



environmental interests, ocean recreation interests, coastal utilities, and electric utilities. TSPWG and TSPAC worked closely together and shared some membership.

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

On October 23, 2009, OPAC recommended an amendment to the text of the Territorial Sea Plan entitled *Part Five: Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities*.

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

On November 25, 2009, the Department filed *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* as OAR 660-036-0005 with the Secretary of State, and it became effective that day pursuant to ORS 183.355(3).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On October 7, 2013, the Commission filed *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities*, amending OAR 660-036-0005 and LCDC Order 13-OCMP-001842 with the Secretary of State, and it became effective that day pursuant to ORS 183.335(3).

On March 7, 2018, the Court of Appeals, on judicial review, invalidated the amendments to *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities*, OAR 660-036-0005 on procedural grounds.

On July 26, 2018, the Commission received a briefing from the Department on the background and history of the Part 5 amendment process, the result of the Court of Appeals decision, and the process to complete the amendment process.

On September 20-21, 2018, OPAC met and engaged in an informational overview of all of the Territorial Sea Plan, including a session on *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities*.

On September 27, 2018, the Commission held a public hearing and recommenced rulemaking on *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities*, OAR 660-036-0005. The Commission agreed with the Department recommendation of the revisions required to carry out applicable goal and statutory policies and in compliance with ORS 196.471(3) returned the amendments to OPAC with the invitation to make additional recommendations.

On December 5, 2018, by letter from Chair Lidz, the Commission returned amendments to *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities*, OAR 660-036-0005, to OPAC with certain specific revisions under ORS 196.471(3).

On December 7, 2018, OPAC considered a review and summary of the process and statutory timeline for making a subsequent recommendation to the Commission that included the specific plan amendment revisions to *Part Five: Uses of the Territorial Sea for the Development of*

*Renewable Energy Facilities or Other Related Structures, Equipment or Facilities*, OAR 660-036-0005.

On April 3, 2019, OPAC made the Commission’s specific revisions and voted unanimously to send a recommendation for additional amendment to *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities*, OAR 660-036-0005, to the Commission.

On May 22, 2019, the Commission’s hearing’s officer held a hearing pursuant to ORS 183.335(3)(b) at the Best Western Agate Beach Inn, Newport.

On May 24, 2019, the Commission held a public hearing and then adopted amendments to *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities*, OAR 660-036-0005, establishing standards applicable to state agency review of marine renewable energy facilities and incorporating maps that designate specific marine resources and use areas within the territorial sea.

### Authority

The Commission reviews amendments to the Territorial Sea Plan recommended by OPAC and makes findings whether the amendments carry out the policies of ORS 196.405 to 196.515, and are consistent with applicable statewide planning goals, with emphasis on the four coastal goals.<sup>3</sup> The Commission has statutory authority to “Perform other functions required to

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<sup>3</sup> ORS 196.471 provides:

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

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

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

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

“(3)(a) If the commission does not make the findings required by subsection (1) of this section, the commission shall return the plan or amendments to the council for revision. The commission may specify any needed revisions.

“(b) If the council makes subsequent recommendations for amendments, the council must:

“(A) Include the commission’s specified revisions in the recommendations; and

“(B) Make the subsequent recommendations for amendments within 155 days after the date that the commission returns the plan or amendments to the council for revision. The commission and the council may mutually agree to extend the time that the council is allowed under this subparagraph for submitting subsequent recommendations to the commission.

carry out ORS chapters 195, 196, and 197.” ORS 197.045(4). The Commission has authority to adopt rules to carry out ORS chapter 196. ORS 197.040(1)(b). The Commission also has statutory authority to direct the performance of the Department for the functions under ORS chapters 195, 196, and 197, including the director’s authority to coordinate the Department’s land conservation and development functions with “federal agencies, other state agencies, local governments and special districts.” ORS 197.090(1)(b).

