

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CHARLES CIECKO and DAVID
YAMAMOTO,

Petitioners,

v.

DEPARTMENT OF LAND
CONSERVATION AND
DEVELOPMENT,

Respondent.

Court of Appeals No. A156130

**PETITIONERS' OPENING BRIEF
AND EXCERPT OF RECORD**

Judicial Review of an Administrative Rule of the Oregon
Department of Land Conservation and Development

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 The Oregon Land Conservation and Development Commission
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STATEMENT OF THE CASE

Nature of Proceedings and Relief Sought

This is an action for judicial review to determine the validity of an administrative rule under ORS 183.400. Petitioners Charles Ciecko and David Yamamoto (“petitioners”) seek an order declaring an administrative rule of the Oregon Department of Land Conservation and Development (“DLCD”), OAR 660-036-0005, invalid on the basis that the rule exceeds the statutory authority of the agency or was adopted without compliance with applicable rulemaking procedures. ORS 183.400(4)(b), (c).

Nature of Administrative Rule Sought to Be Reviewed

This is a direct challenge to the validity of an administrative rule under ORS 183.400. There is no judgment or final agency contested case order involved.

Statutory Basis of Appellate Jurisdiction

The Court of Appeals has jurisdiction to review the validity of an administrative rule under ORS 183.400 upon the filing of a petition by “any person.” ORS 183.400(1). Petitioners are not a party to a contested case in which the validity of the rule may be determined. Petitioners are individuals and thus “persons” under ORS 183.310(8) entitled to seek judicial review of the rule. *Kellas v. Dept. of Corrections*, 341 Or 471, 145 P3d 139 (2006).

Relevant Dates for Appellate Jurisdiction

The rule in question was approved on January 24, 2013. The rule was adopted by order dated October 7, 2013, and became effective that same day upon filing with the Secretary of State. ORS 183.355(2), (5). The petition for judicial review was filed on January 27, 2014.

Question Presented

Did the Oregon Land Conservation and Development Commission (“commission”) exceed its statutory authority or fail to comply with applicable rulemaking procedures by adopting OAR 660-036-0005 in contravention of ORS 196.471, thus rendering the rule invalid?

Summary of Arguments

From the time of adoption of the Territorial Sea Plan in 1994, the established procedure under statute has been to review the recommendation of the Ocean Policy Advisory Council and then make the required findings with respect to that recommendation.

The commission, however, did not follow this established procedure in adopting OAR 660-036-0005 in 2013. Instead, the commission approved a recommendation to amend Part Five of the Territorial Sea Plan that differed from the OPAC recommendation in a number of significant respects.

By doing that, and under the principles of statutory construction, the

commission exceeded its statutory authority and failed to comply with applicable rulemaking procedures. Accordingly, the rule adopted by the commission to amend Part Five of the Territorial Sea Plan should be invalidated.

Summary of Administrative Rule

The commission approved OAR 660-036-0005 on January 24, 2013 (ER-1-2), which was later adopted by order dated October 7, 2013. (ER-3-30). The rule amended 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. (Rec 32-158).

Significant Motions Filed in the Appeal

During the process to correct and amend the judicial review record, petitioners filed a motion on December 5, 2014 requesting, in the alternative, that the court take judicial notice under OEC 201(b) of Exhibits H, I, and J attached to the petition for judicial review. On February 2, 2015, an order was issued granting petitioners' request to take judicial notice of these documents. (App-1-17, App-19-20).

The order also noted that the Territorial Sea Plan¹ and Oregon Ocean

¹ The Territorial Sea Plan is available at:
http://www.oregon.gov/LCD/OCMP/pages/ocean_tsp.aspx

Resources Management Plan (“Ocean Plan”),² both adopted by DLCDC rules in OAR chapter 660, division 36, may be cited under OEC 202. *See also* ORS 183.360(4) (judicial notice taken of rules filed with Secretary of State).

Petitioners also filed a response on May 18, 2015 (treated as a motion to correct the record) to include ‘Exhibit 9, Agenda Item 5’ as part of the judicial review record, a copy of which was attached to the petition for judicial review as Exhibit D. On June 8, 2015, an order was issued granting petitioners’ request to include this document as part of the judicial review record. (ER-165).

ASSIGNMENT OF ERROR

The commission exceeded its statutory authority or failed to comply with applicable rulemaking procedures by adopting OAR 660-036-0005 in contravention of ORS 196.471, thus rendering the rule invalid.

Preservation of Error

This is an original proceeding in the Court of Appeals under ORS 183.400. There are no applicable preservation requirements. Nevertheless, the issue presented by the assignment of error was raised by the chair and vice chair of the Ocean Policy Advisory Council in a January 22, 2013 transmittal letter to the commission before the commission had approved

² The Ocean Plan is available at:
http://www.oregon.gov/LCD/OCMP/pages/ocean_plan.aspx

OAR 660-036-0005 on January 24, 2013. (ER-31-42).³

Standard of Review

The court invalidates a rule under ORS 183.400(4) if it finds that, in adopting the rule, the agency violated the constitution, exceeded its statutory authority, or failed to comply with applicable rulemaking procedures.

Petitioners have challenged the rule under ORS 183.400(4)(b) and (c) on the grounds that the commission exceeded its statutory authority or failed to comply with applicable rulemaking procedures by adopting the rule in contravention of ORS 196.471.

In determining whether an agency exceeded its statutory authority in adopting a rule, the court considers whether the agency “departed from a legal standard expressed or implied in the particular law being administered, or contravened some other applicable statute.” *Friends of Columbia Gorge v. Columbia River*, 346 Or 366, 377, 213 P3d 1164 (2009) (quoting *Planned Parenthood Assn. v. Dept. of Human Res.*, 297 Or 562, 565, 687 P2d 785 (1984)). The court also considers whether “the rule corresponds to the statutory policy as we understand it.” *Managed Healthcare Northwest v. DCBS*, 338 Or 92, 96, 106 P3d 624 (2005) (quoting *Planned Parenthood*

³ As noted on page 4, note 4, of the petition for judicial review, the attorney for petitioners is not rendering legal services on this petition in any official capacity he may otherwise hold on the Ocean Policy Advisory Council.

Assn., 297 Or at 573 (brackets omitted)).

In examining whether an agency exceeded its statutory authority in adopting a rule, the record on review consists of “the wording of the rule itself (read in context) and the statutory provisions authorizing the rule.” *Wolf v. Oregon Lottery Commission*, 344 Or 345, 355, 182 P3d 180 (2008) (citing ORS 183.400(3)(a), (b)). In examining whether an agency complied with applicable rulemaking procedures, the record also consists of “all documents necessary to demonstrate” such compliance. ORS 183.400(3)(c). *See AFSCME Local 2623 v. Dept. of Corrections*, 315 Or 74, 79, 843 P2d 409 (1992) (factual issues can be resolved for compliance with procedures).

ARGUMENT

A. **OAR 660-036-0005, which amended Part Five of the Territorial Sea Plan, was adopted in contravention of ORS 196.471 and is therefore invalid.**

In accordance with ORS chapter 183, the commission has authority to adopt rules that it considers necessary to carry out ORS chapters 195, 196, and 197. *See* ORS 197.040(1)(b), (c)(A) (duties of commission).

ORS chapter 196 contains the Oregon Ocean Resources Management Act (“Act”), which is found at ORS 196.405 to 196.515. At the time amended Part Five of the Territorial Sea Plan was approved by the commission on January 24, 2013, ORS 196.471 provided:

“(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.”

ORS 196.471 (1993),⁴ *amended* by Or Laws 2013, ch 416, § 1.⁵

The commission approved amended Part Five, as recommended by DLCD in a January 14, 2013 staff report “Findings on the Adoption of an

⁴ ORS 196.471 was initially enacted by Oregon Laws 1991, chapter 501, section 20. Oregon Laws 1993, chapter 18, section 35, amended it by deleting subsection (1)(c), which referenced a nonexistent subsection (5) in the statute. The language in subsection (1)(c) had required compatibility “with adjacent county comprehensive plans” which is nearly identical to language found in ORS 196.465(1).

⁵ Oregon Laws 2013, chapter 416, section 1, took effect on June 13, 2013. This amendment to ORS 196.471 provided timelines under new subsections (3)(b) and (c) and added language at the end of the first sentence in subsection (1) – “recommended by the council” – reiterating existing language in that sentence. (App-21).

Administrative Rule to Amend the Territorial Sea Plan.” (ER-43-121).

Nearly nine months later, on October 7, 2013, the director of DLCD signed an order “For the Commission”⁶ that provided, in part:

“The Commission made the findings above required by ORS 196.471(1) herein and adopts *Part Five*: * * * as filed herewith, however: * * * The Commission also adopts the ‘Findings on the Adoption of an Administrative Rule to Amend the Territorial Sea Plan dated January 14, 2013.’ In the event findings in that document are inconsistent with this order, the findings of the Commission herein prevail.” (Emphasis in original.) (ER-30).

The order was filed with the Secretary of State that same day along with OAR 660-036-0005, which provided:

“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 Part Five: Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities, that the Commission approved as modified on January 24, 2013.” (ER-1-2).

1. Adoption of amended Part Five did not follow established procedure.

From the time of adoption of the Territorial Sea Plan in 1994,⁷ the established procedure, consistent with language in ORS 196.471 (1993), has been to review the recommendation of the Ocean Policy Advisory Council

⁶ This order was apparently issued by the DLCD director under a delegation of authority from the commission to “[p]repare and execute written orders, on behalf of the Commission, implementing any action taken by the Commission on any matter.” OAR 660-002-0010(6).

⁷ OAR 660-036-0000 provides that “[t]he Land Conservation and Development Commission adopts and herein incorporates by reference the Territorial Sea Plan approved by the Ocean Policy Advisory Council on August 12, 1994, as part of the Oregon Coastal Management Program.”

(“OPAC”) and then make the required findings under subsection (1) of the statute with respect to the *OPAC recommendation*.

This established procedure is reflected not only in the initial approval of Part Five on November 5, 2009,⁸ but also in other amendments to the Territorial Sea Plan and also the Ocean Plan in 1994, as adopted by the ‘Ocean Planning’ rules in OAR chapter 660, division 36. (App-1-4, App-18). It is also reflected in more detail in the DLCD director reports for OAR 660-036-0003 and OAR 660-036-0004, both adopted in May 2001 (App-5-17), along with a corresponding memo from the agency’s legal counsel dated July 20, 1994. (App-19-20).

The commission, however, did not follow this established procedure in adopting OAR 660-036-0005 in 2013. Instead, and as noted on pages 14-16 of the order issued by the DLCD director on October 7, 2013, the commission

⁸ The commission initially approved Part Five as an amendment to the Territorial Sea Plan on November 5, 2009 pursuant to a recommendation from the Oregon Ocean Policy Advisory Council (“OPAC”) on October 23, 2009. As filed with the Secretary of State on November 25, 2009 (ER-134), OAR 660-036-0005 provided:

“The Land Conservation and Development Commission adopts as part of the Ocean 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 and the Commission approved as modified on November 5, 2009.” (ER-135).

The modification was a one-word change in one of the policies listed in Part Five. See October 26, 2009 comment to the commission and DLCD. (ER-165). It remained in the OPAC recommendation for amended Part Five. (ER-63).

approved a recommendation to amend Part Five of the Territorial Sea Plan under ORS 196.471 (1993) that differed from the OPAC recommendation in a number of significant respects. (ER-16-18, ER-31-42). These differences, the significance of which can be further elaborated on by those appearing *amicus curiae*, included changes to specific text and certain map area designation sites.

2. Adoption of amended Part Five was not consistent with language in ORS 196.471 (1993) under a text and context analysis.

The language to be construed in ORS 196.471 (1993) is placement of the definite article “the” before “plan or amendments” in subsection (1), which provides that the 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*” carry out the policies of the Oregon Ocean Resources Management Act (ORS 196.405 to 196.515) and is consistent with applicable statewide planning goals.

(Emphasis added.)

Determining the intended meaning of a statute is ultimately a question of law for the court. *Bergerson v. Salem-Keizer School District*, 341 Or 401, 411, 144 P3d 918 (2006). Depending on the nature of the statutory language at issue – exact, inexact, or delegative – an agency’s interpretation may be

entitled to some measure of deference. *Springfield Education Assn. v. School Dist.*, 290 Or 217, 223, 621 P2d 547 (1980).

An inexact term or phrase, as the case is here, “express[es] a complete legislative meaning but with less precision” than an exact term or phrase. *Bergerson*, 341 Or at 411. In such cases, the agency’s interpretation “is not entitled to deference on review.” *Blachana, LLC v. Bureau of Labor and Industries*, 354 Or 676, 687, 318 P3d 735 (2014).

A statute is interpreted using the principles of statutory construction set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), and modified by *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009). This includes examining the text and context of the statute and, if helpful, legislative history. *Id.*

Rules of grammar are used in statutory construction as part of text analysis of the language in question. *See Martin v. City of Albany*, 320 Or 175, 181-82, 880 P2d 926 (1994) (analyzing use of particular verb tense). The use of the definite article “the” in a phrase or sentence indicates a legislative intent to refer to a previous part of the statute. *See Carroll and Murphy*, 186 Or App 59, 68, 61 P3d 964 (2003).

In *Carroll*, the phrase “future gross payment or installment” was used in two different places in a subsection of the statute. The court held that,

“[t]he use of the definite article ‘the’ in the second sentence rather than the indefinite article ‘a’ before ‘future gross payment or installment’ indicates that the legislature was referring to a specific, previously mentioned ‘future gross payment or installment’ rather than just any ‘future gross payment or installment.’”

Id.

Using this rule of grammar in subsection (1) of ORS 196.471 (1993), the phrase “the plan or amendments” at the end of the sentence was referring to a specific, previously mentioned “plan” or “amendments” in the sentence, which was “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 * * *.”

(Emphasis added.)

Also, as part of context analysis, other provisions of the same statute and other related statutes are considered. *PGE*, 317 Or at 611; *see also Lane County v. LCDC*, 325 Or 569, 578, 942 P2d 278 (1997) (each subsection in a statute is construed with the other “in an attempt to produce a harmonious whole”).

As to other subsections in ORS 196.471 (1993), subsection (3) also refers to the “council” and, when considered together, subsections (1) to (3) produce a harmonious whole when the phrase “the plan or amendments” in subsection (1) is construed as referring to the specific, previously mentioned language in that sentence.

As to other related statutes, in context, enacted at the time of or before ORS 196.471 (1993), *see Stull v. Hoke*, 326 Or 72, 79-80, 948 P2d 722 (1997) (articulating context), another provision in ORS chapter 196 enacted in 1991 provided that OPAC “[p]repare a management plan for the territorial sea as described in ORS 196.471” and also “[r]ecommend amendments to the Oregon Ocean Resources Management Plan and Territorial Sea Plan as needed.” ORS 196.443(1)(a), (c) (1991).⁹

Also, ORS 196.471 (1993) was companion to a provision – ‘Sec. 15. Initial Territorial Sea Plan’ – that was *compiled as a note* in the Oregon Ocean Resources Management Act. (App-24). This provision, which was enacted in 1987 and amended by Oregon Laws 1991, chapter 501, section 19, provided that OPAC “adopt” the Territorial Sea Plan by July 1, 1994 and “submit” the plan to the commission “for adoption as part of the Oregon Coastal Management Program.”¹⁰

⁹ This provision was later amended by Oregon Laws 2003, chapter 744, section 9, and now provides, in part, that OPAC “[p]eriodically review the Territorial Sea Plan and submit recommendations for the plan to state agencies represented on the council” and also “[r]ecommend amendments to the Oregon Ocean Resources Management Plan as needed.” ORS 196.443(1)(a), (d).

¹⁰ The Oregon Ocean Resources Management Plan, which was adopted in 1990, *see* OAR 660-036-0010, had recommended establishing an Ocean Policy Advisory Council to prepare a plan to manage the state’s territorial sea. *See* testimony of Janet C. Neuman, Division of State Lands director, Senate Committee on Agriculture and Natural Resources, SB 162, Mar 25, 1991, Ex F, and House Committee on Water Policy, SB 162, May 9, 1991, Ex F (describing same). (App-25-28).

OPAC submitted the Territorial Sea Plan to the commission in 1994 for adoption as part of the Oregon Coastal Management Program. *See* OAR 660-036-0000 (Territorial Sea Plan).

Also consistent with subsection (1) of ORS 196.471 (1993), the Territorial Sea Plan outlined the role of OPAC in recommending amendments. Part One of the plan, subsection F.2. (Changing the Plan), notes that:

“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.”

Also in Part One of the plan, subsection F.2.e. (Council Approval and Submittal to LCDC), it further notes that:

“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.”

Further recognition of the role of OPAC in recommending such amendments is found in language establishing the Oregon Ocean Resources Management Program under ORS 196.425, which was established to further the purposes of the Act and has included OPAC, the Ocean Plan, and the Territorial Sea Plan as elements of the program since 1991. Or Laws 1991, ch 501, §§ 5, 8(2).

a. Particular intent in ORS 196.471 (1993) controls over general intent in ORS 183.333.

In interpreting ORS 196.471 (1993), the commission also contends that the use of rule advisory committees in ORS chapter 183 (the Oregon Administrative Procedures Act) is indication that the language in subsection (1) can pertain to amendments not necessarily recommended by OPAC, but rather by a rule advisory committee or DLCD. (ER-15).

ORS 183.333 provides generally for agencies to appoint rule advisory committees to assist agencies in drafting rules. Appointing a rule advisory committee is discretionary with an agency, ORS 183.333(1), although the agency would have to explain why no advisory committee was used. ORS 183.335(2)(b)(F).

The commission used a rule advisory committee, the Territorial Sea Plan Advisory Committee (“TSPAC”), in the rulemaking process for both the initial Part Five and amended Part Five. (ER-99-103). However, unlike ORS 183.333, which applies to agency rulemaking generally, ORS 196.471 (1993) applies specifically to rulemaking for the Territorial Sea Plan and also the Ocean Plan.

As part of context analysis, when a statute deals with a subject generally and another statute deals with the same subject more specifically, the particular statute controls over the general statute if the two cannot be

read together and harmonized. *Lewis v. CIGNA Ins. Co.*, 339 Or 342, 349-50, 121 P3d 1128 (2005); ORS 174.020(2). *Cf. Willamette University v. LCDC*, 45 Or App 355, 374, 608 P2d 1178 (1980) (statewide planning goals occupy preferred position because of statutory scheme with special adoption procedures over and above general rulemaking procedures in Oregon APA).

In this case, the use of TSPAC as a rule advisory committee under ORS 183.333 did not, in any way, conflict with the role of OPAC under ORS 196.471 (1993). Rather, for both the initial Part Five and amended Part Five, the use of TSPAC complemented the rulemaking process and the work done by OPAC in developing a recommendation under ORS 196.471 (1993).¹¹ (ER-122-133, ER-170).

However, to the extent that ORS 183.333 is interpreted in a way that either conflicts or is inconsistent with ORS 196.471 (1993) and the language in subsection (1) of the statute, then the particular intent in ORS 196.471 (1993) controls and “is paramount” to the more general intent in ORS 183.333. *See* ORS 174.020(2) (articulating rule of construction).

3. Adoption of amended Part Five was not consistent with language in ORS 196.471, as amended in 2013.

As noted previously, ORS 196.471 (1993) was amended by Oregon

¹¹ DLCD included audio-visual recordings of the TSPAC meetings in the judicial review record, but not the OPAC meetings, which petitioners raised as an objection during the process to correct and amend the judicial review record.

Laws 2013, chapter 416, section 1, which took effect on June 13, 2013. (App-21). And as explained in the legislative history, the 2013 amendment was a legislative response to the action taken by the commission on January 24, 2013, approving amended Part Five of the Territorial Sea Plan. Staff Measure Summary, Senate Committee on Rural Communities & Economic Development, SB 605-A, Apr 9, 2013; Staff Measure Summary, House Committee on Energy & Environment, SB 605-B, May 17, 2013. (App-22-23). *See Robert Camel Contracting, Inc. v. Krautscheid*, 205 Or App 498, 503-04, 134 P3d 1065 (2006) (use of staff measure summaries when considering legislative history).

The 2013 amendment reiterated existing language in the first sentence of subsection (1) of the statute, consistent with the text and context analysis used in construing that provision, as set forth above. The 2013 amendment also provided timelines under new subsections (3)(b) and (c). (App-21).

Notably, though, and relevant to this petition for judicial review, the 2013 amendment took effect before the commission completed its findings and adopted OAR 660-036-0005 by order dated October 7, 2013 (ER-3-30), and also before the rule became effective upon filing with the Secretary of State that same day. (ER-1-2). *See* ORS 183.355(2), (5) (rule not valid or effective until filed with Secretary of State). Accordingly, the adoption of

OAR 660-036-0005 not only contravened ORS 196.471 (1993), it contravened ORS 196.471, as amended in 2013, as well.

CONCLUSION

The commission exceeded its statutory authority and failed to comply with applicable rulemaking procedures. The commission contravened ORS 196.471 (1993) and also ORS 196.471, as amended in 2013. Accordingly, petitioners respectfully request that the court invalidate OAR 660-036-0005.

Dated this 25th day of August, 2015.

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REQUEST FOR COSTS AND ATTORNEY FEES

As noted on page 7 of the petition for judicial review, petitioners request an award of costs and reasonable attorney fees under ORS 183.497.

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Secretary of State
Certificate and Order for Filing
PERMANENT ADMINISTRATIVE RULES

Justify that the attached copies are true, full and correct copies of the PERMANENT Rule(s) adopted on 01/24/2013 by the

Land Conservation and Development Department

660

Agency and Division

Administrative Rules Chapter Number

Casaria Taylor

(503) 373-0050, ext. 322

Rules Coordinator

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Address

To become effective Upon filing, Rulemaking Notice was published in the January 2013 Oregon Bulletin.

RULE CAPTION

Designate areas and establish regulatory standards for marine renewable energy development within the territorial sea.

Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

RULEMAKING ACTION

Secure approval of new rule numbers with the Administrative Rules Unit prior to filing.

ADOPT:

AMEND:

660-036-0005

REPEAL:

RENUMBER:

AMEND AND RENUMBER:

Statutory Authority:

ORS 197.040

Other Authority:

Statewide Planning Goal 19 (OAR 660-015-0010(4))

Statutes Implemented:

ORS 196.471

RULE SUMMARY

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 Part Five: Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities, that the Commission approved as modified on January 24, 2013.

FILED
10-7-13 3:12 PM
ARCHIVES DIVISION
SECRETARY OF STATE

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660-036-0005

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

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 Part Five: Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities, that the Commission approved as modified on January 24, 2013.

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

Stat. Auth.: ORS 197.040

Stats. Implemented: ORS 196.471

Hist:

BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF AMENDING)
OAR 660-036-0005, PART FIVE OF) ORDER 13-OCMP-001842
THE TERRITORIAL SEA PLAN)

The Matter of Amending the Oregon Territorial Sea Plan *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities*, OAR 660-036-0005, came before the Land Conservation and Development Commission pursuant to ORS 196.471(1) and 197.040(1)(c) on January 24, 2013. In amending Part Five of the Territorial Sea Plan, the Commission fully considered the recommendations of the Territorial Sea Plan Advisory Committee (TSPAC) and the Ocean Policy Advisory Council (OPAC), the report and recommendation of the Department of Land Conservation and Development (Department), and the oral and written testimony of the public.

Background and Procedural History

On March 26, 2008, the Federal Energy Regulatory Commission (FERC) and the State of Oregon entered into a Memorandum of Understanding to coordinate the procedures and schedules for review of wave energy projects in the Territorial Sea of Oregon.¹

On March 26, 2008, by Executive Order No. 08-07, Governor Kulongoski *inter alia* ordered the Department to seek OPAC recommendations concerning appropriate amendments to the Territorial Sea Plan, reflecting comprehensive plan provisions on wave energy siting projects.

On May 22, 2008, OPAC established the Territorial Sea Plan Working Group (TSPWG).

On October 16, 2008, the Commission initiated rulemaking and authorized the Department to form a rule advisory committee, TSPAC, as provided in ORS 183.333(1).

On December 5, 2008, the Commission appointed TSPAC. Although OPAC had created TSPWG, a Territorial Sea Plan work group comprised of OPAC members, the Commission formed TSPAC pursuant to ORS 183.333 and as a means of engaging a broader spectrum of interests. This was done by inviting representatives of key organizations or interests in addition to those statutorily represented on OPAC under ORS 196.438(1). TSPAC membership ultimately included representatives of OPAC, coastal cities, coastal counties, coastal special districts, and Oregon tribes consistent with ORS 182.164(3), five state agencies, two state commodity commissions, recreational and charter fishing interests, two coastal local advisory committees, the marine renewable energy industry, coastal conservation interest, ocean environmental interests, ocean recreation interests, coastal utilities, and electric utilities. TSPWG and TSPAC worked closely together and shared some membership.

¹ The State of Oregon entered into the Memorandum of Understanding by and through the Department, the Oregon Department of Fish and Wildlife, Department of Environmental Quality, Department of State Lands, Water Resources Department, Oregon Parks and Recreation Department, and Department of Energy.

On September 14, 2009, the Department filed a Notice of Proposed Rulemaking Hearing, Statement of Need and Fiscal Impact, and Housing Cost Impact Statement with the Secretary of State.

On October 23, 2009, OPAC recommended an amendment to the text of 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*.

On November 5, 2009, the Commission reviewed the OPAC recommendation, along with the recommendation of the Department and adopted *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* as a new rule, OAR 660-036-0005. Part Five provided the policies, procedures, standards and operational requirements for siting and developing renewable energy facilities. Part Five did not designate specific locations in the territorial sea for that type of new use, however paragraph B(1)(a) addressed the siting of areas designated for renewable energy facilities development in state waters by referencing the maps to be subsequently incorporated into the plan. The plan amendment did not include a spatial map of the territorial sea that delineated marine resources and uses or identified areas where marine renewable energy may be located.

On November 25, 2009, the Department filed *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* as OAR 660-036-0005 with the Secretary of State, and it became effective that day pursuant to ORS 183.355(2).

On January 25, 2010, OPAC continued the Part Five amendment effort by discussing a process for TSPWG to draft amendments through an intensive public participation and review process using marine spatial planning methods for collecting and assimilating data and information.² TSPWG met three times in early 2011, and participated in a series of eight public workshops in the spring and summer of 2011 to review the data and information for use in developing a plan map and resource inventory, as well as the basic framework for the plan amendment.

On April 22, 2010, the Commission appointed replacement members to TSPAC for representatives of the wave energy industry, the Oregon Wave Energy Trust, and the Oregon Department of Energy for TSPAC meetings to consider the spatial analysis component of the territorial sea planning process.

On September 20-21, 2011, the Oregon Department of Fish and Wildlife (ODFW) Marine Division conducted the “Ecological Atlas Science Workshop” where science experts reviewed the ecological resource data and information being used for the territorial sea planning process.

² Agenda Item 2, Attachment C – “Public Review Process and Public Comment Summary Report” of the Commission’s January 24, 2013 meeting materials provides a listing of public meetings related to the Part Five amendment process.

On December 16, 2011, OPAC approved a second series of eleven public work sessions to distribute the draft plan maps and information and collect public comment.

On April 9, 2012, OPAC reviewed and approved TSPWG's general recommendations for amending Part Five, supporting a basic framework of four zones and two overlays, and a glossary describing the basic objectives of each zone and overlay. Oregon Parks and Recreation Department (OPRD) presented the Visual Impact Assessment Analysis methodology. OPAC asserted that the fisheries data, recreational use details, STAC recommendations, and Part 5 text revisions needed to be addressed and recommended that TSPAC create subcommittees to work on these issues.

On May 8, 2012, TSPAC resumed its Part Five review based on the OPAC recommendations and specific request; and held a series of TSPWG public review work sessions that resulted in drafts of Part Five, resource and use inventory maps, and a plan methodology. Based on the OPAC suggestions, TSPAC organized itself into five subcommittees to work separately on fisheries, ecological, recreational, visual resources, and the text of Part Five. Other areas of concern that OPAC asked the TSPAC to address included the aesthetic and recreational resources inventory overlays, stakeholder participation in the Joint Agency Review Team (JART) process, phased development and test sites, and the mechanism for incorporating the maps, standards and review criteria into Part Five.

On October 16, 2012, the Department filed an amended Notice of Proposed Rulemaking Hearing, Statement of Need and Fiscal Impact, and Housing Cost Impact Statement with the Secretary of State.

On November 16, 2012, TSPAC met to form its recommendations to the Commission. In four meetings in the summer and fall of 2012, TSPAC had reviewed and recommended modifications to draft Part Five text and map documents. The five TSPAC subcommittees conducted a total of 22 public meetings during this period to formulate suggested revisions to the text of Part Five and the map information for each of the resources and uses. TSPAC met four times to consider these proposed revisions and used them in compiling their final draft recommendation for amending Part Five.

On November 15, 2012, the Commission held a public hearing.

On December 4, 2012, OPAC met and heard presentations on the work of TSPAC.

On December 6, 2012, TSPAC met and forwarded their final recommendation to the Commission and provided it to OPAC.

On December 14, 2012, the Department filed an amended Notice of Proposed Rulemaking Hearing, Statement of Need and Fiscal Impact, and Housing Cost Impact Statement with the Secretary of State.

On January 3-4, 2013, OPAC met and agreed to provide the entire results of the meeting to the Commission as its recommendation on the Part Five amendments.

On January 22, 2013, the Commission's hearings officer held a hearing at the Newport Public Library.

On January 23, 2013, Commission held a public hearing and then adopted amendments to *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities*, OAR 660-036-0005, establishing standards applicable to state agency review of marine renewable energy facilities and incorporating maps that designate specific marine resources and use areas within the territorial sea.

Authority

The Commission reviews amendments to the Territorial Sea Plan recommended by OPAC and makes findings whether the amendments carry out the policies of ORS 196.405 to 196.515, and are consistent with applicable statewide planning goals, with emphasis on the four coastal goals.³ The Commission has statutory authority to "Perform other functions required to carry out ORS chapters 195, 196, and 197." ORS 197.045(4). The Commission has authority to adopt rules to carry out ORS chapter 196. ORS 197.040(1)(b). The Commission also has statutory authority to direct the performance of the Department for the functions under ORS chapters 195, 196, and 197, including the director's authority to coordinate the Department's land conservation and development functions with "federal agencies, other state agencies, local governments and special districts." ORS 197.090(1)(b).

Findings

The Oregon Ocean Resources Management Act (ORS 196.405 to ORS 196.515)

Pursuant to ORS 196.471(1)(a), the Commission reviews these amendments to determine whether they "carry out" the policies of the Oregon Ocean Resources Management Act, ORS

³ ORS 196.471 provides:

"(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."

196.405 to ORS 196.515. As used in ORS 196.471(1)(a), “carry out” is a transitive verb that the Commission understands to mean “to put into execution” the policies. The Commission recognizes that not all statutes in ORS 196.405 to ORS 196.515 provide ocean management policy. Further, because Part Five is a component of the Territorial Sea Plan which, as adopted in OAR 660-036-0000, OAR 660-036-0003, OAR 660-036-0004, and OAR 660-036-0005, collectively, carries out the policies of the Oregon Ocean Resources Management Act, in adopting amendments to OAR 660-036-0005, the Commission only considers those policies of the Act that are applicable to Part Five. The Commission specifically identifies the following statutory policies as having some application to *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities*: ORS 196.408(3), ORS 196.410; ORS 196.415, ORS 196.420, ORS 196.425, ORS 196.435, ORS 196.443, ORS 196.451, ORS 196.455, and ORS 196.471.

ORS 196.408(3)

ORS 196.408(3) authorizes state agencies to *inter alia* coordinate with federal agencies to manage use and activities of ocean areas adjacent to coastal cliffs and offshore rocks and islands managed within the National Wildlife Refuge System.⁴ The Commission finds that Appendix B “Beneficial Uses Resource Inventory – National Wildlife Refuges” identifies the ocean areas adjacent to coastal cliffs and offshore rocks and islands managed within the National Wildlife Refuge System and delineates such areas as a Goal 19 resource. *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* generally treats the areas within the territorial sea that are adjacent to rocky coastal cliffs, offshore rocks and islands as Important, Significant or Unique (ISU) resources and protects them as such.

ORS 196.410

ORS 196.410 provides the legislative findings for offshore oil and gas leasing.⁵ After detailing the nature of the territorial sea and its uses; the policy concludes, “Oregon is unwilling

⁴ ORS 196.408(3) provides:

“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.”

⁵ ORS 196.410 provides:

“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.

to risk damaging sensitive marine environments or to sacrifice environmental quality to develop offshore oil and gas resources.” The Commission finds that the Part Five amendments, although not specifically intended to carry out this policy, are nevertheless consistent with it because nothing in Part Five provides for development of offshore oil and gas resources.

ORS 196.415 and ORS 196.420

ORS 196.415 provides the legislative findings for ocean resources management.⁶ ORS 196.420 provides the policies that are based on those legislative findings. As such, ORS 196.415 provides the context to understand ORS 196.420. The Commission finds that amendments to

“(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.”

⁶ ORS 196.415, entitled “Legislative findings for ocean resources management” provides:

“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.”

Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities carry out the policy of the State of Oregon provided in ORS 196.420.

The first policy, ORS 196.420(1), provides what the state will do, where it will do it, and how it will do so. The state will “[c]onserve the long-term values, benefits and natural resources of the ocean.” The state will do so “both within the state and beyond.” And the state will do so “by giving clear priority to the proper management and protection of renewable resources over nonrenewable resources.”

In determining whether Part Five carries out ORS 196.420(1), the Commission first determines whether marine renewable energy constitutes a “renewable” or a “nonrenewable resource” for purposes of the policy expressed in ORS 196.420(1) of giving priority to proper management and protection of renewable resources. Although the Commission determines that marine renewable energy is not a “renewable resource” as that term is used in ORS 196.420(1), the Commission also determines that marine renewable energy (*e.g.* wind, wave, current, thermal, etc.) is not a “*nonrenewable* resource” as that term is used in ORS 196.420(1). The Commission’s determinations are informed by Goal 19, which makes a distinction between “renewable *marine* resources” (*e.g.* “living marine organisms”) and non-renewable ocean resources. Clearly, wind, wave and other forms of marine renewable energy are not “living marine organisms” but, just as clearly, they also are not “non-renewable” ocean resources in the ordinary meaning of those words, and as the legislature intended in ORS 196.420(1). In other words, the policy preference expressed by the legislature in ORS 196.420(1) does not apply directly in the context of marine renewable energy, because this category of resources is neither nonrenewable nor renewable in the specific senses that those terms are used in the statutes and related administrative provisions of the Commission.

At the same time, the Commission believes that the more general policy direction in the first clause in ORS 196.420(1), namely to “[c]onserve the long-term values, benefits and natural resources of the ocean both within the state and beyond * * *” is captured in both Goal 19 and the other legislative acts. *See*, particularly, ORS 196.415(1) and (2). The Commission’s intent in adopting Part Five is 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. Part Five limits the total amount of area within the territorial sea that may be developed or committed for renewable energy facilities, both on a statewide and an area basis. *See* subparagraph B(4)(g)(7). It also limits the areas that may in the future be designated as Renewable Energy Facility Suitability Study Areas (REFSSAs) to no more than five percent of the territorial sea. The REFSSA designations adopted herein occupy less than two percent of the territorial sea, as shown in the plan map in Appendix B. Throughout the territorial sea, Part Five applies the special resource and use standards of paragraph B(4)(g) to conserve ocean resources and protect uses. The legislative findings of ORS 196.415(1) regarding the importance of the Pacific Ocean and its many resources identify environmental, economic, aesthetic, and recreational as important to the state. Part Five prescribes standards for protections of those resources: environmental resources – Ecological Resources Protection Standards, subparagraph B(4)(g)(3); economic resources – Fisheries Use Protection Standards, subparagraph B(4)(g)(2) and Proprietary Use and Management Areas, subparagraph B(4)(g)(6); aesthetic resources –

Visual Resources Protection Standards, subparagraph B(4)(g)(5); and recreational resources – Recreational Resource Standards, subparagraph B(4)(g)(4).

The Commission finds that Part Five applies “both within the state and beyond” to the extent allowed by law. The Implementation Requirements of section B provide how they pertain to both state waters and federal waters. Paragraphs B(1)(a) and (b).

Finally, the Commission finds that Part Five is structured to carry out the policy of ORS 196.420(1) on the whole. The Part Five Policies in paragraphs A(2)(a-f), provide for marine renewable energy development to occur as a beneficial use of the territorial sea, so long as that development is carried out in a manner consistent with Goal 19, and so long as the development occurs in a manner that protects and is compatible with other marine resources and uses of the territorial sea.

The state has established a policy to “Encourage ocean resources development which is environmentally sound and economically beneficial to adjacent local governments and to the state.” ORS 196.420(2). The Commission finds that Part Five is intended to carry out the policy of ORS 196.420(2), as expressed in the preface to Part Five:

“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.”

This intent is carried out by requiring the proper siting and development of renewable energy facilities. Subsection A(1). Part Five also establishes state policy to encourage research and responsible development of ocean-based renewable energy sources that “meet the state’s need for economic and affordable sources of renewable ocean energy.” Paragraph A(2)(f). To enable adjacent local governments to advocate for economic beneficial development, Part Five allows local jurisdiction representatives, including those from affected cities, counties and port districts, to be represented on the JART. Subparagraph B(3)(a)(3). Further, to encourage development of this ocean resource, Part Five provides for review triggers to allow OPAC and the Commission to amend Part Five, including the maps, to integrate new data and information and to reflect new understandings of the renewable energy industry and the needs of that industry. Section F. The Commission finds that these aspects of Part Five are in furtherance of both the policy in ORS 196.420(2) and the direction set by the governor. Executive Order No 08-07 directs the adoption of Part Five to “further protect coastal communities” in Oregon’s collaboration with FERC on the siting of marine renewable energy facilities by identifying in a comprehensive plan “appropriate locations for future wave energy projects that minimize adverse impacts to existing ocean resource and resource users.” FERC and the state will use license and permit conditions to “optimally site wave energy facilities to mitigate the impacts of projects on coastal communities.” *Ibid.*

The Commission finds that Part Five also carries out the policy of ORS 196.420(3), namely to “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.” Part Five, paragraph B(1)(b) of the Territorial Sea Plan reiterates the partner relationship between the state and federal agencies that is provided for under Plan Implementation, Part One, section F with respect to activities that are authorized in federal waters. The legislative findings in ORS 196.415(4), identify federal laws that recognize the state’s interest “in management of ocean resources in federal waters and provide for state participation in ocean resources management decisions” and further 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.” The legislature also recognized that the state has an opportunity to “to more fully exercise and assert their responsibilities pertaining to the protection, conservation and development of ocean resources under United States jurisdiction.” ORS 196.415(5). Most specifically, ORS 196.415(6) provides legislative finding that are carried out by the Commission’s adoption of Part Five:

“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.”

The Commission is insuring effective state participation in federal agency management of ocean resources through Part Five. The Department, as the primary state agency for the purposes of carrying out the Coastal Zone Management Act of 1972 under ORS 196.435, will submit the *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* amendments pursuant to ORS 196.471(2) to the National Oceanic and Atmospheric Administration (NOAA) Office of Ocean and Coastal Resource Management (OCRM) for inclusion in the federally approved Oregon Coastal Management Program (OCMP). Once approved by OCRM, federal agencies undertaking management actions in or affecting Oregon’s territorial sea will have to make consistency determinations for their actions, including FERC siting decisions. In addition, the Department will submit the Oregon Territorial Sea Plan directly to the FERC as a comprehensive plan, as provided for by the Section 10(a) of the Federal Power Act and as contemplated in the March 26, 2008 Memorandum of Understanding between the State of Oregon and FERC. These actions will provide the state with the ability to guide the siting of marine renewable energy projects under FERC jurisdiction, an ability that the state would otherwise not have except through the general provisions of the Territorial Sea Plan. For these reasons, the Commission finds that Part Five carries out the policy expressed in ORS 196.420(3) that are based on the legislative findings in ORS 196.415.

The Commission finds that Part Five also carries out the policy of ORS 196.420(4), namely to “[e]ncourage research, study and understanding of ocean processes, marine life and other ocean resources” and the policy of ORS 196.420(5), to “[e]ncourage research and development of new, innovative marine technologies to study and utilize ocean resources.”

Those policies follow in part from the finding in ORS 196.415(7) that notes “additional study and research is required to gain information and understanding necessary for sound ocean planning and management.” The policies in Part Five, subsection A(2) contains several provisions that carry out those statutory policies. Part Five, paragraph A(2)(e) will “[l]imit the potential for unanticipated adverse impacts by requiring, when resource inventory and effects information is insufficient, 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.” Part Five, paragraph A(2) (f) provides a policy to “encourage 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 energy”. In addition, Part Five, paragraph B(4)(f) provides for the opportunity to require the use of Pilot and Phased Development Project as a mechanism for obtaining sufficient information and data to support the authorization of a marine renewable energy project. The Commission concludes that Part Five carries out the policies in ORS 196.420(4) and (5).

The Commission finds that Part Five also carries out the policy of ORS 196.420(6), namely to “[e]nsure 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.” Part Five, paragraph A(2)(d) provides a policy to “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”. Part Five Paragraph B(3)(a)(3) designates “representatives from affected cities, counties, and their affected communities, and affected port districts” as “local jurisdictions” that are consulted as members of the JART that the Department of State Lands will convene to provide recommendations on an application for a permit or lease authorization related to a marine renewable energy project. Further, the Commission finds that in the multi-year process of preparing Part Five, OPAC worked “closely with coastal local governments to incorporate * * * coastal local government and resident concerns, coastal economic sustainability and expertise of coastal residents.” As summarized in the Background and Procedural History section of this order and in the document referenced in footnote 2, OPAC and its TSPWG engaged in sustained effort to work closely with coastal local governments and coastal residents in preparing these Part Five amendment recommendations.

ORS 196.425

ORS 196.425 establishes a program of ocean resource planning and management.⁷ The Commission finds that incorporation of *Part Five: Uses of the Territorial Sea for the*

⁷ ORS 196.425 provides:

“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

Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities as an amendment to the Territorial Sea Plan described in ORS 196.425(4) carries out the policy of ORS 196.425 to “ensure the conservation and development of ocean resources affecting Oregon consistent with the purposes of ORS 196.405 to 196.515” by establishing standards applicable to state agency review of marine renewable energy facilities and incorporating maps that designate specific marine resources and use areas within the territorial sea.

ORS 196.435

ORS 196.435 designates the Department as the primary agency for coordination of ocean planning and tasks it with *inter alia* assisting both the Governor in responding to federal activities affecting coastal and ocean resources and OPAC. ORS 196.435(1)(a) and (b). The Commission finds that adoption of the *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* as an amendment to the Territorial Sea Plan carries out the policies of ORS 196.435. First, the Governor ordered the Department to seek OPAC recommendations concerning appropriate amendments to the Territorial Sea Plan, reflecting comprehensive plan provisions on wave energy siting projects. Executive Order No. 08-07. The Governor required the Department’s assistance in carrying out the March 26, 2008 Memorandum of Understanding with FERC to coordinate the procedures and schedules for review of wave energy projects in the Territorial Sea of Oregon. Throughout the process, the Commission finds the Department provided assistance to OPAC in developing the recommended amendments.

ORS 196.443

ORS 196.443 describes the duties of OPAC, providing in part:

“(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. * * *

“* * *

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.”

“(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. * * *

As set forth above, in the procedural history for this rulemaking, OPAC has reviewed Part Five of the TSP, and submitted recommendations to the Commission, along with the Commission’s rulemaking advisory committee (TSPAC). OPAC’s review of Part Five provided a forum for discussing policy, planning and management issues associated with marine renewable energy, and OPAC’s work narrowed the areas of disagreement substantially. Finally, OPAC made recommendations to the Commission concerning Part Five, and these recommendations were (with very limited exceptions) adopted by the Commission. The Commission finds that *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* amendments carry out the policy of ORS 196.443.

ORS 196.451

ORS 196.451 requires OPAC to establish a permanent scientific and technical advisory committee to aid and advise OPAC in the performance of its functions which includes recommendations regarding the Territorial Sea Plan under ORS 196.443(1)(a). The Commission finds that OPAC has established its Scientific and Technical Advisory Committee (STAC) required by ORS 196.451. The Commission further finds that OPAC carried out the policy of ORS 196.451 by requesting that STAC review the data sets and information used in Oregon Marine Map for the Territorial Sea Plan amendments. In particular, OPAC asked STAC to review the (1) Nearshore Ecological Data Atlas (NEDA) and (2) the Fishing Grounds maps. STAC prepared its “Preliminary Evaluation of Oregon Marine Map Data and Information” report dated June 20, 2012. The Commission concludes that STAC evaluated the information regarding the spatial delineation of Goal 19 resources within the territorial sea that provided the factual basis for Part Five and that comprise Appendix B.

ORS 196.455

In order to insure that *inter alia* the Territorial Sea Plan is coordinated with federal agency programs for coastal and ocean resources, ORS 196.455 authorizes OPAC to invite federal agencies “with responsibility for the study and management of ocean resources or regulation of ocean activities” to attend OPAC meetings and “review draft plan materials” prepared by OPAC. Pursuant to this statutory authority, OPAC has a Federal Liaison, created to improve communications between the council and federal agencies with ocean responsibilities. The OPAC federal liaison was the NOAA OCRM Programs Specialist for Oregon, who, along with other NOAA program and legal staff, coordinated closely with the TSPWG and TSPAC Part Five work group on the formulation of the Part Five text. The involvement of NOAA OCRM in the review of draft plan materials and participation on OPAC with regard to identifying those elements of Part Five that can be approved as an enforceable policy for purposes of CZMA review directly lead to Part Five, Appendix C: Enforceable Policies Subject to Federal Consistency. In addition, representatives from NOAA Fisheries; US Coast Guard,

Bureau of Ocean Energy Management (BOEM), US Army Corps of Engineers, FERC, and US Environmental Protection Agency attended and participated in both the OPAC meetings and TSPAC meetings throughout their processes.

ORS 196.471 and ORS chapter 183

ORS 196.471(1) requires the Commission to “review the Territorial Sea Plan and any subsequent amendments recommended by the Ocean Policy Advisory Council * * *” and make certain findings concerning the recommended amendments. Under section (3) of the statute “[i]f 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.” The Commission received testimony construing ORS 196.471 to mean that only OPAC may make recommendations for amendments to the Territorial Sea Plan, and that if the recommendations are not adopted verbatim, then the Commission must return the proposal to OPAC, presumably for revision.

ORS 196.471 does not provide that OPAC has the exclusive authority to propose amendments to the Territorial Sea Plan. Further, ORS 196.471 must be read in conjunction with ORS 197.040, which (as noted above) requires the Commission to adopt its rules in accordance with ORS chapter 183 (the Oregon Administrative Procedures Act). ORS 183.333 and 183.355 together, provide strong policy direction to agencies to utilize rule advisory committees for certain specific purposes, including preparation of impact statements. The Commission harmonizes ORS 196.471 and the requirements of ORS chapter 183 for rulemaking (the Territorial Sea Plan is adopted as a rule) by using both OPAC and its rule advisory committee, TSPAC. The Commission considers OPAC’s recommendations, as required by ORS 196.471, along with recommendations from its rule advisory committee and the Department. *If*, the Commission is unable to make the findings with regard to the OPAC recommendations, as set forth in ORS 196.471, then the Commission is obligated to return OPAC’s recommendations to that body. That is not what happened in this rulemaking, however.

Here, the Commission was presented with recommendations from OPAC, TSPAC and the Department that coincided in almost all respects. Where the recommendations differed was concerning two of the areas the Commission designated as REFSSAs. In the case of these two areas, the Commission could have made the findings required by ORS 196.471 with regard to OPAC’s recommendations, but it also could do so with regard to the TSPAC and Department recommendations, which differed from OPAC’s. In this circumstance, the Commission had the ultimate responsibility to decide which recommendation or combination of recommendations to follow. As a policy matter, the Commission gave great weight to the OPAC recommendations, and it added certain conditions and provisions to its action reflecting OPAC’s concerns. ORS 196.471 does not shift rulemaking authority and responsibility from the Commission to OPAC. The Commission retains the authority to make the final decision regarding what best carries out the applicable statutory policies and is consistent with Goal 19. That is what the Commission did in this case. The following narrative explains, in more detail, how the Commission considered the OPAC recommendations, and how those recommendations differed from the Commission’s final action.

Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities as adopted by the Commission is, for the most part, consistent with the revisions recommended by OPAC. The final version of Part Five reflects changes incorporated through the efforts of the subcommittees that OPAC created to work on specific topical areas including fisheries, ecological, recreation, visual and Part Five policies. These working groups formulated and reviewed the text that became the Part Five document which was distributed for public review and considered by the Commission. In that manner, most of the revisions that OPAC recommended were incorporated into the draft plan document through an iterative public review process that occurred over a period of two years and involved several rounds of public meetings, review and comment. The revisions to the Part Five policies, JART process, pilot and phase development requirements, resource and use standards, application process and operational plan requirements, had all been incorporated into the draft plan that OPAC eventually forwarded to this Commission. Those changes to Part Five were all achieved through the OPAC process and constituted the major part of the revisions to that OPAC recommended. The final OPAC recommendations to the Commission, in the form of a letter to LCDC Chair Worrix dated January 22, 2012, states that “There is general agreement among OPAC, TSPAC and DLCD staff as to much of the work product now before LCDC for consideration.”

The final OPAC recommendation does differ with the plan adopted by the Commission in several instances related to the inclusion or definition of specific text, and in the selection and delineation of two REFSSA sites in the Plan Map and Area Designations. The Commission considered implementation of Goal 19 in resolving those differences in adopting Part Five.

OPAC recommended that the plan not include specific buffer distances for the ISU identified under Part Five, subparagraph B(4)(g)(3)(a)(iv), but rather rely on ODFW to determine these distances on a case by case basis. ODFW recommended the use of specific buffers for selected habitat areas where it could be supported by the current scientific consensus. The plan incorporates those buffers for rock reef habitat and seabird nesting colonies. Applying the buffers ensures the protection of important marine habitat that is “especially vulnerable because of size, composition, or location in relation to chemical or other pollutants, noise, physical disturbance, alteration” as required by Goal 19, Implementation Requirement 1(3)(e), or are “unique or limited range within the state” under Goal 19, Implementation Requirement 1(3)(f). Testimony provided to the Commission raised concern that the buffers applied to fisheries activities. Under Part Five the ISU protection buffers are “intended to provide adequate room for species foraging or other activities, or protection of the ISU resource from disturbance from *a renewable energy facility* while allowing existing beneficial uses.” Part Five, subparagraph B(4)(g)(3)(a)(iv) (emphasis added). The Commission finds that Part Five is clear that the application of buffers under Part Five is limited to locating a renewable energy facility.

OPAC recommended that text be added to the description of the JART process to make it “inclusive, especially [of] people in the impacted area”. The Department, in consultation with legal staff and the Department of State Lands (DSL), determined that the OPAC description of “people in the impacted area” was imprecise and did not afford DSL clarity necessary to convene the JART. This is not a matter of whether the findings required by ORS 196.471 can be made, rather it is a practical question of whether the OPAC language would be administratively

feasible. Part Five does not include that text. Instead Part Five expands the membership of the JART under subparagraph B(3)(a)(4) to include “Statewide and local organizations and advisory committees – including but not limited to those addressing areas important to fisheries, ecological resources, recreation and visual impacts”. To address the OPAC concern that the JART might not adequately represent “people of the impacted area,” subparagraph B(3)(a)(3) allows DSL, when inviting representatives of local jurisdictions, to specifically invite such representatives to be from “affected communities.” The Commission finds that in substance Part Five provides for appropriate representation on JART.

