compatible with acknowledged city and county comprehensive plans. Part Five provides the procedural and substantive requirements for use of the territorial sea for the development of renewable energy facilities and related infrastructure. As such, Part Five applies to areas of the territorial sea. Although county boundaries extend to the western boundary of the state, planning for ocean resources and for submerged and submersible lands of the territorial sea is accomplished under the Oregon Ocean Resource Management Act and not through county (or city) comprehensive plans. ORS 201.370. As such, no acknowledged comprehensive plan contains enforceable provisions with which Part Five is not compatible. ORS 196.465(2) requires OPAC to work with the department and the Oregon Coastal Zone Management Association (OCZMA) to meet and consult with local officials, distribute materials and solicit comments and provide information about the ocean resource issues. OPAC and OCZMA incorporated input from numerous public meetings about the proposed amendment to the TSP into their recommendations on the amendment.

V. LCDC RULEMAKING AUTHORITY AND REQUIREMENTS

The commission is required to review OPAC recommended amendments to the TSP under ORS 196.471(1). The commission reviews the recommended amendments and makes findings that the recommendations carry out the policies of the Oregon Ocean Resource Management Act and are consistent with the applicable statewide planning goals. After making such findings, ORS 196.471(2) requires the commission to adopt the proposed amendments. In addition, the commission is authorized by ORS 197.045 to “perform other functions required to carry out ORS chapters 195, 196 and 197,” and by ORS 197.090, to coordinate “land conservation and development functions with other government entities.”

The department submitted public notices and fiscal impact statements for proposed rules to the Secretary of State, legislative leaders and selected committee chairpersons, and the public on September 15, 2009.

Although the department decided to schedule rulemaking hearings for this matter of its own accord and not in response to a request for a rulemaking hearing under ORS 183.335(3)(a), because the Part Five rulemaking arguably affects or applies to only a limited geographic area, the Department of Justice recommended that the department hold a hearing within that geographic area. The department held the public hearing in Florence on October 23, 2009, and the hearings officer reported those comments in a memorandum distributed to the commission.

VI. SUMMARY

The amendment to the Territorial Sea Plan, Part Five: Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities, is based on the existing policies and implementation requirements of Goal 19 Ocean Resources, the TSP and ORS 196.405 to 196.515. In addition, the OPAC and the TSPAC ensured that the requirements of Part Five would be compatible with other state and federal agency authorities and regulatory requirements that would apply to the permitting, licensing and leasing necessary to authorize the development and use of renewable energy facilities in the territorial sea.

VII. RECOMMENDATION

The department recommends that the commission adopt this staff report as the findings required to adopt the rule to amend the Territorial Sea Plan to add Part Five.

VIII. POSSIBLE MOTIONS

Recommended motion:

I move that the commission find that the Territorial Sea Plan Part Five amendment recommended by OPAC carries out the policies of the Oregon Ocean Resource Management Act and is consistent with applicable statewide planning goals; and further

that Territorial Sea Plan Part Five be adopted as part of the Oregon Coastal Management Program.

Alternative Motion:

I move that the commission find that the Territorial Sea Plan Part Five amendment recommended by OPAC does not carry out the policies of the Oregon Ocean Resource Management Act; is not consistent with applicable statewide planning goals; or both, and further that Territorial Sea Plan Part Five be returned to OPAC for revision.

ATTACHMENTS

- A. Goal 19 Ocean Resources
- B. ORS 196.405 to 575 Oregon Ocean Resources Management
- C. Territorial Sea Plan Part One and Part Two
- D. Proposed rule OAR 660-036-0005

Oregon's Statewide Planning Goals & Guidelines

GOAL 19: OCEAN RESOURCES

OAR 660-015-0010(4)

To conserve marine resources and ecological functions for the purpose of providing long-term ecological, economic, and social value and benefits to future generations.

To carry out this goal, all actions by local, state, and federal agencies that are likely to affect the ocean resources and uses of Oregon's territorial sea shall be developed and conducted to conserve marine resources and ecological functions for the purpose of providing long-term ecological, economic, and social values and benefits and to give higher priority to the protection of renewable marine resources—i.e., living marine organisms—than to the development of non-renewable ocean resources.

OCEAN STEWARDSHIP AREA

The State of Oregon has interests in the conservation of ocean resources in an Ocean Stewardship Area, an ocean area where natural phenomena and human uses can affect uses and resources of Oregon's territorial sea. The Ocean Stewardship Area includes the state's territorial sea, the continental margin seaward to the toe of the continental slope, and adjacent ocean areas. Within the Ocean Stewardship Area, the State of Oregon will:

- Use all applicable state and federal laws to promote its interests in management

- and conservation of ocean resources;
- Encourage scientific research on marine ecosystems, ocean resources and uses, and oceanographic conditions to acquire information needed to make ocean and coastal-management decisions;
- Seek co-management arrangements with federal agencies when appropriate to ensure that ocean resources are managed and protected consistent with the policies of Statewide Planning Goal 19, Ocean Resources, and the Territorial Sea Plan; and
- Cooperate with other states and governmental entities directly and through regional mechanisms to manage and protect ocean resources and uses.

The Ocean Stewardship Area is not intended to change the seaward boundary of the State of Oregon, extend the seaward boundaries of the state's federally approved coastal zone under the federal Coastal Zone Management Act, affect the jurisdiction of adjacent coastal states, alter the authority of federal agencies to manage the resources of the United States Exclusive Economic Zone, or limit or otherwise change federal agency responsibilities to comply with the consistency requirements of the federal Coastal Zone Management Act.

INFORMATION AND EFFECTS ASSESSMENT REQUIRED

Prior to taking an action that is likely to affect ocean resources or uses of Oregon's territorial sea, state and federal agencies shall assess the reasonably foreseeable adverse effects of the action as required in the Oregon Territorial Sea Plan. The effects assessment shall also address reasonably foreseeable adverse effects on Oregon's estuaries and shorelands as required by Statewide Planning Goal 16, Estuarine Resources; Goal 17, Coastal Shorelands; and Goal 18, Beaches and Dunes.

IMPLEMENTATION REQUIREMENTS

1. Uses of Ocean Resources

State and federal agencies shall carry out actions that are reasonably likely to affect ocean resources and uses of the Oregon territorial sea in such a manner as to:

a. maintain and, where appropriate, restore the long-term benefits derived from renewable marine resources;

b. protect:

1. renewable marine resources—i.e., living marine organisms—from adverse effects of development of non-renewable resources, uses of the ocean floor, or other actions;

2. the biological diversity of marine life and the functional integrity of the marine ecosystem;

3. important marine habitat, including estuarine habitat, which are areas and associated biologic communities that are:

a) important to the biological viability of commercially or recreationally caught species or that support important

food or prey species for commercially or recreationally caught species; or

b) needed to assure the survival of threatened or endangered species; or

c) ecologically significant to maintaining ecosystem structure, biological productivity, and biological diversity; or

d) essential to the life-history or behaviors of marine organisms; or

e) especially vulnerable because of size, composition, or location in relation to chemical or other pollutants, noise, physical disturbance, alteration, or harvest; or

f) unique or of limited range within the state; and

4. areas important to fisheries, which are:

a) areas of high catch (e.g., high total pounds landed and high value of landed catch); or

b) areas where highly valued fish are caught even if in low abundance or by few fishers; or

c) areas that are important on a seasonal basis; or

d) areas important to commercial or recreational fishing activities, including those of individual ports or particular fleets; or

e) habitat areas that support food or prey species important to commercially and recreationally caught fish and shellfish species.

c. Agencies, through programs, approvals, and other actions, shall

1. protect and encourage the beneficial uses of ocean resources—such as navigation, food production, recreation, aesthetic enjoyment, and uses of the seafloor—provided that such activities do not adversely affect the resources protected in subsection 1.,

above; avoid, to the extent possible, adverse effects on or operational conflicts with other ocean uses and activities; and

2. comply with applicable requirements of the Oregon Territorial Sea Plan.

2. Management Measures

Management measures for ocean resources and uses shall be appropriate to the circumstances and provide flexibility for future actions. Such management measures may include:

a. Adaptive Management: to adapt management programs to account for variable conditions in the marine environment, the changeable status of resources, and individual or cumulative effects of uses;

b. Condition Approvals or Actions: to place conditions or limit actions to protect or shield other uses and resources;

c. Special Management Area Plans: to develop management plans for certain marine areas to address the unique management needs for resource protection, resource utilization, and interagency cooperation in the areas;

d. Intergovernmental Coordination and Cooperation: to coordinate, integrate, and co-manage programs and activities with all levels of government, including Indian tribal governments;

e. Regional Cooperation and Governance: to cooperate with other coastal states, countries, organizations, and federal agencies within the larger marine region to address common or shared ocean resource management issues;

f. Public Involvement: to involve the public and affected groups in the

process of protecting ocean resource, especially through public awareness, education, and interpretive programs;

g. Precautionary Approach: to take a precautionary approach to decisions about marine resources and uses when information is limited.

3. Contingency Plans:

State and federal agencies, when approving or taking an action that could, under unforeseen circumstances, result in significant risks to ocean resources and uses, shall, in coordination with any permittee, establish appropriate contingency plans and emergency procedures to be followed in the event that the approved activity results in conditions that threaten to damage the marine or estuarine environment, resources, or uses.

OREGON OCEAN RESOURCES MANAGEMENT

196.405 Definitions for ORS 196.405 to 196.515. As used in ORS 196.405 to 196.515, unless the context requires otherwise:

- (1) "Council" means the council established in ORS 196.438.
- (2) "Exclusive Economic Zone" has the meaning set forth in Proc. 5030 whereby the United States proclaimed jurisdiction over the resources of the ocean within 200 miles of the coastline.
- (3) "Panel" means a project review panel established under ORS 196.453.
- (4) "Plan" means the Oregon Ocean Resources Management Plan.
- (5) "Territorial sea" means the waters and seabed extending three geographical miles seaward from the coastline in conformance with federal law.
- (6) "Territorial Sea Plan" means the plan for Oregon's territorial sea. [1987 c.576 §6; 1991 c.501 §2; 2003 c.744 §1]

196.407 Policy. It is the policy of this state to:

- (1) Work with the States of Washington and California to explore the possibility of development of communication information systems including a computerized system of coastal and marine resource information.
- (2) Work with the States of Washington and California to develop compatible programs of ocean oil spill response, damage assessment and compensation.
- (3) Cooperate and coordinate with adjacent states to develop a regional approach to obtaining fisheries information. [1989 c.895 §2; 2003 c.744 §2]

196.408 Duties of state agencies. (1) State agencies shall, to the maximum extent practicable, coordinate development of coastal and ocean information systems with those in adjacent states.

(2) State agencies with responsibility for oil spill and hazardous material response, damage assessment and compensation in the marine environment shall, to the maximum extent practicable, coordinate Oregon's plans, programs, policies and techniques with those of adjacent states.

(3) State agencies which have jurisdiction over water areas, the seabed and resources adjacent to offshore rocks and islands may coordinate with adjacent states and federal agencies to develop programs and regulations to manage uses and activities of ocean areas adjacent to coastal cliffs and offshore rocks and islands managed within the National Wildlife Refuge System.

(4) The State Department of Fish and Wildlife may coordinate with fishery managers in adjacent states to develop a uniform fish catch and monitoring system. [1989 c.895 §3; 2003 c.744 §3]

196.410 Legislative findings for offshore oil and gas leasing. The Legislative Assembly finds:

(1) Oregon's territorial sea encompasses all the rocks and islands of the Oregon National Wildlife Refuge, borders all beaches, headlands and rocky intertidal areas and includes areas heavily used for commercial and recreational fishing. Navigation lanes for barges and vessels pass through the area.

(2) Oregon's territorial sea is rich in marine life. Its renewable resources support significant portions of the coastal economy. It is a dynamic, hazardous marine environment within which oil spills cannot be contained.

(3) Oregon's nearshore zone is extremely high in biological productivity, reflected by the variety and value of commercial and sport ocean fisheries catch. The Oregon coast provides a significant habitat for migrating seabirds and mammals. Oregon is unwilling to risk damaging sensitive marine environments or to sacrifice environmental quality to develop offshore oil and gas resources. [1989 c.895 §4]

196.415 Legislative findings for ocean resources management. The Legislative Assembly finds that:

(1) The Pacific Ocean and its many resources are of environmental, economic, aesthetic, recreational, social and historic importance to the people of this state.

(2) Exploration, development and production of ocean resources likely to result from both federal agency programs in federal waters of the outer continental shelf and initiatives of private companies within state waters will increase the chance of conflicting demands on ocean resources for food, energy and minerals, as well as waste disposal and assimilation, and may jeopardize ocean resources and values of importance to this state.

(3) The fluid, dynamic nature of the ocean and the migration of many of its living resources beyond state

boundaries extend the ocean management interests of this state beyond the three geographic mile territorial sea currently managed by the state pursuant to the federal Submerged Lands Act.

(4) Existing federal laws, the Coastal Zone Management Act of 1972, the Coastal Zone Act Reauthorization Amendments of 1990, the Magnuson Fisheries Management and Conservation Act of 1976, as amended, and the Outer Continental Shelf Lands Act of 1978, recognize the interests of coastal states in management of ocean resources in federal waters and provide for state participation in ocean resources management decisions. The Coastal Zone Act Reauthorization Amendments of 1990 require that all federal coastal activities affecting natural resources, land uses and water uses in the coastal zone must be consistent with the federally approved Oregon Coastal Management Program.

(5) The 1983 Proclamation of the 200-mile United States Exclusive Economic Zone has created an opportunity for all coastal states to more fully exercise and assert their responsibilities pertaining to the protection, conservation and development of ocean resources under United States jurisdiction.

(6) It is important that the State of Oregon develop and maintain a program of ocean resources management to promote management of living and nonliving marine resources within state jurisdiction, to insure effective participation in federal agency planning and management of ocean resources and uses which may affect this state, and to coordinate state agency management of ocean resources with local government management of coastal shorelands and resources.

(7) While much is known about the ocean, its composition, characteristics and resources, additional study and research is required to gain information and understanding necessary for sound ocean planning and management. [1987 c.576 §3; 1991 c.501 §3; 2003 c.744 §4]

196.420 Policy. It is the policy of the State of Oregon to:

(1) Conserve the long-term values, benefits and natural resources of the ocean both within the state and beyond by giving clear priority to the proper management and protection of renewable resources over nonrenewable resources;

(2) Encourage ocean resources development which is environmentally sound and economically beneficial to adjacent local governments and to the state;

(3) Assert the interests of this state as a partner with federal agencies in the sound management of the ocean resources within the United States Exclusive Economic Zone and on the continental shelf;

(4) Encourage research, study and understanding of ocean processes, marine life and other ocean resources;

(5) Encourage research and development of new, innovative marine technologies to study and utilize ocean resources; and

(6) Ensure that the Ocean Policy Advisory Council will work closely with coastal local governments to incorporate in its activities coastal local government and resident concerns, coastal economic sustainability and expertise of coastal residents. [1987 c.576 §4; 1991 c.501 §4; 2003 c.744 §5]

196.425 Oregon Ocean Resources Management Program. To ensure the conservation and development of ocean resources affecting Oregon consistent with the purposes of ORS 196.405 to 196.515, a program of ocean resource planning and management is established. This program shall be known as the Oregon Ocean Resources Management Program and is part of Oregon's coastal management program. The Oregon Ocean Resources Management Program consists of:

(1) Applicable elements of the Oregon Coastal Management Program approved by the U.S. Secretary of Commerce on July 7, 1977, and as subsequently amended pursuant to the Coastal Zone Management Act of 1972, including statutes that apply to coastal and ocean resources, those elements of local comprehensive plans of jurisdictions within Oregon's coastal zone as defined in the Oregon Coastal Management Program which may be affected by activities or use of resources within the ocean, and those statewide planning goals which relate to the conservation and development of ocean and coastal resources;

(2) The Ocean Policy Advisory Council or its successor;

(3) Those portions of the Oregon Ocean Resources Management Plan that are consistent with ORS 196.405 to 196.515; and

(4) The Territorial Sea Plan as reviewed by the council and submitted to the agencies represented on the council. [1987 c.576 §5; 1991 c.501 §5; 2003 c.744 §6]

196.435 Primary agency for certain federal purposes; restrictions. (1) The Department of Land Conservation and Development is designated the primary agency for coordination of ocean resources planning. The department is

designated the State Coastal Management Agency for purposes of carrying out and responding to the Coastal Zone Management Act of 1972. The department shall assist:

- (a) The Governor with the Governor's duties and opportunities to respond to federal agency programs and activities affecting coastal and ocean resources; and
- (b) The Ocean Policy Advisory Council.

(2) The provisions of ORS 196.405 to 196.515 do not change statutorily and constitutionally mandated responsibilities of other state agencies.

(3) ORS 196.405 to 196.515 do not provide the Land Conservation and Development Commission with authority to adopt specific regulation of ocean resources or ocean uses. [1987 c.576 §7; 1989 c.325 §1; 1991 c.501 §21; 2003 c.744 §7]

196.438 Ocean Policy Advisory Council; members; term of office; quorum. (1) The Governor shall establish an Ocean Policy Advisory Council that is staffed by the State Department of Fish and Wildlife, the Department of Land Conservation and Development and other departments as the Governor deems necessary. The council shall be composed of:

- (a) The Governor or the Governor's designee, as a nonvoting member;
 - (b) The director or the director's designee of the following agencies, as nonvoting members:
 - (A) Department of Environmental Quality;
 - (B) State Department of Fish and Wildlife;
 - (C) State Department of Geology and Mineral Industries;
 - (D) Department of Land Conservation and Development;
 - (E) Department of State Lands;
 - (F) Parks and Recreation Department;
 - (G) State Department of Agriculture; and
 - (H) On behalf of the State Board of Higher Education, the director or director's designee of Oregon State University, Sea Grant College;
 - (c) A member of the governing body of Coos, Curry, Douglas or Lane County to be appointed by the Governor, chosen in consultation with and with the approval of a majority of the members of the governing bodies of Coos, Curry, Douglas and Lane Counties;
 - (d) A member of the governing body of Clatsop, Lincoln or Tillamook County to be appointed by the Governor, chosen in consultation with and with the approval of a majority of the members of the governing bodies of Clatsop, Lincoln and Tillamook Counties;
 - (e) An elected city official from a coastal city bordering the territorial sea to be appointed by the Governor with advice from an Oregon coastal zone management association;
 - (f) A representative of each of the following ocean interests, to be appointed by the Governor, and subject to confirmation by the Senate pursuant to section 4, Article III, Oregon Constitution:
 - (A) Commercial ocean fisheries of the North Coast from Newport north;
 - (B) Commercial ocean fisheries of the South Coast south of Newport;
 - (C) Charter, sport or recreation ocean fisheries of the North Coast from Newport north;
 - (D) Charter, sport or recreation ocean fisheries of the South Coast south of Newport;
 - (E) Ports marine navigation or transportation;
 - (F) Coastal nonfishing recreation interests of surfing, diving, kayaking or windsurfing;
 - (G) A coastal conservation or environmental organization;
 - (H) Oregon Indian tribes appointed after consultation with the Commission on Indian Services;
 - (I) A coastwide organization representing a majority of small ports and local governments, as a nonvoting member; and
 - (J) A statewide conservation or environmental organization; and
 - (g) Two representatives of the public, at least one of whom shall be a resident of a county bordering the territorial sea, to be appointed by the Governor.
- (2) The term of office of each member appointed by the Governor is four years, but a member serves at the pleasure of the Governor. Before the expiration of the term of a member, the Governor shall appoint a successor whose term begins on July 1 next following. A member is eligible for reappointment. If there is a vacancy for any cause, the Governor shall make an appointment to become immediately effective for the unexpired term.
- (3) A majority of the voting members of the council constitutes a quorum for the transaction of business.

(4) The voting members of the council shall elect a person from among the membership to chair the council. [1991 c.501 §6; 2003 c.744 §8]

Note: 196.438 to 196.448 were added to and made a part of 196.405 to 196.515 by legislative action but were not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

196.443 Duties of council. (1) The purposes of the Ocean Policy Advisory Council are to:

- (a) Periodically review the Territorial Sea Plan and submit recommendations for the plan to state agencies represented on the council. The council shall recommend deletions to the Territorial Sea Plan of all site designations and management prescriptions to the Land Conservation and Development Commission.
 - (b) Advance the policies of ORS 196.420 to the federal government and any multistate bodies.
 - (c) Provide a forum for discussing ocean resource policy, planning and management issues and, when appropriate, mediating disagreements.
 - (d) Recommend amendments to the Oregon Ocean Resources Management Plan as needed. If the recommended amendments to the plan incorporate the establishment of a system of limited marine reserves or other protected areas, the council also shall perform an economic analysis of short-term and long-term effects that the establishment of such areas would have on coastal communities. Any recommended amendments related to marine reserves or marine protected areas shall be submitted to the State Fish and Wildlife Commission for review and approval.
 - (e) Offer advice to the Governor, the State Land Board, state agencies and local governments on specific ocean resources management issues.
 - (f) Encourage participation of federal agencies in discussion and resolution of ocean resources planning and management issues affecting Oregon.
- (2) The Ocean Policy Advisory Council may not, except to the extent of fulfilling its advisory capacity under subsection (1)(e) of this section, establish fishing seasons, harvest allocations, geographic restrictions or other harvest restrictions. [1991 c.501 §8; 2003 c.744 §9]

Note: See note under 196.438.

196.445 [1987 c.576 §8; 1989 c.154 §1; 1989 c.904 §52; repealed by 1991 c.501 §18]

196.448 Member compensation; meetings. (1) A member of the Ocean Policy Advisory Council is entitled to compensation and expenses as provided in ORS 292.495.

(2) The council shall meet at least once every six months at a place, day and hour determined by the council. The council also shall meet at other times and places specified by the call of the chair or of a majority of the members of the council. [1991 c.501 §§9,10,11; 2003 c.744 §10]

Note: See note under 196.438.

196.450 [1987 c.576 §9; repealed by 1991 c.501 §18]

196.451 Technical advisory committee. (1) To aid and advise the Ocean Policy Advisory Council in the performance of its functions, the council shall establish a permanent scientific and technical advisory committee chaired by the director of the Sea Grant College program or other similarly qualified member of the Ocean Policy Advisory Council and may establish additional committees as needed.

(2) Members of the advisory committees are not entitled to compensation, but in the discretion of the council may be reimbursed from funds available to council for actual and necessary travel and other expenses incurred by them in the performance of their official duties, subject to ORS 292.495. [1991 c.501 §12]

Note: 196.451 and 196.453 were added to and made a part of 196.405 to 196.515 by legislative action but were not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

196.453 Project review panels; guidelines. (1) The Ocean Policy Advisory Council may establish project review panels to address and coordinate the interests of state, federal and local governments in specific development proposals.

(2) The council may adopt guidelines to establish criteria to create review panels and determine the scope of the activities of the panel.

(3) A panel shall not have any authority independent of the council. The authority of any panel shall be that granted to it by the council. [1991 c.501 §16; 2003 c.744 §11]

Note: See note under 196.451.

196.455 Coordination with federal programs. To insure that the Oregon Ocean Resources Management Plan and Territorial Sea Plan are coordinated with federal agency programs for coastal and ocean resources, the Ocean Policy Advisory Council may invite federal agencies with responsibility for the study and management of ocean resources or regulation of ocean activities to designate a liaison to the council to attend council meetings, respond to council requests for technical and policy information and review draft plan materials prepared by the council. [1987 c.576 §10; 1991 c.501 §13; 2003 c.744 §12]

196.465 Compatibility of acknowledged comprehensive plans. (1) The Oregon Ocean Resources Management Plan and Territorial Sea Plan, when adopted pursuant to ORS 196.471, shall be compatible with acknowledged comprehensive plans of adjacent coastal counties and cities.

(2) To insure that the plan is compatible with the comprehensive plans of adjacent coastal counties and cities, the Ocean Policy Advisory Council shall work with the Department of Land Conservation and Development and any Oregon coastal zone management association to:

- (a) Meet and consult with local government officials;
- (b) Distribute draft materials and working papers for review and solicit comment on council materials; and
- (c) Provide technical and policy information to local governments about ocean resource issues. [1987 c.576 §11; 1991 c.501 §14; 2003 c.744 §13]

196.470 [1987 c.576 §12; repealed by 1991 c.501 §18]

196.471 Territorial Sea Plan review requirements. (1) The Land Conservation and Development Commission shall review the Territorial Sea Plan and any subsequent amendments recommended by the Ocean Policy Advisory Council to either the Territorial Sea Plan or the Oregon Ocean Resources Management Plan and make findings that the plan or amendments:

- (a) Carry out the policies of ORS 196.405 to 196.515; and
 - (b) Are consistent with applicable statewide planning goals, with emphasis on the four coastal goals.
- (2) After making the findings required by subsection (1) of this section, the commission shall adopt the Territorial Sea Plan or proposed amendments as part of the Oregon Coastal Management Program.
- (3) If the commission does not make the findings required by subsection (1) of this section, the commission shall return the plan or amendments to the council for revision. The commission may specify any needed revisions.
- (4) Upon adoption of the Territorial Sea Plan or subsequent amendments the commission may, after consultation with affected state agencies, identify amendments to agency ocean or coastal resource management programs necessary to conform to the provisions of the adopted plan. [1991 c.501 §20; 1993 c.18 §35]

Note: 196.471 was added to and made a part of 196.405 to 196.515 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

196.475 [1987 c.576 §13; 1991 c.501 §15; repealed by 2003 c.744 §14]

196.485 State agency coordination requirements; incorporation of plans. (1) If a state agency incorporates the Oregon Ocean Resources Management Plan and Territorial Sea Plan by reference in its coordination program and, upon a finding by the Land Conservation and Development Commission that the agency has amended its rules, procedures and standards to conform with the objectives and requirements of the plan and Territorial Sea Plan, the state agency shall satisfy the requirements of state agency planning and coordination required by ORS 197.180 for ocean planning.