### Findings

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

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

#### **ORS 196.408(3)**

ORS 196.408(3) authorizes state agencies to *inter alia* coordinate with federal agencies to manage use and activities of ocean areas adjacent to coastal cliffs and offshore rocks and islands managed within the National Wildlife Refuge System.<sup>4</sup> The Commission finds that Appendix B “Beneficial Uses Resource Inventory – National Wildlife Refuges” identifies the ocean areas

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“(c) If the council does not make the subsequent recommendations for amendments within the time provided for in paragraph (b)(B) of this subsection, the commission may adopt the Territorial Sea Plan amendments recommended by the council under subsection (1) of this section, including any needed revisions specified by the commission.

“(4) Upon adoption of the Territorial Sea Plan or subsequent amendments the commission may, after consultation with affected state agencies, identify amendments to agency ocean or coastal resource management programs necessary to conform to the provisions of the adopted plan.”

<sup>4</sup> ORS 196.408(3) provides:

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

adjacent to coastal cliffs and offshore rocks and islands managed within the National Wildlife Refuge System and delineates such areas as a Goal 19 resource. *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* generally treats the areas within the territorial sea that are adjacent to rocky coastal cliffs, offshore rocks and islands as Important, Significant or Unique (ISU) resources and protects them as such.

### **ORS 196.410**

ORS 196.410 provides the legislative findings for offshore oil and gas leasing.<sup>5</sup> After detailing the nature of the territorial sea and its uses; the policy concludes, “Oregon is unwilling to risk damaging sensitive marine environments or to sacrifice environmental quality to develop offshore oil and gas resources.”<sup>6</sup> The Commission finds that the Part Five amendments, although not specifically intended to carry out this policy, are nevertheless consistent with it because nothing in Part Five provides for development of offshore oil and gas resources.

### **ORS 196.415 and ORS 196.420**

ORS 196.415 provides the legislative findings for ocean resources management.<sup>7</sup> ORS 196.420 provides the policies that are based on those legislative findings. As such, ORS 196.415

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<sup>5</sup> ORS 196.410 provides:

“The Legislative Assembly finds:

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

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

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

<sup>6</sup> The Commission notes that Senate Bill 256 (2019) amends ORS chapter 274, effective January 1, 2020 to provide in part:

“the Department of State Lands is prohibited from leasing any of the submerged and submersible lands within the territorial sea for:

“(a) The exploration, development or production of oil, gas or sulfur in the territorial sea; or

“(b) Activities in furtherance of the exploration, development or production of oil, gas or sulfur within federal waters adjacent to the territorial sea.” 2019 Or Laws, ch 14, § 4.

<sup>7</sup> ORS 196.415, entitled “Legislative findings for ocean resources management” provides:

“The Legislative Assembly finds that:

provides the context to understand ORS 196.420. The Commission finds that amendments to *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* carry out the policy of the State of Oregon provided in ORS 196.420.

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

In determining whether Part Five carries out ORS 196.420(1), the Commission first determines whether marine renewable energy constitutes a “renewable” or a “nonrenewable resource” for purposes of the policy expressed in ORS 196.420(1) of giving priority to proper management and protection of renewable resources. Although the Commission determines that marine renewable energy is not a “renewable resource” as that term is used in ORS 196.420(1),

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

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

“(3) The fluid, dynamic nature of the ocean and the migration of many of its living resources beyond state boundaries extend the ocean management interests of this state beyond the three geographic mile territorial sea currently managed by the state pursuant to the federal Submerged Lands Act.

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

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

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

“(7) While much is known about the ocean, its composition, characteristics and resources, additional study and research is required to gain information and understanding necessary for sound ocean planning and management.”

