

Routine Program Change

Updating Oregon's Enforceable Policies Regarding Shellfish

O.R.S. §§ 622.010-622.080, 622.992, 622.996

July 24, 2014

I. Introduction

The Oregon Coastal Management Program requests that the National Oceanic and Atmospheric Administration (NOAA) Office of Ocean and Coastal Resource Management (OCRM) approve updates to the OCMP to reflect some of the changes to Oregon's statutes regarding shellfish. Oregon requests concurrence that these updates constitute a Routine Program Change.

Section II.A describes the relevant program in ORS Chapter 622 and identifies changes to the statutes since OCRM's previous approvals. Section II.B identifies those sections that state "enforceable policies" that are used in Oregon's federal consistency review determinations. Section II.C shows that the submitted updates are a Routine Program Change under NOAA regulations and guidelines.

II. Analysis of Routine Program Change

A. Discussion of the Program in Chapter 622

The OCMP was initially approved by NOAA in 1977. In 1987, OCRM approved a Routine Program Change that incorporated ORS chapter 622.

The attached table includes statutory provisions addressing shellfish. The sections being updated are ORS § 622.010 and § 622.080 as well as § 622.992 and § 622.996. Other sections of this chapter were incorporated into the OCMP in 1987 and remain part of the OCMP even though they are not addressed in this RPC. We are attaching the full current versions of ORS § 622.010 to § 622.080 and § 622.992 and § 622.996.

As shown in the attached table, the only changes to many of these sections since their OCRM approval in 1987 were terminology updates, agency reference changes, and cross-reference revisions. The term "license" became "certificate" in the title of ORS § 622.065. The title "Penalties" was given added specificity as "Criminal penalty." Throughout the chapter, "division" and "assistant director" were changed to "State Department of Agriculture" or "department." Reference to ORS chapter 620, which concerned the sale of horse meat and was repealed in 1995, was removed. Reference to the series of statutes "ORS 624.010 to 624.120" was replaced with "ORS 624.010 to 624.121" after ORS § 624.120 was renumbered ORS § 624.029 in 2007, the same year that ORS § 624.045 was renumbered ORS § 624.121. Reference to "ORS 183.310 to 183.550," the Administrative Procedures Act, became "ORS chapter 183."

Other updates are summarized as follows:

General Provisions

ORS § 622.010. Coinciding with the shift in authority over the shellfish sanitation certification program from what was known as the Health Division of the Department of Human Resources to the Department of Agriculture, the definitions for “division” and “assistant director” were removed, and the definition for “department” was added. The numbering for all definitions changed accordingly. Also, the definition of “shellfish” was expanded to include scallops, except where the final product is only the shucked adductor muscle of a scallop, and was limited to edible species rather than “edible products thereof.”

ORS § 622.050. This section has limited the life of shellfish sanitation certificates to December 31st following the date of issue, but the section now allows the Department of Agriculture to specify an expiration date by rule, should the default of December 31st not be preferred.

ORS § 622.080. This section concerns fees for commercial shellfish activities. In addition to changing the title from “Fees; areas of operation” to “Certificate fees; rules,” changing the agency to which those fees are owed, and changing the fees noted from fixed to maximum amounts, the Oregon Legislature set different maximum fees depending on annual gross income from the operations: \$50,000 or less, more than \$50,000 but not more than \$500,000, and more than \$500,000. The subsection numbering changed accordingly. In addition, commercial harvesters were added to shucker-packers, growers, and distributors as those owing fees.

Penalties

ORS §§ 622.992–622.996. These sections establish penalties for the violation of any provision of ORS §§ 622.010 to 622.180. Violation is a Class C misdemeanor, and the State Department of Agriculture has the authority to impose a civil penalty as well.

B. Enforceable Policies

OCRM initially approved Oregon’s Coastal Management Program, including entire state statutes as part of the approved program. Subsequently OCRM has requested that states identify enforceable policies within their statutes as updates are submitted. While Oregon seeks to incorporate all updates to O.R.S. §§ 622.010 to 622.080 and 622.992 to 622.996 into the OCMP, we have identified specific sections that define enforceable policies for federal consistency purposes.