(2) If a state agency does not incorporate the plan or Territorial Sea Plan in its coordination program, the agency shall be subject to the state agency coordination requirements of ORS chapters 195, 196 and 197 for state agency

programs, procedures and standards that in any way affect ocean resources.

(3) State agency programs or rules for management of ocean resources or ocean uses shall be consistent with the Oregon Ocean Resources Management Plan and the Territorial Sea Plan. [1987 c.576 §17; 1991 c.501 §17]

196.490 [1987 c.576 §18; repealed by 1991 c.501 §18]

196.495 [1987 c.576 §19; repealed by 1991 c.501 §18]

196.500 [1987 c.576 §20; repealed by 1991 c.501 §18]

196.505 [1987 c.576 §21; repealed by 1991 c.501 §18]

196.515 Short title. ORS 196.405 to 196.485 shall be known as the Oregon Ocean Resources Management Act. [1987 c.576 §2]

196.575 Authorization to obtain federal oceanographic data; joint liaison program; use of data. (1) The Department of Land Conservation and Development is authorized to participate on behalf of the State of Oregon with the States of Washington, California, Alaska and Hawaii in a joint liaison program with the Center for Ocean Analysis and Prediction of the National Oceanic and Atmospheric Administration.

(2) The objective of the program is to assist the states in taking maximum advantage of the oceanographic data, products and services available from the federal government through the Center for Ocean Analysis and Prediction.

(3) The Department of Land Conservation and Development shall integrate data obtained through the liaison program for use by other state agencies and maximize the use of the State Service Center for Geographic Information Systems. [1991 c.524 §§1,3]

Note: 196.575 and 196.580 were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 196 by legislative action. See Preface to Oregon Revised Statutes for further explanation.

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A. HISTORY OF OCEAN PLANNING IN OREGON

Ocean planning in Oregon has evolved from strong public interests in coastal use and protection that began long before statehood. This historic concern for the coast has involved several Governors, the Oregon Legislature, and, as always, a vocal and active public.

1. Before 1973

Oregon's ocean shore has always been a vital part of the Oregon way of life. Native people lived on the Oregon coast for thousands of years, sustained by a rich, steady supply of food in marine waters and along the shore. The long sandy beaches were integral pathways for journeys between rivers. Early trappers and settlers in the Oregon country customarily used the ocean shore for travel and recreation long before automobiles came to the Oregon coast in the early 1900s. Railroads took "weekenders" to Seaside, Gearhart, and Newport. In some places the beach served as highway until completion of the Coast Highway in the mid-1930s. Governor Oswald West proposed, and the 1913 Oregon Legislature agreed, that the ocean shore, between low and ordinary high tide be officially designated a public highway to ensure that the ocean-front tidelands were retained in public ownership. Over the years Oregonians assumed that all the beach belonged to the public. But in the mid-1960s some coastal property owners asserted their ownership of the dry sand beaches. Out of a growing public concern that public use of beaches would be lost, Governor Tom McCall and the 1967 Oregon Legislature forged and passed Oregon's famous "Beach Bill" that created a public recreation easement across private dry sand beach areas. The law has been upheld in landmark court cases (as recently as March 1994, the United States Supreme Court refused to hear an appeal related to an Oregon Supreme Court Decision upholding the law).

The citizen alliances that formed to support the Beach Bill also began to express concerns about Oregon's coast in light of increasing development of coastal areas and destruction of estuaries, shorelands, and the like. The 1971 Legislature established the Oregon Coastal Conservation and Development Commission, made up principally of coastal officials and citizens, and charged it with preparing a plan for the Oregon coast. The OCC&DC addressed many issues, including use of the ocean shore and ocean waters of the continental shelf. And although the OCC&DC was eclipsed by the statewide planning program begun in 1973, it laid the foundation for policies on

the management and protection of all coastal resources, including the ocean. Thus, the public concerns for the use of the beaches led to the first efforts to create ocean management policies.

2. 1973-1987

In 1973 the legislature established a statewide land-use program and created the Land Conservation and Development Commission (LCDC) to develop a set of statewide planning goals to guide local government planning and state agency programs. Parts of this statewide program are keystone elements of Oregon's ocean planning program as well, such as citizen involvement, local government planning, and state agency coordination. Some 14 statewide goals were adopted in late 1974. In 1976 LCDC adopted four specific coastal planning goals: Goal 16, Estuarine Resources; Goal 17, Coastal Shorelands; Goal 18, Beaches and Dunes; and Goal 19, Ocean Resources. These four coastal goals were derived from the earlier work of the OCC&DC.

The Ocean Resources Goal (Goal 19) was developed amid national concerns about federal offshore oil and gas drilling as well as regional concerns about foreign fishing fleets and over-fishing on or near the US continental shelf. Accordingly, the Ocean Resources Goal established a priority for renewable resources, emphasized optimum-yield management for fisheries, and established a decision-making process that required adequate inventory information and the assessment of impacts from development actions.

The statewide goals created a framework for carrying out the legislative mandate for a consistent, comprehensive statewide land-use planning program. Cities and counties were required by law to prepare and adopt comprehensive land-use plans that complied with the statewide goals. Similarly, state agencies were required to develop "agency coordination" programs to meet the Goals and coordinate their functions with local planning. Between 1973 and 1987 the state's land-use program emphasized completion of local city and county land-use plans to meet land development and urban growth issues covered by Goals 1-18.

Because ocean issues were beyond local government authority and generally not of concern, the plans of coastal local governments did not address ocean resource issues or Goal 19 and the LCDC gave little direction to state or federal agencies regarding the implementation of Goal 19. However, federal initiatives in the early 1980s to create a 200-mile-wide U.S. Exclusive Economic Zone, lease for deep-sea mineral resources, and explore for oil and gas on the outer continental shelf caused Oregon to pay close attention to Goal 19 and how it might be applied. By early 1987, an administrative rule for Goal 19 was prepared but not adopted because the 1987 legislature established the Ocean Resources Management Task Force to prepare a plan for ocean-resources management. Thus LCDC deferred preparing Goal 19 rules pending development of the Ocean Plan by the Task Force.

3. 1987-1991

Two major activities dominated the second phase of ocean planning: 1) preparation of a broad framework plan addressing ocean resources within the 200-mile U.S. EEZ off Oregon, and 2)

responding to federal oil and gas lease sale proposals for the Outer Continental Shelf off Washington and Oregon. The Ocean Task Force developed the Oregon Ocean Resources Management Plan (Ocean Plan) in 1990, which the LCDC subsequently adopted as part of the state's coastal management program as required by law (see Part One Section D.2. for an explanation of the Ocean Plan; see Appendix G for policies of the Ocean Plan). The plan built upon the subject matter addressed by the Ocean Resources goal but-although richer in detail, broader in scope, and more explicit in policy direction-still did not provide detailed guidance to administer Goal 19 or tell how specific areas or activities in Oregon's territorial sea should be managed. A principal recommendation of the Ocean Task Force to the Oregon Legislature was to create an Ocean Policy Advisory Council to prepare a plan for the territorial sea.

Historical Roots of Oregon's Territorial Sea Plan

Before 1973

"Beach Bill" & O.C.C. & D.C.

- *public access to beaches*
- *coastal protection*
- *coastal conservation*

1973 - 1987

ORS 197 Oregon Land Use Program

- *Statewide Planning Goals 1 - 19*
- *Local Planning Programs*
- *State Agency Programs*

1987 - 1991

ORS 196 Creates Ocean Task Force to Develop Ocean Plan

- *Ocean Stewardship Area*
- *Marine Habitat Protection*
- *Ocean Resources Policies*
- *Territorial Sea Plan Needed*
- *Ocean Policy Advisory Council*

1991 - 1994

ORS 196 Amended:

- *Creates Ocean Policy Advisory Council*
- *Initial Territorial Sea Plan Prepared*

Future: 1994 ?

- *Territorial Sea Plan Additions and Amendments*

During this 1987-1991 period, areas of the federal Outer Continental Shelf off Washington, Oregon, and California were scheduled by the federal government for potential oil and gas leases. In addition, intense interest developed in exploring and potential mining for strategic minerals off the southern Oregon coast in both state and federal waters. Other concurrent concerns arose over conflicts between Steller sea-lion habitat and the sea-urchin dive industry. Together, these issues provided much of the focus and impetus for the Ocean Plan.

4. 1991-1994

The 1991 Oregon Legislature established the Ocean Policy Advisory Council (OPAC) to, among other duties, prepare a plan, by July 1, 1994, for managing the resources and activities in the state's territorial sea. The management-oriented Territorial Sea Plan is very different from the policy-oriented Ocean Plan in that it provides detailed guidance to state and federal agencies in managing the area from 0-3 miles while, by contrast, the Ocean Plan addressed the entire 200-mile US Exclusive Economic Zone with emphasis on an ocean stewardship area (0-50 miles) generally covering the continental shelf and slope.

After the OPAC completes the Territorial Sea Plan in mid-1994, it will be submitted to the LCDC, which will review it against the statewide planning goals and state law and then adopt it as part of the state's Coastal Management Program. The LCDC will, in turn, submit the plan to the Office of Ocean and Coastal Resources Management, within the National Oceanic and Atmospheric Administration, for review and approval as an amendment to Oregon's federally approved Coastal Management Program.

5. Beyond 1994

The Council was unable to address many ocean-resource management issues during preparation of the initial plan. Therefore, the Council will continue to refine and add to the Territorial Sea Plan through plan amendments and updates to address such issues as kelp-reef special-area management, mariculture, seabed leasing, marine water quality and sewerage outfalls, dredged material disposal, ocean structures, oil and gas exploration, marine minerals, and ocean hazards. The Council is charged by law with providing the Governor with policy advice on ocean matters including new ones that will undoubtedly emerge over time.

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B. THE OCEAN POLICY ADVISORY COUNCIL

The 1991 Oregon Legislature created the Ocean Policy Advisory Council to provide a means of coordinating and creating ocean policy for the state and to prepare a plan for managing the resources and uses of Oregon's territorial sea. The Council's role and membership composition reflects the success of its predecessor, the Oregon Ocean Resources Management Task Force, 1987 - 1990, which recommended this on-going Council structure to the Legislature.

1. Membership

Membership on the Ocean Policy Advisory Council is specified in law (ORS 196.438). Current Council positions and membership may be viewed at ****** [lcd/coastal opacmembers.doc](#) ******.

2. Planning Process

a. Council Process

The Council began work in early March, 1992, with a two-day workshop at the University of Oregon Institute for Marine Biology in Charleston. During Phase One of its work, the Council met five times over eight months and developed internal procedures, reviewed the Oregon Ocean Resources Management Plan to scope a short list of planning issues to address in the Territorial Sea Plan, and held a series of eight public workshops in the fall of 1992: Brookings, Port Orford, North Bend, Yachats, Newport, Lincoln City, Tillamook, and Seaside. These sessions provided the public with the opportunity to learn about the Council and for the Council to gain information about ocean resource concerns and issues that the Council or member agencies should address. In the end, the Council chose to focus on two major issue areas: rocky shores and administrative procedures for making ocean-resource decisions.

During Phase Two, Plan Development, the Council met four times beginning in January, 1993, to review and approve work being developed by staff and working groups. Working groups met frequently to develop plan materials. At its August 20, 1993, meeting, the Council approved draft plan material for initial review by the public. The Council held three public workshops in late November, 1993, in Tillamook, Newport, and North Bend.

Phase Three, Plan Refinement, was a period of intense work by working groups. The Council met twice to review proposed improvements and amendments to the draft plan. At its March 11, 1994, meeting the Council approved revised plan material to be published for public review in May and June, 1994. The Council held three public meetings to hear comment in Tillamook, Bandon, and Newport. The Council reviewed all comments at its June 17, 1994, meeting, and identified several remaining issues to be resolved. The Council adopted the plan August 12, 1994.

All Council meetings were and are open to the public; all were videotaped and tapes are available for review.

b. Planning Considerations

The Council used the following considerations in determining which issues to address in the initial Territorial Sea Plan, and will use these same considerations to determine whether to address future management issues.

- 1.) Identified in the Ocean Plan:** the issue is specifically referenced in the Ocean Resources Management Plan as stated problem that should be addressed by the Ocean Policy Advisory Council in preparing the plan for the territorial sea;
- 2.) Within the Territorial Sea:** the issue specifically encompasses a problem of management of ocean resources or uses within the state's territorial sea seaward of the beach zone line and is within the state's purview to address;
- 3.) An interagency problem:** the issue involves more than one agency or jurisdiction of government and requires Council action to mediate and address;
- 4.) Achievable results:** Council action may prevent management problems and/or lead to a foreseeable improvement in management of Oregon's territorial sea;
- 5.) Information base:** the issue has data and information available to support Council action on the issue or problem;
- 6.) Consequences of not addressing the issue:** the issue may have substantial economic, environmental or legal costs or consequences if not addressed by the Council.

c. A Short List

The Council considered a lengthy list of issues identified in the Ocean Plan, heard at public workshops, and identified by Council members at their initial workshop. These issues included:

- Administrative Rules for Statewide Planning Goal 19, Ocean Resources

- Marine Birds and Mammals Habitat Areas (Rocks and Reefs)
- Intertidal Areas (Marine Gardens)
- Oil Spill Response
- Marine Water and Air Quality
- Leases for Marine Plants and Animals
- Artificial Reefs
- Recreation and Cultural Resources
- Dredged Materials Disposal
- Marine Minerals
- Overall Policies (Stewardship, Conservation, Habitat Protection)
- Oil and Gas Development
- Littoral Cell Management (Coastal Hazards)
- Beaches and Dunes

From this list, the Council narrowed to a "short list" of planning issues composed of two broad items:

- the need for administrative procedures to guide future decision-making by the Council with emphasis on interpreting and applying the requirements of Statewide Planning Goal 19, Ocean Resources;
- the need to address a bundle of nearshore resource protection and use issues under the umbrella heading of "rocky shores."

As work on these two topics progressed, a third "issue" emerged, i.e. the need to include a management framework to explain and clarify the linkages among and between the various ocean laws, programs, and policies already in place in Oregon.

d. The "Initial" Territorial Sea Plan

The Oregon Legislature anticipated that not all topics or issues could be addressed during the time period established for the Council to develop the Territorial Sea Plan. Chapter 576, Section

15, Oregon Laws is entitled "Initial Territorial Sea Plan." The Council, too, developed the Territorial Sea Plan with the understanding that the issues not included on the short list remain to be addressed in subsequent phases of planning work and that new issues will arise over time that will need to be addressed. Thus, this Territorial Sea Plan is a reflection of the on-going process of planning for and managing resources and uses of the ocean. The Council will amend and update the plan through a process described in Part One, Section F.2.

e. The Territorial Sea Plan and Ocean Fisheries

The principal focus of the Territorial Sea Plan is the conservation and protection of marine habitat through clear procedures and standards for making decisions. Neither the Oregon Legislature nor the Ocean Policy Advisory Council intends the Territorial Sea Plan to be an ocean-fisheries management plan or the Council to assume fisheries regulation and management. However, marine habitat conservation considerations may affect some ocean-fisheries management decisions of state or federal agencies. In that event, Council decisions relative to marine habitat and resource conservation will provide policy direction for the Department of Fish and Wildlife and other fishery-management bodies. The Council will expressly avoid specific fishery management regulations and will instead rely on the agencies with fishery jurisdiction to work with industry on fishery-program changes needed to conform to standards in the Territorial Sea Plan.

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C. OREGON'S TERRITORIAL SEA

1. Oregon's Seaward Boundary

Oregon, along with nearly every other coastal state¹, has jurisdiction over the seabed and its resources out to three geographical (or nautical) miles² and sometimes further if offshore islands or rocks provide a more seaward point for measurement. First proposed in 1793 by then-Secretary of State Thomas Jefferson as a "temporary" seaward boundary for the United States, state jurisdiction over this so-called "territorial sea" was finally established by Congress in the 1953 Submerged Lands Act (43 USC 1301-1315). This three-mile ribbon of ocean, comprising about 1,000 square miles, is Oregon's ocean area covered by this Territorial Sea Plan.

The term "territorial sea" is not used in the Submerged Lands Act. Instead, that act confirmed that the seaward boundary of a coastal state consists of "a line three geographical miles distant from its coast line."³ "Coastline" is defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." A 1986 Opinion of the Attorney General, State of Oregon (No. 8182, November 13, 1986), noted that "the determination of the exact location of a state's boundary (is) a complex task." That Opinion states that "the burden of establishing criteria for determining the exact location has fallen on the United States Supreme Court." The Supreme Court, in *United States v. California*, 381 US 139 (1965), adopted the definitions of the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1607) which arose out of the 1958 First Conference on the Law of the Sea in Geneva, Switzerland.

The Attorney General Opinion further urged the state to be guided by "official United States government charts" that depict the coastal boundary, as long as the boundary depicted is "consistent with the terms of the Convention." The U.S. Department of the Interior, Minerals Management Service (MMS) is responsible for locating this boundary for federal oil and gas

¹ Based on historical claims, Texas and Florida have jurisdiction to three marine leagues, which equals nine nautical miles (10.35 statute miles), in waters of the Gulf of Mexico. [*U.S. v. Louisiana* 363 U.S. 83-85 (1960)] [*U.S. v. Florida* 363 U.S. 121 (1960)]

² A "geographical" or "nautical" mile is the length along one minute of arc of latitude of the Earth's surface and measures 6,076 feet. A "statute" mile is the familiar 5,280 feet (based on the Latin for 1,000 paces). Thus, a "geographical" mile is about 1.15 "statute" miles.

³ The 1953 Submerged lands Act (43 USC) 1301 - 1315) uses the two words "coast line" instead of the correct term "coastline" that is used in this plan.

leasing purposes and, on the Pacific Coast, has adopted a coastal "baseline" of Mean Lower Low Water from which to measure three miles seaward. The Oregon Division of State Lands and the MMS undertook a joint project in 1989-90 to identify and document the location of the points of the baseline along the Oregon coast. Maps of the baseline are not yet available from MMS.

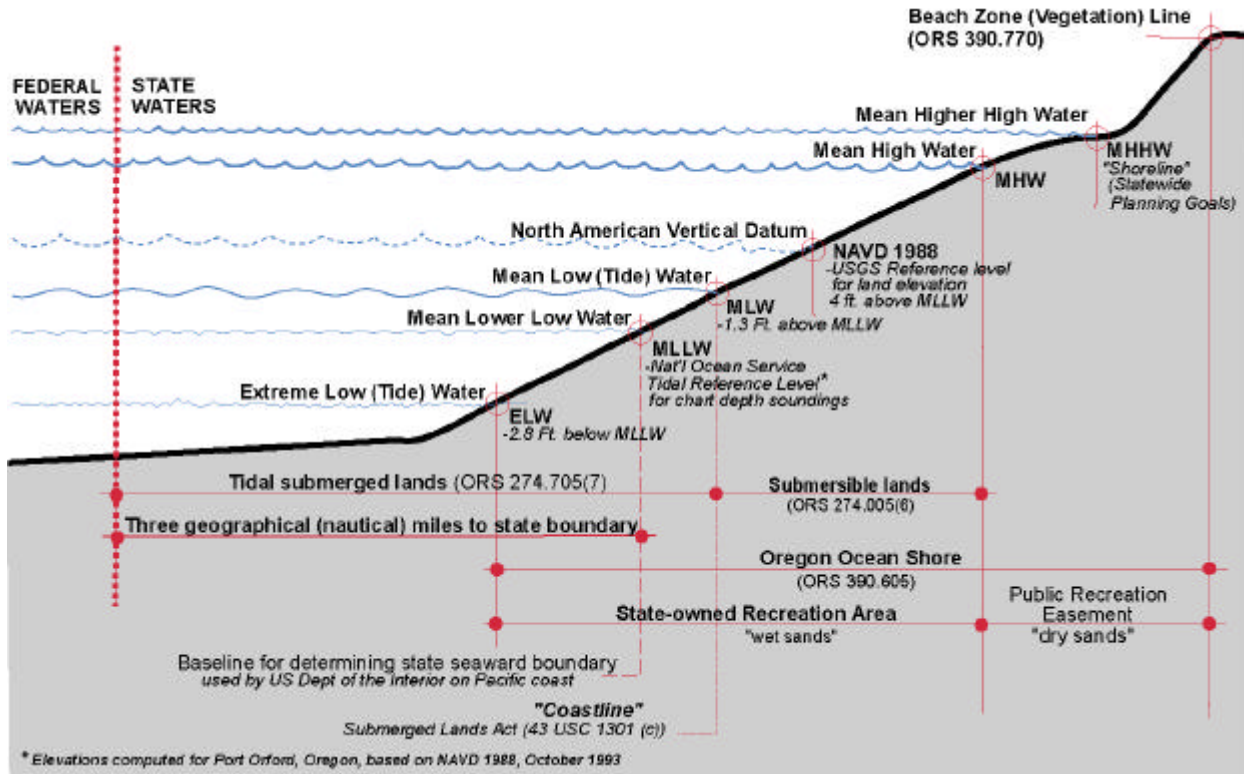


Figure 2: Jurisdictional Boundaries for Oregon's Ocean Shore and Territorial Sea

This diagram shows the intersection of the ocean shore with the height of each of six different levels of ocean water described in various state or federal authorities used as reference lines to determine various jurisdictional boundaries. The Oregon Division of State Lands uses "mean" (average) high water in place of "ordinary" high water to determine the upper boundary of tidal submersible lands (authorized in ORS 274.015).

2. Ocean Shore

The 1991 Oregon Legislature required that this plan for the Territorial Sea also include the "ocean shore," which is defined in state law (ORS 390.605) as the "land lying between extreme low tide of the Pacific Ocean and the line of vegetation" as established in state law (also known as the "Beach Zone Line"). These boundaries are shown in Figure 2, below. Technical notes are in Appendix D.

This "ocean shore" is very important to Oregonians. A 1967 political and legal struggle to clarify and protect the public's rights to the dry sand beaches resulted in a law that defines the landward

limit of this "ocean shore" as the "line of vegetation" or the 16-foot elevation line, within which the public has rights of access and use.



Oregon's Territorial Sea and Coastal Zone

This map shows in light blue the approximate extent of Oregon's three nautical mile-wide (3.45 statute miles) territorial sea, as measured from the "coastal baseline" (Mean Lower Low Water). Note how the boundary bulges seaward off headlands such as Cape Arago or offshore rocks such as those in Orford Rogue Reef. These bulges add to Oregon's total ocean.

The landward boundary of the Oregon Coastal Zone is the crest of the coastal watershed except at the downstream end of Puget Island in the Columbia River, Scottsburg on the Umpqua River, and Agness on the Rogue River.

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D. LAWS AND OTHER LEGAL AUTHORITIES AFFECTING OCEAN MANAGEMENT

Various state and federal agencies carry out many different laws that have been enacted over the years to govern the resources and activities in Oregon's ocean area. Bringing all these laws and programs together in a coordinated management framework is the task of the Ocean Policy Advisory Council through this Territorial Sea Plan. These laws are briefly described, followed by a discussion of the hierarchy among them. Although this section is intended to be complete, it is NOT a detailed or exhaustive listing of all agency programs and authorities.

NOTE: A summary of the AGENCIES that carry out these laws are listed in Section E.

1. State ocean-related laws

a. Ocean Resources Management Act of 1987/1991 (ORS 196.405 et seq)

NOTE: See ORS 196.405-196.515.

This Act is the legislative and policy framework for Oregon's Ocean Program. Enacted in 1987, it resulted in the Oregon Ocean Resources Management Plan, 1990. Amended in 1991, the Act sets legislative policy for ocean resource management, creates the Ocean Policy Advisory Council in the Office of the Governor, and mandates a plan for the Territorial Sea as part of Oregon's Coastal Management Program.

b. Statewide Land Use Planning (ORS 197.005 et seq)

Enacted in 1973, this law establishes Oregon's statewide land-use planning program including the Land Conservation and Development Commission, the statewide planning goals as mandatory standards, listing areas to be addressed by the goals, including "...recreational and outstanding scenic areas"; "beaches, dunes, coastal headlands and related areas"; and "unique wildlife habitat." State agencies are required to "carry out their planning duties, powers, and responsibilities and take actions...with respect to programs affecting land use in compliance with

(statewide planning) goals..." and to adopt a coordination program "to assure compliance with the goals..."

