GC
1005.2
.07
074
1991

The Oregon Ocean Plan

Published and distributed in January 1991 by the State of Oregon:
Neil Goldschmidt, Governor 1987 – 1991
Barbara Roberts, Governor 1991 –

Oregon's Ocean Resources Management Task Force

Gail Achterman, Task Force Chair, Governor's Assistant for Natural Resources
Ralph Brown, Commercial Fisheries
Bob Pullen, Charter Fisheries
Paul Vogel, Director, Oregon International Port of Coos Bay, Ocean Navigtion
Dee Chamberlain, PhD., ARCO, Oil and Gas
*Jim Wenzel, Marine Development Associates Inc., Marine Minerals***
Jay Rasmussen, Director, Oregon Coastal Zone Management Association
Debbie Boone, Clatsop County Commissioner, Coastal Counties (1987-88)
Dave Werschkul, Curry County Commissioner, Coastal Counties (1989-90)
Jayne Fraese, Public at Large
Neal Maine, Public at Large
Ellen Lowe, Public at Large
*Chief Edgar Bowen, Confederated Tribes of Coos, Lower Umpqua and Siuslaw, Coastal Indian Tribes**
*Bruce Andrews, Director, Oregon Department of Agriculture **
*Don Mann, Oregon Economic Development Department **
Nancy Rockwell, Deputy Director, Oregon Department of Energy
Fred Hansen, Director, Oregon Department of Environmental Quality
Rollie Rousseau, Deputy Director, Oregon Department of Fish and Wildlife
John Beaulieu, Deputy State Geologist, Oregon Department of Geology and Mineral Industries
Susan Brody, Director, Oregon Department of Land Conservation and Development
James F. Ross, Director, Oregon Department of Land Conservation and Development, 1987-88
Pete Bond, Ocean Shores Coordinator, Oregon Department of Parks and Recreation
Martha Pagel, Director, Oregon Division of State Lands

** appointed pursuant to 1989 legislation*
***Note: Jim Wenzel, Marine Development Associates Inc., represented marine mineral interests as a Task Force member. Mr. Wenzel wishes to be disassociated from the final plan recommendations.*

The Oregon Ocean Plan

Executive Summary:

Program Analysis
and Recommendations
for Action

January 1991

Property of CSC Library

US Department of Commerce
NOAA Coastal Services Center Library
2234 South Hobson Avenue
Charleston, SC 29405-2413

AUG 5 1997

The Oregon Ocean Resource Program
320 SW Stark Rm 530
Portland, Oregon 97204
(503) 229-6068

Oregon's Ocean Plan is the result of the vision, leadership, and support of Senator Bill Bradbury, who foresaw the need for Oregon to take affirmative action to protect its ocean resources.

The Oregon Ocean Resources Management Task Force Staff:

Eldon Hout, Program Manager

Robert Bailey, Outer Continental Shelf Coordinator

Nan Evans, Senior Policy Analyst

Jeff Weber, Coastal Ocean/GIS Specialist

Acknowledgements:

The Ocean Plan was prepared with the generous assistance of many individuals within state agencies, federal agencies, local governments, universities and the public at large. Their technical knowledge, insights, criticisms, and helpful suggestions are gratefully acknowledged.

A special "thank you" is directed to the many Oregon citizens who cared enough to come to workshops and meetings, voice opinions or share knowledge, and write letters of comment. The Ocean Plan is the better for their participation.

Funds for the preparation of the Ocean Plan were provided from the Oregon General Fund by the 1987 and 1989 Oregon Legislatures. Additional funds were provided by the U.S. Department of Commerce, National Oceanographic and Atmospheric Administration (NOAA), Office of Ocean and Coastal Resources Management (OCRM) through both a Section 306 Coastal Zone Management Grant and an Interagency Personnel Agreement.

Introduction

This Executive Summary of the Oregon Ocean Resources Management Plan (Plan) briefly describes the recommendations of the Plan and lists legislative and administrative changes necessary to implement it. The Executive Summary is presented in a narrative and chart format, both organized in a manner similar to the Plan itself.

Part I, Recommendations for Agency Action, consists of action recommendations laid out in chart form, by subject area.

Part II, Ocean Resource Issues, consists of a narrative, organized as follows:

1) Major recommendations for each issue, listed in a section titled "Summary of the Plan."

2) Current state statutes and relevant administrative rules, identified and discussed in a section titled "Current Jurisdiction and Administration."

3) Legislative and/or administrative rule changes necessary to implement major Plan recommendations, presented and discussed in a section titled "Necessary Implementation Actions."

Part III, Tools for Governing, contains a discussion of certain procedural issues and topics covered in the Plan: the Territorial Sea Plan, Ocean Policy Advisory Council, Project Review Panels, Coastal Local Governments.

Part IV, Indian Issues, represents a initial identification of some of the ocean issues relating to Indian Tribes.

The following abbreviations are used throughout this report:

DEQ	Department of Environmental Quality
DLCD	Department of Land Conservation and Development
DOGAMI	Department of Geology and Mineral Industries
DSL	Division of State Lands
EFSC	Energy Facility Siting Council
EQC	Environmental Quality Commission
OFWC	Oregon Fish and Wildlife Commission
LCDC	Land Conservation and Development Commission
NMFS	National Marine Fisheries Service
OAR	Oregon Administrative Rules
ODFW	Oregon Department of Fish and Wildlife
OPAC	Ocean Policy Advisory Council
ORS	Oregon Revised Statutes
OTC	Oregon Transportation Commission
P&RD	Parks and Recreation Department
PRP	Project Review Panel
USFWS	United States Fish and Wildlife Service

I. Summary of Recommendations for Agency Action

Ocean Fisheries

(Plan pp. 59-80)

Agency	Recommendation	Necessary Implementation Actions
OFWC/ODFW	☐ Adopt marine habitat classification system. ☐ Identify Important Fishery Areas. ☐ Conduct detailed biological, economic and risk assessments whenever specific nonrenewable resource projects proposed. ☐ Conduct and support research on important fishery areas. ☐ Coordinate development of public education and interpretive programs.	Statutory authority is sufficient. OFWC should adopt rules establishing: 1. Marine habitat classification system; 2. Method and procedure of identifying Important Fishery Areas; and 3. Procedure and standards for evaluating risks of nonrenewable resource projects.
DSL	☐ Prohibit all nonrenewable resource activities in 5 identified areas.	Statutory authority is sufficient. DSL should adopt rules prohibiting nonrenewable resource activities in identified areas.

Marine Birds and Mammals

(Plan pp. 81-100)

Agency	Recommendation	Necessary Implementation Actions
OFWC/ODFW		
	Interim:	
	☐ Allow fishing around all nearshore rocks and islands.	Statutory authority and rules are sufficient.
	Long Term:	
	☐ Conduct and support scientific research.	Statutory authority is sufficient. OFWC should adopt rules establishing:
	☐ Identify key habitats.	1. Program for protection of marine birds and mammals.
	☐ Establish criteria for designation and protection of sensitive populations.	2. Protection criteria.
	☐ Examine resource protection needs of specific sites	3. Policy and/or procedure by which to identify key habitats.
	☐ Develop site-specific measures to protect sensitive populations.	4. Criteria for reviewing uses and activities.
	☐ Examine potential for state wildlife management refuges.	
	☐ Review specific uses or activities for their effect on sensitive populations.	
DSL		
	Interim:	
	☐ Allow harvesting of renewable resources around all nearshore rocks and islands unless ODFW determines that specific activity adversely affects sensitive populations.	Statutory authority is sufficient. DSL should adopt rules or policy requiring ODFW consultation prior to allowing harvest of renewable resources around nearshore rocks and islands, and prior to allowing academic and public agency research regarding nonrenewable resources.
	☐ Prohibit all other activities within 1/4 mile of 33 identified sensitive areas.	
	☐ Prohibit exploration and development of nonrenewable resources within 3 miles of all nearshore rocks and islands, but allow academic and public agency scientific research if ODFW determines that these activities will not adversely affect sensitive populations.	

Intertidal Plants and Animals

(Plan pp. 101-111)

Agency	*Recommendation*	*Necessary Implementation Actions*
OFWC/ODFW	☐ Conduct or support research on intertidal ecosystems. ☐ Work with educators to develop public awareness. ☐ Act as lead agency for establishing and managing Intertidal Marine Gardens. ☐ Develop legislative proposals to define authority over Marine Gardens.	New legislation giving ODFW clear lead role in evaluating, establishing and managing Marine Gardens. Legislation should require consultation with OPAC and DSL in implementing any proposal for a Marine Garden.
P & RD	☐ Expand educational and interpretive programs on ocean resources at coastal state parks. ☐ Work with OPAC, DSL and ODFW to explore better management approaches for intertidal areas.	Statutory authority is sufficient. P & RD might enter MOU or MOA with OPAC, DSL, and ODFW.
DSL	☐ Coordinate with ODFW, OPAC and P & RD to explore better management and protection approaches. ☐ Make any legal and fiduciary arrangements necessary to develop and designate Intertidal Marine Gardens.	General statutory authority is sufficient, except that exclusive jurisdiction over submerged and submersible lands may need to be clarified to allow ODFW to take lead role in management. Kelp harvesting statute should be amended to require ODFW approval prior to leasing. DSL might enter MOU or MOA with OPAC, P & RD and ODFW.

Recreation and Cultural Resources

(Plan pp. 113-120)

Agency	Recommendation	Necessary Implementation Actions
P & RD		
	☐ Coordinate recreational plan and strategy for Oregon coast that identifies outstanding coastal and ocean views, evaluates possible marine park and upland sites for new state parks, completes Beach Access Plan, and specifies proposals for a coordinated marine education and information program (*i.e.*, Ocean Watch Sites).	Statutory authority is sufficient. P & RD should adopt rules establishing ocean watch sites. P & RD should also identify specific marine park sites.
	☐ In consultation with DSL and local governments, identify specific sites for marine parks that will be included in the Territorial Sea Plan.	
	☐ Protect archeological sites and prohibit private exploitation on public lands.	Amend ORS 358.915, 358.920, 390.235 to prohibit any excavation along the ocean floor or shore. (Alternative: amend to require OPAC review prior to issuing a permit).
DSL		
	☐ Protect treasure trove sites and prohibit private exploitation on public lands.	Amend treasure trove laws (ORS 273.718-.742) to prohibit all treasure trove permits along the ocean shore or on the ocean floor. (Alternative: amend laws to require OPAC review prior to issuing a permit).
Highway Division		
	☐ Preserve major segments of Highway 101 as significant recreational, aesthetic and historic resources.	Statutory authority is sufficient (via statewide land use planning goals).
	☐ Incorporate ocean views, shoreline recreation and education into plans for improving Highway 101.	
Local Governments		
	☐ Review comprehensive plans to assess effects of growth and development on recreation, tourism, cultural and esthetic resources.	Statewide land use planning laws are sufficient.
	☐ Identify sites appropriate for P&RD acquisition.	

Marine Air and Water Quality

(Plan pp. 121-130)

Agency	Recommendation	Necessary Implementation Actions
DEQ		
	☐ Coordinate preparation of marine water and air quality protection program that includes: Monitoring Water quality discharge and dumping standards Research Marine debris management Improved siting standards, backup facilities and emergency procedures for municipal and industrial ocean outfalls.	Statutory authority is sufficient. DEQ should adopt rules establishing new program provisions and consolidate scattered rules relating to marine water quality.
ODFW		
	☐ Provide technical assistance. ☐ Coordinate establishment of baseline sites to monitor water quality and biological commodities.	Statutory authority is sufficient. ODFW might enter into MOU or MOA on coordination of the monitoring program.

