

On February 27, 2023, the Department filed the Notice of Proposed Rulemaking Hearing, Statement of Need and Fiscal Impact, and Housing Cost Impact Statement with the Secretary of State.

On March 22, 2023, the Commission’s hearings officer held a hearing pursuant to ORS 183.335(3)(b) at the Hatfield Science Center, Newport.

On April 20, 2023, the Commission held a public hearing and then adopted amendments to *Part Three: Rocky Habitat Management Strategy*, OAR 660-036-0000, adding the six site-based management designations which OPAC recommended on December 9, 2023, to *Appendix E: Rocky Habitat Designations & Map*.

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.¹ The Commission has statutory authority to “Perform other functions required to

¹ 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.

“(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.

carry out ORS chapters 195, 196, and 197.” ORS 197.045(4). The Commission has authority to adopt by rules any statewide land use policies it considers necessary to carry out ORS chapter 196. ORS 197.040(1)(c)(A). 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 Three 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 660-036-0000, the Commission only considers those policies of the Act that are applicable to this amendment of Part Three. The Commission specifically identifies the following statutory policies as having some application to the addition of site-based management designations to *Part Three: Rocky Habitat Management Strategy Appendix E: Rocky Habitat Designations & Map*: ORS 196.408(3), ORS 196.415, ORS 196.420, ORS 196.425, ORS 196.443, 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.² In developing recommendations for amendment of *Part Three: Rocky Habitat Management Strategy*, the Department coordinated on a regular basis with the United States Fish and Wildlife Service (USFWS). The OPAC Territorial Sea Plan Working Group included federal agency staff from both the USFWS and

“(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.”

² 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.”

National Oceanic and Atmospheric Administration (NOAA). The text of Part Three recognizes the federal agency responsibility for managing the system of national wildlife refuges:

“National Wildlife Refuge System/National Wilderness System

“National Wildlife Refuge System Administration Act (16 USC § 668dd-668ee) and Oregon Islands National Wildlife Refuge; Wilderness Act (16 USC §§ 1131-1136)

“Almost all the rocks and islands along the Oregon Coast are in the Oregon Islands National Wildlife Refuge, Three Arch Rocks National Wildlife Refuge, or Cape Mears National Wildlife Refuge, and are administered by the U.S. Fish and Wildlife Service. There are extensive regulations for managing these rocks and islands under many different laws. The chief regulations of interest for rocky habitats relate to prohibiting trespass (no climbing or landing on), and harassing wildlife, whether intentional or unintentional. In addition, the operation of unmanned aircraft (*e.g.* drones) is illegal on refuge islands. Most rocks under National Wildlife Refuge System jurisdiction are also in the Oregon Islands Wilderness designated by the U.S. Congress.” Part 3.C.3.a.ii.

In its order 23-OCMP-001907, the Commission found that *Part Three: Rocky Habitat Management Strategy* identified the importance of rocky habitats in the ocean areas adjacent to coastal cliffs and offshore rocks and islands managed within the National Wildlife Refuge System and delineated such areas as a Goal 19 resource. The Commission concluded that *Part Three: Rocky Habitat Management Strategy* provides both programs and regulations that “manage uses and activities of ocean areas adjacent to coastal cliffs and offshore rocks and islands managed within the National Wildlife Refuge System” and therefore carries out the policy of ORS 196.408(3).

The designation of the Ecola Point Marine Conservation Area, the Chapman Point Marine Garden, and the Blacklock Point Marine Conservation Areas carry out the objective of developing programs with federal agencies to manage use and activities of ocean areas adjacent to offshore rocks managed within the National Wildlife Refuge System. The aforementioned areas focus protection on the shoreline areas adjacent to offshore islands which are part of the Oregon Islands National Wildlife Refuge. Site goals are focused on raising awareness of the unique and sensitive nature of the site, linking continued use and education to support existing wildlife disturbance measures, efforts to protect biodiversity of the intertidal area, and reduce trampling. The Commission finds that adding the Ecola Point Marine Conservation Area, the Chapman Point Marine Garden, and the Blacklock Point Marine Conservation Area to *Appendix E: Rocky Habitat Designations & Map* carry out the policy of ORS 196.408(3).