NOTE: The Land Conservation and Development Commission adopted Statewide Planning Goal 17, Coastal Shorelands, and 19, Ocean Resources, in 1977. Until the enactment of ORS 196 (above) and creation of the Ocean Resources Management Program in 1987, Goal 19 was the state's fundamental policy element related to ocean resources in Oregon's land-use planning program. This Territorial Sea Plan clarifies how Goal 19 will be implemented by government agencies.

c. Ocean Shores (Beach Bill) (ORS 390.605 et seq)

Oregon's "ocean shore" is defined in ORS 390.605 as "land lying between extreme low tide of the Pacific Ocean and the line of vegetation as established and described by ORS 390.770. This shore area, whether publicly-owned or part of the privately-owned 23 miles, is declared to be a "state recreation area" under the jurisdiction of the Parks and Recreation Department for public recreational purposes. A complicating fact is that the part of this strip of land "between ordinary high tide and extreme low tide" is under concurrent jurisdiction of the State Land Board and the Parks and Recreation Department. The 1991 Oregon legislature required that this "ocean shore" area be addressed in the Territorial Sea Plan along with the submerged lands lying seaward to three miles.

d. Submerged/Submersible Lands (ORS 274.005 et seq)

Submerged lands are defined as "lands lying below the line of ordinary low water... within the boundaries of the state...". Submersible lands are defined as "lands lying between the line of ordinary high water and the line of ordinary low water of all navigable waters and all islands, shore lands...within the boundaries of this state...whether tidal or non-tidal." "Ordinary high and low water" means "annual mean high or mean low water of the preceding year." The Division of State Lands has "exclusive jurisdiction over all un-granted tidal submerged lands owned by the state" (ORS 274.710). "Un-granted" means that the bed or banks of the territorial sea have not been sold or otherwise conveyed out of public ownership.

e. Fish and Wildlife Laws (ORS 496 et seq)

These laws define "fish" and "wildlife," establish broad legislative policy regarding management of fish and wildlife, create and provide authority for the Department of Fish and Wildlife (ODFW) and its oversight Commission, and enact laws for threatened and endangered species. These laws give ODFW broad authority to develop fish and wildlife protection programs and perform actions necessary to carry out fish and wildlife laws. The ODFW has adopted general administrative rules about harvesting marine intertidal animals and has created "marine gardens" for certain intertidal areas where no taking of marine invertebrates is allowed.

**f. Commercial Fishing (ORS 506.001-.405)
and Developmental Fisheries (ORS 506.450-.465)**

These statutes provide the Oregon Fish and Wildlife Commission with "exclusive jurisdiction over all fish, shellfish, and all other animals living intertidally on the bottom, within the waters of this state." Establishes food-fish management policy and creates authority for the commission to regulate commercial harvest of food fish. Establishes a developmental fisheries management program to plan the commercial development of underutilized food-fish species while protecting long-term sustainability of the commercial and biological values of those resources.

g. Kelp Leasing (ORS 274.885 et seq)

This law provides the Division of State Lands with exclusive jurisdiction over the state-owned tidal-submerged lands where kelp grows. Authorizes the Division to lease these lands "for the purpose of harvesting kelp and other seaweed after consultation with the State Fish and Wildlife Commission." There are some limitations on lease area, amount, and duration.

h. Threatened or Endangered Wildlife Species (ORS 496.172 et seq)

The Oregon Fish and Wildlife Commission is required to identify and establish programs to protect and conserve threatened and endangered wildlife species (ORS 496.172). Procedures and criteria are given for listing species under this law.

i. Marine Water Quality (ORS 468)

Discharge of pollutants into the waters of the state is prohibited. The term "waters of the state" is defined as including "the Pacific Ocean within the territorial limits of the State of Oregon." Numerous other provisions address controlling wastes, requiring certain practices, establishing effluent limitations and conditions, and setting water-quality standards generally.

j. Oil Spill Contingency Planning (ORS 468B.300)

This act requires an oil spill prevention and emergency response plan approved by the Department of Environmental Quality prior to the operation of onshore or offshore oil or gas facilities or operation of tanker, cargo, or passenger vessels in state waters of the Pacific Ocean, estuaries to the head of tide water, the Columbia River, and the Willamette River to Willamette Falls. This act includes legislative policy, provides the DEQ with authority to adopt standards for preparing contingency plans, and lists minimum requirements for such contingency plans. The act emphasizes coordination with the State of Washington and the United States Coast Guard, establishes an Oil Spill Prevention Fund, creates an Oregon coast safety committee, and establishes a wildlife rescue training program.

2. The Oregon Ocean Resources Management Plan (Ocean Plan)

NOTE: See Appendix G for a complete listing of all policies of the Oregon Ocean Plan.

a. Status and Scope

The Oregon Ocean Resources Management Plan (Ocean Plan) was adopted November 8, 1990, as part of Oregon's Coastal Management Program by the Oregon Land Conservation and Development Commission. The Ocean Plan was prepared pursuant to the requirements of state law by the Ocean Resources Management Task Force during the period 1987-1990. The Ocean Plan addresses ocean uses and resources across the entire continental margin and 200-mile U.S. Exclusive Economic Zone in both state and federal waters.

b. Principal Policies

The Ocean Plan created a broad policy framework for ocean management. It defined an "Ocean Stewardship Area" off Oregon, from the crest of the coast mountains seaward to the toe of the continental margin, within which Oregon asserts that it has direct concerns and ocean-resource management responsibilities. Within this area Oregon will apply policies and principles of conservation and marine habitat protection. The Ocean Plan also identified 33 "sensitive marine habitats" on offshore rocks and islands and shoreline cliffs where further work is needed to protect resources. The plan prohibits oil and gas development in state waters and lists a number of stringent conditions related to oil and gas activities in federal waters. The Ocean Plan recommended creation of an Ocean Policy Advisory Council and preparation of a plan for the territorial sea.

The Ocean Plan recognized the significance of Oregon's commercial and recreational ocean fisheries to coastal communities and their economies and identified "important fishery areas." The Ocean Plan included several policies related to ocean fisheries, including one to "conserve, protect and, where needed, enhance or restore marine habitats that are important to commercial and recreational fish species" and one to "oppose any uses of nonrenewable resources which [that] could adversely impact ocean fisheries."

c. Application to the Territorial Sea Plan

The Ocean Plan remains as part of the Oregon Coastal Management Program. The 1991 legislature specifically stated that the Territorial Sea Plan was to build from the policies and issues of the Ocean Plan. Thus the Ocean Plan is a larger framework document for the entire "Ocean Stewardship Area" within which the Territorial Sea Plan applies to the area of state jurisdiction. As policies in the Territorial Sea Plan are adopted, the Land Conservation and Development Commission may need to amend the Ocean Plan to replace or delete policies that the Territorial Sea Plan supersedes.

3. Statewide Planning Goals

Two statewide planning goals directly relate to the present Territorial Sea Plan: Goal 17, Coastal Shorelands, and Goal 19, Ocean Resources.

a. Goal 17, Coastal Shorelands

The Shorelands Goal aims to "...conserve, protect, where appropriate, develop and where appropriate restore the resources and benefits of all coastal shorelands..." while recognizing the diverse contributions that shorelands make such as protecting and maintaining water quality, providing fish and wildlife habitat, siting water-dependent uses for economic development, providing recreational opportunities, and the aesthetic or scenic qualities that define the coastal environment. The goal requires that "management of these shoreland areas shall be compatible with the characteristics of the adjacent coastal waters."

The goal also seeks to "...reduce the hazard to human life and property..." and reduce the adverse effects on water quality and fish and wildlife habitat that can result from the use of Oregon's coastal shorelands.

The Shorelands Goal requires that: "inventories shall be conducted to provide information necessary for identifying coastal shorelands and designating uses and policies. These inventories shall provide information on the nature, location, and extent of geologic and hydrologic hazards and shoreland values, including fish and wildlife habitat, water-dependent uses, economic resources, recreational uses and aesthetics in sufficient detail to establish a sound basis for land and water use management."

Coastal shorelands are defined as lands within 100 feet of the ocean shore as well as other lands around estuaries and coastal streams.

b. Goal 19, Ocean Resources

NOTE: This description of Goal 19 differs from the text of the Territorial Sea Plan published in 1994 because Goal 19 was amended December 1, 2000, by the Land Conservation and Development Commission.

The Ocean Resources Goal was adopted in 1977 and amended for the first time in 2000. The goal establishes that Oregon's primary ocean policy objectives are long term conservation-oriented the proper management of renewable resources is a top priority. The revised goal requires that

"...all actions by local, state, and federal agencies that are likely to affect the ocean resources and uses of Oregon's territorial sea shall be developed and conducted to conserve marine resources and ecological functions for the purpose of providing long-term ecological, economic, and social values and benefits and to give higher priority to the protection of renewable marine resources--i.e., living marine organisms--than to the development of non-renewable ocean resources. policy elements."

The revised goal clearly asserts that Oregon's ocean management interests extend beyond state waters to an Ocean Stewardship Area that extends seaward to the toe of the continental margin. This is a policy assertion first articulated in the Oregon Ocean Resources Management Plan.

The revised goal clarifies the original requirement that agency decisions be based on information

by specific reference to the requirements in the Territorial Sea Plan for resource inventory and effects evaluation:

"Prior to taking an action that is likely to affect ocean resources or uses of Oregon's territorial sea, state and federal agencies shall assess the reasonably foreseeable adverse effects of the action as required in the Oregon Territorial Sea Plan."

And the revised goal also provides specific criteria, including definitions of *important marine habitat* and *important fishery areas* for evaluating whether an action complies with the goal.

4. Federal Laws

A number of federal laws pertain to Oregon's territorial sea. Two of these, the Coastal Zone Management Act and the Submerged Lands Act, establish a framework for management of Oregon's territorial sea. Others relate to specific resources, uses, and activities.

a. Clean Water Act (33 USC 1251 - 1375)

The Clean Water Act, administered by the US Environmental Protection Agency (EPA), is the most important law dealing with the quality of water in the United States, including marine waters. Under the Act, the EPA and the Oregon Department of Environmental Quality (DEQ) have an agreement that the DEQ regulates all point-source (e.g. a pipe) discharges into rivers, estuaries, and the ocean through the National Pollutant Discharge Elimination System (NPDES). Section 404 of the Act regulates the dumping of dredged materials and is administered by the US Army Corps of Engineers.

b. Coastal Zone Management Act (16 USC 1451 - 1464), amended

The 1972 Coastal Zone Management Act established a national program of coastal management that is carried out by coastal states through state coastal-management programs reviewed and approved by the Secretary of Commerce through NOAA, the National Oceanic and Atmospheric Administration (NOAA), Office of Ocean and Coastal Resources Management. State programs approved as meeting federal guidelines become the operative management program within the state's coastal boundary. The law, with subsequent amendments, requires all federal actions or programs affecting a state's coastal zone to be consistent with the mandatory provisions of that state's program.

NOTE: In 1977, the Secretary of Commerce approved Oregon's Coastal Management Program, which was the second in the nation to be approved. Oregon's Coastal Zone extends from the crest of the Coast Range mountains (with two exceptions on the Rogue and Umpqua Rivers) seaward to the limits of state jurisdiction. Thus, after this Territorial Sea Plan is adopted by the Land Conservation and Development Commission and approved by NOAA/Commerce, it will become an official part of Oregon's federally approved Coastal Management Program.

c. Comprehensive Environmental Response Compensation and Liability Act of 1980 (42 USC 9601 - 9657)

This Act, known as CERCLA, provides the framework for responding to all manner of hazardous-waste contingencies, including spills, leaks, disposal, or discharges of oil, chemicals, or other hazardous substances into the environment. The Act also provides for recovery of damages from injury or loss of natural resources. The Act authorizes the President to enter into cooperative agreements with states to take actions under this Act, including damage assessment and recovery.

d. Endangered Species Act of 1973 (16 USC 1531 - 1543)

The Endangered Species Act authorized the Secretaries of the Interior and Commerce to list all species determined to be endangered or threatened. "Endangered species" means "any species which [that] is in danger of extinction throughout all or a significant portion of its range." "Threatened species" means "any species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." The Act prohibits "take" (i.e. killing, harassing, hunting, etc.) and requires protective regulations and recovery plans for any listed species. The federal agencies may enter into agreements with states to develop and carry out conservation programs for such species. The Endangered Species Act refers to the commitments of the United States to various international agreements to conserve natural resources and wildlife.

e. Fish and Wildlife Act of 1956 (16 USC 742a - 742j-2)

The Fish and Wildlife Act created the US Fish and Wildlife Service within the Department of the Interior. The Act established legislative policy with regard to fish and wildlife resources. The duties and authorities of the US Fish and Wildlife Service are further described in other related laws such as the Fish and Wildlife Coordination Act (16 USC 661 - 666c)

f. Magnuson Fisheries Conservation and Management Act (16 USC 1801 - 1882)

Originally enacted in 1976, the Magnuson Fisheries Conservation Act is the legal framework for the United States to assert its management jurisdiction over fishery resources in the area from three to two hundred miles offshore. In addition to controlling the entry and activity of foreign fishing fleets, the Act created eight regional fishery-management areas, each governed by a council. States have representation on the Council. The Act generally preserves coastal state fisheries-management authority within the territorial sea unless a fishery within state waters is covered by a fishery management plan developed by the council or if the state's fishery program would, either by action or inaction, adversely affect a fishery in a fishery-management plan. Fishery-management plans must be approved by the Secretary of Commerce; implementation is through the National Marine Fisheries Service.

g. Marine Mammal Protection Act (16 USC 1361 - 1407)

The Marine Mammal Protection Act set up strict prohibitions against the taking, importation, or

possession of marine mammals or marine-mammal products. "Take" is defined as "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." Marine mammals include sea otters, polar bears, all cetaceans (whales), pinnipeds (seals and sea lions), and sirens (manatees and dugongs). Some "incidental take" is allowed in commercial-fishery operations. The act also created a Marine Mammal Commission and a Committee of Scientific Advisors on Marine Mammals. The US Fish and Wildlife Service (Department of the Interior) has jurisdiction over sea otters and polar bears; the National Marine Fisheries Service (Department of Commerce) has jurisdiction over all other marine mammals.

h. Marine Plastics Pollution Research and Control Act of 1987

This act implements an international agreement on ocean garbage titled Annex V of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (known by word MARPOL). MARPOL is a primary impetus for ports in Oregon to provide garbage disposal and recycling facilities for vessels.

i. Marine Protection, Research and Sanctuaries Act (16 USC 1431 - 1434)

Title III of this act authorizes the Secretary of Commerce to designate marine areas that meet certain standards as National Marine Sanctuaries. The National Oceanic and Atmospheric Administration (NOAA) carries out the National Marine Sanctuary Program. There are no National Marine Sanctuaries off the Oregon coast, although the Heceta-Stonewall Banks complex at the outer edge of the Oregon continental margin has been identified as a potential sanctuary. There are five National Marine Sanctuaries on the Pacific Coast: the Olympic Coast NMS off the northern Washington coast, the Monterey Bay NMS in central California, the Gulf of the Farallones NMS and the adjacent Cordell Bank NMS off San Francisco Bay, and the Channel Islands NMS off southern California. A sanctuary can include state waters as well as federal.

j. Migratory Bird Conservation Act of 1929 (16 USC 715 - 715r)

This Act created a Migratory Bird Conservation Commission made up of the Secretaries of the Interior (chair), Agriculture, and Transportation; Congressional members; and ex-officio state members. The Commission approves the acquisition of land and water areas for sanctuaries, refuges, or other management purposes.

k. Migratory Bird Treaty Act of 1918 (16 USC 703 - 712) as amended

This landmark Act recognizes the importance of protecting migratory birds throughout their range and implements treaties with Canada (1916), Mexico (1936), Japan (1972), and the USSR (now Russia, in 1976) for protecting migratory birds. These treaties not only relate to hunting issues, but also to preservation of habitat on which birds depend. This Act is the basis for the Secretary of the Interior (through the U.S. Fish and Wildlife Service) to set and enforce hunting seasons and regulations for migratory birds on both public and private lands..

l. National Environmental Policy Act (42 USC 4321-4347)

Enacted in 1969 shortly after the first "Earth Day," this Act is the legal basis for requiring an Environmental Impact Statement for "major federal actions significantly affecting the quality of the human environment." The concept behind the law was one of a systematic and interdisciplinary approach to resource planning and decision making.

m. National Wildlife Refuge System Administration Act of 1966 (16 USC 668dd - 668ee) as amended

This Act created a National Wildlife Refuge System that includes wildlife refuges, wildlife ranges, wildlife management areas, and waterfowl production areas. The Secretary of the Interior (US Fish and Wildlife Service) is authorized to manage these areas and to permit uses that are compatible with the purposes of the established areas. This is the basic act authorizing the three National Wildlife Refuges in Oregon's territorial sea (see item s., below).

n. Ocean Dumping Act (33 USC 1401 - 1445)

Also known as Title I of the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), this act regulates ocean dumping of all types of materials, including dredged materials. The Act's 1988 amendments aim to end the ocean dumping of sewage sludge and industrial waste in the ocean. The EPA and the Corps administer this Act while NOAA is charged with ongoing research and monitoring.

o. Oil Pollution Act of 1990

Enacted in response to the Exxon Valdez oil spill, this act expands federal statutory liability for damages resulting from oil spilled or dumped into navigable waters. It also creates the Oil Spill Liability Trust Fund that may be used to compensate for injuries from spills. The Oil Pollution Act builds on CERCLA and CWA and contains many similar provisions.

p. Rivers and Harbors Appropriation Act of 1899

This authorizes the US Army Corps of Engineers to permit, authorize, or construct piers, dikes, jetties, or other structures within navigable waters of the United States or to excavate or place fill material in these navigable waters.

q. Submerged Lands Act (43 USC 1301 - 1315)

This 1953 Act legislatively established state ownership of all lands and natural resources "beneath navigable waters" within the boundaries of the state, which are defined as a line three geographical miles from "the coastline" which is defined as the line of "ordinary low water." This "ordinary" (also "mean" or "average") low-water line is the same line as that which, in state law, de-marks "submersible" (intertidal) and "submerged" (subtidal).

r. Wilderness Act of 1964 (16 USC 1131 - 1136)

The Wilderness Act of 1964 directs the Secretary of the Interior to review all roadless areas of certain sizes, all islands within the National Wildlife Refuge System regardless of size, and to recommend to Congress areas to be designated for formal protection and preservation as wilderness.

s. Laws Creating National Wildlife Refuge and Wilderness off Oregon 's Coast

- **Executive Order 699 (1907)** established Three Arch Rocks Reservation
- **Executive Order 5702 (1931)** protected additional refuge lands at T.A.R.
- **Executive Order 7035 (1935)** established Goat Island Reservation
- **Executive Order 7957 (1938)** created Cape Meares Migratory Bird Refuge
- **Executive Order 2416 (1940)** changed names to Three Arch Rocks N.W.R., Oregon Islands N.W.R., and Cape Meares N.W.R.
- **Public Land Order 4395 (1968)** added islands to Oregon Islands N.W.R.
- **Public Law 91-504 (1970)** "Oregon Islands Wilderness" status for Three Arch Rocks N.W.R. and Oregon Islands N.W.R.
- **Public Law 95-450 (1978)** added islands to Oregon Islands N.W.R. and designated additional "Oregon Islands Wilderness" lands
- **Public Land Order 6287 (1982)** added islands to Oregon Islands N.W.R.; designated some islands "Oregon Islands Wilderness"

5. International Law

The oceans cover about 71 percent of the Earth's surface and lap the shores of many nations. A rich and complicated fabric of international laws and agreements has grown over the centuries in response to the use of the oceans for transportation, warfare, food, chemicals, materials, research, and recreation. This web of international laws provides the framework for nations, such as the United States, and their political components, such as states, to manage ocean uses and resources.

The United States is a party to many international agreements related to the oceans, including the 1982 United Nations Convention on the Law of the Sea. Although the United States has yet acceded to the 1982 Convention because of objections to deep-seabed mineral provisions, the U.S. has been a party to all four of the 1958 Geneva Conventions on the Law of the Sea and generally recognizes as customary international law all provisions except for the deep-seabed provisions. States, in carrying out their governance authority for areas of the ocean under their jurisdiction, have a duty to comply with international law as part of U.S. law.

Thus, the Oregon Territorial Sea Plan is a governance instrument for affirmatively addressing these international agreements. The standards for evaluating ocean development proposals, the rocky shores goals and policies to protect marine biodiversity, and the conservation standards of Statewide Planning Goal 19 are all provisions that assist the United States to meet these

international obligations.

6. Status and Interests of Oregon Coast Indian Tribes

There are four federally-recognized tribes on the Oregon coast: the Confederated Tribes of the Grande Ronde; the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw; the Coquille Tribe; and the Confederated Tribes of Siletz. These tribal governments encompass many smaller tribes and bands of Indians that originally inhabited western Oregon and the coast. Tribal status was terminated by the federal government in 1954 but Congressional action in the late 1970s and early 1980s restored federal tribal status to these and other Oregon Indian tribes.

While the federal restoration acts renewed the tribes' relationship with the federal government and renewed health and education benefits for tribal members, hunting or fishing rights were not restored to the tribes. The restoration acts expressly provided that "no hunting, fishing, or trapping rights of any nature of the tribe or of any member...are granted or restored..." Two of the tribes have negotiated agreements with the State of Oregon related to tribal hunting, fishing, trapping, and gathering rights. In 1980, the Confederated Tribes of Siletz, the state, and the federal government reached an agreement that specifies the terms and conditions under which the tribe and its members may hunt, fish, collect, or gather a variety of fish and wildlife resources including seaweed. Under this agreement, the gathering of sea anemones, rocky oysters, and saltwater mussels is subject to all applicable state law except that upon request of the tribe, the Department of Fish and Wildlife may issue special gathering permits to allow an opportunity for ceremonial and subsistence purposes. In 1986, the Confederated Tribes of Grande Ronde and the state entered into an agreement to permanently define the tribes' hunting, fishing, trapping, and gathering rights.

7. Hierarchy of Legal Authorities in the Territorial Sea

Numerous legal authorities apply to the management of ocean resources in Oregon's territorial sea, including state laws (e.g. ORS 196 and ORS 197), the Statewide Planning Goals (specifically Goal 19), the Ocean Resources Management Plan, this Territorial Sea Plan, other Oregon statutes that provide specific management authority to state agencies, and state agency rules and coordination programs. Federal laws also apply in the territorial sea and are a part of the mix of legal authorities. The implementers of these "laws" include OPAC, state agencies, local government, and federal agencies. This section seeks to describe the linkage or relationship of these "laws" to each other.

a. State Constitution

The Oregon Constitution is the basic legal framework for the State of Oregon, including the structure and authorities of the various branches of state government. The Constitution establishes a State Land Board of the Governor, Secretary of State, and State Treasurer, to "manage lands under its jurisdiction with the object of obtaining the greatest benefit for the

people of this State, consistent with the conservation of this resource under sound techniques of land management." Lands under its jurisdiction include all submerged and submersible lands in the Territorial Sea, estuaries, and navigable streams (see also Part I, D.1.d. Submerged/Submersible Lands).

b. Common Law and the Public Trust

Common law doctrines, such as the public trust doctrine or the doctrine of custom, may provide guidance concerning the public's rights within the territorial sea. Courts generally apply these doctrines to guarantee certain public rights such as recreation, commerce, or navigation. The public trust doctrine, in particular, provides an overarching basis for state ownership and management of resources and activities within the Territorial Sea. This doctrine, derived from English Common Law, traditionally holds that the state holds title to tidelands and navigable waters in trust for the benefit of the public, including navigation, fishing, bathing, swimming, boating, and general water-related recreational uses.

c. State Laws

As indicated in Figure 4, the relationship of the relevant "laws" is generally conceived of as a hierarchy. First, there are statutes the legislature enacts that provide substantive authority and mandates for natural-resource agencies. Aside from any applicable constitutional provision, these statutes sit at the top of the hierarchy. Overall laws for ocean management are ORS 196 and ORS 197.

d. Statewide Planning Goals

Next come the statewide planning goals, such as Goal 19, that the LCDC adopted at the direction of the legislature. They are considered "super rules" (as a result of specific court decisions) in that they govern if there is a conflict between the statewide planning goals and, for example, LCDC's other administrative rules. For ocean management in particular, it is also clear that these planning goals come next in the hierarchy because the law (ORS 196) states that LCDC can approve the Territorial Sea Plan only if it finds that the plan is consistent with the statewide planning goals, including Goal 19. Because of this requirement, it is clear that the Territorial Sea Plan (like the Ocean Resources Management Plan) is subordinate to Goal 19, at least to the extent that the plan must be consistent with the goal.

e. Ocean Plans

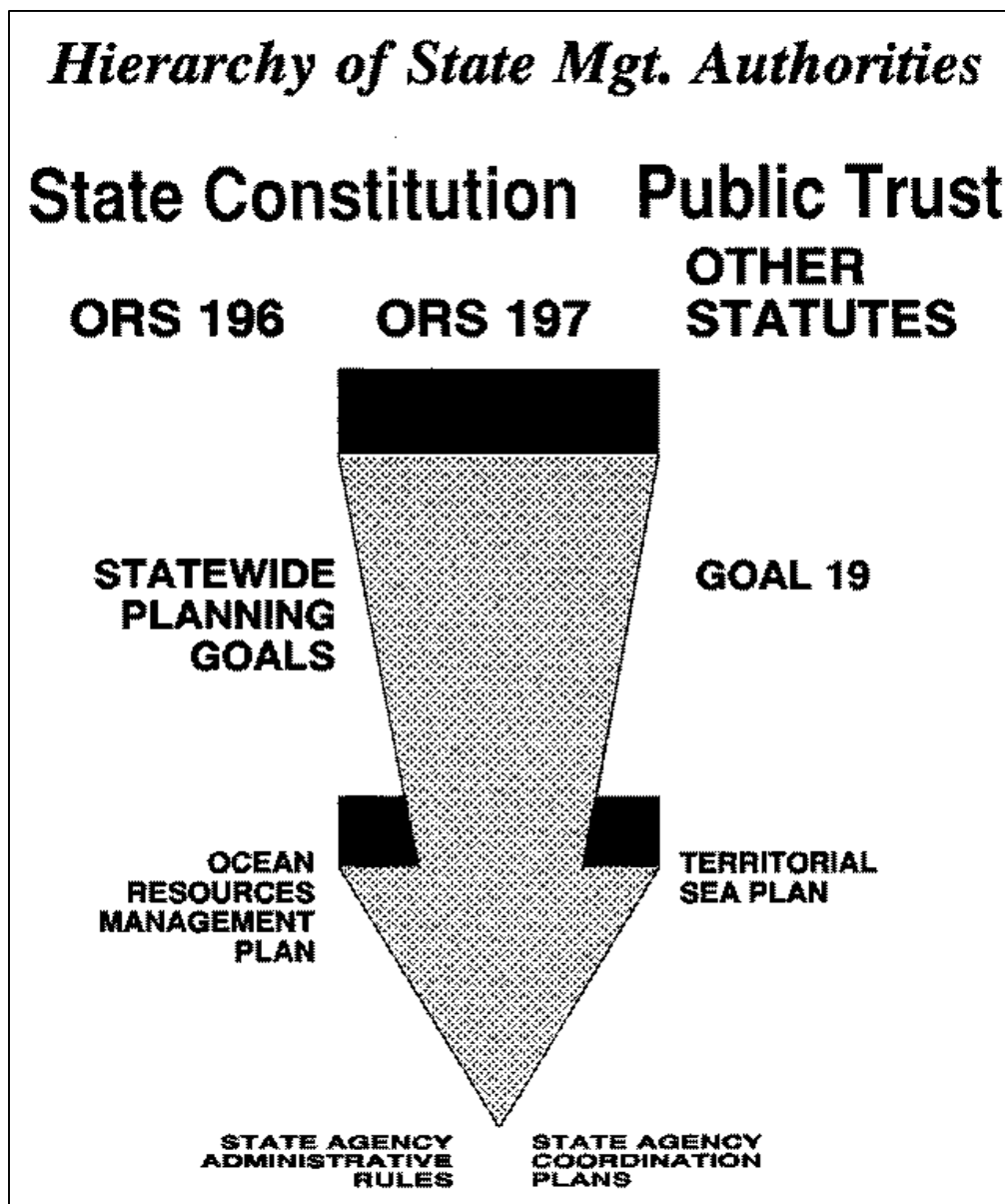
Ranking below state law and the statewide goals are Oregon's two ocean plans: the Ocean Resources Management Plan and the Territorial Sea Plan. This is because, by law, both plans must be consistent with the goals and state laws, including the original authorizing statute. A further complexity, however, is that unless the Ocean Plan is amended prior to the adoption of the Territorial Sea Plan, the Ocean Plan takes precedence and the Territorial Sea Plan must be consistent with it.

f. Agency Rules and Programs

Finally, agency rules and state-agency coordination programs are shown at the bottom of Figure 4. These rules and programs are adopted through rule making and guide the agency in carrying out day-to-day programs. Agency rules must be amended as changes occur in applicable agency statutes or the statewide goals.