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

At the same time, the Commission believes that the more general policy direction in the first clause in ORS 196.420(1), namely to “[c]onserve the long-term values, benefits and natural resources of the ocean both within the state and beyond \* \* \*” is captured in both Goal 19 and the other legislative acts. *See*, particularly, ORS 196.415(1) and (2). The Commission’s intent in adopting Part Five is to accommodate a beneficial use of the ocean in a manner that conserves the long-term values, benefits and natural resources of the ocean that are identified in Goal 19. Part Five limits the total amount of area within the territorial sea that may be developed or committed for renewable energy facilities, both on a statewide and an area basis. *See* subparagraph B(4)(g)(7). It also limits the areas that may in the future be designated as Renewable Energy Facility Suitability Study Areas (REFSSAs) to no more than five percent of the territorial sea. The REFSSA designations adopted herein occupy less than one percent of the territorial sea, as shown in the plan map in Appendix B. Throughout the territorial sea, Part Five applies the special resource and use standards of paragraph B(4)(g) to conserve ocean resources and protect uses. The legislative findings of ORS 196.415(1) regarding the importance of the Pacific Ocean and its many resources identify environmental, economic, aesthetic, and recreational as important to the state. Part Five prescribes standards for protections of those resources: environmental resources – Ecological Resources Protection Standards, subparagraph B(4)(g)(3); economic resources – Fisheries Use Protection Standards, subparagraph B(4)(g)(2) and Proprietary Use and Management Areas, subparagraph B(4)(g)(6); aesthetic resources – Visual Resource Protection Standards, subparagraph B(4)(g)(5); and recreational resources – Recreational Resources Standards, subparagraph B(4)(g)(4).

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

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

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

“The requirements of Part Five are intended to protect areas important to renewable marine resources (*i.e.* living marine organisms), ecosystem integrity, marine habitat and areas important to fisheries from the potential adverse effects of renewable energy facility siting, development, operation, and decommissioning and to identify the appropriate locations for that development which minimize the potential adverse impacts to existing ocean resource users and coastal communities.”

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

The Commission finds that Part Five also carries out the policy of ORS 196.420(3), namely to “[a]ssert the interests of this state as a partner with federal agencies in the sound management of the ocean resources within the United States Exclusive Economic Zone and on the continental shelf.” Part Five, paragraph B(1)(b) of the Territorial Sea Plan reiterates the partner relationship between the state and federal agencies that is provided for under Plan Implementation, Part One, section F with respect to activities that are authorized in federal waters. The legislative findings in ORS 196.415(4), identify federal laws that recognize the state’s interest “in management of ocean resources in federal waters and provide for state participation in ocean resources management decisions” and further that “all federal coastal activities affecting natural resources, land uses and water uses in the coastal zone must be consistent with the federally approved Oregon Coastal Management Program.” The legislature also recognized that the state has an opportunity to “to more fully exercise and assert their responsibilities pertaining to the protection, conservation and development of ocean resources under United States jurisdiction.” ORS 196.415(5). Most specifically, ORS 196.415(6) provides legislative finding that are carried out by the Commission’s adoption of Part Five:

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

The Commission is insuring effective state participation in federal agency management of ocean resources through Part Five. The Department, as the primary state agency for the purposes of carrying out the Coastal Zone Management Act of 1972 under ORS 196.435, will resubmit the *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* amendments pursuant to ORS 196.471(2) to the National Oceanic and Atmospheric Administration (NOAA) Office for Coastal Management (OCM) for inclusion in the federally approved Oregon Coastal Management Program (OCMP).<sup>8</sup> Once approved by OCRM, federal agencies undertaking management actions in or affecting Oregon’s territorial sea will have to make consistency determinations for their actions, including FERC siting decisions. In addition, the Department will submit the Oregon Territorial Sea Plan directly to the FERC as a comprehensive plan, as provided for by the Section 10(a) of the Federal Power Act and as contemplated in the March 26, 2008 Memorandum of Understanding between the State of Oregon and FERC. These actions will provide the state with the ability to guide the siting of marine renewable energy projects under FERC jurisdiction, an ability that the state would otherwise not have except through the general provisions of the Territorial Sea Plan. For these reasons, the Commission finds that Part Five carries out the policy expressed in ORS 196.420(3) that are based on the legislative findings in ORS 196.415.

