



# Oregon

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## Department of Land Conservation and Development

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TO: Land Conservation and Development Commission

FROM: Juna Hickner, Coastal State-Federal Relations Coordinator  
Patty Snow, Coastal Program Manager

SUBJECT: **Agenda Item 5, March 15-16, 2012, LCDC Meeting**

### **PUBLIC HEARING AND ADOPTION OF AMENDMENTS TO ADMINISTRATIVE RULES REGARDING COASTAL ZONE MANAGEMENT ACT FEDERAL CONSISTENCY REVIEW (OAR CHAPTER 660, DIVISION 35)**

#### **I. AGENDA ITEM SUMMARY**

Under this item the Land Conservation and Development Commission will hold its first public hearing on the proposal to amend, repeal, renumber, and adopt administrative rules at OAR chapter 660, division 35, regarding state review of federal actions in the coastal zone pursuant to the Coastal Zone Management Act of 1972 (Attachment A). As proposed division 35 would be procedural rather than substantive in nature, and will align the state administrative rules with the governing federal regulations.

The department issued notice for this rulemaking in the February 1, 2012 Secretary of State bulletin. The department plans to file an amended notice in the April 1, 2012 Secretary of State bulletin. If adopted by LCDC at its May 2012 meeting, these rules would take effect upon filing with the Secretary of State. The department recommends that the Commission conduct a public hearing on the proposed amendments.

For additional information regarding this action, please contact Juna Hickner at (503) 373-0050 ext. 253, or by email at [juna.hickner@state.or.us](mailto:juna.hickner@state.or.us).

#### **II. BACKGROUND**

The federal Coastal Zone Management Act of 1972, as amended, contains a “federal consistency” provision that allows states with an approved coastal management program to review federal activities affecting coastal uses or resources in order to ensure that the activities are consistent with the state’s coastal management program. The department is Oregon’s designated coastal zone management agency, and administers the federally-approved Oregon Coastal Management Program (OCMP). When conducting federal consistency reviews, the

department follows the procedures and requirements that the National Oceanic and Atmospheric Administration (NOAA) outlined in 15 CFR Part 930, and the corollary state rules in OAR chapter 660, division 35. The proposed rulemaking actions are necessary to align OAR chapter 660, division 35, with 15 CFR Part 930.

The commission initially adopted OAR chapter 660, division 35, in 1988. The rule in its current state captures the federal requirements and procedures in effect at the time of adoption, but in the intervening years NOAA has amended 15 CFR Part 930. The department now proposes rulemaking actions for division 35 to reflect amendments to the controlling federal regulations and to clarify that the department will conform with the requirements and procedures of 15 CFR Part 930 when conducting consistency reviews. The commission initiated this rulemaking action on January 7, 2010. Since that time the department has worked with the Oregon Department of Justice and NOAA's Office of Ocean and Coastal Resource Management to revise the rules to conform with 15 CFR Part 930.

### **III. DESCRIPTION OF DEPARTMENT'S RECOMMENDED RULE LANGUAGE OR GOAL AMENDMENT**

#### **A. 660-035-0000 Purpose**

The department is proposing only minor wording changes to the purpose statement.

#### **B. 660-035-00xx Conformance With Federal Consistency Review Rules**

The department is proposing to adopt a new rule as a guiding statement that clarifies that when administering federal consistency reviews, the department will follow the federal requirements and procedures provided in 15 CFR Part 930.

#### **C. 660-035-0010 Definitions**

The department is proposing to simplify and streamline the definitions section by applying the definitions contained in CZMA section 304, 15 CFR Part 930, ORS 196.405, and ORS 197.015, and deleting duplicative definitions. The department is also proposing amendments to clarify the definitions of "coastal zone" and "OCMP."

#### **D. 660-035-00xx Activities Subject to Review**

In order to provide clarity and transparency, the department is proposing to provide a list of the types of federal activities the department will review for consistency with the OCMP. 15 CFR Part 930 guides the list of activities, which include:

- Proposed federal agency activities, including proposed federal development projects, which affect any coastal use or resource;
- Activities that affect any coastal use or resource and that require one or more federal licenses or permits identified on the approved OCMP license and permit list, or unlisted licenses or permits that the department identifies through an alternative process set forth in 15 CFR §930.54;

- Outer continental shelf exploration, development, and production activities that affect any coastal use or resource;
- Federal assistance to state and local governments for activities that affect any coastal use or resource; and
- Federal activities having interstate coastal effects.

This proposed rule renumbers and amends an existing provision, OAR 660-035-0020(2), and conforms to 15 CFR Part 930.

