



# Oregon

Kate Brown, Governor

## Land Conservation and Development Commission

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December 5, 2018

Jena Carter, Chair  
Ocean Policy Advisory Council  
635 Capitol Street NE, Suite 150  
Salem, Oregon 97301  
[\(jcarter@tnc.org\)](mailto:jcarter@tnc.org)



Dear Chair Carter and members of the Ocean Policy Advisory Council,

At our September 27, 2018 meeting, the Land Conservation and Development Commission (Commission) decided to recommence rulemaking on the Oregon Territorial Sea Plan and, in compliance with ORS 196.471(3), to return the amendments to *Part Five: Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Relates Structures, Equipment or Facilities* to your Council with certain specific revisions. The Commission had considered the amendments to Part Five that the Ocean Policy Advisory Council recommended in January 2013, and, by Order 13-OCMP-001842, found that with specific modifications, the amendments carried out the statutory policies of the Oregon Ocean Resources Management Act and were consistent with the statewide planning goals. As you know, the Court of Appeals subsequently determined that the Commission did not follow the statutory procedures in ORS 196.471(3), and held the amendments to be invalid. *Ciecko v. DLCD*, 290 Or App 655 (2018). Therefore, the 2009 version of Part Five is currently the effective text. The Council and the Commission now undertake the process to restore the Joint Agency Review Team (JART) review processes, review standards, plan review, plan maps, and area designations to Part Five.

Part Five is intended to accommodate a beneficial use of the ocean in a manner that conserves the long-term values, benefits and natural resources of the ocean that are identified in Goal 19. The Commission acknowledged that the adopted Part Five amendments differed from the 2013 OPAC recommendation and explained each instance. Order 13-OCMP-001842 at 14-17, *Ciecko*, 290 Or App at 658-660. To be certain, the Commission based its ultimate determination that the amendments carried out the statutory policies of the Oregon Ocean Resources Management Act and were consistent with the statewide planning goals on the modified, adopted Part Five amendments. In order to adhere to the statutory process and the *Ciecko* decision, the Commission now

returns the 2013 OPAC recommendation for Part Five amendments to the Council with specific revisions intended to address the instances where the adopted Part Five amendments differed and where the Commission determined changes are necessary to either carry out the statutory policies of the Oregon Ocean Resources Management Act or be consistent with the goals and, of course, to be a constitutional regulation.

Additionally, as pointed out by staff and in public comment, in the five years that have passed since 2013, circumstances have changed. Those changes lead to some recommended changes that the Commission requests the Council consider, in addition to the specific revisions.

For specific revisions to the text of Part Five, the Council should begin by conforming its 2013 recommendation to the text of Part Five that was filed as an administrative rule based on Commission Order 13-OCMP-001842. That text differs from the 2013 OPAC recommendation. The adopted text includes specific buffer distances as required by Goal 19, Implementation Requirements 1(3)(e) and (f), and clarifies JART membership for appropriate representation of local jurisdiction representing people of the impacted area consistent with the policy of ORS 196.420(2). The adopted text does not include OPAC recommended language in the Proprietary Use and Management Area (PUMA) because it is inconsistent with the Delegation Clause under Article I, section 21 of the Oregon Constitution. To address the underlying concern represented by the 2013 OPAC recommendation, in presentations to both the Council and the Commission, the staff has suggested moving cables from the PUMA to the areas designated Renewable Energy Exclusion Area (REAA). To be clear, that text change is not a specific revisions that the Commission is requiring under ORS 196.471(3)(a), but it has received favorable public comment and the Council is welcome to include that as a recommendation for amendment pursuant to ORS 196.471(3)(b)(B).

The final amendments adopted by the Commission also differed from the recommendations provided by the Council regarding the Renewable Energy Facility Suitability Study Area (REFSSA) text and designations. While the 2013 OPAC recommendation was particularly diffuse around REFSSA, the Commission determined that it did not go far enough to accommodate a beneficial use of the ocean in a manner that conserves the long-term values, benefits and natural resources of the ocean that are identified in Goal 19. Regarding the total area built and committed to marine renewable energy development, the Commission will change the adopted Part Five text

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to the 2013 OPAC recommendation of two percent of the total area of the territorial sea, instead of three percent. The revised REFSSA map designation retains Lakeside and Camp Rilea and removes the Nestucca/Pacific City and OPT Reedsport sites. The change of the OPT Reedsport REFSSA to a Resources Uses Conservation Area effectuates a condition that the Commission included in its order in the event OPT abandoned the site, which has transpired. Order 13-OCMP-001842 at 28. Changing Nestucca/Pacific City REFSSA to a Resource and Uses Management Area aligns with the 2013 OPAC recommendation and reflects the diminished interest in the site for possible development of renewable energy. The map designation revisions are to reflect the 2013 OPAC recommendation for OPT Reedsport and Nestucca/Pacific City while accommodating the opportunity for renewable energy facilities at the Lakeside and Camp Rilea REFSSAs.

The specific revisions that the Commission is requiring to the 2013 OPAC recommendation are few, which affirms the extent of the agreement achieved on Part Five. For purposes of ORS 196.471(3)(B), please consider the date of this letter the date of the return of the Part Five amendments. Like the Commission, the Council has many new members since 2013. However, with the limited extent of the Part Five revisions and with the briefings and materials provided by staff, we hope that the Council will be able to make its revisions and recommendation to the Commission swiftly so that the protections afforded the territorial sea are soon restored.

Sincerely,



Jerry Lidz  
LCDC Chair

cc: Jim Rue, Director, DLCD  
Patty Snow, Oregon Coastal Program Manager, DLCD