8. Conflicts Among Legal Authorities

Although the foregoing describes a hierarchy, conflicts or uncertainties can, and undoubtedly will, arise between or among authorities. It should be emphasized that standard principles of statutory interpretation require that conflicts in law or other authority be resolved to give as much "effect" as possible to all of the authorities, rather than selecting one predominating authority.



Oregon Territorial Sea Plan

Adopted 1994



PART ONE:

Ocean Management Framework

E. OCEAN MANAGEMENT AGENCIES

NOTE: The following descriptions of agency programs and authorities are limited to those that relate to ocean or coastal resources. These descriptions are necessarily brief and do not purport to be comprehensive.

1. State Agencies

a. Department of Agriculture

The Department of Agriculture has three interests in the territorial sea. One is the leasing and regulatory functions for oysters (although in Oregon none are grown outside of estuaries); the second is regulating the use of TBT (tri-butyltin), a chemical in antifouling paints used to retard the growth of marine life on boat hulls; the third is assisting in the marketing of seafood commodities through seafood-commodity commissions.

b. Department of Environmental Quality (DEQ)

The Department of Environmental Quality has overall authority for protecting water and air quality in the territorial sea. In addition to authority and responsibility to carry out state pollution laws, the DEQ is authorized to carry out federal pollution-control laws such as the Clean Water Act and regulate discharge of pollutants into marine waters under the federal National Pollutant Discharge Elimination System. DEQ also has oil spill prevention and response responsibilities and evaluates oil spill contingency plans mandated by state law, manages oil spill response activities, and provides public education and outreach to volunteer responders. DEQ and its oversight body, the Environmental Quality Commission, has divided the state into water quality basins; there are five such basins along the Oregon coast and they include marine and estuarine waters as well as fresh. "Marine waters" are defined by DEQ rules to mean "all oceanic, offshore waters outside the estuaries or bays and within the territorial limits" of the state. DEQ is also involved in reviewing dredge and fill permits for certification of water quality under Section 401 of the Clean Water Act. DEQ and the ODFW are jointly designated as trustee under state and federal law (CERCLA) to assess and recover compensation for environmental damages from oil spills, water pollution, etc.

c. Department of Fish and Wildlife (ODFW)

The Department of Fish and Wildlife has broad authority to develop protection programs for fish and wildlife and enforce fish and wildlife laws. The Fish and Wildlife Commission, ODFW's oversight policy body, has adopted harvest regulations for intertidal animals, fish, and shellfish, including sea urchins. ODFW also has responsibilities for protecting marine mammals, including threatened or endangered species, and sea birds. ODFW provides an increasingly important role as the state's "marine biological consultant" to other agencies and the Governor on ocean-related programs such as kelp leasing, dredge-material disposal, marine mineral exploration, and ocean discharge of wastes. ODFW and the DEQ are jointly designated as trustee under state and federal law (CERCLA) to assess and recover compensation for environmental damages from oil spills, water pollution, etc.

d. Department of Geology and Mineral Industries (DOGAMI)

The Department of Geology and Mineral Industries has three primary interests in territorial-sea management. One is regulatory authority over such operations as exploring for and extracting oil, gas, or geothermal resources in the territorial sea and coastal zone and hard minerals, such as sand and gravel, on upland sites. Another is advising the Division of State Lands when that agency issues permits for exploratory geological, geophysical, and seismic surveys in the territorial sea. A third is related to understanding and mitigating for geologic hazards and processes. DOGMI undertakes coastal-hazard assessments and studies for both chronic and catastrophic hazards and conducts programs aimed at reducing loss of life and property.

e. Department of Land Conservation and Development (DLCD)

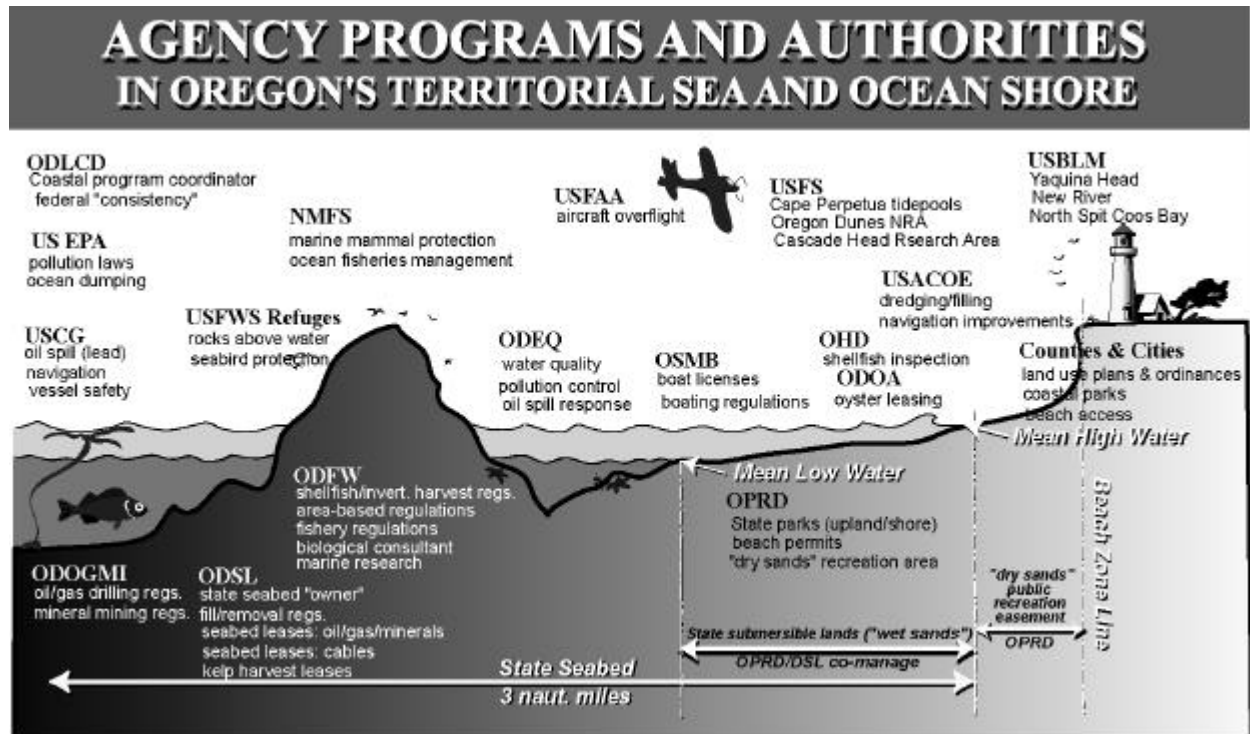
The DLCD is designated by statute as the state's Coastal Zone Management Agency for federal coastal management purposes, provides staff support to the Ocean Policy Advisory Council, and administers the state's land-use program, including Statewide Planning Goal 19, Ocean Resources, and the other 18 statewide goals. DLCD has no direct regulatory authority for ocean resources but, through state-agency coordination requirements and through federal consistency requirements, is the coordinator among all coastal resource agencies to make sure their actions and programs are coordinated with each other, local governments, and the Oregon Coastal Management Program.

f. Oregon Parks and Recreation Department (OPRD)

The Oregon Parks and Recreation Department has several management interests in the Territorial Sea. The ocean beach law designates all of Oregon's "ocean shore" as a state recreation area to be managed by OPRD. OPRD has regulatory authority over improvements such as sea walls, rip-rap, pipeline and cable crossings, and other construction within the area from the statutory vegetation (beach zone) line seaward to Extreme Low Tide. Within this "ocean shore," PRD has concurrent jurisdiction with the DSL over submerged and submersible lands seaward of Mean High Water (the so-called "wet sands"). OPRD owns and manages many state parks on the upland adjacent to rocky-shore sites that provide access to rocky shores.

g. Division of State Lands (DSL)

The Division is the administrative arm of the State Land Board (composed of the Governor, Secretary of State, and Treasurer) which manages the assets (land and money) of the Common School fund and which holds in trust for the people of Oregon all lands under tidal and navigable waters, including rocky intertidal areas and submerged rocks and reefs in the state's Territorial Sea. In these areas the Division has authority over removal and fill; kelp or seaweed harvest; shellfish harvest (except oysters); geological, geophysical, and seismic surveys; oil, gas, and mineral leasing; and easements or other rights-of-entry for various uses.



FEDERAL AGENCIES

USFWS: U.S. Fish and Wildlife Service
USEPA: U.S. Environmental Protection Agency
USACOE: U.S. Army Corps of Engineers
NMFS: National Marine Fisheries Service
USBLM: U.S. Bureau of Land Management
USCG: U.S. Coast Guard
USFS: U.S. Forest Service
FAA: Federal Aviation Authority

STATE AGENCIES

DLCD: Dept. of Land Conservation and Development
DOGAMI: Dept. of Geology and Mineral Industries
ODFW: Dept. of Fish and Wildlife
DSL: Division of State Lands
DEQ: Dept. of Environmental Quality
DOA: Dept. of Agriculture
OPRD: Oregon Parks and Recreation Department
OHD: Oregon Health Division
OSMB: Oregon State Marine Board

COUNTIES AND CITIES (fronting on the ocean)

CLATSOP: Gearhart, Seaside, Cannon Beach, Warrenton
TILLAMOOK: Manzanita, Rockaway Beach
LINCOLN: Lincoln City, Newport, Yachats
LANE: none
DOUGLAS: none
COOS: Bandon
CURRY: Port Orford, Gold Beach, Brookings

Fig. 5 Agencies Diagram

h. State Marine Board

The Marine Board has authority to regulate boating activities in state waters, including the Territorial Sea. The Marine Board, through boater education and publications, can assist in education and awareness of wildlife resources affected by boating activity.

2. Federal Agencies

NOTE: The following descriptions of agency programs and authorities are limited to those that relate to ocean or coastal resources. These descriptions are necessarily brief and do not purport to be comprehensive.

a. Army Corps of Engineers (USACE)

The Corps is responsible for building and maintaining coastal navigational projects, including jetties, navigation channels, and navigational structures under the Rivers and Harbors Act (33 USC 401 - 709b and 2201 - 2329). Material dredged from coastal ports is frequently disposed in ocean waters at sites designated by the Environmental Protection Agency (EPA). Placement of dredged materials at these ocean sites is regulated under sections 102 and 103 of the Marine Protection, Research, and Sanctuaries Act (MPRSA) administered by the EPA or the Corps under section 404 of the Clean Water Act (CWA). The Corps also has permit authority over work performed by others in navigable waters under section 10 of the Rivers and Harbors Act, Section 404 of the CWA, and section 103 of the MPRSA.

b. Bureau of Land Management (BLM)

The BLM (within the U.S. Department of the Interior) owns and administers, on behalf of the public, several sites that include or are adjacent to ocean shore areas. These are Yaquina Head Outstanding Natural Area near Newport, the Coos Head (Cape Gregory) Lighthouse Reserve and Squaw Island near Coos Bay, New River Area of Critical Environmental Concern near Langlois, Cape Blanco Lighthouse Reserve, North Sisters Rock south of Port Orford, and Zwagg Island at Brookings.

c. U.S. Coast Guard (USCG)

The US Coast Guard has several lines of authority and program activities that relate to Oregon's territorial sea. The USCG (1) is the lead agency for oil-spill response and cleanup and is the on-scene coordinator for planning and response; (2) maintains search-and-rescue stations, including air stations at Warrenton (Astoria) and North Bend (Coos Bay); (3) has authority over buoys and markers to regulate vessel operations. The USCG has a program of routine Marine Environmental Patrols along the ocean shore to locate and ensure safe removal of any hazardous materials or debris that may be washed ashore.

d. Environmental Protection Agency (EPA)

The EPA is responsible for protecting marine water quality under several federal laws. The EPA and Oregon Department of Environmental Quality have entered into an agreement whereby the DEQ regulates all point-source (e.g. a pipe) discharges into rivers, estuaries, and marine waters through the National Pollutant Discharge Elimination System (NPDES). EPA is also charged with carrying out the Marine Protection, Research, and Sanctuaries Act of 1972 (also known as the Ocean Dumping Act), the Marine Plastics Pollution Research and Control Act of 1987, and the National Marine Pollution Program. The EPA also administers the Clean Air Act of 1977.

e. U.S. Fish and Wildlife Service (USFWS)

The USFWS (within the U.S. Department of the Interior) administers three National Wildlife Refuges in Oregon's Territorial Sea: the Oregon Islands NWR, Cape Meares NWR, and Three Arch Rocks NWR. USFWS jurisdiction includes approximately 1,400 rocks and islands above state jurisdiction (Mean High Water), the so-called "dry" portion of the rocks and islands. In addition, USFWS co-administers the federal Endangered Species Act and administers several other federal laws related to marine wildlife and seabirds.

f. U.S. Forest Service (USFS)

The Forest Service, an agency of the U.S. Department of Agriculture, operates the Cape Perpetua Visitors Center. Linked to the visitor center are access trails, interpretive facilities, and visitor information programs related to the rocky intertidal areas adjacent to lands of the Siuslaw National Forest.

g. Minerals Management Service (MMS)

The Minerals Management Service is housed in the Department of the Interior. It has two functions of potential interest in Oregon's territorial sea. One is locating and mapping the coastal baseline from which the state's three-mile seaward boundary is drawn for purposes of offshore oil and gas leasing. The other is preparing and carrying out a program of oil and gas lease sales in federal waters of the Outer Continental Shelf and offering leases for marine mineral exploration and development in federal waters.

h. National Marine Fisheries Service (NMFS)

The National Marine Fisheries Service, a branch of NOAA within the US Department of Commerce, has three interests in Oregon's Territorial Sea. First, NMFS administers the Marine Mammal Protection Act which protects all seals, sea lions, whales, and other marine mammals that use Oregon's ocean area. Second, NMFS co-administers the federal Endangered Species Act under which the Steller sea lion, which breeds on the Oregon coast, is protected. Third, NMFS regulates certain ocean fisheries under the Magnuson Marine Fisheries Conservation Act with consequent indirect effect on fishing activity in Oregon's territorial sea.

i. National Ocean Service, Office of Ocean and Coastal Resources Management (OCRM)

OCRM, a relatively small agency in NOAA, is responsible for administering the National Coastal Zone Management Act of 1972, as subsequently amended. OCRM administers essential federal funds to state coastal management programs through both regular grants and special program enhancement grants. Oregon has made use of both grant programs to fund development of the Territorial Sea Management Plan. OCRM has responsibility within NOAA and the Department of Commerce for reviewing and approving state coastal management programs and subsequent amendments under the federal Coastal Zone Management Act. The National Marine Sanctuary Program and National Estuarine Research Reserve Program are administered by OCRM.

3. Local Governments

a. Cities

Thirteen cities border Oregon's territorial sea: Brookings, Gold Beach, Port Orford, Bandon, Yachats, Waldport, Newport, Depoe Bay, Lincoln City, Rockaway Beach, Manzanita, Cannon Beach, and Seaside. Although these coastal cities have very limited jurisdiction or authority over ocean shore resources or areas, they may play a role in protecting and managing rocky shore areas and resources through policies and decisions about land use on adjacent uplands.

b. Counties

Seven Oregon counties border the Pacific Ocean: Curry, Coos, Douglas, Lane, Lincoln, Tillamook, and Clatsop. Notwithstanding the fact that county boundaries and jurisdiction extend westward to the limit of state waters, Oregon law [ORS 201.370(2)] specifically delegates the planning function for the Territorial Sea to the Ocean Policy Advisory Council and the Territorial Sea Plan. Like coastal cities, coastal counties can play a part in the management of some rocky shore sites where local land-use plans and ordinances can be used to help carry out this rocky shore strategy.

The Council is required to consult with local governments on ocean developments. These mandatory consultation provisions are included in Part Two, Making Resource Use Decisions.

c. Coastal Port Districts

There are fifteen port districts on the Oregon coast: the Ports of Brookings-Harbor, Gold Beach, Port Orford, Bandon, Coquille River, Coos Bay, Umpqua, Siuslaw, Alsea, Newport, Toledo, Nehalem, Garibaldi, Tillamook Bay, and Astoria. While these governmental entities do not have land use planning responsibilities under Oregon law like those of counties or cities, they nonetheless have direct interests in the economy of the coast and, therefore, can play a key role in promoting development of Oregon's ocean resources that is both economically and environmentally sound.

Oregon Territorial Sea Plan

Adopted 1994



PART ONE:

Ocean Management Framework

F. PLAN IMPLEMENTATION

1. How The Plan Works

a. A Three-Part Plan

This initial Territorial Sea Plan has developed with three parts. Part One, Management Framework, provides a framework for describing, linking, and understanding the relationships among all relevant state and federal laws, state programs, statewide planning goals, and federal agency programs. This plan will not replace those elements but will coordinate and supplement them through specific plan provisions.

Part Two, Making Resource Use Decisions, establishes mandatory procedures and standards for carrying out Goal 19, Ocean Resources. These procedures will provide agencies and the public with requirements for receiving and reviewing proposals for activities in the territorial sea that require agency approvals. These procedures anticipate that there will be proposals for activities that are not, and perhaps cannot be, directly addressed or anticipated by this plan.

Part Three, A Rocky Shores Management Strategy, is the application of planning to specific locations and resources. It provides a planning framework for agencies to manage rocky shore sites, uses, and resources. The strategy includes goals, policies, and objectives, and applies an ecosystem-management approach to actual rocky shore locales on the Oregon coast.

Other sections on additional topics will be added over time as the Council continues its work.

b. Mandatory or Discretionary Provisions of the Plan

The Oregon Legislature clearly intended that the Territorial Sea Plan would have effect and directed that once the LCDC adopts the plan, state agencies must act consistently with it.

Consequently, the plan was written to include sections that are explicitly mandatory and sections that are recommendations only. The provisions of the plan that are mandatory include:

- 1.) all of Part Two: Making Resource Use Decisions; and

- 2.) specific sections within Part Three: Rocky Shores Management Strategy:
 - B.1. Rocky Shores Policy Framework: Goal, Objectives, Policies;
 - C.1. Mandatory Policies for Site Management;
 - C.2. Mandatory Policies for Amending the Rocky Shores Strategy;
 - F.2. Management Categories
 - G.1.-39. Site Designations & Management Prescriptions

All other plan provisions are recommendations and therefore discretionary. The recommendations are intended to provide planning guidance and describe preferred, but not required, courses of action.

c. Carrying Out The Mandatory and Recommended Provisions of the Plan

The mandatory provisions of the Territorial Sea Plan apply to a variety of agency actions. When agencies do any of the following related ocean resources, they must be consistent with the mandatory provisions of the plan: make program decisions, make or amend rules affecting ocean resources, approve resource-use permits and leases, manage property owned or controlled by agencies, and manage ocean resources.

State agencies may choose to incorporate the plan by reference in their state agency coordination programs. Then, upon a finding by LCDRC that an agency has amended its rules, procedures, and standards to conform with the Territorial Sea Plan, the state agency will be deemed to have satisfied the requirements of state agency planning and coordination required by ORS 197.180 for ocean planning. If a state agency does not incorporate the Territorial Sea Plan in its coordination program, the agency will be subject to the state agency coordination requirements of ORS chapters 196 and 197 for state agency programs, procedures, and standards that in any way affect ocean resources. This second alternative means, in essence, that the agency must demonstrate compliance with this plan for each action it takes with respect to ocean resources.

For those plan provisions that are discretionary or that anticipate more detailed or site-specific planning and implementation, agencies are expected to refer to the plan and to act consistently whenever possible. For example, the Territorial Sea Plan does not currently provide detailed management plans for each rocky-shore site. State agencies should refer to the Territorial Sea Plan as a framework for making these more detailed, site-specific management decisions, such as improving public access and providing parking.

When adopted by LCDRC, some parts of this plan will take effect immediately, such as the provisions of Part II, Making Resources Use Decisions that carry out the meaning of Goal 19, Ocean Resources. Other parts of the plan will not take effect immediately but will depend upon subsequent agency actions, such as revising a master plan for a coastal State Park or building public interpretive facilities at rocky-shoreline areas along the coast.

Local governments also may play a role in carrying out the Territorial Sea Plan, particularly in rocky-shore areas. The Council is specifically authorized to recommend changes to both local comprehensive plan and ordinances to help the local plans become consistent with the Territorial

Sea Plan. However, there are no statutory requirements for local governments to change comprehensive plans, ordinances, or land-use regulations.

d. Adoption and Approval of the Territorial Sea Plan

The Council first must recommend the plan for adoption to the Land Conservation and Development Commission. Then, LCDC must make findings that the Territorial Sea Plan:

- carries out the policies of the Ocean Management Act;
- is consistent with applicable statewide planning goals, with emphasis on the four coastal goals; and
- is compatible with adjacent county comprehensive plans.

After making these findings, LCDC will adopt the Territorial Sea Plan and any subsequently proposed amendments, through rule making.

If the LCDC cannot make the required findings, it cannot itself amend the Territorial Sea Plan. Instead, LCDC must send the plan back to the OPAC for additional work.

e. Federal Approval

While the Territorial Sea Plan and its amendments will become part of Oregon's Coastal Management Program, federal approval of this plan is not required. However, such approval by the Secretary of Commerce under the federal Coastal Zone Management Act of 1972 will provide the state with the ability to review certain federal activities for consistency with the mandatory provisions of this plan. After adopting this plan, LCDC anticipates seeking such approval from the Secretary of Commerce.

2. Changing the Plan

After the Territorial Sea Plan is adopted by the LCDC, the Council has a continuing obligation to recommend amendments as needed to both the Oregon Ocean Resources Management Plan and the Territorial Sea Plan. Although the Territorial Sea Plan appears to be a complete document, it is not a completed plan. Rather, the Council has committed itself to a continuous process of addressing new issues and proposing necessary amendments to LCDC to make sure that the plan remains relevant and workable. The LCDC will make any amendments to the plan through official rule making.

The Council recognizes the need to provide a clear and orderly process for taking these actions because of the background work required, the complexity of policy decisions for ocean resources, and the need for scheduling the Council's work program. Accordingly, the Council will adopt clear procedures for proposing amendments to the Territorial Sea Plan. The procedures to be adopted by rule are expected to include the following steps:

a. Initiating an Amendment

There are two ways by which consideration of an amendment may reach the Council:

1.) Issues Survey

After completing this initial plan or any future additions, the Council will survey issues remaining from the Ocean Resources Management Plan and new issues that have arisen. This survey will occur at approximately one-to three-year intervals depending on the length of time the Council requires to complete plan additions. This issues-survey is intended to be the primary method by which plan amendments are initiated.