In the Proprietary Use and Management Area (PUMA) of Part Five, Appendix B, OPAC recommended that regulating agencies only accept renewable energy facility applications that have “been agreed to by the authorized users.” While this OPAC recommendation did not conflict with either ORS 196.405 to ORS 196.515 or Goal 19, under advice of counsel, the Commission approved different language than OPAC recommended in PUMA standards. The OPAC recommended provision created a potential delegation of authority issue under the Delegation Clause under Article I, section 21 of the Oregon Constitution. Article I, section 21 provides in relevant part that no law shall be passed “the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution * * *.” In *Cosner v. Umatilla County*, 65 Or LUBA __ (2012), the Land Use Board of Appeals determined that a county could not delegate decision on permit issuance to landowner agreeing to a reduced setback requirement. Likewise, Part Five cannot delegate to “authorized users” whether regulating agencies may accept renewable energy facility applications in the Proprietary Use and Management Area.

OPAC recommended as a policy that REFSSA sites provide for flexible siting to allow project developers and local stakeholders to collaborate on the micro-siting of a project within a larger planning area. However, the Commission received testimony that the sites that OPAC recommended as REFSSA, were not, as a matter of fact, large enough to allow for micro-siting consistent with the policy OPAC agreed on. OPAC also recommended that Part Five, Appendix B designate no more than five percent of the total area of the territorial sea as REFSSA, and that renewable energy facility development be limited to a total area not to exceed two percent of the territorial sea. However, the three sites that OPAC recommended as REFSSA amounted to approximately one percent of the total territorial sea area, one-fifth the size of the proposed cap, and too small and too few to provide adequate opportunity for testing or development of most marine renewable technologies. In this respect, the issue with the OPAC recommendations was not that they do not carry out the policies in ORS 196.405 to 196.505, but that they were so protective of marine renewable resources that they did not, in the Commission’s view, provide a sufficient (but limited) opportunity for marine renewable *energy* resources within the territorial sea. Under the circumstances, the Commission favored implementation of the flexible siting policy while implementing the OPAC recommendations for limitations on the amount of area designated REFSSA and the total areas of renewable energy facility development.

The Part Five, Appendix B Plan Map and Area Designations that the Commission adopts are predicated on the Goal 19 Implementation Requirements for protecting resources and uses, while encouraging marine renewable energy as a beneficial use of ocean resources. When considered in conjunction with Special Resources and Uses Review Standards provided under

Part Five, paragraph B(4)(g), the size and distribution of the different plan areas provide a very high level of protection. The Commission, in consultation with ODFW, determined that the application of the general fisheries and ecological review standards in paragraph B(4)(g), and the required consultations between the project developer, state agencies, local fishing and port interests, that are required by the plan in A(2)(a-f) are sufficient to ensure that marine resources will be protected in a manner consistent with the Goal 19 Implementation Requirements, and that the Part Five amendments will “maintain and, where appropriate, restore the long-term benefits derived from renewable marine resources; [and] protect * * *” the resources protected under Goal 19.

The Part Five, Appendix B Plan Map results in areas that comprise the following size and percent of the total territorial sea, which measures 1260 sq. miles in total. The Resources and Uses Conservation Areas (RUCA) comprise 900 sq. miles or 72 percent. Marine renewable energy development in this portion of the territorial sea would need to navigate the very stringent standards in Part Five. The Resources and Uses Management Areas (RUMA) comprise 137 sq. miles or 11 percent. In areas designated RUMA, renewable energy facility development must establish on a site and project specific showing that Goal 19 resources are fully protected. The Renewable Energy Exclusion Areas (REEA) comprise 130 sq. miles or 10 percent. These areas consist of the state’s Marine Reserve system and a series of federally permitted offshore dredge material disposal sites, where no renewable energy development may occur. The Proprietary Use Management Areas (PUMA) comprise 68 sq. miles or five percent. These areas consist of sites for which there are existing authorizations for other uses such as fiber optic cable landings, outfalls, navigation channels, and scientific facilities, in addition to areas that are owned or managed by state or federal agencies. Renewable energy development in the PUMA is subject to the approval of the authorizing or managing agency through consultation with the authorized user. The REFSSA comprise 22 sq. miles or less than two percent. These are the areas where the state is acting to guide renewable energy projects to locate. They are the areas of least conflict, or conflict that is most likely to be mitigated, through a project-specific siting process. The Renewable Energy Permit Areas (REPA) consisting of only 2 sq. miles or less than one percent, are areas that already hold state and federal permits for development of marine renewable energy, at the Ocean Power Technology 10 buoy project site off of Reedsport and the Oregon State University Northwest National Marine Renewable Energy Center (NNMREC) site off of Newport.

The OPAC REFSSA site recommendations also would achieve a high level of protection for resources and uses, and specifically the protection of marine renewable resources over marine renewable energy development. They carry out the policies of ORS 196.415 and 196.420. However, the OPAC REFSSA site recommendations would limit the areas where marine renewable energy projects could site to an extent that is more protective than required by the applicable statutes and Goal 19. As a result, the Commission had the discretion to expand the REFSSA areas on a limited basis, so long as it could still make the findings required by ORS 196.471.

The Part Five Plan Map and Area Designations, as adopted, achieve the Goal 19 policy of “conserving marine resources and ecological functions for the purpose of providing for long-term ecological, economic, and social value and benefits”. Further, it is consistent with the

objectives of ORS 196.420(1) and ORS 196.420(5) as these clauses relate to the use of marine resources for environmentally sound and economically beneficial use of marine resources, and the development of new, innovative marine technologies.

Statewide Planning Goal 2 Land Use Planning (OAR 660-015-0000(2))

Under ORS 183.335(13), the Commission's adoption of *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* does not need to be based upon or supported by an evidentiary record. Nevertheless, to the extent that ORS 196.471(1)(b) requires the Commission to determine consistency with Goal 2, the Commission considers whether there is an adequate factual basis for Part Five. Generally, the Goal 2 requirement for an adequate factual base requires that a legislative land use decision be supported by substantial evidence. *DLCD v. Douglas County*, 37 Or LUBA 129, 132 (1999). Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993).

The Commission finds that the Department developed and applied technical tools that were used throughout the process, including Oregon Marine Map, an interactive mapping tool used to compile, display, and distribute spatial data and information. Oregon Marine Map is an internet site wherein all the data and maps used in the territorial sea planning process are accessible to the public. STAC reviewed the data sets and information used in Oregon Marine Map for the Territorial Sea Plan, and the Commission concludes that it is reasonable to utilize the maps included as Appendix B of Part Five. In addition, the ODFW Marine Division conducted the "Ecological Atlas Science Workshop" in Corvallis on September 20-21, 2011, where science experts reviewed the ecological resource data and information being used for the territorial sea planning process.

The Commission also finds that an adequate factual base for undertaking the planning for marine renewable energy. Recent studies verify that Oregon has a very high potential for the development of marine renewable energy, including: *Mapping and assessment of the United States Ocean Wave Energy Resource*, Electric Power Research Institute, Final Report, December 2011; *Oregon Wave Energy Trust, Utility Market Initiative*, Pacific Energy Ventures, December 2009; and *The Future Potential of Wave Energy in the United States*, RE Vision on behalf of the U.S. Department of Energy, August 2012. Other studies have shown that marine renewable energy, in turn, has the potential to provide direct economic benefits to the state and local communities, including; *Economic Impacts of Wave Energy to Oregon's Economy*, ECONorthwest on behalf of the Oregon Wave Energy Trust, September 2009, and *Wave Energy in Clatsop County, OR: An Economic Impact Analysis*, Northwest Economic Research Center, Portland State University, 2013.

Goal 2 provides in part "Opportunities shall be provided for review and comment by citizens and affected governmental units during preparation, review and revision of plans and implementing ordinances." Specific to ocean resources, Goal 19 includes "public involvement" as a management measure, providing "to involve the public and affected groups in the process of protecting ocean resource, especially through public awareness, education, and interpretive

programs.” The Commission finds that the public advisory and review processes that were conducted over a three-year period as part of the state’s effort to amend the Territorial Sea Plan were complex, iterative, comprehensive, and thorough in scope and content. OPAC through the TSPWG, conducted two separate series of public review work sessions at various coastal and inland locations, to inform and gather public input on the summary overlays of mapped data and information developed by DLCD, ODFW, NOAA, researchers, technical consultants, local advisory organizations and several non-governmental organizations.

The Commission concludes that *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* is consistent with Goal 2.

Statewide Planning Goal 19 Ocean Resources (OAR 660-015-0010(4))

Statewide Planning Goal 19 is “[t]o conserve marine resources and ecological functions for the purposes of providing long-term ecological, economic, and social value and benefits to future generations.” Goal 19 specifies that a regulating agency must develop and conduct actions that are likely to affect the ocean resources and uses of the territorial sea in such a way as to conserve marine resources and ecological functions. This Commission provided the dual purposes of those conservation requirements in Goal 19. The first purpose is to provide “long-term ecological, economic and social values and benefits.” The second purpose is 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.”

In reviewing *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* for compliance with Goal 19, the Commission first determines how marine renewable energy facilities are classified under Goal 19. Goal 19 narrowly defines what constitutes renewable marine resources, twice providing “renewable marine resources – *i.e.*, living marine organisms” in the text of the goal. By using “*i.e.*” an abbreviation of the Latin phrase “*id est*” which means “that is,” the Commission in adopting Goal 19 choose to precisely and narrowly define marine renewable resource. Elsewhere in Goal 19, the Commission utilized “*e.g.*” an abbreviation of the Latin phrase “*exempli gratia*” which means “for the sake of an example” where it intended to provide a non-exclusive listing of examples of other terms used in that goal. The Commission therefore construes the term “renewable marine resources” under Goal 19 to mean only “living marine organisms” and therefore renewable energy facilities may not be classified as a “renewable marine resource” under Goal 19.

That does not, however, mean that renewable energy facilities constitute a “non-renewable resource” for purposes of Goal 19. Goal 19 protects “renewable marine resources” and distinguishes them from “development of non-renewable resources; uses of the ocean floor, or other actions.” Goal 19, Implementation Requirement 1(b)(1). Thus, under Goal 19, there are uses of the territorial sea that are neither “renewable marine resource” nor “non-renewable resources.” That also is made clear in the protection and encouragement of “beneficial uses of ocean resources” under Goal 19. Examples of the later beneficial uses include “navigation, food production, recreation, aesthetic enjoyment, and uses of the seafloor.” Thus, although in

common usage “marine renewable resources” generally could be broadly construed to include marine renewable energy, the Commission finds that it does not, both because Goal 19 narrowly defines renewable resources as “living marine organisms” and because Goal 19 also includes other resources such as non-extractive recreation and aesthetic enjoyment among the listed “beneficial uses of ocean resources”

In conclusion, for purposes of Goal 19, marine renewable energy is not a “marine renewable resource.” Nor is it a non-renewable resource, given the plain and ordinary meaning of “non-renewable.” The Commission concludes that renewable energy facilities are uses of the ocean floor that are “beneficial uses of ocean resources” to be protected and encouraged under Goal 19 in the same manner as “navigation, food production, recreation, and aesthetic enjoyment” to the extent that such activities do not adversely affect renewable marine resources. Implementation Requirement 1(c)(1).

Ocean Stewardship Area

Goal 19 defines an “Ocean Stewardship Area” in which the state has interests in the conservation of ocean resources.⁸ Within that area, Goal 19 provides that the state will engage in specified activities in furtherance of the conservation of ocean resources. The Commission concludes that *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* furthers the objectives of the Ocean Stewardship Area.

First, Goal 19 provides the state will “[u]se all applicable state and federal laws to promote its interests in management and conservation of ocean resources.” The amendments to Part Five pertain to renewable energy facilities. The 2008 Memorandum of Understanding between the state and FERC recognized that the siting of renewable energy facilities implicates both federal law – the Federal Power Act, the Clean Water Act, the Coastal Zone Management Act, and the National Historic Preservation Act – and state law, including proprietary authorizations, regulatory authorizations to use waters of the state, and regulatory authorizations to use the ocean shore. FERC and the state entered into the MOU for the purpose of coordinating the procedures and schedules for review of marine renewable projects. The MOU acknowledges that Oregon intends to file Part Five with FERC as a comprehensive plan for the siting of marine renewable energy facilities in the Territorial Sea under section 10(a)(2)(A)(ii) of the Federal Power Act. Further, Executive Order No. 08-07 directs the Department to submit Part Five to NOAA OCRM “for approval as enforceable policies of Oregon’s Coastal Management Program under the federal Coastal Zone Management Act.” EO No. 08-07 at 4. TSPAC and the Department coordinated extensively with NOAA OCRM to identify those elements of Part Five that the federal agency could approve as enforceable policies of the state OCMP. Part Five Appendix C: Enforceable Policies Subject to Federal Consistency. The

⁸ Goal 19 describes the Ocean Stewardship Area to include “the state’s territorial sea, the continental margin seaward to the toe of the continental slope, and adjacent ocean areas” and clarifies that it 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.”

Commission finds that Part Five represents a comprehensive effort to use applicable state and federal laws to promote the state's interests in management of marine renewable energy facilities and conservation of ocean resources consistent with Goal 19.

Second, within the Ocean Stewardship Area, Goal 19 provides that the state will “[e]ncourage scientific research on marine ecosystems, ocean resources and uses, and oceanographic conditions to acquire information needed to make ocean and coastal-management decisions[.]” Part Five provides policies of general applicability to renewable energy facilities within the Territorial Sea, including:

“Limit the potential for unanticipated adverse impacts by requiring, when resource inventory and effects information is insufficient, 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; and

“Encourage 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.”

Part Five, paragraphs A.2.e and f. Part Five recognizes that an applicant for a renewable energy facility “may not be able to obtain or provide the information required by subsection B.4 (Resource and Use Inventory and Effects Evaluation and Special Resource and Use Review Standards), due to the lack of data available about the effect that the proposed development may have on marine resources and uses.” Part Five, paragraph B.4.f. In such instances, Part Five allows the state to recommend a pilot project for the purpose of testing new technologies or locating appropriate sites. Part Five, subparagraph B.4.f.2. The state may also recommend a phased development project “to allow for commercial energy production while obtaining certain data and information necessary to fulfill the requirements of subsection B.4. that 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.” Part Five, subparagraph B.4.f.3. The Commission finds that the policies and implementation requirements of Part Five encourage scientific research to acquire information needed to make ocean and coastal-management decisions related to renewable energy facilities and are therefore consistent with Goal 19.

Third, within the Ocean Stewardship Area, the state will “[s]eek 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[.]” As discussed above, the state and FERC have entered into an MOU for purposes of coordinating the procedures and schedules for review of renewable energy facility projects in the territorial sea that require a FERC license. The MOU acknowledges that Oregon intends to file Part Five with FERC as a comprehensive plan for the siting of marine renewable energy facilities in the Territorial Sea that FERC will, “in issuing any preliminary permit, pilot project license, or other license for a wave energy project in Oregon's Territorial Sea, consider the extent to which the proposed project is consistent with the Oregon Plan.” 2008 MOU at 3. Also, upon OCRM approval of those provisions in Part Five Appendix C: Enforceable Policies Subject to Federal Consistency, the Department will employ those

provision of Part Five in its review of federal actions related to renewable energy projects that have reasonably foreseeable effects on coastal uses or resources for consistency with the enforceable policies of the Oregon Coastal Management Program. The Commission finds that Part Five is consistent with Goal 19 because it provides an appropriate management scheme with federal partners for the protection of ocean resources.

Finally, Goal 19 provides that within the Ocean Stewardship Area, the state will “[c]ooperate with other states and governmental entities directly and through regional mechanisms to manage and protect ocean resources and uses.” The Commission finds that Part Five is not intended as an interstate regional ocean management provision. However, the Commission notes that once Part Five is an enforceable policy of the Oregon Coastal Management Program, it could serve as the basis for reviewing some federal actions occurring in an adjacent state that will have coastal effects in Oregon under the “interstate consistency” provisions of 15 CFR part 930, subpart I.

Information and Effects Assessment Required

Goal 19 requires regulating agencies to assess reasonably foreseeable adverse effects of an action prior to taking an action likely to affect ocean resources or uses of the territorial sea. The Commission finds that the Resource Use and Inventory and Effects Evaluation and Special Resource and Use Review Standards of subsection B.4. satisfies the information and effects assessment requirement of Goal 19. The requirements under subsection B(4) are derived from the general resource inventory and effects evaluation requirements already present in the TSP under Part Two, section A, but are more specifically designed for the types of potential impacts associated with marine renewable energy development technologies. The inventory content requirements prescribed in paragraph B(4)(d), are specifically designed to evaluate a broad range of foreseeable impacts to the resources and areas listed in the Goal 19 Implementation Requirements. The Part Five, paragraph B(4)(g) Special Resources and Uses Standards are also specifically designed to provide regulatory standards to protect the resources and uses listed under the Goal 19, Implementation Requirements, including fisheries B(4)(g)(2), ecosystem and marine habitat B(4)(g)(3), recreation B(4)(g)(4) and aesthetic B(4)(g)(5). The protection of other beneficial uses, including navigation, scientific research, fiber optic cables, dredge material disposal sites and managed areas is provided for under Part Five through the delineation of these areas and their incorporation within the Proprietary Use Management Area Standards found in Part Five, subparagraph B(4)(g)(6).

Implementation Requirements

1. Uses of Ocean Resources

Goal 19 specifies the manner in which regulating agencies are to carry out actions that are reasonably likely to affect ocean resources and uses of the Oregon territorial sea. First, regulating agencies must “maintain and, where appropriate, restore the long-term benefits derived from renewable marine resources.” Goal 19, Implementation Requirement 1(a). As discussed above, Goal 19 limits “renewable marine resources” to mean living marine organisms. Second, regulating agencies must protect renewable marine resources, biological diversity,

important marine habitat, and areas important to fisheries. Goal 19, Implementation Requirement 1(b)(1)-(4). The policies of Part Five require regulating agencies to make decisions regarding the siting, development, operation, and decommissioning of renewable energy facilities in a manner that is consistent with these implementation requirements of Goal 19. Part Five, paragraph A(2)(a). Part Five then specifies what regulating agencies must require. Part Five, subparagraphs A(2)(a)(1)-(4). Those policy directives are implemented in Part Five both through the mapping of Goal 19 resources and the Special Resources and Uses Review Standards provided under paragraph B(4)(g).

The Part Five, Appendix B Plan Map and Area Designations are predicated on the Goal 19, Implementation Requirements 1(b)(1)-(4) for protecting resources and uses. Those area designations are paired with Special Resources and Uses Review Standards provided under Part Five, paragraph B(4)(g). The resulting size and distribution of the different plan areas provide a very high level of protection. As determined above the Commission, concludes that the application of the general fisheries and ecological review standards in Part Five, paragraph B(4)(g), and the required consultations between the project developer, state agencies, local fishing and port interests, that are required by the plan in Part Five, paragraphs A(2)(a-f) are sufficient to ensure that marine resources will be protected in a manner consistent with the Goal 19 Implementation Requirements, and that the Part Five amendments will maintain and, where appropriate, restore the long-term benefits derived from renewable marine resources; and protect the resources protected under Goal 19.

Goal 19 requires regulating agencies to “protect and encourage the beneficial uses of ocean resources.” Goal 19, Implementation Requirement 1(c)(1). As discussed above, the Commission concludes that renewable energy facilities are uses of the ocean floor that are “beneficial uses of ocean resources” to be protected and encouraged under Goal 19 in the same manner as “navigation, food production, recreation, and aesthetic enjoyment” to the extent that such activities do not adversely affect renewable marine resources. Part Five, Appendix B maps Beneficial Uses Data Sets, including dredge material disposal sites, commercial shipping lanes, coastal discharge outfalls, tugboat towlanes, navigational aides, ocean recreation, and submarine cables. However, Part Five provides the process for making decisions regarding a specific beneficial use, development of renewable energy facilities, and provides a manner to do so that does not adversely affect renewable marine resources. Thus, for renewable energy facilities, meeting the Goal 19, Implementation Requirement 1(c)(2), which requires regulating agencies to “comply with applicable requirements of the Oregon Territorial Sea Plan” in approving beneficial uses of ocean resources will now be accomplished through complying with the specific provisions of Part Five. The Commission finds that Part Five is consistent with Goal 19, Implementation Requirement 1(c).

2. Management Measures

Goal 19 requires that management measure for ocean resources and uses are appropriate to the circumstances and provide flexibility for future actions. The management measures may include adaptive management, condition approvals or actions, special management area plans, intergovernmental coordination and cooperation, regional cooperation and governance, public involvement, and precautionary approach. The Commission finds that *Part Five: Uses of the*

Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities, is consistent with these management measures.

Goal 19 includes the adaptive management as a possible management measure, providing “to adapt management programs to account for variable conditions in the marine environment, the changeable status of resources, and individual or cumulative effects.” The Commission finds that the Part Five is consistent with the use of adaptive management. Part Five requires an applicant to submit an operation plan that includes an Adaptive Management Plan. Part Five, paragraph D(3)(d). The Resource and Use Inventory and Effects Evaluation and Special Resource and Use Review Standards specifically require the use of adaptive management and monitoring to evaluate a project at each phase to inform the design, installation, and operation of successive phases. Part Five, subparagraph B(4)(e)(5).

Part Five includes policies that are consistent with the Goal 19 management measure “to place conditions or limit actions to protect or shield other uses and resources.” Specifically, Part Five requires that regulating agencies making decisions in instances when resource inventory and effects information is insufficient, to use pilot projects and phased development to collect data and study the effects of a project on the affected marine resources and uses. Part Five, paragraph B(4)(f). The intent of such conditions on projects is to limit the potential for unanticipated adverse impacts. Part Five, paragraph A(2)(e).

The amendments to Part Five incorporate a spatial plan map that delineates the territorial sea into different area designations based generally on the concentration and importance of the marine resources and uses present within them. The designations, REPA, REFSSA, REEA, PUMA, RUCA, and RUMA, and the map overlays for visual and recreational use resources provide specific project review standards. Thus, Part Five provides Special Management Area Plans as called for in Goal 19 management measures, *i.e.* “to develop management plans for certain marine areas to address unique management needs for resource protection, resource utilization, and interagency cooperation in areas.” Goal 19, Implementation Requirement 2(c).

Goal 19, Implementation Requirement 2(d), Intergovernmental Coordination and Cooperation, provides, “To coordinate, integrate, and co-manage programs and activities with all levels of government, including Indian tribal governments.” Part Five establishes the Joint Agency Review Team (JART), comprised of all-levels of government: state and federal agencies; local jurisdictions including representatives of cities, counties, and ports; and federally recognized Oregon tribes. Those government representatives, along with invited statewide and local organizations and advisory committees, acting as the JART will review project applications to determine if the information provided is sufficient and complete, and apply that information to determine if that information meets the applicable standards and screening criteria for the project site.

Goal 19 also includes Regional Cooperation and Governance as a management measure. Goal 19, Implementation Requirement 2(e). Cooperation with federal agencies, among others, “within the larger marine region to address common or shared ocean resource management issues” is specified. Part Five is an effort to address shared ocean resource management issues related to the development of renewable energy facilities with the federal government. As noted

in Part Five, once OCRM approves incorporation of the enforceable policies of Part Five into the Oregon Coastal Management Program, they are applicable to those federal actions that affect Oregon's coastal zone and are subject to federal consistency requirements of the federal Coastal Zone Management Act. The Commission finds that the incorporation of a spatial plan map that delineates the territorial sea into different area designations based generally on the concentration and importance of the marine resources and uses present within them is consistent with the Congressional findings regarding development of state ocean resource plans in the CZMA. 16 USC § 1451(m).⁹

In addition to the public involvement in plan development discussed above under Goal 2, Goal 19 includes Public Involvement in the process of protecting ocean resources. Implementation Requirement 2(f). In Part Five, paragraph A(2)(d), regulating agencies are required to:

“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[.]”

The Commission finds that Part Five provides for means “to involve the public and affected groups in the process of protecting ocean resources” as required by Goal 19.

Finally, Goal 19 includes the precautionary approach as a possible management measure, providing “to take a precautionary approach to decisions about marine resources and uses when information is limited.” Goal 19, Implementation Requirement 2(g). The Commission finds that these amendments to Part 5 expressly incorporate that, providing: “Oregon prefers to develop renewable energy through a precautionary approach that supports the use of pilot projects and phased development in the initial stages of commercial development.” Furthermore, the principle of the precautionary approach is found elsewhere in the Territorial Sea Plan in Part One, section G.

3. Contingency Plans

Goal 19 requires regulating agencies that are approving an action that could result in significant risk to ocean resources and uses to establish appropriate contingency plans and emergency procedures. The Commission finds that Part Five requires an operation plan, specifically including a contingency plan. Part Five, paragraph D(3)(a).

As discussed above, the Commission finds that *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or*

⁹ CZMA section 302(m) provides:

“Because of their proximity to and reliance upon the ocean and its resources, the coastal states have substantial and significant interests in the protection, management, and development of the resources of the exclusive economic zone that can only be served by the active participation of coastal states in all Federal programs affecting such resources and, whenever appropriate, by the development of state ocean resource plans as part of their federally approved coastal zone management programs.”

Facilities is consistent with Goal 19's stated purposes to provide "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."

Other Statutory Provisions

ORS 197.040(1)

The Commission finds that it has general statutory authority to adopt these Territorial Sea Plan amendments pursuant to ORS 197.040(1). In order to carry out the statutory provisions of ORS chapters 195, 196, and 197, ORS 197.040(1) separately authorizes the Commission to adopt both any statewide land use policies and any administrative rules that it considers necessary. ORS 197.040(1)(b) authorizing the Commission to adopt administrative rules, provides in part:

"In accordance with the provisions of ORS chapter 183, adopt rules that it considers necessary to carry out ORS chapters 195, 196 and 197."

ORS 197.040(1)(c)(A), authorizing the Commission to adopt statewide land use policies, provides:

"Adopt by rule in accordance with ORS chapter 183 or by goal under ORS chapters 195, 196 and 197 any statewide land use policies that it considers necessary to carry out ORS chapters 195, 196 and 197."

In both instances, the statute directs the Commission to adopt rules in accordance with the state Administrative Procedures Act, ORS chapter 183. The Commission finds that the distinction in the two statutory grants of rulemaking authority is between those Commission rules that implement a statute and those that establish statewide land use policies. The Commission finds that in adopting the Territorial Sea Plan *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities*, it is acting primarily under its authority to adopt statewide land use policies under ORS 197.040(1)(c)(A).

However, to the extent that in adopting the Territorial Sea Plan *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities*, the Commission is secondarily adopting a rule necessary to carry out *inter alia*, ORS chapter 196, *i.e.* ORS 196.471, the Commission makes the following findings pursuant to ORS 197.040(1)(b)(A)-(E). In designing rules the Commission considers necessary to carry out ORS chapters 196, ORS 197.040(1)(b) mandates that the Commission:

"(A) Allow for the diverse administrative and planning capabilities of local governments;

"(B) Consider the variation in conditions and needs in different regions of the state and encourage regional approaches to resolving land use problems;

“(C) Assess what economic and property interests will be, or are likely to be, affected by the proposed rule;

“(D) Assess the likely degree of economic impact on identified property and economic interests; and

“(E) Assess whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact.”

Paragraph (A) requires the Commission to “[a]llow for the diverse administrative and planning capabilities of local governments.” Local governments do not have any planning responsibility or authority for the state territorial sea. Under ORS 201.370(2), planning for ocean resources and for submerged and submersible lands of the territorial sea is to be accomplished under the Oregon Ocean Resources Management Act, ORS 196.405 to 196.515. Nevertheless, under the Territorial Sea Plan *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities*, the Department of State Lands will invite local governments to be represented on the Joint Agency Review Team that considers a proposal for placement or operation of a renewable energy facility within the Oregon Territorial Sea. Part Five, paragraph B(3)(a). Thus, the Commission finds that in affording representatives from affected cities, counties and port districts the opportunity to participate in the JART, but not requiring their participation, Part Five has allowed for the diverse capabilities of local governments.

Paragraph (B) requires consideration by the Commission of “the variation in conditions and needs in different regions of the state and encourage regional approaches to resolving land use problems.” In geographic terms, Part Five addresses the needs of a discrete region of the state – the state territorial sea. The Governor directed the Commission to address the land use problem presented by uncoordinated planning for marine renewable energy facility siting identified in Executive Order No. 08-07, Directing State Agencies to Protect Coastal Communities in Siting Marine Reserves and Wave Energy Projects. That order was prompted by the concerns of coastal communities and commercial and recreational fishers, that the implementation of a marine reserves system combined with areas being sought to develop wave energy facilities in Oregon’s territorial sea would significantly restrict the areas available to fishing and harm the economies of coastal communities.

Within the territorial sea, Part Five, subparagraph B(4)(g)(7) further establishes project development limitations and constraints. Overall, the total area that is built and committed to renewable energy development may not exceed three percent of the total area of the territorial sea. Part Five, B(4)(g)(7)(a). Part Five distributes the economic impacts and opportunities of marine renewable energy development along the coast by requiring that the total area built and committed to marine renewable energy development not exceed a maximum of one percent of the total area within a 60 nautical mile arc as measured from the mouths of the Columbia River estuary, the Newport estuary, and the Coos Bay estuary. Part Five, subparagraph B(4)(g)(7)(b).

Paragraph (C) requires the Commission to “[a]ssess what economic and property interests will be, or are likely to be, affected by the proposed rule.” Similarly, paragraph (D) requires the Commission to “[a]ssess the likely degree of economic impact on identified property and economic interests.” In accordance with ORS 183.335(2)(b)(E), the Department prepared a Statement of Need and Fiscal Impact, reviewed by TSPAC pursuant to ORS 183.333(3), that assessed the economic interests of state agencies, local governments, and marine renewable energy developers regarding Part Five. Although there are no private property interest in the state owned territorial sea, in response to public comment, Part Five includes measures to protect private property through consideration of visual impacts and economic interests associated with tourism through the Special Resource and Use Standards in Part Five, subparagraphs B(4)(g)(4) and (5). The Fisheries Use Protection Standards under Part Five, subparagraph B(4)(g)(2) specifically address the economic interests of fishing industry, both at the statewide sector and local port scale for both commercial and recreation sectors. The standards under subparagraph B(4)(g)(6) are designed to protect existing economic interests within the territorial sea such as fiber optic cable corridors, navigation channels, and scientific instrumentation.

Finally, paragraph (E) requires the commission to “Assess whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact.” In this matter, the Commission is acting pursuant to the express directive of Executive Order No. 08-07 ordering the Department to seek OPAC recommendations concerning appropriate amendments to the Territorial Sea Plan, reflecting comprehensive plan provisions on wave energy siting projects. Additionally, the March 26, 2008 Memorandum of Understanding between the Federal Energy Regulatory Commission and the State of Oregon contemplates review of wave energy projects in the Territorial Sea of Oregon to be addressed in the TSP.

ORS 197.646

ORS 197.646(2)(b)(B) requires the Commission to establish the time period within which an acknowledged comprehensive plan must be in compliance with a new rule adopted by the Commission. Here, however, because local governments do not have planning authority over the Territorial Sea under ORS 201.370(2), the Commission finds that adoption of this rule does not require local governments to amend their comprehensive plans. State agencies programs or rules for management of ocean resources or ocean uses shall be consistent with *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities*, pursuant to ORS 196.485.

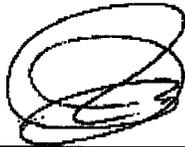
Order

The Commission made the findings above required by ORS196.471(1) herein and adopts *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* as filed herewith, however:

- (1) The Commission adds a condition regarding the “Reedsport OPT REFSSA”; if OPT abandons the site, the area will revert to a Resources and Uses Conservation Area designation. OPAC and the Commission will seek to identify a new viable deepwater REFSSA site following the plan amendment process and the distribution provisions of Part Five, paragraph B(4)(g)(7).
- (2) The Commission also adopts the “Findings on the Adoption of an Administrative Rule to Amend the Territorial Sea Plan dated January 14, 2013.” In the event findings in that document are inconsistent with this order, the findings of the Commission herein prevail.

DATED THIS 7th DAY OF OCTOBER, 2013.

FOR THE COMMISSION:



Jim Rue, Director
Department of Land Conservation and Development

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DAVID ALLEN, VICE CHAIR

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Jack Brown
City of Depoe Bay
(Coastal City Elected Official)

Paul Engelinger
National Audubon Society
(Statewide Conservation Organization)

Robin Harmons
Oregon Shores Conservation Coalition
(Coastal Conservation Organization)

Robert Kautz
Confederated Tribes of Siletz
(Oregon Coastal Indian Tribes)

Susan Morgan
Commissioner, Douglas County
(South Coastal County Commissioner)

Brad Pettinger
Oregon Trawl Commission
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James Pax
(South Coast Charter, Sport or
Recreational Fisheries)

Fred Sicker
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Federal Agency Liaison, NOAA OCRM

Tim Wood
Director, Department of Parks and
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John A. Kitzhaber M.D., Governor

January 22, 2013

Marilyn Worrix, Chair
Land Conservation and Development Commission
635 Capitol Street NE, Ste 150
Salem, OR 97301

Re: OPAC recommendation for Amendments to
Part Five of Oregon Territorial Sea Plan

Dear Chair Worrix and Commissioners:

Before proceeding with the recommendation for amendments to the Territorial Sea Plan (TSP) Part Five, a brief look at the history behind the state Ocean Policy Advisory Council (OPAC), as documented in the TSP, may prove useful as a backdrop to the discussion.

Background

In 1977, LCDC adopted Statewide Planning Goal 19, Ocean Resources. Until enactment of the Oregon Ocean Resources Management Act in 1987 (ORS 196.405 to 196.485), Goal 19 was the fundamental policy element for ocean resources in the state's land-use planning program.

During the period from 1987 to 1990, and pursuant to requirements of state law, the Oregon Ocean Resources Management Plan (Ocean Plan) was prepared and adopted as part of the state's coastal management program.

The Ocean Plan created a broad policy framework for the entire Ocean Stewardship Area off Oregon, which extends seaward to the toe of the continental slope. Within the Ocean Stewardship Area, and as noted in the principal policies of the Ocean Plan (TSP App. G), the state will "give priority to renewable resources over non-renewable resources." As discussed later in this letter, ocean renewable energy is a "non-renewable resource" for ocean planning and management purposes.

In addition to a broad policy framework, the Ocean Plan also recommended creation of an Ocean Policy Advisory Council to prepare a plan for managing the resources and activities in the state's territorial sea (0-3 nautical miles).

In 1991, the Legislature established the state Ocean Policy Advisory Council. And in 1994, OPAC completed the Oregon Territorial Sea Plan, which LCDC adopted as part of the state's coastal management program and NOAA approved as an amendment to Oregon's federally-approved coastal management program.

In 2003, the Legislature modified the composition of OPAC, but its duty under ORS 196.443 to advise the governor, state agencies, and local governments on ocean resources management issues remained unchanged. OPAC membership is shown in the left margin on page one of this letter.

One of the changes in the 2003 legislation was to distinguish between voting and non-voting OPAC members. Language was also added to one of the state policies under ORS 196.420 that OPAC 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."

Another duty of OPAC under ORS 196.443 is to advise LCDC on amendments to the TSP. Under ORS 196.471, LCDC is required to review any such amendments recommended by OPAC and determine if the amendments are consistent with applicable statewide planning goals, like Goal 19. If not consistent, then LCDC is to return the amendments to OPAC for revision.

In 2000, Goal 19 was amended for the first time. Goal 19 asserts, as the Ocean Plan did, that Oregon's ocean interests extend for the entire Ocean Stewardship Area. Likewise, Goal 19 also requires that higher priority be given "to the protection of renewable marine resources – i.e., living marine organisms – than to the development of non-renewable ocean resources."

That same goal language is also found in TSP Part One, section G., Ocean Management Goals and Policies, which LCDC adopted and added to the TSP in May 2001. The introductory paragraph to the goals and policies states they 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."

As noted generally over the course of this TSP amendment process, ocean renewable energy is a "non-renewable resource" for Goal 19 purposes. More specifically, and at the request of OPAC and its TSP Working Group (TSPWG), OPAC legal counsel advised OPAC and TSPWG earlier last year that the reference in Goal 19 to "development of non-renewable resources" includes ocean renewable energy.

While individuals on OPAC have changed since its formation, our recommendation is similar to that provided by our predecessors many years ago in response to industrialization of the ocean with potential offshore oil and gas drilling – development must not adversely impact Oregon's way of life. Go slow, take a precautionary approach, protect existing Goal 19 resources and uses, and evaluate the effects of small-scale development before allowing larger projects to proceed.

This approach is consistent with language in the preamble in TSP Part One, section G., Ocean Management Goals and Policies:

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.

When OPAC started to work on TSP Part Five in 2008, it recognized there were no seats on OPAC representing the ocean renewable energy sector. OPAC recommended that LCDC establish a TSP Advisory Committee (TSPAC) to include representation from that field so their interests were heard. That is the Oregon way.

Many modifications to the initial OPAC recommendation were made in light of the work done by TSPAC. Both OPAC and TSPAC agree on many parts of their recommendations. But where they differ, LCDC should give greater weight to the OPAC recommendation. Below are reasons why.

As already noted under ORS 196.443 (duties of council), it was anticipated that not all topics and issues would be addressed in the initial TSP. Moreover, TSP Part One, subsection F.2., Changing the Plan, also noted how amendments are to be made:

After the Territorial Sea Plan is adopted by the LCDC, the Council [OPAC] 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.

And in TSP Part One, subsection F.2.e., Council Approval and Submittal to LCDC, it further noted:

The Council [OPAC] 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.

It is clear, under both statute and the TSP document itself, that OPAC has the primary advisory role to LCDC on amendments to the TSP. This was also recognized in Executive Order No. 08-07 (page 4), when then-Governor Kulongoski directed that "DLCD shall seek recommendations from OPAC concerning appropriate amendments to Oregon's Territorial Sea Plan, reflecting comprehensive plan provisions on wave energy siting projects."

OPAC Recommendation

Attached to this letter are the notes from the facilitator's flipchart notes at the January 3-4, 2013 OPAC meeting in North Bend. These notes reflect the discussion and recommendation from that

meeting. There is general agreement among OPAC, TSPAC, and DLCD staff as to much of the work product now before LCDC for consideration.

Initially, OPAC discussed buffer distances around Important, Sensitive, or Unique (ISU) areas. OPAC rejected including these distances in TSP Part Five by voting (9-yes, 2-no) to instead include language in the document that directed applicants to consult with ODFW regarding these distances prior to filing an application. This language is now included in subsection g.3)(a)iii on page 19 of the document. However, agency staff has since inserted buffer distances in a new subsection g.3)(a)iv found on page 20 of the document. As noted on page 2 of the attached notes, OPAC requested this letter include the names of the OPAC voting members who had preferred including buffer distances in the document. Those two members were Paul Engelmeyer and Robin Hartmann.

Also, and as noted on page 3 of the attached notes, OPAC requested this letter include an OPAC declaration of intent that "significant reduction" and "minimize" be more clearly defined in TSP Part Five for future users of the document, and to develop measurable thresholds for these terms. Agency staff has since included a definition for "minimize" in Appendix A of the document.

OPAC also recommended, as noted on page 2 of the attached notes, to add a sentence to the introductory paragraph in TSP Part Five, under section B.3 on JART Project Review Process, noting the intent of the JART process is "inclusiveness, especially people in the impacted area." That language has not been inserted in the document.

OPAC supported Flexible Siting, which is described as having project developers and local stakeholders collaborate on the micro-siting of a project within a larger area, such as the Camp Rilea original site. OPAC also supported that no more than five percent of the total area of the territorial sea be designated as Renewable Energy Facility Suitability Study Areas (REFSSAs).

OPAC voted (9-yes, 2-no) in favor of a cap of two percent of the total area of the territorial sea for ocean renewable energy development (i.e., project build-out based on the area permitted and leased for that use). On the same vote count of 9-2, OPAC rejected a cap of three percent of the total area of the territorial sea for such development.

Contrary to the OPAC recommendation for a two percent total cap on project build-out, agency staff inserted a three percent total cap in a new subsection g.7) (a) on page 25 of the document. The OPAC recommendation, however, is consistent with management measures in Goal 19 and TSP Part One, section G. In particular, the management measures to "place conditions or limit actions to protect or shield other uses and resources" and to "take a precautionary approach to decisions about marine resources and uses when information is limited."

OPAC also supported a one-third project build-out cap for each of the deep water ports of Astoria, Newport, and Coos Bay (using a 60 nautical mile radius around each port). So, for example, a two percent total cap on project build-out would be 0.67 percent for each deep water port area.

An important issue resulting in different recommendations between OPAC, TSPAC, and DLCD staff, and likely indicative of the varied interests in this process, is designation of proposed areas as

REFSSAs. Many also view the designation of REFSSAs as a barometer of the level of protection the amendments to TSP Part Five will actually afford Goal 19 resources and uses.

The OPAC recommendation for designation of REFSSAs is listed on page 4 of the attached notes. Ten voted in support of this recommendation, with only a single 'no' vote.

The initial vote tally to determine level of support for each of the 11 areas under consideration is set out below, from most to least support. The first three areas listed below were recommended to proceed as REFSSAs, and the last three areas listed below were recommended not to proceed as REFSSAs:

<u>Area</u>	<u>Votes For</u>	<u>Votes Against</u>
Lakeside revised	11	0
Camp Rilea alternate (1 nm)	9	1
Nearshore Reedsport alternate	8	0
Gold Beach alternate	6	6
OPT-Reedsport 50 MW	5	6
Camp Rilea	3	3
Nearshore Reedsport	3	3
North Newport	3	5
Langlois	1	9
Nestucca/Pacific City	1	10
Netarts	0	11

For the three areas that OPAC recommended to proceed as REFSSAs, OPAC modified the Camp Rilea area (only out to 1 nm) so as to better protect Goal 19 resources and uses clearly identified as deserving protection under Resources and Uses Conservation Area (RUCA) standards.

Likewise, OPAC recommended an alternate Nearshore Reedsport area so as to better align with protections assured under Goal 19. This was also done in light of the adjacent OPT-Reedsport 50 MW area, which encompassed a RUCA. The third area that OPAC recommended to proceed as a REFSSA was Lakeside revised.

For the three areas that OPAC recommended not to proceed as REFSSAs – Langlois, Netarts, and Nestucca/Pacific City – they included Goal 19 resources and uses clearly identified as deserving protection under either RUCA standards or Resources and Uses Management Area (RUMA) standards. The Commission cannot disregard these Goal 19 protections.

Possible Motions

Finally, and in light of the DLCD staff report and recommendation, in particular for proposed REFSSAs, the following motions are offered for LCDC consideration. Both motions refer to the OPAC recommendation and are consistent with the motions the department listed when LCDC adopted TSP Part Five in 2009 (see attached excerpt from November 5, 2009 staff report). These motions are also consistent with the Commission's TSP review requirements under ORS 196.471.

OPAC transmittal letter
January 22, 2013

Page 6

Recommended motion:

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

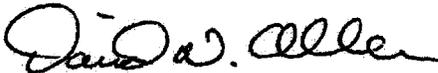
If the Commission chooses the alternative motion, it can also specify any needed revisions, per ORS 196.471(3).

We look forward to presenting the OPAC report and recommendation to the Commission at the January 24, 2013 meeting in Salem.

Best regards,



Scott McMullen, Chair



David Allen, Vice Chair

Attachments:

Facilitator's notes Jan. 3-4, 2013 OPAC meeting
Excerpt from Nov. 5, 2009 DLCDC staff report

Notes from January 3 - 4, 2013 OPAC meeting in North Bend, Oregon
 (Drafted by facilitator Jane Brass Barth from her flipchart notes;
 Edited by OPAC chair and vice-chair and DLCD staff)

The focus of the facilitated section of the January 3rd meeting was Part 5 of the TSP. Each OPAC member was asked to identify any issues s/he wanted to discuss regarding Part 5. All issues were listed on a flipchart and the group began working through the list. This discussion carried over into the morning of January 4th to cover most of the issues and to make decisions on recommended changes to the Part 5 document. The afternoon of January 4th the focus shifted to sideboards and area designations.

Part 5 Issues and Related Recommendations

- **Visual Section:**
 - Suggestion made by Kris Wall, NOAA, to define the terms *seascape* and *viewshed* in the Appendix A to avoid confusion.
 - Revised language related to visual contrast (page 17) was accepted by OPAC by consensus.
 - OPAC approved by consensus that a score of 24 or more for scenic quality evaluation will be the rating for special areas.

- **Financial capacity:** Important to OPAC members that applicants for marine renewable energy (MRE) projects be financially viable. One key concern was to not waste state agency time and resources on reviewing applications from entities that do not have the financial capacity to complete the application process. As articulated by Richard Whitman, financial capacity to actually complete a project and to deal with any accidents and eventual decommissioning also are important.
 - OPAC supported the inclusion of a Financial Assurance Plan section within Part 5. This section is directed at assuring "holders" have the capacity to plan, construct, operate and decommission MRE facilities.
 - OPAC supported DSL incorporating financial viability requirements in its MRE application forms and process.
 - OPAC supported the JART process including a review of financial viability. It was unclear how person(s) with expert knowledge in financing large-scale MRE projects would best be included in the JART process. Agencies will work this out.
 - OPAC suggested including general guidance on financial viability in the JART section, but the facilitator's notes do not indicate if draft wording was inserted in the Part 5 document.
 - OPAC supported by consensus inclusion of language offered by Richard Whitman regarding decommissioning.
 - The vice chair, David Allen, initially wanted to require proof of testing of MRE devices prior to application. His concerns were satisfied via these financial viability additions.

- JART membership, roles, and responsibilities
 - OPAC recommended by consensus that Ports be listed on top of page 5, section 3.a.3)
 - OPAC recommended that a sentence be added to the introductory paragraph of section 3 to indicate that the intent is inclusiveness, especially the people in impacted area.
 - OPAC discussed the importance of including people with marine operations and also financing MRE projects in the JART review process. They acknowledged that these people would more likely be involved as contracted resource experts rather than volunteer JART members. OPAC expressed satisfaction in leaving the details of working this out to the DSL.
 - OPAC discussed the potential role of the JART in project monitoring and adaptive management. The main purpose would be to ensure continued public involvement in the adaptive management process. There was not support to convene the JART for this purpose. Rather, OPAC supported by consensus additional language on page 22 in the Agreements section and also adding a public engagement plan within the monitoring plan (page 21).

- Buffers around ISUs: The focus of the discussion was whether to specify buffer distances in Part 5 or leave the specific distances to ODFW guidelines. All members want specificity in a document that applicants can reference. They did not, however, all think that Part 5 was the appropriate document. Points in favor of specifying buffer distances were for transparency. Point against were for flexibility and the unintended application of buffer distances for other uses.
 - First, OPAC agreed by consensus to include rocks as ISUs.
 - OPAC did not come to consensus on whether to include specific buffer distances so it took a vote. OPAC agreed by majority vote to include new language in Part 5 on page 14. That language did not include specific buffer distances, but rather directed applicants to consult with ODFW regarding buffers prior to submitting an application.
 - OPAC will include in its letter to LCDC the number and names of members who preferred including specific buffer distances. (n=2 Robin Hartmann, Paul Engelmeyer.)

- Estuaries
 - OPAC agreed by consensus to recommend estuaries be considered ISUs. They asked staff to work on the appropriate language by the LCDC meeting.

- Cumulative effects, *biological/ecological*
 - OPAC agreed by consensus to add the words "but not limited to" on page 9 section 4) A) last sentence before the numbered list.

- **Cumulative effects, *social and economic***
 - No specific changes to Part 5 were identified. OPAC stressed the importance of continuing to develop tools to measure these fishing and shoreside impacts. They noted the recent work on a tool with OWET funding. They are interested in discussing this topic as part of future OPAC work.
- **Terminology:** OPAC discussed extensively the lack of clarity in the terms *significant reduction* (page 13) and *minimize*, which is used throughout the document. Examples can be found on page 13 section B). It was noted that the TSP does include a definition of *significance* which could be helpful. Also the term *minimal* is used in places and there was higher comfort with that term than *minimize*.
 - They did not reach agreement on replacement terms or sample %s to include. Rather they chose an aspirational approach.
 - OPAC approved by consensus to forward to LCDC a declaration of intent to
 - A) make these terms and their definitions clearer to future users of the document and
 - B) develop measurable thresholds
- **OPAC review of the TSP Part 5**
 - The Chair, Scott McMullen, requested that more specific language be added on page 23 indicating that OPAC could review the document without waiting for the 7 year or 1% trigger. No official vote was taken on this, but others supported it and the facilitator's sense is that OPAC would have agreed to this clarification.

Sideboards and REFSSAs

OPAC supported the following sideboards by consensus:

- **Distribution by 1/3 of total build-out cap in 60-mile radius area around each deepwater port area (Astoria, Newport, and Coos Bay) within the initial 7 year period.**
- **Flexible Siting (i.e., larger sites that allow for specific project site decisions within it to fit the specific technology).** Note: During the discussion, staff pointed out that flexible siting was not feasible with the current set of REFSSAs. OPAC members still wanted to show their support for micro-siting as Oregon moves forward with MRE.
- **Maximum total 5% of TS in REFSSA's**

OPAC supported the following sidebar by a majority vote of 9-2. With a separate vote, OPAC did not support a 3% project build-out (vote 2 for, 9 against).

- **Total 2% Project Build out** (the development footprint authorized under a FERC license or an authorization from DSL)

OPAC did not vote on the sidebar supported by TSPAC of "At least 4-5 areas on coast suitable for marine renewable energy counting Camp Rilea and Reedsport OPT 50 megawatt sites." OPAC chose to get to the number of REFSSAs it would support by discussing and voting on individual areas. Before voting, DLCD staff reviewed the area locations and size on Marine Map. Then a subset of OPAC members proposed alternatives to the Camp Rilea and Nearshore Reedsport areas. This group also recommended that the OPT build-out area not be set as a REFSSA, but rather revert to the underlying RUCA. OPAC did not vote on this recommendation alone. Instead, all voting members were asked to vote for what areas they supported as REFSSAs and which they did not support being REFSSAs.

A total of 11 areas were under consideration during the vote. Eleven members voted. The total votes for each area don't always total 11 because some people did not vote for certain areas. The Gold Beach 12 is an unexplained anomaly.

	Votes For	Votes Against
Camp Rilea	3	3
Camp Rilea alternate (only out to 1 nautical mile)	9	1
Netarts	0	11
Nestucca/Pacific City	1	10
North Newport	3	5
OPT 50 megawatt Build-out	5	6
Nearshore Reedsport	3	3
Nearshore Reedsport alternate	8	0
Lakeside revised	11	0
Langlois	1	9
Gold Beach alternate	6	6

Prior to adjourning, OPAC supported the following motion (moved by Fred Sickler; seconded by Susan Morgan) by a vote of 10-1 (n=Robin Hartmann):

OPAC will provide to the Commission the entire results of this meeting, including this tally reorganized from most to least support. It recommends Camp Rilea alternate, Nearshore Reedsport alternate and Lakeside revised areas proceed as REFSSAs. OPAC recommends that Netarts, Nestucca/Pacific City and Langlois areas do not proceed as REFSSAs.