Oil and Gas Development

(Plan pp. 131-140)

Agency	Recommendation	Necessary Implementation Actions
State Waters		
	Majority Proposal:	
	☐ Prohibit oil and gas exploration and development.	
DSL		Statutes authorizing disposal and leasing of oil and gas would need to be repealed (ORS 274.710; 273.551). Repeal rules relating to leasing of oil and gas under submerged and submersible lands (OAR chapter 141, division 82). New legislation prohibiting oil and gas exploration and development within state territorial sea (*i.e.*, make permanent ban established by 1989 Or Laws ch 895, 5).
DOGAMI		Amend ORS 520.025(1) (permit for drilling or using an oil or gas well) to prohibit permits for offshore oil and gas exploration and development.
	Minority Proposal	
	☐ Consider exploration and development activities that do not adversely affect the ecological integrity and beneficial uses of marine water within the state territorial sea.	
	☐ Allow inventories of inshore and continental shelf areas.	
DSL		Amend ORS 273.551 and 274.710, to allow leasing of oil and gas only if consistent with Plan and Territorial Sea Plan and amend to require OPAC approval prior to issuing a lease; amend OAR Ch. 141, Div. 82, to require OPAC approval or a DSL determination that proposed lease is consistent with Plan and Territorial Sea Plan; amend ORS 196.800-.905 to require similar consistency.
	Federal Waters	
	☐ Cancel Lease Sale #132.	
	☐ Oppose any federal lease sale unless certain conditions met.	
	☐ Participate in Pacific Northwest OCS Task Force.	

Oil Spills

(Plan pp. 141-147)

Agency	Recommendation	Necessary Implementation Actions
DEQ		
	☐ Develop and update existing state spill contingency plans.	New legislation to require any party engaging in petroleum exploration, production, storage or transportation to develop an oil spill contingency plan. DEQ should then establish standard elements for an adequate contingency plan.
	☐ Ensure that oil spill contingency plans identify spill prevention strategies.	
	☐ Identify specific state spill response actions.	Statutory authority for state contingency plans is sufficient.
	☐ Seek continued funding and industry commitment to develop and maintain response capabilities.	
	☐ Develop comprehensive damage assessment strategy.	DEQ should adopt administrative rules establishing a comprehensive damage assessment strategy, after consultation with ODFW.
	☐ Require all parties engaging in exploration production, storage or transportation of petroleum products to submit and get approval of a spill contingency plan.	
OFWC/ODFW		
	☐ Coordinate with DEQ in developing comprehensive damage assessment strategy.	Statutory authority is sufficient. ODFW should adopt rules establishing a comprehensive damage assessment strategy, after consultation with DEQ.

Marine Minerals

(Plan pp. 149-157)

Agency	Recommendation	Necessary Implementation Actions
DSL		
	Majority Proposal	
	☐ Prohibit commercial mineral exploration and development in Important Fishery Areas and within 3 miles of sensitive offshore rocks and islands.	Statutory authority is sufficient to prohibit commercial mineral exploration and development in Important Fishery Areas and within 3 miles of sensitive offshore rocks and islands. DSL should immediately adopt rules prohibiting mineral exploration and development within 3 miles of offshore rocks and islands. Once ODFW identifies Important Fishery Areas, DSL should prohibit exploration and development in these areas.
	☐ Implement 5-year moratorium on exploration contracts.	Legislation imposing 5-year moratorium and requiring PRP consultation prior to issuing marine mineral exploration contract once the moratorium expires.
	☐ Provide for PRP review and approval of an inventory and environmental effects assessment of exploration contracts.	Adopt rule so requiring.
DSL		
	☐ Amend ORS 274.640(6) and (7) to clarify that an exploration contract confers no proprietary rights to minerals found and does not oblige the state to proceed with any steps toward mineral leasing and development.	Amend ORS 274.640(6) and (7) as Plan recommends.
	Minority Proposal	
	☐ Cooperate with DOGAMI and ODFW to develop comprehensive research plan to determine costs and benefits of marine mining.	Statutory authority is sufficient. DSL might enter MOU or MOA with DOGAMI and ODFW to develop comprehensive research plan.
	☐ Postpone proposed minerals research program scheduled for summer of 1990.	
LCDC/DLCD		
	☐ Adopt rules that require an inventory and effects assessment prior to any commercial exploration contract.	Statutory authority is sufficient. LCDC should adopt rules under Goal 19.

Territorial Sea Plan

(Plan pp. 163-165)

Agency	*Summary of the Plan*	*Necessary Implementation Actions*
	Expand scope to cover: ☐ Marine bird and mammal habitat areas (evaluate sensitivity, focusing on identified sensitive areas; provide criteria and protection measures for populations and habitat). ☐ Intertidal Marine Gardens (criteria for identifying, designating and managing, process for designating, list of sites, analysis of alternative management approaches, public education programs, proposal for any needed changes in state agency programs or authorities). ☐ Marine water and air quality (air quality monitoring program; marine water quality monitoring program; discharge and dumping standards; improved siting standards, backup facilities and emergency procedures; research; marine debris management). ☐ Oil and gas development. ☐ Oil spill response (policies and standards for oil spill contingency plan requirements, use of dispersant, liability limits, damage assessment and compensation. ☐ Leases for cultivating or harvesting marine plans and animals. ☐ Artificial reefs. ☐ Recreation and cultural resources. ☐ Dredged material disposal. ☐ Marine minerals (clarify and refine policy, research plan for academic and public agency research, policies and criteria for rules to guide commercial exploration).	Statutory change to 1987 Or Laws ch 576. New legislation should specify additional issues to be addressed, expand the preparation time, and require State Land Board to coordinate with OPAC in preparing Territorial Sea Plan.

Ocean Policy Advisory Council (OPAC)

(Plan pp. 166-167)

Agency	Recommendation	Necessary Implementation Actions
	☐ Coordinate preparation of Territorial Sea Plan. ☐ Provide forum for discussing ocean resource policy, planning and management issues: Oppose any uses of nonrenewable resources that might adversely impact ocean fisheries. Assess risks associated with development of nonrenewable resources Document sites, develop alternatives and analyze protection proposals for marine birds and mammals Assist and facilitate efforts to establish and protect Intertidal Marine Gardens Explore better management approaches. ☐ Recommend improvements to Ocean Resources Plan and Territorial Sea Plan. ☐ Offer advice to Governor, State Land Board, state agencies and local governments on specific ocean resource management issues. ☐ Establish Project Review Panels and recommend when particular proposals should be reviewed. ☐ Coordinate interagency and intergovernmental review of resource use through Project Review Panels. ☐ Offer advice to Governor, State Land Board, state agencies and local governments on specific ocean resource management issues. ☐ Establish Project Review Panels and recommend when particular proposals should be reviewed. ☐ Coordinate interagency and intergovernmental review of resource use through Project Review Panels.	Legislation establishing OPAC, specifying duties in implementing and developing Ocean Resource Plan and Territorial Sea Plan. Legislation should also specify the issues OPAC should address, provide authority to adopt administrative rules, provide authority to establish Project Review Panels (including when panel is to be consulted and who may request the consultation, require state agencies to either adopt panel recommendations or justify rejection of the recommendation through written findings and conclusions).

II. Ocean Resource Issues

A. Ocean Fisheries

Summary of the Plan

The Plan recommends that ODFW:

1) adopt a marine habitat classification system;

2) identify "Important Fishery Areas" vital to recreational and commercial fisheries;

3) conduct detailed biological, economic, and risk assessments whenever a nonrenewable resource project is proposed;

4) conduct and support research on important fisheries and determine whether any additional protection is needed; and

5) coordinate the development of public education and interpretive programs about the commercial and recreational fishing industry.

In general, the Plan recommends that Oregon give clear priority to the management and protection of *renewable* resources over *nonrenewable* resources throughout the Ocean Planning Area. That recommendation includes a specific priority for commercial and recreational ocean fisheries over oil, gas, and mineral exploration and development. The Plan identifies five areas in which DSL should prohibit all nonrenewable activities that could establish a proprietary interest: Heceta-Stonewall Banks, Coquille Bank, Astoria Canyon, Rogue Canyon, and the fishery grounds offshore from Cape Blanco. In other "Important Fishery Areas," the Plan recommends that specific uses of nonrenewable resources should be allowed *only* if ODFW determines that the proposed activity will not adversely affect commercial or recreational fishery activities, fish habitat, or fish population viability.

The Plan recommends that OPAC:

1) encourage ODFW, NMFS, and the Pacific Fishery Management Council to continue management steps to protect important fisheries and fish habitat and to undertake research on marine habitat and ecosystems that support Oregon's commercial and recreational fisheries;

2) oppose any use of nonrenewable resources that might adversely impact ocean fisheries; and

3) provide a forum for evaluating risks associated with the development of nonrenewable resources.

Current Jurisdiction and Administration

Under ORS 496.138 and 496.146, the OFWC formulates and implements the state's wildlife management policies and programs. "Wildlife" includes fish, wild birds, amphibians, reptiles and wild animals. ORS 496.004(15). OFWC's authority is quite broad and allows it to perform all acts necessary to carry out the wildlife laws. ODFW and its director also havebroad authority to carry out the programs and policies established by OFWC and to establish divisions within ODFW. ORS 496.112 and 496.118. Two divisions within ODFW are established by statute: the Fish Division and the Wildlife Division. ORS 496.124. The Fish Division is responsible for the management of all fish and other marine life over which OFWC has regulatory jurisdiction. ORS 506.142.

Oregon statutes separately define "game fish" and "food fish." "Game fish" include trout, steelhead, char, greyling, Atlantic salmon, white fish, salmon (when under 15 inches or when taken by angling), green sturgeon, white sturgeon (when taken by angling), American shad (when taken by angling), and yellow perch. ORS 496.009. "Food fish" are any animals over which the OFWC has jurisdiction under ORS 506.036 (i.e., all fish, shellfish, and all other

animals living intertidally on the bottom within Oregon waters). Most of the pertinent ODFW and OFWC rules apply to both game fish and food fish. *See* OAR 635-07-501(10). Certain statutory policies, however, apply only to food fish and will be discussed separately.

By administrative rule, ODFW has adopted four goals for fish management and production:

1) adopt management plans for fish species, stream systems, or geographic areas to achieve optimum populations and production of fish while maximizing the benefit to Oregon's citizens,

2) ensure a wide diversity of fish use opportunities by managing for naturally spawned fish, hatchery fish, or a combination of hatchery and naturally spawned fish,

3) optimize the use of any harvestable surplus of anadromous salmon, trout, and other species, and

4) achieve and maintain an optimum and equitable harvest.

OAR 635-07-510. *See also* OAR 635-07-515 (setting out ten policies necessary to achieve the defined management goals, including protection of genetic resources, allocations based on biological requirements and sharing principles, and consideration of all viable alternatives). The administrative rules define "optimum" as the most desirable attained or attainable under implied or specified conditions to include the environment, biology of the species, and political, economic, and sociological considerations. OAR 635-07-501(34).

ODFW has established a natural production policy (how to maintain naturally spawned indigenous and introduced fish) and a wild fish management policy (how to manage anadromous salmon species, trout, sturgeon, or fish species ODFW has designatedas "sensitive"). OAR 635-07-521 to 635-07-524; 635-07-525 to 635-07-529. ODFW has established three operating principles for natural production management: to protect and restore habitat on public and private lands, to oppose any actions that allow competition, predation or disease to threaten natural production, and to oppose harvest strategies that endanger the long-term viability of a population or pose a risk to meeting natural production objectives. OAR 635-07-523. ODFW has also established operating principles for wild fish management:

1) limit the interbreeding of hatchery and wild fish;

2) oppose habitat degradation and advocate habitat restoration;

3) oppose any actions that allow mortality of wild fish from competition, predation, or disease; and

4) oppose harvest strategies that, by themselves, cause a population decline to 300 spawners in a five-year period.

OAR 635-07-527. ODFW and OFWC may exempt a particular fish population from the wild fish management policy if the OFWC finds that social and economic considerations offset the biological consequences of losing the population and that the exemption, "when considered alone and in light of any other exemptions that have been granted," will not cause a serious depletion of the species in Oregon. OAR 635-07-528.