2.) Amendment Request

The Council will consider any written request for plan amendment in the same manner as those arising from the issues survey. The Council intends that the plan be as relevant and accurate as possible and recognizes that amendments to existing provisions will probably be necessary to facilitate implementation, provide more appropriate guidance to agencies, respond to public concerns, or meet changed conditions in the field. The written request may be from an interested party or from the Land Conservation and Development Commission pursuant to its rules for requesting that the Council consider work on an amendment.

b. Issue Evaluation

The Council will weigh the circumstances of the issues surveyed or the requested amendment against the Planning Considerations for Council Action (see section I.B.2.b.) and other factors to determine whether the issue is appropriate for Council action and whether work load, staff resources, and other logistical factors will make it possible to undertake an evaluation of the issue.

c. Work Program

If the Council agrees to address an issue, it will develop a work program that includes a schedule with a completion target date, public participation opportunities, any working groups or other necessary technical assistance.

d. Public Participation

The Council will include opportunities for public review throughout the planning process including public workshops, from time to time, to solicit ideas and comments about needed Council action on issues or concerns.

e. Council Approval and Submittal to LCDC

The Council will approve any plan amendments in the same manner as the initial plan and will

submit the amendment, along with any needed amendments to the Ocean Plan, to the LCDC for adoption.

3. Implementing the Plan: Legal Requirements

Because Oregon has a networked system for coastal management and planning, putting this plan into action will require the involvement and actions of many parties, including OPAC, state agencies, federal agencies, and local governments. As noted in subsection Part I.F.1.c., above, some parts of the plan, such as Part II and the site management designations of Part III.G., will take effect immediately upon approval by LCDC as part of the Oregon Coastal Management Program while other parts of the plan will be acted on over time.

This section lists the legal requirements of the various parties for implementing the plan and briefly describes actions that they need to take.

a. Ocean Policy Advisory Council

As outlined in state law, the Ocean Policy Advisory Council will play a coordinating, supervising role in carrying out the Territorial Sea Plan. However, it has no authority to take action on its own to regulate ocean uses or resources and instead will rely on state and federal agencies, primarily, to take appropriate action. The Council will continue to develop and refine the Territorial Sea Plan through amendments.

1.) Legal Requirements

ORS 196.443 specifies the duties of the Council:

- a.) Prepare a management plan for the territorial sea as described in ORS 196.471;
- b.) Provide a forum for discussing ocean-resource policy, planning, and management issues and, when appropriate, mediating disagreements;
- c.) Recommend amendments to the Oregon Ocean Resources Management Plan and Territorial Sea Plan as needed;
- d.) Offer advice to the Governor, the State Land Board, state agencies and local governments on specific ocean resources management issues;
- e.) Coordinate interagency and intergovernmental review of specific ocean-resource projects or actions through project review panels;
- f.) Encourage participation of federal agencies in discussion and resolution of ocean-resources planning and management issues affecting Oregon;
- g.) Coordinate development of a computerized ocean-resources information system among

affected state and federal agencies.

b. Local Governments

Coastal local governments have a great interest in the development and conservation of ocean resources. Use and management of upland areas under city or county jurisdiction can affect marine resources. In other instances, the development of resources at sea, such as commercial fisheries or petroleum reserves, can have significant impacts on local ports, labor force, retailers, housing, and the like. The legislature was concerned that local government comprehensive plans and the Territorial Sea Plan be compatible. Compatibility will require a close working relationship among the Council, state agencies, and local governments.

In addition to the statutory coordination requirements between the Council and local governments, the Council has developed mandatory consultation procedures with local governments for major ocean-development proposals that are spelled out in Part II.C. of this plan.

1.) Legal Requirements

ORS 196.465 spells out three basic ways the Ocean Policy Advisory council is to coordinate the Territorial Sea Plan with coastal local governments. These are summarized as follows:

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LINKAGES: OCEAN RESOURCES MANAGEMENT

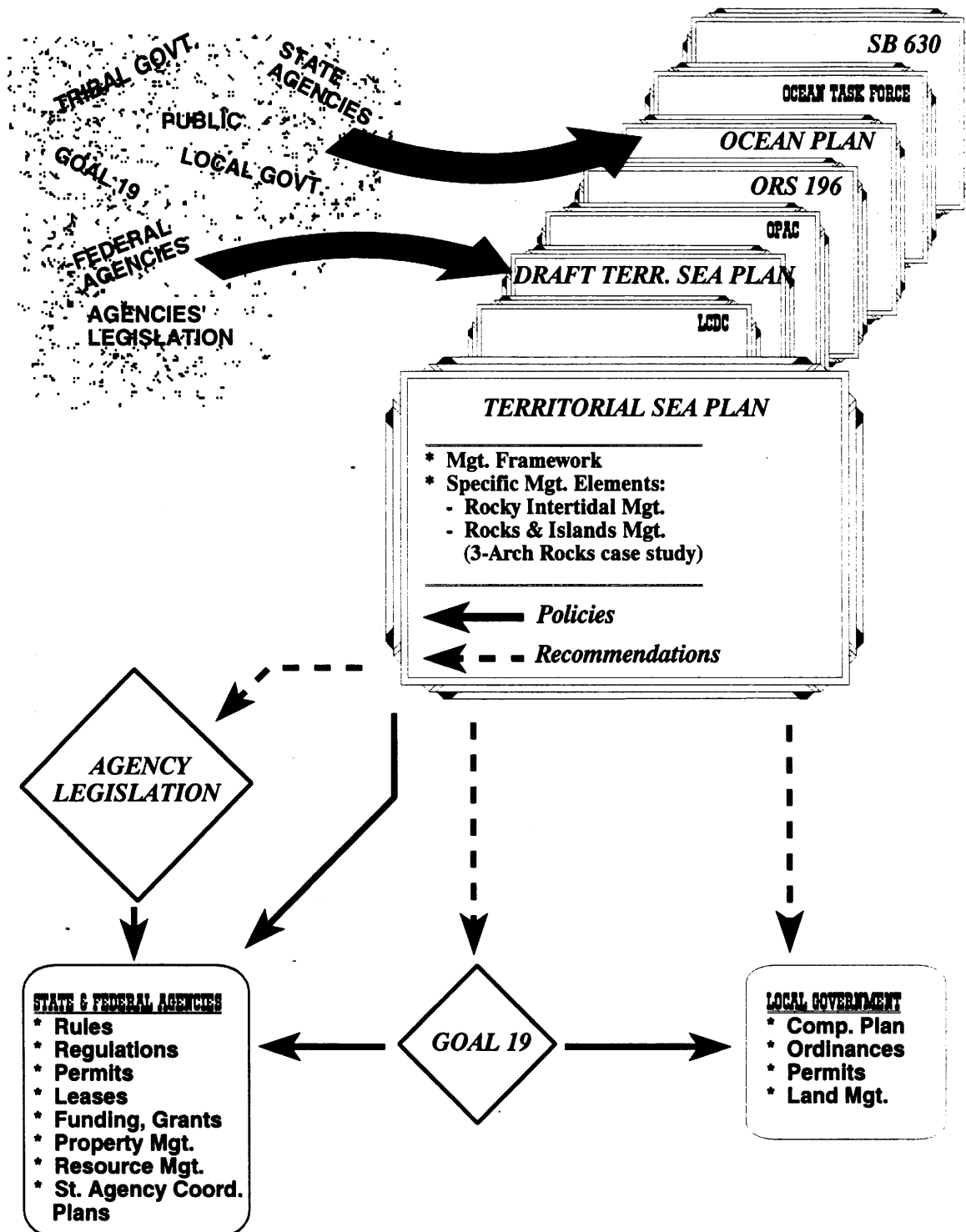


Figure 6: Territorial Sea Management Linkages With Other Ocean Management Authorities

- a.) When adopted by the Land Conservation and Development Commission, the Territorial Sea Plan must be compatible with the acknowledged comprehensive plans of adjacent coastal counties and cities;
- b.) The Council is to work with the coastal zone management association to coordinate with coastal local governments during preparation of the Territorial Sea Plan, including "provisions for mandatory consultation, as necessary, between [among] local governments, the Governor and state agencies on major ocean-development activities or actions";
- c.) The Council may recommend amendments to local comprehensive plans needed to achieve compatibility with state ocean law and policies of the Territorial Sea Plan.

c. State Agencies

State agencies will be the principal implementers of the Territorial Sea Plan. The Legislature in 1991 added three provisions to the Oregon Ocean Resources Management Act that clarify how state agencies are to implement the plan. In addition, the State Agency Coordination requirements of the state's land use planning program will come into play when state agencies carry out the plan.

1.) Legal Requirements

- a.) The act requires state agencies, within their existing authorities, to amend their programs and rules relevant to ocean resources to be consistent with the Ocean Plan and the Territorial Sea Plan (ORS 196.435(2)). This provision will ensure that the Ocean Policy Advisory Council's (OPAC) policies get incorporated in the rules and programs of the appropriate agencies.
- b.) The act makes LCDC's state agency coordination responsibilities under ORS 197.180 an official part of the Oregon Ocean Resources Management Program (ORS 196.425(5)). The LCDC coordination rule provides a ready-made set of procedures for use by state agencies to adopt the Territorial Sea Plan.
- c.) The act does not change the statutorily and constitutionally mandated responsibilities of agencies other than DLCD (ORS 196.435(2)). This provision prevents OPAC from directing state agencies to do things that the Legislature has not given the agencies the authority to do.

2.) State Agency Coordination Programs

The Oregon Legislature made LCDC's state agency coordination requirements part of the state's ocean program. All relevant ocean-management state agencies have existing "state agency coordination programs" approved by LCDC. Most of these coordination programs were developed prior to completion of the Ocean Plan and thus typically contain only generic or general statements describing that agency's relationship to the Oregon Ocean Resources Management Program.

In most cases, agencies will amend their existing coordination programs to incorporate relevant provisions of the Territorial Sea Plan. ORS 196.485 and LCDC's rules governing state agency coordination provide the mechanism for review and approval of state agency rules and programs that LCDC has not previously approved.

d. No New Agencies

No additional state agencies are needed to manage the resources of Oregon's territorial sea. The state's existing network management approach for ocean and coastal resources, which includes a strong coordination mechanism through OPAC and the Governor's Office, is appropriate to handle ocean-resource issues.

NOTE: This also appears as a policy statement in the Ocean Plan (pg. 173).

e. Federal Agencies

Federal agencies were invited to participate in the state's process for territorial sea planning. Several did so enthusiastically as a means of coordinating and strengthening their programs and objectives. These agencies will have a program incentive to follow the provisions of the plan and assist in its implementation.

Section 307 (c)(1) of the Coastal Zone Management Act of 1972 (CZMA), amended in 1990, provides that any federal agency activity is subject to the CZMA requirement for consistency if it will affect any natural resources, land uses, or water use in the coastal zone. Oregon's coastal zone includes the territorial sea. The amendments of 1990 overturned the decision of the Supreme Court in *Secretary of the Interior v. California* to make it clear that federal oil and gas lease sales on the outer continental shelf are subject to these consistency requirements. The term "affecting" is to be construed broadly including direct effects and indirect effects later in time or removed in distance.

Federal agencies are required to act consistently with the "enforceable" policies of a state's federally approved coastal-management program. After adoption by the Land Conservation Development Commission, this Territorial Sea Plan will be submitted to the Secretary of Commerce via the National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resources Management (OCRM), for approval as part of Oregon's federally approved Coastal Management Program. After approval by OCRM, federal agencies will be required to act consistently with the mandatory or enforceable provisions of this plan.

f. The Public

ORS 196.425(1) incorporates by reference "applicable elements of the Oregon Coastal Management Program" into the Ocean Resources Management Program. Among these applicable elements are the requirements of Statewide Planning Goal 1, Citizen Involvement. Goal 1 requires that citizens be provided the opportunity to be involved in all phases of the

planning process.

Beyond any legal requirement to involve the public in plan preparation and implementation is the overriding need for informed and aware citizens to take personal responsibility to conserve and protect Oregon's ocean resources. The Council recognizes the need for programs to educate, inform, and increase awareness among the general public and various user or interest groups and to communicate the need for personal and community stewardship.

Simply put, government agencies cannot carry out this plan alone or rely on regulations and enforcement. Members of the public must play a major part in helping to meet its goals and objectives.

Oregon Territorial Sea Plan

Amendment of May 4, 2001



PART ONE:

Ocean Management Framework

G. OCEAN MANAGEMENT GOALS AND POLICIES

Note: The preamble, goals, and policies of this document were adopted by the Land Conservation and Development Commission May 4, 2001, and were thereby added to the Oregon Territorial Sea Plan.

Preamble to Ocean Management Goals and Policies:

The Pacific Ocean is an important and defining feature of the State of Oregon. The people of the state, as well as the nation and world, derive numerous economic, aesthetic, cultural, educational, recreational, and ecological benefits and values from the resources of the Pacific Ocean.

The State of Oregon holds the lands, waters, and living resources within its boundaries in trust for the public and, acting through local, state, and federal laws, seeks to ensure that these ocean resources, values, and benefits are conserved for the current and future generations. The state has therefore established in law a program of ocean-resources planning and management that includes ocean-resource goals and policies and seeks to integrate the ocean-management responsibilities of all levels of government, involve the public and users of ocean resources, and promote the conservation of all ocean resources. Oregon places special emphasis on conserving renewable ocean resources because these are expected to provide greater long-term benefits to the state from food production, recreation, aesthetic enjoyment, navigation, and ecosystem stability than non-renewable marine resources.

The State of Oregon recognizes that the ocean area within its jurisdiction is an integral part of the larger marine environment of the Northeastern Pacific Ocean and the entire Pacific Ocean. The highly dynamic, fluid, and interconnected nature of the marine environment, the migratory life stages of numerous marine organisms, and the patterns of economic use of ocean resources by coastal communities serve to extend the state's interests in the conservation of ocean resources to areas beyond state waters. Similarly, the state recognizes that the marine environment extends into coastal estuaries, which provide important habitat for many marine species and which are affected by or affect the larger marine ecosystem.

The State of Oregon encourages the public, ocean users, other coastal states, and nations to embrace the responsibility of stewardship of ocean resources in order to sustain them into the future. The following goals and policies define and assert Oregon's long-term interests in the sustainable use of ocean resources.

GOALS

The following goals and policies of the State of Oregon are mandatory for ocean resources planning and management; all actions by local, state, or federal agencies that affect the ocean resources of the state shall be consistent with them.

The overall ocean-management goal of the State of Oregon is to:

conserve the long-term values, benefits, and natural resources of the nearshore ocean and the continental shelf.

To achieve this goal, the State of Oregon will:

1. give higher priority to the protection of renewable marine resources than to the development of non-renewable ocean resources;
2. support development of ocean resources that is environmentally sound and economically beneficial to coastal communities and the state;
3. protect the diversity of marine life, the functions of the marine ecosystem, the diversity of marine and estuarine habitats, and the overall health of the marine environment; and
4. seek the conservation of ocean resources within the larger marine region that is of ecologic and economic interest to the State of Oregon.

POLICIES

POLICY 1: SCOPE OF AUTHORITY

It is the policy of the State of Oregon that all local, state, and federal plans, programs, and activities that affect the resources and uses of the Oregon territorial sea shall:

- A. be developed, managed, and conducted to maintain and, where appropriate, restore the long-term benefits derived from Oregon's renewable marine resources;
- B. meet the requirements of the Territorial Sea Plan for inventory information and effects-analysis;
- C. protect:
 - 1. renewable marine resources from adverse effects of development of non-renewable resources;
 - 2. the biological diversity of marine life and the functional integrity of the marine-ecosystem;
 - 3. important marine habitat, including estuarine habitat;
 - 4. areas important to fisheries;
 - 5. beneficial uses of ocean resources, such as navigation, food production, recreation, and aesthetic enjoyment that do not adversely affect the resources to be protected in policy items 1-4, above.

POLICY 2: ESTUARIES

It is the policy of the State of Oregon that:

- A. estuaries are an essential part of the marine environment over which the state has jurisdiction;

- B. the effects of ocean-resource development activities on the estuarine environment shall be considered through the requirements of the Resource Inventory and Effects Evaluation in the Territorial Sea Plan.

POLICY 3: MANAGEMENT MEASURES

- A. It is the policy of the State of Oregon that management measures for ocean resources and uses shall be appropriate to the circumstances and provide flexibility for future actions. Such management measures include:
1. **Cumulative Effects Assessment:** to act with regard for the accumulated consequences or effects of activities in the environment that may occur at a distance, over time, or in combination with other actions;
 2. **Adaptive Management:** to adapt management programs to account for variable conditions in the marine environment, the changeable status of resources, and individual or cumulative effects of uses;
 3. **Conditional Approvals or Actions:** to place conditions or limit actions to protect or shield other uses and resources;
 4. **Special Management Area Plans:** to develop management plans for certain marine areas to address the unique management needs for resource protection, resource utilization, and interagency cooperation in the areas;
 5. **Intergovernmental Coordination and Cooperation:** to coordinate, integrate, and co-manage programs and activities with all levels of government, including coastal Indian tribal governments;
 6. **Regional Cooperation and Governance:** to cooperate with other coastal states, countries, organizations, and federal agencies within the larger marine region to address common or shared ocean resource management issues.
 7. **Public Involvement:** to involve the public and affected groups in the process of protecting ocean resource, especially through public awareness, education, and interpretive programs.

8. **Contingency Plans:** to require contingency plans and emergency procedures for activities or operations that may result in damage to the marine or estuarine environment.

9. **Precautionary Approach:** to take a precautionary approach to decisions about marine resources and uses when information is limited.

B. It is the policy of the State of Oregon to prepare and regularly update a marine research strategy to provide a basis for identifying, funding, and coordinating marine research.

POLICY 4. OCEAN STEWARDSHIP AREA

A. The State of Oregon has interests in the conservation of ocean resources in an Ocean Stewardship Area, an ocean area where natural phenomena and human uses can directly affect uses and resources of Oregon's territorial sea; the Ocean Stewardship Area includes the state's territorial sea, the continental margin seaward to the toe of the continental slope, and adjacent ocean areas;

B. Within the Ocean Stewardship Area, the State of Oregon will:

1. use all applicable state and federal laws to promote its interests in management and conservation of ocean resources within the state's Ocean Stewardship Area;
2. encourage scientific research on marine ecosystems, ocean resources, and oceanographic conditions to acquire information needed to make ocean and coastal-management decisions;
3. seek co-management arrangements with federal agencies when appropriate to ensure that ocean resources are managed and protected consistent with the policies of the Territorial Sea Plan; and
4. cooperate with other states and governmental entities directly and through regional mechanisms to manage and protect ocean resources and uses.

C. The Ocean Stewardship Area is not intended to:

1. change the state's seaward boundary;
2. extend the seaward boundaries of the state's federally approved Coastal Zone under the National Coastal Zone Management Act of 1972;
3. affect the jurisdiction of adjacent coastal states; or
4. alter the authority of federal agencies to manage the resources of the United States Exclusive Economic Zone.
5. limit or otherwise change federal agency responsibilities to comply with the consistency requirements of the federal Coastal Zone Management Act.

POLICY DEFINITIONS

The following definitions give meaning to various terms found in the ocean-resource goals and policies. These definitions are to be considered as policy statements with regard to ocean-resource planning and management.

“Conserve:” to manage in a manner that avoids wasteful uses or wanton destruction of habitat and provides for future availability.

“Long-term values and benefits:” those values and benefits that accrue to future generations because of the continuous availability of marine resources and ecological functions.

“Renewable marine resources:” living marine organisms;

“Protect:” to shield from loss, destruction, or injury, or to save for future potential use.

“Important Marine Habitats” are areas and associated biologic communities that are:

1. important to the biological success of commercially or recreationally caught species or that support important food or prey species for commercially or recreationally caught species;

2. needed to assure the survival of threatened or endangered species;
3. ecologically significant to maintaining ecosystem structure, biological productivity, and biological diversity;
4. essential to any life-history stage of marine organisms, such as feeding, courtship, breeding, spawning, rearing, parental foraging, overwintering, and resting;
5. especially vulnerable because of size, composition, or location in relation to chemical or other pollutants, noise, physical disturbance, alteration, or harvest;
6. unique or of limited range within the state.

“Areas Important to Fisheries” are:

1. areas of high catch (e.g. high total pounds landed and high value of landed catch);
2. areas where highly valued fish are caught even if in low abundance or by few fishers;
3. areas that are important on a seasonal basis;
4. areas important to commercial or recreational fishing activities, including those of individual ports or particular fleets;
5. habitat areas that support food or prey species important to commercially and recreationally caught fish species

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PART TWO:

Making Resource Use Decisions

Part Two of the Territorial Sea Plan describes the process for making decisions in the future about the use of Oregon's ocean resources. This part lays a very important foundation for consistently evaluating ocean resource proposals to determine whether they satisfy Oregon's ocean resource protection policies. Included in Part Two are requirements for resource inventory information, evaluating environmental effects, conducting small-scale environmental disturbances to seek new information, making the final resource use decision, Joint Review Panels, and a mandatory process for consulting with local coastal governments, including coastal Indian tribes.

A. RESOURCE INVENTORY & EFFECTS EVALUATION

1. Context

Informed decision making, the heart of Goal 19 and the Ocean Plan, depends upon adequate information about ocean resources and uses and the effects of any proposed action on those resources and uses.

2. Mandatory Policies

a. Inventory/Evaluation Required

1.) Duty To Inventory and Evaluate. Prior to making any decision to conduct, approve, or fund any action that will occur within Oregon's territorial sea or the Rocky Shores Management area of the Territorial Sea Plan and that is related to or affects marine resources and uses in Oregon's territorial sea, an agency shall prepare, or cause to be prepared, a resource inventory and effects evaluation as required by this section.

2.) Sufficiency of Inventory and Evaluation. The resource inventory and effects evaluation shall be sufficient to understand the short-term and long-term effects of the proposed decision on the affected resources and uses.

b. Standards For Decision Making

Any government agency making decisions that relate to marine resources and uses in Oregon's territorial sea shall conform to the requirements of this Territorial Sea Plan; Oregon's ocean law; Statewide Planning Goal 19, Ocean Resources; and the policies of the Oregon Ocean Resources Management Plan, as well as any amendments by the Land Conservation and Development Commission upon recommendation from the Ocean Policy Advisory Council.

c. Inventory Content

At a minimum, the following factors shall be considered for inclusion in the inventory as appropriate to the magnitude, likelihood of effects, and the significance of potentially affected resources and uses:

1.) The proposed action:

- (a) Location (using maps, charts, descriptions, etc.);
- (b) Numbers and sizes of equipment, structures;
- (c) Methods, techniques, activities to be used;
- (d) Transportation and transmission modes needed to serve/support the proposed project;
- (e) Materials to be disposed of and method of disposal;
- (f) Physical and chemical properties of hazardous materials to be used or produced, if any;
- (g) Navigation aids; and
- (h) Proposed time schedule.

2.) Location and description of all affected areas, including areas for onshore support facilities.

3.) Physical and chemical conditions such as:

- (a) Water depth;
- (b) Wave regime;
- (c) Current velocities;

- (d) Dispersal, horizontal transport, and vertical mixing characteristics of the area;
- (e) Meteorological conditions; and
- (f) Water quality.

4.) Bathymetry (bottom topography).

5.) Geological structure and hazards.

6.) Biological features, including:

- (a) Critical marine habitats (see Definitions);
- (b) Other habitats important to the marine ecology, such as kelp and other algae beds, exposed seafloor gravel beds, seagrass beds, rocky reef areas, marine mammal rookeries and haulout areas, seabird rookeries, and areas where fish and shellfish congregate in large numbers;
- (c) Fish and shellfish stocks and other biologically important species;
- (d) Recreationally or commercially important finfish or shellfish species;
- (e) Planktonic and benthic flora and fauna; and
- (f) Other elements important to the primary productivity and the food chain.

7.) Mineral deposits, including sand, gravel and hydrocarbon resources.

8.) Cultural, economic, and social uses (present and projected) associated with the affected resources, such as:

- (a) Commercial and sport fishing;
- (b) Aquaculture;
- (c) Scientific research;
- (d) Ports, navigation, and DMD sites;
- (e) Recreation;
- (f) Tourism;
- (g) Mineral extraction; and

- (h) Waste discharge.

9.) Significant historical or archeological sites.

d. Effects Evaluation: Purpose & Content

The purpose of the effects evaluation is to determine whether the proposed action can meet the resource or user-protection standards referred to in Subsection 2.b, Standards For Decision-Making.

1.) Written Evaluation. The government agency shall use the inventory information or cause it to be used to write an evaluation of all reasonably foreseeable adverse effects of the proposed actions. Where relevant, the evaluation shall describe:

- (a) The potential short-term and long-term effects on resources and uses of the continental shelf, the Oregon nearshore ocean, and onshore areas based on the following considerations:
 - i. Biological and ecological effects, including those on critical marine habitats and other habitats, and on the species those habitats support. Factors to consider include:
 - The time frames/periods over which the effects and recovery will occur;
 - The maintenance of ecosystem structure, biological productivity, biological diversity, and representative species assemblages;
 - Maintaining populations of threatened, endangered, or sensitive species; and
 - Vulnerability of the species, population, community, or the habitat to the adverse effects of pollution, noise, habitat alteration, and human trespass;
 - ii. Conformity and compatibility with existing and projected uses of ocean resources such as fishing, recreational uses, ports and navigation, and waste discharge.
 - iii. Local and regional economies.
 - iv. Archeological and historical resources.
 - v. Transportation safety, accidents.
 - vi. Geologic hazards.