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

January 14, 2013

TO: Land Conservation and Development Commission
FROM: Paul Klarin, Marine Affairs Coordinator
SUBJECT: **Agenda Item 2, January 24th, 2013, LCDC Meeting**

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

I. SUMMARY

Under this agenda item the Land Conservation and Development Commission (commission) will consider adopting amendments to Part Five of the Oregon Territorial Sea Plan (TSP) (Attachment A). The commission adopted Part Five, Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities, in November of 2009. This amendment will incorporate maps into the TSP that designate specific marine resources and use areas within the territorial sea based on the delineation of Goal 19 Ocean Resources within each specific geographic area. The amendment will also establish standards to be applied by state agencies when reviewing proprietary authorizations and permits for the development of marine renewable energy facilities within each area. The public review and advisory process, used by the department in the formulation of this plan amendment, was conducted through the joint efforts of the Ocean Policy Advisory Council (OPAC) and the LCDC Territorial Sea Plan Advisory Committee (TSPAC).

The Territorial Sea Plan review requirements are prescribed under ORS 196.471(1). The statute requires the commission to review TSP amendments recommended by OPAC and make findings that (a) the amendments carry out the policies of ORS 196.405 to 196.515 (the Oregon Ocean Resources Management Act), and (b) are consistent with applicable statewide planning goals, emphasizing the coastal goals, prior to adopting the proposed amendments as part of the plan. In this instance, Goal 19 Ocean Resources, OAR 660-015-0010(4), contains the applicable policies and implementation requirements.

A. Type of Action or Commission Role

The Department of Land Conservation and Development (department) recommends that the commission adopt the rule to amend 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, and find that the amendments are consistent with (a) the applicable statewide planning goals, with an emphasis on the coastal goals and specifically Goal 19 Ocean Resources, and (b) carry out the policies under ORS 196.405 to 196.515 for Oregon Ocean Resources Management.

B. Staff Contact

If you have any questions about the Territorial Sea Plan Advisory Committee, please contact Paul Klarin, Marine Affairs Coordinator at (503) 373-0050 ext. 249 or paul.klarin@state.or.us.

II. RECOMMENDATIONS

The department recommends the commission adopt an amendment of the Territorial Sea Plan that will clarify the state and federal review process for marine renewable energy (MRE) facility development, describe the state agency review process for MRE projects, and establish regulatory review standards for determining the impacts of that development on specific Goal 19 ocean resources. The amendment will incorporate maps that delineate areas to which the standards apply based on an analysis of the marine resources and uses present.

A detailed description of the proposed amendments is included in the analysis section of this report, below. In brief summary, the amendments to Part Five will incorporate a spatial plan map, by reference, as the Map Designations in Appendix B. The plan map delineates the territorial sea into different area designations based on the concentration and importance of the marine resources and uses present within them. The area designations being incorporated into the plan map are: the Renewable Energy Permit Areas (REPA); Renewable Energy Facility Suitability Study Areas (REFSSA); Renewable Energy Exclusion Areas (REEA); Proprietary Use Management Areas (PUMA); Resources and Uses Conservation Areas (RUCA); and Resources and Uses Management Areas (REMA); which are defined in Attachment B. In addition to these spatially explicit resources and uses areas, the amended plan incorporates separate map overlays covering the entire territorial sea, to which specific project review standards will be applied for visual and recreational use resources.

The department recommends the following four areas be incorporated into the Map Designations in Appendix B as Renewable Energy Facility Suitability Study Areas (REFSSA):

- 1) Camp Rilea site, modified to account for the fiber optic cable corridor underlying the PUMA along the northern boundary;
- 2) Nestucca site, modified to avoid the mouth of the Nestucca estuary and to avoid the high value fishing grounds. The department recommends that the use of this area be restricted to technologies that are sub-surface or have limited visual resource impact;
- 3) Reedsport site for which Ocean Power Technology (OPT) holds a FERC Preliminary Permit for a 50MW project;

4) Reedsport Lakeside site.

The department also recommends the commission consider including the North Newport site as a REFSSA. Consideration of this site is pending the decision by the Northwest National Marine Renewable Energy Center (NNMREC) to select the location of the Pacific Marine Energy Center (PMEC), which will be located in federal waters near either Reedsport or Newport.

III. BACKGROUND

Governor Kulongoski's March 26, 2008 Executive Order No. 08-07, Directing State Agencies to Protect Coastal Communities in Siting Marine Reserves and Wave Energy Projects, ordered the department to seek recommendations from OPAC concerning appropriate amendments to Oregon's Territorial Sea Plan, reflecting comprehensive plan provisions on wave energy projects. In October 2008, the commission authorized the creation of the TSPAC, with Commissioner Tim Josi as chair, and approved the membership of the group at the December meeting that followed. TSPAC was created to consider and propose amendments to OAR 660, division 36 (Ocean Planning) and to amend the Territorial Sea Plan for marine renewable energy generation facilities in state waters. This was achieved, in part, with the adoption by LCDC of Part Five: Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities, in November 2009. Part Five Section B.1 (a) established the siting of areas designated for MRE facilities in state waters by referencing maps that will be incorporated into Part Five as Appendix B, by this amendment.

The Advisory and Public Review Processes:

The public advisory and review processes that were conducted over the past three years as part of the state's effort to amend the Territorial Sea Plan have been complex, iterative, comprehensive, and thorough in scope and content. As part of these efforts, the department developed and applied technical tools that were used throughout the process, including Oregon MarineMap, an interactive mapping tool which is used to compile, display and distribute spatial data and information. Beginning in 2010, through the spring of 2012, the OPAC, through its Territorial Sea Plan Work Group (TSPWG), conducted regular public meetings as it formulated a draft plan framework. In addition to its own meetings, the TSPWG conducted two separate series of public review work sessions at various coastal and inland locations, to inform and gather public input on the summary overlays of mapped data and information developed by DLCD, ODFW, NOAA, researchers, technical consultants, local advisory organizations and several NGO's.

The information and public input gathered from this process was used by OPAC to develop an initial set of draft resources and uses inventory maps and plan options. The OPAC used that information to formulate a draft plan framework along with a set of recommendations which it forwarded to the department for further review by the TSPAC, which commenced its activities in May 2012. TSPAC then conducted another series of public review sessions in November after which the advisory committee concluded their efforts with a recommendation for amending the

TSP at their final December meeting. OPAC met twice more before formulating their final recommendation to LCDC, discussed below, predicated on the work completed by the TSPAC.

During the period between 2009 and 2012, staff made formal presentations or met informally with local advisory groups and committees, as well as city councils and county commissions, to discuss the progress of the TSP amendment and collect feedback. Staff also attended and made presentations at numerous workshops, group meetings and conferences.

Video and digital recordings were taken at the OPAC, TSPWG, TSPAC and public review work sessions, which are available from the department. A special TSP public comment email function was built into the <http://www.OregonOcean.info> website to allow for online comments to be submitted. Staff has provided a report that summarizes the public review process for both OPAC and TSPAC, their working groups, subcommittees, and the public work sessions that were used to collect public input on the plan framework, area designations and specific sites that were in consideration. Included in the report are the meeting dates and attendance, as well as a compilation of the public comments that have been collected since the inception of the review process (Attachment C). In addition, the department will be conducting a hearing to collect public comment on January 22nd, at the Newport Public Library. The hearings officer will provide a report of that hearing and the comments that were collected as hard copy documents for this meeting.

The Territorial Sea Plan Advisory Committee Recommendations

Since the TSPAC began meeting again in May of 2012, the commission replaced several members of the original committee who left for various reasons, and added several more new members representing additional interests. TSPAC followed up on the basic planning framework that was produced by OPAC, by organizing itself into six subcommittees to complete tasks related to fisheries, ecological, recreational, visual aesthetic, and energy resources, as well as revisions to Part Five. See Attachment D for a TSPAC subcommittee memo. The subcommittees were primarily tasked with drafting the regulatory review standards text that agencies will apply to the areas designated in the plan map and incorporated into Part Five as the project review standards. Presentations, materials, and documents used by TSPAC and subcommittees, including recordings and summary reports from the meetings, are available at <http://www.oregon.gov/LCD/Pages/TerrSeaPlanAdComm.aspx>. Staff has produced a report summarizing the recommendations forwarded to the department by TSPAC for the commission's consideration (Attachment E).

Many of the TSPAC recommendations have already been incorporated into the revised draft version of Part Five (Attachment A). Those revisions are detailed below in the analysis. TSPAC recommended a spatial plan that delineates the territorial sea into a series of defined areas based on the marine resources and uses within them, with specific project review standards that would be applied by state agencies to protect the resources and uses within those areas. In addition to the basic plan framework and project review standards, the TSPAC recommended that the plan incorporate various limitations to ensure that MRE development is constrained from expanding too quickly and is limited in scope in its initial phases. TSPAC made several general recommendations about the objectives of the plan, including that it should be flexible in nature

and contain up to 4 or 5 REFSSA's. This was to be achieved by establishing larger plan areas wherein the marine renewable energy companies would be able to seek locations that are suitable for a variety of technologies that require differing ranges of physical conditions to operate. The TSPAC recommended that the plan limit the areas designated as Renewable Energy Facility Suitability Study Areas (REFSSA) to 5% of the territorial sea, and that there be a cap of 3% on the amount of area within the territorial sea that could be developed with facilities and structures, including the cable. TSPAC recommended that the preferred development sites, or REFSSA's, be distributed among the areas associated with the three deep water ports of the Columbia River, Newport and Coos Bay. TSPAC recommended there be an initial cap of 1\3 build-out of MRE projects within the territorial sea within the first seven years for each of the 3 deep water port areas. This coincides with their recommendation that the plan have an automatic periodic review trigger built into it at 7 years or 1% build-out, whichever comes first. TSPAC made no decision to recommend a limit on the number of REFSSA that could be sited per port. The limitation on initial build-out during the first 7 years has been incorporated into the draft version of Part Five in consideration.

In terms of the specific sites, the TSPAC recommended that the OPT Reedsport 50 MW project site (FERC preliminary permit P-13666) and the Camp Rilea MRE Study Area site be included in the plan as REFSSA's, and count as 2 of the 4 or 5 sites that would be included in the total. TSPAC did not select any other specific sites as REFSSA, but did rank their level of support for the remaining candidate sites that were under consideration. The sites were ranked from highest level of support to lowest (low number shows a higher level of support and vice versa) as follows; Camp Rilea (46), Lakeside (66), Reedsport Nearshore (97), Langlois (106), Nestucca (108), Newport (115), Gold Beach (129) and Netarts (160).

The recommendations of TSPAC are taken into consideration in the department's final recommendation to the commission on the amendment of Part Five of the Territorial Sea Plan.

The Ocean Policy Advisory Council Recommendation

The OPAC public process that took place over the past three years is described above, and in the chronology of public meetings provided in Attachment C. OPAC has made recommendations for revisions to Part Five and for the sites that should be incorporated into the plan map as REFSSA. Generally, OPAC approved of the amendments to Part Five recommended by TSPAC, and reflected in the version provided as Attachment A. OPAC also recommended revisions to Part Five include: major modifications to the JART membership and process; the addition of a new section for applicant financial assurance requirements, changes to the section on pilot projects and phased development, an update of the section for the Northwest National Marine Renewable Energy Center (NNMREC); and the addition of new definitions to the glossary. OPAC also approved of the basic planning framework and area map designations as recommended by TSPAC.

In terms of spatial and siting recommendations, OPAC also recommended the concept of flexible siting and a cap of 5% of territorial sea area for REFSSA. OPAC recommended limiting total MRE build-out to 2% of territorial sea. OPAC also recommended that MRE build-out

be distributed on an equal-third basis for each of the deep water ports of Astoria, Newport, and Coos Bay.

OPAC recommended 3 sites be selected for REFSSA as follows: a revised Camp Rilea site with the western boundary adjusted to 1 nm rather than 3 nm; a revised nearshore Reedsport site with the boundary adjusted to conform to the adjacent RUMA, and the Lakeside site unchanged. OPAC recommended that the Netarts, Pacific City/Nestucca, and Langlois sites not be considered for REFSSA. No specific decision was made for the remaining sites at Gold Beach, OPT-Reedsport 50 MW, Nearshore Reedsport, North Newport, and Camp Rilea, which left these for the commission to consider. OPAC made no recommendation on the total number of REFSSA that should be selected for inclusion in the plan, or their distribution among major port areas. OPAC supported the TSPAC recommendation for establishing an initial cap of 13 build-out of MRE projects within the territorial sea within the first seven years for each of the 3 deep water port areas.

OPAC has provided a letter to the commission summarizing its recommendations for the amendment to Part Five, as well as other related concerns and recommendations. The recommendations of OPAC are taken into consideration in the department's final recommendation to the commission on the amendment of Part Five of the Territorial Sea Plan.

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

The proposed rule represents the second phase to amend the Territorial Sea Plan for siting and regulating marine renewable energy facilities development. This amendment will consist of revisions to Part Five, and the incorporation of a maps which will identify areas within the territorial sea that are appropriate for renewable energy development and the standards that state agencies would apply to determine the impacts of that development. Pursuant to ORS 196.485, upon adoption and incorporation into the plan, state agencies must apply the new requirements of the Territorial Sea Plan. Further, upon federal approval, the department will apply Part Five as an "enforceable policy" when conducting federal consistency reviews pursuant to 15 CFR Part 930) and provisions of the Coastal Zone Management Act. (16 USC §§ 1451 to 1465).

The department considered the TSPAC, OPAC and state agency recommendations when finalizing the proposed amendments to the TSP. There was general agreement among the advisory bodies and state agencies on the proposed revisions to the text of Part Five, and with respect to the types of spatial constraints or sideboards that would be placed on renewable energy development. There was also agreement on the concept of a plan that would provide for flexible siting, and to some degree, the distribution of MRE development among the deep water ports.

This analysis of the proposed Part Five amendments is divided into the three sections that are being revised or added to the existing plan. The first will address changes to existing sections of Part Five. This includes additions and revisions to the Part Five Appendix A: Definitions and Terms and the footnotes, both of which contain references for the specific statutory and rule text

that are used in the document. That is followed by a summary of the Special Resource and Use Review Standards, which establishes the project review standards that will be applied by state agencies to project applications. The last section addresses the map designations for resources and uses and related inventory data and information that will be incorporated as Appendix B. The proposed amended Part Five with revisions in strike-out and underline is in Attachment A.

Preamble:

The preamble to Part Five establishes the purpose for Part Five and some general objectives. A sentence was added to the second paragraph of the preamble describing the state's preference for taking a precautionary approach to marine renewable energy development. This objective is further detailed below under subsection B.4.f: Pilot and Phased Development Projects.

Section (B) Implementation Requirements

Extensive revisions were made to the terminology in subsections B.1 and B.2 to clarify the regulatory relationship of the state and federal government agencies and the application of the federal consistency regulations under 15 CFR Part 930. These changes were the result of a collaborative discussion between the NOAA, DLCD and the Oregon Department of Justice. Many of the revisions and inclusions requested by NOAA are captured in the endnotes.

Joint Agency Review Team (JART)

The JART is the state and local agency staff team that will review project applications to determine if the information provided is sufficient and complete, and apply that information to determine if that information meets the applicable standards and screening criteria for the project site. Stakeholders continued to have concerns about how the JART would function and who would be on the team. Subsection B.3, JART Project Review Process and Coordination, was extensively revised to expand, clarify and redefine the function of the Joint Agency Review Team. The JART membership list has been enumerated and expanded to ensure the participation of affected local jurisdictions, ports and federally recognized coastal tribes. This subsection stipulates that DSL may invite local organizations or advisory committees to participate when the team deliberates on specific resource or use questions, and may acquire outside technical expertise to assist in the review as needed.

A new subsection (B.3.f) was added, titled JART Roles and Responsibilities. This subsection clarifies the role of the Department of State Lands (DSL) in establishing the JART, and DSL's use of the JART recommendations in the review of applications for MRE projects under their proprietary authorization rules.

Resource and Use Inventory and Effects Evaluation and Special Resource and Use Review Standards

The title of Section B.4 has been revised to indicate that this section will now contain the project review standards. New text was added to clarify that this part of the plan contains the enforceable policies and necessary data and information requirements that the state will use for federal consistency purposes. At the request of NOAA, Appendix D: Enforceable Policies Subject to Federal Consistency, has been added to Part Five, so that state and federal agencies have a summary list of the enforceable policies that the department will apply when making a

consistency determination. Subsection B.4 was also updated to properly reference the JART involvement in the review process in keeping with the revisions to that process discussed above.

Pilot and Phased Development Projects

The Subsection B.4.f, formerly titled Insufficient / Incomplete Information, has been revised and is now titled Pilot and Phased Development Projects. This was done to clarify the intent of this subsection, which is to provide for the systematic use of pilot projects and phased development to gather and analyze information and data in order to determine the potential impacts of a specific project on affected marine resources and uses. This section applies the objective related to the precautionary approach that has been inserted in the Part Five preamble. Additional text was inserted at the request of NOAA to clarify the circumstances and conditions under which the department will apply federal consistency for MRE projects, and how the state may apply the CZMA authority to recommend a pilot project or phased development be conducted. Much of the remaining text of the former subsection remains the same.

Special Resources and Use Review Standards

Special Resources and Use Review Standards (Subsection, B.4.g), have been added containing the review standards for evaluating the impacts of a proposed MRE project on the affected resources and uses at a specific site. The review standards, as applied to the designated areas, provide an opportunity to MRE developers to seek areas appropriate for their particular type of technology in most areas within the territorial sea. They do so by establishing a sliding scale of regulatory standards that were devised to provide a higher level of protection for areas where there are concentrations of significant or important marine resources and uses, thereby directing development toward areas with lesser concentration.

The standards were developed by the TSPAC through a deliberative public review subcommittee process, and approved by the full TSPAC for inclusion in Part Five. The OPAC also reviewed and approved the inclusion of the standards in its recommendation.

As originally conceived by OPAC, the standards address the potential impacts from a proposed MRE project to fisheries use, ecological resources, recreation resources, and visual resources, as predicated by the implementation requirements of Goal 19 Ocean Resources. Each set of standards applies to a resource and use area delineated in the maps being incorporated as Appendix B. In addition to the specific resource and use standards that apply to projects potentially located in a particular resource or use area, a set of general standards were developed that will be applied to any project in any area. This subsection also contains a requirement for the state agencies to use the best available maps and data, consider new information as it becomes available, and apply their best science and professional judgment.

The general standards are consistent with similar requirements that are applied by federal agencies under their regulatory authority. The general standards are intended to ensure that MRE projects consider alternative deployment sites, minimize activities during critical time periods for species migration, and minimize disturbances to other resources and uses during construction and installation.

The Fisheries Use Protection Standards (subsection B.4.g.2): contain a set of general standards that apply to projects in any of the designated areas it is allowed that are designed to minimize compaction of fishing effort, the reduction in fishing grounds, navigational hazards and distribution of projects in any a particular local port or fishing sector area. Two special terms that are used in the fisheries standards, “adverse effect” and “presumptive exclusion,” are defined in the subsection. Since the same terms are used somewhat differently in the Ecological Standards section, it was necessary to also include the different definitions for those terms in Appendix A: Definition and Terms. Included under the definition for Important, Sensitive, or Unique Area (ISU) in Appendix A. are the specific buffer distances that would apply to certain ISU resources.

The fisheries use standards apply to development proposed in the Resources and Uses Conservation Areas (RUCA), Resources and Uses Management Areas (RUMA), and the Renewable Energy Facility Suitability Areas (REFSSA). They were designed to create a regulatory screen geared to provide a level of protection commensurate with the concentration of Goal 19 resources and uses in a specific area as defined by the maps.

- RUCA: the standard for a RUCA presumptively excludes MRE development, but allows it if it can be demonstrated that the project will have no reasonably foreseeable adverse effect on areas important to fisheries and there is no practicable alternative site.
- RUMA: the standard allows development if it can be demonstrated that the project will have no significant adverse effect on areas important to fisheries.
- REFSSA: this standard is designed to be most favorable for development, and applies the resource inventory and effects evaluation requirements listed under Section B.4, and the general standards as applicable.

The Ecological Resource Protection Standards (subsection B.4.g.3): also contains a section to define terms specifically for use in the standard including adverse effect, presumptive exclusion, and Important, Sensitive, or Unique Area (ISU), and ecological resources of concern. The latter two terms define areas and resources of high ecological value to which the standards apply.

- RUCA: As in the fisheries standard, there is a presumptive exclusion for MRE development in the RUCA. However, it specifically applies to the ISU areas only, and again, it may be overcome by a demonstration that there are no practicable alternative sites outside an ISU area and the project will have no reasonably foreseeable adverse effect on the ISU located at the site. The RUCA also require no significant adverse effect on foraging areas and ecological resources of concern.
- RUMA: the ecological standard in the RUMA also requires no significant adverse effect on critical foraging areas, areas with ecological resources of concern, along with the ISU standard as applied in the RUCA.
- REFSSA: the standard for these areas requires no significant adverse effect on ecological resources of concern and the ISU protection standard.

Recreational Resources Standards (Subsection B.4.g.4): Unlike the fisheries and ecological resources, the recreational resource standard applies in all areas, and is based on an inventory map of recreational usage that is applied as a coastwide overlay to the territorial sea. The standard requires that an MRE project have no significant adverse effect on areas of high use or importance. An adverse effect occurs when access is denied or impeded; health or safety is impacted; or there is a reasonably foreseeable significant impact on the natural environment upon which the recreation community depends.

Visual Resource Protection Standards (subsection B.4.g.5): This set of standards is the most complex. Like the recreational resource standard, the visual resource standard applies to all projects uniformly throughout the territorial sea. It also relies on an existing overlay produced by an inventory of 144 viewsheds along the ocean shore. Most of the viewsheds are located in state and federal parks or managed areas, but many are also in areas that are managed as public access sites in city or county jurisdictions. There are several viewsheds in the ownership and management of nonprofit organizations that are maintained for public use. A classification system has been developed based on a set of objective criteria related to the unique setting, aesthetic qualities and physical properties of a site. Each site is assigned to a class, and each class has its own visual subordination standard designed to maintain the character of the viewshed. Each viewshed has a series of arcs associated with the foreground, middle ground, and background views. The standards are generally based on an evaluation of the level of contrast the proposed development has with the natural environment at those varying distances. The standard takes into account the fact that it is not possible to avoid or mitigate contrast since it will be a required feature of most developments in order to ensure navigational safety.

The class system ranges from I through IV, with viewsheds in Class I being afforded the highest level of protection as it allows for a very low level of change to the seascape. Each class thereafter, has a lesser level of protection, and would allow a project to be more visible to the casual observer. The contrast evaluation required to apply the standards will be conducted through a visual simulation of the project from the affected viewsheds. It is likely that multiple viewsheds will be affected by most MRE projects, and the standards for the highest class of the affected viewsheds will be applied. A total of 75 (58%) of viewsheds are in Class I, and another 54 (38%) are in Class II. Together the Class I and II viewshed arcs cover 99% of the territorial sea, which means that a fairly high level of viewshed protection is applied to most areas.

The visual resource standard also includes the project review criteria that must be applied when conducting and analyzing the visual simulation. These include such factors as distance and angle of observation, project size and scale, and light and atmospheric conditions, among others.

The department finds that the proposed changes to the text portions of the Part Five of the Territorial Sea Plan are consistent with the ORS 196.405 to ORS 415, and statewide planning goals, with emphasis on Goal 19 Ocean Resources.

PUMA Standards: This standard allows developers to seek areas for MRE projects where there are other authorized uses or management plans in place. The applicant must obtain the approval of the current user and meet the underlying resources and uses standards that apply to the area.

Spatial Maps and Area Designations

Part Five contains a reference under Section B.1.a, Siting: areas designated for renewable energy facilities development 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 has designated areas of the territorial sea appropriate for the development of renewable energy facilities (See Map Designations in Appendix B) and established the review standards for projects within those designated areas (See Section B.4).”¹

These maps constitute the spatial section of the plan, delineating the territorial sea into a series of “areas,” each defined by the occurrence and concentration of marine resources and uses as prescribed by the Goal 19 Ocean Resources Implementation Requirements. The Addendum to the maps provides the area definitions and descriptions. As described in the section on standards above, each area has a set of resource and use review standards that will be applied by state agencies to assess the potential impacts a specific project may have on a location within the area. The maps referred to as Appendix B, along with the resource and use inventory data used to produce them, are maintained by the department in a server under the administration of the department’s Coastal Division. They are available for review and distribution on Oregon’s ocean information website at (<http://www.OregonOcean.info>) and as GIS files from the department. The maps, along with the resource and use inventory data upon which they are based, are all incorporated into the amended Territorial Sea Plan by reference upon adoption of Part Five by the commission. In total, the Map Designations in Appendix B will include the statewide territorial sea plan map of the designated areas, a set of resource and use inventory maps, and the map addendum. The map products will be made available by county, in various scales, for easier use and viewing.

The commission, upon adopting the plan map, will designate specific areas for potential development based on the type of area and applicable standards. The Renewable Energy Facility Suitability Study Areas, which are subject to the least restrictive standards, were the primary focus of the public review process conducted by OPAC and TSPAC. Through that process, many locations were considered as potential REFSSA, though not all of locations were uniformly consistent with the resource and use inventory data for the area. In some cases, REFSSA were considered in areas where the resource inventory maps indicated a higher level of ecological concern or a high concentration of fishing effort. Concerns for conflicts with ecological resources, specifically salmon bearing estuaries and rocky seafloor habitat, were addressed through additional analysis and the reconfiguration of sites where the resources of concern were located.

The fisheries resource use maps for several of the sites that are being considered do indicate they are subject to high levels of fishing effort. However, the potential REFSSA that are being considered for these locations are relatively small in comparison to the total area that has been delineated as high effort fishing grounds, and several of those potential REFSSA sites were initiated by the local fishing communities. There was general support for the use of the fishing effort maps during the initial planning process, but the accuracy and utility of the maps was

challenged by members of local fishing communities when the state agency's spatial analysis resulted in the identification of areas for MRE development that they did not support. In several instances alternative sites were identified by the local fishing communities as potential REFSSA.

The department, in consultation with ODFW, finds that if several of these areas are to be made available for potential development as REFSSA, the application of the general fisheries and ecological review standards, and the required consultations between the developer, state agencies, local fishing and port interests, are sufficient to ensure that Goal 19 resources will be protected in a manner consistent with the goal implementation requirements and that there will be minimal adverse impact on ecological resources or fishing uses.

The department has considered the recommendations and decisions of TSPAC and OPAC regarding the specific sites that were in consideration as REFSSA. Both TSPAC and OPAC supported a plan which would limit the area dedicated to REFSSA at 5% of the territorial sea. However, the 3 sites recommended by TSPAC, (Lakeside, OPT Reedsport, and Camp Rilea) amount to less than 2% of the territorial sea. The sites recommended by OPAC (Lakeside, Reedsport nearshore revised and Camp Rilea revised) amount to an area equivalent to slightly more than 1% of the total territorial sea area. Both TSPAC and OPAC ranked the other sites that were in consideration but left it to the commission to decide if any of them should be made REFSSA. The OPAC and TSPAC recommendations for REFSSA are also problematic in that the Reedsport OPT site does not allow for any other company to use the area, and the Camp Rilea site is under the control and jurisdiction of the Oregon Military Department, who would select the companies and technologies that could use the area. In neither area would MRE developers have open access to a REFSSA that is not already encumbered and controlled.

The commission may choose to apply specific conditions for the type of development that will be allowed to occur within a specific REFSSA. The Addendum to the map will be amended to include the list of sites selected as REFSSA, and any specific conditions that will apply to a specific REFSSA will be incorporated into the map designation and applied by state agencies when projects are proposed for that site. The plan map legend will also contain that information. In addition to the site specific conditions that may be applied to an area, the Addendum may also contain any other conditions or constraints that the commission chooses to apply as implementation requirements for the plan. These conditions may include a limit on the total area within the territorial sea that may be developed with MRE facilities. This type of limitation or "cap" has been recommended by TSPAC and OPAC, and would otherwise be applied as a trigger for periodic review of the plan under TSP Part Five Section E: Plan Review.

TSPAC and OPAC recommended a distribution of MRE project build-out among the three deep-water ports of the Columbia River, Newport and Coos Bay area. The department concludes that this will be achieved during the initial period of development through the periodic review requirement that is being incorporated into the Part Five text, which limits project build-out during the first seven years to 1% of the territorial sea, and distributes that among the three ports. The recommendation can be revisited, if necessary, during periodic review.

The department recommends four areas be incorporated into the Map Designations in Appendix B as Renewable Energy Facility Suitability Study Areas (REFSSA):

1) Camp Rilea: This site has been modified to account for the PUMA along the northern boundary. It is a high use fisheries area and would not normally have met the criteria for identifying a prospective REFSSA. However, the department concludes that there are special and unique circumstances for providing the Oregon Military Department (OMD) with an opportunity to consider the feasibility of MRE development at Camp Rilea. One of the missions of Camp Rilea is to provide regional emergency services. Energy independence and energy security are operational imperatives for both the primary and secondary missions of the base. Renewable energy sources are important alternatives to the electrical grid and fossil fuels for the camp's backup generator. Camp Rilea requires renewable energy to meet its mission including disaster recovery in the event that windstorms, earthquakes, or flooding disrupts the electrical grid. In addition to energy security, energy independence and disaster resilience, the envisioned Camp Rilea ocean renewable energy project promotes the OMD's interest in two critical areas: achieving Army Net Zero goals and assisting with pursuit of the state's alternative energy goals.

Camp Rilea is uniquely positioned to facilitate off-shore wave energy as it already has a Safety Distance Zone (SDZ) management area within the territorial sea and in federal waters off-shore to facilitate the camp's on-site live-fire ranges. This SDZ management area provides a compatible co-use with potential wave energy devices as there are already management devices off-shore to facilitate monitoring of ocean traffic in this area during live-fire exercises. In addition, Camp Rilea's operations and infrastructure provide accessibility of the electrical grid with favorable site characteristics plus the unique capabilities of the Oregon Military Department (OMD) in planning, facilities management, engineering personnel, and environmental staff.

Camp Rilea is also investigating the feasibility for MRE development in federal waters outside the territorial sea. That siting process will be conducted by the federal Bureau of Ocean Energy Management. It may be several years before pilot projects are conducted to determine the locations and respective technologies that best meet the base's needs.

Total REFSSA area: 11 sq. mi. (8.3 nautical)

2) Nestucca: This site has been modified to avoid the mouth of the Nestucca estuary and to reduce the impact on the adjacent high effort fishing grounds. This site was one of few areas in consideration as REFSSA that would be amenable to the potential development of certain MRE technologies that require a near-shore location and flat bottom. The department concludes that the site, as modified, addresses the concerns expressed by local communities, as well as environmental and fishing interests who are concerned about the proximity to high value resources and uses. The department recommends that the use of this area be restricted to technologies that are sub-surface or have limited visual resource impact due to the areas proximity to several communities and Class I Visual Resource sites.

Total REFSSA area: 2.1 sq. mi. (1.6 nautical)

3) Reedsport (OPT): This is the site for which Ocean Power Technology holds a FERC Preliminary Permit for a 50MW project. Imbedded in the area is the REPA site for which OPT has a FERC license to develop up to 10 buoys. The area has been the focus of considerable investment by OPT, as well as studies and research funded by the Oregon Wave Energy Trust. Though the resources and uses inventory data indicates it is a high effort fishing area, especially for Dungeness crab, the area proposed as a REFSSA is small by comparison to the total crab fishery in the area.

Total REFFSA area: 5.25 sq. mi. (4 nautical)

4) Reedsport Lakeside: This site was brought forward to TSPAC as an alternative location for a REFSSA by the Southern Oregon Ocean Resources Coalition which represents the fishing communities from Reedsport, Charleston, Coos Bay and Bandon. It was originally offered as an alternative to a proposed location in the Langlois area, which is not being recommended as a REFSSA. The site is also located in an area that the resources and uses inventory maps indicate is a high effort fishing ground, but like the other sites, it is small and its use as a REFSSA would not cause an significant adverse impact to the total crab or other fisheries in the vicinity.

Total REFFSA area: 3.95 sq. mi. (3 nautical)

Supplementary Site Recommendation

The department recommends that LCDC also consider one additional location at North Newport as a potential REFSSA, pending the outcome of the selection process being conducted by the Northwest National Marine Renewable Energy Center (NNMREC) to select the site of the Pacific Marine Energy Center (PMEC), which will be located just outside and adjacent to the territorial sea, in federal jurisdiction. NNMREC is scheduled to make the decision about whether to locate PMEC near Reedsport or Newport prior to the commission meeting. The distribution of REFSSA among the deep water ports is supported by OPAC, TSPAC and the state agencies. No other sites are in consideration as REFSSA within the radius of Newport. Establishing a REFSSA at the North Newport location would apply the concept of distribution. Should NNMREC decide to locate PMEC near Reedsport, the commission should consider selecting the North Newport location as a REFSSA. The North Newport site is adjacent to the existing NNMREC location and would benefit from the public process and environmental study work that has been conducted to establish NNMREC and to install the Ocean Sentinel device.

Total REFSSA area: 4.24 sq. mi. (3.2 nautical)

Plan Area Designations Summary: The total area occupied by the four recommended REFSSA comprises 22.3 sq. mi. (17 nautical), which is less than 2% of the territorial sea, and well below the 5% threshold that OPAC, TSPAC and the state agencies recommended as the maximum area that should be dedicated to REFSSA. It is also below the TSPAC, OPAC and state agency recommended thresholds for the maximum area that should be eventually developed with projects. With the exception of Camp Rilea, where the choice of technology will be controlled by the Oregon Military Department, the limited size of the individual REFSSA being recommended for inclusion in the plan is not consistent with the TSPAC, OPAC and state

agency recommendations that the plan allow for flexible siting, in that they are too small to accommodate alternative locations for siting commercial projects.

The revised plan standards do allow for siting MRE development in the RUMA, RUCA and PUMA based on the project review standards that apply to the specific location. The state agencies anticipate that companies may be able find locations within some of those respective areas that are suitable for their type of technology. Only by locating MRE development within areas other than REFSSA will the plan provide the opportunity that the industry needs, and that OPAC, TSPAC and the state agencies have recommended for flexible siting. The final plan with the inclusion of the proposed REFSSA (22.3 sq. mi. 17 nautical 2%), will result in areas that comprise the following size and percent of the total territorial sea, which measures 1260 sq. mi. or 951 nautical). RUCA (900 sq. mi. 680 nautical and 72%), RUMA (137 sq. mi. 104 nautical and 11%), REEA (130 sq. mi. 98 nautical and 10%), PUMA (68 sq. mi. 51 nautical and 5%), and REPA (2 sq. mi. 1.5 nautical and 0%). The final plan map is provided as Attachment G.

Upon adoption of an area to become a REFSSA by the commission, the department will revise the plan map to delineate the areas accordingly, and amend the Map Designation addendum to list the different areas and incorporate any limitations or conditions for development that are applied to them. The final plan map and area designations will be incorporated into the plan as Appendix B under the Implementation Requirements at Subsection B.1.a, where the plan addresses siting marine renewable energy facilities in state water.

II. LCDC RULEMAKING AUTHORITY AND REQUIREMENTS

The commission is required to review OPAC recommended amendments to the Territorial Sea Plan under ORS 196.471(1). The commission reviews the recommended amendments and makes findings that the recommendation carries out the policies of the Oregon Ocean Resource Management Act and is 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 January 1, 2013.

The department scheduled 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 affects or applies to only a limited geographic area (the state’s coastal zone), the Department of Justice recommended that the department hold a hearing within that geographic area. The department held the public hearing in Newport on January 22nd, 2013, and the hearings officer report of those comments will be provided as a hand carry document to the commission.

The proposed rule amends OAR chapter 660, division 36, Ocean Planning, by adopting a new section numbered 660-036-0006. The text of the proposed rule will amend Part Five of the State of Oregon Territorial Sea Plan by reference. (See text at Attachment F)

VI. SUMMARY

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, is consistent with the policies and implementation requirements of Goal 19 Ocean Resources, the Territorial Sea Plan, and ORS 196.405 to 196.515. In addition, the review process conducted by the OPAC, TSPAC and the state agencies ensured that the requirements of Part Five, as amended, will be compatible with other state and federal agency authorities and regulatory requirements that apply to the permitting, licensing and leasing authorizations needed to approve the development and use of renewable energy facilities in the territorial sea.

VII. RECOMMENDATION

The department recommends that the commission adopt the rule to amend Part Five of the Territorial Sea Plan and make a finding that the amendments are consistent with the applicable statewide planning goals, with an emphasis on the coastal goals and specifically Goal 19 Ocean Resources, and carry out the policies under ORS 196.405 to ORS 196.515 for Oregon Ocean Resources Management.

VIII. POSSIBLE MOTIONS

Recommended motion:

I move that the commission find that the Territorial Sea Plan Part Five amendment and plan map area designation adoption recommended by the department 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, as amended, 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 and plan map area designation adoption recommended by the department 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 the department and OPAC for revision.

ATTACHMENTS

- A. Territorial Sea Plan Part Five (as amended)
- B. Addendum to Appendix B Map Area Designations
- C. Public Review Process and Public Comment Summary Report
- D. TSPAC Subcommittee memo
- E. TSPAC Recommendation Report
- F. Proposed rule OAR 660-036-0005
- G. TSP plan map (as recommended)

ⁱ 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.”

1 **Oregon Territorial Sea Plan**

2
3 **PART FIVE:**

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

7
8 **PART FIVE** of the Oregon Territorial Sea Plan¹ describes the process for making
9 decisions concerning the development of renewable energy facilities (*e.g.* wind, wave,
10 current, thermal, etc.) in the state territorial sea, and specifies the areas where ~~that~~
11 development may be sited. The requirements of Part Five are intended to protect areas
12 important to renewable marine resources (*i.e.* living marine organisms), ecosystem
13 integrity, marine habitat and areas important to fisheries from the potential adverse
14 effects of renewable energy facility siting, development, operation, and decommissioning
15 and to identify the appropriate locations for that development which minimize the
16 potential adverse impacts to existing ocean resource users and coastal communities.

17
18 **Oregon's renewable energy portfolio lists ocean energy as a renewable energy source with**
19 **potential to reduce dependence on fossil fuels.² Renewable ocean energy facilities**
20 **development may present opportunities to apply technologies that rely on wind, wave,**
21 **wind, current or thermal energy, ~~that~~which may potentially reduce the environmental**
22 **impact of fossil fuels. Oregon prefers to develop renewable energy through a**
23 **precautionary approach that supports the use of pilot projects and phased development in**
24 **the initial stages of commercial development. If developed in a responsible and**

¹ See Part One, section C for the Oregon Territorial Sea and Territorial Sea Plan description

2 It is the goal of Oregon to develop permanently sustainable energy resources and the policy of the state to encourage the development and use of these resources. ORS 469.010(2) provides in part:

“It is the goal of Oregon to promote the efficient use of energy resources and to develop permanently sustainable energy resources. The need exists for comprehensive state leadership in energy production, distribution and utilization. It is, therefore, the policy of Oregon:

“(a) That development and use of a diverse array of permanently sustainable energy resources be encouraged utilizing to the highest degree possible the private sector of our free enterprise system.

“* * * * *

“(g) That state government shall provide a source of impartial and objective information in order that this energy policy may be enhanced.”

V.12413 (SS edit)

1 appropriate manner, in accordance with the requirements of this Part and other
 2 applicable state and federal authorities, renewable ocean energy may help preserve
 3 Oregon's natural resources and enhance our quality of life.

4 5 **A. Renewable Energy Facilities Development**

6 7 **1. Background**

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

16
 17 State agencies, including the Oregon Departments of State Lands, Fish and Wildlife, Parks and
 18 Recreation, Environmental Quality, Land Conservation and Development, Water Resources,
 19 Energy, and Geology and Mineral Industries, need specific policies and standards for
 20 considering the siting and regulation of renewable energy facility development in the territorial
 21 sea. ~~The State also needs specific policies and standards to guide,~~ **data and information**
 22 **within the Territorial Sea Plan should also assist** federal agencies in the siting and regulation
 23 of renewable energy facilities development located in federal waters adjacent to the Oregon
 24 territorial sea.⁴

25
 26 ***NOTE: Notwithstanding Part One, paragraph F.1.b, the following policies and***
 27 ***implementation requirements are mandatory. Decisions of state and federal agencies⁵ with***
 28 ***respect to approvals of permits, licenses, leases or other authorizations to construct, operate,***
 29 ***maintain, or decommission any renewable energy facility to produce, transport or support***
 30 ***the generation of renewable energy within Oregon's territorial waters and ocean shore must***
 31 ***comply with the requirements mandated in the Oregon Territorial Sea Plan. ~~The Once~~***
 32 ***NOAA/OCRM approves the incorporation of the enforceable policies (see Part Five,***
 33 ***Appendix D) of the Territorial Sea Plan and into the Oregon Coastal Management Program,***
 34 ***they are applicable to those federal actions that affect Oregon's coastal zone and are subject***
 35 ***to the federal consistency requirements of the federal Coastal Zone Management Act.***

with regulatory, consultation or other authority or responsibility for management of ocean
 resources.

⁴ Part One, subsections E.1 and E.2 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.

⁵ State agencies making decisions to authorize the siting, development and operation of renewable energy facilities
 development or other related structures, equipment or facilities within the Territorial Sea, will be referred to as
 "the regulating agency" or "regulating agencies".

V.12413 (SS edit)

1 **2. Policies**

2 The following policies apply generally to renewable energy facilities within the Oregon
 3 Territorial Sea, and establish the guiding principles for the implementation requirements listed
 4 in ~~sections~~**sections B and C**. When making decisions to authorize the siting, development,
 5 operation, and decommissioning of renewable energy facilities within the territorial sea, ~~state-~~
 6 ~~and federal~~ **regulating** agencies shall

- 7
- 8 a. Maintain and *protect* renewable marine resources (*i.e.* living marine organisms),
 9 ecosystem integrity, *marine habitat* and *areas important to fisheries* from adverse
 10 effects that may be caused by the installation or operation or removal of renewable
 11 energy facility by requiring that such actions:
- 12
- 13 1.) Avoid adverse effects to the integrity, diversity, stability and complexity of the
 14 marine ecosystem and coastal communities, and give first priority to the conservation
 15 and use of renewable marine resources;
- 16
- 17 2.) Minimize effects by limiting the degree or magnitude of the action and its
 18 implementation;
- 19
- 20 3.) Rectify or mitigate the effects that occur during the lifetime of the ~~facility~~**project** by
 21 monitoring and taking appropriate corrective measures through adaptive management;
 22 and
- 23
- 24 4.) Restore the natural characteristics of a site to the extent practicable when the ~~facility-~~
 25 ~~and structures are~~ **project is** decommissioned and removed;
- 26
- 27 ~~b.~~ **b.** Protect ~~marine~~ renewable **marine** resources; the biological diversity and
 28 functional integrity of **the** marine ecosystem, important marine habitat, areas important
 29 to fisheries, navigation, recreation and aesthetic enjoyment ~~as required by Statewide-~~
 30 ~~Planning~~ (*see also* Goal 19-);
- 31
- 32 ~~Promote direct communication and collaboration between~~ **c. Communicate and**
 33 **collaborate with** an applicant for a state or federal authorization for the siting,
 34 development and operation of renewable energy facilities and affected ocean users and
 35 coastal communities to reduce or avoid conflicts. ~~Agencies will strongly;~~
- 36
- 37 ~~e.~~ **d. Strongly** encourage applicants to engage with local, state and federal agencies,
 38 community stakeholders, tribal governments and affected ocean users in a collaborative

ted structures, equipment or facilities within the Oregon Territorial Sea, will be referred to as
 “the regulating agency” or “regulating agencies”.

V.12413 (SS edit)

1 agreement-seeking process prior to formally requesting authorization to initiate a
2 project.^{7,8}

- 3
- 4 ~~d.~~ **e.** Limit the potential for unanticipated adverse impacts by requiring, ~~as necessary~~
5 **when resource inventory and effects information is insufficient**, the use of pilot
6 projects and phased development to collect data and study the effects of the
7 development on the affected marine resources and uses; **and**
- 8
- 9 **e. f.** Encourage the research and responsible development of ocean-based renewable
10 energy sources including wave, tidal, and wind that meet the state's need for economic
11 and affordable sources of renewable ocean energy.

12 **B. Implementation Requirements**

13 ~~State and federal~~ **Regulating** agencies shall apply the following implementation requirements
14 when considering a proposal for the placement or operation of a renewable energy facility
15 ~~development~~ within the Oregon Territorial Sea. Regulating agencies shall comply with the
16 standards and procedural requirements in Part Five of the Territorial Sea Plan as prescribed
17 below. This includes the cables, connectors or other transmission devices that connect, anchor,
18 support or transmit energy between the separate components within a renewable energy
19 facility. **The Regulating agencies shall apply the** requirements in Part Four, Uses of the
20 Seafloor for Telecommunication Cables, Pipelines, and other Utilities, ~~will apply~~ to the utility
21 cables that transmit the electrical energy from the renewable energy facility to the on-shore
22 substation.⁹ The requirements in Part Two, Making Resource Use Decisions, ~~Sections~~**sections**
23 A and B, will not apply to the evaluation, siting or operation of renewable energy development
24 or other related structures, equipment or facilities.

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

26 **a. In State Waters:**

27 Pursuant to the requirements for amending the Territorial Sea Plan under ORS 196.471,
28 to carry out the policies of the Oregon Ocean Resources Management Act and
29

30 ⁸ In its "Rules Governing the Placement of Ocean Energy Conversion Devices On, In or Over State-Owned-Land
31 within the Territorial Sea", the Department of State Lands requires applicants to meet with the agency, as well as
32 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.

⁹ The manner in which federal agencies comply with the enforceable policies and information requirements of
Goal 19 is governed by NOAA's CZMA Federal Consistency regulations at 15 CFR Part 930. Thus, any reference
to "federal agencies" in the Territorial Sea Plan does not impose obligations on federal agencies that are in
addition to those described in the CZMA and NOAA's regulations.

V.12413 (SS edit)

1 consistent with the statewide planning goals, the Land Conservation and Development
 2 Commission ~~will designate~~ **has designated** areas of the territorial sea appropriate for
 3 the development of renewable energy facilities.¹⁰ (See appendix C map). (see Map
 4 Designations in Appendix B), and established the review standards for siting
 5 projects within those designated areas (see section B.4).¹¹ Renewable energy
 6 facilities development of the state lands of the territorial sea lying seaward of Extreme
 7 Low Water (~~which is~~ *i.e.* the seaward boundary of the Ocean Shore State Recreation
 8 Area) shall be sited within ~~the areas~~ **an area** designated for that use so as to avoid,
 9 minimize or mitigate the adverse effects of ~~that development~~ **the project**, and to
 10 protect: renewable marine resources, biological diversity and functional integrity of
 11 marine ecosystem, important marine habitat, and areas important to fisheries, as ~~defined~~
 12 ~~in Statewide Planning~~ **provided in** Goal 19 Ocean Resources.

13
 14 **b. In Federal Waters:**

15 The Department of Land Conservation and Development will review federal decisions
 16 to permit, license, or otherwise authorize renewable energy facilities ~~development~~
 17 within the waters and seafloor of the outer continental shelf adjacent to the Oregon
 18 Territorial Sea **that have reasonably foreseeable effects on coastal resources or uses**
 19 for consistency with the Oregon Territorial Sea Plan and the applicable enforceable
 20 policies of the Oregon Coastal Management Program: **pursuant to NOAA's CZMA**
 21 **federal consistency regulations at 15 CFR Part 930.12** Federal actions, including the
 22 issuance of any federal authorizations, ~~that affect any land or water use or natural~~
 23 ~~resources of the~~ **are subject to** Oregon Coastal Zone **CZMA review, shall** be supported

Program.”

¹¹ 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.”

12 Whether a particular federal license or permit activity proposed in federal waters is subject to Oregon review depends on whether the State has, pursuant to 15 CFR § 930.53, (1) listed the federal authorization in the Oregon Coastal Management Program, and (2) the proposed listed activity falls within a NOAA-approved “Geographic Location Description” (GLD). If Oregon has not listed the activity and does not have a NOAA-approved GLD, the State can seek NOAA approval to review a project on a case-by-case basis as an “unlisted activity” pursuant to 15 CFR § 930.54. If a federal action, including the issuance of any federal authorizations, is subject to Oregon CZMA review, it shall be supported by the information required in NOAA’s regulations at either 15 CFR §§ 930.39, 930.58 or 930.76.

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1 by environmental studies and analysis as prescribed below, to ensure compliance with
 2 the enforceable policies of Oregon Territorial Sea Plan and the Oregon Coastal
 3 Management Program. 13 the information required in NOAA's regulations at either
 4 15 CFR §§ 930.39, 930.58 or 930.76.14
 5

6 2. State Agency Review Process

7 Pursuant to ORS 196.485 and ORS 197.180, state agencies shall apply the policies and
 8 provisions of the Oregon Ocean Resources Management Plan and, Oregon Territorial Sea
 9 Plan, and Goal 19 Ocean Resources as required to comply with State Agency Coordination
 10 Programs (OAR chapter 660, divisions 30 and 31).
 11

12 ~~The Department of State Lands shall coordinate the review of requests for approvals of~~
 13 ~~leases, temporary use permit, easements and removal fill in consultation with the~~
 14 ~~Departments of Fish and Wildlife, Parks and Recreation, Environmental Quality, Land~~
 15 ~~Conservation and Development, Water Resources, Geology and Mineral Industries, Energy,~~
 16 ~~coastal local governments, and tribal governments as appropriate. These agencies, with the~~
 17 ~~addition of the regulating federal agencies, will constitute the joint agency review team~~
 18 ~~(JART) described in subsection B.3 below. Pursuant to the federal Coastal Zone~~
 19 ~~Management Act In accordance with the federal Coastal Zone Management Act,~~
 20 ~~federal consistency regulations (15 CFR Part 930), and ORS 196.435, the Department~~
 21 ~~of Land Conservation and Development will review the consistency certification together~~
 22 ~~with required necessary data and information submitted by the applicant for federal~~
 23 ~~authorization for a renewable energy facilities development to ensure the project is~~
 24 ~~consistent with enforceable policies of the Oregon Coastal Zone Management Program,~~
 25 ~~including the Territorial Sea Plan.~~
 26

27 The Department of State Lands (DSL) shall coordinate the review of applications for
 28 proprietary authorizations in consultation with the Joint Agency Review Team
 29 (JART) as described in paragraph B.3.a.
 30

31 3. JART Project Review Process and Coordination

32 ~~The Department of State Lands (DSL) shall convene the JART; during the pre-~~
 33 ~~application and application phases in order to facilitate the coordination of state and~~
 34 ~~federal agencies, in consultation with local jurisdictions, as they apply their separate~~
 35 ~~regulatory, proprietary, or other authorities to the review of a proposed renewable energy~~
 36 ~~facility development. ~~The team shall consist of the state and federal.~~~~
 37

14 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."