Each of the sections identified specifies a substantive enforceable policy; identifies when a certificate is required; or provides enforceable mechanisms for implementation of the substantive provisions. Statutory sections not defined as enforceable are those that are purely procedural, that contain only statements of findings, or that merely grant state officials authority to undertake administrative acts not affecting the potential activities of federal actors or licensees.

Thus, statements of policy, requirements for authorizations, lists of conditions for authorizations, provisions for rules that define regulatory requirements, and definitions that specify the content of obligations and requirements are enforceable policies. The sections in this Routine Program Change stating enforceable policies are: 622.010, 622.020, 622.040, 622.050, 622.065, 622.992, and 622.996. The attached table identifies these with an X and describes the content of each section.

These policies are rendered enforceable by the certificates required in 622.020, 622.040, and 622.050. Enforcement implementation includes certificate suspension and revocation under 622.065, civil penalties under 622.996, and criminal penalties under 622.992.

C. Action as Routine Program Change

Pursuant to CZMA §306(e) and 15 C.F.R. §923.84, this section explains why this update to Oregon’s program is a Routine Program Change and does not constitute an amendment. Under 15 C.F.R. §923.80(d), amendments are defined as substantial changes in one or more of five listed coastal management program areas:

- (1) uses subject to management;
- (2) special management areas;
- (3) boundaries;
- (4) authorities and organization; and
- (5) coordination, public involvement and the national interest.

OCRM’s 1996 Program Change guidance states that a “substantial change” is a high threshold requiring case-by-case determination. Statutory changes are identified in the attached table. The table relates each change to Oregon’s authority as previously approved as part of the OCMP in 1987. Each change is described in detail in the right-hand column of the table.

1. Uses subject to management.

This submittal does not identify new uses subject to management.

2. Special management areas.

This submittal does not designate or change special management areas. It does not establish new criteria for special management areas.

3. Boundaries.

This submittal does not change the boundaries of Oregon’s coastal zone.

4. Authorities and organization.

This submittal does not change Oregon’s administration of the OCMP. The State Department of Agriculture, which already had primary authority over other of the state’s shellfish programs incorporated into the OCMP, see ORS §§ 622.210 to 622.300 in the 1987 RPC, simply has added the

authority over shellfish sanitation certificates, replacing what was known as the Health Division of the Department of Human Resources.

5. Coordination, public involvement, and the national interest.

This submittal does not change any coordination, public involvement, or national interest provisions of the OCMP.

Accordingly, this submittal is a Routine Program Change, and Oregon requests OCRM concurrence.

Shellfish

Changes to Statutes in the Program since Last OCRM Approval

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective ¹	Changes Since Last Approval
GENERAL PROVISIONS						
622.010	Definitions	Defines key terms as used in this chapter	X	1987	1993 1995	<ul style="list-style-type: none"> • Removed subsection (1) defining “Division” • Removed subsection (2) defining “Assistant Director” • Renumbered the definition of “Dealer” from subsection (3) to (1) • Added new subsection (2) defining “Department” as the State Department of Agriculture • Renumbered the definition of “Peddler” from subsection (4) to (3) • Renumbered the definition of “Person” from subsection (5) to (4) • Renumbered the definition of “Shellfish” from subsection (6) to (5) • Expanded the definition of “Shellfish” to include scallops, removed “and all fresh edible

¹ Oregon is seeking to establish the 2013 Edition of the Oregon Revised Statutes and the 2014 Oregon Laws supplement as the effective baseline for the statutory provisions incorporated into the Oregon Coastal Management Program (OCMP). The year in the “updates adopted and effective” column refers to the year(s) during which the Oregon legislature adopted changes to the statutory provisions incorporated into the OCMP.