- vii. Cumulative effects of project in conjunction with effects of past projects, other current projects, and probable future projects.
- (b) Financial and technical capability of the applicant to perform.
- (c) Surveillance and monitoring -- agencies' ability to monitor performance and to respond if needed.
- (d) Feasible alternatives to achieve the purpose or objective of the proposed action.
- (e) Evaluations for development of nonrenewable resources shall also determine:
 - i. The probability of exposure of biological communities and habitats to adverse effects from operating procedures or accidents;
 - ii. The sensitivity of these biological communities and habitats to such exposure; and
 - iii. The probable effects of exposure on the marine ecosystem.

2.) Reasonably Foreseeable Adverse Effects. For purposes of the above evaluation, the determination of "reasonably foreseeable adverse effects" shall be based on scientific evidence. The evaluation need not discuss highly speculative consequences. However, the evaluation shall discuss catastrophic environmental effects of low probability.

3.) Use of Available Environmental Information. State and federal agencies may use existing data and information from any source when complying with the requirements for resource inventory and effects evaluation. All data and information used for the inventory and evaluation, including existing data from federal environmental impact statements or assessments, shall meet the same standards of adequacy required for the inventory and the evaluation (see Subsections A.2.c. and A.2.d.)

e. Insufficient/Incomplete Information

1.) Choice. When any agency discovers during the decision-making process that information regarding the effects of the proposed action is insufficient or incomplete, the agency must then determine whether and how to acquire the additional information. In the situation of insufficient information, the agency has the following options:

- (a) Terminate, suspend, or postpone the decision-making process until the information is available.

OR

- (b) Determine whether the provisions of Subsection A.2.e.2. Limited Environmental Disturbance are appropriate to provide the needed information;

OR

- (c) In the case of Developmental Fisheries pursuant to ORS 506.455, apply the provisions of Subsection A.2.e.3.

2.) Limited Environmental Disturbances. To obtain adequate environmental-effects information, it may be necessary to create a limited environmental disturbance and measure the effects. The state agency's decision to allow such a disturbance shall be based on the following:

(a) Approval Criteria:

- i. The exclusive purpose of the proposed disturbance shall be to provide needed information for the effects evaluation as required by the provisions of this Part Two of the Territorial Sea Plan.
- ii. Adequate inventories of baseline conditions, as required by this Part Two, shall be completed prior to conducting the environmental disturbance.
- iii. The risk of adverse effects from the disturbance shall be insignificant, because:
 - of low probability of exposure of biological communities and habitats; or
 - of low sensitivity of the biological communities and habitats to the exposure; or
 - the effects of exposure to sensitive communities and habitats will be insignificant.
- iv. The proposed limited environmental disturbance shall not adversely affect any critical marine habitat (see "Definitions" in Glossary).
- v. The proposed environmental disturbance shall conserve any marine resource as a whole. In this context, "conserve" means:
 - to avoid waste or destruction,
 - to restore and/or continuously maintain for future availability, and
 - to avoid irreversible or long-term adverse effects.

- vi. Each proposed limited environmental disturbance shall avoid significant or long term interference with other human users of marine resources.
 - vii. The scale (size and time frame) of the limited environmental disturbance shall be the minimum needed to obtain the required information. Characteristics regarding scale and time frame include: geographic scope or coverage; amount of marine resources to be taken, removed, harvested, or altered; the duration of the disturbance.
 - viii. There shall be an adequate work plan developed as described below.
- (b) Conditions on the Limited Environmental Disturbance:
- i. All data shall be in the public domain subject to ORS 192.410 et seq.
 - ii. The proposed limited environmental disturbance shall be scheduled only for short periods of time, as discrete pieces of research, and shall be evaluated before proceeding to additional activities.
- (c) Work Plan: A written work plan shall be developed. Elements of the work plan shall include but not be limited to the following:
- i. A list of the information needed to satisfy the effects evaluation of this plan.
 - ii. Specific study objectives to obtain the needed information and explanation of how the study design will meet the objectives.
 - iii. Description of study methods to meet the objectives, such as:
 - Literature review;
 - Collection of any needed baseline data;
 - Hypotheses to address the study objectives;
 - Descriptions of field sampling and data-analyses methods to be used; and
 - Use of adequate controls to allow the effects of the proposed action to be separated from natural fluctuations in resources and habitats.
 - iv. Supporting documentation demonstrating that the study design is scientifically appropriate and statistically adequate to address the research objectives.
 - v. Descriptions of how the data and analyses will be reported and delivered for review and approval.

3.) Developmental Fishery Harvest: State law requires the Oregon Department of Fish and Wildlife to institute a management system for the commercial harvest of developmental fishery species, i.e. finfish or invertebrate species that are underutilized or have not been previously harvested. For some fish species very little information is available to assure sustainable harvest or to meet the inventory and effects evaluation required by this plan. Initial harvest of these species may be permitted as controlled "research-level fisheries" to gather necessary information on stocks, habitat interactions, and effects on other marine resources and users. Each such fishery shall be conducted with an information-gathering and research plan developed by the Oregon Fish and Wildlife Commission. The research plan shall address the following:

(a) Approval Criteria:

- i. The purpose of research-level fisheries shall be to obtain information needed to manage the fishery on a long-term sustainable basis and to evaluate effects as required by this Territorial Sea Plan and Goal 19;
- ii. The scale, intensity, and duration of fishing effort under a research-level fishery program shall be the minimum needed to obtain information about stock distribution, abundance, reproductive rates, habitat interactions, and life history.
- iii. A research-level fishery shall not adversely affect any critical marine habitat, any special management area designated in this Territorial Sea Plan, or any sensitive habitat areas identified in the Oregon Ocean Resources Management Plan.
- iv. A research-level fishery shall conserve the species and its environment as a whole. In this context "conserve" means:
 - to avoid waste or destruction;
 - to restore and/or continuously maintain for future availability; and
 - to avoid irreversible or long term adverse effects.
- v. A research-level fishery shall
 - avoid significant or long term interference with other human users of marine resources;
 - minimize disturbance or disruption to other marine resources and biological communities.

(b) **Research-Level Fishery Work Plan.** A fishery work plan shall be prepared for each research-level fishery and shall include the following:

- i. A list of the information needed to satisfy the effectsevaluation of this plan;
- ii. Specific study objectives;
- iii. Description of study methods to meet the objectives, such as:
 - Literature review;
 - Hypothese to address study objectives;
 - Harvest effort, techniques, and location;
 - Related monitoring or sampling necessary to understand the effects of the harvest on associated biological resources and habitats;
 - Use of adequate controls to allow the effects of the fishery to be separated from natural fluctuations in the marine environment;
- iv. Methods for reporting and analyzing data that have been gathered.

4.) Supervision of Research Quality:

- (a) The approving agency may, subject to its statutory authority, require that the research be conducted or paid for by the applicant/development proponent.
- (b) The approving agency is responsible for ensuring research quality, techniques which may include the following:
 - i. Specify the qualifications of researchers, and approve the applicant's proposed research team (that is, the actual people doing the research) and the methods of research.
 - ii. Determine costs for any cost-incurring participation by state government agencies and assign those costs to the applicant.
 - iii. Encourage the technical staff of affected state and federal agencies to involve themselves in data collection, analyses, etc. being conducted by or for the applicant--for example, to be on board during research cruises (the applicant would be responsible for any associated costs).

- iv. Encourage the submission of results to scientific journals, and the use of peer groups, steering groups, panels of experts, etc. to review research plans, data, analyses, and conclusions.
 - v. Use administrative techniques to avoid problems with proprietary data, such as summarizing proprietary data.
- (c) OPAC recommends to the Legislature that relevant state agencies be provided with adequate staff and funding to conduct long term ocean research and management.
- (d) All research data shall be in the public domain as allowed by ORS 192.410 et seq.

f. Analysis of Data

Proponents and opponents of any proposed ocean development, proposed environmental disturbance, or developmental fishery shall each be held to the same standards when analyzing resource inventories and effects evaluations or environmental disturbance data.

g. Inventory/Evaluation Checklist

The Department of Land Conservation and Development shall develop a "checklist" for assisting the relevant agencies in identifying applicable ocean management rules/requirements. The checklist will not be mandatory but merely a guide.

i. Agency Responsibilities, Coordination

Any government agency required to comply with OPAC ocean-management policies and with Goal 19 also has certain responsibilities for making the process work properly. Due to the emphasis on resource inventories and effects evaluations, the review of a single development proposal may often involve other government agencies with relevant resource expertise. In addition, there may be other agencies involved due to, for example, multiple regulatory authorities or required consultation.

1.) Process Coordinator. When multiple agencies are involved for whatever reason, a single agency among the group should serve to coordinate the participation of the agencies and the overall working of the process. "Coordinate" does not mean that an agency is authorized to make decisions for another agency regarding the other agency's compliance with Goal 19 or OPAC's ocean-management policies.

2.) Individual Agency Responsibilities. When multiple agencies are involved, each is responsible for incorporating its relevant components into the inventory and evaluation. Each agency which has the responsibility to comply with OPAC's policies and Goal 19 must ultimately decide what is needed in the inventory and effects evaluation to satisfy the agency's responsibilities, and when it is adequate.

3.) Public Participation. Agencies implementing the Territorial Sea Plan's policies on resource inventories and evaluations shall provide adequate opportunities for citizens to be involved in all phases of the process.

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PART TWO:

Making Resource Use Decisions

B. Joint Review Panels (JRPs)

1. Context

Many decisions by government agencies regarding the use of ocean resources require a great deal of coordination among federal, state, and local agencies. Oregon does not have a formal interagency procedure for coordinating these decisions (Ocean Plan, p.168). For example, the State Agency Coordination Program created by ORS 197.180 is very agency-specific. Consequently, it does not set up a single overall coordination program and is not always comprehensive. In response, the Ocean Plan recommends (p. 168) the creation of "project review panels" to coordinate the more complex decisions on ocean development.

The 1991 Legislature responded by specifically authorizing OPAC to create "project review panels to address and coordinate the interests of state, federal and local governments in specific development proposals" (ORS 196.453). OPAC was also given authority to adopt administrative rules for the panels. In turn, OPAC has determined that the name of these coordination mechanisms should be changed to "joint review panels" (JRPs), whose scope would remain the same as for the former "project review panels".

2. Mandatory Policies

a. Purpose of JRPs

Joint Review Panels (JRPs) shall be used when appropriate to coordinate interagency involvement and to provide technical advice to state, federal, and local agencies regarding compliance with the Ocean Plan, the Territorial Sea Plan, and Statewide Planning Goal 19 on specific proposals to use or alter ocean resources. JRP review and recommendations shall focus on technical issues. Specific proposals subject to JRP review may include but are not limited to the following:

- 1.) Applications for permits, leases, or other forms of approval;

- 2.) Development actions being proposed directly by an agency; such as facility construction; alteration of ocean habitat, flora, or fauna; resource management plan;
- 3.) Funding by an agency of another party's development or management actions;
- 4.) Marine resource management plans proposed by government agencies; or
- 5.) Proposed state agency administrative rules.

b. Functions and Duties of JRPs

JRPs may perform any of the following tasks:

- 1.) Advise on preparation of resource inventories and effects evaluations, and comment on their adequacy;
- 2.) Review and comment on the adequacy of NEPA environmental assessments and impact statements, mitigation plans, monitoring programs, and contingency plans;
- 3.) Advise on the design of environmental disturbances, special permit conditions, construction and operational performance standards, lease stipulations, and mitigation measures.
- 4.) Review and comment on alternatives to the proposed action.

c. Membership

- 1.) Flexibility. JRP membership will be determined by OPAC on a case-by-case basis, and may vary according to the nature of the action being considered.
- 2.) Limitations. Membership on any JRP shall:
 - (a) include one non-state agency member of OPAC with no conflict of interest in the proposed action; and
 - (b) in addition, be limited to representatives of entities with regulatory, proprietary, or statutorily mandated consultative responsibilities; and
 - (c) persons not representing an entity described in (a) above, but who have relevant technical expertise and no conflict of interest in the proposed action as defined by state law.

d. When To Convene JRPs

JRPs may be convened only when:

- 1.) There is a need for coordination and review; and
- 2.) No better mechanism exists for interagency coordination and review of the proposed action; and
- 3.) The proposed action involves either:
 - (a) A large, complex project or several related projects that require expertise or authorities of several agencies or from outside state government; OR
 - (b) A new or unique issue or project, the understanding and coordination of which would be significantly improved by additional public exposure and agency coordination.

e. Who Convenes A JRP

- 1.) JRPs may be convened by:
 - (a) OPAC, upon request of a state or federal agency, a local government, or other interested party; OR
 - (b) OPAC on its own initiative.
- 2.) In the interim between regularly scheduled OPAC meetings, a majority of OPAC members or the chair of OPAC may call a meeting of OPAC to consider convening a JRP.

f. Accept Recommendations

Any agency may elect not to accept the JRP's recommendation but shall provide OPAC with written findings and conclusions that explain how the agency's decision is consistent with applicable statutes, rules, and policies.

g. Public Meetings, Public Participation

- 1.) Open Meetings. JRP meetings shall be open to the public, consistent with Oregon open meeting laws (ORS 192.610 et seq.).
- 2.) Opportunity for Comment. Opportunity for verbal and written comment from members of the public shall be provided at JRP meetings regarding the technical recommendations being formulated by the JRP.

h. JRP Authority

JRPs shall have only such authority as granted to them by OPAC; JRPs have no independent authority.

i. Administrative Rules

OPAC shall, by administrative rule, set procedural and substantive requirements and standards it deems appropriate to carry out these policies for JRPs.

Oregon Territorial Sea Plan

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PART TWO:

Making Resource Use Decisions

C. LOCAL GOVERNMENT CONSULTATION

1. Context

The 1991 Legislature directed OPAC to create a "mandatory consultation process, as necessary, among local governments, the Governor, and state agencies on major ocean-development activities or actions" (ORS 196.465(2)(f)). The purpose of the consultation process is to ensure that the (Ocean) plan and the Territorial Sea Plan are compatible with the comprehensive plans of adjacent coastal counties and cities.

2. Consultation Process Described

The mandatory process for state agencies to consult with local governments consists of three basic parts:

- Agencies inform local governments of the opportunity to comment regarding a major ocean development;
- Agencies respond in writing to local government comments;
- Agencies offer assistance to local governments if appropriate.

3. Mandatory Policies

a. Purpose

Major ocean developments can have significant effects, even if secondary. Affected local government's only role in the approval of such offshore actions is to provide comment. This can be frustrating to local governments when the approving state or federal agency neither acknowledges nor explains its disagreement with received comments. Consequently, another purpose of the mandatory consultation process could be to raise the level of state and federal agencies' responses to received comments from local governments. This would not be a veto authority, but only an elevation of the current consultation process.

b. Major Ocean Development Activities

For purposes of the "local consultation process" mandated by ORS 196.465, the term "major ocean developments" means any of the following:

- 1.) Any ocean development that involves the siting of an onshore facility in a coastal county or city.
- 2.) Any ocean activity that results in a Joint Review Panel.
- 3.) Federal or state ocean leasing for oil/gas or hard mineral exploration or development (not geological or geophysical testing or sampling).
- 4.) Any ocean activity or action for which state or federal law requires approval from the Governor.
- 5.) Designation of any restricted ocean-use area, whether for resource protection (e.g., marine sanctuary) or for development (e.g., kelp lease). Included in this category are any future amendments, deletions, or additions to the rocky-shore site planning designations in the adopted Territorial Sea Plan, and future adoptions of rocky-shore site-management plans whether those actions are made by OPAC or any other state agency empowered by the plan to do so.

c. Eligible Local Governments

Any local coastal city or county that submits written comments to a relevant state or federal agency regarding a major ocean development is eligible for this mandated consultation process. The local government's comments shall describe how the proposed major ocean development would be:

- 1.) Compatible or incompatible with specific provisions in the local comprehensive plan applicable to land-use decisions within the local government's land-use planning jurisdiction;

OR

- 2.) Contrary or beneficial to the interests of the community; that is, would have secondary or indirect adverse or beneficial effects which are not covered by the local comprehensive plan.

d. Agency Response To Comments

1.) State Agency Coordination Rules. LCDC's existing "state agency coordination" rule regarding agency compatibility with local plans, OAR 660-30-070, is applicable to agency actions under this policy.

2.) Agencies That Must Respond. This mandatory consultation process applies to the Governor's Office, any other state agency, or federal agency that is:

- (a) Proposing a major ocean development; or
- (b) Approving a major ocean development; or
- (c) Funding a major ocean development; or
- (d) In the case of state government, the "lead" or "coordinating" agency formulating a "state" response to a major ocean development.

Such agencies must "consult" with eligible local governments as described below.

3.) Duty To Inform. Agencies shall inform local coastal governments regarding major ocean developments.

- (a) Informing the local governments shall occur as soon after the agency learns of the development as is practical. This may mean informing the local governments before the agency is required by law to issue public notice for whatever permitting or decision-making process in which the agency is involved.
- (b) Agencies shall give local governments an adequate opportunity to comment to the agency on the proposed major ocean development.
- (c) Whatever methods are used by agencies shall be sufficient to inform the local governments of the following:
 - i. The nature and location of the major ocean development;
 - ii. That the "mandatory local government consultation" process is commencing;
 - iii. The opportunity for the local governments to submit comments regarding compatibility with the local comprehensive plan as provided in Subsection 2.c "Eligible Local Governments" above; and
 - iv. The name, address, and phone number of the appropriate agency staff person(s) to contact for more information or to whom comments may be sent.

4.) Agency Response--Local Plan Compatibility. The responding federal or state agency must provide a written response to each coastal city and county government which comments on whether the proposed major ocean development would be compatible with the local comprehensive plan.

- (a) If the agency agrees with the local government's interpretation, then the agency shall acknowledge that agreement.
- (b) If the agency disagrees with the local interpretation, then the agency shall prepare a written explanation of the agency's determination.
- (c) If the agency determines that the proposed major ocean development will be incompatible with the local plan, then the agency may, or request the proponent to, do one of the following, in addition to other options in law:
 - i. Terminate the proposed development.
 - ii. Revise the proposed development to be compatible with the local comprehensive plan.
 - iii. Provide technical assistance to the local government to help remove the incompatibility; such as, mitigating adverse effects; amending the local comprehensive plan to accommodate the onshore effects of the proposed development.
- (d) If the agency determines that the proposed major ocean development will be compatible with the local plan, but the local government disagrees or determines that the proposed development will be adverse to the interests of the community, then the agency is encouraged to assist the local government in mitigating any adverse effects from the development. Such mitigating actions may include:
 - i. Revising the proposed development,
 - ii. Allowing the local government sufficient time to amend its comprehensive plan and land-use ordinances to address or accommodate the onshore effects of the development, or
 - iii. Working with local officials to conduct educational and informational workshops that address the expressed community concerns.

5.) Agency Response--Local Community Interest. The agency is not required to provide a written response to local governments regarding any effects of the proposed development on the interests of the local community. However, the agency is encouraged to assist the local government in mitigating any of the development's adverse effects on local community interests.

6.) Tribal Governments. Agencies shall notify and consult with relevant tribal governments as required by this Part 2.C. for coastal city and county governments. Relevant tribal governments are those described for purposes of the state's archeological-resources protection statutes (ORS 358.905 et seq.) and whose archeological-resource administrative boundaries border or include the Pacific Ocean.

7.) Other Groups. Agencies are encouraged to notify other local government groups and groups other than local governments. In responding to written comments from these groups, the agency is encouraged to provide at least a single written response that aggregates and responds to clusters of common comments.

8.) No New Inventory Requirements. OPAC's "ocean framework" policies already require the resource inventory and effects evaluation for all proposed ocean developments to include the onshore effects of proposed offshore activities. Consequently, the consultation process does not create a new requirement for the proponent of a major ocean development to generate information on local community effects.

e. Local Plan "Compatibility"

Current state statute (ORS 201.370(2)) prohibits local coastal governments from exercising their planning authorities in Oregon's territorial sea, which essentially extends seaward from the low water line. Consequently, the issue of major ocean development decisions being compatible with local comprehensive plans becomes an issue of the offshore development's onshore land-use effects, both direct and indirect.

Local governments may need assistance evaluating proposed major ocean developments for plan compatibility, or appropriately amending their plans to adequately address the onshore effects of major ocean developments. The following types of technical assistance might be useful to local governments:

1.) Education. Some local officials and agency staff people subject to the local consultation process may need assistance to determine whether an ocean development action is compatible with a local comprehensive plan. For example, how does one know which proposed ocean developments need to be evaluated for compatibility; when is consultation needed and when is it not; what aspects of a local plan need to be examined and evaluated; what does it mean for a plan to be "silent" regarding a proposed development; what are the potential secondary effects; why is it useful for the local plan to describe the "community interest" in relation to offshore development? OPAC and DLCD, perhaps working with the League of Oregon Cities and the Association of Oregon Counties, could provide this type of information and assistance on a continuing basis. Such information could include written materials, workshops, and hands-on assistance.

2.) Model Plan Amendments. If desired by local governments, there may be standardized, boiler plate language that could be amended into local plans in advance of

major ocean development proposals. One purpose for such standardized language might be to describe whatever restrictions that existing laws place on local governments and local comprehensive plans to affect proposed ocean developments. An example of a restricting law is ORS 469.503 which limits local governments' land-use planning authorities in favor of the state Energy Facility Siting Council regarding certain energy facilities. Such language could be added to plan inventories, policies, or implementing ordinances. Working with local governments and others, OPAC could use its local plan amendment recommendation authority (ORS 196.465(3)) to develop model language for incorporation in local comprehensive plans.

3.) Specific Plan Amendments, Mitigation. A local government may wish to amend its comprehensive plan to accommodate the onshore effects of a proposed major ocean development. If needed, the agency making the ocean-development decision should work with DLCD and the local government to develop an understanding of the proposed development's specific onshore land-use effects, and to suggest potential land-use solutions to mitigate or accommodate the effects.

660-036-0005

Territorial Sea Plan:

The Land Conservation and Development Commission adopts as part of the Oregon Coastal Management Program, and herein incorporates by reference, an amendment to the Territorial Sea Plan entitled Part Five: Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities, that the Ocean Policy Advisory Council recommended on October 23, 2009.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 197.040

Stats. Implemented: ORS 196.471

Hist.



Oregon

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DATE: November 5, 2009

TO: Land Conservation and Development Commission (LCDC)

FROM: Paul Klarin, Marine Affairs Coordinator

SUBJECT: **Agenda Item 5, November 5-6, 2009, LCDC meeting**

The Ocean Policy Advisory Council, in carrying out its responsibilities under ORS 196.433, has made the attached recommendation to amend the Territorial Sea Plan by incorporating Part Five "Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities."

Oregon Territorial Sea Plan

DRAFT PART FIVE:

Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities

PART FIVE of the Territorial Sea Plan describes the process for making decisions concerning the development of renewable energy facilities (*e.g.* wind, wave, current, thermal, etc.) in the state territorial sea, and specifies the areas where that development may be sited. The requirements of Part Five are intended to protect areas important to renewable marine resources (*i.e.* living marine organisms), ecosystem integrity, marine habitat and areas important to fisheries from the potential adverse effects of renewable energy facility siting, development, operation, and decommissioning and to identify the appropriate locations for that development which minimize the potential adverse impacts to existing ocean resource users and coastal communities.

Oregon's renewable energy portfolio lists ocean energy as a renewable energy source with potential to reduce dependence on fossil fuels.¹ Renewable ocean energy facilities development may present opportunities to apply technologies that rely on wave, wind, current or thermal energy, that may potentially reduce the environmental impact of fossil fuels. If developed in a responsible and appropriate manner, in accordance with the requirements of this Part and other applicable state and federal authorities, renewable ocean energy may help preserve Oregon's natural resources and enhance our quality of life.

A. Renewable Energy Facilities Development

1. Background

Oregon's territorial sea has been identified as a favorable location for siting renewable energy facilities for research, demonstration and commercial power development. These facilities may vary in the type and extent of the technologies employed and will require other related structures, equipment or facilities to connect together, anchor to the seafloor and transfer energy to on-shore substations. The State of Oregon will require the proper siting and development of these facilities in order to minimize damage to or conflict with other existing ocean uses and to reduce or avoid adverse effects on marine ecosystems and coastal communities.

State agencies, including the Oregon Departments of State Lands, Fish and Wildlife, Parks and Recreation, Environmental Quality, Land Conservation and Development, Water Resources, Energy, and Geology and Mineral Industries, need specific policies and standards for considering the siting and regulation of renewable energy facility development in the territorial sea. The State also needs specific policies and standards to guide federal agencies in the siting

and regulation of renewable energy facilities development located in federal waters adjacent to the Oregon territorial sea.²

NOTE: Notwithstanding Part One, paragraph F.1.b, the following policies and implementation requirements are mandatory. Decisions of state and federal agencies with respect to approvals of permits, licenses, leases or other authorizations to construct, operate, maintain, or decommission any renewable energy facility to produce, transport or support the generation of renewable energy within Oregon's territorial waters and ocean shore must comply with the requirements mandated in the Oregon Territorial Sea Plan. The enforceable policies of the Territorial Sea Plan and the Oregon Coastal Management Program are applicable to those federal actions that affect Oregon's coastal zone and are subject to the federal consistency requirements of the federal Coastal Zone Management Act.