- 1 **a. DSL will invite representatives from the following agencies, jurisdictions and**
 2 **organizations to be members of the JART:**
 3 **1.) Departments of Fish and Wildlife, Parks and Recreation, Environmental**
 4 **Quality, Land Conservation and Development, Water Resources, Energy, and**
 5 **Geology and Mineral Industries;**
 6 **2.) Federal agencies, as invited,** with regulatory or planning authority applicable to
 7 the proposed project and location; ~~DSL shall also request that~~
 8 **3.) Local jurisdictions including representatives from affected cities, counties, and**
 9 **their affected communities, and affected port districts;**
 10 **4.) Statewide and local jurisdictions, if any, organizations and advisory committees,**
 11 **as invited, to participate in the JART review and may also invite local or statewide-**
 12 **interest groups and advisory committees to participate. The joint agency review-**
 13 **team application of specific standards, including but not limited to those addressing**
 14 **areas important to fisheries, ecological resources, recreation and visual impacts;**
 15 **and,**
 16 **5.) Federally Recognized Coastal Tribes in Oregon.**

17
 18 **b. JART Roles and Responsibilities**

- 19 **1.) The JART will coordinate ~~the~~with DSL¹⁵ on the pre-application** review process,
 20 and comment on the adequacy of the resource inventories and effects evaluations
 21 required under subsection B.4 (Resource **and Use** Inventory and Effects Evaluation **and**
 22 **Special Resource and Use Review** Standards), ~~below, and~~ **and National**
 23 **Environmental Policy Act (NEPA)** environmental assessments and environmental
 24 impact statements.
 25 **2.) The joint agency review team JART will make recommendations to regulating**
 26 **agencies on whether the information provided by the applicant for the**
 27 **proposed renewable energy facility meets the applicable standards and**
 28 **screening criteria associated with the map designation standards and criteria.**
 29 **3.) The JART will make recommendations to DSL on the approval of proprietary**
 30 **authorizations, and to other applicable regulatory agencies on their decision to**
 31 **permit, license or authorize proposed renewable energy facility projects.**¹⁶
 32 **4.) The JART will also consider and make recommendations on** the adequacy of the
 33 information provided for the operation plan, as required under section C. (Operation
 34 Plan Development) ~~below,~~, including the monitoring requirements, mitigation
 35 measures, adaptive management plans, construction and operational performance

¹⁵ OAR chapter 141, division 140 establishes and prescribes the pre-application process for renewable energy facilities within the territorial sea.

¹⁶ For purposes of CZMA federal consistency reviews in accordance with NOAA's regulations at 15 CFR Part 930 and ORS 196.435, the Department of Land Conservation and Development is the designated state agency for conducting the federal consistency review.

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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 (5.)~~ **The JART recommendations are advisory; regulating agencies who are members of the JART still operate in accordance with their own rules and statutory mandates.**

6.) DSL may acquire the services of technical experts to assist the JART in analyzing specific subject information such as marine business economics and operations, as necessary to conduct the application review.

Operation Plan Development), below.

4. Resource and Use Inventory and Effects Evaluation and Special Resource and Use Review Standards

~~Regulating agencies will require the~~ **An applicant to must provide a resource inventory and effects evaluation, as required by this subsection** ~~the regulating agencies the data and information to complete the Resource and Use Inventory and Effects Evaluation and apply the Special Resource and Use Review Standards,~~ prior to ~~the regulating agencies~~ making any decision.¹⁷ State agencies will assist the applicant by providing readily available data and other information as applicable to the review process. **An applicant may use relevant inventory information included in a project application to a federal agency to meet the requirements of this subsection.**

~~a. Sufficiency of~~ **Purpose of the Resource and Use Inventory and Effects Evaluation** ~~The resource inventory and effects evaluation shall be sufficient to identify and quantify the short-term~~ **Special Resource** ~~and long-term effects of the proposed renewable energy facility development on the affected marine resources and uses.~~ **Use Review Standards**

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** ~~The purpose of the Resource and Use Inventory and Effects Evaluation and Special Resource and Use Review Standards is to provide the regulating~~ **agencies the data and information necessary to make a decision based on the**

¹⁷ This is not “necessary data and information” for the purposes of 15 CFR § 930.58(a)(1)(ii).

1 **potential coastal effects the project might incur. Resource and Use Inventory and**
 2 **Effects Evaluation and Special Resource and Use Review Standards** will help
 3 identify where the applicant needs to address deficiencies. The regulating agency will
 4 use the evaluation to develop specific measures for environmental protection and
 5 mitigation, measures to protect ocean uses, monitoring, and adaptive management.
 6

7 **b. Sufficiency of Resource and Use Inventory and Effects Evaluation**

8 **An applicant must provide information and data to complete the Resource and Use**
 9 **Inventory and Effects Evaluation and apply the Special Resource and Use Review**
 10 **Standards that is sufficient to identify and quantify the short-term and long-term**
 11 **effects of the proposed renewable energy facility ~~development~~ on the affected**
 12 **marine resources and uses.**
 13

14 **c. Use of Available Environmental Information**

15 Regulating agencies may allow the applicant to use existing data and information from
 16 ~~any source~~ **other authoritative sources, including NEPA documents**, when complying
 17 with the requirements for resource inventory ~~the Resource and effects evaluation. All~~
 18 **data Use Inventory** and information used for the inventory **Effects Evaluation** and
 19 evaluation, including existing data from federal environmental impact statements or
 20 assessments, shall meet the same standards of adequacy required for the
 21 inventory **Special Resource** and the evaluation **Use Review Standards**.
 22

23 **d. Inventory Content**

24 To evaluate the magnitude of the proposed project, the likelihood of ~~the project~~ **effects**
 25 ~~of the project~~, and the significance of the resources and uses that the project may affect,
 26 regulating agencies shall require that the applicant include consideration of ~~the~~
 27 ~~following factors in the inventory:~~ **certain factors in the inventory. The Resource**
 28 **and Use Inventory and Effects Evaluation and Special Resource and Use Review**
 29 **Standards requirements apply to all renewable energy facility projects for which**
 30 **an applicant pursues a DSL proprietary authorization, unless the requirements**
 31 **are waived by DSL or otherwise addressed in another subsection of the plan. In**
 32 **addition to the resource inventory and effects evaluation content of this paragraph,**
 33 **projects are also subject to the Special Resource and Use Review Standards**
 34 **specified in paragraph B.4.g.**
 35

36 ~~1) Proposed factors associated with.)~~ **Information regarding** the development,
 37 placement, operation, maintenance, and decommissioning of the project:

38 **A(a)** Location (using maps, charts, descriptions, etc.);

39 **B(b)** Numbers and sizes of equipment, structures;

40 **C(c)** Methods, techniques, activities to be used;

41 **D(d)** Transportation and transmission systems needed for service and support;

42 **E(e)** Materials to be disposed of and method of disposal;

43 **F(f)** Physical and chemical properties of hazardous materials, if any, to be used
 44 or produced;

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1 G(g) Navigation aids; and
2 H(h) Proposed time schedule.

3
4 2).) Location and description of all affected areas, including, but not limited to:

5 A(a) Site of the renewable energy facility;
6 B(b) Adjacent areas that may be affected by physical changes in currents and
7 waves caused by the ~~facility~~**project**;
8 C(c) Utility corridor transiting the territorial sea and ocean shore; and
9 D(d) Shoreland facilities.

10
11 3).) Physical and chemical conditions including, but not limited to:

12 A(a) Water depth;
13 B(b) Wave regime;
14 C(c) Current velocities;
15 D(d) Dispersal, horizontal transport, and vertical mixing characteristics;
16 E(e) Meteorological conditions; and
17 F(f) Water quality.

18
19 4).) Bathymetry (bottom topography) and Shoreline Topography (LIDAR (Light
20 Detection ~~And~~**and** Ranging))

21
22 5).) Geologic structure, including, but not limited to:

23 A(a) Geologic hazards, such as faults or landslides of both marine and shoreline
24 facility areas;
25 B(b) Mineral deposits;
26 C(c) Seafloor substrate type; and
27 D(d) Hydrocarbon resources.

28
29 6).) Biological features, including, but not limited to:

30 A(a) Critical marine habitats (*see* **Part Five**, Appendix A);
31 B(b) Other marine habitats;
32 C(c) Fish and shellfish stocks and other biologically important species;
33 D(d) Recreationally or commercially important finfish or shellfish species;
34 E(e) Planktonic and benthic flora and fauna;
35 F(f) Other elements important to the marine ecosystem; and
36 G(g) Marine species migration routes.

37
38 7).) Cultural, economic, and social uses affected by the ~~project~~**renewable energy**
39 **facility**, including, but not limited to:

40 A(a) Commercial and sport fishing;
41 B(b) State or ~~Federally~~**federally** protected areas;
42 C(c) Scientific research;
43 D(d) Ports, navigation, and ~~Dredge Material Disposal~~**dredge material disposal**
44 sites;

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- 1 E(e) Recreation;
 2 F(f) Coastal ~~Communities Economy~~communities economy;
 3 G(g) Aquaculture;
 4 H(h) Waste water or other discharge;
 5 I(i) Utility or pipeline corridors and transmission lines;
 6 J(j) Military ~~Uses~~uses; and
 7 K(k) Aesthetic ~~Resources~~resources.

8
 9 8.) Significant historical, cultural or archeological resources.

10
 11 9.) Other data that the regulating agencies determine to be necessary and
 12 appropriate to evaluate the effects of the proposed project.

13
 14 e. **Written Evaluation.**

15 Regulating agencies shall require the applicant to submit a written evaluation of all the
 16 reasonably foreseeable adverse effects associated with the development, placement,
 17 operation, and decommissioning of the proposed renewable energy facility. For
 18 purposes of the evaluation, the submittal shall base the determination of “reasonably
 19 foreseeable adverse effects” on scientific evidence. **The information and data to**
 20 **comply with the Special Resources and Uses Standards is specified in paragraph**
 21 **B.4.g.** The evaluation shall describe the potential short-term and long-term effects of the
 22 proposed renewable energy facility on marine resources and uses of the **Oregon**
 23 territorial sea, continental shelf, onshore areas and coastal communities based on the
 24 inventory data listed in paragraph B.4.d ~~above~~ and the following considerations:

25
 26 1) 1) Biological and Ecological Effects:

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

- 34
 35 A(a) The time frames/periods over which the effects will occur;
 36 B(b) The maintenance of ecosystem structure, biological productivity,
 37 biological diversity, and representative species assemblages;
 38 C(c) Maintaining populations of threatened, endangered, or sensitive species;
 39 D(d) Vulnerability of the species, population, community, or the habitat to the
 40 proposed actions; and
 41 E(e) The probability of exposure of biological communities and habitats to
 42 adverse effects from operating procedures or accidents.

43
 44 2) 2) Current Uses:

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

- 4 **A(a)** Local and regional economies;
 5 **B(b)** Archeological and historical resources; and
 6 **C(c)** Transportation safety and navigation.
 7

8 **3.) Natural and Other Hazards**

9 Evaluate the potential risk to the renewable energy facility, in terms of its
 10 vulnerability to certain hazards and the probability that those hazards may cause
 11 loss, dislodging, or drifting of structures, buoys, or facilities. Consider both the
 12 severity of the hazard and the level of exposure it poses to the renewable marine
 13 resources and coastal communities. Hazards to be considered ~~should~~**shall** include
 14 the scouring action of currents on the foundations and anchoring structures, slope
 15 failures and subsurface landslides, faulting, tsunamis, variable or irregular bottom
 16 topography, weather related, or due to human cause.
 17

18 **4.) Cumulative Effects**

19 Evaluate the cumulative effects of a project, including the shoreland component, in
 20 conjunction with effects of any prior phases of the project, past projects, other
 21 current projects, and probable future projects.¹⁸⁻¹⁹ The evaluation ~~should~~**shall**
 22 analyze the biological, ecological, physical, and socioeconomic effects of the
 23 renewable energy facility development and of other renewable energy facility
 24 projects along the Oregon coast, while also taking into account the effects of
 25 existing and future human activities and the regional effects of global climate
 26 change.

27 **A(a)** In conducting the cumulative effects analysis, the applicant ~~should~~**shall**
 28 focus on the specific resources and ~~ecological components~~**uses**, as detailed
 29 under paragraph B.4.d ~~above~~, that may be affected by the incremental effects of
 30 the proposed project and other projects in the same geographic area. The
 31 evaluation ~~should consider~~**shall include but not be limited to consideration of**
 32 whether:

- 33 **1.)i.** the resource ~~is~~**and uses are** especially vulnerable to incremental effects;

¹⁹ 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.

1 2) ii. the proposed project is one of several similar projects in the same
2 geographic area;

3 3) iii. other developments in the area have similar effects on the
4 resource resources and uses;

5 4) iv. these effects have been historically significant for ~~this~~ the resource and
6 uses; and

7 5) v. other analyses in the area have identified a cumulative effects concern.

8
9 B) The ~~Joint Agency Review Team may determine the scope~~ JART shall make
10 recommendations as to the adequacy of the cumulative effects analysis ~~through a~~
11 ~~set of guidelines developed by JART that regulating agencies will~~ shall require of
12 the applicant for phased development projects as described ~~below~~ under
13 subparagraph B.4.f.3 and subsection C.1. The JART will ~~make a determination~~
14 ~~from~~ use the analysis to inform the location, scale, scope and technology of
15 subsequent stages of the phased development project; ~~to provide input on any other~~
16 ~~factors it determines to be relevant; or both. The renewable energy.~~

17
18 **5.) Adaptive Management**

19 Regulating agencies and the project developer ~~will conduct a comprehensive~~
20 ~~cumulative effects analysis at the initial phase of a development designed to inform~~
21 ~~future phases of development. The regulating agencies and project developer~~
22 ~~will~~ shall use adaptive management ~~or a similar process~~ and monitoring to evaluate
23 the project at each subsequent phase; the intent of such evaluation is to inform the
24 design, installation and operation of successive phases.

25
26 ~~f. Insufficient/Incomplete Information~~

27 **f. Pilot and Phased Development Projects**

28 An applicant may not be able to obtain or provide the information required by
29 subsection B.4 (Resource and Use Inventory and Effects Evaluation and Special
30 Resource and Use Review Standards), ~~above~~, due to the lack of data available about
31 the effect that the proposed development may have on ~~environmental~~ marine resources
32 and uses. When ~~a regulating agency~~ JART recommends and DSL determines that the
33 information provided by the applicant is not sufficient or complete enough to fulfill the
34 requirements of subsection B.4, ~~the~~ a regulating agency has the following options:

35
36 1) i. Agency Discretion

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1 The regulating agency may terminate the **state permit** decision-making process or
 2 suspend the **state permit** process until the applicant provides the information.²¹
 3

4 2) .j Pilot Project

5 The regulating agency may recommend that an applicant conduct a pilot project to
 6 obtain adequate information and data and measure the effects.²² Pilot projects are
 7 renewable energy facility developments which are removable or able to be shut
 8 down quickly, are not located in sensitive areas, and are for the purpose of testing
 9 new technologies or locating appropriate sites.²³ ~~The agency's decision to~~²⁴ **A**
 10 **regulating agency may** allow **the a project developer to** use of a pilot project is
 11 for the purpose of obtaining the data and information necessary to fulfill the
 12 requirements of subsection B.4., and shall be based on the following approval
 13 criteria:
 14

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

19 **B**

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

23 **C**

24 **(c)** The risk of adverse effects from the pilot project shall be insignificant,
 25 because:

26 ~~1.~~ **i.** of low probability of exposure of biological communities and habitats;
 27

²¹ For purposes of CZMA federal consistency reviews, NOAA's regulations at 15 CFR Part 930 determine when the CZMA review periods start and ends; a state cannot start, terminate or suspend the CZMA review independent of NOAA's requirements.

²² Alternatively, DLCD may issue a CZMA "conditional concurrence" under 15 CFR § 930.4 and include a condition that in order to be consistent with the information requirements of the Territorial Sea Plan a project developer must first conduct a pilot project, or, if DLCD objects under the CZMA, may recommend a pilot project as an alternative to the proposed project.

²⁴ 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."

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

5
6 **D(d)** The pilot project shall not adversely affect any “important marine habitat”
7 or “critical marine habitat” (*see Part Five, Appendix A: Glossary of Terms*).

8
9 **E(e)** The pilot project will have a term, not to exceed five years, and
10 authorization for the project will include a standard condition requiring project
11 alteration or shutdown in the event that an unacceptable level of environmental
12 effect occurs.

13
14 **F(f)** The pilot project shall avoid significant or long-term interference with
15 other human uses of marine resources, and will require decommissioning and
16 site restoration at expiration of the authorization period if federal and state
17 authorization for a commercial renewable energy facility is not sought **and**
18 **approved.**

19
20 **G(g)** All data **necessary to meet the requirements of subsection B.4,** shall be
21 in the public domain subject to ORS 192.410 *et seq.*

22
23 **H(h)** Work Plan: The applicant shall provide a written work plan which will
24 include, but not be limited to the following: ²⁵~~25~~²⁶

- 25
26 **i.** A list of the information needed to satisfy the requirements of
27 subsection B.4. ~~above.~~
28 2. ii. Specific pilot project objectives to obtain the needed information and
29 an explanation of how the study or test design will meet the objectives.
30 3. iii. Description of study or test methods to meet the objectives, such as:
31 Literature review;
32 Collection of any needed baseline data;
33 Hypotheses to address the study objectives;
34 Descriptions of field sampling and data-analyses methods to be
35 used; and
36 Use of adequate controls to allow the effects of the proposed
37 action to be separated from natural fluctuations in resources and habitats.

pilot project from a short-term limited scope facility to a commercial operation scale facility.

²⁶ 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. 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.

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1
2 4iv. Supporting documentation demonstrating that the study design is
3 scientifically appropriate and statistically adequate to address the
4 research objectives.

5 5v. Descriptions of how the project developer will report and deliver the
6 data and analyses will be reported and delivered to the regulating agency
7 for review and approval.

8
9 **(i) A pilot project that provides the necessary and sufficient information**
10 **may become a phased development.**

11
12 3.) Phased Development

13 The regulating agency may recommend that an applicant conduct a project as a
14 phased development in order to obtain adequate information and data and to
15 measure the incremental effects of each phase prior to further or complete build-out
16 of the project.²⁷ Phased development projects are renewable energy facility
17 developments which are limited in scale and area, but are designed to produce
18 energy for commercial use. The applicant for a phased development project ~~will~~
19 ~~need to~~ **shall** comply with the requirements of subsection B.4. A regulating
20 ~~agency's decision to~~ **agency may** allow the use of a phased development project ~~is~~
21 ~~designed~~ to allow for commercial energy production while obtaining certain data
22 and information ~~that are~~ necessary to fulfill the requirements of subsection B.4., ~~but~~
23 **that** can only be obtained through the monitoring and study of the effects of the
24 development as it is installed and operated for a discrete period of time.

25
26 **g. Test Facility**

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

32 **g. Special Resources and Uses Review Standards**

33 **In addition to the resource and use inventory and effects evaluation requirements,**
34 **special resource and use standards apply to specific areas within the territorial sea,**
35 **based on the delineation and definition of those areas in Part Five, Appendix B**
36 **Map Designations. The marine resources and uses addressed in this paragraph**
37 **are not intended to represent the exclusive subject matter of regulatory agency**
38 **review process. In applying the special resource and use review standards, the**
39 **regulating agencies shall use the best available maps and data. A regulating**

27 Alternatively, the Department of Land Conservation and Development may issue a CZMA "conditional concurrence" under 15 CFR § 930.4 and include a condition that in order to be consistent with the information requirements of the Territorial Sea Plan that a phased project must first be conducted, or, if the state objects under the CZMA, may recommend a phased project as an alternative to the proposed project.

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1 agency may consider new information that it deems sufficient and applicable to the
 2 review. The regulating agency will apply each standard in determining the
 3 potential adverse effects of the proposed project based on best available science
 4 and professional judgment. When confronting significant uncertainty regarding
 5 the potential adverse effects of the proposed project, a regulating agency shall
 6 apply the precautionary approach in decision-making.

7
 8 1.) The following siting and development requirements apply to the construction,
 9 deployment or maintenance of a renewable energy facility:

10
 11 (a) Consider practicable alternative deployment and placement of structures
 12 in proximity to the proposed project area that would have less impact on
 13 identified resources and uses.

14 (b) Minimize construction and installation activities during critical time
 15 periods for the resources and uses as identified by appropriate regulatory
 16 agencies.

17 (c) Minimize disturbance to the identified resources and uses during
 18 construction and installation of the renewable energy facility and other
 19 structures.

20
 21 2.) Fisheries Use Protection Standards

22 The regulating agencies shall protect areas important to fisheries using the
 23 following use protection standards to evaluate the impact an individual
 24 renewable energy facility would have on fisheries use.

25
 26 (a) Definition of Terms

27
 28 i. Adverse Effect for Fisheries Use Protection Standards: a significant
 29 reduction in the access of commercial and recreational fishers to an
 30 area spatially delineated as an area important to a single fishing
 31 sector, multiple combined sectors, or to the fishing community of a
 32 particular port.

33 ii. Presumptive Exclusion Fisheries Use Protection Standards: the
 34 assumption that the distribution and importance of fisheries use
 35 within an area would preclude siting a renewable energy facility
 36 based on the potential adverse effects of that development on those
 37 identified resources and uses. To overcome the presumptive
 38 exclusion, an applicant must demonstrate and the regulating agency
 39 must concur that the proposed project meets all applicable
 40 standards for protecting the fisheries use subject to potential adverse
 41 effects.

42
 43 (b) General Fisheries Use Protection Standard

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1 **The following standards must be considered in determining the possible**
 2 **adverse effects a renewable energy facility might have on fisheries use, and**
 3 **are applicable to applications in all resource and use areas unless otherwise**
 4 **designated by the plan:**

- 5
- 6 **i. Minimize the displacement of fishers from traditional fishing areas,**
 7 **and the related impact on the travel distance and routing required to**
 8 **fish in alternative areas;**
- 9
- 10 **ii. Minimize the compaction of fishing effort caused by the reduction in**
 11 **the areas normally accessible to fishers;**
- 12
- 13 **iii. Minimize the economic impact resulting from the reduction in area**
 14 **available for commercial and recreational fishing for the effected**
 15 **sectors and ports.**
- 16
- 17 **iv. Mitigate possible hazards to navigation and, provide practicable**
 18 **opportunities for vessel transit, at the project location.**
- 19
- 20 **v. Limit the number and size of projects that are located in an area to**
 21 **minimize the impact on a particular port or sector of the fishing**
 22 **industry. Consider the distribution of projects and their cumulative**
 23 **effects based on the criteria listed in (i) through (iv).**

24

25 **(c) Area Designation Fisheries Use Protection Standards**

26 **The following standards apply to specific plan areas as delineated and**
 27 **described in the map located in Part Five, Appendix B.**

28

29 **i. Resources and Uses Conservation Areas (RUCA) Standards**

30 **The following standards apply to the protection of areas important**
 31 **to fisheries within Resources and Uses Conservation Areas.**
 32 **Renewable energy facilities within RUCA are presumptively**
 33 **excluded from areas important to fisheries. To overcome the**
 34 **presumptive exclusion, an applicant must demonstrate and the**
 35 **regulating agency must concur that the project will have no**
 36 **reasonably foreseeable adverse effect on areas important to fisheries**
 37 **and there is no practicable alternative site.**

38

39 **ii. Resource and Use Management Areas (RUMA) Standards**

40 **The following standards apply to the protection of areas important**
 41 **to fisheries within Resources and Uses Management Areas.**
 42 **Renewable energy facilities within RUMA may locate within areas**
 43 **important to fisheries of high catch; high value fish in low**
 44 **abundance or low fishing effort; important on a seasonal basis, or;**

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important to individual ports or particular fleet, if the applicant demonstrates and the regulating agency concurs that the project will have no significant adverse effect on areas important to fisheries.

iii. Renewable Energy Facility Suitability Study Area (REFSSA) Standards

The following standards apply to the protection of areas important to fisheries within Renewable Energy Facility Suitability Study Areas. Renewable energy facilities may locate within REFSSA based on a resource and use inventory evaluation of recreational and commercial fisheries, and the application of the standards listed under subparagraphs g.1 and g.2.b, if applicable.

3.) Ecological Resources Protection Standards

The state shall protect living marine organisms, the biological diversity of marine life, the functional integrity of the marine ecosystem, important marine habitat and associated biological communities by using the following ecological resource protection standards to evaluate marine renewable energy project proposals.

(a) Definition of Terms

i. Adverse Effect for Ecological Resource Protection Standards:

degradation in ecosystem function and integrity (including but not limited to direct habitat damage, burial of habitat, habitat erosion, reduction in biological diversity) or degradation of living marine organisms (including but not limited to abundance, individual growth, density, species diversity, species behavior).

ii. Presumptive Exclusion for Ecological Resource Protection

Standards: the assumption that the distribution and importance of ecological resources within an area would preclude the siting of a renewable energy facility based on the potential adverse effects of that project on those identified resources.

iii. Important, Sensitive, or Unique (ISU) Area: The state has identified

particularly important, sensitive and unique ecological resources (ISUs), with the intention of providing them the highest level of protection from the effects of renewable energy development while allowing existing beneficial uses. ISU areas include both the discrete locations of the ISU resources and bounding polygons (i.e. buffers) intended to provide adequate room for species foraging or other activities; protection from disturbance of the ISU resource; or both. Project developers shall consult with the Oregon Department of Fish and Wildlife (ODFW) and plan the project build-out consistent with ODFW recommended buffers prior to filing application materials with regulating agencies. Currently delineated ISU resources are

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1 located within RUCA. The identified ISU resources are known to be
 2 especially vulnerable to development impacts due to high
 3 concentration of the resource in a small area or the nature of the
 4 resource. The state may change the list of ISUs in the future
 5 (through addition or deletion of ISU from list or through updating
 6 the distribution of an ISU) as new data become available.
 7 Regulating agencies will apply the ISU standard where ISUs are
 8 discovered outside the RUCA. Currently, ISUs include:

- 9 • Rock habitat (including kelp beds, seagrass beds, subtidal
- 10 reefs, and rocky intertidal);
- 11 • Pinniped haulout areas;
- 12 • Seabird nesting colonies; and
- 13 • Estuary and river mouths (especially those that support
- 14 salmon)

15
 16 iv. Each ISU area includes the discrete locations of the ISU resources
 17 plus bounding polygons (i.e. buffers) that are intended to provide
 18 adequate room for species foraging or other activities, or protection
 19 of the ISU resource from disturbance from a renewable energy
 20 facility while allowing existing beneficial uses. Project developers
 21 shall consult with ODFW to calculate the ISU area (i.e. determine
 22 protection buffers) prior to filing application materials with
 23 regulating agencies.

- 24
- 25 • For rock resources, regulating agencies will apply a buffer of
- 26 1000 feet (0.164 nautical miles) to account both for rock reef
- 27 species foraging and disturbance from development.
- 28 • For seabird nesting colonies and pinniped haulouts,
- 29 regulating agencies will apply a buffer of between 1000 and
- 30 2000 feet (0.164-0.329 nautical miles) depending on the
- 31 inhabitants (species, abundance, critical nature of the colony
- 32 or haulout).

33
 34 v. Ecological Resources of Concern:

- 35 • Critical marine habitats (including but not limited to critical
- 36 habitats as defined in the Endangered Species Act, and high-use
- 37 areas),
- 38 • Other important marine habitats,
- 39 • Fish and shellfish stocks and other biologically important species
- 40 (including but not limited to seabirds and mammals),
- 41 • Recreationally or commercially important finfish or shellfish
- 42 species,
- 43 • Planktonic and benthic flora and fauna,

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- 1 • Other elements important to the marine ecosystem, including but
- 2 not limited to:
- 3 ○ ecosystem structure,
- 4 ○ biological productivity,
- 5 ○ species density,
- 6 ○ biological diversity,
- 7 ○ representative species assemblages, and,
- 8 • Marine species migration routes.

9
10 **(b) Area Designation Ecological Resources Protection Standards**

11 **The following standards apply to specific plan areas as delineated and**
12 **described in the map located in Part Five, Appendix B.**

13
14 **i. Resources and Uses Conservation Areas (RUCA) Standards:**

15 **Renewable energy facilities are presumptively excluded from ISU**
16 **areas delineated within a RUCA.**

17 **(a) If the regulating agency concurs, the applicant may overcome**
18 **the presumptive exclusion by a demonstration that:**

19 **1) there is no practicable alternative site outside an ISU area**
20 **that is less environmentally damaging (when evaluating**
21 **the project proposal, the regulating agencies shall not**
22 **consider project cost as a factor when determining**
23 **whether practicable alternatives exist), and;**

24 **2) the project will have no reasonably foreseeable adverse**
25 **effects on the ISUs located at the project site and off-site**
26 **ISUs potentially affected by the project.**

27
28 **(b) Renewable energy facilities shall have no significant adverse**
29 **effect on areas that provide intense foraging for several**
30 **important species.**

31 **(c) Renewable energy facilities shall have no significant adverse**
32 **effect on ecological resources of concern.**

33
34 **ii. Resources and Uses Management Areas (RUMA) Standards:**

35 **(a) Renewable energy facilities shall have no significant adverse**
36 **effects on areas that provide intense foraging for several**
37 **important species.**

38 **(b) Renewable energy facilities shall have no significant adverse**
39 **effects on ecological resources of concern.**

40
41 **(c) The ISU standard, as applied within a RUCA, shall apply to**
42 **ISU resources that are delineated within a RUMA.**

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1 **iii. Renewable Energy Facility Suitability Study Area (REFSSA)**

2 **Standards:**

3 **These areas have been identified as having the lowest potential for**
 4 **conflict between renewable energy facilities and ecological resources.**

5 **(a) Ecological Resources of Concern: Renewable energy facilities**
 6 **shall have no significant adverse effects on ecological resources of**
 7 **concern.**

8 **(b) The ISU standard, as applied within a RUCA, shall apply to**
 9 **ISU resources that are delineated within a REFSSA.**

10
11 **4.) Recreational Resources Standards**

12 **The state shall protect recreational resources as a beneficial use of the**
 13 **territorial sea. The standards for recreational resources shall be applied to all**
 14 **renewable energy facility projects throughout the territorial sea, unless**
 15 **otherwise provided by the plan. A determination of impact is based on the**
 16 **inventory of recreational uses contained in the map (Part Five, Appendix B).**

17
18 **(a) Renewable energy projects may not have a significant adverse effect on**
 19 **areas of high or important use for recreational activities. A significant**
 20 **adverse effect occurs when:**

21 **i. Access is denied or unreasonably impeded;**

22 **ii. The project creates reasonably foreseeable health or safety impacts;**
 23 **or**

24 **iii. The project would have reasonably foreseeable significant impacts**
 25 **on the natural environment that the recreational community**
 26 **depends on.**

27
28 **(b) Areas of high or important use for recreational activities occur where there**
 29 **is**

30 **i. Community of historical users;**

31 **ii. High intensity of use; or**

32 **iii. Uniqueness or a special quality associated with the recreational use**
 33 **relative to the state or region.**

34
35 **5.) Visual Resource Protection Standards**

36 **The regulating agencies shall protect visual resources (i.e. viewsheds of the**
 37 **territorial sea) by applying the following visual resource protection standards**
 38 **to evaluate the potential impact of proposed renewable energy projects on the**
 39 **affected viewsheds. Most renewable energy projects will be subject to**
 40 **regulations for navigational safety that may require visual contrast with the**
 41 **environment. The standards below are based on an evaluation of visual**
 42 **contrast, which cannot be avoided or mitigated for the purposes of navigational**
 43 **safety.**

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1 The following standards rely on an overlay of delineated ocean viewsheds that
 2 has been incorporated into the map (Part Five, Appendix B). Regulating
 3 agencies will apply these standards to projects in all designated areas within
 4 the territorial sea.

5
 6 **(a) Classification of Viewsheds**

7 The following classification system categorizes viewshed sites based on a set
 8 of objective criteria related to the unique setting, aesthetic qualities and
 9 physical properties of each site. Each viewshed class has a specific objective
 10 that determines the level of activity that would be compatible with
 11 maintaining the character of the viewshed. The class objectives and project
 12 review criteria are used to determine the impact a project has on each
 13 affected viewshed. A single project may impact multiple viewsheds, and
 14 will be subject to the associated visual subordination standard for each of
 15 them. The JART will provide the applicant with the list of affected
 16 viewsheds for which the applicant must conduct simulations to determine if
 17 the project meets the standards described for the affected viewshed class.

18
 19 **i. Class I: The objective of this class is to preserve the existing**
 20 **character of the seascape. This class provides for natural ecological**
 21 **changes; however, it does not preclude very limited development**
 22 **activity. The level of change to the characteristic seascape must be**
 23 **very low and may not attract attention.**

24
 25 **ii. Class II: The objective of this class is to retain the existing character**
 26 **of the seascape. The level of change to the characteristic seascape**
 27 **must be low. Development activities may be seen, and may attract**
 28 **minimal attention, but may not dominate the view of the casual**
 29 **observer.**

30
 31 **iii. Class III: The objective of this class is to partially retain the existing**
 32 **character of the seascape. The level of change to the characteristic**
 33 **seascape may be moderate. Development activities may be seen, and**
 34 **may attract attention but may not dominate the view of the casual**
 35 **observer.**

36
 37 **iv. Class IV: The objective of this class is to provide for development**
 38 **activities which require major modifications of the existing character of**
 39 **the seascape. The level of change to the characteristic seascape can be**
 40 **high. These development activities may dominate the view and be the**
 41 **major focus of viewer attention. However, every attempt shall be made**
 42 **to minimize the impact of these activities through careful location,**
 43 **minimal disturbance, and repeating the basic elements.**
 44

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1 **(b) Project Review Criteria**

2 **In order to determine whether the proposed project meets the standards**
 3 **defined for each Class of viewshed, regulating agencies will consider the**
 4 **following contrast criteria for the visible portion of the proposed renewable**
 5 **energy facility for which the applicant has produced visual simulations for**
 6 **the affected viewsheds selected by the JART.**

7
 8 **i. Distance from viewpoint. The contrast created by a project usually is**
 9 **less as viewing distance increases.**

10
 11 **ii. Angle of Observation. The apparent size of a project is directly**
 12 **related to the angle between the viewer's line-of-sight and the slope**
 13 **upon which the project is to take place.**

14
 15 **iii. Length of Time the Project Is In View. If the viewer has only a brief**
 16 **glimpse of the project, the contrast may not be of great concern. If,**
 17 **however, the project is subject to view for a long period, as from an**
 18 **overlook, the contrast may be very significant.**

19
 20 **iv. Relative Size or Scale. Project contrast is directly related to project**
 21 **size and scale as compared to the surroundings in which it is located.**
 22 **This should include consideration of project size (e.g., number of**
 23 **devices) along with size of the individual devices and associated**
 24 **structures along with layout and spacing. For example, minimizing**
 25 **horizontal spread of the layout may reduce contrast.**

26
 27 **v. Season of Use. Contrast ratings should consider the physical**
 28 **conditions that exist during the heaviest or most critical visitor use**
 29 **season.**

30
 31 **vi. Light Conditions. Light conditions can substantially affect the**
 32 **amount of contrast. The direction and angle of lighting can affect**
 33 **color intensity, reflection, shadow, from, texture, and many other**
 34 **visual aspects of the seascape. Light conditions during heavy use**
 35 **periods must be a consideration in contrast ratings.**

36
 37 **vii. Spatial Relationships. The spatial relationship within a seascape is a**
 38 **major factor in determining the degree of contrast. For example,**
 39 **projects in areas that are the "focus of key views" like a headland or**
 40 **large offshore rocks could have a higher contrast.**

41
 42 **viii. Atmospheric Conditions. The visibility of projects due to**
 43 **atmospheric conditions such as fog or natural haze should be**
 44 **considered.**

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ix. Motion, lights and color. Movement and lighting draw attention to a project and vary depending on conditions and time of day and night. Surface treatment (e.g., color) may increase or decrease visibility.

x. Shore-based facilities. Associated shore-based facilities (e.g., buildings, cables etc.) should also be considered in the visual impact analysis.

6.) Proprietary Use and Management Area (PUMA) Standards

A PUMA is an area wherein there are one or more authorized uses or special management designations, including but not limited to, undersea fiber-optic or scientific research cable corridors, navigation channel and pilotage safety corridors, and state or federal habitat management areas. Regulating agencies will not accept a renewable energy facility application in a PUMA unless the use is legally permissible and complies with the authorized use of the area. Applications for projects within a PUMA are subject to the resources and uses review standards that apply to the type of resources or uses area the PUMA is located in, as delineated by the Map Designations in Appendix B.

7.) Project Development Limitations and Constraints

The total amount of area within the territorial sea that is to be built or committed for renewable energy facilities is limited both on a statewide and regional basis.

(a) The total area that is built and committed to marine renewable energy development, based on the area permitted and leased for that use, shall not exceed a maximum of three percent of the total area of the territorial sea.

(b) The total area that is built and committed to marine renewable energy development, based on the area permitted and leased for that use, shall not exceed a maximum of one percent of the total area within a 60 nautical mile arc as measured from the mouths of the Columbia River estuary, the Newport estuary, and the Coos Bay estuary.

(c) The total area designated as REFSSA in the plan shall not exceed five percent of the total area of the territorial sea.

C. Application Requirements

1. Pre-Application

The regulating agency shall require the applicant to participate in a pre-application conference before an application is submitted.

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1 **2. Financial Capacity**

2 **The regulating agency shall assure that an applicant has the financial capacity to**
 3 **complete the application process before resources are committed to review of the**
 4 **application.**

5
6 **3. Application Fee**

7 **The application must include all information required by applicable rules of the**
 8 **regulating agency, as well as any applicable fee for review of the application.**

9
10 **D. Operation Plan Development**

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

19
20 **1. Phased Development Plan**

21 A regulating agency may require that a facility be developed in phases in order to determine
 22 whether the environmental effects of the structures and the operation of the facility are
 23 consistent with the inventory and effects evaluation conducted under subsection B.4. The
 24 requirements for an operation plan listed in this section would apply to each stage of the
 25 phased development so as to account for any changes in design, technology or operation
 26 that may result from monitoring the initial phase of the operation. ~~The state and federal~~
 27 ~~joint agency review team~~ **The JART, as discussed in subsection B.3** will assist the
 28 developer in assessing the environmental effects of the initial phase and in determining
 29 what, if any, changes in the development and operation of future phases of the facility
 30 might be necessary to mitigate or prevent harm or damage to the marine ecosystem.

31
32 A facility that has been developed to the full extent of its design and operating capacity
 33 may, during the lifetime of its authorization, require systematic improvements to the
 34 technology, structures and operational procedures that were originally authorized. The
 35 regulating agency ~~will~~ **shall** require a new facility development plan, as appropriate and
 36 necessary, to provide the data and information for the redevelopment and operation of the
 37 new facility components.

38
39 **2. Facility Development Plan**

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

- 43
44 **a.** Structural and project design, materials used, anchoring and installation information;

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- 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~~**shall** 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~~**shall** 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~~**shall** 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~~**shall** 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~~**shall** include, at a minimum:

- 1.) A list of the information needed to satisfy an effects evaluation.

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1 2).) Specific study objectives to obtain the needed information and explanation of
 2 how the study design will meet the objectives.

3
 4 3).) Description of study methods to meet the objectives, such as:

5
 6 A(a) Literature review;

7 B(b) Collection of needed baseline data;

8 C(c) Hypotheses to address the study objectives;

9 D(d) Descriptions of field sampling and data-analyses methods to be used; and

10 E(e) Use of adequate controls, such as control sites, to allow the effects of the
 11 proposed action to be separated from natural fluctuations in resources and
 12 habitats.

13
 14 4.) The monitoring plan ~~will~~shall include supporting documentation demonstrating
 15 that the study design is scientifically appropriate and statistically adequate to
 16 address the research objectives.^{28²⁹}

17
 18 4) 5.) The monitoring plan ~~will~~shall include a description of the method that
 19 will be used to report and deliver data and analyses information to the
 20 authorizing state agency for review in a timely and efficient manner.³⁰

21
 22 **6.) The monitoring plan will include a description of the process for periodic**
 23 **and ongoing public involvement and review of the monitoring work.**

24
 25 **d. Adaptive Management Plan**

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

a Before, After, Control, Impact (BACI) experimental study design.

²⁹ 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.

³⁰ 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."

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1 operation of the project. The adaptive management plan will explain processes for how
 2 adaptation measures will be applied to the operation and management of the project.
 3 ~~The adaptive management plan should account for:~~

- 4
- 5 1.) Variable conditions in the marine environment;
- 6 2.) Change in the status of resources;
- 7 3.) New information provided by monitoring of the project;
- 8 4.) Data and information provided by research and from other sources;
- 9 5.) New technologies that would provide for greater protection of ocean resources;
- 10 6.) Ocean fisheries, or other ocean uses to be protected from adverse effects and
- 11 operational conflicts; and
- 12 7.) Unanticipated cumulative effects.
- 13

14 4. Decommissioning Plan:

15 An applicant ~~is required to~~ shall provide a plan to restore the natural characteristics of the
 16 site to the extent practicable by describing the facilities to be removed.²³¹ The plan should
 17 include; a proposed decommissioning schedule; a description of removal and containment
 18 methods; description of site clearance activities; plans for transporting and recycling,
 19 reusing, or disposing of the removed facilities; a description of those resources, conditions,
 20 and activities that could be affected by or could affect the proposed decommissioning
 21 activities; results of any recent biological surveys conducted in the vicinity of the structure
 22 and recent observations of marine mammals at the structure site; mitigation measures to
 23 protect archaeological and sensitive biological features during removal activities; and a
 24 statement as to the methods that will be used to survey the area after removal to determine
 25 any effects on marine life. A decommissioning plan should identify how the project owner
 26 will restore the site to the natural condition that existed prior to the development of the site,
 27 to the extent practicable.

³¹ The requirement for a decommissioning plan is based upon DSL rules under OAR chapter 141, division 140. Under OAR 141-140-0080(5)(e), 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.”

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1
2 **5. Financial Assurance Plan:**

3 The applicant ~~must~~shall provide a financial assurance compliance plan that describes ~~their~~
4 ~~ability to~~ how the holder will comply with the state ~~regulating agency~~ requirements for
5 financial assurance ~~instruments to guarantee performance, and any other.~~ The plan must
6 assure that the financial terms and conditions that ~~may~~assurance provided by the holder
7 will be applied. ~~Wavesufficient to cover the estimated costs of: (1) removal and~~
8 recovery of the facility or portions of the facility lost or damaged through an accident;
9 (2) damages to vessels and equipment owned by third parties through an accident;
10 and (3) decommissioning and removal of the facility upon the termination of its
11 authorization(s). Holders of authorizations for renewable energy facilities or devices
12 shall comply with ~~the~~applicable state financial assurance requirements of, including but
13 not limited to: ORS 274.867,³ and ~~the~~ implementing administrative rules of the
14 Department of State Lands, OAR chapter 141, division 140-0080 and OAR 141-140-0090.
15 In addition, the regulating agency shall determine whether the holder will have the
16 technical, organizational and financial capacity to construct, operate and
17 decommission and remove the proposed facility.
18

19 **6. Agreements:**

20 Applicants ~~are required to~~shall communicate with traditional ocean users and stakeholders
21 with an interest in the area of the proposed project to address issues of concern.⁴³²
22 Applicants are encouraged to memorialize agreements with those ocean users and
23 stakeholders on ~~the~~ specific actions, including conducting the adaptive management and
24 monitoring plan, that the applicant ~~will take~~is required to address ~~their issues of concern.~~
25 perform.
26

27 **~~D.E.~~ Northwest National Marine Renewable Energy Center Mobile Test**
28 **~~Berth Site~~**

29
30 **~~1. Test Berth Site Plan~~**

31 The purpose of the Northwest National ~~Marine~~ Renewable Marine Energy Center ~~mobile~~
32 ~~test berth site~~ (NNMREC) Ocean Test Site is ~~established~~to conduct experimental

³² 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.”

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1 marine renewable energy device testing. A primary function of the NNMREC Ocean
 2 Test Site is to understand the environmental effects of various marine renewable
 3 energy devices, in addition to the amount of energy produced by the various
 4 technologies.

5
 6 **1. The Mobile Ocean Test Berth Site**

7 The purpose of the NNMREC Mobile Ocean Test Berth (MOTB) site at Newport is to
 8 conduct short-term experimental testing of ~~the~~ marine renewable energy technologies at
 9 ~~the~~ devices. This site will be used for short-term deployments of individual wave
 10 energy devices in conjunction with or independently of The Ocean Sentinel, a mobile
 11 ocean test berth facility. . This site is not grid-connected.

12
 13 **2. ~~Test Berth~~Regulating Agency Authorizations for MOTB Site Use**

14 An application for a permit, license, or other authorization for ~~the~~ installation and use of the
 15 Northwest National Marine Renewable Energy Center mobile test berth site, operation at
 16 the NNMREC MOTB site is not subject to the requirements of sections B or C, above.

17
 18 ~~—An experimental or test device or other structure for use at the Northwest National Marine~~
 19 ~~Renewable Energy Center mobile test berth site is required to~~ that seeks permission to use
 20 the NNMREC MOTB site, shall obtain any applicable license, permit or
 21 authorization. licenses, permits or Department of State Lands authorizations.

22
 23 **F. Plan Review**

24 Territorial Sea Plan Part Five shall be subject to review by the Ocean Policy Advisory
 25 Council (OPAC) no longer than seven years after it has been adopted or when one
 26 percent of the Territorial Sea has been permitted and the facilities developed for
 27 renewable energy facilities, whichever occurs first. OPAC may, at any time, choose to
 28 initiate an amendment of the plan through the process described under Part One,
 29 section F.2, Changing the Plan and ORS 196.443(1)(a).
 30

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1
2 **Part Five Appendix A: Definitions and Terms**

3
4 **As used in The following definitions shall apply to Part Five, unless the context requires**
5 **otherwise, the following definitions shall apply:**

6
7 **Adverse Effect for Ecological Resource Protection Standards: degradation in ecosystem**
8 **function and integrity (including but not limited to direct habitat damage, burial of**
9 **habitat, habitat erosion, reduction in biological diversity) or degradation of living marine**
10 **organisms (including but not limited to abundance, individual growth, density, species**
11 **diversity, species behavior).**

12
13 **Adverse Effect for Fisheries Use Protection Standards: a significant reduction in the**
14 **access of commercial and recreational fishers to an area spatially delineated as an area**
15 **important to a single fishing sector, multiple combined sectors, or to the fishing**
16 **community of a particular port.**

17
18 **Applicant:** An applicant for a state permit, license, lease or other authorization for renewable
19 energy facilities development or other related structures, equipment or facilities will be referred
20 to as “the applicant²²” **or “project developer”**

21
22 **Areas important to fisheries:** (Goal 19)

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

30
31 **Conservation:** a principle of action guiding ~~Oregon's~~ **Oregon's** ocean-resources management,
32 which seeks to protect the integrity of marine ecosystems while giving priority to the protection
33 and wise use of renewable resources over nonrenewable; as used in the Oregon Ocean
34 Resources Management Plan, the act of conservation means “that the integrity, diversity,
35 stability, complexity, and the productivity of marine biological communities and their habitats
36 are maintained or, where necessary, ~~restored~~ **restored**” and
37 ~~“...accommodat~~ **accommodate**(ing) the needs for economic development while avoiding
38 wasteful uses and maintaining future availability..” (Territorial Sea Plan Appendix A: Glossary
39 of Terms)

40
41 **Critical marine habitat:** means one or more of the following land and water areas:

- 42 a.) areas designated as ~~“critical habitat”~~ **“critical habitat”** in accordance with federal laws governing threatened
43 and endangered species; or

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1 b.) areas designated in the Territorial Sea Plan as either:

- 2 1.) as needed for the survival of animal or plant species listed by state or federal laws as
 3 "“threatened”, “”, “endangered”, or “sensitive”. Such areas might include special areas
 4 used for feeding, mating, breeding/spawning, nurseries, parental foraging, overwintering,
 5 or haul out or resting. This is designation does not intended to limit the application of
 6 federal law regarding threatened and endangered species; or
 7 2.) “unique” (*i.e.* one of a kind in Oregon) habitat for scientific research or education
 8 within the Oregon territorial sea. (Territorial Sea Plan, Part Two)
 9

10 **Ecosystem:** the living and non-living components of the environment which interact or
 11 function together, including plant and animal organisms, the physical environment, and the
 12 energy systems in which they exist. All the components of an ecosystem are interrelated.
 13 (Oregon Statewide Planning Goals)
 14

15 **Habitat:** the environment in which an organism, species, or community lives. Just as humans
 16 live in houses, within neighborhoods, within a town or geographic area, within a certain region,
 17 and so on, marine organisms live in habitats which may be referred to at different scales. (*see*
 18 also “critical marine habitat”, “important marine habitat”) (Territorial Sea Plan
 19 Appendix A: Glossary of Terms)
 20

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

- 22 a.) important to the biological viability of commercially or recreationally caught species or that
 23 support important food or prey species for commercially or recreationally caught species; ~~or~~
 24 b.) needed to assure the survival of threatened or endangered species; ~~or~~
 25 c.) ecologically significant to maintaining ecosystem structure, biological productivity, and
 26 biological diversity; ~~or~~
 27 d.) essential to the life-history or behaviors of marine organisms; ~~or~~
 28 e.) especially vulnerable because of size, composition, or location in relation to chemical or
 29 other pollutants, noise, physical disturbance, alteration, or harvest; or
 30 f.) unique or of limited range within the state.
 31

32 Important marine habitats must be specifically considered when an ~~inventory~~ **information** and
 33 ~~-effects evaluation~~ **assessment** is conducted pursuant to Goal 19: including but not limited to:
 34 habitat necessary for the survival and conservation of Oregon renewable resources (*e.g.* areas
 35 for spawning, rearing, or feeding), kelp and other algae beds, seagrass beds, seafloor gravel
 36 beds, rock reef areas and areas of important fish, shellfish and invertebrate concentration.
 37 (~~Oregon Statewide Planning~~ (Goal 19)).
 38

39 **Impact: is the severity, intensity, or duration of the effect, and can be either or both**
 40 **positive or negative outcomes.**
 41

42 **Minimize: to reduce or avoid the effect to the extent practicable.**

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1
2 **Mitigate: is the avoidance or minimization of a direct or indirect ecological effect or**
3 **impact on a receptor through engineering or operational modification of the project.**
4 **Mitigation does not refer herein to so-called “offsite” mitigation or to compensatory**
5 **mitigation (i.e., paying or compensating for environmental damage).**
6

7 **Phased development projects:** Renewable energy facility developments which are limited in
8 scale and area, but are designed to produce energy for commercial use.
9

10 **Precautionary Approach: the application of a planning and regulatory decision making**
11 **system that accounts for circumstances where information about marine resources and**
12 **uses is limited, and there are increased levels of risk and uncertainty related to the**
13 **outcome of the action. The principle of the precautionary approach is found in the**
14 **Management Measures provided in Part One, section G. and in Goal 19 Ocean Resources.**
15

16 **Presumptive Exclusion for Ecological Resource Protection Standards: the assumption**
17 **that the distribution and importance of ecological resources within an area would**
18 **preclude the siting of a renewable marine energy facility based on the potential adverse**
19 **effects of that development on those identified resources.**
20

21 **Presumptive Exclusion for Fisheries Use Protection Standards: the assumption that the**
22 **distribution and importance of fisheries use within an area would preclude the siting a**
23 **renewable marine energy facility based on the potential adverse effects of that**
24 **development on those identified resources and uses.**
25

26 **Project: see “renewable energy facility or facilities” below.**
27

28 **Project Developer: see “applicant” above.**
29

30 **Regulating agency or regulating agencies:** State and federal agencies making decisions to
31 authorize the siting, development and operation of renewable energy facilities development or
32 other related structures, equipment or facilities within the Oregon Territorial Sea.
33

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

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- 1 **Seascape: the coastal landscape and adjoining areas of open water, including views from**
2 **land to sea, from sea to land and along the coastline. A seascape has areas of sea, coastline**
3 **and land.**
- 4 **Viewshed: the natural environment that is visible from one or more fixed viewpoints. For**
5 **the purposes of Part Five, these are areas within the territorial sea as seen from**
6 **viewpoints on shore.**

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1 **Part Five Appendix B: EndnotesMap Designations**

2
3 **The map information and data contained and referenced herein, designate areas**
4 **within the territorial sea that are subject to section B.4., Resource and Use Inventory**
5 **and Effects Evaluation and Special Resource and Use Review Standards. The maps**
6 **delineate areas within the territorial sea based on the resources and uses present**
7 **within them, and to which the review standards apply.**

8
9 **Territorial Sea Plan Resources and Uses Area Map Designations:**

10 **The area descriptions below apply to the map designations incorporated into Part**
11 **Five, Appendix B.**

12
13 **Renewable Energy Permit Area (REPA): these areas are delineated sites for which**
14 **there is an existing authorization for the development of renewable energy testing,**
15 **research or facilities. Applications for renewable energy facilities within a REPA**
16 **must comply with the terms and conditions required by the regulating agency**
17 **authorization for the site. The total area of renewable energy facility sites authorized**
18 **as REPA may not exceed two percent of the territorial sea (25.2 sq. miles or 19 sq.**
19 **nautical miles).**

20
21 **Renewable Energy Facility Suitability Study Area (REFSSA): an area wherein there**
22 **may be ecological resources, or activities relating to commercial fishing sectors,**
23 **recreational fishing, or individual ports. Renewable energy facilities may be sited**
24 **within a REFSSA. Renewable energy facility development in these areas is**
25 **anticipated to have the lowest potential adverse effects on inventoried marine**
26 **resources and uses within state waters. A renewable energy facility proposal in a**
27 **REFSSA must comply with Part Five, paragraphs B.4.a through f., and section C, and**
28 **the applicable regulatory and proprietary requirements of state and federal agencies.**
29 **The total area for REFSSA may not exceed five percent of the territorial sea (63 sq.**
30 **miles or 47.5 sq. nautical miles).**

31
32 **Resources and Uses Management Area (RUMA): an area wherein there are important**
33 **or significant ecological resources or areas that are economically important to**
34 **commercial fishing sectors, recreational fishing, or individual ports. Renewable**
35 **energy facilities may be sited within a RUMA. Under some circumstances there is a**
36 **potential for renewable energy facility development to have significant adverse effects**
37 **on inventoried marine resources and uses within these areas. A project proposal for**
38 **MRE development in a RUMA must demonstrate that itthe project will have no**
39 **significant adverse effects on inventoried marine resources and uses as determined by**
40 **the standards for protecting those resources and uses in that area. Based on the map**
41 **designations in Appendix C, the RUMA are X square miles (X sq. nautical miles)**
42 **covering X% of the territorial sea.**
43

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1 Resources and Uses Conservation Area (RUCA): an areas wherein there are
 2 important, significant, or unique (ISU) ecological resources, or an area that is of
 3 significant economic importance to commercial fishing sectors, recreational fishing, or
 4 individual ports. MRE developmentA renewable energy facility could be sited within
 5 a RUCA, though there is a high potential that most types of MRE
 6 developmentprojects would have significant adverse effects on inventoried marine
 7 resources and uses within the area. A project proposal for MRE development in a
 8 RUCA must demonstrate that the iproject will have no reasonably foreseeable adverse
 9 effects on inventoried marine resources and uses as determined by the standards for
 10 protecting those resources and uses in that area. Based on the map designations in
 11 Appendix C, the RUCA are X square miles (X sq. nautical miles) covering X% of the
 12 territorial sea.