ODFW and OFWC have established season, gear and area restrictions, and closure dates for the ocean commercial salmon fishery. OAR 635-03-005 to 635-03-082. Restrictions have also been established for the rockfish, sablefish, coastal rivers shad, smelt, sturgeon, and thresher shark fisheries, OAR 635-04-005 to 635-04-110, as well as the commercial shellfish fishery. OAR 635-05-001 to 635-05-220 (including abalone, Dungeness crab, red rock, box and tanner crab, crayfish, intertidal animal and mussels, oysters, rock oysters, scallop, sea urchin, pink shrimp, and spot, sidestripe and coonstripe shrimp fisheries). ODFW and OFWC also have adopted landing restrictions and daily catch limits for sport fishermen. OAR 635-39-100 to 635-39-135 (including marine fish, halibut, shellfish, and other marine invertebrates).

ODFW and OFWC have adopted rules relating to commercial gear, including: general fishing gear specifications and operation; fishing licenses for commercial fishermen and dealer license requirement for retail fish dealers; required records and reports for retail fish dealers, fish bait dealers,wholesale fish dealer, food fish canners, and shellfish canners; permit requirements for scallop and ocean pink shrimp; a Columbia River Gillnet salmon vessel fleet reduction program; a restricted vessel permit system for the Yaquina Bay roe-herring fishery; and a restricted permit system for the sea urchin fishery. OAR 635-06-005 to 635-06-650. In addition, ODFW's administrative rules include sport fishing regulation for fish, shellfish, and marine invertebrates, OAR 635-11-050 to 635-11-165, and sport salmon angling. OAR 635-13-003 to 635-13-040.

With the exception of oysters,[1] OFWC has exclusive jurisdiction over all food fish (i.e., fish, shellfish, and all other intertidal animals) within the waters of the state. ORS 506.011, 506.036. Oregon's statutory policy is to manage food fish to provide the optimum economic, commercial, recreational and aesthetic benefits for present and future generations of Oregon's citizens. ORS 506.109.

Oregon has entered into two compacts with other states, the Oregon-Washington Columbia River Fish Compact and the Pacific Marine Fisheries Compact with California and Washington. ORS 507.010-.040. The Pacific Marine Fisheries Compact established the Pacific Marine Fisheries Commission, which has authority to recommend actions to preserve fisheries and protect against over-fishing, but largely functions to coordinate activities between member state agencies.

Beyond the territorial sea, federal law governs. Under the Magnuson Fishery Conservation and Management Act, the Secretary of Commerce established a regionalized, domestic fishery management program. 16 USC 1801-1882 (1988). Each region is represented by a regional fishery management council, composed of a representative from the National Marine Fisheries Service (NMFS), state fisheries management directors, and gubernatorially recommended representatives. The member states of the Pacific Council are California, Idaho, Oregon, and Washington. The primary purpose of all the councils is to develop fishery management plans, which recommend regulations for the various fisheries based on the best scientific evidence available. These fishery management plans are submitted to the Secretary of Commerce for approval. The Pacific Fishery Management Council has adopted and the Secretary has approved fishery management plans for salmon and groundfish (which include several bottom and mid water species, such as cod, rockfish, sole, and flounder). The Magnuson Act also allows Oregon to regulate vessels fishing beyond the territorial sea if such vessels are registered in Oregon.[2]

Section 307(c)(1) of the Coastal Zone Management Act requires that federal activities, such as the approval and implementation of fishery management plans, be consistent with Oregon's federally approved coastal zone management program "to the maximum extent practicable." 16 U.S.C. 1464(c)(1). Goal 19 of the statewide land use planning goals is part of Oregon's coastal zone management program. Under Goal 19, state and federal agencies shall:

1) develop scientific information on commercially, recreationally, and ecologically impor-

1 The Department of Agriculture has jurisdiction over commercially cultivated oysters while OFWC has jurisdiction over all native oysters. ORS 622.220. *See also* ORS 506.036(4). However, oysters are not covered either in the Plan or this paper because they live primarily in estuaries and are managed under existing estuary plans.

2 Or Atty Gen Op No 8182 (Nov 13, 1986) concluded that a vessel is "registered" within the meaning of the Magnuson Act, under Oregon law if it has a certificate of number and certificate of title from the State Marine Board, or has a commercial fishing license issued pursuant to ORS 508.006-.920.

tant fish, shellfish, marine mammals and other marine animal species;

2) designate and enforce fishing regulations to maintain the optimum sustainable yield while protecting the marine ecosystem;

3) develop and encourage improved fishing practices and equipment; and

4) develop an understanding of the effects of human activities on the marine ecosystem.

Goal 19 also provides that since renewable ocean resources and uses such as recreation, food production, water quality, navigation, and aesthetic enjoyment provide greater long-term benefits than nonrenewable resources, plans and activities of local, state and federal agencies must give priority to management and protection of renewable resources. LCDC has not yet adopted administrative rules to implement Goal 19.

Necessary Implementation Actions

The broad regulatory authority of ODFW and OFWC over Oregon's commercial and recreational fisheries allow implementation of the Plan's ocean fisheries recommendations without the need for statutory change. (It should be noted, however, that the statutes under the jurisdiction of agencies responsible for permitting nonrenewable resource projects, such as DSL and DOGAMI, may need to be changed in order to require ODFW and OPAC review *prior* to project approval. *See* the Oil and Gas; Marine Minerals Sections.)

Although ODFW and OFWC have the requisite statutory authority to implement the Plan's recommendations, OFWC will need to adopt rules to cover several recommendations, including:

1) a marine habitat classification system;

2) a method for identifying "Important Fishery Areas" (in addition to the definition outlined in the Plan); and

3) a procedure for assessing the risks and biological and economic effects of nonrenewable resource projects.

ODFW and OFWC also should establish guidelines for determination of whether a fishery needs additional protection from nonrenewable resource development. Finally, ODFW should coordinate with P&RD in developing public education and interpretive programs about the commercial and recreational fishing industry.

DSL's statutory authority is sufficient to allow it to prohibit nonrenewable resource activities in the identified areas. *See* Marine Birds and Mammals Section. The recommendations for OPAC are general in nature and should be included as a goal or policy in the legislation establishing the OPAC. *See* Ocean Governance Section. The recommendation to prioritize management and protection of renewable resources over nonrenewable resources is already incorporated in Goal 19, and requires no legislative change.

B. Marine Birds and Mammals

Summary of the Plan

The Plan generally calls for strengthened state protection of marine birds and mammals (especially endangered, threatened, and sensitive species) and their habitats. To accomplish this, the Plan recommends that the Territorial Sea Plan evaluate the sensitivity of specific marine wildlife and its habitat, focusing on thirty-three sensitive areas identified in the Plan. The Plan also recommends that the Territorial Sea Plan provide criteria for determining which populations and habitat to protect, and provide site-specific measures to protect these populations and habitat.

However, until the Territorial Sea Plan is complete, the Plan recommends certain interim approaches, including:

1) allow fishing and harvesting of renewable resources around nearshore rocks and islands *unless* ODFW determines that a specific use or activity adversely affects sensitive marine bird or mammal populations;

2) prohibit all other activities, other than those necessary to save human life, within 1/4 mile of the thirty-three sensitive areas; and

3) prohibit exploration and development of nonrenewable resources within three miles of all nearshore rocks and islands, with the exception of academic and public agency scientific research on nonrenewable resources, which will be allowed only if ODFW determines that these activities will not adversely affect sensitive marine bird or mammal populations.

The Plan recommends that ODFW should:

1) conduct and support scientific research on marine birds, mammals, and their habitats;

2) identify key habitats;

3) establish criteria for designation and protection of sensitive populations and evaluate the sensitivity of populations at specific sites;

4) examine the resource protection needs of specific sites;

5) develop site-specific measures to protect sensitive populations and their habitats; and

6) examine the need to establish state wildlife management refuges overlying or surrounding federal wildlife refuges and develop a co-management scheme with USFWS for those areas.

Under the Plan, OPAC is to act as the policy forum for documenting specific sites, developing alternatives for resolving use conflicts and analyzing proposals for additional protective measures. OPAC is also to assist state agencies in providing immediate protection for stressed marine bird or mammal communities and developing interpretive programs.

Current Jurisdiction and Administration

OFWC has authority to formulate and implement policies and programs for the management of marine birds and mammals, pursuant to its authority to perform all acts necessary to administer and carry out the wildlife laws. ORS 496.138. Wild birds and wild mammals are included in the definition of "wildlife." ORS 496.004. Under OAR 635-44-130, it is unlawful to trap, pursue, kill, take, catch, angle for or possess any seal, sea lion, sea otter, fisher or any other nongame bird. OFWC has not adopted any other specific rules relating to marine birds and mammals.

Under the state Endangered Species Act, the OFWC has a mandate to identify and establish programs to protect and conserve threatened and endangered wildlife species.

ORS 496.172. OFWC has listed as endangered under the state Endangered Species Act: the Aleutian Canada goose, the American peregrine falcon, the California brown pelican, and the gray, right, blue, fin, sei, humpback and sperm whales. These same species are also on the federal Endangered Species List. The bald eagle and western snowy plover are listed as threatened species under state law. The bald eagle is also listed as a threatened species under federal law. In addition, ODFW maintains a list of "sensitive" species, which include the fork-tailed storm petrel, dusky and cackling Canada geese,northern goshawk, greater yellowlegs, long-billed curlew, marbled murrelet, purple martin, bank swallow, and the northern sea lion.

The state Endangered Species Act requires that before a state agency takes, authorizes, or provides direct financial assistance for any action on state owned or leased land, it must determine that the action is consistent with programs established by ODFW for threatened or endangered species or that the action will not reduce the likelihood of the survival or recovery of threatened and endangered species. ORS 496.182. If the state agency determines that the action has the potential to reduce the likelihood of survival or recovery, it must notify ODFW, and ODFW is required to recommend "reasonable and prudent" alternatives. The consulting agency then must either

1) adopt ODFW's recommended alternative or

2) demonstrate that the potential benefits of the proposed action outweigh the potential harm and that reasonable mitigation and enhancement measures are taken, to the extent practicable, to minimize the adverse impacts on the affected species. *Id.*

USFWS manages the dry land sections of the rocks and islands that are part of the Oregon Islands National Wildlife Refuge. DSL has exclusive jurisdiction over all ungranted tidal submerged lands owned by the state. ORS 274.710. (This includes the "wet" areas surrounding the Oregon Islands National Wildlife Refuge.) DSL is required to give consideration to the protection and conservation of all natural resources, including scenic and recreational resources, "so as to conserve the public health and recreational enjoyment of the people, protect property and human life, and conserve plant, aquatic and animal life," in its consideration of the sale, exchange or lease of any state lands. ORS 273.051(2)(b).

DSL has promulgated general rules for leasing state-owned submerged and submersible lands that describe the lease application process, the factors considered in review of an application, and the lease terms and rates. OAR 141-82-005 to 141-82-050. DSL also has rules governing the granting of easements and right of ways across state-owned submerged and submersible lands. OAR 141-83-010 to 141-83-700. In addition, DSL has closed several estuaries to motor vehicles. OAR 141-84-010 to 141-84-100. Finally, DSL has adopted rules regulating public uses of the South Slough Estuarine Sanctuary. OAR 142-10-005 to 142-10-060 (adopted in accordance with the South Slough Estuarine Sanctuary Management Plan, ORS 273.533-.558, a federal grant-in-aid, and the Coastal Zone Management Act).