The Commission finds that Part Five also carries out the policy of ORS 196.420(4), namely to “[e]ncourage research, study and understanding of ocean processes, marine life and other ocean resources” and the policy of ORS 196.420(5), to “[e]ncourage research and development of new, innovative marine technologies to study and utilize ocean resources.” Those policies follow in part from the finding in ORS 196.415(7) that notes “additional study and research is required to gain information and understanding necessary for sound ocean planning and management.” The policies in Part Five, subsection A(2) contains several provisions that carry out those statutory policies. Part Five, paragraph A(2)(e) will “[l]imit the potential for unanticipated adverse impacts by requiring, when resource inventory and effects information is insufficient, the use of pilot projects and phased development to collect data and study the effects of the development on the affected marine resources and uses.” Part Five, paragraph A(2) (f) provides a policy to “encourage the research and responsible development of ocean-based renewable energy sources including wave, tidal, and wind that meet the state’s need for economic and affordable sources of renewable ocean energy”. In addition, Part Five, paragraph B(4)(f) provides for the opportunity to require the use of Pilot and Phased Development Projects as a mechanism for obtaining sufficient information and data to support

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<sup>8</sup> In 2014, NOAA approved the incorporation of Part Five as enforceable policies identified in Appendix C as part of OCMP. The Department must resubmit Part Five and NOAA OCM must reapprove Appendix C before Oregon can use any Part 5 enforceable policies for federal consistency review.

the authorization of a marine renewable energy project. The Commission concludes that Part Five carries out the policies in ORS 196.420(4) and (5).

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

## **ORS 196.425**

ORS 196.425 establishes a program of ocean resource planning and management.<sup>9</sup> The Commission finds that incorporation of *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or*

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<sup>9</sup> ORS 196.425 provides:

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

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

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

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

“(4) The Territorial Sea Plan as reviewed by the council and submitted to the agencies represented on the council.”

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

### **ORS 196.435**

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

### **ORS 196.443**

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

“(1) The purposes of the Ocean Policy Advisory Council are to:

“(a) Periodically review the Territorial Sea Plan and submit recommendations for the plan to state agencies represented on the council. \* \* \*

“\* \* \*

“(c) Provide a forum for discussing ocean resource policy, planning and management issues and, when appropriate, mediating disagreements.

“(d) Recommend amendments to the Oregon Ocean Resources Management Plan as needed. \* \* \*”

As set forth above, in the procedural history for this rulemaking, OPAC has reviewed Part Five, and submitted recommendations to the Commission, along with the Commission’s rulemaking advisory committee (TSPAC). OPAC’s review of Part Five provided a forum for discussing policy, planning and management issues associated with marine renewable energy, and OPAC’s work narrowed the areas of disagreement substantially. In 2013, OPAC made recommendations to the Commission concerning Part Five, and these recommendations were (with very limited

exceptions) adopted by the Commission. Finally, in April 2019, OPAC made the Commission’s specific revisions and voted unanimously to send a recommendation for additional amendment to OAR 660-036-0005 to the Commission. The Commission finds that *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* amendments carry out the policy of ORS 196.443.

### **ORS 196.451**

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

### **ORS 196.455**

In order to insure that *inter alia* the Territorial Sea Plan is coordinated with federal agency programs for coastal and ocean resources, ORS 196.455 authorizes OPAC to invite federal agencies “with responsibility for the study and management of ocean resources or regulation of ocean activities” to attend OPAC meetings and “review draft plan materials” prepared by OPAC. Pursuant to this statutory authority, OPAC has a Federal Liaison, created to improve communications between the council and federal agencies with ocean responsibilities. The OPAC federal liaison was the NOAA OCM Programs Specialist for Oregon, who, along with other NOAA program and legal staff, coordinated closely with the TSPWG and TSPAC Part Five work group on the formulation of the Part Five text. The involvement of NOAA OCM in the review of draft plan materials and participation on OPAC with regard to identifying those elements of Part Five that can be approved as an enforceable policy for purposes of CZMA review directly led to Part Five, Appendix C: Enforceable Policies Subject to Federal Consistency. NOAA OCM approved Appendix C in 2014; the Department will resubmit Appendix C for approval. In addition, representatives from NOAA Fisheries; US Coast Guard, Bureau of Ocean Energy Management (BOEM), US Army Corps of Engineers, FERC, and US Environmental Protection Agency attended and participated in both the OPAC meetings and TSPAC meetings throughout their processes.