ORS 196.415 and ORS 196.420

ORS 196.415 provides the legislative findings for ocean resources management.³ ORS 196.420 provides the policies that are based on those legislative findings. As such, ORS 196.415

³ ORS 196.415, entitled “Legislative findings for ocean resources management” provides:

provides the context to understand ORS 196.420. Two of the legislative findings are particularly relevant to the Commission’s finding that the site designation amendments to *Part Three: Rocky Habitat Management Strategy Appendix E: Rocky Habitat Designations & Map* carry out the policy of the State of Oregon provided in ORS 196.420 are ORS 196.415(6) and (7).

The finding in ORS 196.415(6) recognizes the importance of developing and maintaining “a program of ocean resources management to promote management of living and nonliving marine resources” under the jurisdiction of the state. In its order 23-OCMP-001907, the Commission found that the purpose of *Part Three: Rocky Habitat Management Strategy* is to provide a combination of polices, objectives, and site-specific recommendation for the protection of unique ecosystems along the Oregon Coast. Part 3.A.1. Turning to these site designations, the statutory finding also states the importance of coordinating “state agency management of ocean resources and uses with local government management of coastal shorelands and resources.” The Cannon Beach City Council endorsed the Ecola Point Marine Conservation

“The Legislative Assembly finds that:

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

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

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

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

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

“(6) It is important that the State of Oregon develop and maintain a program of ocean resources management to promote management of living and nonliving marine resources within state jurisdiction, to ensure 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.”

Area and Chapman Point Marine Garden proposals, the City of Garibaldi endorsed the Cape Lookout Marine Conservation Area proposal, the City of Depoe Bay and Lincoln City Chamber of Commerce endorsed the Fogarty Creek Marine Conservation Area proposal, and the City of Depoe Bay and City of Newport endorsed the Cape Foulweather Marine Conservation Area proposal.

The finding provided in ORS 196.415(7) acknowledges the need for additional study and research “to gain information and understanding necessary for sound ocean planning and management.” Among the strategy’s five objectives is “To improve our knowledge and understanding of rocky habitat ecosystems by fostering research and monitoring efforts.” Part 3.A.2.d. Although none of the six new site-based management designations are for a Marine Research Area, several of the management recommendations advance research objectives. The Ecola Point Marine Conservation Area and Chapman Point Marine Garden both endeavor to build upon existing efforts “to continue monitoring black oystercatcher nests and cormorants, begin sea star surveys in cooperation with PISCO⁴ and marine debris surveys in cooperation with CoastWatch and NOAA.” Monitoring and research at the Cape Lookout Marine Conservation Area will include climate change impacts to rocky habitat and the effectiveness of kelp forest restoration projects. The Cape Foulweather Marine Conservation Area also recommends sponsoring community science related to kelp monitoring and effectiveness of management activities. The Fogarty Creek Marine Conservation Area designation notes that Oregon State University researchers Dr. Francis Chan and Dr. Bruce Menge are interested in studying the site for the role of submerged aquatic vegetation in the mitigation of ocean acidification and hypoxia. Having previously found that *Part Three: Rocky Habitat Management Strategy* carries out ORS 196.415(7), the Commission finds that the Ecola Point Marine Conservation Area, Chapman Point Marine Garden, Cape Lookout Marine Conservation Area, Cape Foulweather Marine Conservation Area, and Fogarty Creek Marine Conservation Area designations in *Appendix E: Rocky Habitat Designations & Map* each carry out ORS 196.415(7).

Turning to ORS 196.420, the first relevant 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 LCDC Order 23-OCMP-001907, the Commission determined that Part Three carried out ORS 196.420(1) because it establishes the policies and principles for the long-term use and conservation of marine resources – rocky habitats that are along the intertidal areas of Oregon’s shoreline – and establishes a program of adaptive management of specific areas through a biannual proposal process. The six new site-based management designations result from the program of adaptive management of specific areas in furtherance of ORS 196.420(1).