Necessary Implementation Actions

Prior to completion of the Territorial Sea Plan, the Plan recommends certain interim approaches. Actions necessary to implement these interim approaches are analyzed below. Under current state law, OFWC and ODFW have authority generally to establish programs for the conservation and protection of listed species, and to develop programs to protect marine bird and mammal habitats. Thus, ODFW and OFWC already have the statutory authority to conduct and support research, identify key habitats, establish protection criteria, develop site-specific protection measures, and evaluate the need for a state wildlife refuge system. ODFW also has

sufficient authority to close or restrict fishing around nearshore islands. *See* Ocean Fisheries Section. To implement the Plan, OFWC should promulgate rules which describe the criteria for designation and protection of sensitive populations and the site-specific measures to be used to protect those populations and their habitats. ODFW will also need to develop policies and management goals specific to marine birds and mammals.

Because of its exclusive jurisdiction and power to issue rules and regulations, DSL also has sufficient statutory authority to implement the interim measures recommended by the Plan. DSL will need to issue regulations prohibiting all activities within 1/4 mile of the identified thirty-three sensitive areas. DSL may also need to issue regulations prohibiting the exploration and development of nonrenewable resources within three miles of the nearshore areas. (However, oil and gas exploration has been suspended under state statute. Thus, rules may not be needed for oil and gas development if the statutory suspension is long enough to allow the State Land Board to complete the Territorial Sea Plan. *See* Oil and Gas and Marine Minerals Sections.)

As noted, the Plan recommends that all activities that threaten marine bird and animal populations around nearshore rocks and islands be prohibited. Under the current statutory scheme, DSL has exclusive jurisdiction over these areas and may lease these lands for a variety of purposes. Article VIII, section 5(2) of the Oregon Constitution, however, requires the State Land Board to "manage lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management." In addition, all DSL leases are subject to "due consideration" for the protection and conservation of all natural resources. ORS 273.051(2)(b).

Under these constitutional and statutory requirements, DSL could issue regulations prohibiting all activities around nearshore rocks and islands if it finds that such activity would endanger the public health and recreational enjoyment, would not protect property or human life, or would not conserve plant, aquatic or animal life. Thus, to implement the Plan, DSL will need to adopt rules or a policy demonstrating that DSL has duly considered these factors.

Once the Territorial Sea Plan is complete, DSL will need to issue regulations requiring consultation with ODFW for a determination of whether academic and public agency scientific research on nonrenewable resources would adversely affect sensitive marine birds and mammals. Under the current statutory scheme, DSL is not required to consult with ODFW on issues concerning "sensitive" species, only threatened or endangered species. ORS 496.182(2). However, DSL may choose to consult an agency with a particular expertise. ORS 273.155. To implement the interim recommendation, DSL should adopt a policy requiring ODFW consultation prior to allowing academic or public agency scientific research. (NOTE: If the type of nonrenewable resources research contemplated by this section includes exploration, the recommendation to allow research on nonrenewable resources may conflict with the Oil and Gas Section's majority recommendation to prohibit all exploration and development, even for research purposes. *See* Oil and Gas Section for a more thorough discussion).

DSL also has sufficient statutory authority to restrict the harvesting of kelp and other seaweed in order to protect nearshore areas. DSL is required to consult ODFW prior to leasing any submerged lands for kelp harvesting. *See* Intertidal Plants and Animals Section.

The recommendations for OPAC are general in nature and should be included in the legislation which establishes OPAC. *See* Ocean Governance Section.

C. Intertidal Plants and Animals

Summary of the Plan

The Plan's primary goal for intertidal plants and animals is to protect intertidal ecosystems from adverse changes. The Plan recommends that the state promote public understanding of intertidal habitats and establish Intertidal Marine Gardens to protect particularly vulnerable areas. To accomplish this goal, the Plan recommends that the Territorial Sea Plan include:

1) criteria for identifying, designating, and managing Intertidal Marine Gardens;

2) a process for designating Intertidal Marine Gardens that allows public participation;

3) a list of specific sites for designation;

4) an analysis of alternative management approaches for Intertidal Marine Gardens;

5) public education programs for Intertidal Marine Gardens; and

6) proposals for any needed changes in state agency programs or authorities.

The Plan identifies eleven locations that should be initially included in the Territorial Sea Plan's analysis of Intertidal Marine Garden sites.

The Plan recommends that ODFW conduct or support research on intertidal ecosystems, work with educators to develop public awareness programs, serve as lead agency in the development of Intertidal Marine Gardens, consult with OPAC and DSL in implementing Intertidal Marine Gardens and develop legislative proposals to define its authority over Intertidal Marine Gardens. The Plan recommends that P&RD should expand educational and interpretive programs on ocean resources at coastal state parks, and work with OPAC, DSL, and ODFW to explore better management approaches to intertidal areas. The Plan recommends that DSL coordinate with ODFW, P&RD, and OPAC to explore better management and protection approaches and make any legal and fiduciary arrangements necessary to develop and designate Intertidal Marine Gardens.

Finally, the Plan recommends that OPAC assist, encourage, and facilitate the efforts of local communities and state agencies to establish and protect Intertidal Marine Gardens.

Current Jurisdiction and Administration

ODFW and OFWC have broad statutory authority to develop wildlife protection programs and perform any actions necessary to carry out the wildlife laws. ORS 496.138. Pursuant to that statutory authority, OFWC has adopted general rules that restrict the method of harvesting intertidal animals and make it unlawful to waste fish, shellfish, and marine invertebrates. OAR 635-11-100 to 635-11-165 and 635-39-100 to 635-39-135. ODFW has not developed specific rules for bottom dwellers beyond the intertidal zone or for non-bottom dwellers within the intertidal zone, although it has statutory jurisdiction to do so. However, ODFW has closed certain "marine garden" areas to the taking of marine invertebrates, clams, and mussels. OAR 635-39-110 (Otter Rock, Cape Perpetua, Haystack Rock/Cannon Beach and Yaquina Head Natural Area. Yaquina Bay and Netarts Bay are also closed to clamming in posted shellfish preserves, while Whale Cove is closed to the taking of fish and shellfish). ODFW has not defined the term "marine garden" in its administrative rules.

DSL has exclusive jurisdiction over tidal submerged and submersible lands, which includes the harvesting of intertidal plants (i.e., kelp). ORS 274.885. DSL may lease submerged

state lands for kelp or other seaweed harvesting, but only after consultation with OFWC. DSL has not promulgated specific rules governing kelp harvesting. Instead, DSL considers kelp harvesting to be aquaculture, as defined in OAR 141-82-005 ("harvesting . . . natural crops so as to maintain an optimum yield"). As such, it requires a general lease from DSL. OAR 141-82-010(2)(a).

By administrative rule, DSL has established a general lease application process, as well as general lease terms and rates, that apply to any application for kelp harvesting. OAR 141-82-015 to 141-82-050. By statute, however, the lease term for kelp harvesting may not exceed 50 years and all kelp leases require the lessee to harvest at least 1,000 tons of kelp or other seaweed within any one year. If the lessee fails to harvest at least 1,000 tons, DSL may cancel the lease. ORS 274.885.

Necessary Implementation Actions

The primary thrust of the Plan recommendations is to establish an Intertidal Marine Garden system. ODFW's authority to establish Intertidal Marine Gardens is not express in its statutes. However, ODFW has used its authority to regulate the harvest of intertidal animals to allow it to establish "marine garden" areas in which certain harvest activities are prohibited. To implement the Plan's recommendation of establishing Intertidal Marine Gardens based on the entire intertidal ecosystem, however, the legislature will need to give ODFW clear lead authority. Under current law, ODFW is responsible for regulating intertidal animal life; DSL is responsible for the submerged land and plant life; and P&RD is responsible for state parks. *See* Recreation and Cultural Resources Section. In order to effectively implement the Plan's recommendation that ODFW be the lead agency, ODFW's statutes should be amended to clearly give it lead authority in evaluating, establishing, and managing Intertidal Marine Gardens.

Legislation is also necessary to implement the Plan's recommendation that ODFW consult OPAC and DSL in implementing the Intertidal Marine Gardens, because each of these agencies will be responsible for resources and policies that will have an effect on the Intertidal Marine Gardens. *See* Oil and Gas, Marine Minerals, and Ocean Governance Sections. In addition, DSL's exclusive statutory jurisdiction over submerged and submersible lands may need to be amended in order to allow ODFW to take the lead in managing the Intertidal Marine Gardens. DSL's statutes currently provide DSL with exclusive authority to lease submersible lands for kelp harvesting, although it must consult with OFWC prior to granting any lease. The statute might more effectively implement the Plan's recommendation of establishing ODFW as the lead agency if it required ODFW *approval* prior to leasing, rather than mere consultation.

DSL and P&RD have sufficient statutory authority to implement the Plan's recommendations for coordination of the Intertidal Marine Garden program and expansion of existing programs. DSL will need to adopt kelp harvesting policies consistent with the Intertidal Marine Garden program. It may be desirable for P&RD, DSL, OPAC, and ODFW to enter into a Memorandum of Agreement to coordinate management and designation of Intertidal Marine Gardens.

The recommendations for OPAC are general in nature and should be included in the legislation which establishes OPAC.

D. Recreation and Cultural Resources

Summary of Plan

The Plan recommends that P&RD prepare and coordinate a comprehensive recreational plan and strategy for the Oregon coast that:

1) identifies outstanding coastal and ocean views;

2) evaluates possible marine park sites and upland sites for new state parks;

3) completes the Beach Access Plan; and

4) specifies proposals for a coordinated marine education and information program (including the establishment of Ocean Watch Sites at scenic viewpoints along highways and in parks).

The Plan calls for an amendment of the archaeological and treasure trove laws to protect archaeological sites and shipwrecks and to prohibit private exploitation on public lands.

The Plan also recommends that the Highway Division preserve major segments of Highway 101 as significant recreational, aesthetic, and historical resources, and incorporate ocean views, shoreline recreation and education into plans for improving Highway 101.

Finally, the Plan also recommends that local governments review their comprehensive plans to assess the effects of growth and development on recreation, tourism, and cultural and aesthetic resources. Local governments should also identify sites appropriate for acquisition as recreational or scenic sites by P&RD.

Current Jurisdiction and Administration

ORS 390.615 vests ownership of the shore of the Pacific Ocean between ordinary high tide and extreme low tide in the State of Oregon and makes the entire shoreline a state recreation area. As such, the Pacific shore is under the jurisdiction of the P&RD. ORS 390.605(3). However, P&RD and the State Land Board have concurrent jurisdiction to undertake appropriate court proceedings to protect, settle, and confirm all public rights and easements in the state. ORS 390.620(1). Furthermore, DSL has jurisdiction over mining and drilling leases for valuable mineral deposits, ORS 273.551, and leases and easements for oil, gas and sulphur, ORS 274.710 within the recreation area. *See* Marine Minerals section. Furthermore, pursuant to ORS 390.620(3), DSL is directed to carry out its duties with respect to the submerged and submersible lands of the Pacific shore consistent with its statutory authority to lease and grant easements to submerged and submersible lands. *See* ORS 274.705 - .895.

To construct any improvement on the ocean shore (the land lying between extreme low tide and the line of vegetation), a person must obtain a permit from P&RD. The standards for approving a permit are outlined in ORS 390.655 and OAR chapter 736, division 20. They include:

1) public need for healthful, safe and aesthetic surroundings, the natural scenic, recreational, and other resources of the area, the present and prospective need for conservation and development of those resources;

2) the physical characteristics and suitability of the area for improvement;

3) the land uses and improvements already present in the area, and the trends, density and value of property and improvements in the area; and

4) the need for future recreation and access to particular sites in the area.

Removal of sand, rock, mineral, marine growth or other natural products of the ocean shore (other than fish and wildlife) is prohibited except by a P&RD permit. ORS 390.725. How-

ever, P&RD must consult with ODFW, DOGAMI and DSL prior to issuing any permit. P&RD has promulgated rules concerning the removal of natural products from the ocean shore. OAR 736-20-035. In addition to meeting these statutory standards, an application for the removal of sand and rock must also demonstrate that the sand or rock is essential to meet the reasonable need for essential construction uses in the area and that it is not otherwise obtainable at reasonable cost. OAR 736-20-035. In other words, economic considerations play a role in determining whether an application for the removal of sand and rock is approved. ORS 390.725 (3).