13
 14
 15 Renewable Energy Exclusion Area (REEA): special management areas. These areas
 16 contain permitted or managed uses that have some form of exclusive right or
 17 authority to exclude, restrict or control other uses in that area, . Examples of these
 18 types of authorizations including e dredge material disposal sites, marine reserves and
 19 marine protected areas. Regulating agencies will not accept renewable energy facility
 20 aApplications for MRE development will not be accepted within a REEA. Based on
 21 the map designations in Appendix C, the REEA are X square miles (X sq. nautical
 22 miles) covering X% of the territorial sea.

23
 24 Proprietary Use and Management Area (PUMA): areas wherein there are authorized
 25 uses and special management designations. These areas are subject to some form of
 26 authority to restrict or control other uses. Examples of these types of authorizations
 27 include undersea fiber-optic or scientific instrumentation, cable corridors, and
 28 navigation channel and pilotage safety corridors. R egulating agencies will not accept
 29 renewable energy facility MRE applications in these areas will not be accepted by
 30 regulating agencies unless the use is legally permissible and , complies with the
 31 authorized use of the area., and has been agreed to by the authorized users. Based on
 32 the map designations in Appendix C, the PUMA are X square miles (X sq. nautical
 33 miles) covering X% of the territorial sea.
 34

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Part Five Appendix CD: Enforceable Policies Subject to Federal Consistency

This Appendix lists the provisions of Part 5 that constitute the “enforceable policies” for Federal Consistency purposes, under the CZMA and pursuant to the Federal Consistency Regulations at 15 CFR Part 930. The federal Coastal Zone Management Act requires that certain federally permitted or licensed activities that affect coastal uses or resources must be conducted in a manner consistent with the enforceable policies of a state’s federally approved coastal management program. When reviewing federal decisions to permit or license renewable energy facilities for consistency with the OCMP the Department of Land Conservation and Development will apply the following sections of TSP Part 5 as enforceable policies:

Note: The exact text for each of the section below will be included here once the text is finalized and approved.

Section B.4. Resource and Use Inventory and Effects Evaluation and Special Resource and Use Review Standards

B.4.a. Sufficiency of Resource and Use Inventory and Effects

B.4.d. Inventory Content

B.4.e. Written Evaluation

B.4.f. Pilot and Phased Development

B.4.f.2) Pilot Project

B.4.f.3) Phased Development

B.4.g. Special Resources and Use Review Standards

B.4.g.1) General siting and development requirements

B.4.g.2) Fisheries Use Protection Standards

B.4.g.3) Ecological Resource Protection Standards

B.4.g.4) Recreational Resource Standards

B.4.g.5A) Visual Resource Protection Standards – Classification of Viewsheds

Section C.

C.1. Phased Development Plan

C.2. Facility Development Plan

C.3. Project Operation Plan

C.4. Decommissioning Plan

C.5. Financial Assurance Plan

C.6. Agreements

Appendix A. Definitions

All

Appendix BC. Map Designations

All

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Addendum to Appendix B: Territorial Sea Plan Resources and Uses Area Map Designations

Territorial Sea Plan Resources and Uses Area Map Designations:

The area descriptions below apply to the map designations incorporated into the Territorial Sea Plan Part Five, as Appendix B.

Renewable Energy Permit Area (REPA): these areas are delineated sites for which there is an existing authorization for the development of MRE testing, research or facilities. Applications for marine renewable energy (MRE) development within a REPA must comply with the terms and conditions required by the regulating agency authorization for the site. The total area of marine renewable energy facility development sites authorized as REPA may not exceed 2% of the territorial sea (25.2 sq. miles or 19 sq. nautical miles)

Renewable Energy Facility Suitability Study Area (REFSSA): an area wherein there may be ecological resources, or activities relating to commercial fishing sectors, recreational fishing, or individual ports. MRE development may be sited within a REFSSA. MRE development in these areas is anticipated to have the lowest potential adverse effects on inventoried marine resources and uses within state waters. A proposal for MRE development in a REFSSA must comply with TSP Part Five Sections B.4.a through f., and C, and the applicable regulatory and proprietary requirements of state and federal agencies. The total area for REFSSA may not exceed 5% of the territorial sea (63 sq. miles or 47.5 sq. nautical miles)

Resources and Uses Management Area (RUMA): an area wherein there are important or significant ecological resources, or an area that is economically important to commercial fishing sectors, recreational fishing, or individual ports. MRE development may be sited within a RUMA. Under some circumstances there is a potential for MRE development to have significant adverse effects on inventoried marine resources and uses within these areas. A proposal for MRE development in a RUMA must demonstrate that the project will have no significant adverse effects on inventoried marine resources and uses as determined by the standards for protecting those resources and uses in that area.

Resources and Uses Conservation Area (RUCA): an area wherein there are important, significant, or unique (ISU) ecological resources, or an area that is significantly economically important to commercial fishing sectors, recreational fishing, or individual ports. MRE development could be sited within a RUCA, though there is a high potential that most types of MRE development would have significant adverse effects on inventoried marine resources and uses within the area. A proposal for MRE development in a RUCA must demonstrate that the project will have no reasonably foreseeable adverse effects on inventoried marine resources and uses as determined by the standards for protecting those resources and uses in that area.

Renewable Energy Exclusion Area (REEA): special management areas. These areas contain permitted or managed uses that have some form of exclusive right or authority to exclude, restrict or control other uses, including dredge material disposal sites, marine reserves and marine protected areas. Applications for MRE development will not be accepted within a REEA.

Proprietary Use and Management Area (PUMA): areas wherein there are authorized uses and special management designations. These areas are subject to some form of authority to restrict or control other uses. Examples of these types of authorizations include undersea fiber-optic or scientific instrumentation, cable corridors, and navigation channel and pilotage safety corridors. MRE applications in these areas will not be accepted by regulating agencies unless the use is legally permissible, complies with the authorized use of the area, and has been agreed to by the authorized users.

Attachment C

Oregon Territorial Sea Plan, Part 5 Public Process Report 2008 - 2013

Summary: The Oregon Coastal Management Program has funded and supported the work the Oregon Ocean Planning Council (OPAC) and its Territorial Sea Plan Working Group, and the LCDC's Territorial Sea Plan Advisory Committee (TSPAC) and its various subcommittees to meet the challenges put forth in Governor Kulongoski 2009 executive order # 08-07.

This is a chronological compilation of public meetings and work sessions that were used to facilitate the TSP amendment process. All the OPAC and TSPAC meetings and work sessions well as those of their subsidiary work groups and subcommittees, were public meetings for which there was public notice. Materials used at the meetings and work sessions were made available in hard copy form and online at the OregonOcean.info website. Meeting notes, video or digital recordings were taken for all meetings listed. Meetings were made accessible via direct phone line and online meeting links that allowed group members and the public to see and hear the meeting, and participate through the audio connections. Attendance of group members and public attendees were kept for all meetings, including those who may have attended via phone or online.

In addition to the meetings of OPAC and TSPAC, the agency staff provided presentations to legislative committees and the coastal caucus on several occasions. Staff also met with local advisory groups, stakeholder organizations and throughout the period beginning in 2009 through 2012. Staff also did presentations to city and county commissions on numerous occasions. Staff also made presentations and participated on panels at conferences and workshops, and other public venues and meetings.

The territorial sea planning process was the subject of numerous newspaper articles and editorials, from local coastal, statewide and national newspapers and periodicals, including multiple Oregonian stories and editorials, regional newspapers and the New York Times. The TSP process was the topic of discussion for Oregon Public Radio shows on three separate occasions.

January 2008 - Ocean Policy Advisory Council Meeting

OPAC members Robin Hartman and Cathy Tortorici do a presentation on Wave Energy and explain the work they have been doing with FERC. Work on an MOU between FERC and the State is continuing.

February 2008 - Ocean Policy Advisory Council Meeting

Robin Hartmann shared update on the FERC MOU and the State.

March 2008

MOU between FERC and the State of Oregon is signed. It to coordinate the schedules and procedures for review of wave energy projects in its Territorial Sea and off Oregon's Outer Continental Shelf (OCS) and to ensure coordinated review of proposed wave energy projects are responsive to environmental, economic and cultural concerns will providing a timely, stable and predictable means for developers of such projects to seek necessary approvals.

Governor Kulongoski signs Executive Order No. 08-07 directing state agencies to protect coastal communities in siting Marine Reserves and Wave Energy Projects. The Order also directed DLCD to "seek recommendations from OPAC concerning appropriate amendments to Oregon's Territorial Sea Plan (TSP) reflecting comprehensive plan provisions on wave energy projects. On or before July 31, 2009, DLCD shall begin the process to develop proposed amendments to Oregon's Territorial Sea Plan for consideration by LCDC for such amendments." The order also directed DLCD to provide final amendment recommendations to the Commission on or before December 2009.

April 2008 - August 2008

OPAC continues to meet on the Marine Reserve site designation. In the May 2008 OPAC Meeting - The OPAC Executive Committee recommended the formation and membership of a working group to address OPAC's decision on amendments to the Territorial Sea Plan. OPAC approved the formation of a TSP Working Group (TSPWG). David Allen (OPAC) and Paul Klarin (DLCD) were co-chairs of the TSPWG.

Mtg. #1 of TSPWG - August 18, 2008, Garibaldi

September - November 2008

The Department recommended that a rulemaking effort to amend the TSP to provide policy guidance and the allocation of specific areas for development of wave energy facilities would be beneficial to all parties involved. Prepares staff reports.

December 2008 - LCDC Meeting, Tillamook Oregon

The Commission approves the motion on the selection of an advisory committee consisting of state agencies and stakeholders that will review TSP Part 5 consider and propose amendments, as appropriate, to OAR 660, division 36 to amend the Territorial Sea Plan for the use of wave energy facilities in state waters. The Territorial Sea Plan Advisory Committee (TSPAC) is formed. LCDC member Tim Josi will chair.

2009

OPAC/TSPWG

Mtg. #2 of TSPWG - January 8, 2009, Newport
Mtg. # 3 of TSPWG - February 11, 2009, Newport

Mtg. # 4 of TSPWG - April 21, 2009, Newport
Mtg. # 5 of TSPWG - May 15, 2009, Newport
OPAC Meeting - June 8, 2009, Salem

OPAC Meeting - October 23, 2009, Florence

TSPAC

TSPAC Mtg. # 1 - Feb 17, 2009, Salem

TSPAC Mtg. # 2 - June 23, 2009, Salem
TSPAC Mtg. # 3 - July 16, 2009, Salem

2010

OPAC Meeting - January 29, 2010 - Bandon
OPAC Meeting - July 19, 2010 - Salem
OPAC Meeting - December 6-7, 2010 - Newport

2011

OPAC/TSPWG

Mtg. # 6 of TSPWG - January 21, 2011, Newport
Mtg. # 7 of TSPWG - March 4, 2011, Newport
Mtg. # 8 of TSPWG - April 7, 2011, Newport

TSPWG conducted Public Work Sessions

Mtg. # 9 of TSPWG - April 21, 2011, North Bend
Mtg. # 10 of TSPWG - April 29, 2011 - AM Meeting, Brookings
Mtg. # 11 of TSPWG - April 29, 2011 - PM Meeting, Port Orford
Mtg. # 12 of TSPWG - May 10, 2011 - Newport
Mtg. # 13 of TSPWG - May 23, 2011 - AM Meeting, Garibaldi
Mtg. # 14 of TSPWG - May 23, 2011 - PM Meeting, Astoria
Mtg. # 15 of TSPWG - June 3, 2011, Salem
Mtg. #16 of TSPWG - July 26, 2011, Newport

BOEM Oregon OCS Renewable Energy Task Force - August 1, Portland
BOEM Oregon OCS Renewable Energy Task Force - March 31, Portland
OCZMA & DLCD - Local Government Issues Meeting - September 16, Newport

Mtg. # 17 of TSPWG - October 7, 2011, Newport
Mtg. #18 of TSPWG - December 15, 2011, Astoria

2012

OPAC/TSPWG

TSPAC and Subcommittees

Mtg. # 19 of TSPWG - January 20, 2012, Newport

TSPWG conducted Public Work Sessions

Mtg. # 20 of TSPWG - February 2, 2012 - AM Meeting, Portland

Mtg. # 21 of TSPWG - February 2, 2012 - PM Meeting, Eugene

Mtg. # 22 of TSPWG - February 10, 2012 - AM Meeting, Bandon

Mtg. # 23 of TSPWG - February 10, 2012 - PM Meeting, Brookings

Mtg. # 24 of TSPWG - February 17, 2012 - AM Meeting, Camp Rilea

Mtg. # 25 of TSPWG - February 17, 2012 - PM Meeting, Cannon Beach

Mtg. # 26 of TSPWG - February 24, 2012 - AM Meeting, Waldport

Mtg. # 27 of TSPWG - February 24, 2012 - PM Meeting, Reedsport

Mtg. # 28 of TSPWG - March 6, 2012 - AM Meeting, Depoe Bay

Mtg. # 29 of TSPWG - March 6, 2012 - PM Meeting - Pacific City

Mtg. # 30 of TSPWG - March 22, 2012 Meeting, Newport

OPAC Meeting - April 9, 2012, Florence

TSPAC Mtg. # 4 - May 8, 2012, Salem

TSPAC Mtg. # 5 - May 29, 2012, Salem

TSPAC Subcommittees Formed:

Part 5 (6 Meetings)

Ecological (2 Meetings)

Fisheries (3 Meetings)

Recreation (2 Meetings),

Visual Aesthetics (6 meetings)

Wave Energy (3 meetings)

Select "Plan Designations" group (2 meetings)

TSPAC Mtg. # 6 - July 9, 2012, Salem

TSPAC Mtg. # 7 - August 9, 2012, Salem

TSPAC Mtg. # 8 - October 9, 2012, Newport

TSPAC Mtg. # 9 - October 24, 2012, Florence

TSPAC conducted Public Work Sessions

November 1, 2012 Meeting, North Bend

November 6, 2012 Meeting, Newport

November 7, 2012 Meeting, Astoria

TSPAC Mtg. # 10 - November 16, 2012,

OPAC Meeting - December 4, 2012, Tillamook

TSPAC Mtg. # 11- December 6, 2012, Gleneden Beach

BOEM Oregon Task Force - April 12, 2012, Portland

BOEM Oregon Task Force - September 24, 2012, Portland

2013

OPAC Meeting - January 3 & 4, 2013, North Bend

In total, there were more than 100 public meetings, work sessions, legislature committee, county commission, city council, local advisory committee, etc. that contributed to the development of the TSP plan amendment over a four year period.



Oregon

John A. Kitzhaber, M.D., Governor

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Memo

To: Marilyn Worrix, Chair, Land Conservation and Development Commission
 Jim Rue, Director, Dept. of Land Conservation and Development

From: Todd Hallenbeck, Sea Grant Fellow

Date: Jan. 10, 2013

Re: Executive Summary of Ocean Policy Advisory Council Public Comment



Oregon's Territorial Sea plan is being amended to find areas suitable for marine renewable energy development in the Territorial Sea. These amendments are being made using a transparent and robust public process, meant to engage stakeholders and solicit input regarding draft recommendations that will ultimately go to the Land Conservation and Development Commission for final adoption. In this effort, the Territorial Sea Plan Working Group held two rounds of public work sessions to solicit public comment on the data and process used to amend the plan, as well as location specific input. Public comments from the first round of work sessions were summarized [here](#). During the second round, the TSPWG held 10 public work sessions in coastal and inland communities over a two-month period. The TSPWG was specifically seeking input on several questions posed at each work session:

1. Do you notice any data gaps?
2. What do you think about our classification of resources /uses?
3. Do you think that our categories of resources /uses are appropriate?
4. How would you define the categories "most /high /moderate /least"?
5. Do you think there should be exclusion areas for wave energy?
6. Do you think there should be opportunity areas for wave energy? If so, what percentage of the Territorial Sea should be made available?
7. Should we be planning for federal waters?

Since the end of the first public work session, approximately 220 comments were collected (this compares to just under 50 for the first round.) The majority (176) were collected during the public work sessions held on the coast. Additionally, comments were submitted online through

<http://www.oregonocean.info/> (36), or mailed to the Dept. of Land Conservation and Development (8). The vast majority of comments were made by stakeholders who identified as citizens of Oregon, i.e. public-at-large (60). Additionally, comments were made by individuals representing commercial fishers (34), the conservation community (31), non-consumptive recreational users (29), renewable energy industry (24), and local governments (9).

Generally, stakeholders expressed appreciation for the opportunity to provide input and optimism in the OPAC process, but many urged a cautious approach to allow for testing and development of the industry until more information about environmental impacts of wave energy could be assessed. As anticipated, this round of work sessions saw many more data and location-specific comments in addition to the questions posed above. While some of the questions posed received few comments, others elicited strong responses from the public. This summary is organized to highlight major comments reiterated over multiple work sessions as well as important comments from individual work sessions. Several comment themes were reiterated by one individual at multiple meetings; those comments are marked with an asterisk.

The themes that emerged from the work sessions were as follows:

1. Do you notice any data gaps?

- Visual/ Aesthetic Resources (21)*
- Commercial fishing data /Economic Analysis (10)
- PCDA Fishing Maps (6)*

2. What do you think about our classification of resources /uses?

- Move Non-consumptive resource to level 1 (27)*
- Move Visual resources to level 1 (21)*
- Move Fishing resources to level 1 (10)
- Move ESA species data to level 1 (7)*

3. Do you think that our categories of resources /uses are appropriate?

- Support exclusion category (53)*
 - Near headlands, jetties, and river mouths/harbors (13)
 - Fishing areas (10)

-ESA species (7)

- Support development of a comprehensive spatial plan (15)

4. How would you define the categories “most /high /moderate /least”?

- Tie level of burden to level of protection (2)

5. Do you think there should be exclusion areas for wave energy?

- Yes (53)*
- No (5)*

6. Do you think there should be opportunity areas for wave energy?

- Yes (26)*
 - primarily for testing and development (12*)*
 - support fishery consultation /mitigation in siting (20)*
 - local government consultation in siting (4)*
- No (6)

7. Should we be planning for federal waters?

- Yes (5)

In addition to the overall comments described above, regional interests were expressed at public work sessions:

Portland & Eugene (2/2/12)

- General support for the process
- Encouraged inclusion of Surfrider “hotspot” data for Level 1 protection
- Recommended 1000m buffer around undersea cables

Bandon & Brookings (2/10/12)

- Encourage development of spatial plan with protection for fishing areas
- Encouraged inclusion of Surfrider “hotspot” data for Level 1 protection

Camp Rilea & Cannon Beach (2/17/12)

- Recommend mitigation for loss of fishing access
- Express concerns about view shed issues
- Express desire for protection of headlands

Waldport & Reedsport (2/24/12)

- Recommend exclusion at river mouths, jetties, and headlands
- Recommends moving fishing areas to highest level of protection

Depoe Bay & Pacific City (3/6/12)

- Encourage use of PCDA map for fishery protection
- Concerns over view shed issues, state parks



Oregon

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Department of Land Conservation and Development

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Memo

To: Marilyn Worrix, Chair, Land Conservation and Development Commission

Jim Rue, Director, Dept. of Land Conservation and Development

From: Todd Hallenbeck, Sea Grant Fellow

Date: Jan. 10, 2013

Re: Executive Summary of Territorial Sea Plan Advisory Committee Public Comment



Oregon's Territorial Sea plan (TSP) is being amended to plan for the development of marine renewable energy while balancing ecological resources and existing ocean uses. The draft plan developed by the Ocean Policy Advisory Council (OPAC) in April 2012, has been augmented and refined by the Territorial Sea Plan Advisory Committee (TSPAC) with help from public input. These amendments are being made using a transparent and robust public process, meant to engage stakeholders and solicit input regarding draft recommendations.

In support of the recent TSPAC and OPAC deliberations, Department of Land Conservation and Development (DLCD) staff held three public work sessions in North Bend, Newport, and Astoria over a two-week period in early November 2012 to share information and gather public input on the draft Territorial Sea Plan, Part 5 and proposed Renewable Energy Facility Suitability Study Areas. Additionally, the Tillamook Futures Council held a fourth public meeting in Tillamook. This summary represents the themes and tone of the public comment collected at those four meetings as well as online and written comment received between Oct. 17, 2012 and Jan. 10, 2012. A TSP Survey was conducted by the Tillamook Futures Council; you can view the results [here](#). Public comment will continue to be collected at tsp.comments@state.or.us until the final plan is adopted at the January 24, 2013 LCDC hearing.

A total of 252 comments were received to date. The largest number of public comments came from individuals who were identified as "public at large" (134), as opposed to commercial and recreational fishing (60), conservation and recreation (29), local government (14), or ocean energy (6) representatives, indicating that outreach efforts are getting to this stakeholder group. Generally, stakeholders are supportive of ocean energy development on a limited basis and pleased with the approach of the TSP process, but expressed some concerns that the process

needs more time for adequate public input and research to determine impacts. Stakeholders reiterated the need to protect fishing grounds, viewsheds, and ecologically sensitive areas. Many comments were directed at proposed sites, suggesting modifications or opposing them outright for fishery, ecological, safety, or viewshed impacts. In order to reflect the different type of comments received, I have categorized them as General, Location, Process, and Data.

Comment Themes

General

- Support Marine Reserves and Marine Protected Areas as exclusion areas (54)
- Encourage highest protection for rock reefs, headlands, and river mouths (34) and buffers (12)
- Support adaptive, phased, precautionary approach (28)
- Support plan for testing and research, as opposed to commercialization (19)
- Concern for cumulative impacts to fishing industry (15)
- Support flexible plan with large Development Areas (9)
- Concerns over adequacy of financial bonding requirements (3)

Location

- Camp Rilea
 - Concerns about impacts to fishing, safety (5)
- Netarts
 - Concerns about proximity to important ecological areas, lack of community vetting (13)
- Pacific City/Nestucca
 - Concerns about impacts to fishing, navigation, viewsheds, tourism (32)
 - Modification – Move northern boundary below mouth of Nestucca R.(10)
- North Newport
 - Concerns about proximity to Otter Rock MR, NNMREC, whale migration (9)
- Reedsport
 - Concerns about impacts to fishing (1)
 - Modification – Move northern boundary below mouth of Tahkenitch R. (9)
- Lakeside
 - Support (4)
- Langlois

- Concerns about impacts to ecological resources, fishing, light pollution (30)
- Modification – Reduce size, move southern boundary north to avoid viewshed impacts (12).
- Gold Beach
 - Concerns about proximity to important ecological areas, lack of community vetting (40)

Process

- Support for the TSP approach and outreach to stakeholders (39)
- Concern over the pace of the process and lack of public input (26)

Data

- Data Gaps
 - Seabird and marine mammal foraging and migration (6)
 - Effects of anchors on soft sediment (3)
 - Cost/Benefit analysis (3)
 - Salmon and EMF (3)

In addition to this executive summary, each comment is presented in its entirety. You can find those comments on Oregonocean.info and at the following links:

[TSPAC/OPAC Public Comments - General](#)

[TSPAC/OPAC Public Comments - Location](#)

[TSPAC/OPAC Public Comments - Process](#)

[TSPAC/OPAC Public Comments - Data](#)



Oregon

John A. Kitzhaber, M.D., Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 1^F

Salem, Oregon 97301-2540

Phone: (503) 373-0050

January 10, 2013

From: Paul Klarin

To: LCDC

Re: TSPAC recommendations

Commission:

This memo summarizes the recommendations on an amendment of the Territorial Sea Plan Part Five from the LCDC Territorial Sea Plan Advisory Committee. The committee based its efforts on the draft plan framework that OPAC provided, and worked diligently to complete tasks OPAC had initiated and had requested TSPAC to continue. The committee recommendations are derived from the committee voting process that followed the committee by laws. The discussion and voting process was conducted by a facilitator at the final two TSPAC meetings on November 16th and December 6th, as discussed below.

During the first meeting, the focus and decisions addressed recommendations to amend the content of Part Five. The initial discussions about sideboards and sites were inconclusive, and were addressed during the second meeting. The recommendations of the committee were the result of the facilitated voting process. When there was no consensus on a specific recommendation, the level of support and opposition among committee members for the recommendation is indicated by the voting results.

Plan Framework

Consensus: The basic area plan framework, including the area names and descriptions. The plan framework being presented to the Commission is the version TSPAC recommended. The area names and descriptions includes replacing the term for Renewable Energy Development Area with the Renewable Energy Facility Suitability Study Area (REFSSA).

Consensus: Add new text to the Visual Resource Protection Standards section of Part Five to replace existing Class II language with language recommended by subcommittee.

Consensus: Adopt the concept of the "special areas" to explicitly denote iconic spots on the Oregon Coast, but to defer the decision about the scale of the areas to LCDC.

Consensus: Incorporate a requirement to conduct periodic review after 7 years from adoption of the plan, or when there has been a project build-out of 1%, whichever comes first.

Spatial and Area Related Recommendations:

Consensus: the plan should include “At least 4-5 areas on coast suitable for marine renewable energy counting Camp Rilea and Reedsport OPT 50 megawatt sites. A vote was taken to decide if there was a consensus on 4 or 5 sites, with 14 for 5 REFSSAs and 10 for 4 REFSSAs.

Consensus: the committee supported the concept of flexible siting, i.e., larger sites that allow for specific project site decisions within it to fit the specific technology. The committee acknowledged that supporting flexible siting would mean a need to reconsider actual REFSSAs since most currently under consideration are too small for micro-siting.

Consensus: a maximum cap of 5% for the total amount of area of territorial sea that should be included in the REFSSA’s. There was a majority support (15-Yes versus 8-No), for a 7% cap. No other caps were considered by the committee.

Consensus: establish a limit of a 1/3 build-out of projects for each deep water port area within the initial 7 year period. The group debated placing a cap of no more than 2 RREFSSA’s in each deep water port area, but did not approve that requirement through a vote, and left it for OPAC and LCDC to discuss.

Majority support (16 yes versus 8 no): cap on the total project build out area at 3% of the territorial sea. The group also considered caps of 2% (12 yes versus 12 no) and 5% (6 yes versus 18 no).

Majority Support (20 yes versus # no): to distribute REFSSAs equally among the deep water ports. The group refined this concept of “distribution” by crafting additional sideboards, and came to the consensus, described above, on the 1/3 distribution of build-out in each port area. The group debated placing a cap of no more than 2 RREFSSA’s in each deep water port area, but did not approve that requirement through a vote, and left it for OPAC and LCDC to discuss.

Ranking Sites: TSPAC was not able to reach consensus on a recommendation for sites that were being considered for Renewable Energy Suitability Study Areas (REFSSAs), other than Camp Rilea and the OPT Reedsport locations. Several votes were taken with mixed results. Instead of selecting areas, TSPAC members ranked the sites, including Camp Rilea, from #1 to #8 with 1 being the highest ranking and 8 being the lowest. The ranking score for each site is inverse to the point score, with fewer points equaling a higher ranking. 23 members participated in the ranking with the following result:

Camp Rile (consensus)	46
Lakeside revised	66
Nearshore Reedsport	97
Langlois	106
Pacific City/Nestucca	108
N. Newport	115
Gold Beach Alternate	129
Netarts	160

The ranking process was followed by a discussion about the distribution of ranked sites, noting that 3 of the top 4 sites were located on the south coast. The recommendations for distribution discussed above, address this issue. No vote was made regarding individual sites, and TSPAC makes no recommendation regarding the inclusion of specific sites in the plan.

A few other issues related to spatial siting were discussed for which no votes were taken to support a position by TSPAC. These could be worthy topics for the commission to discuss further, including:

- establish REFSSAs at different depths to fit the physical siting needs for different types of marine renewable energy technologies;
- ensure that development is located at some minimum distance from estuaries; and,
- apply some form of mandatory buffers for certain ecological resources.

Part Five Revisions

There have been numerous draft revisions of Part Five that resulted from the TSPAC review and the work of its subcommittee. Most of those changes were not subject to a vote by TSPAC, but were in the version of the document that was forwarded to OPAC for their consideration. The changes to the document resulting from TSPAC's efforts are reflected in the current draft version of Part Five, and are discussed in detail in the agency staff report.

TSPAC revised Part Five so that it clarifies the state's preference to initiate development through pilot projects and phased development. A sentence has been added to the preamble specifying a state preference for phased development, and the section titled Insufficient/Incomplete Data section has been retitled to Pilot and Phased Development Projects.

TSPAC revised the section on the process, membership and responsibilities of the Joint Agency Review Team entirely to ensure more local participation in the regulatory review and further clarify the role of the JART in the Department of State Lands proprietary authorization process.

The primary effort of the TSPAC was to develop the project review standards for fishing, ecological, visual and recreational resources. These are found in a new section of the revised draft titled Special Resource and Use Review Standards.

Note that the document also contains revisions that have been incorporated into it as the result of the state's continuing consultations with NOAA to ensure the revised plan will meet federal requirements. Revisions were also made on the advice of the Oregon Department of Justice. The appendix were updated, some new definitions were added, as were the end notes section.

660-036-0006

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 Part Five: Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities, that the Commission approved as modified on January 24TH, 2013.

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

Stat. Auth.: ORS 197.040

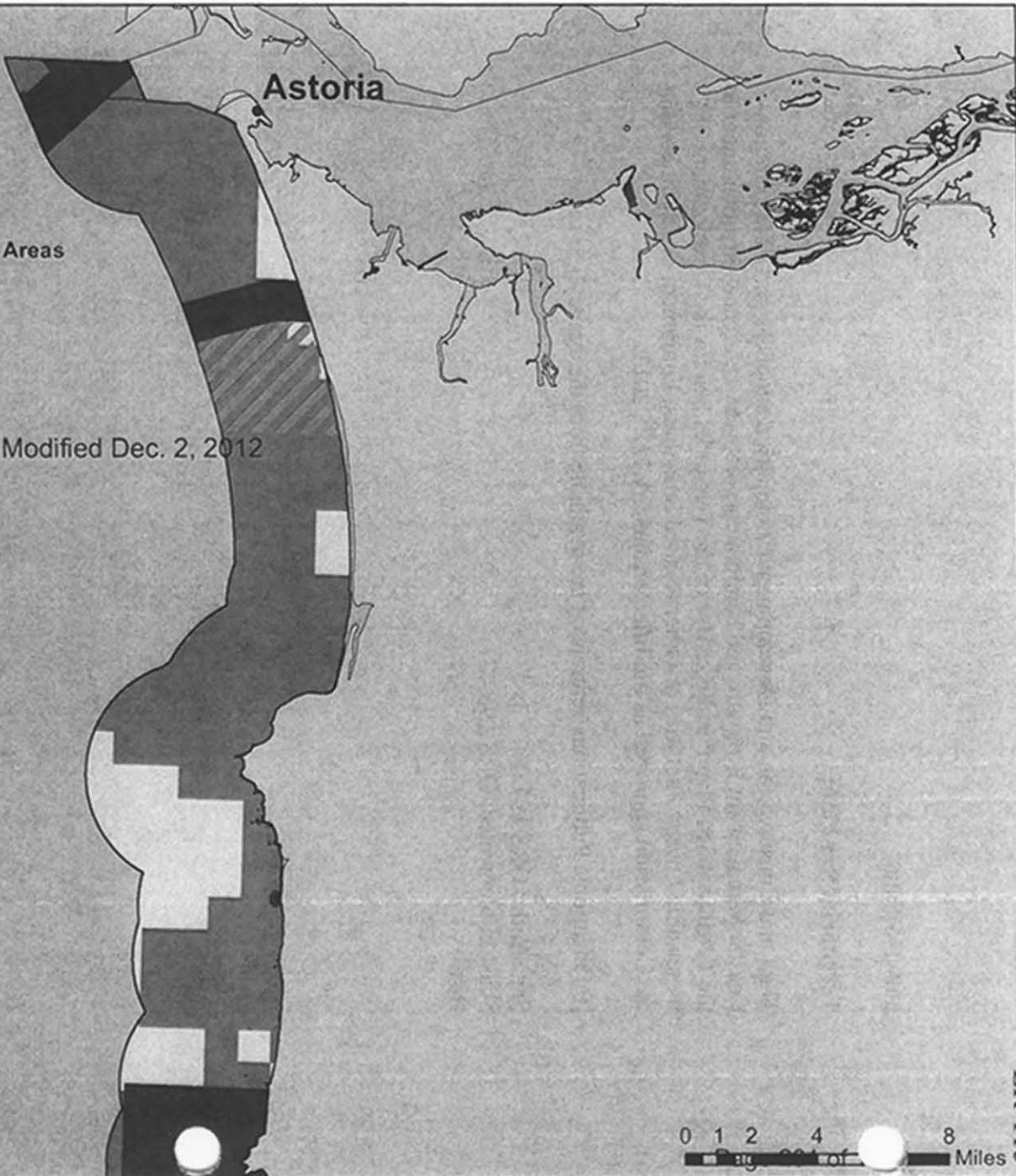
Stats. Implemented: ORS 196.471

Hist.

TSP Draft Maps

These maps are based on identified Goal 19 Resources and Uses and represent the DLCD staff recommendation to LCDC. To read area definitions and standards, please see TSP Part 5.

-  Renewable Energy Exclusion Area (REEA)
-  Proprietary Uses and Management Area (PUMA)
-  Resources and Uses Conservation Area (RUCA)
-  Resources and Uses Management Area (RUMA)
-  Renewable Energy Permit Area (REPA)
-  Proposed Renewable Energy Facility Suitability Study Areas



Camp Rilea - Modified Dec. 2, 2012



0 1 2 4 8 Miles

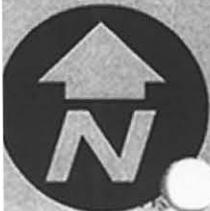
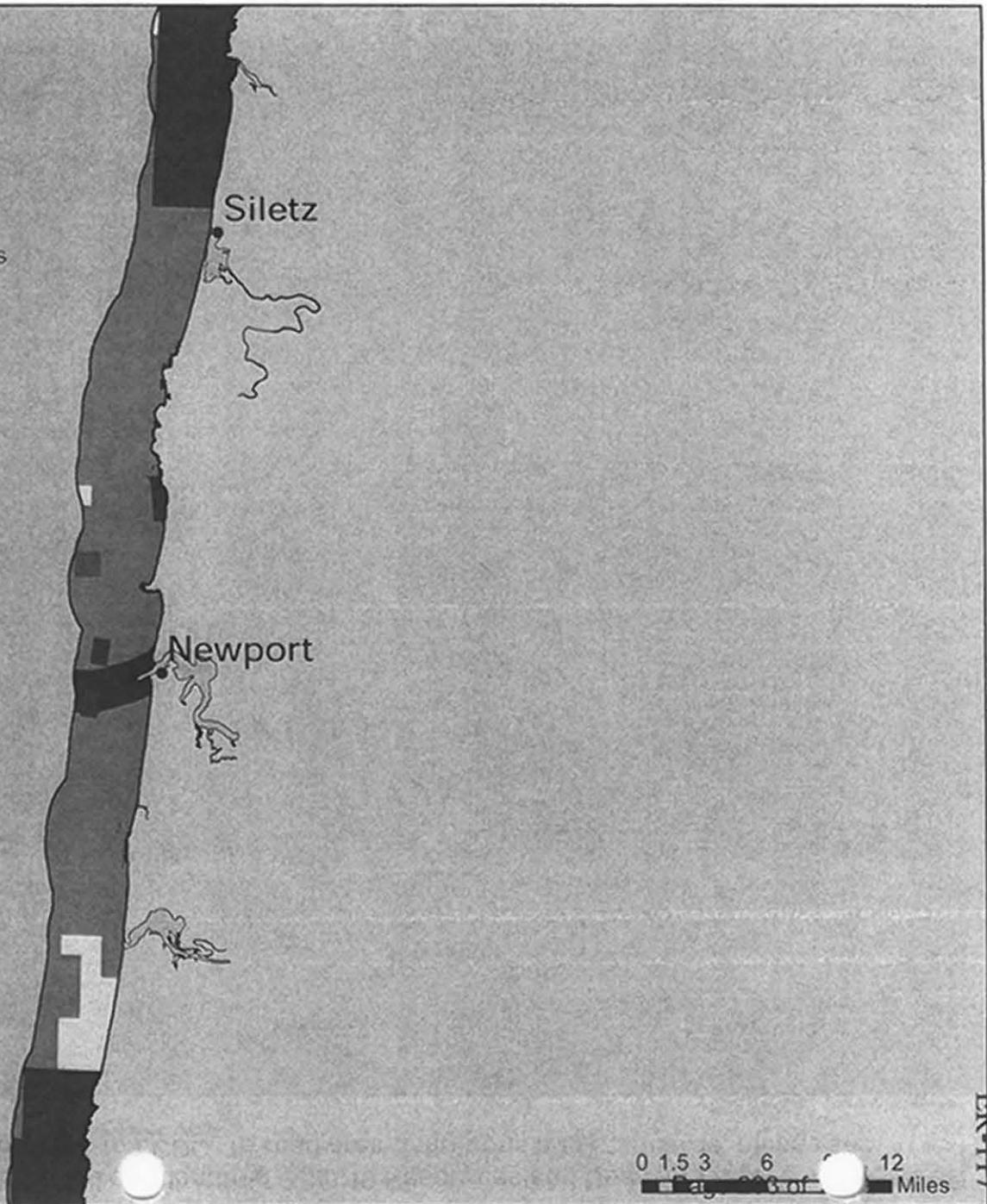
Questions? Please contact Paul Klarin (paul.klarin@state.or.us)

ER-115

TSP Draft Maps

These maps are based on identified Goal 19 Resources and Uses and represent the DLCD staff recommendation to LCDC. To read area definitions and standards, please see TSP Part 5.

- Renewable Energy Exclusion Area (REEA)
- Proprietary Uses and Management Area (PUMA)
- Resources and Uses Conservation Area (RUCA)
- Resources and Uses Management Area (RUMA)
- Renewable Energy Permit Area (REPA)
- Proposed Renewable Energy Facility Suitability Study Areas

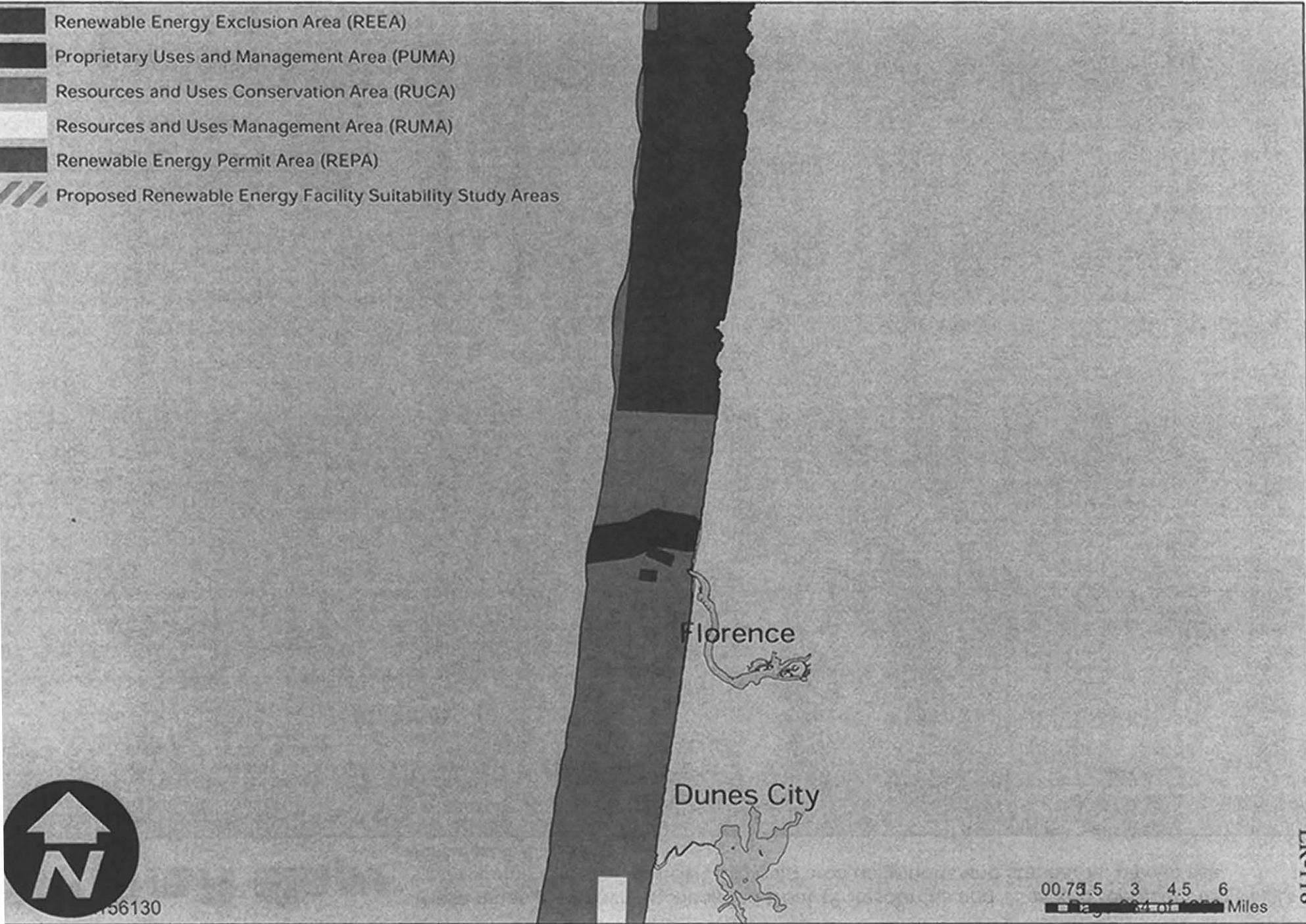


0 1.5 3 6 12 Miles

ER-117

Questions? Please contact Paul Klarin (paul.klarin@state.or.us)

- Renewable Energy Exclusion Area (REEA)
- Proprietary Uses and Management Area (PUMA)
- Resources and Uses Conservation Area (RUCA)
- Resources and Uses Management Area (RUMA)
- Renewable Energy Permit Area (REPA)
- Proposed Renewable Energy Facility Suitability Study Areas



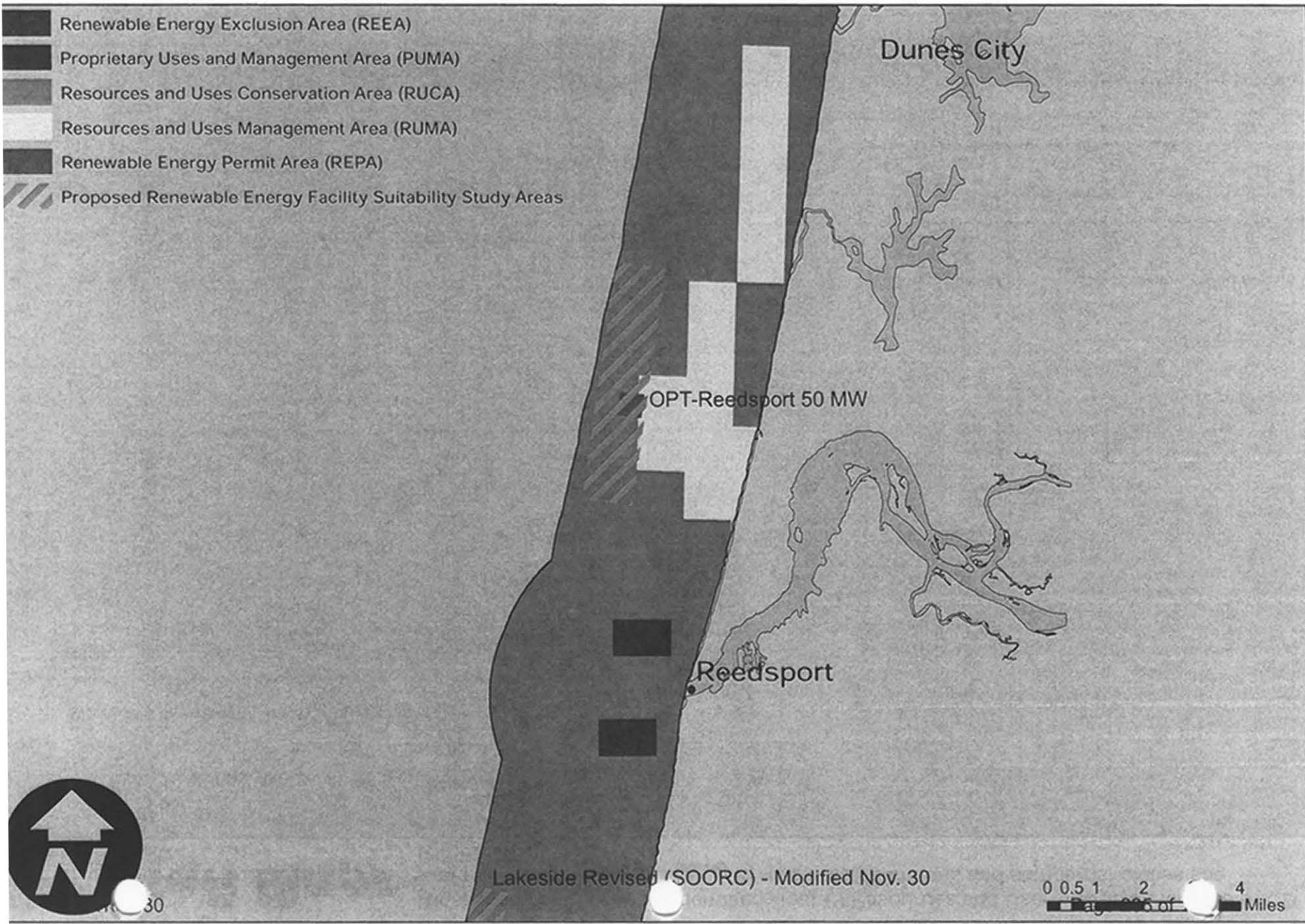
0 0.75 1.5 3 4.5 6 Miles

ER-118

TSP Draft Maps

These maps are based on identified Goal 19 Resources and Uses and represent the DLCDC staff recommendation to LCDC. To read area definitions and standards, please see TSP Part 5.