The Commission finds that the site designations also carry out the policy of ORS 196.420(4), namely to “[e]ncourage research, study and understanding of ocean processes,

⁴ PISCO is the Partnership for Interdisciplinary Studies of Coastal Oceans, an academic consortium that conducts research to advance understanding of the coastal ocean within the California Current Large Marine Ecosystem and inform management and policy.

marine life and other ocean resources” and to a lesser extent, 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), discussed above, that notes “additional study and research is required to gain information and understanding necessary for sound ocean planning and management.” For the reasons discussed above under ORS 196.415(7), the Commission finds that the Ecola Point Marine Conservation Area, Chapman Point Marine Garden, Cape Lookout Marine Conservation Area, Cape Foulweather Marine Conservation Area, and Fogarty Creek Marine Conservation Area designations in *Appendix E: Rocky Habitat Designations & Map* each carry out the policies in ORS 196.420(4) and (5).

The Commission finds that the new Part Three site-based management designations also carry 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.” In adopting Part Three, the Commission established an adaptive management process for site-based management proposals from coastal residents and stakeholders. The OPAC recommended management proposals came through the Part Three Community Based Proposal process for the designation, alteration, or removal of existing site-based management designations. The Ecola Point Marine Conservation Area and Chapman Point Marine Garden were endorsed by the City of Cannon Beach along with multiple community groups, including: Friends of Haystack Rock, the North Coast Land Conservancy, the North Coast Watershed Association, the Lower Nehalem Watershed Council, the Northwest Guides and Anglers Association, along with many other businesses and individuals from the community. The Cape Lookout Marine Conservation Area was endorsed by the City of Garibaldi, the Boy Scouts of America Cascade Pacific Council, the Cape Perpetua Collaborative, the Cascade Head Biosphere Reserve, the MidCoast Watersheds Council, the Oregon Audubon Council, Portland Audubon, and the Oregon Chapter of the Sierra Club. The Fogarty Creek Marine Conservation Area was endorsed by the City of Depoe Bay, the Lincoln City Chamber of Commerce, the MidCoast Watersheds Council, and the Lincoln City Audubon Society. The Cape Foulweather Marine Conservation Area was endorsed by the City of Depoe Bay and the City of Newport, the neighborhoods of Little Whale Cove and Miroco through their homeowner associations, the Cape Perpetua Collaborative, the Cascade Head Biosphere Reserve, Friends of Otter Rock, the Oregon and Mary’s Peak Chapter of the Sierra Club, the MidCoast Watersheds Council, the Oregon Audubon Council and Portland Audubon, the Salmon Drift Creek Watershed Council, and the Coast Range Association. Finally, the Kalmiopsis Audubon Society and the Oregon Shores Conservation Coalition endorsed the Blacklock Point Marine Conservation Area. The Commission concludes that *Part Three: Rocky Habitat Management Strategy Appendix E: Rocky Habitat Designations & Map* carries out the policy of ORS 196.420(6).

ORS 196.425

ORS 196.425 establishes a program of ocean resource planning and management.⁵ The Commission finds that incorporation of these site-based management designations as an

⁵ ORS 196.425 provides:

amendment to *Part Three: Rocky Habitat Management Strategy* 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 maintaining current enforceable policies. Appendix D of *Part Three: Rocky Habitat Management Strategy* now clearly identifies enforceable policies for federal consistency review. The Commission finds that the six designations in *Appendix E: Rocky Habitat Designations & Map* comply with *Appendix D, Table 2 Regulatory Standards & Management Practices*. For this reason, the Commission finds that Part Three carries out the policy expressed in ORS 196.425 for establishing a program of ocean resource planning and management.

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. The council shall recommend deletions to the Territorial Sea Plan of all site designations and management prescriptions to the Land Conservation and Development Commission.

“* * *

“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.”