Under ORS 390.668, P&RD has adopted rules governing vehicle use on the ocean shore and established vehicle use zones. OAR 736-22-005 to 736-22-010 & 736-24-005 to 736-24-045. P&RD requires a vehicle permit for the restricted zones. OAR 736-22-010. The fill and removal laws, ORS 196.800 - .990, apply as well to activities on the beach.

ORS 390.140 directs the P&RD Director to study and appraise the recreation needs of Oregon, as well as assist in the development and coordination of recreation facilities, activities, and programs. In addition, P&RD has adopted a State Park Master Plan for each state park, including parks along the ocean shore. ORS 390.180; OAR 736-18-000. Under the direction of the P&R Commission, the P&R Director may assist any state agency in rendering recreation services and assist in the coordination of federal, state and local recreation facilities, personnel, activities, and programs. ORS 390.140(2).

P&RD is also authorized to acquire land adjacent, abutting or contiguous to the ocean shore for state recreation areas or for access to the shore or recreation areas. ORS 390.630. To acquire private land, P&RD must consider the availability of other public lands, the land uses, improvements and density of development in the vicinity, the existing public recreation areas and accesses, and any local zoning or use restrictions affecting the area. *Id.* P&RD has not adopted any rules regarding land acquisition.

Under ORS 358.920 and 390.235, the intentional excavation and alteration of an archaeological site or removal of an archaeological object is prohibited without a permit from P&RD. Approval of the responsible state agency, local governing body, or Indian tribe is required when the excavation or removal takes place on public land. ORS 390.235. However, the permit requirement does not apply to a person who unintentionally discovers an archaeological object on public or private property and keeps the object for personal use. ORS 358.915.

DSL is responsible for regulating "treasure-trove" exploration on state-owned lands, including exploration along the ocean shore and underneath the ocean surface. ORS 273.722. "Treasure-trove" includes money, coin, gold, silver, precious jewels, plates and bullion found hidden in a private place where the true owner is not known. ORS 273.718. However, in October 1989, the State Land Board imposed a moratorium on the issuance or renewal of treasure trove permits pending program review and possible legislative change.

Prior to the moratorium, DSL could issue permits for treasure-trove exploration and could establish permit conditions "as required under the circumstances." ORS 273.728. However, DSL did not have any standard conditions. If an individual discovered treasure trove without a permit, DSL assumed control (but not physical custody) of the goods. If the rightful owner could not be found, the goods became the property of the state. ORS 273.737. Although the finder could not recover the treasure trove itself, he could make a claim to DSL for part of the treasure trove's value. ORS 273.742.

The Highway Division and the Oregon Transportation Commission (OTC) are responsible for the state and federal highway systems, which includes Highway 101 along the Oregon

coast. ORS 366.205. According to the Plan, the Highway Division and OTC are completing a study of Highway 101's coastal corridor which will make recommendations on traffic flow improvements. Under current law, OTC and the Department of Transportation may consult with the state historic preservation officer and other groups on the rehabilitation of designated scenic or historic highways. ORS 377.105. However, no other consultation appears to be required.

Necessary Implementation Actions

The Plan's recommendations for P&RD are within its current statutory authority. ORS 390.140 requires the P&RD Director to study and appraise the recreation needs of Oregon. This directive should allow P&RD to conduct the study called for in the Plan. Furthermore, P&RD's current statutes call for it to assist in the development and coordination of recreation facilities, activities, and programs which is sufficient authority for P&RD to evaluate and identify possible marine and upland park sites and establish proposals for marine education and information programs. The Ocean Watch Site program could be established by administrative rule under P&RD's current statutory authority.

The current statutory scheme for treasure trove and archaeological resources, absent a moratorium, allows private exploration of these resources on state-owned lands. For the most complete protection of archaeological resources, ORS 358.915, 358.920 and 390.235 should be amended to prohibit any excavation along the ocean shore or on the ocean floor. A complete ban on excavation would insure that no archaeological resources are removed. Alternatively, the statutes could be amended to require OPAC approval or consistency with the Plan prior to issuing any permits.

The treasure trove statutes also need amendment in order to prohibit private exploration. One approach would be to prohibit all treasure trove permits along the ocean shore or on the ocean floor. Since permit issuance is discretionary with DSL, DSL could probably accomplish this goal through administrative rules that prohibit treasure trove permits along the ocean shore or on the ocean floor. Alternatively, the treasure trove laws could be amended to prohibit all permits along the ocean shore and on the ocean floor or to require consistency with the Plan or OPAC approval.

The preservation of Highway 101 is within the Highway Division's current authority *if* the segments under improvement consideration are designated as scenic and historic highways. For those segments, no further statutory authorization is necessary because OTC and the Highway Division are required to provide for the rehabilitation, restoration, maintenance, and preservation of those scenic or historic features whenever prudent and feasible. ORS 377.105(1). For those segments not designated, however, the Highway Division's statutory authority should be amended to require that any improvement of Highway 101 that may affect the scenic and natural resources of the Oregon coast comply with the Plan. Alternatively, OTC and the Highway Division could be required to confer with OPAC on any proposed modification of Highway 101.

E. Marine Water and Air Quality

Summary of the Plan

The Plan recommends that the appropriate state and federal agencies develop a coordinated marine water and air quality protection program that includes monitoring, marine water quality discharge and dumping standards, research, marine debris management, and improved siting standards, backup facilities and emergency procedures for municipal and industrial ocean outfalls. The Plan recommends that DEQ coordinate preparation of the program for the State of Oregon, and that ODFW provide technical assistance for the development of the program and the establishment of baseline sites to monitor marine water quality and biologic communities. The Plan recommends that DLCD assist coastal local governments in developing policies to reduce and promote public awareness about marine pollution. Finally, the Plan recommends that the Territorial Sea Plan include protective measures for marine water and air quality.

Current Jurisdiction and Administration

DEQ has broad authority to regulate water pollution. ORS 468.705. In general, it is unlawful for any person to cause pollution or discharge wastes into the waters of the state without a permit issued by DEQ. ORS 468.720 and 468.740. The regulations pertaining to those permits are set forth at OAR 340-45-005 to 340-45-075. DEQ also has authority to regulate sewage treatment systems and to review all plans and specifications for the construction, installation, and modification of those plants. ORS 454.005.-805, 468.742; OAR 340-52-005 to 340-52-050.

Acting through the EQC, DEQ has established both specific and general effluent limitations, water quality standards, and other minimum requirements for disposal of wastes, as provided in the Federal Water Pollution Control Act (Clean Water Act). ORS 468.725 and 468.735; OAR 340-41-001 to 340-41-975. DEQ has adopted specific policies, standards, and treatment criteria for several basins, including the North Coast-Lower Columbia Basin, the Mid Coast Basin, and the South Coast Basin. OAR 340- 41-202 to 340-41-215; 340-41-242 to 340-41-270 and 340-41-322 to 340-41-335.

Three agencies, DEQ, ODFW, and the Attorney General have authority to bring an action against any person responsible for the injury, death, contamination, or destruction of fish or other wildlife as a result of water pollution or violation of a pollution permit. Such person is strictly liable for the value of the fish or wildlife destroyed and any restoration costs. ORS 468.745. Neither DEQ nor ODFW has adopted administratively standards by which to evaluate the value of damaged fish and wildlife; however, ORS 496.705 provides statutory values for many species.

DEQ, acting through the EQC, may establish air purity standards and air emission standards for all of Oregon or for particular airsheds. ORS 468.295. DEQ has established a number of air emission standards for special control areas, but coastal areas are not specifically designated as such.

OAR 340-21-010. However, DEQ has established standards for municipal waste incinerators that apply specifically to coastal areas. OAR 340-21-027. DEQ has also established general gaseous emission standards for sulphur-content fuels, sulphur dioxide, and volatile organic compounds that apply throughout the state. OAR 340-22-005 to 340-22-300. Finally, DEQ has set ambient air quality standards that apply throughout the state. OAR 340-31-005 to 340-31-130.

DEQ is also required to prepare a comprehensive air pollution abatement plan for any area of the state "in which air pollution is found already existing or in danger of existing." ORS 468.305. DEQ is also authorized to require permits for air contamination sources by type of air contaminants, by type of air contaminant source, or by area of the state. ORS 468.065 and 468.310. Moreover, DEQ may review construction plans and specifications for any new air contaminant sources and may deny approval for failure to meet established air quality standards. ORS 468.325. DEQ may grant variances from the air contamination rules and standards or may delegate that authority to local governments. ORS 468.345. DEQ has adopted administrative rules implementing these provisions. OAR 340-20-001 to 340-20-320.

Necessary Implementation Actions

DEQ's current legislative authority is broad enough to allow it to develop and coordinate the marine water and air quality protection program recommended by the Plan. DEQ can implement the program by establishing the Ocean Stewardship Area as a specific airshed under ORS 468.295. DEQ can then adopt specific policies, standards, and treatments for the area. DEQ may want to incorporate current rules that are specific to coastal areas into the marine water and air quality protection program (e.g., the standards for municipal waste incinerators).

ODFW also has sufficient statutory authority to provide technical assistance and to establish baseline monitoring sites for the program. Under ORS 496.146(11), ODFW may enter into contracts with any person or governmental agency for the development and encouragement of wildlife research and management programs and projects. Furthermore, ODFW, acting through OFWC, has authority to implement state wildlife policies and programs. ORS 496.138.

F. Oil and Gas Development

Summary of the Plan

The Plan recommendations regarding oil and gas leasing are organized in recognition of the distinction between state and federal waters. In addition, the Plan recommendations with regard to state waters contain both a majority and a minority position.

In state waters, the majority recommendation is to prohibit all oil and gas exploration and development. The minority position recommends consideration of exploration and development activities that do not adversely affect the ecological integrity and beneficial uses of these waters. The minority recommendation calls for inventories of inshore and continental shelf areas, to develop a better understanding of the resources and potential impacts.

In federal waters, the Plan calls upon the Secretary of the Interior to cancel Lease Sale No. 132. (Since the Plan was written, Lease Sale No. 132 has been cancelled.) The Plan also recommends that the state oppose any federal lease sale until certain conditions are met, including: consideration of energy alternatives; consideration of tribal rights; environmental studies recommended by OPAC; consideration of onshore impacts; exclusion of identified special management areas; development and adoption of an oil spill presentation and response plan; development of damage assessment stand-

ards and protocols; establishment of a compensation program; and compliance with all state environmental standards. The Plan recommends that Oregon participate in the Pacific Northwest OCS Task Force. Finally, the Plan calls upon Congress to review and revise the Outer Continental Shelf Lands Act to give priority consideration to renewable resources and to include coastal states as full partners in all management decisions.

Current Jurisdiction and Administration

1989 Or Laws, ch 895, section 5 establishes a six-year moratorium on any form of leasing for exploration, development, or production of oil, gas, or sulphur within the territorial sea. The moratorium does not apply to exploration for academic research purposes or geologic survey activities conducted by DOGAMI.[3] When the moratorium ends, 1989 Or Laws, ch 895 requires that any exploration for oil, gas, or sulphur in the territorial sea conform to the standards of the Plan.

The following is a summary of the statutory and administrative framework applicable to oil, gas, and sulphur exploration and development (both within and outside of the territorial sea). However, the effect of the moratorium is the suspension of this statutory scheme, as it pertains to oil and gas leasing, within the territorial sea.

Prior to the moratorium, DSL had authority to dispose of oil, gas, and sulphur under state tidal submerged and submersible lands. ORS 274.710(2). DSL also had authority to issue oil and gas leases underlying the ocean shore. ORS 274.710(3)(b). DSL could grant easements on state-owned lands to aid in the extraction and transportation of oil, gas, or sulphur from state, private, and federal lands. ORS 274.710(3)(a).