2. Policies

The following policies apply generally to renewable energy facilities within the Oregon Territorial Sea, and establish the guiding principles for the implementation requirements listed in section B. When making decisions to authorize the siting, development, operation, and decommissioning of renewable energy facilities within the territorial sea, state and federal agencies shall³:

- a. Maintain and *protect* renewable marine resources (*i.e.* living marine organisms), ecosystem integrity, *marine habitat* and *areas important to fisheries* from adverse effects that may be caused by the installation or operation or removal of renewable energy facility by requiring that such actions:
 - 1.) Avoid adverse effects to the integrity, diversity, stability and complexity of the marine ecosystem and coastal communities, and give first priority to the conservation and use of renewable marine resources;
 - 2.) Minimize effects by limiting the degree or magnitude of the action and its implementation;
 - 3.) Rectify or mitigate the effects that occur during the lifetime of the facility by monitoring and taking appropriate corrective measures through adaptive management; and
 - 4.) Restore the natural characteristics of a site to the extent practicable when the facility and structures are decommissioned and removed.
- b. Protect marine renewable resources, the biological diversity and functional integrity of marine ecosystem, important marine habitat, areas important to fisheries, navigation, recreation and aesthetic enjoyment as required by Statewide Planning Goal 19.
- c. Promote direct communication and collaboration between an applicant for a state or federal authorization for the siting, development and operation of renewable energy facilities and affected ocean users and coastal communities to reduce or avoid conflicts.

Agencies will strongly encourage applicants to engage with local, state and federal agencies, community stakeholders, tribal governments and affected ocean users in a collaborative agreement-seeking process prior to formally requesting authorization to initiate a project.⁴

- d. Limit the potential for unanticipated adverse impacts by requiring, as necessary, the use of pilot projects and phased development to collect data and study the effects of the development on the affected marine resources and uses.
- e. Facilitate the research and responsible development of ocean-based renewable energy sources including wave, tidal, and wind that meet the state's need for economic and affordable sources of renewable ocean energy.

B. Implementation Requirements

State and federal agencies shall apply the following implementation requirements when considering a proposal for the placement or operation of a renewable energy facility development within the Oregon Territorial Sea. Regulating agencies shall comply with the standards and procedural requirements in Part Five of the Territorial Sea Plan as prescribed below. This includes the cables, connectors or other transmission devices that connect, anchor, support or transmit energy between the separate components within a renewable energy facility. The requirements in Part Four, Uses of the Seafloor for Telecommunication Cables, Pipelines, and other Utilities, will apply to the utility cables that transmit the electrical energy from the renewable energy facility to the on-shore substation. The requirements in Part Two, Making Resource Use Decisions, Sections A and B, will not apply to the evaluation, siting or operation of renewable energy development or other related structures, equipment or facilities.

1. Siting: areas designated for renewable energy facilities development.

a. In State Waters:

Pursuant to the requirements for amending the Territorial Sea Plan under ORS 196.471, to carry out the policies of the Oregon Ocean Resources Management Act and consistent with the statewide planning goals, the Land Conservation and Development Commission will designate areas of the territorial sea appropriate for the development of renewable energy facilities.⁵ (See appendix C map). Renewable energy facilities development of the state lands of the territorial sea lying seaward of Extreme Low Water (which is the seaward boundary of the Ocean Shore State Recreation Area) shall be sited within the areas designated for that use so as to avoid, minimize or mitigate the adverse effects of that development, and to protect: renewable marine resources, biological diversity and functional integrity of marine ecosystem, important marine habitat, and areas important to fisheries, as defined in Statewide Planning Goal 19 Ocean Resources.

b. In Federal Waters:

The Department of Land Conservation and Development will review federal decisions to permit, license, or otherwise authorize renewable energy facilities development

within the waters and seafloor of the outer continental shelf adjacent to the Oregon Territorial Sea for consistency with the Oregon Territorial Sea Plan and the applicable enforceable policies of the Oregon Coastal Management Program. Federal actions, including the issuance of any federal authorizations, that affect any land or water use or natural resources of the Oregon Coastal Zone shall be supported by environmental studies and analysis as prescribed below, to ensure compliance with the enforceable policies of Oregon Territorial Sea Plan and the Oregon Coastal Management Program.⁶

2. State Agency Review Process

Pursuant to ORS 196.485 and ORS 197.180, state agencies shall apply the policies and provisions of the Oregon Ocean Resources Management Plan and Territorial Sea Plan, and Goal 19 Ocean Resources as required to comply with State Agency Coordination Programs (OAR chapter 660, divisions 30 and 31).

The Department of State Lands shall coordinate the review of requests for approvals of leases, temporary use permit, easements and removal-fill in consultation with the Departments of Fish and Wildlife, Parks and Recreation, Environmental Quality, Land Conservation and Development, Water Resources, Geology and Mineral Industries, Energy, coastal local governments, and tribal governments as appropriate. These agencies, with the addition of the regulating federal agencies, will constitute the joint agency review team (JART) described in subsection B.3 below. Pursuant to the federal Coastal Zone Management Act, the Department of Land Conservation and Development will review the consistency certification together with required necessary data and information submitted by the applicant for federal authorization for a renewable energy facilities development to ensure the project is consistent with enforceable policies of the Oregon Coastal Zone Management Program, including the Territorial Sea Plan.

3. Project Review Process and Coordination

The Department of State Lands (DSL) shall convene the JART, in order to facilitate the coordination of state and federal agencies as they apply their separate regulatory, proprietary, or other authorities to the review of a proposed renewable energy facility development. The team shall consist of the state and federal agencies with regulatory or planning authority applicable to the proposed project and location; DSL shall also request that affected local jurisdictions, if any, participate in the JART review and may also invite local or statewide interest groups and advisory committees to participate. The joint agency review team will coordinate the review process, and comment on the adequacy of the resource inventories and effects evaluations required under subsection B.4 (Resource Inventory and Effects Evaluation Standards), below, and NEPA environmental assessments and environmental impact statements. The joint agency review team will also consider the adequacy of the information provided for the operation plan, as required under section C. (Operation Plan Development) below, including the monitoring requirements, mitigation measures, adaptive management plans, construction and operational performance standards, or any other special conditions that a regulating state agency may apply pursuant to the lease, permit, license or other authorization.

DSL shall require that an applicant provides documentation verifying their communication and coordination efforts with local communities, interest groups and advisory committees. Those efforts shall, at a minimum, include information on the proposed project operation protocols, response to emergencies and procedures for on-going communication as specified in section C (Operation Plan Development), below.

4. Resource Inventory and Effects Evaluation Standards

Regulating agencies will require the applicant to provide a resource inventory and effects evaluation, as required by this subsection, prior to making any decision. State agencies will assist the applicant by providing readily available data and other information as applicable to the review process.

a. Sufficiency of Inventory and Evaluation

The resource inventory and effects evaluation shall be sufficient to identify and quantify the short-term and long-term effects of the proposed renewable energy facility development on the affected marine resources and uses.

b. Purpose of the Effects Evaluation

The purpose of the effects evaluation is to determine whether the proposed actions can meet the policies and standards for the protection of resources, resource users and coastal communities referred to above in subsection A.2 (Policies), above. The evaluation will help identify where the applicant needs to address deficiencies. The regulating agency will use the evaluation to develop specific measures for environmental protection and mitigation, measures to protect ocean uses, monitoring, and adaptive management.

c. Use of Available Environmental Information

Regulating agencies may allow the applicant to use existing data and information from any source when complying with the requirements for resource inventory and effects evaluation. All data and information used for the inventory and evaluation, including existing data from federal environmental impact statements or assessments, shall meet the same standards of adequacy required for the inventory and the evaluation.

d. Inventory Content

To evaluate the magnitude of the proposed project, the likelihood of the effects of the project, and the significance of the resources and uses that the project may affect, regulating agencies shall require that the applicant include consideration of the following factors in the inventory:

- 1) Proposed factors associated with the development, placement, operation, maintenance, and decommissioning of the project:
 - A) Location (using maps, charts, descriptions, etc.);
 - B) Numbers and sizes of equipment, structures;
 - C) Methods, techniques, activities to be used;
 - D) Transportation and transmission systems needed for service and support;
 - E) Materials to be disposed of and method of disposal;

- 1 F) Physical and chemical properties of hazardous materials, if any, to be used or
2 produced;
3 G) Navigation aids; and
4 H) Proposed time schedule.
5
- 6 2) Location and description of all affected areas, including, but not limited to:
7 A) Site of the renewable energy facility;
8 B) Adjacent areas that may be affected by physical changes in currents and
9 waves caused by the facility;
10 C) Utility corridor transiting territorial sea and ocean shore; and
11 D) Shoreland facilities.
12
- 13 3) Physical and chemical conditions including, but not limited to:
14 A) Water depth;
15 B) Wave regime;
16 C) Current velocities;
17 D) Dispersal, horizontal transport, and vertical mixing characteristics;
18 E) Meteorological conditions; and
19 F) Water quality.
20
- 21 4) Bathymetry (bottom topography) and Shoreline Topography (LIDAR (Light
22 Detection And Ranging))
23
24
- 25 5) Geologic structure, including, but not limited to:
26 A) Geologic hazards, such as faults or landslides of both marine and shoreline
27 facility areas;
28 B) Mineral deposits;
29 C) Seafloor substrate type; and
30 D) Hydrocarbon resources.
31
- 32 6) Biological features, including, but not limited to:
33 A) Critical marine habitats (see Appendix A);
34 B) Other marine habitats;
35 C) Fish and shellfish stocks and other biologically important species;
36 D) Recreationally or commercially important finfish or shellfish species;
37 E) Planktonic and benthic flora and fauna;
38 F) Other elements important to the marine ecosystem; and
39 G) Marine species migration routes.
40
- 41 7) Cultural, economic, and social uses affected by the project including, but not
42 limited to:
43 A) Commercial and sport fishing;
44 B) State or Federally protected areas;
45 C) Scientific research;
46 D) Ports, navigation, and Dredge Material Disposal sites;
47 E) Recreation;
48 F) Coastal Communities Economy;

- G) Aquaculture;
- H) Waste water or other discharge;
- I) Utility or pipeline corridors and transmission lines;
- J) Military Uses; and
- K) Aesthetic Resources.

8) Significant historical, cultural or archeological resources.

9) Other data that the regulating agencies determine to be necessary and appropriate to evaluate the effects of the proposed project.

e. Written Evaluation.

Regulating agencies shall require the applicant to submit a written evaluation of all the reasonably foreseeable adverse effects associated with the development, placement, operation, and decommissioning of the proposed renewable energy facility. For purposes of the evaluation, the submittal shall base the determination of “reasonably foreseeable adverse effects” on scientific evidence. The evaluation shall describe the potential short-term and long-term effects of the proposed renewable energy facility on marine resources and uses of the territorial sea, continental shelf, onshore areas and coastal communities based on the inventory data listed in paragraph B.4.d above and the following considerations:

1) Biological and Ecological Effects:

Biological and ecological effects include those on critical marine habitats and other habitats, and on the species those habitats support. The evaluation will determine the probability of exposure and the magnitude of exposure and response, as well as the level of confidence (or uncertainty) in those determinations. The evaluation need not discuss highly speculative consequences. However, the evaluation will discuss catastrophic environmental effects of low probability. Factors to consider include, but are not limited to:

- A) The time frames/periods over which the effects will occur;
- B) The maintenance of ecosystem structure, biological productivity, biological diversity, and representative species assemblages;
- C) Maintaining populations of threatened, endangered, or sensitive species;
- D) Vulnerability of the species, population, community, or the habitat to the proposed actions; and
- E) The probability of exposure of biological communities and habitats to adverse effects from operating procedures or accidents.

2) Current Uses:

Evaluate the effects of the project on current uses and the continuation of a current use of ocean resources such as fishing, recreation, navigation, and port activities. Factors to consider include, but are not limited to:

- A) Local and regional economies;
- B) Archeological and historical resources; and
- C) Transportation safety and navigation.

3) Natural and Other Hazards

Evaluate the potential risk to the renewable energy facility, in terms of its vulnerability to certain hazards and the probability that those hazards may cause loss, dislodging, or drifting of structures, buoys, or facilities. Consider both the severity of the hazard and the level of exposure it poses to the renewable marine resources and coastal communities. Hazards to be considered should include the scouring action of currents on the foundations and anchoring structures, slope failures and subsurface landslides, faulting, tsunamis, variable or irregular bottom topography, weather related, or due to human cause.

4) Cumulative Effects

Evaluate the cumulative effects of a project, including the shoreland component, in conjunction with effects of any prior phases of the project, past projects, other current projects, and probable future projects.⁷ The evaluation should analyze the biological, ecological, physical, and socioeconomic effects of the renewable energy facility development and of other renewable energy facility projects along the Oregon coast, while also taking into account the effects of existing and future human activities and the regional effects of global climate change.

A) In conducting the cumulative effects analysis, the applicant should focus on the specific resources and ecological components, as detailed under paragraph B.4.d above, that may be affected by the incremental effects of the proposed project and other projects in the same geographic area. The evaluation should consider whether:

- 1) the resource is especially vulnerable to incremental effects;
- 2) the proposed project is one of several similar projects in the same geographic area;
- 3) other developments in the area have similar effects on the resource;
- 4) these effects have been historically significant for this resource; and
- 5) other analyses in the area have identified a cumulative effects concern.

B) The Joint Agency Review Team may determine the scope of the cumulative effects analysis through a set of guidelines developed by JART that regulating agencies will require for phased development projects as described below under subparagraph B.4.f.3 and subsection C.1. The JART will make a determination from the analysis to inform location, scale, scope and technology of the phased development project; to provide input on any other factors it determines to be relevant; or both. The renewable energy project developer will conduct a comprehensive cumulative effects analysis at the initial phase of a development designed to inform future phases of development. The regulating agencies and project developer will use adaptive management or a similar process to evaluate the project at each subsequent phase; the intent of such evaluation is to inform the design, installation and operation of successive phases.

f. Insufficient/Incomplete Information

An applicant may not be able to obtain or provide the information required by subsection B.4 (Resource Inventory and Effects Evaluation Standards), above, due to the lack of data available about the effect that the proposed development may have on environmental resources and uses. When a regulating agency determines that the information provided by the applicant is not sufficient or complete enough to fulfill the requirements of subsection B.4,⁸ the agency has the following options:

1) Agency Discretion

The regulating agency may terminate the decision-making process or suspend the process until the applicant provides the information.

2) Pilot Project

The regulating agency may recommend that an applicant conduct a pilot project to obtain adequate information and data and measure the effects. Pilot projects are renewable energy facility developments which are removable or able to be shut down quickly, are not located in sensitive areas, and are for the purpose of testing new technologies or locating appropriate sites.⁹ The agency's decision to allow the use of a pilot project is for the purpose of obtaining the data and information necessary to fulfill the requirements of subsection B.4., and shall be based on the following approval criteria:

A) The exclusive purpose of the pilot project shall be to provide information on the performance, structural integrity, design and environmental effects of a specific renewable energy technology or its supporting equipment and structures.

B) The applicant shall complete adequate inventories of baseline conditions, as required by paragraph B.4.d (Inventory Content) above, prior to conducting the pilot project.

C) The risk of adverse effects from the pilot project shall be insignificant, because:

1. of low probability of exposure of biological communities and habitats;
2. of low sensitivity of the biological communities and habitats to the exposure; or
3. the effects of exposure to sensitive communities and habitats will be insignificant.

D) The pilot project shall not adversely affect any "important marine habitat" or "critical marine habitat" (see Appendix A: Glossary of Terms).

E) The pilot project will have a term, not to exceed five years, and authorization for the project will include a standard condition requiring project alteration or shutdown in the event that an unacceptable level of environmental effect occurs.

F) The pilot project shall avoid significant or long-term interference with other human uses of marine resources, and will require decommissioning and site

restoration at expiration of the authorization period if federal and state authorization for a commercial renewable energy facility is not sought.

G) All data shall be in the public domain subject to ORS 192.410 *et seq.*

H) Work Plan: The applicant shall provide a written work plan which will include, but not be limited to the following: ¹⁰

1. A list of the information needed to satisfy the requirements of subsection B.4. above.
2. Specific pilot project objectives to obtain the needed information and an explanation of how the study or test design will meet the objectives.
3. Description of study or test methods to meet the objectives, such as:
 - (a) Literature review;
 - (b) Collection of any needed baseline data;
 - (c) Hypotheses to address the study objectives;
 - (d) Descriptions of field sampling and data-analyses methods to be used; and
 - (e) Use of adequate controls to allow the effects of the proposed action to be separated from natural fluctuations in resources and habitats.
4. Supporting documentation demonstrating that the study design is scientifically appropriate and statistically adequate to address the research objectives.
5. Descriptions of how the data and analyses will be reported and delivered to the regulating agency for review and approval.

3) Phased Development

The regulating agency may recommend that an applicant conduct a project as a phased development in order to obtain adequate information and data and to measure the incremental effects of each phase prior to further or complete build-out of the project. Phased development projects are renewable energy facility developments which are limited in scale and area, but are designed to produce energy for commercial use. The applicant for a phased development project will need to comply with the requirements of subsection B.4. A regulating agency's decision to allow the use of a phased development project is designed to allow for commercial energy production while obtaining certain data and information that are necessary to fulfill the requirements of subsection B.4., but can only be obtained through the monitoring and study of the effects of the development as it is installed and operated for a discrete period of time.

g. Test Facility

Applications for a permit, license, or other authorization for the installation and use of an experimental or test device at the Northwest National Marine Renewable Energy Center Mobile Test Berth Site zone, are not subject to the requirements of section B. See section D: Northwest National Marine Renewable Energy Center Mobile Test Berth Site, below, for the specific requirements for the use of these facilities.

C. Operation Plan Development

The regulating agency shall require the applicant to submit an operation plan as a condition of approval for a state or federal permit, license, lease or other authorization for renewable energy facility development. The operation plan must explain the procedures and mechanisms that the operator will employ so that the facility will comply with regulatory standards and other conditions of permit or license approval related to water and air quality, adverse environmental effects, maintenance and safety, operational failure and incident reporting. The operation plan shall be designed to prevent or mitigate harm or damage to the marine and coastal environment and at a minimum shall include the following information:

1. Phased Development Plan

A regulating agency may require that a facility be developed in phases in order to determine whether the environmental effects of the structures and the operation of the facility are consistent with the inventory and effects evaluation conducted under subsection B.4. The requirements for an operation plan listed in this section would apply to each stage of the phased development so as to account for any changes in design, technology or operation that may result from monitoring the initial phase of the operation. The state and federal joint agency review team will assist the developer in assessing the environmental effects of the initial phase and in determining what, if any, changes in the development and operation of future phases of the facility might be necessary to mitigate or prevent harm or damage to the marine ecosystem.

A facility that has been developed to the full extent of its design and operating capacity may, during the lifetime of its authorization, require systematic improvements to the technology, structures and operational procedures that were originally authorized. The regulating agency will require a new facility development plan, as appropriate and necessary, to provide the data and information for the redevelopment and operation of the new facility components.

2. Facility Development Plan

A plan is required that describes the physical and operational components of the proposed facility and must contain, at minimum, detailed technical information, data, protocols and references for:

- a. Structural and project design, materials used, anchoring and installation information;
- b. All cables and pipelines, including lines on project easements;
- c. A description of the deployment activities;
- d. A listing of chemical products used;
- e. A description of vessels, vehicles, aircraft and the transit lanes that will be used;
- f. A general description of the operating procedures and systems;
- g. Construction schedule; and
- h. Other information as required by the Department of State Lands.

3. Project Operation Plan

An operation plan is required that describes, at a minimum, information regarding the routine environmental monitoring, safety management and emergency response procedures, facility inspections, and the decommissioning of the project. The operation plan should

explain the procedures and mechanisms that will be employed so that the facility will comply with regulatory standards and other conditions of permit or license approval related to water and air quality, environmental protection and mitigation, facility maintenance and safety, operational failure and incident reporting. An operation plan will include the following information:

a. Contingency Plan:

A plan to describe how the facility operator will respond to emergencies caused by a structural or equipment failure due to human error, weather, geologic or other natural event. The plan should include a description of the types of equipment, vessels and personnel that would be deployed, the chain of command or management structure for managing the facility repairs, recovery or other forms of remedial action, and the process and timeline for notification of state and federal authorities.

b. Inspection Plan:

A plan to provide for the implementation of a routine inspection program to ensure the mechanical, structural and operational integrity of renewable energy project facilities and other related structures, equipment or facilities. In addition, unscheduled inspections are to be required after any major geologic or meteorologic event to ensure continued operational safety and environmental protection.

c. Monitoring Plan:

A plan to provide for the implementation of a routine standardized monitoring program for potential impacts on specific resources as specified by the resource inventory and effects evaluation. The operator shall monitor activities related to the operation of the facility and demonstrate that its performance satisfies specified standards in its approved plans. Monitoring shall be sufficient to accurately document and quantify the short-term and long-term effects of the actions on the affected resources and uses. Plans for monitoring must include, at a minimum:

- 1) A list of the information needed to satisfy an effects evaluation.
- 2) Specific study objectives to obtain the needed information and explanation of how the study design will meet the objectives.
- 3) Description of study methods to meet the objectives, such as:
 - A) Literature review;
 - B) Collection of needed baseline data;
 - C) Hypotheses to address the study objectives;
 - D) Descriptions of field sampling and data-analyses methods to be used; and
 - E) Use of adequate controls, such as control sites, to allow the effects of the proposed action to be separated from natural fluctuations in resources and habitats.
- 4) The monitoring plan will include supporting documentation demonstrating that the study design is scientifically appropriate and statistically adequate to address the research objectives.¹¹

- 5) The monitoring plan will include a description of the method that will be used to report and deliver data and analyses information to the authorizing state agency for review in a timely and efficient manner.¹²

d. Adaptive Management Plan

An adaptive management plan to provide a mechanism for incorporating new findings and new technologies into the operation and management of the project. The adaptive management plan shall include performance standards that are based on results of the resource inventory and effects evaluation and incorporated in the study design of the monitoring plan as described in paragraph C.3.c (Monitoring Plan), above. The plan will explain the processes for how adaptation measures are applied to the operation of the project. When the monitoring results show that the performance standards are not being met due to the operation of the facility, adaptation measures designed to bring the operation into compliance with the performance standard will be applied to the operation of the project. The adaptive management plan will explain processes for how adaptation measures will be applied to the operation and management of the project. The adaptive management plan should account for:

- 1) Variable conditions in the marine environment;
- 2) Change in the status of resources;
- 3) New information provided by monitoring of the project;
- 4) Data and information provided by research and from other sources;
- 5) New technologies that would provide for greater protection of ocean resources;
- 6) Ocean fisheries, or other ocean uses to be protected from adverse effects and operational conflicts; and
- 7) Unanticipated cumulative effects.

4. Decommissioning Plan:

An applicant is required to provide a plan to restore the natural characteristics of the site to the extent practicable by describing the facilities to be removed.¹³ The plan should include; a proposed decommissioning schedule; a description of removal and containment methods; description of site clearance activities; plans for transporting and recycling, reusing, or disposing of the removed facilities; a description of those resources, conditions, and activities that could be affected by or could affect the proposed decommissioning activities; results of any recent biological surveys conducted in the vicinity of the structure and recent observations of marine mammals at the structure site; mitigation measures to protect archaeological and sensitive biological features during removal activities; and a statement as to the methods that will be used to survey the area after removal to determine any effects on marine life. A decommissioning plan should identify how the project owner will restore the site to the natural condition that existed prior to the development of the site, to the extent practicable.

5. Financial Assurance Plan:

The applicant must provide a financial assurance compliance plan that describes their ability to comply with the state regulating agency requirements for financial assurance instruments to guarantee performance, and any other financial terms and conditions that may be applied. Wave energy facilities or devices shall comply with the requirements of

1 ORS 274.867,¹⁴ and the implementing administrative rules of the Department of State
2 Lands, OAR 141-140-0080 and OAR 141-140-0090.

3
4 **6. Agreements:**

5 Applicants are required to communicate with traditional ocean users and stakeholders with
6 an interest in the area of the proposed project to address issues of concern.¹⁵ Applicants are
7 encouraged to memorialize agreements with those ocean users and stakeholders on the
8 specific actions that the applicant will take to address their issues of concern.
9

10
11 **D. Northwest National Marine Renewable Energy Center Mobile**
12 **Test Berth Site**

13
14 **1. Test Berth Site Plan**

15 The Northwest National Marine Renewable Energy Center mobile test berth site is
16 established to conduct short-term experimental testing of renewable energy technologies at
17 the mobile test berth facility.
18

19 **2. Test Berth Site Use**

20 An application for a permit, license, or other authorization for the installation and use of the
21 Northwest National Marine Renewable Energy Center mobile test berth site, is not subject
22 to the requirements of sections B or C, above.
23

24 An experimental or test device or other structure for use at the Northwest National Marine
25 Renewable Energy Center mobile test berth site is required to obtain any applicable license,
26 permit or authorization.

Appendix A: Definitions and Terms

As used in Part Five, unless the context requires otherwise, the following definitions shall apply:

Applicant: An applicant for a state permit, license, lease or other authorization for renewable energy facilities development or other related structures, equipment or facilities will be referred to as "the applicant".