⁶ Goal 19 describes the Ocean Stewardship Area to include “the state’s territorial sea, the continental margin seaward to the toe of the continental slope, and adjacent ocean areas” and clarifies that it is “not intended to change the seaward boundary of the State of Oregon, extend the seaward boundaries of the state’s federally approved coastal zone under the federal Coastal Zone Management Act, affect the jurisdiction of adjacent coastal states, alter the authority of federal agencies to manage the resources of the United States Exclusive Economic Zone, or limit or otherwise change federal agency responsibilities to comply with the consistency requirements of the federal Coastal Zone Management Act.”

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

The Commission finds that these amendments to *Part Three: Rocky Habitat Management Strategy* arose through OPAC’s review of site based proposals under Part Three, Section E of the Territorial Sea Plan and recommendation for six site-based management designation plan amendments to LCDC pursuant to ORS 196.443(1)(a). As set forth above, in the procedural history for this rulemaking, OPAC has reviewed the six site-based management designations under Part Three, and submitted recommendations to the Commission. OPAC’s review of the site-based management designations provided a forum for discussing policy, planning and management issues associated with rocky habitats on Oregon’s coast. The Commission finds that these *Part Three: Rocky Habitat Management Strategy* site designation amendments in *Appendix E: Rocky Habitat Designations & Map* carry out the policy of ORS 196.443.

ORS 196.455

In order to ensure 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 Commission concludes that the policy of ORS 196.455 is carried out in these *Part Three: Rocky Habitat Management Strategy* site-based management plan amendments in *Appendix E: Rocky Habitat Designations & Map*.

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 ORS 196.471(2), after the commission makes the findings required by ORS 196.471(1), the commission shall adopt the plan or amendments as part of the OCMP. The Commission decided on April 20, 2023, to adopt the rulemaking amendments to Part Three of the Oregon Territorial Sea Plan, and makes all required findings in this order, in compliance with 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 Three: Rocky Habitat Management Strategy* 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 Three. 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 SeaSketch, an interactive mapping tool used to compile, display, and distribute spatial data and information. Oregon SeaSketch is an internet site wherein all the data and maps used in the territorial sea planning process are accessible to the public. The Department consulted with STAC experts to review the data sets and information used in Oregon SeaSketch for the Territorial Sea Plan. The six new designated areas all used the Oregon SeaSketch data and maps.

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 new designated areas stem from the Community Based Proposal process for the designation, alteration, or removal of existing site-based management designations.

The Commission concludes that the six site-based management designations added to *Part Three: Rocky Habitat Management Strategy Appendix E: Rocky Habitat Designations & Map* are 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.” The Commission previously reviewed *Part Three: Rocky Habitat Management Strategy*, as “a coordination and adaptive management framework focused on the long-term protection of ecological resources and coastal biodiversity” for compliance with Goal 19. Part 3.A.1. The Commission determined that *Part Three: Rocky Habitat Management Strategy* 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.” LCDC Order 23-OCMP-001907 at 12-17. In this order, the Commission considers whether the six site-based management designations amending *Part Three: Rocky Habitat Management Strategy Appendix E: Rocky Habitat Designations & Map* are consistent with Goal 19.

Ocean Stewardship Area

Goal 19 defines an “Ocean Stewardship Area” in which the state has interests in the conservation of ocean resources.⁶ Within that area, Goal 19 provides that the state will engage in specified activities in furtherance of the conservation of ocean resources. *Part Three: Rocky Habitat Management Strategy* pertains to a subset of the Ocean Stewardship Area, the rocky habitats that account for approximately 41 percent of Oregon’s 362-mile coastline and six percent of the subtidal area. The Commission previously concluded that *Part Three* furthers the objectives of the Ocean Stewardship Area. *See* LCDC Order 23-OCMP-001907 at 13.