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective ¹	Changes Since Last Approval
						products thereof,” limited it to only edible species, and exempted instances where the final product is only the shucked adductor muscle of a scallop
622.020	Certificate of shellfish sanitation required to be dealer	Prohibits growing, harvesting, processing or distributing shellfish for human consumption shall without the certificate or certificates of shellfish sanitation issued by the State Department of Agriculture	X	1987		<ul style="list-style-type: none"> Replaced “division” with “State Department of Agriculture”
622.030	Exemptions	Exempts retail stores, and specific operations and out-of-state dealers from the provisions of this chapter		1987	1995	<ul style="list-style-type: none"> Removed reference to ORS chapter 620 in subsection (2) Replaced “ORS 624.010 to 624.120” with “ORS 624.010 to 624.121”
622.040	Certificate required for each area of operation	Requires a separate certificate of shellfish sanitation for each area of operation	X	1987		<ul style="list-style-type: none"> Replaced “division” with “State Department of Agriculture”
622.050	Application for certificate; inspections; expiration and renewal; rules	Requires a dealer to apply to the State Department of Agriculture for a certificate or certificates of shellfish sanitation; requires compliance with all provisions of this chapter and rules thereunder to receive such certificates; and identifies certificate expiration	X	1987	2007	<ul style="list-style-type: none"> Added “rules” to the end of the title Replaced “division” with “State Department of Agriculture” in subsection (1) Replaced “division” and “assistant director” with “department” in subsection (2) Added “or on such date as may be specified by department rule” to the statement regarding certificate expiration in subsection (3)

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective ¹	Changes Since Last Approval
622.065	Denial, suspension and revocation of certificate; procedure	Authorizes the State Department of Agriculture to suspend, deny, and revoke certificates of shellfish sanitation for violating ORS 622.010 to 622.180 or any rule promulgated under ORS 622.180	X	1987		<ul style="list-style-type: none"> Replaced “license” with “certificate” in the title Replaced “assistant director” with “State Department of Agriculture” in subsection (1) Replaced “ORS 183.310 to 183.550” with “ORS chapter 183”
622.080	Certificate fees; rules	Requires persons growing, producing, harvesting, or distributing shellfish to pay annual fees to the State Department of Agriculture; identifies limits of those fees for different annual gross incomes from those activities		1987	1993 2007 2011	<ul style="list-style-type: none"> Replaced “Fees; areas of operation” with “Certificate fees; rules” in the title Added a distinction in fees based upon annual gross income from the operations: \$50,000 or less, more than \$50,000 but not more than \$500,000, and more than \$500,000 Created new subsections (1), (2), and (3), each beginning with “Persons engaged in the growing, production, harvesting or distribution of shellfish who receive from such operations ... in annual gross income shall pay annual fees to the State Department of Agriculture” Replaced “The following is the schedule of annual fees to be paid to the division” with “The department shall establish the amount of the annual fees by rule, not to exceed” and placed the latter in each of the newly created subsections

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective ¹	Changes Since Last Approval
						<ul style="list-style-type: none"> Increased the fee for shucker-packers and renumbered the subsection from (1) to (a) under each of the newly created subsections (1), (2), and (3) Increased the fee for growers and renumbered the subsection from (2) to (b) under each of the newly created subsections (1), (2), and (3) Increased the fee for distributors and renumbered the subsection from (3) to (c) under each of the newly created subsections (1), (2), and (3) Added under each of the newly created subsections (1), (2), and (3), “(d) \$250 for a certificate of shellfish sanitation as a commercial harvester, for any person harvesting clams or mussels for commercial purposes”
PENALTIES						
622.992	Criminal penalty	Makes a violation of any provision of ORS 622.010 to 622.180 or rules promulgated under ORS 622.180 a Class C misdemeanor	X	1987		<ul style="list-style-type: none"> Replaced “Penalties” with “Criminal penalty” in the title

Statutes Enacted Since Last OCRM Approval

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective ²	Statutory History
PENALTIES						
622.996	Civil penalties; rules; hearing; disposition of moneys	Authorizes the State Department of Agriculture to impose a civil penalty for a violation of ORS 622.010 to 622.180 or of rules adopted under ORS 622.180; authorizes the department to adopt rules establishing a schedule of civil penalties; restricts these civil penalties to \$10,000 per violation	X		2009	<ul style="list-style-type: none"> • Enacted in 2009

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Text of ORS Chapter 622 Statutes Included in the July 24, 2014 RPC
2013 Edition Oregon Revised Statutes

GENERAL PROVISIONS

622.010 Definitions. As used in this chapter:

(1) “Dealer” means every person or peddler engaged in the business of growing, harvesting, processing or distributing shellfish for human consumption.

(2) “Department” means the State Department of Agriculture.

(3) “Peddler” means every person who on the person’s own behalf or as the agent of another goes from place to place, or house to house, carrying or offering shellfish for sale.