### **ORS 196.471**

ORS 196.471(1) requires the Commission to “review the Territorial Sea Plan and any subsequent amendments recommended by the Ocean Policy Advisory Council \* \* \*” and make certain findings concerning the recommended amendments. Under section (3) of the statute “[i]f the commission does not make the findings required by subsection (1) of this section, the

commission shall return the plan or amendments to the council for revision. The commission may specify any needed revisions.” The Commission decided on September 27, 2018, to recommence rulemaking on the Oregon Territorial Sea Plan and, in compliance with ORS 196.471(3), to return the amendments to *Part Five: Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* to OPAC with certain specific revisions.

By Order 13-OCMP-001842, the Commission had considered the January 2013 Part Five OPAC recommended amendments and found that with specific modifications, the amendments carried out the statutory policies of the Oregon Ocean Resources Management Act and were consistent with the statewide planning goals. The Court of Appeals subsequently determined that the Commission did not follow the statutory procedures in ORS 196.471(3), and accordingly held the amendments to be invalid. *Ciecko v. DLCD*, 290 Or App 655, 415 P3d 1122 (2018). The *Ciecko* decision rendered the 2009 version of Part Five the effective text; the Commission and OPAC undertook the process to restore the Joint Agency Review Team (JART) review processes, review standards, plan review, plan maps, and area designations to Part Five.

In order to adhere to the statutory process and the *Ciecko* decision, the Commission returned the 2013 OPAC recommendation for Part Five amendments with specific revisions intended to address the instances where the adopted Part Five amendments differed and where the Commission determined that changes were necessary to either carry out the statutory policies of the Oregon Ocean Resources Management Act or be consistent with the goals and, of course, to be a constitutional regulation. In addition to the specific revisions, the Commission requested, but did not require, that OPAC consider some recommended amendments reflecting changed circumstances in the five years that passed since 2013.

Turning to specific revisions to the text of Part Five, the Commission tasked OPAC to conform its recommendation to the text of Part Five that was filed as an administrative rule based on Commission Order 13-OCMP-001842 in a few instances. First, the adopted text included specific buffer distances as required by Goal 19, Implementation Requirements 1(3)(e) and (f).<sup>10</sup> Second, consistent with the policy of ORS 196.420(2), the adopted text clarified JART membership for appropriate representation of local jurisdiction representing people of the impacted area. Thirdly, the adopted text did not include OPAC recommended language in the Proprietary Use and Management Area (PUMA) because it was inconsistent with the Delegation Clause under Article I, section 21 of the Oregon Constitution.

The final amendments adopted by the Commission in 2013 also differed from the OPAC recommendations regarding the Renewable Energy Facility Suitability Study Area (REFSSA) text and designations. While the 2013 OPAC recommendation was particularly diffuse around REFSSA, the Commission determined that it did not go far enough to accommodate a beneficial

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<sup>10</sup> Applying the buffers ensures the protection of important marine habitat that is “especially vulnerable because of size, composition, or location in relation to chemical or other pollutants, noise, physical disturbance, alteration” as required by Goal 19, Implementation Requirement 1(3)(e), or are “unique or limited range within the state” under Goal 19, Implementation Requirement 1(3)(f).

use of the ocean in a manner that conserves the long-term values, benefits and natural resources of the ocean that are identified in Goal 19. Regarding the total area built and committed to marine renewable energy development, the Commission changed the adopted Part Five text to the 2013 OPAC recommendation of two percent of the total area of the territorial sea, instead of three percent. The Commission revised the REFSSA map designation to retain Lakeside and Camp Rilea and remove the Nestucca/Pacific City and OPT Reedsport sites. The change of the OPT Reedsport REFSSA to a Resources Uses Conservation Area effectuates a condition that the Commission included in its order in the event OPT abandoned the site, which has transpired. Order 13-OCMP-001842 at 28. Changing Nestucca/Pacific City REFSSA to a Resource and Uses Management Area aligns with the 2013 OPAC recommendation and reflects the diminished interest in the site for possible development of renewable energy. The map designation revisions are to reflect the 2013 OPAC recommendation for OPT Reedsport and Nestucca/Pacific City while accommodating the opportunity for renewable energy facilities at the Lakeside and Camp Rilea REFSSAs.