Areas important to fisheries: (Goal 19)

- a.) areas of high catch (e.g., high total pounds landed and high value of landed catch); or
- b.) areas where highly valued fish are caught even if in low abundance or by few fishers; or
- c.) areas that are important on a seasonal basis; or
- d.) areas important to commercial or recreational fishing activities, including those of individual ports or particular fleets; or
- e.) habitat areas that support food or prey species important to commercially and recreationally caught fish and shellfish species.

Conservation: a principle of action guiding Oregon's ocean-resources management, which seeks to protect the integrity of marine ecosystems while giving priority to the protection and wise use of renewable resources over nonrenewable; as used in the Oregon Ocean Resources Management Plan, the act of conservation means "that the integrity, diversity, stability, complexity, and the productivity of marine biological communities and their habitats are maintained or, where necessary, restored" and "...accommodat(ing) the needs for economic development while avoiding wasteful uses and maintaining future availability. (Territorial Sea Plan Appendix A: Glossary of Terms)

Critical marine habitat: means one or more of the following land and water areas:

- a.) areas designated as "critical habitat" in accordance with federal laws governing threatened and endangered species; or
- b.) areas designated in the Territorial Sea Plan as either:
 - 1.) as needed for the survival of animal or plant species listed by state or federal laws as "threatened", "endangered", or "sensitive". Such areas might include special areas used for feeding, mating, breeding/spawning, nurseries, parental foraging, overwintering, or haul out or resting. This is not intended to limit the application of federal law regarding threatened and endangered species; or
 - 2.) "unique" (i.e. one of a kind in Oregon) habitat for scientific research or education within the Oregon territorial sea. (Territorial Sea Plan, Part Two)

Ecosystem: the living and non-living components of the environment which interact or function together, including plant and animal organisms, the physical environment, and the energy systems in which they exist. All the components of an ecosystem are interrelated. (Oregon Statewide Planning Goals)

Habitat: the environment in which an organism, species, or community lives. Just as humans live in houses, within neighborhoods, within a town or geographic area, within a certain region,

1 and so on, marine organisms live in habitats which may be referred to at different scales. (see
2 also "critical marine habitat", "important marine habitat") (Territorial Sea Plan Appendix A:
3 Glossary of Terms)
4

5 **Important marine habitat:** (Goal 19) are areas and associated biologic communities that are:

6 a.) important to the biological viability of commercially or recreationally caught species or that
7 support important food or prey species for commercially or recreationally caught species; or

8 b.) needed to assure the survival of threatened or endangered species; or

9 c.) ecologically significant to maintaining ecosystem structure, biological productivity, and
10 biological diversity; or

11 d.) essential to the life-history or behaviors of marine organisms; or

12 e.) especially vulnerable because of size, composition, or location in relation to chemical or
13 other pollutants, noise, physical disturbance, alteration, or harvest; or

14 f.) unique or of limited range within the state.
15

16 Important marine habitats must be specifically considered when an inventory-and-effects
17 evaluation is conducted pursuant to Goal 19: including but not limited to: habitat necessary for
18 the survival and conservation of Oregon renewable resources (*e.g.* areas for spawning, rearing,
19 or feeding), kelp and other algae beds, seagrass beds, seafloor gravel beds, rock reef areas and
20 areas of important fish, shellfish and invertebrate concentration. (Oregon Statewide Planning
21 Goal 19).
22

23 **Phased development projects:** Renewable energy facility developments which are limited in
24 scale and area, but are designed to produce energy for commercial use.
25

26 **Regulating agency or regulating agencies:** State and federal agencies making decisions to
27 authorize the siting, development and operation of renewable energy facilities development or
28 other related structures, equipment or facilities within the Oregon Territorial Sea.
29

30 **Renewable Energy Facility or Facilities:** The term "renewable energy facilities development
31 or other related structures, equipment or facilities," means energy conversion technologies and
32 devices that convert the energy or natural properties of the water, waves, wind, current or
33 thermal to electrical energy, including all associated buoys, anchors, energy collectors, cables,
34 control and transmission lines and other equipment that are a necessary component of an
35 energy conversion device research project, demonstration project or commercial operation. The
36 terms "renewable energy facility" or "renewable energy facilities" are used to describe any and
37 all components of these developments.

Appendix B: Endnotes

¹ The state's renewable energy portfolio is described under ORS 469A.025, entitled "Renewable energy sources." ORS 469A.025(1) provides:

"Electricity generated utilizing the following types of energy may be used to comply with a renewable portfolio standard:

- "(a) Wind energy.
- "(b) Solar photovoltaic and solar thermal energy.
- "(c) Wave, tidal and ocean thermal energy.
- "(d) geothermal energy."

² Part One, subsections E.1 and E.2 of the Territorial Sea Plan provide a brief description of programs of certain state and federal agencies with regulatory, consultation or other authority or responsibility for management of ocean resources.

³ State and federal agencies making decisions to authorize the siting, development and operation of renewable energy facilities development or other related structures, equipment or facilities within the Oregon Territorial Sea, will be referred to as "the regulating agency" or "regulating agencies".

⁴ In its "Rules Governing the Placement of Ocean Energy Conversion Devices On, In or Over State-Owned-Land within the Territorial Sea", the Department of State Lands requires applicants to meet with the agency, as well as affected ocean users and other government agencies having jurisdiction in the Territorial Sea, prior to applying for a lease or temporary authorization. OAR 141-140-0040.

⁵ ORS 196.471, entitled "Territorial Sea Plan review requirements, provides in part:

"(1) The Land Conservation and Development Commission shall review the Territorial Sea Plan and any subsequent amendments recommended by the Ocean Policy Advisory Council to either the Territorial Sea Plan or the Oregon Ocean Resources Management Plan and make findings that the plan or amendments:

"(a) Carry out the policies of ORS 196.405 to 196.515; and

"(b) Are consistent with applicable statewide planning goals, with emphasis on the four coastal goals.

"(2) After making the findings required by subsection (1) of this section, the commission shall adopt the Territorial Sea Plan or proposed amendments as part of the Oregon Coastal Management Program."

⁶ The regulations for federal consistency with approved state coastal programs are prescribed in 15 CFR, Part 930. "Energy projects" are defined under 15 CFR § 930.123(c) to mean "projects related to the siting, construction, expansion, or operation of any facility designed to explore, develop, produce, transmit or transport energy or energy resources that are subject to review by a coastal State under subparts D, E, F or I of this part."

⁷ Under the National Environmental Policy Act (NEPA), "cumulative impacts" means "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 CFR § 1508.7.

⁸ One measure of whether the information provided by an applicant is sufficient are the federal consistency regulations under 15 CFR §930.58 (a), which provides “The applicant shall furnish the State agency with necessary data and information along with the consistency certification.”

⁹ Pilot Project has the same meaning as “Demonstration Project” under the Department of State Lands rules governing the placement of ocean energy conversion devices on, in, or over state-owned land within the Territorial Sea. OAR 141-140-0020(7) defines “Demonstration Project” as “a limited duration, non-commercial activity authorized under a temporary use authorization granted by the Department to a person for the construction, installation, operation, or removal of an ocean energy facility on, in or over state-owned submerged and submersible land in the Territorial Sea to test the economic and/or technological viability of establishing a commercial operation. A demonstration project may be temporarily connected to the regional power grid for testing purposes without being a commercial operation.”

¹⁰ Pilot projects that are authorized under the standards and conditions of this subparagraph f.2 are not required to fulfill the requirements of section C below. The standards and requirements of section C will apply to an application for authorization to expand the pilot project from a short-term limited scope facility to a commercial operation scale facility.

¹¹ Standardized monitoring protocols would result in data sets that are comparable and transferable among sites and technologies. The protocols would include a Before, After, Control, Impact (BACI) experimental study design.

¹² Example: the data and analysis will be applied to determine if conditions meet the standard established under the Oregon Department of Environmental Quality rule for “Biocriteria” at OAR 340-041-0011, which provides “Waters of the State must be of sufficient quality to support aquatic species without detrimental changes in the resident biological communities.”

¹³ The requirement for a decommissioning plan is based upon, and will be applied by, the Department of State Lands under OAR 141-140-0080. Under subsection (5)(e) of that rule, the holder of a temporary use authorization or lessee is required to:

“Remove ocean energy monitoring equipment, ocean energy facilities and any other material, substance or related or supporting structure from the authorized area as directed by the Department within a period of time to be established by the Department as a condition of the authorization. If the holder of the temporary use authorization or lessee fails or refuses to remove such equipment, facility or other material, substance or related or supporting structure, the Department may remove them or cause them to be removed, and the holder of the authorization or lessee shall be liable for all costs incurred by the State of Oregon for such removal.”

The decommissioning of the transmission cable is required under OAR 141-083-0850(6), which provides:

“If determined necessary by [DSL] in consultation with the easement holder and other interested parties, and if permitted by the applicable federal agency(ies) regulating the cable, the easement holder shall remove the cable from the state-owned submerged and submersible land within one (1) year following the termination of use of the cable or expiration of the easement.”

¹⁴ ORS 274.867 provides in part:

“(2) Unless exempted under rules adopted by the director under this section, an owner or operator of a facility or device sited within Oregon’s territorial sea, as defined in ORS 196.405, that converts the kinetic energy of waves into electricity shall maintain cost estimates of the amount of financial assurance that is necessary, and demonstrate evidence of financial assurance, for:

“(a) The costs of closure and post-closure maintenance, excluding the removal of anchors that lie beneath submerged lands in Oregon’s territorial sea, of the facility or device; and

“(b) Any corrective action required to be taken at the site of the facility or device.

“(3) The financial assurance requirements established by subsection (2) of this section may be satisfied by any one or a combination of the following:

- “(a) Insurance;
- “(b) Establishment of a trust fund;
- “(c) A surety bond;
- “(d) A letter of credit;
- “(e) Qualification as a self-insurer; or
- “(f) Any other method set forth in rules adopted by the director.”

¹⁵ The Department of State Lands rule on Pre-Application Requirements, OAR 141-140-0040, provides:

“Before submitting an application to the Department, a person wanting to install, construct, operate, maintain or remove ocean energy monitoring equipment or an ocean energy conversion facility for a research project, demonstration project or commercial operation shall meet with:

- “(a) Department staff to discuss the proposed project; and
- “(b) Affected ocean users and other government agencies having jurisdiction in the Territorial Sea to discuss possible use conflicts, impacts on habitat, and other issues related to the proposed use of an authorized area for the installation, construction, operation, maintenance or removal of ocean energy monitoring equipment or an ocean energy facility.”

October 26, 2009

To: LCDC and DLCD
From: David N. Allen
P.O. Box 1321
Newport, OR 97365
Re: Rule adoption – Amendment to the Territorial Sea Plan;
Part Five: Use of the Territorial Sea for the Development
of Renewable Energy Facilities or Other Related Structures,
Equipment or Facilities

This written comment is in follow-up to my verbal comments at the DLCD public hearing conducted after the October 23, 2009 meeting of the Ocean Policy Advisory Council (OPAC) in Florence. I'm the coastal public-at-large member on OPAC and also co-chair of the Territorial Sea Plan working group. I also serve on the commission's Territorial Sea Plan advisory committee (TSPAC). However, the following comments are made in my individual capacity only and not on behalf of or as a representative of OPAC or TSPAC.

TSPAC approved a draft Part 5 at its meeting on September 11, 2009. This document was revised by DOJ on October 14 and again on October 19, 2009 for purposes of legal sufficiency. OPAC approved the TSPAC revision, but made some additional changes.

The change that generated the most discussion at the OPAC meeting is found in subsection A.2.e (Policies). The TSPAC revision states, "Promote the research and responsible development of ocean-based renewable energy sources ..." and the OPAC revision states, "Facilitate the research and responsible development of ocean-based renewable energy sources"

The change from "promote" to "facilitate" may seem minor in nature, but it reflects a different perspective based on the interests represented on OPAC as compared to those represented on TSPAC. However, rather than choosing one over the other, another option is to use the word "encourage." Not only does "encourage" include elements of both; it also is consistent with language found in the Oregon Ocean Resources Management Act, ORS 196.405 to 196.515.

Specifically, it is a policy of the state of Oregon, under ORS 196.420(5), to: "*Encourage* research and development of new, innovative marine technologies to study and utilize ocean resources." (Emphasis added.) And another state policy, under ORS 196.420(4), is to: "*Encourage* research, study and understanding of ocean processes, marine life and other ocean resources." (Emphasis added.)

Thank you.



EXHIBIT: 10 AGENDA ITEM: 5
LAND CONSERVATION & DEVELOPMENT
COMMISSION
DATE: 11-5-09
PAGES: 1
SUBMITTED BY: Nick Furman

November 5, 2009

Land Conservation and Development Commission
635 Capitol St NE, Suite 150
Salem, OR 97301

Re: *Permanent Rule Amending OAR Chapter 660, Division 36 – Territorial Sea Plan*

Dear Members of the Commission:

As a member of the public advisory committee that participated in the Territorial Sea Plan (TSP) review and amendment process which resulted in draft language (Part Five) related to the development of renewable energy facilities in Oregon's territorial sea, I offer the following comments in support of the Ocean Policy Advisory Committee (OPAC) version submitted for your consideration.

The policies, standards and safeguards established in the proposed amendment appear, at this juncture, to provide the intended protection of "important...renewable marine resources...marine habitat and areas important to fisheries ..." necessary to be consistent with the state's original 'Ocean Plan' dating back to 1990.

The process used to develop and articulate those policies was inclusive, representative and most important, respectful of the diverse opinions held by the members of the advisory committee and their respective constituencies. To their credit, DLCD staff did an excellent job of organizing the meetings, informing the participants and orchestrating an outcome that resulted in consensus in an arena often fraught with controversy.

The Dungeness crab fishery is the most valuable 'single specie' fishery in Oregon and has the most to lose, should renewable energy development in the territorial sea move forward in a manner that is inconsistent with the provisions outlined in the TSP amendment currently being considered. Part Five specifically addresses the need for safeguards in response to the "...potential adverse effects of renewable energy facility siting, development and operation...and to identify the appropriate locations for that development which minimize the potential adverse impacts to existing ocean resource users and coastal communities."

We strongly encourage the Commission to adopt the rule amending the Territorial Sea Plan to include Part Five as referenced in the above comments. Oregon's history of sound decisions and policy related to its ocean resources continues to play an important role in the health and future of our industry.

Sincerely,

Nick Furman, Executive Director
ODCC

OPT

OCEAN POWER TECHNOLOGIES

1590 Reed Road
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Tel: 609-730-0400 - Fax: 609-730-0404

EXHIBIT: 11 AGENDA ITEM: 5
LAND CONSERVATION & DEVELOPMENT
COMMISSION
DATE: 11-5-09
PAGES: 2
SUBMITTED BY: Leonard Bergstein

TESTIMONY OF HERB NOCK, V.P. OCEAN POWER TECHNOLOGIES

To the LAND CONSERVATION and DEVELOPMENT COMMISSION
SPRINGFIELD, OREGON
NOVEMBER 5, 2009

Subject: Item #5
Proposed Permanent Rule Amending OAR Chapter 660, Division 36
[Territorial Sea Plan Part Five]

Mr. Chairman and Members of the Commission,

On behalf of my company, Ocean Power Technologies, I am pleased to submit testimony in support of the proposed rule under consideration today and I urge your adoption of the rule as presented by the Territorial Sea Plan Advisory Committee.

Ocean Power Technologies is a leader in the responsible development of renewable energy resources from ocean waves. As the company's representative on the Territorial Sea Plan Advisory Committee, I have been impressed with the hard work of the Advisory Committee members to craft a balanced Part Five that blends the traditional Oregon values of protection of natural resources with the urgent desire to provide national leadership in achieving energy independence and community economic development in a carbon-constrained future.

The proposed rule under consideration is the work product of several state agencies, the diligent review of the Oregon Ocean Policy Advisory Committee and key stakeholders. Perhaps no one deserves more credit for the quality of the process and the product than Paul Klarin of your LCDC staff. Paul's knowledge, talent and tact have insured that the document before you protects marine resources in Oregon's Territorial Sea and promotes collaboration between applicants for renewable energy facilities and affected ocean users and coastal communities, to reduce or avoid conflicts.

There are many reasons to adopt this proposed rule, but let me just mention three:

1. The proposed rule provides a clear process for project review, agency coordination and evaluation. Applicants will know what their regulatory roadmap will be and what will be expected in the form of resource inventories and environmental effects;

2. The proposed rule provides a clear statement of expectations about the operation maintenance and safety of proposed energy facilities;
3. The proposed rule provides an innovative path forward for commercial scale projects utilizing a “Phased Development Plan” approach which relies heavily on adaptive management techniques and active collaboration with a broad range of affected ocean users, coastal communities and other key stakeholders.

In sum, the policies incorporated in this Part Five addition to the Territorial Sea Plan will be both a practical guide and a challenge for “best practices”. By adopting this Part Five you will send a clear signal that Oregon intends to be a leader in the development of renewable energy resources in its Territorial Sea on its own terms – and that only responsible developers who will respect Oregon’s valuable marine resources and habitats need apply.

As a member of the Territorial Sea Plan Advisory Committee – and a representative of a company that has plans for the responsible development of ocean-based renewable energy resources off the coast of Oregon – I am proud of the document that you have before you today because it will promote, encourage and inspire only the best commercial practices in the pursuit of energy independence...and I respectfully urge your adoption of this Proposed Permanent Rule.

Thank you.



November 3, 2009

EXHIBIT: 12 AGENDA ITEM: 5
LAND CONSERVATION & DEVELOPMENT
COMMISSION
DATE: 11-5-09
PAGES: 2
SUBMITTED BY: Meryl Redisch

Development of Land and Conservation Department
Board of Commission
635 Capitol St. NE, Suite 150
Salem 97301-2540

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Bob Liddell
Karen O'Connor Kruse
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Lee Savinar
Ron Spencer

Board Member
Emeritus
Dave Marshall

Dear Commissioners,

Thank you for the opportunity to provide public comments on Part Five of the Draft Territorial Sea Plan. My name is Meryl Redisch and I serve as the executive director for the Audubon Society of Portland, an 11, 0000 membership base non profit organization. Although our main campus is located in Northwest Portland, we own and manage property for conservation purposes in Clackamas and Lane Counties. Established more than a century ago, one of the first measures of protection that was instigated by Audubon activists was securing Three Arch Rocks and its population of Common murre as a National Wildlife Refuge. More recently, Portland Audubon has been actively engaged in implementing a system of marine reserves and protected areas within Oregon's territorial seas. We also have a strong interest in wind power development that is ecologically sustainable and served on the committee that developed the Columbia Plateau Guidelines.

I want to extend my thanks and appreciation to the committee for the time you devoted to developing this plan and to the Commission for taking these comments under consideration. As the plan notes, Oregon's territorial sea has been identified as a favorable location for sitting renewable energy facilities for research, demonstration and commercial power development. The same potential is true for Oregon's land mass. This is one reason why Portland Audubon is eager to see that the state's policies and practices related to wind energy development are,

- Comprehensive and consistent. State agencies should have a set of common guidelines for evaluating, approving and managing projects and that take into account the impact to wildlife and habitat. We are very concerned that energy guidelines are being developed in a disjointed manner. Our understanding from working on the Columbia Plateau guidelines was that this plan would be expanded statewide and reflects specific regional concerns.
- Subject to a realistic mitigation plan which compensates for the loss of the resources and the costs for restorative action.

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- Available to anyone interested in a potential wind energy project and with enough notice for commenting. State agencies should not leave it entirely up to the developer to notify affected communities.

Additionally, Portland Audubon wants to see that birds, their local habitats and migratory requirements are called out in all policy documents related to renewable energy development. In general we would like this document to note the Migratory Bird Treaty Act, Endangered Species and marine Mammal Protection Act under a category of "other regulatory Considerations". In particular, we would like the Commission to include the following;

- **Under Policies, a.** - "add critical avian breeding, foraging and migratory areas".
- **Under Policies, b.** -- add avian populations after fisheries navigation, recreation and aesthetic enjoyment as required by goal 19.
- **Under Policies, c-** add natural resource conservation organizations when describing how to avoid and reduce conflicts.
- **Under Policies, d** – add preconstruction monitoring when describing limiting the potential for unanticipated adverse impacts.
- **Under Implementation Requirements, 1a-** add critical avian migratory, breeding and foraging areas after fisheries.
- **Under Resource Inventory and Effects Evaluation Standards-#6.- Biological features,** add inventory of avian populations including breeding, foraging and migratory routes and include above the water as well as below...
- **Under G) - Marine Species migration routes-** expand this section to capture how the applicant will get the inventories, the methodology, and established baseline data.
- **Under 7)** add birdwatching and wildlife viewing.

Thank you again for providing Portland Audubon with an opportunity to state our comments for public record. We welcome the opportunity to discuss them with you in greater detail.

Sincerely,



Meryl Redisch,
Executive Director

**OCEANA**Protecting the
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oceana.org

November 5, 2009

Mr. John H. VanLandingham
Land Conservation and Development Commission, Chair
635 Capitol Street NE, Suite 150
Salem, OR 97301-2540

EXHIBIT: 13 AGENDA ITEM: 5
LAND CONSERVATION & DEVELOPMENT
COMMISSION
DATE: 11-5-09
PAGES: 2 *DLCD Staff*
SUBMITTED BY: *for Oceana*

**Re: Public Hearing and Possible Adoption of Proposed Permanent Rule Amending OAR
Chapter 660, Division 36.**

Dear Chair VanLandingham and Commission Members:

Oceana is an international non-profit organization dedicated to protecting the world's oceans. Oceana recognizes and commends the State for its work thus far in helping lead us to a more sustainable existence by promoting the development of alternative, renewable energy resources, and reduction of our reliance on fossil fuels. We support amending the Territorial Sea Plan (TSP) to include a new Part 5 that governs the development of renewable energy facilities within Oregon's territorial sea. The draft TSP amendment is a strong conservation planning document that will help encourage steps toward the State's goal of increasing renewable energy production while avoiding adverse impacts to marine habitats, wildlife and existing uses. We commend the Ocean Policy Advisory Council (OPAC) and the Territorial Sea Plan Advisory Committee (TSPAC) for their work and request the Commission consider the following recommendations to help ensure that siting and developing renewable energy resources do not inadvertently create detrimental environmental and social impacts.

Section B.4 of the draft Part 5 allows the applicant to provide the required resource inventory and effects evaluation. While we understand why the State wants to place the financial burden on the applicant, to ensure that the State fulfills its obligation to protect the marine resources of the Territorial Sea, the State should conduct the resource inventory and effects evaluation. In fact, that process is in place in the existing sections of the current TSP, which require regulating agencies to "prepare, or cause to be prepared" the resource inventory and effects evaluation. See TSP Part 2, Section A.2.a.1. The State holds Oregon's natural resources in trust for the benefit of the public and, ultimately, is responsible for ensuring that the resources it holds in trust are not adversely impacted by new development. Because the inventory and evaluation are critical components to determining whether a renewable energy project will have adverse impacts on the resources of the Territorial Sea, the State should prepare them, rather than delegating the responsibility to the industry hoping to develop.

Additionally, the State should officially integrate marine spatial planning into this amendment. Some mapping of the Territorial Sea will be necessary to implement Part 5. This mapping phase is essentially the beginning of a marine spatial planning process for the State. As the State proceeds with this mapping work, it should give priority to the natural habitats, dependent

marine life, and conservation areas in the Territorial Sea, including areas under existing management like Wildlife refuges, pending marine reserves and marine protected areas, intertidal protected areas, conservation and natural estuaries. Therefore, the State should identify and designate Important Ecological Areas (IEAs) before siting areas for development. IEAs are geographically delineated areas which by themselves or in a network have distinguishing ecological characteristics, are important for maintaining habitat heterogeneity or the viability of a species, or contribute disproportionately to an ecosystem's health, including its biodiversity, function, structure, or resilience. Part 5 already includes the basis for IEAs in its definitions of important marine habitat and critical marine habitats.

A proactive approach to marine spatial planning that starts with the identification of IEAs naturally leads to identifying suitable areas for ocean uses, protecting ecosystem health and resilience, and reducing regulatory delay. Using the data and information the State already has and continues to develop to identify and designate IEAs, and then making that information available for future planning purposes including offshore energy development, marine reserves, etc. will only strengthen Oregon as a leader in marine spatial planning and ensure our marine resources are protected for future generations.

Finally, there should be a clear statement that nothing in Part 5 affects the State's duty to comply with federal laws, where applicable. In particular, the Commission should be clear that the State will continue established procedures for compliance with the federal Endangered Species Act (ESA) for federally listed species found in State waters. This obligation is particularly important given that Oregon is home to several federally protected species, and critical habitat for the Southern Green Sturgeon was recently designated within Oregon's Territorial Sea.

Oregon is on the right path towards ensuring it is a leader in promoting alternative, renewable energy resources and marine spatial planning. The recommendations in this letter will help ensure that the siting of marine renewable energy projects in the Territorial Sea protect Oregon's ocean ecosystems and further a marine spatial planning effort. We look forward to working with the Commission and the State on this amendment and its implementation.

Sincerely,

A handwritten signature in black ink, appearing to read "Sarah Winter Whelan". The signature is fluid and cursive, with the first name "Sarah" being the most prominent.

Sarah Winter Whelan
Pacific Counsel
Oceana