(4) “Person” includes city, county and state as well as those included within the definition of person in ORS 174.100.

(5) “Shellfish” means:

(a) All edible species of oysters, either shucked or in the shell, fresh or frozen, whole or in part and intended for human consumption.

(b) All edible species of clams, either shucked or in the shell, fresh or frozen, whole or in part and intended for human consumption.

(c) All edible species of mussels, either shucked or in the shell, fresh or frozen, whole or in part and intended for human consumption.

(d) All edible species of scallops, either shucked or in the shell, fresh or frozen, whole or in part, except when the final product is the shucked adductor muscle only, and intended for human consumption. [1955 c.331 §1; 1969 c.283 §1; 1973 c.508 §1; 1993 c.720 §6; 1995 c.25 §1]

622.020 Certificate of shellfish sanitation required to be dealer. No person shall act as a dealer without the certificate or certificates of shellfish sanitation issued by the State Department of Agriculture. [1955 c.331 §3; 1973 c.508 §2]

622.030 Exemptions. This chapter shall not affect the following:

(1) Retail stores selling to the ultimate consumer.

(2) Operations subject to ORS chapters 616, 619, 621, 625, ORS 624.010 to 624.121, 632.275 to 632.290, 632.450 to 632.490 and 632.900 to 632.985 and to the rules pursuant thereto.

(3) Out-of-state dealers operating under a state shellfish program indorsed by the United States Public Health Service. [1955 c.331 §6; 1957 c.66 §1; 1969 c.283 §2; 1973 c.508 §1a; 1983 c.160 §5; 1995 c.206 §2]

622.040 Certificate required for each area of operation. A certificate of shellfish sanitation shall specify the area of operation to which it applies. A separate certificate validated for each area of operation as defined by ORS 622.080 and the State Department of Agriculture rules made under this chapter is required. [1955 c.331 §7(3); 1973 c.508 §3]

622.050 Application for certificate; inspections; expiration and renewal; rules. (1) A dealer shall make application to the State Department of Agriculture for a certificate or certificates of shellfish sanitation. The application shall be accompanied by the required fee or

fees.

(2) The department shall issue the initial certificate or certificates of shellfish sanitation, if on inspection the department finds that the dealer has complied with all the provisions of this chapter and the rules of the department under this chapter.

(3) Every certificate of shellfish sanitation shall expire on December 31 following the date of issue or on such date as may be specified by department rule. Any certificate of shellfish sanitation may be renewed on payment of the required fee. Inspection is not a condition precedent for renewal, but an inspection shall be made at some time within the renewal year. [1955 c.331 §7(1),(2),(4); 1973 c.508 §4; 2007 c.768 §31]

622.060 [1955 c.331 §9; repealed by 1973 c.508 §5; (622.065 enacted in lieu of 622.060)]

622.065 Denial, suspension and revocation of certificate; procedure. (1) The State Department of Agriculture may suspend, deny or revoke any certificate of shellfish sanitation issued under this section for violation of any applicable provisions of ORS 622.010 to 622.180 or any rule promulgated under ORS 622.180.

(2) Procedures for denial, revocation or suspension of a certificate shall be as provided in ORS chapter 183. [1973 c.508 §6 (enacted in lieu of 622.060 and 622.070)]

622.070 [1955 c.331 §10; repealed by 1973 c.508 §5 (622.065 enacted in lieu of 622.070)]

622.080 Certificate fees; rules. (1) Persons engaged in the growing, production, harvesting or distribution of shellfish who receive from such operations not more than \$50,000 in annual gross income shall pay annual fees to the State Department of Agriculture. The department shall establish the amount of the annual fees by rule, not to exceed:

(a) \$300 for a certificate of shellfish sanitation as a shucker-packer, for a person operating a shellfish shucking, packing or repacking plant for the distribution of shellfish.

(b) \$200 for a certificate of shellfish sanitation as a grower, for a person engaged in the business of growing shellfish.

(c) \$200 for a certificate of shellfish sanitation as a distributor, for any jobber or wholesaler who furnishes or sells shellfish to retail outlets.

(d) \$250 for a certificate of shellfish sanitation as a commercial harvester, for any person harvesting clams or mussels for commercial purposes.