DSL's general powers and duties require it to give due consideration to the protection and conservation of all natural resources when selling, exchanging, or leasing any lands under its control. ORS 273.051(2)(b). Furthermore, leasing must be carried out in conformance with Goal 19. ORS 197.250. Goal 19 requires state and federal agencies to provide that extraction of materials from or discharge of waste products into or affecting the territorial sea do not substantially interfere with, or detract from, the use of the continental shelf for fishing, navigation, recreation, or aesthetic purposes, or from the long-term protection of renewable resources.

ORS 274.755 requires DSL to hold a public hearing before granting an easement or offering lands for leasing. In granting the easement or lease bidding, DSL must consider whether the easement or lease would:

1) be detrimental to the health, safety and welfare of the affected persons;

2) interfere with residential or recreation areas;

3) destroy, impair or interfere with the affected area's scenic value;

4) create any pollution;

5) substantially endanger marine life or wildlife;

6) substantially interfere with commerce or navigation; and

7) protect state lands from drainage of oil and gas. DSL must also consult with DOGAMI, ODFW, and any other interested agencies, boards, and commissions regarding the provisions contained in the leases. ORS 274.280(1).

Submerged and submersible lands lying more than ten miles east of the 124th West Meridian are subject to leasing under ORS 273.551. That section authorizes DSL to execute leases upon conditions agreed upon by DSL and

3 An "academic research purpose" was not defined by the legislature, although it presumably includes research conducted by academic insstitutions and public agencies.

the lessee, after consultation with DOGAMI and any state agency acting for the State of Oregon with respect to surface rights in the subject land. The leases have no time limitation, but the lessee must diligently prospect, develop, or operate the well.

DSL has adopted rules for leasing state-owned submerged and submersible lands. OAR chapter 141, division 82. The rules cover the lease application requirements and the actions DSL must take in reviewing and considering a lease application. OAR 141-82-015 and 141-82-020. The rules also outline the lease terms and rates. OAR 141-82-030 and 141-82-032. DSL may reject any application for a use which is contrary to local, state, or federal law, or which would result in an unreasonable interference with the public rights of navigation, fishery, and recreation. OAR 141-82-025.

DSL also has rules relating to statutory and non-statutory easements and to existing facilities without an easement that are on, under, or over state-owned submerged and submersible lands. OAR chapter 141, division 83. Easements must include a number of conditions, unless DSL determines that a particular condition is inappropriate. The conditions require:

1) public access to navigable waters must be maintained and/or restored upon completion of construction or maintenance of the facility for which the easement is granted;

2) any effluent discharged from any pipeline or outfall must comply with applicable water quality standards; and

3) any fill or removal activity requires a fill or removal permit. OAR 141-83-360.

In addition to a lease for oil and gas development pursuant to ORS 274, ORS 520.025(1) requires a permit from DOGAMI prior to drilling or using any oil or gas well. A permit is required for drilling, redrilling, deepening, or reworking any well. OAR 632-10-010. ORS 520.055 and OAR chapter 632, division 10 require DOGAMI to oversee drilling practices and insure that they are carried out in a safe and efficient manner. DOGAMI also maintains certain records on oil and gas exploration and drilling. ORS 520.095(2); OAR 632-10-017, 632-10-018, 632-10-142, 632-10-144, 632-10-166, 632-10-194, 632-10-196, and 632-10-198. (Although these rules are generic in nature, DOGAMI believes that they apply as well to offshore wells, should development occur.) Finally, DOGAMI has authority to monitor and prevent waste of oil and gas. ORS 520.045.

Once a well-site is established, it would require a number of onshore support facilities (e.g., drilling rigs, pipelines, refineries, and storage tanks). These facilities may require a number of state permits. First, if the developer needs to fill any waters of the state or remove any material from the bed or banks of any waters, the facility will require a fill and removal permit from DSL. ORS 196.810(1). DSL issues permits only if the proposed fill or removal will not be inconsistent with the protection, conservation, and best use of water resources. ORS 196.825(1)-(2). DSL must consider a number of factors in determining whether a permit should be issued, such as the availability of alternatives and whether the proposed fill conforms to sound conservation policies. ORS 196.825(3). Furthermore, DSL may issue permits for a "substantial" fill in an estuary for a nonwater dependent use only if the fill is for a public use and would satisfy a public need that outweighs harm to navigation, the fisheries, and recreation. ORS 196.825(4). Finally, DSL may condition the fill or removal permit. ORS 196.825(5).

DSL has adopted rules governing the administration, enforcement, and control of fill and removal permits. OAR chapter 141, division 85. The rules detail the application requirements, the renewal process, and the application review process. OAR 141-85-025 to 141-85-035. The rules also set out specific factors that DSL must consider prior to issuing a fill or removal permit. OAR 141-85-045 and 141-85-050. Finally, the DSL rules set out a policy relating to es-

tuarine mitigation, which is required as a condition of any permit to fill or remove material from any intertidal or tidal marsh area of any estuary. ORS 196.830; OAR 141-85-240 to 141-85-248.

Onshore support facilities may also require an easement from DSL. *See* discussion *supra*; ORS 274.710(3)(a); OAR chapter 141, division 83. Oil and gas pipelines that are at least six inches in diameter and five or more miles in length are defined as an energy facility under ORS 469.300(1)(e)(A) and require a site certificate from the EFSC. ORS 469.320(1). EFSC has not adopted rules relating to six-inch oil and gas pipelines. EFSC has adopted rules relating to natural gas pipelines that are greater than sixteen inches, OAR chapter 345, division 125, but those rules do not apply to pipelines used to transport oil. OAR 345-125-025(6).

Pipelines, cable lines, and other conduits across and under the ocean shore and the submerged lands adjacent to the ocean shore also require a permit from P&RD. ORS 390.715(1). Permits are subject to conditions that insure the safety of the public and the preservation of economic, scenic and recreational values. ORS 390.715(3). The P&RD rules relating to pipeline placement require the agency to consider:

> 1) the public need for healthful, safe, aesthetic conditions; the natural resources of the area, and the need for conservation and development of those resources;
>
> 2) the physical characteristics and suitability of the area;
>
> 3) the land uses and improvements in the area; and
>
> 4) the need for recreation and access. OAR 736-20-040(3).

Prior to issuing a permit, P&RD must circulate the application to ODFW, DOGAMI, the Health Division, DSL, and other appropriate state agencies for comments and recommendations. OAR 736-020-040(4). P&RD may require liability insurance for potential property damage or personal injury and may require the permittee to change the pipeline's location or installation if a change in the physical characteristics of the state recreation area, ocean shore or submerged lands renders the pipeline hazardous or detrimental to the preservation of the ocean shore's economic, scenic, and recreational value.

All state permits must comply with Goal 19 under ORS 197.250. Each responsible agency must review applications for consistency with Goal 19 and any applicable rules. DLCD has not yet promulgated rules under Goal 19.

Necessary Implementation Actions

With regard to state territorial waters, the Plan's majority recommendation to prohibit oil and gas exploration and development would require a substantial change in the current legislative and administrative scheme. Simply put, the moratorium established under 1989 Or Laws, ch 895 would need to be made permanent. The following statutes also would need to be repealed: ORS 274.710 (DSL's statutory authority to dispose of and use leases for oil and gas under state tidal lands); ORS 273.551 (allowing leasing of submerged and submersible lands lying more than ten miles east of the 124th West Meridian); OAR chapter 141, division 82 (relating to leasing state-owned submerged and submersible lands); and ORS 520.025(1) (requiring a DOGAMI permit prior to drilling or using an oil or gas well). *See* prior discussion for a more thorough analysis of these statutes.

Under the Plan's minority recommendation, the above-listed statutes would need modification rather than repeal. ORS 274.710 should be modified to allow DSL to dispose of oil and gas under state lands only if consistent with the Plan and the Territorial Sea Plan. In addition, the statute should be amended to require DSL to seek approval from OPAC prior to issuing a lease or offering lands for lease bidding. (Alternatively, DSL might be required to make a

specific finding that the proposed lease or lease bidding is consistent with the Plan and the Territorial Sea Plan.)

Under the minority recommendation, ORS 273.551 should be amended to allow leasing or lease bidding only if consistent with the Plan and the Territorial Sea Plan. Similarly, OAR chapter 141, division 82 would need amendment to require either OPAC approval or a DSL determination that the proposed lease or lease bidding is consistent with the two plans. The fill and removal laws, ORS 196.800-.905, would also need amendment to require consistency with the plans or OPAC approval. ORS 520.025(1) would not need amendment under the minority's proposal.

The Plan does not address sulphur in the oil and gas section. Therefore, under the current statutory scheme, DSL could dispose of sulphur under state tidal lands. ORS 274.710(2).

G. Oil Spills

Summary of the Plan

The Plan recommends that every effort be made to prevent and plan for a coastal oil spill. To accomplish this, the Plan recommends that Oregon:

1) emphasize spill prevention strategies;

2) commit sufficient resources to maintain ongoing spill response activities;

3) promote industry efforts to insure that equipment and trained personnel will be immediately available in the event of a spill;

4) ensure that any party engaging in petroleum exploration, production, storage, or transport in or near Oregon waters develops and acquires approval for oil spill contingency plans;

5) coordinate with other coastal states to encourage Congress to amend federal laws to remove limitations on spill liability and to designate the U.S. Coast Guard as the sole federal agency responsible for reviewing industry spill prevention and response plans; and

6) include Oregon's coastal oil spill prevention and response plan in the Territorial Sea Plan.

Specific responsibilities among agencies are assigned as follows. First the Plan recommends that DEQ work with other states, state and federal agencies, industry representatives and Oregonians to: 1) develop and update existing spill contingency plans; 2) ensure that oil spill contingency plans identify spill prevention strategies; 3) identify specific spill response actions (e.g., wildlife rehabilitation centers, volunteer management, and oily debris disposal); 4) develop a policy for the use of dispersants and other oil reactive agents; 5) develop a comprehensive damage assessment strategy; and 6) seek continued funding and industry commitment to develop and maintain response capabilities.

The Plan also requires OPAC to incorporate major elements of the coastal oil spill prevention and response plan into the Territorial Sea Plan. With the assistance of the Oregon Attorney General, OPAC is also required to investigate the need, feasibility, and legality of requiring bonding to engage in offshore oil and gas exploration and development. Finally, the Plan recommends that the Territorial Sea Plan include policies and standards for oil spill contingency plan requirements, the use of dispersants, liability limits, damage assessment, and

compensation.

Current Jurisdiction and Administration

In 1989, the Oregon Legislature enacted two bills concerning oil spills along the Oregon coast. Under the current statutory framework, it is unlawful for oil to enter the waters of the state from a ship, a fixed or mobile facility, or any offshore or onshore installation. ORS 468.785(1). Any ship over 300 gross tons that transports oil in bulk as cargo and uses any port or place in Oregon waters must provide financial assurance for any spill costs, penalties, and damages. ORS 468.825. Any person owning or controlling oil that spills into waters of the state is responsible for its immediate removal or, alternatively, for any costs incurred by DEQ in removing the spill. ORS 468.795. DEQ has promulgated rules governing the reportable quantities, cleanup standards, and required actions for oil spills. OAR 340-108-001 to 340-108-080.

Any person owning or controlling oil that spills into the waters of the state is also strictly liable for any damage caused by the spill unless

1) the person has a permit for discharging oil from DEQ, or

2) the person can prove that the spill was caused by an act of God, by the negligence of the federal government, or by an act or omission of a third party. ORS 468.790. The statutes governing water pollution also impose strict liability on anyone responsible for damage to fish, wildlife, or its habitat due to water pollution from an oil spill. ORS 468.745. Both DEQ and ODFW have authority to bring actions to recover damages for fish and wildlife.