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[.]” An objective of the Rocky Habitat Management Strategy is to “improve our knowledge and understanding of rocky habitat ecosystems by fostering research and monitoring.” Part 3.A.2.d. Policies include promoting research and monitoring, specifically including studying the effects of climate change, ocean acidification, and hypoxia, and authorizing managing agencies to “propose site designations within rocky habitat areas as determined by the best available science.” Part 3.A.6.b.K and P. The Commission found that the objectives and policies of Part Three encourage scientific research to acquire information needed to make ocean and coastal-management decisions related rocky habitats and are therefore consistent with Goal 19. *See* LCDC Order 23-OCMP-001907 at 13. As described above under the Commission’s analysis of ORS 196.415(7), the amendments encourage scientific research on marine ecosystems, ocean resources and uses, and oceanographic conditions to acquire information needed to make ocean and coastal-management decisions consistent with Goal 19.

Goal 19 also requires that 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[.]” The Rocky Habitat Management Strategy contemplates that it cannot alter management of federally designated sites, but recognizes that designations may “provide a more consistent framework of coastal management areas.” Part 3.D. The Commission finds that the new designations provide complimentary rocky habitat designation to the islands (named and un-named) within the Oregon Islands National Wildlife Refuge. Also, upon OCM approval of those provisions in Part Three, Appendix D: Designation Standards for Federal Consistency, the Department will employ those provision of Part Three in its review of federal actions 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 Three is consistent with Goal 19 because it provides an appropriate management scheme with federal partners for the protection of ocean resources.

⁶ Goal 19 describes the Ocean Stewardship Area to include “the state’s territorial sea, the continental margin seaward to the toe of the continental slope, and adjacent ocean areas” and clarifies that it is “not intended to change the seaward boundary of the State of Oregon, extend the seaward boundaries of the state’s federally approved coastal zone under the federal Coastal Zone Management Act, affect the jurisdiction of adjacent coastal states, alter the authority of federal agencies to manage the resources of the United States Exclusive Economic Zone, or limit or otherwise change federal agency responsibilities to comply with the consistency requirements of the federal Coastal Zone Management Act.”

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. In considering nominations for rocky habitat designations, the proposals must describe current infrastructure and uses, including recreational, commercial, cultural, and scientific, and potential future uses based on current site management. Part 3, Appendix C. The Commission finds that the Community Based Proposal process includes requirements for information and effects assessments. For each of the six sites, the Commission finds that the Rocky Habitat Working Group used an evaluation criteria matrix to ensure that the nominations characterized site uses and potential impacts to identified uses consistent with Goal 19.

Implementation Requirements

1. Uses of Ocean Resources

The Commission found that *Part Three: Rocky Habitat Management Strategy* was consistent with Implementation Requirement 1 of Goal 19:

“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). 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). As discussed above, the policies of Part Three are intended to protect rocky habitats:

“A. Consistent with Statewide Land Use Planning Goal 19, actions that are likely to affect rocky habitats shall be developed and conducted to conserve marine resources and ecological functions for the purpose of providing long-term ecological, economic, and social values benefits.

“B. Protection of rocky habitat resources (*i.e.* living marine organisms and their habitat) shall be prioritized over development of non-renewable ocean resource uses.’ Part 3.A.6.b.

“Managing agencies are to incorporate management recommendations into their regulations and site management practices and administer those regulations and permits “in a way that considers the long-term conservation of rocky habitats and organisms.” Part 3.A.6.b.F and G.

“Goal 19 requires regulating agencies to “protect and encourage the beneficial uses of ocean resources.” Goal 19, Implementation Requirement 1(c)(1). Beneficial uses of rocky shores under Goal 19 include recreation and aesthetic enjoyment. Under Part

Three, public access to rocky habitat sites is required to be preserved to maximum extent consistent with protection of the sites. Part 3.A.6.b.D and E. The Commission finds that Part Three is consistent with Goal 19, Implementation Requirement 1(c).” See LCDC Order 23-OCMP-001907 at 14-15.

In reviewing these amendments to *Part Three: Rocky Habitat Management Strategy Appendix E: Rocky Habitat Designations & Map*, the Commission thus considers compliance with Part Three as sufficient to demonstrate compliance with Implementation Requirement 1 of Goal 19. The Commission finds that the six site-based management designations followed the site-based proposal procedures and were reviewed by the Rocky Habitat Working Group and OPAC based on the review criteria provided in *Part Three: Rocky Habitat Management Strategy*. The Commission concludes these amendments to *Part Three: Rocky Habitat Management Strategy Appendix E: Rocky Habitat Designations & Map* comply with Goal 19.