To address an underlying concern represented by the 2013 OPAC recommendation, in presentations to both OPAC and the Commission, the Department suggested moving cables from the PUMA designation to the Renewable Energy Exclusion Area (REAA) designation. That text change was not a specific revisions pursuant to ORS 196.471(3)(a). Instead, OPAC included that as a recommendation for amendment pursuant to ORS 196.471(3)(b)(B). The Commission finds that *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* amendments comply with the procedural requirements of ORS 196.471.

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

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

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

where science experts reviewed the ecological resource data and information being used for the territorial sea planning process.

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

Goal 2 provides in part “Opportunities shall be provided for review and comment by citizens and affected governmental units during preparation, review and revision of plans and implementing ordinances.” Specific to ocean resources, Goal 19 includes “public involvement” as a management measure, providing “to involve the public and affected groups in the process of protecting ocean resource, especially through public awareness, education, and interpretive programs.” The Commission finds that the public advisory and review processes that were conducted over a three-year period as part of the state’s effort to amend the Territorial Sea Plan were complex, iterative, comprehensive, and thorough in scope and content. OPAC through the TSPWG, conducted two separate series of public review work sessions at various coastal and inland locations, to inform and gather public input on the summary overlays of mapped data and information developed by DLCD, ODFW, NOAA, researchers, technical consultants, local advisory organizations and several non-governmental organizations. More recently, OPAC and the Commission collectively held five public hearings spanning the fall of 2018 to the spring of 2019 on these Part Five amendments.

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

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

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

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

That does not, however, mean that renewable energy facilities constitute a “non-renewable resource” for purposes of Goal 19. Goal 19 protects “renewable marine resources” and distinguishes them from “development of non-renewable resources; uses of the ocean floor, or other actions.” Goal 19, Implementation Requirement 1(b)(1). Thus, under Goal 19, there are uses of the territorial sea that are neither “renewable marine resource” nor “non-renewable resources.” That also is made clear in the protection and encouragement of “beneficial uses of ocean resources” under Goal 19. Examples of the later beneficial uses include “navigation, food production, recreation, aesthetic enjoyment, and uses of the seafloor.” Thus, although in common usage “marine renewable resources” generally could be broadly construed to include marine renewable energy, the Commission finds that it does not, both because Goal 19 narrowly defines renewable resources as “living marine organisms” and because Goal 19 also includes other resources such as non-extractive recreation and aesthetic enjoyment among the listed “beneficial uses of ocean resources.”

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

## **Ocean Stewardship Area**

Goal 19 defines an “Ocean Stewardship Area” in which the state has interests in the conservation of ocean resources.<sup>11</sup> Within that area, Goal 19 provides that the state will engage

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<sup>11</sup> Goal 19 describes the Ocean Stewardship Area to include “the state’s territorial sea, the continental margin seaward to the toe of the continental slope, and adjacent ocean areas” and clarifies that it is “not intended to change the seaward boundary of the State of Oregon, extend the seaward boundaries of the state’s federally approved coastal zone under the federal Coastal Zone Management Act, affect the jurisdiction of adjacent coastal states, alter the authority of federal agencies to manage the resources of the United States Exclusive Economic Zone, or limit or

in specified activities in furtherance of the conservation of ocean resources. The Commission concludes that *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* furthers the objectives of the Ocean Stewardship Area.