In addition to liability for damages caused by an oil spill, any person who wilfully or negligently causes or permits the discharge of oil can be assessed an additional civil penalty by DEQ. ORS 468.817. These penalties are deposited into an Oil Spillage Control Fund, which may be used to carry out cleanup activities and to rehabilitate fish and wildlife. ORS 468.819. The state also requires financial assurance for ships that transport oil and other hazardous material in the waters of the state. ORS 468.823-.829.

DEQ is responsible for developing an oil spill response plan for spills in the Columbia and Willamette Rivers and the coastal waters and estuaries of the state. ORS 468.831. Annex O of the Oregon Emergency Operations Plan and the spill response contingency plans for Oregon's three deep draft development estuaries (Columbia River, Yaquina Bay, and Coos Bay) constitute the current response plan. In addition, Oregon is a member of the EPA's Regional Response Team for Region 10. The Team coordinates the spill response activities of thirteen federal agencies.

Goal 19 of the Oregon land use planning goals provides that oil spillage regulation by DEQ is of special concern. Goal 19 requires DEQ and other agencies to provide that the discharge of wastes (e.g., oil) does not substantially interfere with or detract from the use of the continental shelffor fishing, navigation, recreation, aesthetic purposes, or the long-term protection of renewable resources. Goal 19 also calls for the establishment of contingency plans and emergency procedures in the event of a spill that threatens to damage the environment. LCDC has not yet promulgated rules under Goal 19.

Necessary Implementation Actions

The Plan's recommendation that any party engaging in petroleum exploration, production, storage or transportation develop an oil spill contingency plan would require new legislation, because no statutory authority currently exists for DEQ to require such plans. Such legislation should:

1) require all parties engaging in exploration, production, storage, or transportation

to submit a contingency plan to DEQ;

2) establish standard elements for an adequate contingency plan or confer authority on DEQ to establish the elements of an adequate plan; and

3) require each party to receive DEQ approval prior to engaging in these activities. If such legislation is enacted, DEQ would need to adopt rules by which to evaluate contingency plans.

The Plan recommends several other tasks for DEQ, most of which DEQ is already required to undertake. Under current legislative authority, DEQ is required to develop an integrated, interagency response plan for state coastal waters and estuaries that includes response strategies. ORS 468.831-.832. This plan could easily include the response actions and dispersant policy recommended by the Plan. Thus, no new legislative authority is needed. The Plan also requires DEQ to develop an assessment strategy. Since both DEQ and ODFW have authority to bring actions to recover damages for fish and wildlife pursuant to ORS 468.745, both agencies should be involved in the development of the assessment strategy and rules.

The remaining Plan recommendations, that DEQ seek continued funding and industry commitment to develop and maintain response capabilities, require no legislative or administrative rule changes.

H. Marine Minerals

Summary of the Plan

The Plan recommends that the Territorial Sea Plan and the process of preparing that Plan be used as an opportunity to clarify state policies and programs on marine minerals. The Plan provides that the Territorial Sea Plan should include a research program, policies and criteria for administrativerules to guide any commercial exploration. The Plan identifies two areas that should be off limits to commercial mineral exploration and development: "Important Fishery Areas" so designated in the Territorial Sea Plan and areas within three miles of sensitive offshore rocks and islands.

Until these "Important Fishery Areas" are designated in the Territorial Sea Plan, the Plan's majority recommendation is that *all* exploration and development within three miles of all nearshore rocks and islands, except for academic and public agency scientific research related to marine minerals, be prohibited. Moreover, research activities should only be allowed if they will not adversely affect sensitive marine bird or mammal populations or habitats, as determined by ODFW.

The Plan also recommends that DSL take steps to implement a five-year moratorium on exploration contracts currently authorized by ORS 274.611-.640, and that if DSL adopts rules to carry out ORS 274.611-.640, DSL should provide for a Project Review Panel, with ODFW as the lead agency, to review and approve an inventory and environmental effects assessment under Goal 19. In addition, the Plan recommends amendment of ORS 274.611-.640 to clarify that an exploration contract does not confer proprietary rights to minerals found and does not obligate the state to proceed with any steps toward mineral leasing and development.

The Plan recommends that LCDC adopt rules under Goal 19 that require an inventory and effects assessment prior to any commercial

exploration contracts. The Plan would also require that a proposed exploration plan, if approved by appropriate state and federal agencies, contain necessary terms, conditions, and stipulations to avoid significant adverse impacts from exploration activities.

Finally, the Plan calls on the Governor to work for legislation requiring coordination with state ocean resources programs prior to committing public resources to private development.

The Minority recommendation, in contrast, is that:

1) DSL, in cooperation with DOGAMI and ODFW, should develop a comprehensive research plan designed to determine the costs and benefits of marine mining; and

2) Oregon should postpone a proposed minerals research program scheduled for the summer of 1990 until a comprehensive research program is adopted.

Current Jurisdiction and Administration

DSL has jurisdiction over exploration permits and leases for all mineral and geothermal resources owned by the state. ORS 273.780. Under ORS 274.611-.640, DSL has explicit authority to enter into "contracts for exploration of hard minerals on state-owned submersible and submerged lands within the territorial sea and navigable bays that are subject to the jurisdiction of the division." ORS 274.615. "Hard minerals" include natural deposits of minerals such as gold, silver, copper, lead, iron, manganese, silica, chrome, platinum, tungsten and zirconium, *but not* oil, gas, or sulphur. ORS 274.611.

Exploration contracts are required to contain provisions necessary to protect the interests of the state and to prevent adverse effects on people, nearby residential or recreation areas, aesthetic and scenic values, and marine life. ORS 274.635(1). In developing contract provisions, DSL is to consult with DOGAMI, ODFW, DLCD, and other interested agencies, boards, and commissions. However, the current statutory scheme does not require consultation on individual contracts. Instead, DSL must consult on the "form" provisions it establishes by administrative rule. To date, DSL has not adopted any rules governing exploration contracts for hard minerals on submerged and submersible lands.

Leases for marine mineral development are also under the jurisdiction of DSL. In order to execute a lease or contract, DSL must consult with DOGAMI and get concurrence from "any state agency acting for the state with respect to surface rights in the subject land." ORS 273.551(1). However, DSL cannot enter leases for development of marine minerals until the Territorial Sea Management Plan is developed and approved by the State Land Board. ORS 274.640(7)(c). Currently no explicit permit process exists for consideration of the environmental and reclamation aspects of offshore mining.

Necessary Implementation Actions

The Plan recommends that DSL take action to "make clear" that ORS 274.611-.640 will not be implemented for at least five years, and essentially calls on DSL to institute a five-year moratorium on marine mineral exploration. DSL arguably may have authority to implement this recommendation under ORS 273.780, which provides that state-owned mineral and geothermal resource rights "shall be subject to exploration permit or lease by the Division of State Lands, in accordance with rules and conditions established by law or adopted by the division." However, the "shall be subject to exploration permit or lease" language is troubling because it implies that mineral resources are available by law. DSL may condition the exploration permits or leases, but this statutory provision does not seem to give DSL the authority to place a moratorium on exploration permits and leases. Thus, legislative clarification would be helpful.

Under ORS 274.611-.640, however, DSL has considerable discretion in allowing marine mineral exploration. DSL "may" enter into contracts for exploration of hard minerals on state-owned submerged and submersible lands. ORS 274.615. This section allows DSL to deny any and all marine mineral exploration contracts. In addition, "[w]henever it appears advisable to the division to offer submersible and submerged lands for exploration contracts," DSL shall give public notice and invite public bids on the proposed contract. ORS 274.620. This section implies that DSL may find it inadvisable to offer submersible and submerged lands for exploration contracts. Thus, DSL may choose not to offer any lands for public bid, thereby imposing a moratorium.

Nevertheless, any person may request in writing that DSL make lands available for exploration. *Id.* Once a request is made, DSL must give written notice and hold a public hearing, after which the division determines whether an invitation for contract bidding would be in the public interest. In making its determination, DSL must consider whether the proposal is consistent with the statewide planning goals and the potential impacts on the surrounding area. ORS 274.625.

Public requests to make lands available for marine mineral exploration and the subsequent public hearings may hinder DSL's ability to place a moratorium on marine mineral exploration. DSL may be forced to justify its moratorium decision in several public hearings, depending on the number of public requests the division receives. A more effective and efficient means of placing a moratorium on marine mineral exploration contracts therefore would be through a legislatively imposed moratorium, eliminating the possibility of public requests to make lands available.

The Plan also calls on DSL to provide for Project Review Panels (PRPs) should it adopt administrative rules to carry out ORS 274.611-.640. The PRPs would review and approve an inventory and environmental effects assessment, which would be required under Goal 19. *See* discussion on DLCD *infra*. Under the current statutory scheme, DSL is not required to consult with other agencies such as ODFW prior to issuing a marine mineral exploration contract, but nothing prevents the agency from adopting this approach by administrative rule.

The Plan recommends amendment of OAR 274.611-.640 to clarify that an exploration contract does not confer proprietary rights to minerals found and does not obligate the state to proceed with any steps toward mineral leasing and development. ORS 273.780(3) provides that state-owned mineral and geothermal resource rights "shall be retained by the state in the absence of a finding by the State Land Board upon adequate facts presented to it that their sale or exchange is for the purpose of obtaining the greatest benefit for the people of this state, consistent with the conservation of lands under its jurisdiction under sound techniques of land management." This section seems to address the Plan's concern - the presumption under this section is that the state retains all property interest in marine minerals unless the State Land Board explicitly decides otherwise.

However, ORS 274.640(7) provides that an exploration contractor may request a lease from DSL and that the contractor has a preference right to negotiate a development lease, provided that the development is consistent with the Territorial Sea Plan. This section may imply that an exploration contract confers a right to obtain a development lease as long as development is consistent with the Territorial Sea Plan. Subsection (6), which allows the contractor and DSL to agree to subsequent terms in any development lease entered into under subsection (7), reinforces the implication. ORS 274.640(6). At a minimum, therefore, these two subsections need revision and clarification.

The Plan recommends that LCDC adopt administrative rules under Goal 19 that require an inventory and effects assessment prior to

DSL granting any commercial exploration contracts. Goal 19 requires local governments and state and federal agencies that implement plans or carry out projects or activities affecting ocean resources to develop inventory information necessary to understand the impacts of the proposed activity. LCDC has not yet adopted Goal 19 rules, but rules that require an inventory and effects assessment would be consistent with Goal 19.

III. Tools for Governing

A. Territorial Sea Plan

1987 Or Laws ch 576, section 15 requires the State Land Board to adopt a management plan for the resources and uses of the submerged and submersible lands of the state territorial sea (the Territorial Sea Plan). The Territorial Sea Plan is required to be consistent with the purposes of the Oregon Ocean Resource Management Act, ORS 196.405-.505, and the policies and recommendations of the Plan. The State Land Board must adopt the Territorial Sea Plan by July 1, 1991.

However, the Plan recommends that the scope of the Territorial Sea Plan be expanded, to cover marine bird and mammal habitat areas, Intertidal Marine Gardens, marine air and water quality, oil spill responses, leases for cultivating and harvesting marine plants and animals, artificial reefs, recreation and cultural resources, dredged material disposal, and marine minerals. The Plan also recommends that the legislature extend the preparation time for the Territorial Sea Plan and provide budget support for the plan process.

To implement the recommendations for the Territorial Sea Plan, the Oregon legislature will need to amend 1987 Or Laws ch 576, section 15. The amendment should specify the issues to be addressed in the Territorial Sea Plan, expand the preparation time, and require the State Land Board to coordinate with OPAC in preparing the plan.