(2) Persons engaged in the growing, production, harvesting or distribution of shellfish who receive from such operations more than \$50,000 but not more than \$500,000 in annual gross income shall pay annual fees to the department. The department shall establish the amount of the annual fees by rule, not to exceed:

(a) \$600 for a certificate of shellfish sanitation as a shucker-packer, for a person operating a shellfish shucking, packing or repacking plant for the distribution of shellfish.

(b) \$400 for a certificate of shellfish sanitation as a grower, for a person engaged in the business of growing shellfish.

(c) \$450 for a certificate of shellfish sanitation as a distributor, for any jobber or wholesaler who furnishes or sells shellfish to retail outlets.

(d) \$250 for a certificate of shellfish sanitation as a commercial harvester, for any person harvesting clams or mussels for commercial purposes.

(3) Persons engaged in the growing, production, harvesting or distribution of shellfish who

receive from such operations more than \$500,000 in annual gross income shall pay annual fees to the department. The department shall establish the amount of the annual fees by rule, not to exceed:

(a) \$1,200 for a certificate of shellfish sanitation as a shucker-packer, for a person operating a shellfish shucking, packing or repacking plant for the distribution of shellfish.

(b) \$800 for a certificate of shellfish sanitation as a grower, for a person engaged in the business of growing shellfish.

(c) \$900 for a certificate of shellfish sanitation as a distributor, for any jobber or wholesaler who furnishes or sells shellfish to retail outlets.

(d) \$250 for a certificate of shellfish sanitation as a commercial harvester, for any person harvesting clams or mussels for commercial purposes. [1955 c.331 §8; 1969 c.283 §3; 1973 c.508 §7; 1979 c.696 §10; 1993 c.720 §4; 2007 c.71 §188; 2011 c.323 §1]

Note: Section 4 (1) and (2), chapter 323, Oregon Laws 2011, provides:

Sec. 4. (1) The amendments to ORS 622.080 and 622.290 by sections 1 and 2 of this 2011 Act apply to fees assessed for annual periods that begin on or after July 1, 2011. The Legislative Assembly intends that any initial rule adopted under ORS 622.080 or 622.290 by the State Department of Agriculture shall apply retroactively if necessary to allow charging and collection of the full fee amount established by rule for annual periods that begin on or after July 1, 2011.

(2) If the department does not complete the adoption of initial rules under ORS 622.080 and 622.290 on or before July 1, 2011, for any annual period that begins on or after July 1, 2011, and prior to the initial rules taking effect, the department may elect to charge and collect at the beginning of the annual period a partial payment equal to the applicable fee amount under ORS 622.080 and 622.290 as in effect immediately prior to the effective date of the amendments to ORS 622.080 and 622.290 by sections 1 and 2 of this 2011 Act [June 14, 2011]. If the department elects to charge and collect a partial payment under this subsection, the department shall apply the full amount of the collected partial payment toward the annual fee amount due from the person under the applicable initial rule adopted by the department. [2011 c.323 §4(1),(2)]

PENALTIES

622.990 [1955 c.331 §11; repealed by 1973 c.508 §12 (622.992 enacted in lieu of 622.990)]

622.992 Criminal penalty. Violation of any provision of ORS 622.010 to 622.180 or the rules of the division promulgated under ORS 622.180 is a Class C misdemeanor. [1973 c.508 §13 (enacted in lieu of 622.990)]

622.996 Civil penalties; rules; hearing; disposition of moneys. (1) In addition to any penalty available under ORS 561.190 or 622.992, the State Department of Agriculture may impose a civil penalty for a violation of ORS 622.010 to 622.180 or of rules adopted under ORS 622.180. For the purposes of this section, each day a violation continues after the period of time established for compliance shall be considered a separate violation unless the department finds that a different period of time is more appropriate to describe a specific violation event.

(2) The department may adopt rules establishing a schedule of civil penalties that may be imposed under this section. Civil penalties imposed under this section may not exceed \$10,000

for each violation.

(3) When the department imposes a civil penalty under subsection (1) of this section, the department shall impose the penalty in the manner provided by ORS 183.745, except that the written application for a hearing must be received by the department no later than 10 days after the date of mailing or personal service of the notice of civil penalty.

(4) Moneys received by the department from civil penalties imposed under this section shall be deposited in the General Fund to the credit of the Department of Agriculture Account. [2009 c.175 §18]