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 found that *Part Three: Rocky Habitat Management Strategy* to be consistent with these management measures. LCDC Order 23-OCMP-001907 at 15-16.

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.” Policy K requires management actions to consider adaption to climate change, ocean acidification, and hypoxia on rocky habitat ecosystems. Policy E allows for temporary access restrictions for visitor safety, habitat protection, and to manage user conflicts. Policy E is also consistent with the Goal 19 management measure “to place conditions or limit actions to protect or shield other uses and resources.” The Commission found that the Part Three is consistent with both the use of adaptive management and conditioning actions to protect resources.

Part Three provides three types of site-based designations: Marine Research Area, Marine Garden (Marine Education Area), and Marine Conservation Area. The North Coast Rocky Habitat Coalition, the Audubon Society of Lincoln County, Fran Recht, and the South Coast Rocky Habitat Group developed their respective proposals consistent with the area types listed above, with five of them being classified as Marine Conservation Areas and the other a Marine Garden (Marine Education Area). As the Commission previously determined, those Part Three designations are 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 management measures for ocean resources and uses may also include “Intergovernmental Coordination and Cooperation” and “Regional Cooperation.” Intergovernmental efforts may “coordinate, integrate, and co-manage programs and activities with all levels of government, including Indian tribal governments.” Implementation Requirement 2(d). The Rocky Habitat Management Strategy is primarily carried out by state agencies such as Oregon Parks and Recreation Department, Oregon Department of Fish and Wildlife (ODFW), and Department of State Lands (DSL), but in some cases, local governments, federal agencies, and tribal governments may be involved. Part 3.A.5. The strategy recognizes that OPAC recommended management actions should involve “all appropriate management agencies, city or county planning agencies, affected Tribal Nations, and interested citizens and organizations.” Part 3.A.5.a.iv.a. Regional cooperation includes efforts with “federal agencies within the larger marine region to address common or shared ocean resource management issues.” Goal 19, Implementation Requirement 2(e). USFWS manages offshore rocks and islands as National Wildlife Refuges above mean high water, while DSL has jurisdiction over the seabed and ODFW regulates all fish and shellfish harvest throughout both tidal elevations. Appendix B.3.b. An objective of Part Three is to “facilitate cooperation and coordination among local, state, and federal management agencies” for holistic ocean resource management specific to rocky habitats. For each site, the proposals contemplate collaboration with state agencies. For example, the Ecola Point Marine Conservation Area and Chapman Point Marine Garden specify coordination with OPRD on interpretation programs and informational signage, while Fogarty Creek Marine Conservation Area supports the OPRD Fogarty Creek State Park Master Plan.

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). That provision specifies such involvement “especially through public awareness, education, and interpretative programs.” An objective of *Part Three: Rocky Habitat Management Strategy* is to “enhance appreciation and foster personal stewardship of Oregon’s rocky habitats through education, interpretation, and outreach.” Part 3.A.2.c. Strategy elements specify education and public awareness and enumerate eight actions that should be used to build a public awareness and education component into rocky habitat management. Part 3.A.5.b. The site goals for the new designations focus on “raising awareness of the unique and sensitive nature of the site and communicating stewardship oriented site use when visiting.” The Commission finds that the amendments to *Part Three: Rocky Habitat Management Strategy Appendix E: Rocky Habitat Designations & Map* provide 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 found that this is reflected in the policy directive to develop and conduct “actions that are likely to affect rocky habitat” in a manner that conserves “marine resources and ecological functions for the purpose of providing long-term ecological, economic, and social values benefits.” Furthermore, the principle of the precautionary approach is found elsewhere in the Territorial Sea Plan in Part One, section G. LCDC Order 23-OCMP-001907 at 16.