- Renewable Energy Exclusion Area (REEA)
- Proprietary Uses and Management Area (PUMA)
- Resources and Uses Conservation Area (RUCA)
- Resources and Uses Management Area (RUMA)
- Renewable Energy Permit Area (REPA)
- Proposed Renewable Energy Facility Suitability Study Areas



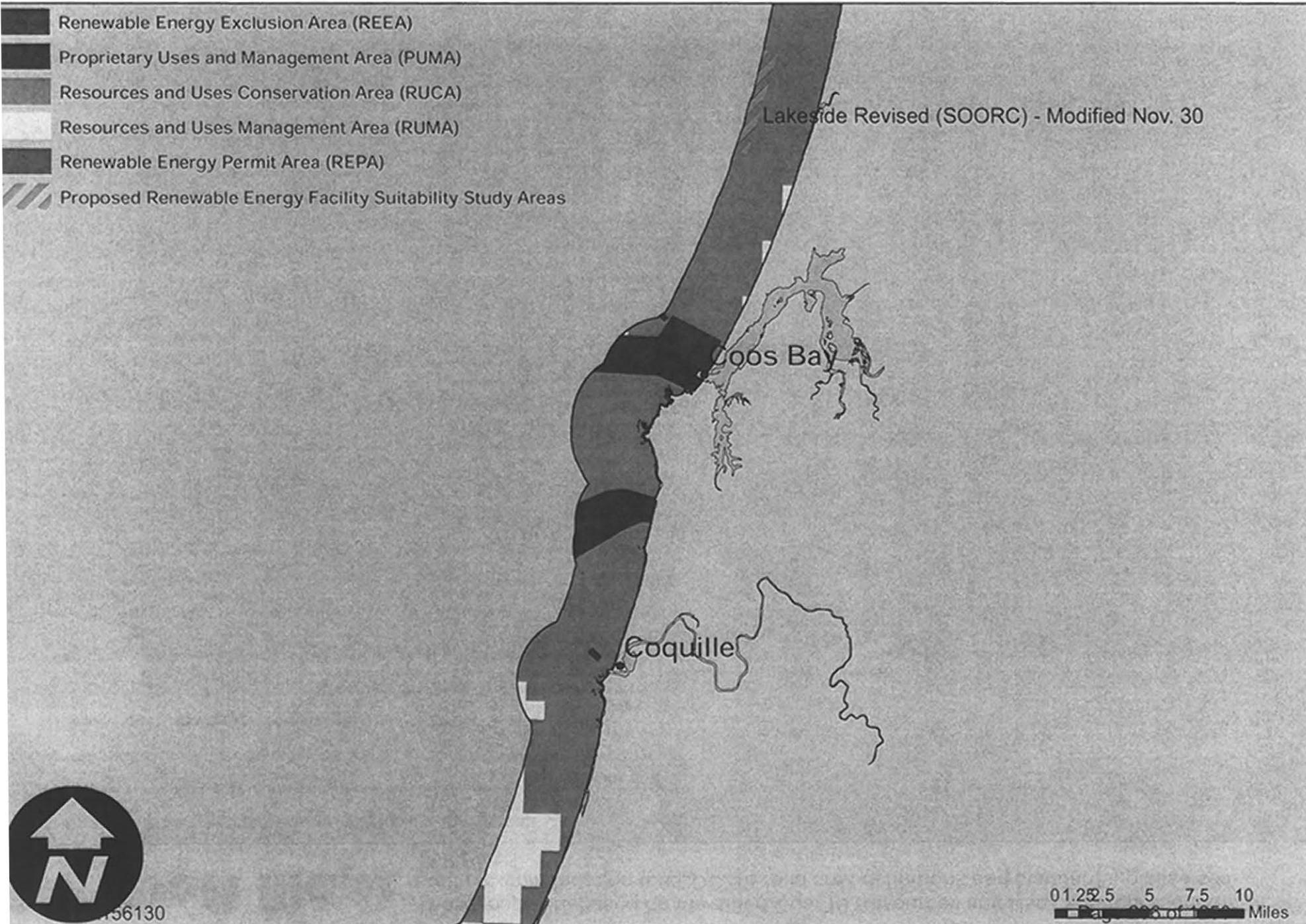
Lakeside Revised (SOORC) - Modified Nov. 30

0 0.5 1 2 4 Miles

Questions? Please contact Paul Klarin (paul.klarin@state.or.us)

ER-119

- Renewable Energy Exclusion Area (REEA)
- Proprietary Uses and Management Area (PUMA)
- Resources and Uses Conservation Area (RUCA)
- Resources and Uses Management Area (RUMA)
- Renewable Energy Permit Area (REPA)
- Proposed Renewable Energy Facility Suitability Study Areas



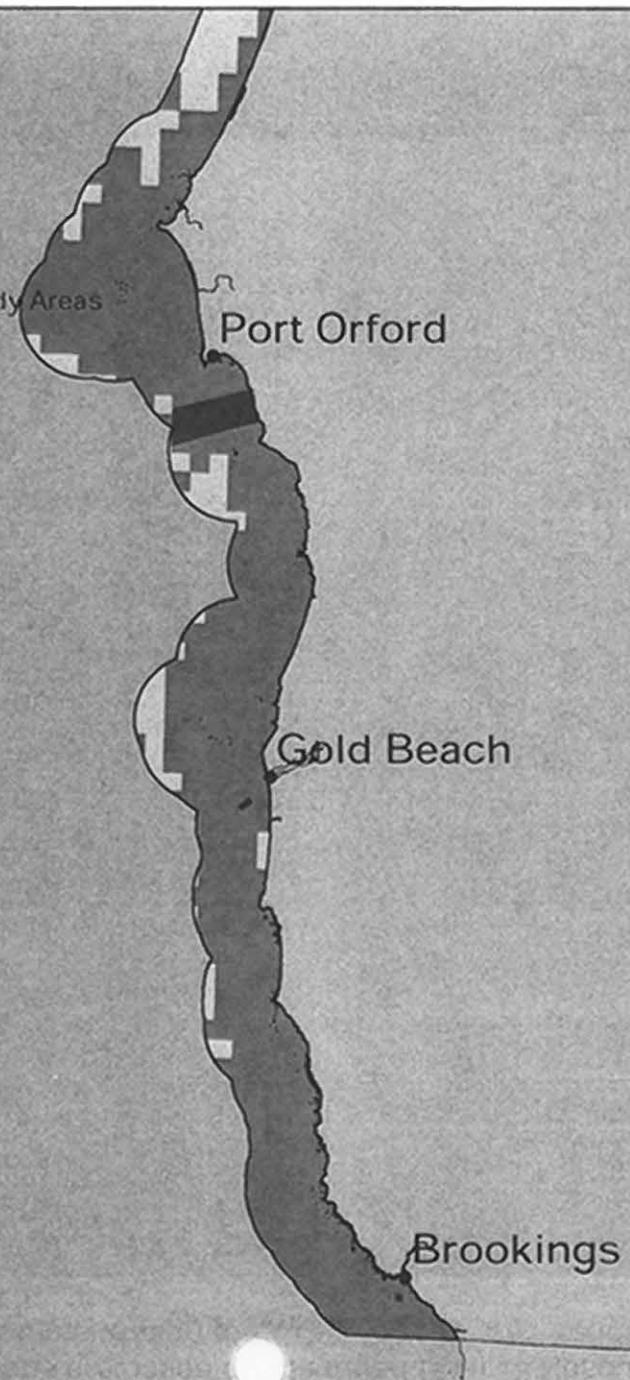
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ER-120

TSP Draft Maps

These maps are based on identified Goal 19 Resources and Uses and represent the DLCD staff recommendation to LCDC. To read area definitions and standards, please see TSP Part 5.

- Renewable Energy Exclusion Area (REEA)
- Proprietary Uses and Management Area (PUMA)
- Resources and Uses Conservation Area (RUCA)
- Resources and Uses Management Area (RUMA)
- Renewable Energy Permit Area (REPA)
- Proposed Renewable Energy Facility Suitability Study Areas



ER-121

Questions? Please contact Paul Klarin (paul.klarin@state.or.us)



Oregon

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December 20, 2012

From: Tim Josi, LCDC and TSPAC Chair

To: Scott McMullen, OPAC Chair

Re: TSPAC recommendations

Scott:

I would like to share with the Ocean Policy Advisory Council, the recommendations on an amendment of the Territorial Sea Plan Part Five from the LCDC Territorial Sea Plan Advisory Committee. The committee based its efforts on the draft plan framework that OPAC provided, and worked diligently to complete tasks OPAC had initiated and had requested TSPAC to continue. The committee's recommendations are reflected in the votes that they took on specific topics at their two facilitated meetings on November 16th and December 6th, as discussed below.

The TSPAC recommendations were produced over the course of two separate facilitated meetings. During the first meeting, the focus and decisions addressed recommendations to amend the content of Part Five. The initial discussions about sideboards and sites were inconclusive, and were addressed in the second meeting. The recommendations of the group were the result of the facilitated voting process which is reported on in this memo.

There was consensus to add new text to the Visual Resource Protection Standards section of Part Five to replace existing Class II language with language recommended by subcommittee. There was also consensus on adopting the concept of the "special areas" to explicitly denote iconic spots on the Oregon Coast, but to defer the decision about the scale of the areas to LCDC.

There was consensus for approval of the basic framework and zone titles for the plan that includes the addition of two new area types, renames them all from their original OPAC version, and provides area definitions. The design of the new plan framework that TSPAC recommended has already been provided to OPAC, along with the definitions for the areas. This was one of the tasks that OPAC had originally requested TSPAC to address.

There was consensus by the group to move forward with "At least 4-5 areas on coast suitable for marine renewable energy counting Camp Rilea and Reedsport OPT 50 megawatt sites." The group agreed to meet again to discuss sites and to further consider their distribution. There was consensus to remove the Waldport and original Gold Beach sites from further consideration, though it was decided to keep the Netarts site in consideration, though there was low support for site, after 4 members did not agree to remove it. Sites and sideboards were the main focus of discussion at the second facilitated TSPAC meeting.

Specific text changes were requested to address issues related to the Part Five section related to the Joint Agency Review Team process and membership. Those issues have been addressed and are reflected in the current version of Part Five.

Recommendations related to inconsistencies and redundancies within Part Five have also been addressed in the current version of the document, as have the recommendation for clarity on the topic of phased development. A sentence has been added to the preamble specifying a state preference for phased development, and the section titled Insufficient/Incomplete Data section has been retitled to Pilot and Phased Development Projects, as recommended.

The current version of Part Five now incorporates the changes recommended by TSPAC. Please note that other changes have been incorporated that were the result of the state's consultations with NOAA, and on the advice of the Oregon Department of Justice.

The TSPAC revisited the sites and sideboards during their second and last facilitated meeting. The committee addressed the number of sites that would be included in the plan as Renewable Energy Facility Suitability Study Areas (REFSSA). The TSPAC reconsidered the recommendation they had supported at the November 16th meeting: "At least 4 or 5 areas on coast suitable for marine renewable energy including Camp Rilea and Reedsport OPT 50 megawatt as two of the sites." The goal was to find out the level of support for 5 or 4 sites. The result was that 14 people voted for 5 REFSSAs and 10 people voted for 4 REFSSAs. So there was no consensus or clear voting majority for one or the other, but there were slightly more members in favor of a plan with 5 sites.

TSPAC discussed and made recommendations on "sideboards" for marine renewable energy in the Territorial Sea. 24 TSPAC members in attendance participated in the voting. Several sideboards received consensus support. Votes are reported to provide information to the Commission and OPAC as they further deliberate the sideboards.

The group reached consensus on the concept of flexible siting, i.e., larger sites that allow for specific project site decisions within it to fit the specific technology. TSPAC members acknowledged that supporting flexible siting would mean a need to reconsider actual REFSSAs since most currently under consideration are too small for micro-siting.

The group reached consensus on a maximum cap of 5% for the total amount of area of territorial sea that should be included in the REFSSA's. There was a majority support (15-Yes versus 8-No), for a 7% cap. No other caps were considered by the committee.

There was majority group support (16 yes versus 8 no) for placing a cap on the total project build out area at 3% of the territorial sea. The group also considered caps of 2% (12 yes versus 12 no) and 5% (6 yes versus 18 no).

There was a lot of discussion about the need to have an automatic periodic review trigger built into the plan, and it was decided that Part Five should have a requirement to conduct periodic review after 7 years from adoption of the plan, or when there has been a project build-out of 1%, whichever comes first.

Another sideboard that was discussed was the need to “distribute REFSSAs along the coast by deep water ports” which was supported by a large majority (20 yes) of committee. The group refined the concept of “distribution” by crafting additional sideboards to address this issue. There was consensus on placing a cap of 1/3 project build-out of the areas associated with each deep water port within the initial 7 year period. The group debated placing a cap of no more than 2 RREFSSA’s in each deep water port area, but did not approve that requirement through a vote, and left it for OPAC and LCDC to discuss.

A few other issues were suggested as sideboards, but were not taken up by TSPAC. There is the need to establish REFSSAs at different depths to fit the physical location needs of the different types of marine renewable energy technologies. There was discussion about the need to ensure that development is located at some minimum distance from estuaries. Finally, the issue of establishing some type of mandatory buffers for certain ecological resources was discussed. These could be worthy topics for OPAC to discuss further.

TSPAC worked toward determining which specific sites to recommend as Renewable Energy Suitability Study Areas (REFSSAs). This discussion was based on the set of eight sites still under consideration, and the group used MarineMap to review the size, location, and iteration of each site to ensure all the members understood how the sites were configured. TSPAC members ranked the sites from #1 to #8 with 1 being their top choice and 8 being their lowest choice. The lower the total points, the higher the ranking. 23 members participated in the ranking with the following result:

Camp Rilea	46
Lakeside revised	66
Nearshore Reedsport	97
Langlois	106
Pacific City/Nestucca	108
N. Newport	115
Gold Beach Alternate	129
Netarts	160

The ranking process was followed by a discussion about the distribution of ranked sites, noting that 3 of the top 4 sites were located on the south coast. The distribution sideboards, discussed above, address this issue. No vote was made regarding individual sites, and TSPAC will not be making a recommendation regarding the inclusion of specific sites in the plan.

I hope this summary will assist OPAC in its deliberations, and look forward to seeing the OPAC recommendations when they come before the Land Conservation and Development Commission when it considers the plan amendment in late January. The recommendations of TSPAC will be incorporated into the staff report to the Commission, and be used in the deliberations along with those of OPAC, state agencies, interested parties and the public.

OREGON OCEAN POLICY ADVISORY COUNCIL

SCOTT McMULLEN, CHAIR
DAVID ALLEN, VICE CHAIR

MAILING ADDRESS: OREGON DLCD
635 CAPITOL STREET NE, STE 150
SALEM, OR 97301

Voting Members

Scott McMullen, Chair
Oregon Fishermen's Cable Committee
(North Coast Commercial Fisheries)

David Allen, Vice Chair
(Coastal Public Representative)

Jim Bergeron
(Ports, Marine Transportation or
Navigation)

Jack Brown
(Coastal City Official)

Paul Engelmeier
National Audubon Society
(Statewide Conservation Organization)

Robin Hartmann
Oregon Shores Conservation Coalition
(Coastal Conservation Organization)

Robert Kenta
Confederated Tribes of Siletz
(Oregon Coastal Indian Tribes)

Susan Morgan
Commissioner, Douglas County
(South Coast County Commissioner)

Brad Pettinger
Oregon Trawl Commission
(South Coast Commercial Fisheries)

James Pax
(South Coast Charter, Sport or
Recreational Fisheries)

Fred Sickler
(Coastal Non-fishing Recreation)

Terry Thompson
Commissioner, Lincoln County
(North Coast County Commissioner)

Frank Warrens
(North Coast Charter, Sport or
Recreational Fisheries)

TBD
(Statewide Public Representative)

Ex-Officio Members

Richard Whitman
Governor's Natural Resources Advisor

Caren Braby
Department of Fish and Wildlife

Dr. Stephen Brandt
Director, Oregon Sea Grant Program

Dalton Hobbs
Department of Agriculture

Onno Husing
Oregon Coastal Zone Management
Association

Vicki McConnell
Director, Department of Geology and
Mineral Industries

Greg Pettit
Department of Environmental Quality

Patty Snow
Department of Land Conservation and
Development

Louise Soliday
Director, Department of State Lands

Kris Wall (NOAA/OCRM)
Federal Agency Liaison

Tim Wood
Director, Department of Parks and
Recreation



John A. Kitzhaber, M.D., Governor

April 27, 2012

To: Tim Josi, Chair
LCDC Territorial Sea Plan Advisory Committee (TSPAC)

Re: Territorial Sea Plan (TSP) Amendment Process

At its April 9, 2012 meeting, the Ocean Policy Advisory Council (OPAC) approved by consensus a suite of general recommendations and follow-up tasks for TSPAC to address in considering the TSP amendment for ocean renewable energy.

The *draft* OPAC meeting summary, with facilitator's notes attached, sets out these general recommendations and follow-up tasks. Documents distributed for the OPAC meeting provide further background and information.

The following highlights some of the points that came out of the OPAC meeting, as well as the work of the Territorial Sea Plan Working Group (TSPWG) this past year:

Community outreach and participation needs to continue in all facets of this process. This can be achieved through various means with assistance from stakeholder groups, local governments, Oregon Sea Grant, and state agencies.

Classification of fishery resources needs to be further vetted by commercial, charter, and recreational fishermen.

Language in TSP Part Five should be modified to expand and strengthen the role of local participation in the joint agency review team (JART) process.

These are just some of the points, as set out in the materials from the OPAC meeting. We look forward to TSPAC moving this process forward and the chance to review its recommendation once completed.

Best regards,

/s/

Scott McMullen, Chair

/s/

David Allen, Vice Chair

Oregon Ocean Policy Advisory Council

Meeting Summary – April 9, 2012

Best Western Agate Beach Inn

3019 N. Coast Highway

Newport, OR 97365

Issues Decided/Positions Taken

- The Draft Meeting Summary of the Dec 16, 2011 Ocean Policy Advisory Council (OPAC) was approved by consensus, without edits.
- OPAC approved by consensus that federal approval of a territorial plan for TSP Part Five was important, both from the NOAA Office of Coastal Resource Management as well as the Federal Energy Regulatory Commission.
- OPAC approved by consensus a suite of general recommendations and follow-up tasks that the Territorial Sea Plan Advisory Committee (TSPAC) will need to address when considering the amendment of the Territorial Sea Plan for Marine Renewable Energy. Those tasks are listed in Appendix 1 of this document (flipchart notes that were produced by the OPAC facilitator, Jane Barth). Briefly listed below, they include:
 - OPAC supports the basic framework of 4 zones and 2 overlays as recommended from the Territorial Sea Plan Working Group (TSPWG) and drafted by agency staff and presented at the meeting. (See draft comprehensive plan PPT).
 - OPAC supports the basic objectives of each zone and overlay as drafted and presented, given a number of additional considerations.
 - OPAC recommends that a suite of definitions be compiled in a user friendly manner (e.g. glossary) to clarify the resource inventory descriptions of the zones.
 - OPAC approved by consensus the use of the methods for Visual Impact Assessment Analysis presented by the Oregon Parks and Recreation Department Staff.
 - OPAC supports the proposed local government/community outreach process. OPAC recommends this process integrate county and city zoning data, where available.
 - OPAC asserts the following issues must be addressed as the TSP process proceeds: (Fisheries data, Ocean Recreation details, STAC's recommendations, Part 5 language). Recommendations below were specific to those issue areas.
 - OPAC supports and encourages groups who have data work with TSPAC/OPAC to bring that data into the TSP process.
 - OPAC recommends TSPAC create a subcommittee to work on fisheries data, both in terms of validity and policy decisions aspects.
 - OPAC recommends that STAC's recommendations on data, e.g. trawl data and Marxan, be addressed.

- The details of the Ocean Recreation Area, specifically size, must be worked out. In addition a definition for ocean recreation “hot spots” must be specified.
- OPAC recommends TSP Part 5 language be looked at and possibly revised for:
 - Aesthetic resources inventory content if not sufficiently addressed by overlay
 - Recreational resources inventory content if not sufficiently addressed by overlay
 - JART process – what stakeholder groups to be involved and participation requirement
 - Timeline for making DSL permit decisions
 - Phased development (page 10)
 - Test site language now that some sites might get connected to the grid (p.14)
 - Add to the “see attached maps” language: zone definitions etc. from framework
 - Incorporation of standards and criteria once developed
- OPAC recommends all policies be set such that updating of data is allowed without influencing policy decisions, thus requiring re-approval by NOAA.

Presentations

- Dr. Stephen Brandt (STAC Chair) presented the STAC report of the Oregon Marine Data Layer Review process to the Council
- Kaety Hildenbrand and Onno Husing presented the recent work of the Northwest National Marine Renewable Energy Center and Local Government Outreach efforts respectively.
- David Allen presented to OPAC the recent work of the Territorial Sea Plan Working Group, as a completed package of work for OPAC to use in the generation of a recommendation.
- Agency Staff (Anny Lanier (OLCD), Laurel Hillmann (OPRD)) gave a presentation to the Council on the Draft Comprehensive Plan Framework and Visual Assessment Inventory and Analysis Framework.

OPAC Members Attendance

Members Present (voting): Scott McMullen (North Coast Commercial Fisheries, OPAC Chair); David Allen (Public at Large, OPAC vice-chair); Jim Bergeron (Ports, Marine Transportation, Navigation); Jim Pex (South Coast Charter, Sport or Recreational Fisheries); Paul Engelmeier (Statewide Conservation or Environmental Organization); Robin Hartmann (Coastal Conservation or Environmental Organization); Brad Pettinger (South Coast Commercial Fisheries); Fred Sickler (Coastal Non-Fishing Recreation); Terry Thompson (North Coastal County Commissioner); Frank Warrens (North Coast Charter, Sport or Recreational Fisheries). [10/14]

Members Present (ex officio): Richard Whitman (Office of the Governor); Caren Braby (Oregon Department of Fish & Wildlife); Onno Husing (Oregon Coastal Zone Management Association); Patty Snow (Department of Land Conservation & Development); Stephen Brandt (Oregon Sea Grant); Chris Castelli (Department of State Lands); Laurel Hillmann (OPRD). Kris Wall (NOAA Office of Coastal Resource Management); Aaron Borisenko (DEQ) [9/10]

Members Absent:; **Jack Brown** (Coastal City Official); **Robert Kentta** (Oregon Coastal Indian Tribes); **Dalton Hobbs** (Dept of Agriculture); **Vicki McConnell** (DOGAMI); **Susan Morgan** (South Coastal County Commissioner); [5]

Staff: **Jane Barth** (OPAC Facilitator); **Lorinda DeHaan** (DLCD); **Todd Hallenbeck** (WCGA Fellow); **Paul Klarin** (DLCD); **Andy Lanier** (DLCD, OPAC Staff); **Tony Stein** (OPRD); **Steve Shipsey** (DOJ).

Public Comment and Attendance

Public Comment speakers (with affiliation if provided): **Rick Williams** (SAIC); **Loren Goddard** (Depoe Bay NSAT); **Laura Anderson** (FISHCRED); **Mason Busch** (Oregon Wave Energy Trust); **Stephanie Webb** (POORT); **David Yamamoto** (Pacific City, TSPAC); **Peg Regan** (Conservation Leaders Network); **John Schaad** (BPA);

Others in Attendance (with affiliation if provided): **Gus Gates** (Surfrider); **Emily Johnson** (Surfrider); **Charlie Plybon** (Surfrider); **Dan Twitchell**; **Dave Lacey**; **Laura Schmidt** (Our Ocean); **Harry Nixon** (Yachats Citizen); **Marissa Duncan**; **Rob Duboc**; **Kaety Hildenbrand** (Our SeaGrant); **Linda Anderson** (Our Ocean); **Peter Huhtala** (Clatsop County); **Abigail DeYoung** (Siuslaw SWCD); **John Schaad** (BPA); **Randy Clark** (USCG); **Patrick Tempel**; **Tim Hush**; **William Vogt** (OMD); **Heather Reiff** (COMPASS); **Joe Bourcy** (PISCO); **Jenna Borberg** (Oregon SeaGrant); **Dick Vanderschaaf** (TNC); **Jenna Carter** (TNC); **Shirley Kalkhoven**; **Susan Allen** (Our Ocean); **Len Bergstein** (Ocean Power Technologies).

Acronyms and Initials:

DLCD-Department of Land Conservation and Development; DOGAMI- Oregon Department of Geology and Mineral Industries; DSL- Department of State Lands; OMD – Oregon Military Department; ODFW- Oregon Department of Fish and Wildlife; OPRD- Oregon Department of Parks and Recreation; DOJ- Department of Justice; CRCFA- Columbia River Crab Fishermen Association; T-Fishermen’s Advisory Committee of Tillamook, TSPWG – Territorial Sea Plan Working Group (an OPAC Subcommittee), NNMREC – Northwest National Marine Renewable Energy Center; PEV- Pacific Energy Ventures; WCGA – West Coast Governors Alliance; BPA- Bonneville Power Administration; USCG- United State Coast Guard; TNC – The Nature Conservancy;

Distributed Materials

1. Draft Agenda
2. OPAC December 16, 2011 - Draft Meeting Summary
3. TSPWG Report to OPAC from David Allen
4. Draft Scenic Resource Evaluation and Visual Effects Analysis Criteria for OPAC Consideration
5. Public Comments Executive Summary as of March 16, 2012
6. NOAA OCRM Summary Guidance for Oregon’s Territorial Sea Plan
7. FERC Comprehensive Plan Guidance Language

8. Draft Comprehensive Plan produced by Agency Staff in Preparation for OPAC.

Additional Resources

1. [Oregon MarineMap](#)
2. [Http://www.OregonOcean.info](http://www.OregonOcean.info)

Video Index

<i>Item</i>	<i>Disc #,</i>
Welcome and Introductions	1
Review and Approval of Draft Meeting Summary (Dist 1.)	1
Update from the Governor's office (15 minutes) – <i>Richard Whitman</i>	1
STAC report (30 minutes) – Stephen Brandt (STAC Chair) will report on the STAC Review of Oregon Marine Planning Data	
Update on the local government and NNMRE outreach (15 minutes) – <i>Kaety Hildenbrand</i> and <i>Onno Husing</i> will provide an update on outreach to local communities.	1
Territorial Sea Planning Process Update (30 minutes) – <i>David Allen</i> (TSPWG Chair) and <i>Jane Barth</i> (Facilitator) will provide an update on the Territorial Sea Plan Working Group progress.	2
Break	2
Territorial Sea Plan Amendment Process (75 minutes) – <i>Jane Barth</i> (Facilitator) will provide OPAC discussion. <i>Andy Lanier</i> provided a presentation on work completed following the last TSPWG meeting in the creation of a preliminary Draft Plan	2
Working Lunch Presentation by OPRD staff on work, and assessment of final impact	3
Public Comment (30 minutes) – <i>Scott McMullen</i> (OPAC Chair). Please note there is limited time, thus written comment submitted online at the meeting is encouraged.	3
Territorial Sea Plan Amendment Process (cont. review and OPAC discussion) – <i>Jane Barth</i> (Facilitator)	4

For a copy of the video record of this meeting, please contact *Andy Lanier* at the contact information listed below and complete a public records request available online at:

http://www.oregon.gov/CD/docs/publications/DO_110.02_PublicAccessToDLCDRecords_RequestForm.pdf

Andy.Lanier@state.or.us

(503) 373-0050 x246

Appendix 1.
OPAC April 9, 2012
 Flipchart notes – Jane Barth

I. The group agreed by consensus:

1. OPAC supports the basic framework of 4 zones and 2 overlays as drafted by staff and presented at this meeting.
 - Marine Renewable Energy Exclusion Area
 - Marine Conservation Area
 - Marine Resource Use Management Area
 - Marine Resource Development Area
 - Visual Impact Assessment Analysis Overlay
 - Marine Recreation Conservation Area Overlay

2. OPAC supports basic objectives of each zone and overlay as drafted and presented. They recommend the following edits and further consideration of terms:
 - Consider removing the term “Conservation” from the Ocean Recreation Conservation Area overlay label to avoid confusion with Marine Conservation Area label.
 - Use objective for Exclusion area as is for now, but allow for flexibility to add in future using the 2nd way NOAA allows for exclusions
 - Remove the terms “existing” and “identified;” instead use the terminology “under Goal 19” (see Marine Conservation Area language for template)
 - On Marine Conservation Area Resource Inventory Layers list, make Ocean Recreation bullet say Ocean Recreation Hotspots
 - On Marine Resource Use Management Area Resource Inventory Layers list, add Ocean Recreation Inventory bullet
 - Instead of “no impacts” in Marine Conservation area on overall framework slide, use “no adverse impacts” language that is on later page on just this area.
 - Reconsider inclusion of the term “users.” Some members felt it was important and appropriate; others recommended it be removed.
 - Consider moving the human influence factors, like ocean recreation, to top of list of inventory layers to avoid it looking like these come up last in our priorities.

3. OPAC recommends that definitions, e.g. subtidal rocky reef, be set out in a visible, easily accessible format. Definitions used in the framework and data layers exist, but they need to be communicated better, perhaps in a glossary.

4. OPAC recommends Oregon Parks and Recreation Department proceed to implement the Visual Impact Assessment Analysis methodology presented at this meeting.
 - OPAC members should get their input on the methodology to Laurel Hillman by the end of April so implementation can start in May.
 - Visual impact assessment work by OPRD, SeaGrant/NNMRC, and local governments/communities should be coordinated so they are consistent to the extent possible.
 - A demonstration project is desired.

5. OPAC supports the proposed local government/community process. OPAC recommends this process integrate county and city zoning data, where available.

II. OPAC asserts the following issues must be addressed as the TSP process proceeds:

- Fisheries data
- Ocean Recreation details
- STAC's recommendations
- Part 5 language

Specific recommendations, supported by consensus were:

1. OPAC supports and encourages groups who have data work with TSPAC/OPAC to bring that data into the TSP process. Examples mentioned were the Pacific City Dory fleet and Depoe Bay.
2. OPAC recommends TSPAC create a subcommittee to work on fisheries data, both in terms of validity and policy decisions aspects.
3. OPAC recommends that STAC's recommendations on data, e.g. trawl data and Marxan, be addressed. Related to this, OPAC decided that the OPAC Executive Committee can review STAC's report and decide on follow-up work by STAC or other professionals.
4. The details of the Ocean Recreation Area, specifically size, must be worked out. In addition a definition for ocean recreation "hot spots" must be specified.
5. OPAC recommends TSP Part 5 language be looked at and possibly revised for:
 - Aesthetic resources inventory content if not sufficiently addressed by overlay
 - Recreational resources inventory content if not sufficiently addressed by overlay
 - JART process – what stakeholder groups to be involved and participation requirement
 - Timeline for making DSL permit decisions
 - Phased development (page 10)
 - Test site language now that some sites might get connected to the grid (p.14)
 - Add to the "see attached maps" language: zone definitions etc. from framework
 - Incorporation of standards and criteria once developed
6. OPAC recommends all policies be set such that updating of data is allowed without influencing policy decisions, thus requiring reapproval by NOAA. Another way of saying this is to create criteria/standards that don't change even though the data may change over time through improvement, additions, etc.

The following are issues people wanted to discuss related to the framework. Many were too specific or technical for the OPAC meeting, but are relevant to the TSP planning and policy-making process as it proceeds.

- Overall framework:
 - Zone names suggestion: Exclusion, Protection (Goal 19 language for highest bar), Conservation, Management/Use
 - Need to include regulatory buffers against disturbances now in place around wildlife refuges
 - Do you want to consider establishing different standards/criteria for different scales/sizes of energy projects? How to define that threshold/scale?
 - Are you wanting to set different stringency of criteria for the Conservation vs. Management vs. Development zones? Or, are these just a visual depiction or potential for use/resource conflicts?
 - What data is responsible for putting an area into a particular zone?
 - I don't understand the quality of the data used in determining the zones.
 - Precautionary Principle: Is this recognized in Goal 19? What does it mean in TSP context?
 - Adaptive Management: How do we update the TSP as information improves? How does NOAA get included with updates? (Note: This issue addressed in agreements made during meeting)
 - Consider adding a requirement/trigger to address certain site specific concerns in JART process (if not already include in Part 5 JART), e.g. Fishery Advisory Body meeting, visual impact analysis.
 - Terminology to define "no impact": no significant alteration to the resource; no significant adverse impact; taken all practicable steps to avoid impact

- Exclusion Area:
 - Concern that there may be opportunities to coordinate uses on developed sites with renewable energy, e.g., outfall pipes like at OPT.
 - Some ecological resources that are not permitted may fit in this zone (per NOAA). [Note: Concern addressed in OPAC's recommendation to reconsider wording of objective for this area.]
 - Concerned about terminology of "renewable energy exclusion." Does NOAA like that? We aren't excluding oil and gas or aquaculture. [Note: During discussion this concern was alleviated by NOAA liaison.]

- Marine Conservation Area:
 - Strengthen language to match Rhode Island language – "Exclusion presumed unless developer demonstrates that "no impact to resources is probable."
 - In order to meet Goal 19, this level needs to be "nearly exclusive."
 - Goal 19 says we must protect fishery resources; this isn't an option.
 - Why would ocean recreational fisheries be placed a different level than commercial fisheries? [Note: Discussion revealed this was due to how data was aggregated at the fishing communities' preference.]
 - Areas of greatest importance to fishing arbitrarily set at too low a level. Level 1 and 2 fishery resources should be placed in this area. Approx. 70% of TS deserves protection.

- Fishery important area maps need updating based on public testimony at Reedsport/Gardiner, Depoe Bay and Pacific City
- Life history unique, should go higher than level 2/3 and into this area
- Concern about understanding and defense of Marxan run: Does one high value ecological attribute turn on whole square mile? Then that square mile's high value triggers increased value on adjacent mile?
- **Marine Resource Use Management Area:**
 - Need to fine-tune fishing effort maps by port and sector
 - Suggestion for alternate language for objective- Maintain the long term use and health of the area for the benefit of existing and future generations and natural resources.
- **Marine Renewable Energy Development Area:**
 - Need clarifying statement about research and development needs- 10 years then an ecological/economic viability analysis
 - Consider county "industrial zones" in evaluating these sites. Not sure if county zoning has been included.
 - Areas of low conflict should be designated even if sites are now considered "stranded."
- **Visual Impact Assessment Overlay**
 - Framework is good; need details clarified... when scenic analysis
 - Adequate stakeholder representation is imperative
 - Local property owners need visual impact protection even when not in a city or near a park.
 - Could be very subjective.
 - Are different viewsheds (public viewpoints, private homes) treated the same way by JART?
- **Ocean Recreation Conservation Overlay**
 - Framework is good; need details clarified, i.e. 300 meters [Note: Distance addressed in OPAC recommendations above.]

Secretary of State
Certificate and Order for Filing
PERMANENT ADMINISTRATIVE RULES

I certify that the attached copies* are true, full and correct copies of the PERMANENT Rule(s) adopted on [November 5, 2009] by the

Oregon Department of Land Conservation and Development		Date prior to or same as filing date 660
Agency and Division	Administrative Rules Chapter Number	
Casaria Tuttle	635 Capitol St., Ste. 150, Salem, OR 97301	503-373-0050 ext. 322
Rules Coordinator	Address	Telephone

to become effective [upon filing]. Rulemaking Notice was published in the [October 2009] Oregon Bulletin.**
Date upon filing or later Month and Year

RULE CAPTION

Amendment to Territorial Sea Plan as part of Oregon Coastal management Program by reference.

Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

RULEMAKING ACTION

List each rule number separately (000-000-0000)

Secure approval of new rule numbers (Adopted or Renumbered rules) with the Administrative Rules Unit prior to filing.

ADOPT: 660-036-0005

AMEND:

REPEAL:

RENUMBER:

AMEND & RENUMBER:

FILED
NOV 25 2009
ARCHIVES DIVISION SECRETARY OF STATE

Stat. Auth.: ORS 196.471 and ORS 197.040

Other Auth.: Statewide Land Use Planning Goal 19 Ocean Resources, (OAR 660-015-0010(4))

Stats. Implemented: ORS 196.405 to 196.435 and ORS 196.471 to ORS 196.485

RULE SUMMARY

The rule adopts by reference amendments to the Territorial Sea Plan authorized by ORS 196.443. ORS 196.471 requires the Land Conservation and Development Commission to review such amendments to the Territorial Sea Plan and adopt the amendments as part of the Oregon Coastal Management Program.

DEPT OF

DEC 02 2009

**LAND CONSERVATION
AND DEVELOPMENT**

Richard Whitman

11/19/09

Authorized Signer

Printed name

Date

*With this original, file one photocopy of certificate, one paper copy of rules listed in Rulemaking Actions, and electronic copy of rules. **The Oregon Bulletin is published the 1st of each month and updates rules found in the OAR Compilation. For publication in Bulletin, rule and notice filings must be submitted by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a weekend or legal holiday, when filings are accepted until 5:00 pm on the preceding workday.

ARC 930-2005

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 and the Commission approved as modified on November 5, 2009.

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

Stat. Auth.: ORS 197.040

Stats. Implemented: ORS 196.471

Hist.

Corrected Item 153



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, OR 97301-2540

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www.lcd.state.or.us

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 of 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

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

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2540

Phone: (503) 373-0050

Fax: (503) 378-5518

www.oregon.gov/LCD



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."

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1 **Oregon Territorial Sea Plan**

2
3 **DRAFT PART FIVE:**

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

7
8 **PART FIVE** of the Territorial Sea Plan describes the process for making decisions
9 concerning the development of renewable energy facilities (*e.g.* wind, wave, current,
10 thermal, etc.) in the state territorial sea, and specifies the areas where that development
11 may be sited. The requirements of Part Five are intended to protect areas important to
12 renewable marine resources (*i.e.* living marine organisms), ecosystem integrity, marine
13 habitat and areas important to fisheries from the potential adverse effects of renewable
14 energy facility siting, development, operation, and decommissioning and to identify the
15 appropriate locations for that development which minimize the potential adverse impacts
16 to existing ocean resource users and coastal communities.

17
18 Oregon's renewable energy portfolio lists ocean energy as a renewable energy source with
19 potential to reduce dependence on fossil fuels.¹ Renewable ocean energy facilities
20 development may present opportunities to apply technologies that rely on wave, wind,
21 current or thermal energy, that may potentially reduce the environmental impact of fossil
22 fuels. If developed in a responsible and appropriate manner, in accordance with the
23 requirements of this Part and other applicable state and federal authorities, renewable
24 ocean energy may help preserve Oregon's natural resources and enhance our quality of
25 life.

26
27
28 **A. Renewable Energy Facilities Development**

29
30 **1. Background**

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

39
40 State agencies, including the Oregon Departments of State Lands, Fish and Wildlife, Parks and
41 Recreation, Environmental Quality, Land Conservation and Development, Water Resources,
42 Energy, and Geology and Mineral Industries, need specific policies and standards for
43 considering the siting and regulation of renewable energy facility development in the territorial
44 sea. The State also needs specific policies and standards to guide federal agencies in the siting

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

3
4 **NOTE: Notwithstanding Part One, paragraph F.1.b, the following policies and**
5 **implementation requirements are mandatory. Decisions of state and federal agencies with**
6 **respect to approvals of permits, licenses, leases or other authorizations to construct, operate,**
7 **maintain, or decommission any renewable energy facility to produce, transport or support**
8 **the generation of renewable energy within Oregon's territorial waters and ocean shore must**
9 **comply with the requirements mandated in the Oregon Territorial Sea Plan. The**
10 **enforceable policies of the Territorial Sea Plan and the Oregon Coastal Management**
11 **Program are applicable to those federal actions that affect Oregon's coastal zone and are**
12 **subject to the federal consistency requirements of the federal Coastal Zone Management Act.**
13

14 15 **2. Policies**

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

- 21
22 a. Maintain and *protect* renewable marine resources (*i.e.* living marine organisms),
23 ecosystem integrity, *marine habitat* and *areas important to fisheries* from adverse
24 effects that may be caused by the installation or operation or removal of renewable
25 energy facility by requiring that such actions:
- 26
27 1.) Avoid adverse effects to the integrity, diversity, stability and complexity of the
28 marine ecosystem and coastal communities, and give first priority to the conservation
29 and use of renewable marine resources;
 - 30
31 2.) Minimize effects by limiting the degree or magnitude of the action and its
32 implementation;
 - 33
34 3.) Rectify or mitigate the effects that occur during the lifetime of the facility by
35 monitoring and taking appropriate corrective measures through adaptive management;
36 and
 - 37
38 4.) Restore the natural characteristics of a site to the extent practicable when the facility
39 and structures are decommissioned and removed.
- 40
41 b. Protect marine renewable resources, the biological diversity and functional integrity of
42 marine ecosystem, important marine habitat, areas important to fisheries, navigation,
43 recreation and aesthetic enjoyment as required by Statewide Planning Goal 19.
- 44
45 c. Promote direct communication and collaboration between an applicant for a state or
46 federal authorization for the siting, development and operation of renewable energy
47 facilities and affected ocean users and coastal communities to reduce or avoid conflicts.

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1 Agencies will strongly encourage applicants to engage with local, state and federal
2 agencies, community stakeholders, tribal governments and affected ocean users in a
3 collaborative agreement-seeking process prior to formally requesting authorization to
4 initiate a project.⁴
5

6 d. Limit the potential for unanticipated adverse impacts by requiring, as necessary, the use
7 of pilot projects and phased development to collect data and study the effects of the
8 development on the affected marine resources and uses.
9

10 e. Facilitate the research and responsible development of ocean-based renewable energy
11 sources including wave, tidal, and wind that meet the state's need for economic and
12 affordable sources of renewable ocean energy.
13

14
15 **B. Implementation Requirements**
16

17 State and federal agencies shall apply the following implementation requirements when
18 considering a proposal for the placement or operation of a renewable energy facility
19 development within the Oregon Territorial Sea. Regulating agencies shall comply with the
20 standards and procedural requirements in Part Five of the Territorial Sea Plan as prescribed
21 below. This includes the cables, connectors or other transmission devices that connect, anchor,
22 support or transmit energy between the separate components within a renewable energy
23 facility. The requirements in Part Four, Uses of the Seafloor for Telecommunication Cables,
24 Pipelines, and other Utilities, will apply to the utility cables that transmit the electrical energy
25 from the renewable energy facility to the on-shore substation. The requirements in Part Two,
26 Making Resource Use Decisions, Sections A and B, will not apply to the evaluation, siting or
27 operation of renewable energy development or other related structures, equipment or facilities.
28

29 **1. Siting: areas designated for renewable energy facilities development.**
30

31 **a. In State Waters:**

32 Pursuant to the requirements for amending the Territorial Sea Plan under ORS 196.471,
33 to carry out the policies of the Oregon Ocean Resources Management Act and
34 consistent with the statewide planning goals, the Land Conservation and Development
35 Commission will designate areas of the territorial sea appropriate for the development
36 of renewable energy facilities.⁵ (See appendix C map). Renewable energy facilities
37 development of the state lands of the territorial sea lying seaward of Extreme Low
38 Water (which is the seaward boundary of the Ocean Shore State Recreation Area) shall
39 be sited within the areas designated for that use so as to avoid, minimize or mitigate the
40 adverse effects of that development, and to protect: renewable marine resources,
41 biological diversity and functional integrity of marine ecosystem, important marine
42 habitat, and areas important to fisheries, as defined in Statewide Planning Goal 19
43 Ocean Resources.
44

45 **b. In Federal Waters:**

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

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1 within the waters and seafloor of the outer continental shelf adjacent to the Oregon
 2 Territorial Sea for consistency with the Oregon Territorial Sea Plan and the applicable
 3 enforceable policies of the Oregon Coastal Management Program. Federal actions,
 4 including the issuance of any federal authorizations, that affect any land or water use or
 5 natural resources of the Oregon Coastal Zone shall be supported by environmental
 6 studies and analysis as prescribed below, to ensure compliance with the enforceable
 7 policies of Oregon Territorial Sea Plan and the Oregon Coastal Management Program.⁶
 8

9 **2. State Agency Review Process**

10
 11 Pursuant to ORS 196.485 and ORS 197.180, state agencies shall apply the policies and
 12 provisions of the Oregon Ocean Resources Management Plan and Territorial Sea Plan, and
 13 Goal 19 Ocean Resources as required to comply with State Agency Coordination Programs
 14 (OAR chapter 660, divisions 30 and 31).
 15

16 The Department of State Lands shall coordinate the review of requests for approvals of
 17 leases, temporary use permit, easements and removal-fill in consultation with the
 18 Departments of Fish and Wildlife, Parks and Recreation, Environmental Quality, Land
 19 Conservation and Development, Water Resources, Geology and Mineral Industries, Energy,
 20 coastal local governments, and tribal governments as appropriate. These agencies, with the
 21 addition of the regulating federal agencies, will constitute the joint agency review team
 22 (JART) described in subsection B.3 below. Pursuant to the federal Coastal Zone
 23 Management Act, the Department of Land Conservation and Development will review the
 24 consistency certification together with required necessary data and information submitted
 25 by the applicant for federal authorization for a renewable energy facilities development to
 26 ensure the project is consistent with enforceable policies of the Oregon Coastal Zone
 27 Management Program, including the Territorial Sea Plan.
 28

29 **3. Project Review Process and Coordination**

30
 31 The Department of State Lands (DSL) shall convene the JART, in order to facilitate the
 32 coordination of state and federal agencies as they apply their separate regulatory,
 33 proprietary, or other authorities to the review of a proposed renewable energy facility
 34 development. The team shall consist of the state and federal agencies with regulatory or
 35 planning authority applicable to the proposed project and location; DSL shall also request
 36 that affected local jurisdictions, if any, participate in the JART review and may also invite
 37 local or statewide interest groups and advisory committees to participate. The joint agency
 38 review team will coordinate the review process, and comment on the adequacy of the
 39 resource inventories and effects evaluations required under subsection B.4 (Resource
 40 Inventory and Effects Evaluation Standards), below, and NEPA environmental assessments
 41 and environmental impact statements. The joint agency review team will also consider the
 42 adequacy of the information provided for the operation plan, as required under section C.
 43 (Operation Plan Development) below, including the monitoring requirements, mitigation
 44 measures, adaptive management plans, construction and operational performance standards,
 45 or any other special conditions that a regulating state agency may apply pursuant to the
 46 lease, permit, license or other authorization.
 47

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1 DSL shall require that an applicant provides documentation verifying their communication
 2 and coordination efforts with local communities, interest groups and advisory committees.
 3 Those efforts shall, at a minimum, include information on the proposed project operation
 4 protocols, response to emergencies and procedures for on-going communication as
 5 specified in section C (Operation Plan Development), below.
 6

7 **4. Resource Inventory and Effects Evaluation Standards**
 8

9 Regulating agencies will require the applicant to provide a resource inventory and effects
 10 evaluation, as required by this subsection, prior to making any decision. State agencies will
 11 assist the applicant by providing readily available data and other information as applicable
 12 to the review process.
 13

14 **a. Sufficiency of Inventory and Evaluation**

15 The resource inventory and effects evaluation shall be sufficient to identify and quantify
 16 the short-term and long-term effects of the proposed renewable energy facility
 17 development on the affected marine resources and uses.
 18

19 **b. Purpose of the Effects Evaluation**

20 The purpose of the effects evaluation is to determine whether the proposed actions can
 21 meet the policies and standards for the protection of resources, resource users and
 22 coastal communities referred to above in subsection A.2 (Policies), above. The
 23 evaluation will help identify where the applicant needs to address deficiencies. The
 24 regulating agency will use the evaluation to develop specific measures for
 25 environmental protection and mitigation, measures to protect ocean uses, monitoring,
 26 and adaptive management.
 27

28 **c. Use of Available Environmental Information**

29 Regulating agencies may allow the applicant to use existing data and information from
 30 any source when complying with the requirements for resource inventory and effects
 31 evaluation. All data and information used for the inventory and evaluation, including
 32 existing data from federal environmental impact statements or assessments, shall meet
 33 the same standards of adequacy required for the inventory and the evaluation.
 34

35 **d. Inventory Content**

36 To evaluate the magnitude of the proposed project, the likelihood of the effects of the
 37 project, and the significance of the resources and uses that the project may affect,
 38 regulating agencies shall require that the applicant include consideration of the
 39 following factors in the inventory:
 40

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

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- 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;

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- 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.

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1
2 **3) Natural and Other Hazards**

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

11
12 **4) Cumulative Effects**

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

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

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

31
32 B) The Joint Agency Review Team may determine the scope of the cumulative
33 effects analysis through a set of guidelines developed by JART that regulating
34 agencies will require for phased development projects as described below under
35 subparagraph B.4.f.3 and subsection C.1. The JART will make a determination
36 from the analysis to inform location, scale, scope and technology of the phased
37 development project; to provide input on any other factors it determines to be
38 relevant; or both. The renewable energy project developer will conduct a
39 comprehensive cumulative effects analysis at the initial phase of a development
40 designed to inform future phases of development. The regulating agencies and
41 project developer will use adaptive management or a similar process to evaluate the
42 project at each subsequent phase; the intent of such evaluation is to inform the
43 design, installation and operation of successive phases.

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1 **f. Insufficient/Incomplete Information**

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

8
9 1) Agency Discretion

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

12
13 2) Pilot Project

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

22
23 A) The exclusive purpose of the pilot project shall be to provide information on
24 the performance, structural integrity, design and environmental effects of a
25 specific renewable energy technology or its supporting equipment and
26 structures.

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

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

- 32
33 1. of low probability of exposure of biological communities and habitats;
34 2. of low sensitivity of the biological communities and habitats to the
35 exposure; or
36 3. the effects of exposure to sensitive communities and habitats will be
37 insignificant.

38
39 D) The pilot project shall not adversely affect any "important marine habitat" or
40 "critical marine habitat" (see Appendix A: Glossary of Terms).

41
42 E) The pilot project will have a term, not to exceed five years, and authorization
43 for the project will include a standard condition requiring project alteration or
44 shutdown in the event that an unacceptable level of environmental effect occurs.

45
46 F) The pilot project shall avoid significant or long-term interference with other
47 human uses of marine resources, and will require decommissioning and site

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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.

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1 **C. Operation Plan Development**

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

10
 11 **1. Phased Development Plan**

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

22
 23 A facility that has been developed to the full extent of its design and operating capacity
 24 may, during the lifetime of its authorization, require systematic improvements to the
 25 technology, structures and operational procedures that were originally authorized. The
 26 regulating agency will require a new facility development plan, as appropriate and
 27 necessary, to provide the data and information for the redevelopment and operation of the
 28 new facility components.

29
 30 **2. Facility Development Plan**

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

- 34
 35 a. Structural and project design, materials used, anchoring and installation information;
 36 b. All cables and pipelines, including lines on project easements;
 37 c. A description of the deployment activities;
 38 d. A listing of chemical products used;
 39 e. A description of vessels, vehicles, aircraft and the transit lanes that will be used;
 40 f. A general description of the operating procedures and systems;
 41 g. Construction schedule; and
 42 h. Other information as required by the Department of State Lands.

43
 44 **3. Project Operation Plan**

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

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1 explain the procedures and mechanisms that will be employed so that the facility will
2 comply with regulatory standards and other conditions of permit or license approval related
3 to water and air quality, environmental protection and mitigation, facility maintenance and
4 safety, operational failure and incident reporting. An operation plan will include the
5 following information:
6

7 **a. Contingency Plan:**

8 A plan to describe how the facility operator will respond to emergencies caused by a
9 structural or equipment failure due to human error, weather, geologic or other natural
10 event. The plan should include a description of the types of equipment, vessels and
11 personnel that would be deployed, the chain of command or management structure for
12 managing the facility repairs, recovery or other forms of remedial action, and the
13 process and timeline for notification of state and federal authorities.
14

15 **b. Inspection Plan:**

16 A plan to provide for the implementation of a routine inspection program to ensure the
17 mechanical, structural and operational integrity of renewable energy project facilities
18 and other related structures, equipment or facilities. In addition, unscheduled
19 inspections are to be required after any major geologic or meteorologic event to ensure
20 continued operational safety and environmental protection.
21

22 **c. Monitoring Plan:**

23 A plan to provide for the implementation of a routine standardized monitoring program
24 for potential impacts on specific resources as specified by the resource inventory and
25 effects evaluation. The operator shall monitor activities related to the operation of the
26 facility and demonstrate that its performance satisfies specified standards in its
27 approved plans. Monitoring shall be sufficient to accurately document and quantify the
28 short-term and long-term effects of the actions on the affected resources and uses.
29 Plans for monitoring must include, at a minimum:
30

- 31 1) A list of the information needed to satisfy an effects evaluation.
- 32 2) Specific study objectives to obtain the needed information and explanation of
33 how the study design will meet the objectives.
- 34 3) Description of study methods to meet the objectives, such as:
 - 35 A) Literature review;
 - 36 B) Collection of needed baseline data;
 - 37 C) Hypotheses to address the study objectives;
 - 38 D) Descriptions of field sampling and data-analyses methods to be used; and
 - 39 E) Use of adequate controls, such as control sites, to allow the effects of the
40 proposed action to be separated from natural fluctuations in resources and
41 habitats.
- 42 4) The monitoring plan will include supporting documentation demonstrating that
43 the study design is scientifically appropriate and statistically adequate to address
44 the research objectives.¹¹
45
46
47
48

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- 1
2 5) The monitoring plan will include a description of the method that will be used to
3 report and deliver data and analyses information to the authorizing state agency
4 for review in a timely and efficient manner.¹²
5

6 **d. Adaptive Management Plan**

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

- 19
20 1) Variable conditions in the marine environment;
21 2) Change in the status of resources;
22 3) New information provided by monitoring of the project;
23 4) Data and information provided by research and from other sources;
24 5) New technologies that would provide for greater protection of ocean resources;
25 6) Ocean fisheries, or other ocean uses to be protected from adverse effects and
26 operational conflicts; and
27 7) Unanticipated cumulative effects
28

29 **4. Decommissioning Plan:**

30 An applicant is required to provide a plan to restore the natural characteristics of the site to
31 the extent practicable by describing the facilities to be removed.¹³ The plan should include;
32 a proposed decommissioning schedule; a description of removal and containment methods;
33 description of site clearance activities; plans for transporting and recycling, reusing, or
34 disposing of the removed facilities; a description of those resources, conditions, and
35 activities that could be affected by or could affect the proposed decommissioning activities;
36 results of any recent biological surveys conducted in the vicinity of the structure and recent
37 observations of marine mammals at the structure site; mitigation measures to protect
38 archaeological and sensitive biological features during removal activities; and a statement
39 as to the methods that will be used to survey the area after removal to determine any effects
40 on marine life. A decommissioning plan should identify how the project owner will restore
41 the site to the natural condition that existed prior to the development of the site, to the
42 extent practicable.
43

44 **5. Financial Assurance Plan:**

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

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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.