First, Goal 19 provides the state will “[u]se all applicable state and federal laws to promote its interests in management and conservation of ocean resources.” The amendments to Part Five pertain to renewable energy facilities. The 2008 Memorandum of Understanding between the state and FERC recognized that the siting of renewable energy facilities implicates both federal law – the Federal Power Act, the Clean Water Act, the Coastal Zone Management Act, and the National Historic Preservation Act – and state law, including proprietary authorizations, regulatory authorizations to use waters of the state, and regulatory authorizations to use the ocean shore. FERC and the state entered into the MOU for the purpose of coordinating the procedures and schedules for review of marine renewable projects. The MOU acknowledges that Oregon intends to file Part Five with FERC as a comprehensive plan for the siting of marine renewable energy facilities in the Territorial Sea under section 10(a)(2)(A)(ii) of the Federal Power Act. Further, Executive Order No. 08-07 directs the Department to submit Part Five to NOAA OCM “for approval as enforceable policies of Oregon’s Coastal Management Program under the federal Coastal Zone Management Act.” EO No. 08-07 at 4. TSPAC and the Department coordinated extensively with NOAA OCM to identify those elements of Part Five that the federal agency could approve as enforceable policies of the state OCMP. Part Five Appendix C: Enforceable Policies Subject to Federal Consistency. The Department submitted the previous Part Five amendment to NOAA OCM for approval as enforceable policies of Oregon’s Coastal Management Program under the federal Coastal Zone Management Act which NOAA OCM approved in 2014. The Department will submit this amendment for reincorporation as enforceable policies of the program. The Commission finds that Part Five represents a comprehensive effort to use applicable state and federal laws to promote the state’s interests in management of marine renewable energy facilities and conservation of ocean resources consistent with Goal 19.

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

“Limit the potential for unanticipated adverse impacts by requiring, when resource inventory and effects information is insufficient, the use of pilot projects and phased development to collect data and study the effects of the development on the affected marine resources and uses; and

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

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otherwise change federal agency responsibilities to comply with the consistency requirements of the federal Coastal Zone Management Act.”

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

Third, within the Ocean Stewardship Area, the state will “[s]eek co-management arrangements with federal agencies when appropriate to ensure that ocean resources are managed and protected consistent with the policies of Statewide Planning Goal 19, Ocean Resources, and the Territorial Sea Plan[.]” As discussed above, the state and FERC have entered into an MOU for purposes of coordinating the procedures and schedules for review of renewable energy facility projects in the territorial sea that require a FERC license. The MOU acknowledges that Oregon intends to file Part Five with FERC as a comprehensive plan for the siting of marine renewable energy facilities in the Territorial Sea that FERC will, “in issuing any preliminary permit, pilot project license, or other license for a wave energy project in Oregon’s Territorial Sea, consider the extent to which the proposed project is consistent with the Oregon Plan.” 2008 MOU at 3. Also, upon OCM reapproval of those provisions in Part Five Appendix C: Enforceable Policies Subject to Federal Consistency, the Department will employ those provision of Part Five in its review of federal actions related to renewable energy projects that have reasonably foreseeable effects on coastal uses or resources for consistency with the enforceable policies of the Oregon Coastal Management Program. The Commission finds that Part Five is consistent with Goal 19 because it provides an appropriate management scheme with federal partners for the protection of ocean resources.

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

## **Information and Effects Assessment Required**

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

## **Implementation Requirements**

### **1. Uses of Ocean Resources**

Goal 19 specifies the manner in which regulating agencies are to carry out actions that are reasonably likely to affect ocean resources and uses of the Oregon territorial sea. First, regulating agencies must “maintain and, where appropriate, restore the long-term benefits derived from renewable marine resources.” Goal 19, Implementation Requirement 1(a). As discussed above, Goal 19 limits “renewable marine resources” to mean living marine organisms. Second, regulating agencies must protect renewable marine resources, biological diversity, important marine habitat, and areas important to fisheries. Goal 19, Implementation Requirements 1(b)(1)-(4). The policies of Part Five require regulating agencies to make decisions regarding the siting, development, operation, and decommissioning of renewable energy facilities in a manner that is consistent with these implementation requirements of Goal 19. Part Five, paragraph A(2)(a). Part Five then specifies what regulating agencies must require. Part Five, subparagraphs A(2)(a)(1)-(4). Those policy directives are implemented in Part Five both through the mapping of Goal 19 resources and the Special Resources and Uses Review Standards provided under paragraph B(4)(g).

The Part Five, Appendix B Plan Map and Area Designations are predicated on the Goal 19, Implementation Requirements 1(b)(1)-(4) for protecting resources and uses. Those area designations are paired with Special Resources and Uses Review Standards provided under Part Five, paragraph B(4)(g). The resulting size and distribution of the different plan areas provide a very high level of protection. As determined above, the Commission concludes that the application of the general fisheries and ecological review standards in Part Five, paragraph

B(4)(g), and the required consultations between the project developer, state agencies, local fishing and port interests, that are required by the plan in Part Five, paragraphs A(2)(a)-(f) are sufficient to ensure that marine resources will be protected in a manner consistent with the Goal 19 Implementation Requirements, and that the Part Five amendments will maintain and, where appropriate, restore the long-term benefits derived from renewable marine resources; and protect the resources protected under Goal 19.