**E. 660-035-0020 Federal Consistency With the OCMP**

The proposed change to section (1) of this rule is intended to clarify how an applicant shall initiate the department's federal consistency review. Section (2) specifies that the department will review all projects against the enforceable policies contained in the OCMP, and outlines that those enforceable policies fall generally into three categories: (1) the statewide planning goals, (2) acknowledged comprehensive plans, and (3) selected state agency statutory and regulatory authorities governing coastal uses or resources. This rule previously contained a list of federal activities the department will review. The department proposes updating the language and moving this list to its own section, above.

**F. 660-035-0030 Consistency for Federal Agency Activities**

The department proposes changes to this rule to clarify that when reviewing federal agency activities, the department will conform to the requirements and procedures provided in 15 CFR Part 930, Subpart C. By referencing the requirements of Subpart C and directing applicants to the federal regulations, the department hopes to alleviate the possible confusion and uncertainty that comes from having duplicative state and federal provisions that are very similar, yet not always identically worded.

Proposed changes in section (2) clarify the use of National Environmental Policy Act (NEPA) documents in federal consistency review, while the proposed section (3) ensures an opportunity for public participation consistent with the provisions of 15 CFR §930.42. Finally, section (4) clarifies that while federal agencies are not required to file applications for state or local permits unless required to do so by provisions of federal law other than the CZMA, the department encourages federal agencies to obtain state and local permits when applicable as evidence that an activity is consistent with the underlying enforceable policy captured by the permit.

**G. 660-035-0040 DLCD Review of Federal Activities and Development Projects**

The department proposes to repeal this rule because it is duplicative of OAR 660-035-0030, above. As detailed in that rule, the department will continue to follow the requirements and procedures of 15 CFR Part 930 when reviewing federal activities and development projects.

**H. 660-035-0050 Consistency for Activities Requiring a Federal license or Permit**

As with OAR 660-035-0030, above, the department proposes changes to this rule to clarify that when reviewing activities requiring a federal license or permit, the department

will conform to the requirements and procedures provided in 15 CFR Part 930, Subpart D. By referencing the requirements of Subpart D and directing applicants to the federal regulations, the department hopes to alleviate the possible confusion and uncertainty that comes from having duplicative state and federal provisions that are very similar, yet not always identically worded.

Proposed changes in sections (2) and (4) clarify the department's requirements regarding state and local permits required by the enforceable policies of the OCMP, as well as the use of NEPA documents in federal consistency review. The proposed section (3) ensures an opportunity for public participation consistent with the provisions of 15 CFR 930.61.

**I. 660-035-0060 Consistency for Outer Continental Shelf Activities**

The department proposes changes to this rule to clarify that when reviewing outer continental shelf activities, the department will conform to the requirements and procedures provided in 15 Part CFR 930, Subpart E. The proposed section (3) ensures an opportunity for public participation consistent with the provisions of 15 CFR §930.77.

**J. 660-035-0070 Consistency for Federal Assistance to State and Local Governments**

The department proposes changes to this rule to clarify that when reviewing federal assistance to local governments, the department will conform to the requirements and procedures provided in 15 CFR Part 930, Subpart F.

**K. 660-035-00xx Federal Activities Having Interstate Coastal Effects**

The department proposes adopting a new rule to address federal activities having interstate coastal effects. As with the other rules, this proposed rule specifies that the department will conform to the requirements and procedures provided in 15 CFR Part 930, Subpart I.

**L. 660-035-0080 Commission Review**

The department proposes to repeal this rule. 15 CFR Part 930, Subpart H details the procedures and standards that govern appeal of federal consistency decisions to the U.S. Secretary of the Interior.

**IV. DESCRIPTION OF STAKEHOLDER AND PUBLIC PARTICIPATION**

Because the proposed rulemaking actions concern rules that are procedural in nature, clarifying that the department will follow federal requirements and procedures for federal consistency reviews, the department did not convene a rules advisory committee. Interested parties were afforded the opportunity to comment on the governing federal regulations when NOAA amended the federal regulations.

**V. SUMMARY OF MAJOR COMMENTS AND DEPARTMENT'S RECOMMENDED RESOLUTIONS**

None at this time.

**VI. DEPARTMENT RECOMMENDATION AND DRAFT MOTIONS**

The department recommends the Commission conduct the first public hearing on the proposed amendments described in this report and provide direction to staff on this matter. Final adoption of this rule may occur at the May 2012 Commission meeting.

**VII. STANDARD ATTACHMENTS**

- A. Proposed Amendments to OAR chapter 660, division 35
- B. 15 CFR Part 930
- C. Notices
- D. Comments