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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,

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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.

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1
2
3**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.

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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.

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“(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.”

DRAFT

EXHIBIT: 9 AGENDA ITEM: S
LAND CONSERVATION & DEVELOPMENT
COMMISSION
DATE: 11-5-09
PAGES: 1
SUBMITTED BY: David Allen

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.

Oregon Ocean Policy Advisory Council

October 23, 2009 Meeting Summary

Florence Events Center

Florence, OR

Issues Decided/Positions Taken

- The summary of the June 8, 2009 Ocean Policy Advisory Council (OPAC) meeting was approved as distributed.
- OPAC Reviewed and approved (with minor edits – listed below), the Territorial Sea Plan Amendment, Part 5. “Use of the Territorial Sea for the Development of Renewable Energy Facilities or other Related Structures, Equipment or Facilities.”
- OPAC approved a motion to authorize the OPAC Executive Committee to carry out a conversation with the STAC (and STAC plus list of individuals – as appropriate) for advice on appropriate procedures for peer review.
- OPAC approved a motion to have ODFW work as the lead on a public strategy for communication of a coordinated message related to the use of foundation funding.
- OPAC decided to delay the discussion of priorities for OPAC attention in 2010 until the next meeting.

Action Items

- OPAC asked the Executive Committee to coordinate a discussion with STAC in regards to procedures for peer review of information products to be used during upcoming state policy processes.

Presentations

- Ed Bowles (ODFW) provided an update on the Marine Reserves Process.
- David Allan provided an update on the West Coast Governor’s Agreement on Ocean Health.
- *Update on Port of Coos Bay Marine Reserves Committee process.* Kathy Wall and Mike Gaul (Port of Coos Bay)
- *Update on Agency Rulemaking* Cristen Don (ODFW), Louise Solliday (DSL), Jeff Farm (OPRD)

OPAC Members Attendance

Members Present (voting): David Allen (Public at Large, OPAC vice-chair); Jim Bergeron (Ports, Marine Transportation, Navigation); Jack Brown (Coastal City Official); Paul Engelmeyer (Statewide Conservation or Environmental Organization); Jim Good (Public at Large); Robin Hartmann (Coastal Conservation or Environmental Organization); Scott McMullen (North Coast Commercial Fisheries, OPAC Chair); Susan Morgan (South Coastal County Commissioner); Brad Pettinger (South Coast Commercial Fisheries); Jim Pex (South Coast Charter, Sport or Recreational Fisheries); Fred Sickler (Coastal Non-Fishing Recreation); Terry Thompson (North Coastal

County Commissioner); **Frank Warrens** (North Coast Charter, Sport or Recreational Fisheries). [14/14]

Members Present (ex officio): **Ed Bowles** (Office of the Governor); **Caren Braby** (Oregon Department of Fish & Wildlife); **Onno Husing** (Oregon Coastal Zone Management Association); **Jay Charland/Paul Klarin** (Department of Land Conservation & Development); **Greg Pettit** (Department of Environmental Quality); **Jay Rasmussen/Jeff Feldner** (Oregon Sea Grant); **Louise Solliday** (Department of State Lands); **Cathy Tortorici** (NOAA Fisheries); **Jeff Farm** (OPRD). [10/11]

Members Absent: **Dalton Hobbs** (Dept of Agriculture); **Robert Kentta** (Oregon Coastal Indian Tribes); **Vicki McConnell** (DOGAMI); [3]

Staff: **Jay Charland** (DLCD, OPAC Staff); **Cristen Don** (Department of Fish and Wildlife); **Juna Hickner** (Department of Fish and Wildlife); **Laurel Hillmann** (Department of Parks and Recreation); **Andy Lanier** (Department of Land Conservation & Development); **Steve Shipsey** (Department of Justice, OPAC Counsel).

Public Comment and Attendance

Public Comment speakers (with affiliation if provided): **Kelly Barnett** (FACT); **John Griffith** (None given); **Lucie La Bonte** (None given); **Dave Lacey** (Our Ocean); **Gus Gates** (Surfrider Foundation); **Peg Reagan** (None given); **Erin Anderson** (Our Ocean); **Susan Allan** (Our Ocean); **Jim Carlson** (Our Ocean); **John Holloway** (RFA-OR)

Others in Attendance (with affiliation if provided): **Nick Furman** (ODCC/SOORC); **Hugh Link** (ODCC); **Mike Gaul** (Port of Coos Bay); **Kathy Wahl** (Port of Coos Bay); **Steve Bodnar** (Coos Bay Trawlers Association); **Ron Kresky** (Congressman Defazio); **Dianne Burch** (Rep to Comm Fleenor); **Jeff Feldner** (Oregon Sea Grant); **Linda Buell** (FACT); **Becky Lunde** (NOAA CSC)

Acronyms and Initials: DLCD-Department of Land Conservation and Development; DOGAMI-Oregon Department of Geology and Mineral Industries; DSL- Department of State Lands; FACT – Fishermen Advisory Committee for Tillamook. NOAA CSC- National Oceanographic and Atmospheric Administrations’ Coastal Services Center; ODCC-Oregon Dungeness Crab Commission; ODFW-Oregon Department of Fish and Wildlife; OPRD-Oregon Department of Parks and Recreation; RFA-Recreational Fishing Alliance; SOORC-Southern Oregon Ocean Resource Coalition.

Distributed Materials

1. Draft Agenda
2. OPAC June 8, 2009 Meeting Summary
3. ODFW Oregon Marine Reserves Community Team Process
4. ODFW Marine Reserves Rule Making
5. Oregon International Port of Coos Bay – Action/Decision Request
6. West Coast Governor’s Agreement on Ocean Health (3 Documents).

7. Territorial Sea Plan Draft Part 5. OPAC Approved., 6.12.09
8. Territorial Sea Plan Draft Part 5. TSPAC Approved 9.11.09, Revised 10.14.09
9. Territorial Sea Plan Draft Part 5. TSPAC Approved 9.11.09, Revised 10.14.09
10. Territorial Sea Plan Draft Part 5. TSPAC Approved 9.11.09, Revised 10.14.09
DOJ review 10.19.09
11. Territorial Sea Plan Draft Part 5. TSPAC Approved 9.11.09, Revised 10.14.09
Red Lined Copy
12. Packard Funding Transparency Documents

OPAC Approved Edits to the TSP Part 5 Draft

List of Edits to Draft of Part 5 the TSP amendment. Changes made to the Red Lined copy of the "TSPAC approved 9/11/09 Draft Revised 10/14/09."

1. Page 3, line 10, change "promote" to "facilitate"
2. Page 3, line 12, change "alternative renewable electric power" to "renewable ocean energy."
3. Page 5, line 11, change "providing available" to "providing readily available"
4. Page 8, line 1, change "Geologic Hazards" to "Natural and Other Hazards"
5. Page 8, line 8, change "tsunamis, and variable" to "tsunamis, weather related, human caused, and variable"
6. Page 9, line 39, change "critical marine habitat" to "important marine habitat or critical marine habitat"
7. Page 14. Line 25. Typo, change devise to device.

Additional Resources

1. West Coast Governors' Agreement on Ocean Health
2. OPAC Draft Priority List, 11.17.05
3. White House Interagency Ocean Policy Task Force
4. White House Interim Report on Ocean Policy
5. NOAA Marine Spatial Planning

Video Index

<i>Item</i>	<i>Time Index</i>
Welcome and Introductions (Dist #1.)	00:00:35
OPAC Staffing change	00:03:35
Review and Approval of June 8 Meeting Summary (Dist #2.)	00:04:40
Marine Reserves Process Update	00:05:00
Ed Bowles – Marine Reserves Process Description	00:05:10
Community Team Formation (Dist #3.)	00:10:05
Rulemaking Process (Dist #4, #5)	01:00:30
Port of Coos Bay – Marine Reserves Process Update	01: 39:40
STAC Update	01:56:00
Jay Rasmussen - review of work products	01:56:30
Discussion of future STAC role	02:00:35
Update on West Coast Governor's Agreement on Ocean Health	02:14:35
David Allen description of current events (Dist #6.)	02:16:15
Working Lunch	02:37:50
Public Comment	02:38:25
Territorial Sea Plan	03:20:40
OPAC review of updates to amendments of the TSP.	03:21:00
Paul Klarin – Discussion of Draft Part 5. (Dist #7-#10)	03:23:45
Paul Klarin - Summary of OPAC edits	04:38:50
Approval of Part 5. by OPAC	04:42:10
Territorial Sea Plan Amendment Process	04:45:19
Description of planning process	04:46:15
Discussion of foundation funding and work proposals	04:52:15
Discussion of OPAC & STAC proposed meeting regarding work products.	05:24:30
OPAC motion to authorize the OPAC Executive Committee to direct STAC for advice related to peer review of project proposal work.	05:40:15
OPAC Motion to have ODFW work as the lead on a strategy to develop a coordinated message related to the use of foundation funding.	05:48:20

For a copy of the video record of this meeting, please contact Andy Lanier at (503) 373-0050 x246 or through email at Andy.Lanier@state.or.us.

Secretary of State

STATEMENT OF NEED AND FISCAL IMPACT

A Notice of Proposed Rulemaking Hearing or a Notice of Proposed Rulemaking accompanies this form.

Department of Land Conservation and Development
Agency and Division

OAR chapter 660
Administrative Rules Chapter Number

Amend the Territorial Sea Plan for Use of Territorial Sea for Renewable Energy Development

Rule Caption (Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.)

In the Matter of:

Statutory Authority: ORS 196.471 and ORS 197.180

Other Authority: Statewide Land Use Planning Goal 19 Ocean Resources, (OAR 660-015-0010 (4) and (36)

Stats. Implemented: ORS 196.405 to ORS.435 and ORS 196.471 to ORS 196.485.

Need for the Rule(s): The proposed permanent rules amend OAR chapter 660, division 36 for Ocean Planning. The purpose of this rule is to amend the Oregon Territorial Sea Plan by adopting Part (5) Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities. The new section of the plan will provide policies for siting and regulating ocean-based renewable energy facilities and other related structures, and establishes the regulatory requirements and review standards that will be applied by state agencies in the implementation of their separate authorities for issuing permits for the renewable energy facility development and leasing the seabed for that purpose.

Documents Relied Upon, and where they are available: Oregon Territorial Sea Plan, Statewide Land Use Planning Goal 19 Ocean Resources, ORS 196 Oregon Ocean Resources Management and ORS 197 Comprehensive Land Use Planning Coordination; All documents relied on are available at the Oregon Department of Land Conservation & Development website and at 635 Capitol St. NE, Suite 150, Salem, Oregon 97301-2540.

Fiscal and Economic Impact, including Statement of Cost of Compliance:

Amendments to the Territorial Sea Plan are not expected to result in fiscal impact to state or federal agencies or local governments, beyond such fiscal impacts that existing application fees and development costs impose under existing laws and regulations. Ocean energy facility developers may be expected to incur some indeterminate additional costs in order to conduct the environmental assessment and operational plan requirements needed to comply with the amended plan. However, the cost of those meeting the new requirements may not be significantly different than the cost of meeting other existing state and federal regulatory requirements. Existing users, such as fishers, who may be displaced by the introduction of ocean-based renewable energy facilities developed in accordance with the amended plan, could experience an undetermined economic impact. The proposed rule will have no cost of compliance effect on small businesses. The proposed rule will have no effect on the cost of housing.

Administrative Rule Advisory Committee consulted:

An official advisory committee was used. The Land Conservation and Development Commission authorized the formation of the Territorial Sea Plan Advisory Committee to assist the Commission and the Department of Land Conservation and Development in amending the Territorial Sea Plan. In addition, the Ocean Policy Advisory Council, under its authority and duties specified in ORS 196.443 has prepared the proposed amendment and submitted it to the LCDC, which, under ORS 196.471, is required to review and adopt such amendments upon making of certain findings. The amendment proposed by OPAC was used by the LCDC Territorial Sea Plan Advisory Committee as the basis for its recommendation to the commission for amending the Territorial Sea Plan. The amendment will be adopted by reference as administrative rule OAR 660-36-0010.

	Richard Whitman, Director	September 15 th , 2009
Signature	Printed name	Date

Administrative Rules Unit, Archives Division, Secretary of State, 800 Summer Street NE, Salem, Oregon 97310. ARC 925-2007



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2524

Phone: (503) 373-0050

First Floor/Coastal Fax: (503) 378-6033

Second Floor/Director's Office: (503) 378-5518

Web Address: <http://www.oregon.gov/LCD>

September 22, 2008



TO: Land Conservation and Development Commission

FROM: Richard Whitman, Director

SUBJECT: **Agenda Item 8, October 15 - 17, 2008 LCDC Meeting**

REQUEST TO INITIATE RULEMAKING AND CONVENE AN ADVISORY COMMITTEE REGARDING AMENDING THE OREGON TERRITORIAL SEA PLAN FOR WAVE ENERGY POWER GENERATION FACILITIES

EXHIBIT: 31
LAND CONSERVATION & DEVELOPMENT
COMMISSION
DATE: 10-16-08
PAGES: 25
SUBMITTED BY: DLCD Staff

I. AGENDA ITEM SUMMARY

This item is a report to the Commission regarding a proposed work group to consider amendments to OAR 660, division 36 (Ocean Planning) to adopt a new chapter to the Oregon Territorial Sea Plan that will include mandatory policies that will apply to state and federal agency approvals for the location and operation of wave energy power generation facilities in the Oregon Territorial Sea.

This report discusses need, issues and proposed timelines, and recommends appointment of an advisory committee and Commission liaison to guide the project.

For additional information, please contact Bob Bailey, Coastal Division Manager or Paul Klarin, Coastal Policy Analyst. Bob can be reached at 503-373-0050, ext. 281, or at bob.bailey@state.or.us. Paul can be reached at 503-373-0050 ext. 249 or at paul.klarin@state.or.us.

II. SUMMARY OF RECOMMENDED ACTION:

The department recommends the Commission initiate rulemaking to convene a work group to discuss issues and recommend amendments to OAR 660, division 36 to amend the Territorial Sea Plan for the of wave power generation facilities in state waters.

III. BACKGROUND

The Governor's March 26, 2008 Executive Order No. 08-07, Directing State Agencies to Protect Coastal Communities in Siting Marine Reserves and Wave Energy Projects,

directs the department to "seek recommendations from the Ocean Policy Advisory Council (OPAC) concerning appropriate amendments to Oregon's Territorial Sea Plan, reflecting comprehensive plan provisions on wave energy projects. On or before July 31, 2009, DLCD shall begin the process to develop proposed amendments to Oregon's Territorial Sea Plan for consideration by LCDC for such amendments." The order directed DLCD to provide final amendment recommendations to the commission on or before December 1, 2009. The order directs the department to submit the Territorial Sea Plan amendment to the National Oceanic and Atmospheric Administration (NOAA) for incorporation as an enforceable policy of the Oregon Coastal Management Program under the federal Coastal Zone Management Act. Lastly, the order calls on OPAC to work with Oregon Sea Grant and the Oregon Coastal Zone Management Association to provide outreach and education on wave energy development.

On that same date, the State of Oregon and Federal Energy Regulatory Commission (FERC) signed a Memorandum of Understanding to "coordinate the schedules and procedures for review of wave energy projects in the Territorial Sea and to ensure coordinated review of proposed wave energy projects that is responsive to environmental, economic, and cultural concerns while providing a timely, stable, and predictable means for developers of such projects to seek necessary approvals". The MOU provides that FERC will, in issuing a permit or license, "consider the extent to which the proposed project is consistent with the Oregon plan". In addition, FERC will also "consider any terms and conditions that are recommended by Oregon under section (10)(a)(3) or the Federal Power Act (FPA) to ensure consistency with the Oregon Plan".

When completed, the commission will adopt the amendment to the Territorial Sea Plan by reference. The commission's authority to amend the Territorial Sea Plan is derived under ORS 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]

The Ocean Policy Advisory Council responsibilities in amending the Territorial Sea Plan are prescribed by 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.

OPAC has directed its Territorial Sea Plan (TSP) workgroup to consider amendments to the Territorial Sea Plan for wave energy. However, OPAC has decided that TSP workgroup shall consist solely of OPAC members and will not, therefore, allow for the participation of other stakeholders and interested parties. The department has informed OPAC that it will request authorization from the commission to form the advisory committee, and it is anticipated that the OPAC TSP workgroup and agency advisory committee will work closely together, and share some membership.

The commission last amended the Territorial Sea Plan in 2000, when, with the advice of OPAC, it revised Part One Ocean Management Framework to add section (G) including a preamble, goals and policies, and added Part Four: Uses of the Seafloor – section (A) Telecommunication Cables, Pipelines, and other Utilities. The department, based on discussions with OPAC members, Oregon Sea Grant, OCZMA and other state agency staff, has concluded that it would not be feasible to meet the timeline set by the EO for amending the Territorial Sea Plan, unless the process is initiated immediately. The memo from agency staff outlining the timeline and tasks is included in the commission packet. It describes, in general terms, how that process must proceed in order for OPAC to fulfill its advisory role, and for the department to meet the December 2009 deadline to deliver a draft Territorial Sea Plan amendment to the commission.

IV. RECOMMENDATION

The department believes that the Territorial Sea Plan does not provide sufficient policy guidance and spatially explicit directions for locating wave energy facilities. The applicable provisions of OAR Chapter 660, division 36, do not appear to anticipate the development of wave energy sources. A rulemaking effort to amend the Territorial Sea Plan to provide policy guidance and the allocation of specific areas for the development of wave energy facilities would benefit future applicants and decision makers, as well as citizens, industry, fishing interests and coastal communities and others affected by wave energy generation decisions.

Timeline: Staff recommends that LCDC approve the formation of an advisory committee and delegate the selection of advisory committee members to the department at its October 15–17 meeting in Prineville. The department will ask LCDC to approve the membership of the advisory committee at its subsequent meeting in December 4-5 in Tillamook. This would then be followed by no fewer than six to eight advisory committee meetings, and proposed administrative rule changes no sooner than December 2009. This is expected to be a long and complex rulemaking.

Citizen Involvement: The procedures for public involvement under the Commission's "Citizen Involvement Guidelines for Policy Development" will be followed in this process (Attachment D). This includes: (1) consultation with the Citizen Involvement Advisory Committee (CIAC) throughout the process; (2) establishing and publicizing a schedule of work group meetings and LCDC meetings to provide opportunities for citizen participation; (3) having rulemaking information available in paper form and available on the agency's website; and (4) providing opportunities for citizens to comment directly to the department and Commission. The procedures for citizen involvement will be utilized when the workgroup meets and when the Commission engages the public in the rule amendment process.

A mailing list is being created by the department to provide information and to notify interested persons of advisory committee and Commission hearings. Information will be available on the agency's website. Persons with questions about this rule amendment process should contact Bob Bailey or Paul Klarin. Persons interested in being included on the mailing list should contact Bryan Gonzalez, at 503-373-0050, ext. 322, or by e-mail at bryan.gonzalez@state.or.us.

Workgroup: The department recommends the Commission delegate the selection of the advisory committee member to the department. The list of the agencies and stakeholders that will comprise the wave energy advisory committee includes:

Tim Josi, LCDC Liaison (Workgroup Chair)
 Coastal County
 Coastal City
 Tribal
 Citizen at Large
 Oregon Department of Energy
 Oregon Department of Fish and Wildlife
 Oregon Department of State Lands
 Oregon Parks and Recreation Department
 Oregon Department of Water Resources
 Oregon Coastal Zone Management Association
 Oregon Wave Energy Trust
 Oregon Policy Advisory Council Territorial Sea Workgroup Member
 Oregon Dungeness Crab Commission
 Oregon Salmon Commission

Recreational \ Charter fishing
Coastal Local Advisory Committee (2)
Wave Industry (2)
Oregon Shores Conservation Coalition
Ocean Environmental - Our Ocean
Ocean Recreation (non fishing) - Oregon Surfrider Foundation
Coastal Electric Power Cooperative
Electric Utility - PGE
Coastal Port

The names of the representatives will be supplied at the December 4- 5 Commission meeting in Tillamook.

Proposed Motion:

I move that the Commission authorize the department to appoint an advisory committee to consider and propose amendments, as appropriate, to OAR 660, division 36 (Ocean Planning), to amend the Territorial Sea Plan for the of wave power generation facilities in state waters.

ATTACHMENTS

- A. Executive Order 08-07
- B. Memorandum of Understanding between the Federal Energy Regulatory Commission and the State of Oregon.
- C. DLCD interoffice memorandum outlining the process and timeline for the TSP process.
- D. LCDC's Citizen Involvement Guidelines for Policy Development

**EXECUTIVE ORDER NO. 08-07****DIRECTING STATE AGENCIES TO PROTECT COASTAL COMMUNITIES IN SITING MARINE RESERVES AND WAVE ENERGY PROJECTS**

Marine reserve designations and wave energy siting in Oregon's Territorial Sea have the potential to significantly impact coastal communities and ocean users. The State must adopt a comprehensive, thoughtful approach to planning marine reserve designations and wave energy siting that balances the needs of Oregon's coastal communities and ocean users with opportunities for continued economic development.

Oregon's coastal communities are comprised of distinct local economies that share a common connection to the ocean and its resources. Coastal communities and ocean users have a wealth of knowledge about maintaining nearshore marine resources and their input is essential to developing informed recommendations for marine reserves, wave energy development and other new uses of the ocean. Oregon can stimulate and strengthen the coastal region's economic vitality by encouraging development of new sustainable industries while preserving existing livelihoods in commercial and sport fishing, ocean recreation, tourism, forest products and agriculture.

Oregon is distinguished among sister states for its collaborative and innovative approach to ocean resource management. Oregon's Ocean Policy Advisory Council (OPAC), a marine policy advisory body, was created by the legislature to ensure the conservation and responsible development of Oregon's ocean resources. OPAC is comprised of representatives from coastal communities and state agencies, including but not limited to Oregon Department of Fish and Wildlife (ODFW), Department of Land Conservation and Development (DLCD) and Oregon Parks and Recreation Department (OPRD).

At my request, OPAC has begun the process of recommending marine reserve designations. OPAC will also be involved in advising the State about other proposed uses of Oregon's Territorial Sea. ODFW, as the state agency with principal responsibility to manage marine fisheries and other marine wildlife, is uniquely poised to lead OPAC in developing marine reserve designations. ODFW has adopted a nearshore marine resource conservation strategy and a statewide conservation strategy to preserve and protect Oregon's ecosystems and the species that depend on them.



**EXECUTIVE ORDER NO. 08-07
PAGE TWO**

To further protect coastal communities, Oregon must closely collaborate with the Federal Energy Regulatory Commission (FERC), the federal agency responsible for reviewing applications for licenses to site and operate wave energy facilities. A Memorandum of Understanding (MOU) between FERC and Oregon outlines the steps for this collaboration. The MOU provides that Oregon will develop a comprehensive plan, which FERC will consider in its wave energy license review process for hydrokinetic projects within Oregon's Territorial Sea. The comprehensive plan will seek to identify appropriate locations for future wave energy projects that minimize adverse impacts to existing ocean resources and resource users. In addition, the MOU provides that FERC and Oregon will include terms and conditions in wave energy licenses and permits to optimally site wave energy facilities to mitigate the impacts of projects on coastal communities.

NOW THEREFORE, IT IS HEREBY DIRECTED AND ORDERED:

1. The director of ODFW, or the director's designee, shall serve as my representative to OPAC. ODFW shall serve as the lead agency in the OPAC marine reserve recommendation process.
2. DLCD, together with ODFW, shall continue to provide OPAC with administrative staff and technical support. OPRD shall continue to provide staff assistance to OPAC. All OPAC member agencies shall continue to support the Marine Reserves Working Group and the Scientific and Technical Advisory Committee (STAC) through the marine reserves recommendation process.
3. The director of ODFW, or the director's designee, shall work with OPAC and its member agencies to:
 - a. Prioritize OPAC activities directly related to implementing an effective public nomination and recommendation process for marine reserves until January 1, 2009, when the process is complete.
 - b. Recommend not more than nine sites for consideration as marine reserves that, individually or collectively, are large enough to allow scientific evaluation of ecological benefits, but small enough to avoid significant economic or social impacts, on or before January 1, 2009.

**EXECUTIVE ORDER NO. 08-07****PAGE THREE**

- c. Give priority consideration to marine reserve designation nominations developed by coastal community nominating teams (e.g., nearshore action teams) comprised of coastal community members, ocean users and other interested parties.
 - d. On or before July 1, 2008, publish a marine reserve nomination form. The nomination form shall utilize STAC expertise. The form shall address site location characteristics, potential biological, social and economic impacts, potential economic development opportunities, and any research opportunities.
 - e. On or before November 1, 2008, submit a proposal to my office for financing, budgeting and implementing OPAC's marine reserve recommendation process in the 2009-11 biennium.
 - f. On or before December 1, 2008, use nomination criteria as a coarse filter to review marine reserve nominations for more thorough evaluation by state agencies.
 - g. On or before January 1, 2009, OPAC member agencies, utilizing STAC and other scientific and technical expertise, shall engage in a secondary review process to develop additional criteria that assess social, economic and biological impacts of marine reserve nominations.
 - h. Continue to collaborate with Oregon Sea Grant, a program organized under the National Oceanic and Atmospheric Administration in collaboration with Oregon State University, in its outreach and public education efforts to facilitate community-driven site nominations. The Department of Economic and Community Development (OECD) shall provide supplemental funding for travel, public outreach facilitation and publication costs to support Oregon Sea Grant's efforts.
4. Following evaluation of marine reserve sites nominated by OPAC and legislative funding approval, State Land Board, Land Conservation and Development Commission (LCDC), Oregon Fish and Wildlife Commission and other appropriate agencies shall consider OPAC's recommendations and agency evaluations for potential adoption of a limited system of marine reserves consistent with ORS 196.443 and in coordination with OPAC and any amendments to Oregon's Territorial Sea Plan.

Office of the Governor
State of Oregon



EXECUTIVE ORDER NO. 08-07
PAGE FOUR

5. DLCD shall seek recommendations from OPAC concerning appropriate amendments to Oregon's Territorial Sea Plan, reflecting comprehensive plan provisions on wave energy siting projects. On or before July 31, 2009, DLCD shall begin the process to develop proposed amendments to Oregon's Territorial Sea Plan for consideration by LCDC for such amendments. DLCD shall provide final amendment recommendations to LCDC on or before December 1, 2009.

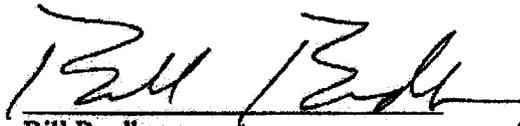
6. DLCD shall submit any comprehensive plan provisions incorporated into Oregon's Territorial Sea Plan to the National Oceanic and Atmospheric Administration for approval as enforceable policies of Oregon's Coastal Management Program under the federal Coastal Zone Management Act.

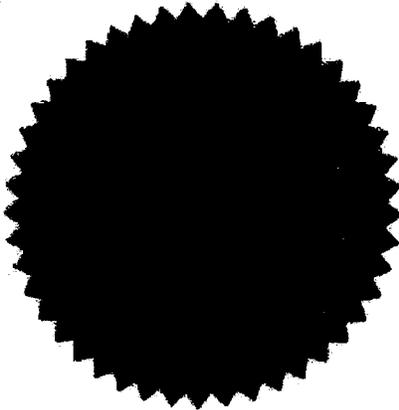
7. OPAC shall work with Oregon Sea Grant and the Oregon Coastal Zone Management Association to provide outreach and public education to coastal communities concerning the potential positive and adverse impacts of wave energy.

Done at Salem, Oregon, this 26th day of March, 2008.


Theodore R. Kulongoski
GOVERNOR

ATTEST:


Bill Bradbury
SECRETARY OF STATE



MEMORANDUM OF UNDERSTANDING
 BETWEEN
 THE FEDERAL ENERGY REGULATORY COMMISSION
 AND
 THE STATE OF OREGON
 BY AND THROUGH ITS DEPARTMENTS OF FISH & WILDLIFE, LAND
 CONSERVATION & DEVELOPMENT, ENVIRONMENTAL QUALITY, STATE
 LANDS, WATER RESOURCES, PARKS & RECREATION, AND ENERGY

The State of Oregon (Oregon) by and through its Department of State Lands, its Department of Water Resources, its Department of Fish & Wildlife, its Department of Land Conservation and Development, its Department of Environmental Quality, its Department of Energy, and its Parks and Recreation Department and the Federal Energy Regulatory Commission (Commission), as parties to this Memorandum of Understanding (MOU), hereby acknowledge and declare as follows:

- A. The Commission issues licenses under Part I of the Federal Power Act, 16 U.S.C. §§ 791a *et seq.* (FPA) for non-federal wave energy projects. This includes, but is not limited to, wave energy projects that are proposed to be located in the Territorial Sea of Oregon. The Commission's staff has established several possible means of authorizing wave energy projects, including procedures to allow shorter-term, experimental projects with environmental safeguards.
- B. Oregon has authorities with respect to wave energy projects that are proposed to be located in its Territorial Sea, including authorities under the following federal laws: the Coastal Zone Management Act 16 USC §§ 1451 *et seq.* (CZMA); the Clean Water Act 33 USC §§ 1251-1387, the National Historic Preservation Act 16 USC §§ 470 *et seq.* (NHPA), as well as the FPA. Oregon state law also includes provisions applicable to wave energy projects that are proposed to be located in its Territorial Sea, including proprietary authorization, regulatory authorization to use waters of the state, and regulatory authorization to use the ocean shore.
- C. The parties have a mutual interest in the timely processing of applications for regulatory and other approvals required for wave energy projects in the Territorial Sea of Oregon to promote clean, renewable sources of energy, and Oregon has stated its intent to be a leader in promoting the development of wave energy projects. The parties also desire to create a process to make it possible for developers of wave energy projects to establish short-term or experimental wave energy projects within the Territorial Sea of Oregon in order to study, monitor, and evaluate the environmental, economic, and cultural effects of wave energy projects. The parties intend that this information will serve as a basis for decision-making concerning requests for longer-term authorizations for wave energy projects in the Territorial Sea of Oregon.
- D. The purpose of this Memorandum of Understanding is to coordinate the procedures and schedules for review of wave energy projects in the Territorial Sea of Oregon and to ensure that there is a coordinated review of proposed wave energy projects

- 2 -

that is responsive to environmental, economic, and cultural concerns while providing a timely, stable, and predictable means for developers of such projects to seek necessary approvals.

Now, therefore, the Commission and Oregon agree that:

1. Oregon supports the efforts by Commission staff to establish procedures to allow shorter-term, experimental wave energy projects with environmental safeguards, including the pilot project license process, which may, in appropriate cases, allow the licensing of wave energy projects by the Commission in a significantly shorter period than a full licensing process would require. Oregon also supports the Commission's conclusion that a license may not be required under Part I of the FPA in certain limited circumstances for the testing of new technology. The parties agree that these and other approaches may be appropriate as short-term means of allowing wave energy projects to proceed on an experimental or pilot basis while additional environmental and other data concerning the effects of such projects are gathered. The parties also agree that these approaches must incorporate safeguards and limitations to ensure that the environmental, economic, and social effects of any experimental or pilot projects will not have a significant adverse effect on the environment.
2. When either the Commission or Oregon becomes aware that a prospective applicant may seek a pilot project license, preliminary permit, or other license from the Commission to study or develop a wave energy project in the Territorial Sea of Oregon, the party obtaining the information promptly will notify the other party, to enable the parties to begin planning how to coordinate review of the project. In such cases, the Commission and Oregon will work together, along with the prospective applicant and other participants in the Commission's pre-filing process (where applicable), to identify potential issues, and to determine what information is needed and what studies must be conducted in order to permit the Commission and Oregon to undertake required reviews of proposed projects.
3. Where a prospective applicant seeks to use the pilot project license process or any other licensing process for wave energy projects to be located in the Territorial Sea of Oregon and subject to the Commission's licensing jurisdiction, the Commission and Oregon agree to confer, as early in the process as possible, in order to reach agreement on a schedule for processing the application as expeditiously as possible. Such a schedule, to be issued by the Commission, will include milestones for the Commission's review of the application and issuance of an environmental document, and the issuance by Oregon of any certifications or concurrences that may be required from it under federal law. Oregon will, to the extent possible, complete any actions required of it within the timeframes established in the schedule and, in any case, will complete such actions by any deadline established by law. The parties further agree that they will use their best efforts to encourage other federal agencies and stakeholders that have an interest in a proposed wave energy project in the Territorial Sea of Oregon to help develop and comply with a coordinated schedule for the review of the project.

- 3 -

4. The parties agree that they will work to coordinate their environmental reviews of any proposed wave energy projects in the Territorial Sea of Oregon subject to the Commission's licensing jurisdiction so that documents prepared by the Commission for review under the National Environmental Policy Act 42 USC §§ 4231 *et seq.* (NEPA) may be used by Oregon agencies to satisfy the requirements of the Oregon Territorial Sea Plan and other similar requirements that are enforceable policies of Oregon's approved Coastal Management Program under the CZMA, or any other actions to be taken by the State. The parties also agree to consult with stakeholders, including the project developers, concerning the design of studies and environmental measures (including adaptive management measures) for wave energy projects in the Territorial Sea of Oregon.

5. The parties acknowledge that Oregon intends to prepare a comprehensive plan for the siting of wave energy projects in the Territorial Sea of Oregon. If Oregon develops and files with the Commission a comprehensive plan (Oregon Plan) for the siting of wave energy projects in the Territorial Sea of Oregon under section 10(a)(2)(A)(ii) of the FPA and 18 C.F.R. 2.19, the Commission will, in issuing any preliminary permit, pilot project license, or other license for a wave energy project in Oregon's Territorial Sea, consider the extent to which the proposed project is consistent with the Oregon Plan. In addition, the Commission will consider any terms and conditions that are recommended by Oregon under section 10(a)(3) of the FPA to ensure consistency with the Oregon Plan. Moreover, without limiting the foregoing, the Commission will inform parties seeking a preliminary permit, pilot project license, or other authorization for a wave energy project in the Territorial Sea of Oregon of any comprehensive plan developed and filed by Oregon under section 10(a)(2)(A)(ii) of the FPA, and encourage the parties to reach agreement with Oregon to the extent practicable. The Commission recognizes that Oregon may also submit such a comprehensive plan to the Office of Coastal Resource Management of the National Atmospheric and Oceanic Administration of the U.S. Department of Commerce (OCRM) for approval as an amendment to Oregon's approved coastal management plan. (Such a comprehensive plan may identify only a limited number of locations within the Territorial Sea of Oregon where the State believes it is appropriate to locate wave energy projects until further information concerning the effects of such projects is developed. Additional locations may be identified in subsequent phases of the comprehensive plan.) ←

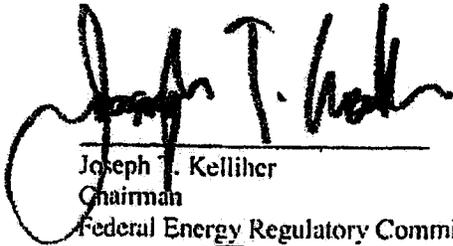
6. Oregon and the Commission recognize that any pilot project license or other license issued by the Commission for a wave energy facility in Oregon's Territorial Sea must include those terms and conditions that are appropriate to protect, mitigate damages to, and enhance fish and wildlife resources.

7. Oregon and the Commission will designate management contacts to work to resolve any procedural issues that may arise in the review of a specific proposed wave energy project in Oregon's Territorial Sea. However, nothing in this MOU shall compromise or affect the rights of any party to seek relief through any available administrative or judicial process.

8. Nothing in the Memorandum of Understanding requires any party to take any action that is contrary to applicable federal or state law or regulation.

9. This MOU is neither a fiscal nor a funds obligation document. Any endeavor to transfer anything of value involving reimbursement or contribution of funds between the parties to this MOU will be handled in accordance with applicable laws, regulations, and procedures including those for Government procurement and printing. Any such endeavors will be outlined in separate documents that shall be made in writing by representatives of the parties and shall be independently authorized by appropriate statutory authority. This MOU does not provide such authority. In addition, this agreement does not establish authority for noncompetitive award to the cooperator of any contract or other agreement.

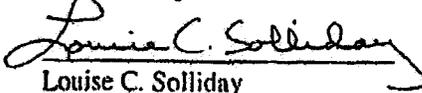
10. This MOU will take effect when signed by all the parties hereto. This MOU may be modified at any time by the mutual written agreement of the parties. The Commission or any other party may terminate the same upon thirty (30) days written notice to the other party. Any State agency may terminate its involvement in this MOU upon thirty days notice to the Commission and the Oregon Governor's Natural Resources Office. During this period, the parties shall make good-faith efforts to resolve any disagreement.


 Joseph T. Kelliher
 Chairman
 Federal Energy Regulatory Commission

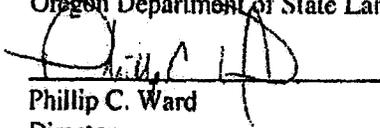
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 Theodore R. Kulongoski
 Governor
 State of Oregon

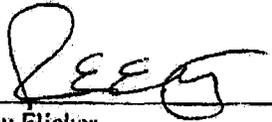
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 Louise C. Solliday
 Director
 Oregon Department of State Lands

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 Date

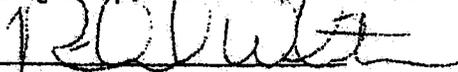

 Phillip C. Ward
 Director
 Oregon Water Resources Department

3/26/08
 Date



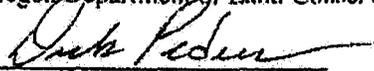
Roy Elicker
Director
Oregon Department of Fish & Wildlife

3/26/08
Date



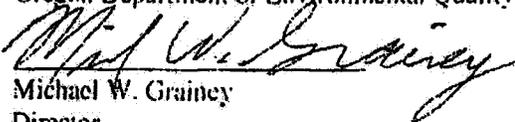
Richard M. Whitman
Director
Oregon Department of Land Conservation and Development

3/26/08
Date



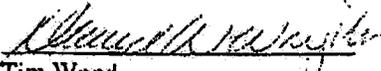
Dick Pedersen
Director
Oregon Department of Environmental Quality

3/26/08
Date



Michael W. Grainey
Director
Oregon Department of Energy

3/26/08
Date



Tim Wood
Director
Oregon Parks and Recreation Department

3/26/08
Date

ATTACHMENT C

INTEROFFICE MEMORANDUM

TO: BOB BAILEY
FROM: PAUL KLARIN
RE: TERRITORIAL SEA PLAN AMENDMENT PROCESS
DATE: 10/02/2008
CC: RICHARD WHITMAN

BACKGROUND

This memo outlines the timeline for amending the Territorial Sea Plan, as directed by the Governor's March 26, 2008 Executive Order No. 08-07, Directing State Agencies to Protect Coastal Communities in Siting Marine Reserves and Wave Energy Projects. The order was prompted by the concerns of coastal communities and commercial and recreational fishers, that the implementation of a marine reserve system combined with areas being sought to develop wave energy facilities in Oregon's Territorial Sea (0 to 3 nautical miles from the ocean shore), would significantly restrict the areas available for fishing and harm the economies of coastal communities.

The EO directed the department to "seek recommendations from OPAC (Ocean Policy Advisory Council) concerning appropriate amendments to Oregon's Territorial Sea Plan, reflecting comprehensive plan provisions on wave energy projects. On or before July 31, 2009, DLCD shall begin the process to develop proposed amendments to Oregon's Territorial Sea Plan for consideration by LCDC for such amendments. DLCD shall provide final amendment recommendations to LCDC on or before December 1, 2009". The order further directs the department to submit the TSP amendment to NOAA for incorporation as an enforceable policy of the Oregon Coastal Management Program under the CZMA. Lastly, the order also directs Oregon Sea Grant and the Oregon Coastal Zone Management Association to provide outreach and public education to coastal communities concerning the potential positive and adverse impacts of wave energy development.

On that same date, the State of Oregon and Federal Energy Regulatory Commission (FERC) signed a Memorandum of Understanding to "coordinate the schedules and procedures for review of wave energy projects in the Territorial Sea and to ensure coordinated review of proposed wave energy projects that is responsive to environmental, economic, and cultural concerns while providing a timely, stable, and predictable means for developers of such projects to seek necessary approvals". The MOU provides that FERC will, in issuing a permit or license, "consider the extent to which the proposed

ATTACHMENT C

project is consistent with the Oregon plan". In addition, FERC will also "consider any terms and conditions that are recommended by Oregon under section (10)(a)(3) or the Federal Power Act (FPA) to ensure consistency with the Oregon Plan".

When completed, the commission will adopt the amendment to the TSP by reference. The commission's authority to amend the TSP is derived under ORS 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]

OPAC responsibilities in amending the TSP are prescribed by 196.443 Duties of Council. 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.

The commission last amended the Territorial Sea Plan in 2000, when, with the advise of OPAC, it revised Part One Ocean Management Framework to add section (G) including a preamble, goals and policies, and added Part Four: Uses of the Seafloor – section (A) Telecommunication Cables, Pipelines, and other Utilities. The department, based on discussions with OPAC members, Oregon Sea Grant, OCZMA and other state agency staff, has concluded that it would not be feasible to meet the timeline set by the EO for amending the TSP, unless the process is initiated immediately. The following timeline

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and tasks describe, in general terms, how that process must proceed in order for OPAC to fulfill its advisory role, and for the department to meet the December 2009 deadline to deliver a draft TSP plan amendment to the commission.

Work Plan

As described above, amending the TSP requires the department to work directly with OPAC, and is also dependent on the assistance of Sea Grant and OCZMA, primarily in the public outreach, engagement and mapping efforts. Listed below are the principal components of the "work plan" to amend the TSP, including the time period and estimated budget cost for each task. The plan is a work in progress, primarily because the various agencies have not been provided with additional funds to perform the work, nor was the work part of their currently budgeted work programs.

Outreach and Engagement

This task is being undertaken primarily by Oregon Sea Grant and OCZMA, and consists mainly of their separate efforts to involve regionally-based communities of fishing interests. To date, most of the outreach effort has been focused toward the local user groups that have organized in the principal fishing ports. Those groups include Fishermen Involved in Natural Energy Committee (FINE), Fisherman's Advisory Committee for Tillamook (FACT), Southern Oregon Ocean Advisory Committee (SOORC). FINE and FACT are both constituted as advisory committees to their respective county commissions. The Coastal Division's policy analyst has been attending meetings of the local advisory groups to inform and incorporate them into the various opportunities available for their engagement in the process.

OCZMA is contractually committed, through the wave energy trust and the Economic Development Administration (EDA) (part of US DOC) to engage in outreach with coastal communities and the fishing industry on wave energy development. The EDA grant to OCZMA for wave energy outreach is \$75,000, of which \$30,000 is obligated toward the support of local ocean resources planning groups (FINE, FACT and SOORC) to work issues related to potential wave energy development. \$10,000 is going to FINE, FACT, and SOORC. The Oregon Wave Energy Trust (OWET) provided OCZMA with \$30,000 in matching funds for the work. Both funding sources will end by June 2009..

OPAC also provides a limited source of engagement for coastal stakeholders through its' meetings and public comment process. The OPAC TSP workgroup has assessed the need for outreach and engagement and scoped out the range of stakeholders who could have an interest in the process of amending the TSP for wave energy.

Duration: July 2008 – October 2009

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Budget: Estimated cost: \$50,000. DLCD and Sea Grant have not received any additional funding for outreach. OCZMA has some funding from a federal Dept. of Energy grant, a portion of which is allocated for work with local communities on the integration of wave energy.

Mapping and Analysis

The TSP, with the exception of selected Rocky Shore areas, does not currently allocate the use of marine resources based on spatial location. Rather, it depends on a resource inventory and effects evaluation to make resource use decisions. The proposed TSP amendment, by contrast, will direct wave energy development to specific areas based on a comprehensive analysis of biological resources, geologic structures, and the existing uses of marine resources, primarily for commercial and sport fishing. A prerequisite for performing the spatial analysis to delineate which areas are appropriate for different uses, including wave energy development, is a comprehensive map of the existing resources and their usage. That involves mapping fishing effort and high value biological features such as critical marine habitat areas.

The data collected by state and federal agencies through commercial fisheries licensing and regulation, while useful, is neither adequate nor specific enough to provide a comprehensive map of fishing effort. That data must be collected with the direct contribution of the commercial and sport fishing community members. It requires the use of a tested standardized mapping methodology which is based on a labor-intensive survey of statistically significant percentage of the fishing community to determine where they fish. The hundreds of individual data sets collected through the surveys are compiled to form a comprehensive map of fishing effort, and then combined with data sets of existing uses, biologic and geologic features, and other information.

The Coastal Division is allocating approximately \$50,000 of its federal FY 2008 §309 CZM funds towards a pilot mapping effort by the SOORC group for the fishing areas along Coos and Lane Counties. This area was chosen because the Reedsport Wave Energy Project was designated as an Oregon Solutions project by Governor Kulongoski in October 2006. The goal of that project is to define and ensure broad stakeholder involvement in the regulatory process for the Reedsport Wave Energy Project proposed by Reedsport OPT Wave Park, LLC (OPT). That agreement that is produced by the settlement process will form the basis for the terms and conditions of the license that FERC would issue for a phased build-out of a wave energy facility off Reedsport in Land County. OPT has subsequently submitted a notification of intent letter to FERC declaring their intent to apply for a full license for fully built-out commercial power facility off the north spit of Coos Bay.

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A coastwide mapping initiative will require substantial funding that is not available in the department budget or in that of any of the other marine cabinet agencies. OCZMA is seeking private foundation funding of up to \$1 million to assist in the development of the TSP amendment by: (1) providing resources to a network of local ocean resource planning groups, (2) the preparation of socio-economic studies in impacted coastal communities (tied or integrated with fishing grounds information), (3) providing resources to local groups to develop fishing grounds information. The Oregon Wave Energy Trust (OWET) may have some funds available in its FY 2007-2009 budget to contribute toward this task, but they have not yet made a decision to allocate the funds.

The estimate for completing a coast-wide mapping effort is from 9 to 12 months. That effort would need to be initiated this fall in order to meet the deadline set by the EO of having a amendment ready for LCDC review by December 2009. The timelines for all subsequent tasks are based on the mapping being completed by fall 2009.

Duration: October 2008 – October 2009

Funding: Estimated cost: The cost for the fishing effort mapping is estimated to be . No state funds available. DLCD has dedicated \$50,000 for a pilot mapping project from the FY 2008 §309 CZM federal funds.

OPAC Territorial Sea Plan Workgroup

The OPAC Territorial Sea Plan workgroup, which was formed with the expressed purpose of amending the TSP, has already initiated a review of the current sections of the TSP on policy and making resource use decisions, specifically for wave energy development. OPAC has decided that the workgroup will consist solely of OPAC members, thereby limiting the range of stakeholders who are represented. The workgroup will develop draft amendments to the text of the appropriate sections of the TSP, and will also draft a new section (Part 5) of the TSP that will focus solely on the environmental review and siting of wave energy facilities in the TSP. The TSP workgroup intends to have draft versions of the relevant sections of the TSP, including Part 5 for Wave Energy Development, available for review by the spring of 2009. The workgroup will then forward their recommendation to the OPAC for consideration by the summer of 2009, and OPAC will make a final decision of its recommendation to the department and LCDC by the September.

Duration: July 2008 – August 2009

Budget: Funding for OPAC and its workgroups is provided by the department from its' annual federal CZM grants.

Department Advisory Committee

The department is asking the LCDC for permission to appoint an advisory committee that then will make recommendations to LCDC on the amendments to the TSP as a single body, including minority reports. The advisory committee membership will consist of a

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full range of affected stakeholders and interested parties, including the wave energy industry, fishing interests and commodities commissions, power companies, local port advisory groups, researchers, state and federal agencies, conservation and environmental groups, etc, as well as the members normally required by the LCDC citizen involvement guidelines.

The group membership will be formed in late 2008, with the group's first meeting in early 2009. Group members will spend the first few months familiarizing themselves with the issues and the existing TSP. It is anticipated that the OPAC TSP workgroup will be able to provide the agency advisory workgroup with draft versions of the TSP amendments by the spring of 2009. The advisory workgroup will continue to meet through the fall of 2009, and make its recommendations to the LCDC by November.

Duration: January 2009 to December 2009.

Budget: Estimated cost: DLCD funds workgroup support and activities.

Commission Review

It is anticipated that the OPAC and the department's advisory committee will have completed their reviews and prepared recommendations, by late fall 2008, and that the department will have completed a draft of the TSP amendment shortly thereafter for review by LCDC. The commission can choose to review the draft amendment and take action immediately or, depending on the advice of OPAC and the DLCD advisory workgroup, delay taking action.

Commission Action

The commission, in an administrative rulemaking action, will adopt the amendment to the Territorial Sea Plan by reference. The public hearing for this action can be conducted during the same commission meeting.

ATTACHMENT D

**LAND CONSERVATION AND DEVELOPMENT COMMISSION
CITIZEN INVOLVEMENT GUIDELINES FOR POLICY DEVELOPMENT**

Approved by LCDC on April 23, 2004

I. Purpose

The purpose of these guidelines is to provide and promote clear procedures for public involvement in the development of Commission policy on land use. The Commission values the involvement of the public and interested parties in all phases of planning, including development of Commission policy. These guidelines are intended to provide the Commission and the Department with practical guidance on public involvement during policy development, consistent with and in some cases beyond the legal requirements of the Attorney General's Model Rules of Procedure, state law, and the Commission's administrative rules.

The Commission and the Department shall follow these guidelines to the extent practicable in the development of new or amended statewide planning goals and related administrative rules, and in other significant policy development activities related to the statewide land use program.

II. Public Involvement Objectives in Development of Commission Policy

- To provide meaningful, timely, and accessible information to citizens and interested parties about policy development processes and activities of the Commission and the Department.
- To promote effective communication and working relationships among the Commission, the Department, citizens and interested parties in statewide planning issues.
- To facilitate submittal of testimony and comments to the Commission from citizens and interested parties and the response from the Commission to citizens and interested parties about issues of concern with regard to policy proposals.