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

## 2. Management Measures

Goal 19 requires that management measures for ocean resources and uses are appropriate to the circumstances and provide flexibility for future actions. The management measures may include adaptive management, condition approvals or actions, special management area plans, intergovernmental coordination and cooperation, regional cooperation and governance, public involvement, and precautionary approach. The Commission finds that *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities*, is consistent with these management measures.

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

Part Five includes policies that are consistent with the Goal 19 management measure “to place conditions or limit actions to protect or shield other uses and resources.” Specifically, Part

Five requires that regulating agencies making decisions in instances when resource inventory and effects information is insufficient, to use pilot projects and phased development to collect data and study the effects of a project on the affected marine resources and uses. Part Five, paragraph B(4)(f). The intent of such conditions on projects is to limit the potential for unanticipated adverse impacts. Part Five, paragraph A(2)(e).

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

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

Goal 19 also includes Regional Cooperation and Governance as a management measure. Goal 19, Implementation Requirement 2(e). Cooperation with federal agencies, among others, “within the larger marine region to address common or shared ocean resource management issues” is specified. Part Five is an effort to address shared ocean resource management issues related to the development of renewable energy facilities with the federal government. As noted in Part Five, once OCM reapproves incorporation of the enforceable policies of Part Five into the Oregon Coastal Management Program, they are again applicable to those federal actions that affect Oregon’s coastal zone and are subject to federal consistency requirements of the federal Coastal Zone Management Act. The Commission finds that the incorporation of a spatial plan map that delineates the territorial sea into different area designations based generally on the concentration and importance of the marine resources and uses present within them is consistent with the Congressional findings regarding development of state ocean resource plans in the CZMA. 16 USC § 1451(m).<sup>12</sup>

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<sup>12</sup> CZMA section 302(m) provides:

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

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

“Strongly encourage applicants to engage with local, state and federal agencies, community stakeholders, tribal governments and affected ocean users in a collaborative agreement-seeking process prior to formally requesting authorization to initiate a project[.]”

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

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

### 3. Contingency Plans

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

As discussed above, the Commission finds that *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities* is consistent with Goal 19’s stated purposes to provide “long-term ecological, economic and social values and benefits” and to “give higher priority to the protection of renewable marine resources – *i.e.*, living marine organisms – than to the development of non-renewable ocean resources.”

### Other Statutory Provisions

#### **ORS 197.040(1)**

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

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

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

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

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

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

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

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

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

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

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

Paragraph (A) requires the Commission to “[a]llow for the diverse administrative and planning capabilities of local governments.” Local governments do not have any planning responsibility or authority for the state territorial sea. Under ORS 201.370(2), planning for ocean resources and for submerged and submersible lands of the territorial sea is to be accomplished under the Oregon Ocean Resources Management Act, ORS 196.405 to 196.515.

Nevertheless, under the Territorial Sea Plan *Part Five: Uses of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities*, the Department of State Lands will invite local governments to be represented on the Joint Agency Review Team that considers a proposal for placement or operation of a renewable energy facility within the Oregon Territorial Sea. Part Five, paragraph B(3)(a). Thus, the Commission finds that in affording representatives from affected cities, counties and port districts the opportunity to participate in the JART, but not requiring their participation, Part Five has allowed for the diverse capabilities of local governments.

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

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

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

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

### **ORS 197.646**

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

### **Order**

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

The Commission also adopts the “Findings on the Adoption of an Administrative Rule to Amend the Territorial Sea Plan dated January 14, 2013. In the event findings in that document are inconsistent with this order, the findings of the Commission herein prevail.

DATED THIS \_\_\_ DAY OF OCTOBER, 2019.

FOR THE COMMISSION:

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Jim Rue, Director  
Department of Land Conservation and Development