B. The Ocean Policy Advisory Council (OPAC)

1987 Or Laws ch 576 required that the Plan include recommendations for a permanent ocean resources planning and management process. Specifically, the Task Force was to consider options for an advisory coordinating body, advisory committees, and a process for updating and amending the Plan. ORS 196.495(7). In responding to that task, the Plan recommends that the Oregon legislature establish a "broadly representative policy advisory council," known as OPAC, to be coordinated by DLCD. The Plan recommends that OPAC:

1) coordinate preparation of the Territorial Sea Plan;

2) provide a permanent forum for discussing ocean resource policy, planning and management issues;

3) recommend improvements to the Plan and the Territorial Sea Plan as needed;

4) offer advice to the Governor, State Land Board, state agencies, and local governments on specific ocean resource management issues;

5) coordinate interagency and intergovernmental review of specific ocean resource projects or actions through Project Review Panels; and

6) encourage federal agency participation.

The Plan recommends that OPAC be composed of: the Governor (or his designee), three "at large" representatives, a conservation or environmental organization representative, a coastal county commissioner, the director of the Oregon Coastal Zone Management Association, a tribal representative, a representative from each of five ocean user groups, and the directors of interested state agencies (DEQ, ODFW, DOGAMI, DSL, P&RD, DLCD, and the Department of Agriculture).

Legislation is required in order to establish OPAC. Such legislation should specify OPAC's duties in implementing the Plan and developing and implementing the Territorial Sea Plan. The legislation should also specify issues OPAC should address, particularly those identified in the Plan itself (e.g., Intertidal Marine Gardens, ocean fisheries, marine birds and mammals, and oil spills), and outline the powers of OPAC (e.g., authority to establish Project Review Panels). Finally, OPAC should be given authority to adopt administrative rules necessary to implement its duties.

C. Project Review Panels (PRPs)

Under the current statutory and regulatory scheme for ocean resources, several agencies have responsibility for reviewing proposals to use different resources. *See* Part II. Coordination between the agencies varies, depending on the resource. To improve coordination, the Plan recommends that OPAC be given authority to establish Project Review Panels (PRPs). These panels would not have any independent authority, but would act as an advisory body to the agencies responsible for reviewing a particular proposal. If an agency elected not to accept the recommendation of a PRP, the Plan recommends that the agency be required to pro-

vide OPAC with written findings and conclusions to support its position.

PRPs would be established at the request of a state agency or local government, or on the recommendation of OPAC; however, the Plan recommends that PRPs not be used when the action under consideration is included in a fisheries management plan.

Legislation is necessary to authorize the establishment of PRPs and give OPAC authority to appoint the panels. In addition, legislation is necessary to require state agencies to either adopt PRP recommendations or provide written findings that justify their rejection of the recommendations. Once OPAC is established, it will need to adopt regulations concerning the criteria for appointing PRPs.

D. Coastal Local Governments

Under ORS 197.175, cities and counties are responsible for preparing comprehensive plans in compliance with the nineteen statewide land use planning goals established by LCDC. Once LCDC has acknowledged a comprehensive plan, the local government is responsible for implementing its plan through the enactment of land use ordinances. Prior to LCDC acknowledgement of their comprehensive plans, local governments are to make land use decisions in compliance with the nineteen goals. Thus, local governments have an important role in implementing the statewide land use planning goals.

The Plan recommends that local governments be represented on OPAC and PRPs as appropriate. Local governments will need to review their comprehensive plans for consistency with Goal 19 (Ocean Resources) and any rules promulgated by LCDC. Furthermore, the Plan calls for legislation providing local governments and Indian tribes, where appropriate, with a share of revenues derived from any future offshore development of oil, gas, or minerals.

To implement these recommendations, any legislation creating OPAC and PRPs will need to require local government representation. In addition, new legislation is required to give local governments a share of revenues derived from oil, gas, or marine mineral exploration or development. (Under current law, the proceeds from state-owned mineral and geothermal resource rights accrue to the Common School Fund unless other disposition is required by federal law. ORS 273.780-.785. The Oregon Constitution also dedicates the proceeds from any tax or excise levied on the extraction, production, storage, use, sale, distribution, receipt, or ownership of oil and natural gas to the Common School Fund. Or. Const. art. VIII, section 2(1)(g). If a royalty payment is an excise on oil or gas production, the Plan's recommendation to distribute royalties to local governments may require a constitutional amendment rather than a legislative amendment.)

IV. Indian Issues

Indian tribes have a unique interest in ocean uses and resources off the Oregon coasts. However, the issues of which tribes may have rights and what those rights are has not been clearly defined, and are beyond the scope of this paper. The Oregon coastal tribes of which we are aware include the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, the Confederated Tribes of Siletz, and the Coquille Tribe. Their range of interests can be briefly summarized as follows:

1) a tribe in close proximity to the coast may have an interest in decisions affecting the Oregon coast because of land ownership or a tribal right to ocean resources;

2) a tribe with only an interest in resources from the ocean (e.g., anadromous fish, oil and gas royalties, tourism, or archaeological resources) may have a potential interest in the decisions affecting ocean resource management;

3) other tribes with salmon fishing rights along Oregon rivers other than the Columbia River may also have an interest in ocean resource management.

Once the potentially affected tribes are identified, the next step is to ascertain what, if any, rights a tribes may have. Tribal rights can stem from four sources:

1) aboriginal title;

2) a treaty;

3) a federal statute; or

4) executive order.

To have a treaty-based or executive order based right, a tribe must have a ratified treaty or executive order with the United States that recognizes the particular right. (The right need not be express in the treaty because treaties are interpreted as the tribes would have understood them. Thus, a right may be implied from the treaty.) However, the Oregon coastal tribes of which we are aware do not have ratified treaties. *See Coos Bay, Lower Umpqua, and Siuslaw Indian Tribes v. United States*, 87 Ct. Cls. 143 (1938).

To establish aboriginal title, Indian tribes must prove actual, continuous, and exclusive possession of the land. If several tribes commonly traveled on the land, none of the individual tribes will have aboriginal title. In the *Coos Bay* case, for instance, the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians were not able to prove aboriginal title to their lands because of their "intimate contacts" with other tribes. *Id.* at 153. Since those Tribes were not

able to establish aboriginal title to their lands, it is unlikely that they could establish an aboriginal right to hunting and fishing rights because the burden of proof for an aboriginal right is the same as for an aboriginal title to land. The aboriginal rights of the other coastal tribes may be subject to a similar limitation.

A final potential source of tribal rights is by congressional action. The statutes recognizing the Oregon coastal tribes, however, do not affect the tribes' hunting and fishing rights. *See, e.g.*, 25 U.S.C. 714 (Confederated Tribes of Coos, Lower Umpqua and Siuslaw). Thus, federal statutes will probably not be a source of tribal claims with respect to the Oregon coast. A more thorough analysis of these issues is needed.

DAVE FROHNMAYER
ATTORNEY GENERAL

JAMES E. MOUNTAIN, JR.
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

PORTLAND OFFICE
1515 SW 5th Avenue
Suite 410
Portland, OR 97201
Telephone: (503) 229-5725
FAX: (503) 229-5120

MEMORANDUM

DATE: October 18, 1990

TO: Susan Brody, Director

Eldon Hout
Program Manager
Ocean Resources Program
Department of Land Conservation
and Development

FROM: Cheryl Coodley
Assistant Attorney General

SUBJECT: Obligation of State Agencies to Implement the Oregon Ocean Resources Management Plan

INTRODUCTION

You have asked for an analysis of the impact of the Oregon Ocean Resources Management Plan ("the Plan") on state agencies, specifically in terms of their obligation to implement the Plan. As you know, the Oregon Ocean Resources Management Act ("the Act") did not change any statutorily or constitutionally mandated responsibility of any state agency. ORS 196.435(3). Thus the questions become (1) to the extent that an agency can act consistently with the Plan without running afoul of its other statutorily or constitutionally mandated responsibilities, is an agency obligated to do so? (2) If the answer is in the affirmative, does "acting consistently" mean that an agency must affirmatively implement all of the recommendations of the Plan, or only that it must not, through existing programs, act inconsistently?

SHORT ANSWER

Based on the language of the Oregon Ocean Resources Management Act, as well as ORS 197.180, to the extent that agencies can constitutionally and statutorily act consistently with the Plan, they are obligated to do so. However, this does not mean that agencies are obligated to elevate Plan recommendations over other statutory priorities, and an agency need not implement new programs recommended by the Plan.

DISCUSSION

The legislature clearly intended that the State of Oregon develop a program of ocean resources management to promote and insure coordinated management of living and non-living marine resources. See ORS 196.415(7). To accomplish that goal, the Act established a coordinated program of ocean resource planning and management, known as the Oregon Ocean Resources Management Program (Program). The Program includes:

1) The existing Oregon Coastal management program, approved by the U.S. Secretary of Commerce on July 7, 1977;

2) Statutes, programs and policies of state agencies which apply to coastal zone resources; those elements of acknowledged local plans which may be affected; planning goals which relate to conservation and development of ocean and coastal resources and the planning and management of land use activities which may be affected;

3) The Plan; and

4) State agency coordination requirements.

The Act sets out a series of specific expectations for the Plan, including:

1) It shall be compatible with acknowledged comprehensive plans of adjacent coastal counties. See, ORS 196.465(1);

2) It shall be reviewed and adopted by LCDC, based on findings that the Plan carries out the policies of the Act, is consistent with applicable statewide planning goals, and is compatible with adjacent county local comprehensive plans. See, Sections 14, 15, ch. 576, Or. Laws 1987;

3) It shall become a part of state agency programs, either through incorporation by reference in a state agency coordination program or, if an agency chooses not to incorporate the Plan, through goal findings. See, ORS 196.485.

As noted above, the Act offers state agencies two options for implementing the Plan into their programs and rules. See, ORS 196.485. An agency may implement the Plan through its SAC program and use the SAC process to do so. ORS 196.485(1). Alternatively, an agency may choose not to incorporate the Plan into its SAC program, but the Act makes clear that if an agency so chooses, the agency is still subject to ORS 197.180 and the requirement of making goal findings for all of its programs, procedures and standards that in any way affect ocean resources. Moreover, the Act specifically states that state agency programs or rules for management of ocean resource or ocean uses shall be consistent with the Plan. ORS 196.485(2).

Thus, two separate provisions in the Act strongly suggest that state agencies are obligated to act in a manner consistent with the Plan. First, the Act itself contains ample legislative findings to suggest that coordinated agency management and programs were the very goal of the Act. Second, state agency coordination requirements, both through ORS 197.180 and in ORS 196.485 obligate agencies to act consistent with all statewide planning goals[1] and with the Plan.

---

[1] Of course, the state agency coordination referenced in ORS 196.485 is merely a restatement of the state agency coordination required by ORS 197.180. State agencies are obliged to comply with statewide planning goals. ORS 197.180. See, Audubon v. Department of Fish and Wildlife, 67 Or App 776 (1984). LCDC has adopted rules which set forth how state agencies are to fulfill that obligation. OAR 660, divisions 30, 31. What the rules and statutes make clear is that because state agencies are statutorily obliged to comply with statewide planning goals, they are obliged to amend state agency programs or rules in order to be consistent with the goals.

Assuming then that agencies are obligated to act consistently with the Plan, what does this mean? Certainly it means that agencies may not, through existing programs and rules, act inconsistent with the Plan (once it is approved by LCDC). See, ORS 196.485(2). Moreover, ORS 196.485(2) specifically directs that agency programs or rules for the management of ocean resources or uses shall be consistent with the Plan, suggesting that existing programs and rules should be amended, if necessary, to achieve consistency.[2]

But agencies need not use limited budgets and staffing to carry out new programs recommended in the Plan. No language in the Act indicates that it was intended to elevate priorities identified in the Plan over other statutorily or constitutionally mandated responsibilities. See, ORS 194.435(3). Indeed, ORS 194.435(3) can be read to the contrary. If the legislature decides to elevate Plan recommendations to priorities for agencies, this can be accomplished through enhanced agency budgets or new legislation.

---

[2] Such a directive, of course, does not alter the plain intent of the Act that no statutory or constitutional responsibility of an agency shall be affected by the Act. ORS 194.435(3).

#4175H/aa

NOAA COASTAL SERVICES CENTER LIBRARY
3 6668 00004 3853