3. Contingency Plans

In its prior order, the Commission found Part Three to be consistent with the contingency plans requirement of Goal 19:

“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 “Rapid Response” section of Rocky Habitat Management recognizes that no single plan or method for event response is possible. Instead, the amendments to Part Three now provide, “Individual response plans for imminent threats and impacts to rocky habitats should occur in a timely manner once recognized” but “[f]oreseeable threats to rocky habitats should be discussed and preemptively planned for by agencies.” Part 3.C.3.e.” LCDC Order 23-OCMP-001907 at 16-17. All of the recommended site designations have a goal of increasing stewardship of the sites through community engagement and monitoring, leading to an increase in understanding and awareness of changes to the environment occurring in the designated areas. This approach to management will inherently increase the capacity of detection and rapid response to physical or environmental damage from accidents or other climate induced threats to the marine environment.

As discussed above, the Commission ultimately finds that the amendments to *Part Three: Rocky Habitat Management Strategy Appendix E: Rocky Habitat Designations & Map* are 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 these amendments to Territorial Sea Plan *Part Three: Rocky Habitat Management Strategy Appendix E: Rocky Habitat Designations & Map*, it is acting primarily under its authority to adopt statewide land use polices under ORS 197.040(1)(c)(A).

However, to the extent that in adopting amendments to the Territorial Sea Plan, *Part Three: Rocky Habitat Management Strategy Appendix E: Rocky Habitat Designations & Map*, 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 that the Commission considers necessary to carry out ORS chapter 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, the amended management principles of the strategy still provide that OPAC or an agency should involve city or county planning agencies in planning or recommended management actions. By allowing for, but not requiring, city or county planning agency involvement, the Commission finds that Part Three has allowed for the diverse capabilities of local governments. Notably, the Cannon Beach City Council endorsed the Ecola Point Marine Conservation Area and Chapman Point Marine Garden proposals, the City of Garibaldi endorsed the Cape Lookout Marine Conservation Area proposal, the City of Depoe Bay and Lincoln City Chamber of Commerce endorsed the Fogarty Creek Marine Conservation Area proposal, and the City of Depoe Bay and the City of Newport endorsed the Cape Foulweather Marine Conservation Area proposal.

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, specifically, its rocky habitat. Part Three classifies rocky habitat into rocky shoreline, submerged rocky habitat, and offshore rocks and islands. Part 3.B.1.b. and Figure 1. An objective for the strategy is to “facilitate cooperation and coordination among local, state, and federal resource managements agencies, and tribal governments, to ensure that marine resources and habitats are holistically managed.” Part 3.A.2.e. The Commission finds that *Part Three: Rocky Habitat Management Strategy* encourages regional approaches to rocky habitats management.

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 OPAC pursuant to ORS 183.333(3), that assessed the economic interests of state agencies, local governments, and small businesses regarding Part Three. There is no private property interest in the state-owned territorial sea, and the Department did not identify costs to small businesses.

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.” The primary economic impact identified related to the adoption of *Part Three: Rocky Habitat Management Strategy* was for state managing agencies that might undertake rulemaking to act consistent with the plan. An alternative to allowing the Community Based Proposal process for the designation, alteration, or removal of existing site-based management designations from the public for review and potential incorporation into Part Three would be to only allow agency proposals. However, the purpose of site-based proposals is twofold: to best incorporate local knowledge and to maintain an up-to-date management strategy. The Commission finds that achieving the objectives listed in A.2 of *Part Three: Rocky Habitat Management Strategy* has similar economic impacts, *i.e.* rulemaking, regardless of the source of site-based management proposals.

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 Three*, pursuant to ORS 196.485.

Order

The Commission made the findings above required by ORS196.471(1) herein and adopts these amendments to *Part Three: Rocky Habitat Management Strategy Appendix E: Rocky Habitat Designations & Map* as filed herewith.

DATED THIS 31st DAY OF JULY, 2023.

FOR THE COMMISSION:



Brenda Bateman, Ph.D., Director

Department of Land Conservation and Development