III. Public Participation and Outreach Methods**A. Citizen Involvement Guidelines**

In order to guide the Commission and the Department in planning for and conducting procedures and activities that will result in a significant new or amended statewide land use policy, such as a new or amended statewide planning goal or an administrative rule, the Commission and the Department shall adhere to the following guidelines to the extent practicable:

1. Consult with the CIAC on the scope of the proposed process or procedure to be followed in the development of any new or amended goal, rule or policy;
2. Prepare a schedule of policy development activities that clearly indicates opportunities for citizen involvement and comment, including tentative dates of meetings, public hearings and other time-related information;
3. Post the schedule, and any subsequent meeting or notice announcements of public participation opportunities on the Department's website, and provide copies via paper mail upon request;

ATTACHMENT D*Citizen Involvement Guidelines for Policy Development*

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4. Send notice of the website posting via an e-mail list of interested or potentially affected parties and media outlets statewide, and via paper mail upon request; and
 5. Provide background information on the policy issues under discussion via posting on the Department's website and, upon request, via paper mail. Such information may, as appropriate, include staff reports, an issue summary, statutory references, administrative rules, case law, or articles of interest relevant to the policy issue.
 6. Develop a database of names of citizens interested in participating in LCDC land use policy development on general or on specific issues. The department shall maintain this database. In addition, information should be provided on the department's website to notify the public of opportunities to serve on advisory committees or workgroups."
- B. In establishing committees, workgroups, and processes for the development of new or amended goals, rules or policies, the Commission and the Department shall consider the complexity of the issues, diversity of interests among interested parties, availability of expertise, potential effects of resolution of the issue on local communities, tribes, citizens and interested parties, and the degree of expressed citizen interest. Depending on these considerations with respect to a particular policy issue, the Commission may:
1. Appoint an advisory committee that includes citizens, local officials, tribal representatives, experts, and other affected or interested parties in order to provide advice and assistance to the Commission on a particular policy issue, prepare options or alternatives and perform other tasks as appropriate. Information about meetings and actions of the advisory committee shall be made available in a variety of media, including the Department's website. The Commission shall indicate whether an advisory committee may make recommendations to the Commission through testimony of individual members, or make recommendations as a single body, including minority opinions.
 2. Authorize the Department to establish an advisory committee that includes affected parties, technical experts and other knowledgeable individuals in order to provide advice and assistance to the Director and the Department on a particular policy issue, prepare options or alternatives, and provide advice and information on the political, practical, technical, and scientific aspects of a potential new or amended policy. Such advisory committees to the Department are referred to as "workgroups" and their meetings shall be open to the public. While these meetings are not necessarily subject to the requirements of the Open Meetings Law, the Department shall strive to comply with the provisions of that law with respect to notice and other requirements. The Department shall report to the Commission when it appoints a workgroup in order to provide an opportunity for the Commission to consider and, if necessary, amend the group;
 3. Choose to not establish an advisory committee or workgroup, provided LCDC and the Department shall explain its reasons for not doing so, either in the public notice advertising the start of a goal, rule, or other policy making project or by means of Commission minutes.

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- C. The Commission, when establishing an advisory committee, or the Department, when establishing a workgroup, shall:
1. Clearly define the task or role of the committee or group, including the authority of an advisory committee to provide the Commission with recommendations independent from the Department staff;
 2. Assure that Department staff provides adequate support, within the limitations noted below;
 3. Require minutes of committee meetings to be prepared and drafts of proposed goals or rules be distributed prior to subsequent committee or workgroup meetings, when timelines permit, and within the limitations noted below;
 4. Assure the involvement of local government staff or elected officials and affected tribes, where warranted, with notice to local elected officials that employ local staff appointed to a committee or workgroup; and
 5. Consider geographic representation in appointing committees or workgroups.
 6. Provide information to members of advisory committees and workgroups, and an opportunity for discussion, to ensure that there is a common understanding about (a) how recommendations will be developed; (b) opportunities to present minority opinions and individual opinions; (c) the time commitment necessary to attend workgroup meetings and related activities and to read background materials; (d) opportunities to discuss background and technical information with department staff; and (e) any potential liability or exposure to litigation as a result of serving on a committee or workgroup.
 7. In evaluating the particular interests to be represented on particular advisory committees or workgroups, the commission should consider appointment of a workgroup member not affiliated with any of the groups affected by or otherwise interested in the matter at hand. This member would be charged with determining and representing the very broad interests of citizens in general, rather than the interests of any particular person or group that may otherwise advocate for or against a policy proposal.
- D. The Commission shall encourage flexibility and innovative methods of engaging the public in its policy activities and shall seek the assistance and advice of citizens affected by or with an interest in the proposed policy issue. To this end the Commission may convene short - term technical panels or focus groups (real or virtual), hold conferences, conduct on-line surveys, and carry out other means of gathering information. Where a goal, rule or significant policy process primarily affects a certain region, and where advisory committee or workgroup meetings are confined to that region, notice and opportunities to comment shall also be made available to citizens and interested parties in other regions of the state. Where appropriate, the Commission shall consider collaborative rulemaking under ORS 183.502.
- E. The Commission is cognizant that the level of public involvement and outreach described in these guidelines will be difficult or impossible without adequate staff support from the Department, and that the scope of efforts to promote and facilitate public participation and outreach will be limited based on the adequacy of staff and funding resources.

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- F. None of the activities described herein are intended to conflict with or replace any of the public notice or comment opportunities provided under state law or administrative rules.
- G. The Commission may waive or modify these guidelines, as necessary and reasonable, including emergency circumstances or when a rulemaking issue is not significant. When the commission chooses to waive or modify these guidelines, it shall explain its reasons for doing so.

IV. Communication with Citizens**A. Understandable Information**

The Commission and the Department shall provide to citizens information that is essential to understanding the policy issues at hand and shall endeavor to make this information easily understood and readily accessible. The Commission and the Department shall identify Department staff or other experts who shall be available to answer questions and provide information to interested citizens.

B. Notice of Decisions

The Commission and the Department shall provide notice of decisions to citizens who have requested information and/or participated in the development of policy. This notice shall be by e-mail except paper mail when specifically requested. Notice shall direct citizens to the Department's website where the decision, background information, staff reports, rationale for the decision, and other information will be available.

C. Costs

Paper copies of items may be mailed upon request subject to fees that may be established by the Department to recover costs (the Commission has established copy fees under OAR 660-040-0005).

D. Appeal Information

Information on appeals procedures shall be available on the Department's website and shall be referenced, when appropriate, in notices to citizens, above.

E. Electronic Communication

While the Commission and the Department recognize that not all citizens presently have or desire direct home access to electronic communications or the agency website on the Internet, the Commission also recognizes the numerous advantages of electronic communication. The Commission is committed to using this medium as a primary means of communication and distribution of information of interest to citizens and shall encourage the Department to employ web-based communication technologies to provide a broad range of information to citizens and to facilitate communication between the Commission and citizens.

ATTACHMENT D*Citizen Involvement Guidelines for Policy Development*

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V. Applicability

These guidelines are effective April 26, 2004, and supercede the previously adopted Citizen Involvement Program adopted October 7, 1977 and Public Involvement Policy adopted May 4, 2001. The Department is directed to consult with CIAC with regard to new and ongoing projects, including advisory committees and workgroups appointed for those projects, at the earliest scheduled CIAC meetings. However, in the event the meeting schedule of those committees will not allow timely consultation on policy projects intended to begin in accordance with the schedule adopted by LCDC, the Department is directed to proceed with those projects and to consult with CIAC at the earliest opportunity.

Secretary of State
Certificate and Order for Filing
PERMANENT ADMINISTRATIVE RULES

I certify that the attached copies* are true, full and correct copies of the PERMANENT ADMINISTRATIVE RULES adopted on May 4, 2001 by the
Date prior to or same as filing date

Department of Land Conservation and Development

Agency and Division

DEPARTMENT OF
LAND CONSERVATION
AND DEVELOPMENT

660

Administrative Rules Chapter Number

Victoria Schiller

Rules Coordinator

503/373-0050-231

Telephone

635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540

Address

to become effective

Upon Filing

Date upon filing or later

Rulemaking Notice was published in the

April 2001

Month and Year

Oregon Bulletin.

FILED

OCT 16 2001

RULEMAKING ACTION

List each rule number separately, 000-000-0000.

ARCHIVES DIVISION
SECRETARY OF STATE

ADOPT:

Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

OAR 660-036-0003 Territorial Sea Plan: Ocean Policies

OAR 660-036-0004 Territorial Sea Plan: Rocky Shores Management at Cape Arago

Renumber: Secure approval of the rule numbers with the Administrative Rules Unit prior to filing.

Amend and Renumber: Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

ORS Chapters 197

Stat. Auth.: ORS

ORS Chapter 196.471

Other Authority

ORS Chapter 196.471

Stats. Implemented: ORS

RULE SUMMARY

The new rules adopt by reference amendments to the Territorial Sea Plan authorized by ORS 196.443. ORS 196.471 requires the Land Conservation and Development Commission to review such amendments to the Territorial Sea Plan, and upon making of findings, adopt the amendments as part of the Oregon Coastal Management Program. The Territorial Sea Plan was amended on June 4, 1999, by Ocean Policy Advisory Council to include a new chapter entitled "Ocean Management Goals and Policies."

OAR 660-036-0003 adopts by reference the new chapter to the Territorial Sea Plan entitled Ocean Management Goals and Policies. OAR 660-036-0004 adopts by reference amendments which amend certain portions of the Rocky Shore Strategy in the Territorial Sea Plan pertaining to the rocky shores of Cape Arago, near Coos Bay.

Victoria Schiller
Authorized Signer

October 16, 2001
Date

* Copies include a photocopy of this certificate with paper and electronic copies of each rule listed in the Rulemaking Action.

** The Oregon Bulletin is published on the 1st of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE, Salem, Oregon 97310 by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday when Notice forms are accepted until 5:00 pm on the preceding workday. ARC 930-1997

Department of Land Conservation and Development
OAR Chapter 660

DIVISION 036
OCEAN PLANNING

1 660-036-0000

2 **Territorial Sea Plan**

3 The Land Conservation and Development Commission adopts and herein
4 incorporates by reference the Territorial Sea Plan approved by the Ocean Policy Advisory
5 Council on August 12, 1994, as part of the Oregon Coastal Management Program.

6 [Publications: The publication(s) referred to or incorporated by reference in this
7 rule are available from the agency.]

8 Stat. Auth.: ORS 183.310 - ORS 183.550, ORS 196.465, ORS 196.471 & ORS
9 197.040

10 Stats. Implemented: ORS 196.465, ORS 196.471 & ORS 197.040

11 Hist.: LCDC 5-1995, f. & cert. ef. 5-24-95

12
13 660-036-0001

14 **Telecommunication cables, pipelines, and other utilities**

15 (1) Oregon's coast is a prime landing zone for fiber-optic telecommunication
16 cables that cross the ocean floor from sites around the Pacific Rim. Other utilities, such
17 as natural gas pipelines, may eventually be routed across Oregon's Territorial Sea bed.
18 Proper placement of utility easements and installation of fixtures is required to avoid
19 damage to or conflict with other ocean uses, such as commercial fishing, and to reduce or
20 avoid adverse effects on marine habitats.

21 State agencies, such as the Division of State Lands, the Department of Fish and
22 Wildlife, the Oregon Parks and Recreation Department, and the Department of Land
23 Conservation and Development, need clear policies and standards for reviewing and
24 approving the routing and installation of utilities on the seafloor of Oregon and adjacent
25 federal waters.

26 (2) **Policies.** When making decisions to approve routing, placement, or operation
27 of a seafloor utility or fixture, state and federal agencies shall:

28 (a) Protect ocean fisheries and other ocean uses from any adverse effects that may
29 be caused by installation or operation of cables, pipelines, or other fixtures by requiring
30 that such routing, placement, or operation:

31 (A) avoid conflicts between commercial or recreational fishing or other ocean-use
32 activities and utilities, as a first priority;

33 (B) reduce any adverse effects when conflicts cannot be avoided; and

34 (C) mitigate for adverse effects after first reducing them to the minimum
35 practicable.

36 (b) Protect marine habitat, fishery areas, and other marine resources as required by
37 Statewide Planning Goal 19, Ocean Resources, and the Oregon Territorial Sea Plan; and

38 (c) Promote direct communication between affected ocean users to resolve or

1 avoid conflicts and require written agreements among the parties when necessary to
2 ensure communication and memorialize agreements.

3 **(3) Implementation Requirements.** When approving the routing, placement, or
4 operation of seafloor utility, state and federal agencies shall avoid or reduce conflicts or
5 adverse effects on other ocean users through the use of one or more of the following:

6 **(a) Burial:**

7 **(A) In state waters:** All telecommunication cables, pipelines, and other fixtures,
8 crossing or affixed to state lands of the territorial sea lying seaward of Extreme Low
9 Water (which is the seaward boundary of the Ocean Shore Recreation Area), shall be
10 buried so as to ensure continuous burial unless the approving state agencies make
11 findings that burial cannot be practically achieved and all affected parties agree that
12 adverse effects of not burying the cable, pipeline, or fixture have been reduced, avoided,
13 or mitigated to the extent practicable.

14 **(B) In federal waters:** Decisions to permit burial of cables, pipelines, or other
15 fixtures crossing or affixed to the seabed of the outer continental shelf (beneath federal
16 waters) to a depth of 2,000 meters off Oregon, will be deemed consistent with this state
17 policy. When a federal agency does not require burial in waters to this depth, the state
18 may concur that the decision is consistent with state policy only if the federal agency
19 makes findings that burial cannot be practically achieved and all affected parties agree
20 that adverse effects of not burying the cable, pipeline, or fixture, have been reduced,
21 avoided, or mitigated to the extent practicable.

22 **(C) Burial shall be certified by the contractor to the easement-granting agency.**

23 **(D) The easement-granting agency shall require that cables, pipelines, or other**
24 **utility fixtures shall be inspected periodically and after any major geologic event, such as**
25 **subduction-zone earthquake to ensure continued burial.**

26 **(b) Communication and coordination.** Written agreements between the
27 applicant and fishers or other users shall be required by the easement-granting agency as
28 evidence of communication and coordination. Such agreements may coordinate work,
29 determine routing, identify routes, respond to emergencies, provide for mitigation of
30 adverse effects, or specify procedures for on-going communication. Written agreements
31 shall specify how fishers or other users and the applicant will resolve disputes over lost
32 fishing gear, damage to seafloor utilities, or liability for such actions.

33 **(c) Controlling the location of utilities.** Locations for new cables, pipelines, or
34 other utilities shall conserve areas available to ocean fisheries, prevent or avoid conflicts
35 with other uses, protect marine habitats, and minimize adverse effects on other public
36 resources of the seafloor or ocean shore. New rights of way may be required to be located
37 as close to existing rights of way as possible or with sufficient capacity to enable future
38 expansion within the approved right of way.

39 **(d) Single point-of-contact.** The Division of State Lands shall coordinate
40 approvals of easements and permits in consultation with the Parks and Recreation
41 Department, the Department of Fish and Wildlife, the Department of Land Conservation
42 and Development, the Department of Geology and Mineral Industries, and coastal local
43 governments, as appropriate. The Department of Land Conservation and Development

1 will use its authority under the federal Coastal Zone Management Act to review federal
2 permits to ensure that they are consistent with state requirements.

3 Stat. Auth.: ORS 183.310-550, ORS 196.465, ORS 196.471 & ORS Chapter 197

4 Stats. Implemented: ORS 196.465, ORS 196.471, & ORS 197.040

5 Hist.: LCDC 1-2001, f. 1-25-01 & cert. ef. 1-26-01

6
7 **660-036-0003**

8 **Territorial Sea Plan: Ocean Policies**

9 The Land Conservation and Development Commission adopts as part of the
10 Oregon Coastal Management Program, and herein incorporates by reference, an
11 amendment to the Territorial Sea Plan entitled Ocean Management Goals and Policies
12 that was approved by the Ocean Policy Advisory Council on June 4, 1999:

13 [Publications: The publication(s) referred to or incorporated by reference in this
14 rule are available from the agency.]

15 Stat. Auth.: ORS 197

16 Stats. Implemented: ORS 196.471

17
18 **660-036-0004**

19 **Territorial Sea Plan: Rocky Shores Management at Cape Arago**

20 The Land Conservation and Development Commission adopts as part of the
21 Oregon Coastal Management Program, and herein incorporates by reference, an
22 amendment to the Territorial Sea Plan approved by the Ocean Policy Advisory Council
23 on June 4, 1999, replacing rocky shore management prescriptions and management area
24 designations on pages 139 through 146 pertaining to the rocky shores of the Cape Arago
25 headland.

26 [Publications: The publication(s) referred to or incorporated by reference in this
27 rule are available from the agency.]

28 Stat. Auth.: ORS 197

29 Stats. Implemented: ORS 196.471

30
31 **660-036-0010**

32 **Ocean Resources Management Plan**

33 The Land Conservation and Development Commission adopts and herein
34 incorporates by reference the Ocean Resources Management Plan adopted by
35 Commission Order #90-OCEAN-699, December 12, 1990, and amendments to the Ocean
36 Resources Management Plan as approved by the Ocean Policy Advisory Council on
37 March 11, 1994 and June 10, 1994.

38 [Publications: The publication(s) referred to or incorporated by reference in this
39 rule are available from the agency.]

40 Stat. Auth.: ORS 183.310 - ORS 183.550, ORS 196.465, ORS 196.471 & ORS
41 197.040

42 Stats. Implemented: ORS 196.405 - ORS 196.515 & ORS 197.040

43 Hist.: LCDC 5-1995, f. & cert. ef. 5-24-95



Oregon

John A. Kitzhaber, M.D., Governor

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DATE: April 18, 2001

TO: Land Conservation and Development Commission

FROM: Richard P. Benner, Director *RB*

SUBJECT: Agenda Item 10 May 3, 2001: Request from Ocean Policy Advisory Council to Amend Territorial Sea Plan

**RULE-MAKING TO ADOPT AMENDMENT
TO TERRITORIAL SEA PLAN: OCEAN POLICIES
OAR 660 - 036 - 0003**

RECOMMENDATION

Adopt Administrative Rule OAR 660-036-0003 to adopt amendment to Territorial Sea Plan, as recommended by the Ocean Policy Advisory Council.

BACKGROUND:

The Ocean Policy Advisory Council (OPAC) at its June 4, 1999, meeting adopted the attached new chapter in the Oregon Territorial Sea Plan (TSP), Ocean Management Goals and Policies, and requested that the Land Conservation and Development amend the Oregon Coastal Management Program by adopting the new chapter as an amendment to the TSP. Concurrently, the OPAC also recommended that the Commission use this new chapter as the basis for revising Goal 19, Ocean Resources. The Commission decided to revise Goal 19 first, await the outcome of that process, and then amend the Territorial Sea Plan with a new Ocean Goals and Policies chapter. The Commission asked the OPAC to assist in preparing goal revisions and, after a lengthy public process, approved significant amendments to Goal 19 on December 1, 2000. Now, the proposed Goals and Policies chapter, approved June 4, 1999, is ready for adoption by the Commission as an amendment to the Territorial Sea Plan.

ORS 196.471 requires that upon receipt of a recommendation to amend the Oregon Territorial Sea Plan from the Ocean Policy Advisory Council, the Commission shall make findings that the plan meets certain criteria in ORS 196.471. If the Commission makes the findings, it is required to adopt the amendment to the plan as an amendment to the Oregon Coastal Management

Program. If the Commission does not make the required findings, it must return the plan to the Council for revisions [ORS 196.471(3)]. The Commission cannot make changes to the plan on its own motion.

A July 20, 1994 memorandum from the Department of Justice to the Department of Land Conservation and Development suggests that the Commission use its rule-making authority as the instrument by which to adopt the plan and any subsequent amendments, with the required findings as the basis for rule-making. This is the procedure the Commission employed on December 8 - 9, 1994, when adopting the initial Territorial Sea Plan. This is the procedure being employed for this amendment, which is the second instance of an action by the Commission to amend the Territorial Sea Plan.

The Department has provided the required public notice for rule-making with the Secretary of State. This action was announced at the July, 2000, and November, 2000, Commission meetings.

FINDINGS:

Requirements: ORS 196.471 (1) requires the Commission to find that the amendments:

- a.) carry out the policies of ORS 196.405 to 196.515;
- b.) are consistent with applicable statewide planning goals, with emphasis on the four coastal goals; and
- c.) are compatible with adjacent county comprehensive plans.

ORS 196.465(1) requires that the Territorial Sea Plan be compatible with the comprehensive plans of adjacent coastal counties and cities.

STANDARD 1: The Commission must find that the plan or amendments carry out the policies of ORS 196.415 - 196.515.

Finding 1:

The Commission finds that the amendment to the Territorial Sea Plan, "Ocean Management Goals and Policies," carries out the policies of ORS.415-196.515.

Discussion and conclusions: The legislative policies included to be addressed are:

ORS 196.420(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;"

The principal policy expressed in this new chapter is nearly identical to this legislative policy, and seeks to carry it out with sub-goal statements and policies that amplify it and give meaning to it. The principal goal and sub-goal statements read:

"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.*

Conclusion: The amendment carries out ORS 196.420(1).

ORS 196.420(2): *"Encourage ocean resources development which is environmentally sound and economically beneficial to adjacent local governments and to the state;"*

The amendment includes a sub-goal statement that is virtually identical to this legislative policy:

"2. support development of ocean resources that is environmentally sound and economically beneficial to coastal communities and the state;"

Conclusion: The amendment carries out ORS 196.420(2).

ORS 196.420(3): *Provide for efficient and coordinated ocean resources management through improvement of the state's coastal management program and statewide land use program.*

The amendment is specifically intended as an improvement of the state's coastal management program by reconciling and clarifying a number of policies about marine resources and establishing them as a single chapter in the Territorial Sea Plan. In addition, the introduction to the amendment specifies that

"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."

Under state law, the goals and policies in this section will thus be required to be followed by local, state, and federal agencies upon adoption by the Commission of the amendment to the Territorial Sea Plan.

Conclusion: The amendment carries out ORS 196.420(3).

ORS 196.420(4): 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;

The amendment includes new policies that assert an 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 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."*

Conclusion: The amendment carries out ORS 196.420(4).

ORS 196.420(5): Promote research, study and understanding of ocean processes, marine life and other ocean resources to acquire sufficient scientific inventory information necessary to describe and understand the long-term impacts of the proposed action on resources and uses of the ocean and nearshore area;

This is a fundamental provision of Goal 19, Ocean Resources, and the policies of this new chapter which, in the Scope of Authority section requires that

... "all local, state, and federal plans, programs, and activities that affect the resources and uses of the Oregon territorial sea shall ... meet the requirements of the Territorial Sea Plan for inventory information and effects-analysis;" and

in the Ocean Stewardship section, seeks to:

"encourage scientific research on marine ecosystems, ocean resources, and oceanographic conditions to acquire information needed to make ocean and coastal-management decisions;

Conclusion: The amendment carries out ORS 196.420(5).

ORS 196.420(6): Encourage research and development of new, innovative marine technologies to study and utilize ocean resources;

Although this plan amendment, through its policies, does not directly encourage research and development, its requirement to conduct an inventory information and effects-analysis for ocean activities and to avoid environmental harm may have the effect of stimulating innovative marine technologies to study and utilize marine resources.

Conclusion: The amendment carries out ORS 196.420(6).

ORS 196.420(7): Assure that the council will work closely with coastal local governments to incorporate wherever possible elements of the local comprehensive plan, insuring coordination of Oregon's Ocean Resources Management Program with local land use plans and land use regulations.

The chapter includes suggested management alternatives, including

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.

Conclusion : The amendment carries out ORS 196.420(7).

STANDARD 2: The Commission must find that the plan or amendments are consistent with applicable statewide planning goals, with emphasis on the four coastal goals.

Finding 2:

The Commission finds that the amendment to the Territorial Sea Plan, "Ocean Management Goals and Policies," is compatible with the applicable Statewide Planning Goals.

Discussion and conclusion:: The principal applicable goals are Statewide Planning Goal 19, Ocean Resources and Goal 16, Estuarine Resources. Goal 19, as amended in December, 2000, was based on the goals and policies in this new chapter and thus, the two are virtually identical in language, organization, and requirements. This new chapter, as does the amended Goal 19, also makes specific reference to the physical, biological, and management linkages between the ocean and estuaries, and thus incorporates Goal 16, as well.

Conclusion 2: The amendment is consistent with applicable statewide planning goals.

STANDARD 3: [ORS 196.450 and ORS 196.471(1)(c)]: The Commission must find that the plan or amendments are compatible with adjacent city and county comprehensive plans.

Finding 3:

The Commission finds that the amendment to the Territorial Sea Plan, "Ocean Management Goals and Policies," is compatible with adjacent city and county comprehensive plans.

Discussion and conclusion:: This new chapter, as a policy chapter, does not change or add any requirements on coastal local governments with regards to compliance with Goal 19 under the statewide planning program; neither does it foresee or propose ocean resource actions that will affect local comprehensive land use plans. In fact, the policies in this chapter specifically recognize and accommodate the interests that coastal cities and counties have in the protection of ocean resources and economic uses of ocean resources and ocean space. This amendment clarifies how proposed ocean-related actions are to be approved, and provides for coordination with local coastal governments.

Conclusion 3: The amendment is compatible with adjacent city and county comprehensive plans..

SUMMARY CONCLUSION:

The amendment to the Territorial Sea Plan adopted June 4, 1999 by the Ocean Policy Advisory Council, a chapter entitled Ocean Management Goals and Policies, meets the requirements of ORS 196.471 (1) and ORS 196.465(1). The Commission is therefore

required to adopt this plan amendment as an amendment to the Oregon Coastal Management Program.

PROPOSED RULE:

660-036-0003

Territorial Sea Plan Amendments

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 Ocean Management Goals and Policies that was approved by the Ocean Policy Advisory Council on June 4, 1999.

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the agency.]

Stat. Auth.: ORS 197

Stats. Implemented: ORS 196.471



Oregon

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Web Address: <http://www.lcd.state.or.us>

DATE: April 18, 2001

TO: Land Conservation and Development Commission

FROM: Richard P. Benner, Director *RB*

SUBJECT: Agenda Item 10 May 3, 2001: Request from Ocean Policy Advisory Council to Amend Territorial Sea Plan



**RULE-MAKING TO ADOPT AMENDMENT TO TERRITORIAL SEA PLAN:
"ROCKY SHORE MANAGEMENT AT CAPE ARAGO"
OAR 660 - 036 - 0004**

RECOMMENDATION

Adopt Administrative Rule OAR 660-036-0004, which adopts Rocky Shore Management at Cape Arago as an amendment to the Oregon Territorial Sea Plan, as recommended by the Ocean Policy Advisory Council.

BACKGROUND:

The rule (OAR 660-036-0004) will amend management prescriptions and management area designations in the Rocky Shores Strategy of the Oregon Territorial Sea Plan pertaining to rocky shores at Cape Arago, near Coos Bay (pp. 139-146). The policies in the proposed amendment were adopted by the Oregon Ocean Policy Advisory Council (OPAC) in June, 1999, after an extensive local public process. The OPAC initiated this local process after receiving comments about problems of implementing the plan provisions as originally adopted in 1994.

Adoption of this amendment has been delayed for over a year after a Commission decision in August 1999 to first adopt amendments to Statewide Planning Goal 19, Ocean Resources, which had also been recommended by the OPAC. The Commission adopted the Goal 19 amendments in December, 2000, and is thus ready to act on this amendment to the Rocky Shores Strategy. The attached management policies for Cape Arago will be incorporated into the Oregon Territorial Sea Plan, replacing existing management policies and management area designations shown on maps pp.139-146. In general the new provisions clarify the status of Cape Arago as an intertidal marine protected area within which marine life cannot be collected without permits and will result in simplified regulations by the Oregon Department of Fish and Wildlife (ODFW) and Oregon Parks and Recreation Department (OPRD).

ORS 196.471 requires that upon receipt of a recommendation from the Ocean Policy Advisory Council to amend the Oregon Territorial Sea Plan, the Commission shall make findings that the plan amendment meets certain criteria in ORS 196.471. If the Commission makes the findings, it is required to adopt the plan amendment. If the Commission does not make the required findings, it must return the amendment to the Council for revisions [ORS 196.471(3)]. The Commission cannot make changes to the plan or proposed amendments on its own motion.

A July 20, 1994 memorandum from the Department of Justice to the Department of Land Conservation and Development suggests that the Commission use its rule-making authority as the instrument by which to adopt the plan and any subsequent amendments, with the required findings as the basis for rule-making. This is the procedure the the Commission employed on December 8 - 9, 1994, when adopting the initial Territorial Sea Plan and is the procedure being employed for this amendment.

The Department has provided the required public notice for rule-making with the Secretary of State. This action was announced at the July, 2000, and November, 2000, Commission meetings.

FINDINGS:

What the Commission is required to find: ORS 196.471 (1) requires the Commission to find that the amendments:

- a.) carry out the policies of ORS 196.405 to 196.515;
- b.) are consistent with applicable statewide planning goals, with emphasis on the four coastal goals; and
- c.) are compatible with adjacent county comprehensive plans.

ORS 196.465(1) requires that the Territorial Sea Plan be compatible with the comprehensive plans of adjacent coastal counties and cities.

STANDARD 1: The Commission must find that the plan or amendments carry out the policies of ORS 196.415 - 196.515.

Finding 1:

The Commission finds that the amendment to the Territorial Sea Plan, "Rocky Shore Management at Cape Arago," carries out the policies of ORS.415-196.515.

Discussion and conclusions: The legislative policies to be addressed are:

ORS 196.420(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;"

Although the intertidal areas of Cape Arago are not under threat from development of management of nonrenewable resources, the proposed plan amendments will improve the protection of sensitive rocky intertidal habitats, living marine resources, and ecosystems from degradation and abuse due to heavy public use of the intertidal areas on the Cape Arago headland. The amendment requires the Oregon Parks and Recreation Department to identify these areas as Intertidal Marine Protected Areas, to prohibit the collection of marine plants without a permit (for educational or scientific purpose), and to close access to certain sensitive marine mammal habitat during pupping season. The amendment requires the Oregon Department of Fish and Wildlife to adopt new regulations prohibiting take of all shellfish and marine invertebrates, except by permit, in the major publically accesible intertidal areas.

Conclusion: The amendment carries out ORS 196.420(1).

ORS 196.420(2): "Encourage ocean resources development which is environmentally sound and economically beneficial to adjacent local governments and to the state;"

The amendment requires the state agencies to adopt management measures that will protect intertidal resources while allowing public access and enjoyment of these areas which are economically and socially important to the local community.

Conclusion: The amendment carries out ORS 196.420(2).

ORS 196.420(3): Provide for efficient and coordinated ocean resources management through improvement of the state's coastal management program and statewide land use program.

The amendment will improve the state's coastal management program by strengthening protection of sensitive marine resources while maintaining public access and enjoyment of them. The Territorial Sea Plan coordinates management of rocky intertidal resources among various responsible state and federal agencies. Under state law, the policies in this section are required to be followed by local, state, and federal agencies upon adoption by the Commission in the Territorial Sea Plan.

Conclusion: The amendment carries out ORS 196.420(3).

ORS 196.420(4): 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;

The amendment addresses resources and uses wholly within Oregon's state jurisdiction but does respond to the need to protect marine mammals that are under the jurisdiction of the US Fish and Wildlife Service. One of the management policies directs the OPRD to continue to close trail access to a sensitive marine mammal pupping areas during the pupping season.

Conclusion: The amendment carries out ORS 196.420(4).

ORS 196.420(5): Promote research, study and understanding of ocean processes, marine life and other ocean resources to acquire sufficient scientific inventory information necessary to describe and understand the long-term impacts of the proposed action on resources and uses of the ocean and nearshore area;

The amendment specifically allows for collecting of intertidal marine animals and plants through educational and scientific permits issued by the ODFW. The need to provide for these permits was a principal reason the OPAC undertook review and revision of the Cape Arago area plan provisions.

Conclusion: The amendment carries out ORS 196.420(5).

ORS 196.420(6): Encourage research and development of new, innovative marine technologies to study and utilize ocean resources;

This policy is not applicable to the proposed amendment.

Conclusion: The amendment carries out ORS 196.420(6).

ORS 196.420(7): Assure that the council will work closely with coastal local governments to incorporate wherever possible elements of the local comprehensive plan, insuring coordination of Oregon's Ocean Resources Management Program with local land use plans and land use regulations.

The proposed amendment was developed through a community-based process that involved the Coos County Parks Department because of the importance of the Cape Arago tidepools to recreation and tourism in the area, including the nearby county park and campground at Coos Head. The amendment addresses rocky intertidal areas and resources that are entirely within state jurisdiction and do not affect or are not affected by local land use plans or regulations.

Conclusion : The amendment carries out ORS 196.420(7).

STANDARD 2: The Commission must find that the plan or amendments are consistent with applicable statewide planning goals, with emphasis on the four coastal goals.

Finding 2:

The Commission finds that the amendment to the Territorial Sea Plan, "Rocky Shore Management at Cape Arago" is compatible with the applicable Statewide Planning Goals.

Discussion and conclusion: The principal applicable goal is Statewide Planning Goal 19, Ocean Resources, the principal policy statement of which is:

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

As discussed above, the proposed amendments seek to do precisely what the goal requires. The regulations that will result from the amendment will improve conservation of marine resources and ecological functions of these Cape Arago area rocky shore areas and will thus increase the likelihood of long-term ecological, economic, and social values and benefits accruing to the Coos Bay area, the state, and the nation.

Conclusion 2: The amendment is consistent with applicable statewide planning goals.

STANDARD 3: [ORS 196.450 and ORS 196.471(1)(c)]: The Commission must find that the plan or amendments are compatible with adjacent city and county comprehensive plans.

Finding 3:

The Commission finds that the amendment to the Territorial Sea Plan, "Rocky Shore Management at Cape Arago" is compatible with adjacent city and county comprehensive plans.

Discussion and conclusion: The amendment addresses marine resources that lie wholly within state jurisdiction adjacent to upland areas under state ownership and management as a State Park and adjacent to ocean areas under state and federal jurisdiction. The proposed amendments neither change or add any requirements of coastal local governments nor propose any ocean resource actions that will affect local comprehensive land use plans. The Coos County Plan recognizes the state parks on the Cape Arago headland as a public recreational facility and destination but does not address intertidal resource management.

Conclusion 3: The amendment is compatible with adjacent city and county comprehensive plans..

SUMMARY CONCLUSION:

The amendment to the Territorial Sea Plan adopted June 4, 1999 by the Ocean Policy Advisory Council, a chapter entitled "Rocky Shore Management at Cape Arago," meets the requirements of ORS 196.471 (1) and ORS 196.465(1). The Commission is therefore required to adopt this plan amendment as an amendment to the Oregon Coastal Management Program.

PROPOSED RULE:

660-036-0004

Territorial Sea Plan Amendments

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 approved by the Ocean Policy Advisory Council on June 4, 1999, replacing rocky shore management prescriptions and management area designations on pages 139 through 146 pertaining to the rocky shores of the Cape Arago headland.

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the agency.]

Stat. Auth.: ORS 197

Stats. Implemented: ORS 196.471

Oregon Territorial Sea Plan

Adopted December 1, 2000



PART FOUR: Uses of the Seafloor

These amendments were adopted by the Land Conservation and Development Commission on December 1, 2000, based on a recommendation from the Ocean Policy Advisory Council, January 28, 2000. These amendments are consistent with administrative rules adopted by the Oregon State Land Board in August, 1999, governing easements for submarine fiber-optic cables.

A. TELECOMMUNICATION CABLES, PIPELINES, AND OTHER UTILITIES

1. Background

Oregon's coast is a prime landing zone for fiber-optic telecommunication cables that cross the ocean floor from sites around the Pacific Rim. Other utilities, such as natural gas pipelines, may eventually be routed across Oregon's Territorial Sea bed. Proper placement of utility easements and installation of fixtures is required to avoid damage to or conflict with other ocean uses, such as commercial fishing, and to reduce or avoid adverse effects on marine habitats.

State agencies, such as the Division of State Lands, the Department of Fish and Wildlife, the Oregon Parks and Recreation Department, and the Department of Land Conservation and Development, need clear policies and standards for reviewing and approving the routing and installation of utilities on the seafloor of Oregon and adjacent federal waters.

[NOTE: In approving these plan policies for submittal to the Land Conservation and Development Commission in January, 2000, the Ocean Policy Advisory Council approved the addition of explanatory background text, maps, and illustrations prior to publication of the amended plan. This background material will in no way affect the mandatory policies of this section.]

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DEPARTMENT OF JUSTICE
PORTLAND OFFICE

MEMORANDUM

DATE: July 20, 1994

TO: Eldon Hout
Bob Bailey
Don Oswald ✓
Department of Land Conservation and Development

FROM: Cheryl F. Coon *CC*
Jane Ard
Assistant Attorneys General

RE: Action by OPAC and LCDC on the Territorial Sea Plan

LCDC
JUL 22 1994
LCDC OFFICE

You have asked about the appropriate process for both OPAC and LCDC to "adopt" the Territorial Sea Plan. Specifically, we have discussed whether either or both LCDC and OPAC must adopt by rule or by some alternative method. This memo addresses your inquiry.

The Oregon Administrative Procedures Act (APA) defines "rule" as "any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency." ORS 183.310(8). However, not every administrative action with public consequences is considered a rule. See United Parcel Service, Inc. v. Oregon Transportation Commission, 27 Or App 147, 150, 555 P2d 778 (1976). Several exceptions are set out in ORS 183.310, which include exceptions for internal management directives which do not substantially affect the interests of the public and for action by agencies directed to other agencies or units of government which do not substantially affect the interests of the public. ORS 183.310(a), (b). Neither of these exceptions would appear to be applicable here. The Territorial Sea Plan is intended not only to be a directive to other agencies and other units of government, but some of its mandatory provisions, such as those which designate sites with consequences for public access, directly and substantially affect interests of the public.

In addition to considering as a general matter whether the Territorial Sea Plan "looks" like a rule, we must also consider the specific provisions of ORS 196.443 and ORS 196.471.

Eldon Hout
Bob Bailey
Don Oswalt
Page 2
July 20, 1994

These provisions suggest that OPAC has the responsibility to prepare the plan but then transmits it to LCDC for action. ORS 196.471 directs the Commission to review the Territorial Sea Plan and make findings. After making these findings, the Commission is directed to adopt the Territorial Sea Plan as part of the Oregon Coastal Management Program. If the Commission cannot make the findings required, the Commission is directed to return the plan to OPAC for revision. Although these provisions do not provide explicitly the procedures which must be used, the limits of OPAC's authority to adopt rules gives us some guidance as to OPAC's actions. OPAC has authority to make rules only as to its own internal procedures, not as to substantive matters. See ORS 196.448(3). LCDC, of course, has substantive rulemaking authority.

Thus, it appears that the appropriate procedure for adopting the Territorial Sea Plan is as follows:

(1) In the first step, OPAC reviews and "recommends" adoption of the Plan to LCDC.

(2) In the second step of the process, LCDC prepares findings concerning the plan and promulgates the plan as a rule. This second step actually collapses two processes into one (i.e., adoption of the findings as well as the rulemaking). For the sake of simplicity, it can be done in one proceeding provided that the findings are prepared in advance.

If you have any questions, please do not hesitate to call.

CHAPTER 416

AN ACT

SB 605

Relating to ocean resources; amending ORS 196.471; and declaring an emergency.
Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 196.471 is amended to read:

196.471. (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 recommended by the council:

(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.]

(3)(a) 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.

(b) If the council makes subsequent recommendations for amendments, the council must:

(A) Include the commission's specified revisions in the recommendations; and

(B) Make the subsequent recommendations for amendments within 155 days after the date that the commission returns the plan or amendments to the council for revision. The commission and the council may mutually agree to extend the time that the council is allowed under this subparagraph for submitting subsequent recommendations to the commission.

(c) If the council does not make the subsequent recommendations for amendments within the time provided for in paragraph (b)(B) of this subsection, the commission may adopt the Territorial Sea Plan amendments recommended by the council under subsection (1) of this section, including any needed revisions specified by the commission.

(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.

SECTION 2. This 2013 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect on its passage.

Approved by the Governor June 13, 2013

Filed in the office of Secretary of State June 13, 2013

Effective date June 13, 2013

77th OREGON LEGISLATIVE ASSEMBLY – 2013 Regular Session
STAFF MEASURE SUMMARY
Senate Committee on Rural Communities & Economic Development

MEASURE: SB 605 A
CARRIER: Sen. Roblan

REVENUE: No revenue impact

FISCAL: Minimal fiscal impact, no statement issued

Action:	Do Pass as Amended and Be Printed Engrossed and Rescind the Subsequent Referral to the Committee on Ways and Means
Vote:	5 - 0 - 0
Yeas:	Baertschiger, Burdick, Close, Prozanski, Roblan
Nays:	0
Exc.:	0
Prepared By:	Racquel Rancier, Administrator
Meeting Dates:	3/26, 4/4

WHAT THE MEASURE DOES: Clarifies that Land Conservation and Development Commission (Commission) must make findings on Territorial Sea Plan and amendments to Territorial Sea Plan or Ocean Resources Management Plan recommended by Ocean Policy Advisory Council (OPAC). Requires OPAC to include Commission's revisions in subsequent recommendations when Commission does not make required findings. Sets time limit of 155 days for OPAC to return subsequent recommendations to Commission with potential for extension upon mutual agreement. Declares emergency, effective on passage.

ISSUES DISCUSSED:

- Commission's adoption of staff recommendations instead of OPAC's recommendations for 2013 Territorial Sea Plan amendment

EFFECT OF COMMITTEE AMENDMENT: Replaces measure.

BACKGROUND: OPAC is responsible for making recommendations to the Commission for the adoption of amendments to the Oregon Ocean Resources Management Plan and Territorial Sea Plan. Prior to adoption, the Commission must find that amendments are consistent with the Ocean Resource Management Act and statewide land use planning goals. If the Commission cannot make the required findings, the Commission must send the amendments back to OPAC for revision.

In 2013, the Commission made findings and adopted the staff recommendations made by the Department of Land Conservation and Development, instead of OPAC. Senate Bill 605 A clarifies that the Commission must make findings on OPAC's amendments and, if the Commission cannot make the required findings, OPAC must include the Commission's revisions in subsequent amendment recommendations.

4/9/2013 9:36:00 AM

This summary has not been adopted or officially endorsed by action of the committee.

Committee Services Form – 2013 Regular Session

77th OREGON LEGISLATIVE ASSEMBLY – 2013 Regular Session
STAFF MEASURE SUMMARY
House Committee on Energy & Environment

MEASURE: SB 605 B
CARRIER: Rep. Boone

REVENUE: No revenue impact

FISCAL: Minimal fiscal impact, no statement issued

Action:	Do Pass as Amended and Be Printed Engrossed
Vote:	9 - 0 - 0
Yeas:	Bentz, Boone, Dembrow, Johnson, Reardon, Vega Pederson, Weidner, Whitsett, Bailey
Nays:	0
Exc.:	0
Prepared By:	Adam Crawford, Administrator
Meeting Dates:	5/9, 5/16

WHAT THE MEASURE DOES: Clarifies that Land Conservation and Development Commission (LCDC) must make findings on Territorial Sea Plan and amendments to Territorial Sea Plan or Ocean Resources Management Plan recommended by Ocean Policy Advisory Council (OPAC). Requires OPAC to include LCDC's revisions in subsequent recommendations when LCDC does not make required findings. Sets time limit of 155 days for OPAC to return subsequent recommendations to LCDC with potential for extension upon mutual agreement. Declares emergency, effective on passage.

ISSUES DISCUSSED:

- Oregon Territorial Sea Plan history
- OPAC membership and operational overview
- Previous interactions between LCDC and OPAC

EFFECT OF COMMITTEE AMENDMENT: Clarifies recommendation and adoption process between LCDC and OPAC.

BACKGROUND: The Ocean Policy Advisory Council (OPAC) is responsible for making recommendations to the Land Conservation and Development Commission (LCDC) for the adoption of amendments to the Oregon Ocean Resources Management Plan and Territorial Sea Plan. Prior to adoption, LCDC must find that amendments are consistent with the Ocean Resource Management Act and statewide land use planning goals. If LCDC cannot make the required findings, LCDC must send the amendments back to OPAC for revision.

In 2013, LCDC made findings and adopted the staff recommendations made by the Department of Land Conservation and Development, instead of OPAC. Senate Bill 605 B clarifies that LCDC must make findings on OPAC's amendments and, if LCDC cannot make the required findings, OPAC must include LCDC's revisions in subsequent amendment recommendations.

5/17/2013 3:10:00 PM

This summary has not been adopted or officially endorsed by action of the committee.

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 Consultation with state and interstate organizations. The council shall consult with appropriate agencies and programs in Washington, California, British Columbia and Alaska and with appropriate interstate organizations. [1987 c.576 §13; 1991 c.501 §15]

Note: Section 15, chapter 576, Oregon Laws 1987, provides:

Sec. 15. Initial Territorial Sea Plan. (1) By July 1, 1994, the Ocean Policy Advisory Council shall adopt a plan for management of resources and uses of the state territorial sea and ocean shore. The Territorial Sea Plan shall be based on the policies and recommendations of the Oregon Ocean Resources Management Plan.

(2) The Territorial Sea Plan may include:

(a) More detailed analyses of and implementation strategies for issues, policies and recommendations of the plan;

(b) Policies or standards applicable to local government, state and federal agency plans or actions within or affecting resources and uses of Oregon's territorial sea;

(c) Special subarea management plans to resolve multiple use conflicts in specific areas; and

(d) Recommendations to the commission for improvements or amendments to the Oregon Coastal Management Program.

(3) The Ocean Policy Advisory Council shall submit the Territorial Sea Plan to the Land Conservation and Development Commission for adoption as part of the Oregon Coastal Management Program. [1987 c.576 §15; 1991 c.501 §19]

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 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 require-

ments 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 196.415 to 196.515 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.

196.580 Liaison program duties. (1) The liaison program shall:

(a) Assist state and local governments to become fully aware of oceanographic data and products available from the Federal Government and in particular from the Center for Ocean Analysis and Prediction.

(b) Assist the Center for Ocean Analysis and Prediction and the National Oceanic and Atmospheric Administration to become more fully aware of state and local problems and the requirements of state and local governments.

(c) Assist in setting up lines of communication to move oceanographic data and products from the Center for Ocean Analysis

SENATE AGRICULTURE AND NATURAL RESOURCES
Bill No. SB 162 Pages 2
Exhibit F Date MAR 25 1991
Presented by Janet Neuman



March 19, 1991

DIVISION OF
STATE LANDS

Senator Dick Springer, Chair
Committee Members
Senate Committee on Agriculture and
Natural Resources

STATE LAND BOARD
BARBARA ROBERTS
Governor
PHIL KEISLING
Secretary of State
ANTHONY MEEKER
State Treasurer

RE: Support of SB 162

Dear Senator Springer and Committee Members:

By means of this letter, I want to express the Division of State Land's support for Senate Bill 162, introduced at the request of the Department of Land Conservation and Development. We believe that continuation of the ocean planning process initiated by enactment of ORS 196.405 through 196.515 in 1987 is necessary to ensure that Oregon's ocean resources will be managed wisely and in the best interests of all Oregonians.

Since passage of the original ocean planning bill, the Division has been a strong advocate of ocean resource planning. We believe that only through careful continued study of the resources of Oregon's Territorial Sea and coastline can the state develop a workable management plan which will fully implement the provisions of Statewide Planning Goal 19--the ocean resources goal--and other state mandates.

As an active member of the Oregon Ocean Resources Management Task Force, we have become keenly aware that several of the requirements of the 1987 law, while necessary and appropriate, simply could not be completed in the time allocated. It quickly became clear to us and the other members of the Task Force that too little reliable data exist to allow the group to develop a comprehensive Territorial Sea Plan addressing the location, extent, and environmental dynamics of each of Oregon's ocean resources. Without this fundamental information and completion of the "umbrella plan," the Division cannot fulfill its own planning requirement under ORS 196.475 to develop a plan for the management of the resources and uses of the submerged and submersible lands of the state Territorial Sea.



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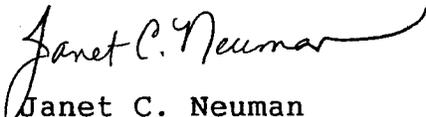
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Senate Bill 162

The Division believes it is critical that the state continue to develop a comprehensive Territorial Sea Plan. More importantly, the Division believes that given the lack of fundamental resource data and diverse viewpoints concerning how these resources should be managed, development of such a plan must continue to involve all affected agencies and local governments equally.

The concept proposed in SB 162 of having the overall management planning effort guided by the Ocean Advisory Council (as the successor to the Task Force), rather than following up with a State Land Board plan pertaining only to the "seabed," is sound. This approach will ensure that a fully responsive, comprehensive, and well conceived Territorial Sea Plan is developed. Furthermore, by providing additional time to complete this plan, additional studies and analyses can be undertaken to fill in some of the information gaps which have been identified. Under the Ocean Advisory Council, these studies can be prioritized and coordinated to provide answers to specific questions. The expanded time frame will also allow more in-depth discussion to occur among Council participants and other interested parties, thereby helping to develop greater consensus regarding ocean management issues.

The Division of State Lands, therefore, endorses SB 162. Creation of the Ocean Advisory Council will result in strong continuity in the effort initiated by the Oregon Ocean Resources Management Task Force, and will ensure that Oregon's ocean resources are managed using the best information available under an established, well-coordinated interagency effort.

Sincerely,



Janet C. Neuman
Director

JCN/DJK/amo
feh:12

SENATE BILL 162

Written Testimony of
Janet C. Neuman, Director of
The Division of State Lands

Before the House Committee on Water Policy

INTRODUCTION

Thank you for the opportunity to address the committee concerning Senate Bill 162, introduced at the request of the Department of Land Conservation and Development. The Division of State Lands supports Senate Bill 162. We believe that continuation of the ocean planning process initiated by enactment of ORS 196.405 through 196.515 in 1987 is necessary to ensure that Oregon's ocean resources will be managed wisely and in the best interests of all Oregonians.

DISCUSSION

Since the original ocean planning bill, the Division has been a strong advocate of ocean resource planning. We believe that only through careful continued study of the resources of Oregon's Territorial Sea and coastline can the state develop a workable management plan which will fully implement the provisions of Statewide Planning Goal 19, the ocean resources goal, and other state mandates.

As an active member of the Oregon Ocean Resources Management Task Force, we have become keenly aware that several of the requirements of the 1987 law, while necessary and appropriate, simply could not be completed in the time allocated. It quickly became clear to us and the other members of the Task Force that too little reliable data exist to let the group develop a comprehensive Territorial Sea Plan addressing the location, extent, and environmental dynamics of each of Oregon's ocean resources. Without this fundamental information, the Division cannot fulfill its own planning requirement under ORS 196.475 to develop a plan for the management of the resources and uses of the submerged and submersible lands of the Territorial Sea.

The Division believes it is critical that the state continue to develop a comprehensive Territorial Sea Plan. More importantly, the Division believes that given the lack of fundamental resource data, and diverse viewpoints concerning how these resources should be managed, development of such a plan must involve all affected state agencies equally.

The concept proposed in SB 162 of having the overall management planning effort guided by the Ocean Advisory Council (as the successor to the Task Force), rather than by the Division, is sound. This approach will ensure that a fully responsive, comprehensive, and well conceived Territorial Sea Plan is developed. Furthermore, by providing additional time to complete this plan, additional studies and analyses can be undertaken to fill in some of the information gaps which have been identified. Under the Ocean Advisory Council, these studies can be

prioritized and coordinated to provide answers to specific questions. The expanded timeframe will also allow more in-depth discussion to occur among Council participants and other interested parties, thereby helping to develop greater consensus regarding ocean management issues.

The Division of State Lands, therefore, endorses SB 162. Creation of the Ocean Advisory Council will result in strong continuity in the effort initiated by the Oregon Ocean Resources Management Task Force, and will ensure that Oregon's ocean resources are managed using the best information available under an established, well-coordinated interagency effort.

feh:56(3)

CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that on August 25, 2015, I electronically filed the original PETITIONERS' OPENING BRIEF AND EXCERPT OF RECORD with the Appellate Court Administrator, Appellate Court Records Section, using the court's electronic filing system.

I further certify that on August 25, 2015, I electronically served the foregoing document on Denise G. Fjordbeck and Judy C. Lucas, attorneys for respondent, using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 3,541 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(g).

The court granted a motion to exceed the 50 page limit for a combined excerpt of record and appendix in ORAP 5.05(2)(e). The order granting the motion was dated August 18, 2015 and permits a 225 page limit, which this brief complies with.

s/ David N. Allen
David N. Allen, OSB No. 870180
dnallen@actionnet.net
Attorney for Petitioners