



# Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2540

Phone: (503) 373-0050

Fax: (503) 378-5518

[www.oregon.gov/LCD](http://www.oregon.gov/LCD)



January 7, 2010

TO: Land Conservation and Development Commission

FROM: Dale Blanton, Senior Coastal Policy Analyst  
Robert J. Bailey, Coastal Program Manager

SUBJECT: **Agenda Item 12, January 20-22, 2010 LCDC Meeting**

## **Initiation of Rulemaking Regarding OAR 660, Division 35 (Federal Consistency)**

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

The purpose of this rulemaking process is to revise existing commission rules to conform to revised federal requirements. The Division 35 rules contain the state's procedures and requirements for federal consistency review under Section 307(c) of the federal Coastal Zone Management Act (CZMA). This rulemaking is identified as a priority in the commission's 2009-2011 policy agenda. For additional information, contact Dale Blanton at (503) 373-0050 ext. 260, [dale.blanton@state.or.us](mailto:dale.blanton@state.or.us) or Jay Charland at (503) 373-0050 ext. 253, [jay.charland@state.or.us](mailto:jay.charland@state.or.us).

### **II. SUMMARY OF RECOMMENDED ACTION**

The department recommends that the commission initiate rulemaking to conform OAR 660-Division 35 to the current federal rules outlined in 15 CFR Part 930. The adoption of conforming rules will resolve the confusion and uncertainty regarding differing state and federal requirements and the status of state rules under Oregon's approved Coastal Management Program.

The department will work with legal counsel at the Oregon Department of Justice (DOJ) to develop revisions to OAR 660-Division 35. Because this is primarily a technical and legal rule-writing task, an advisory committee is not warranted. The department will work closely with staff at NOAA/OCRM to ensure that these new state rules can be approved as a component (i.e. "Enforceable Policy") of the Oregon Coastal Management Program.

### **III. BACKGROUND**

Oregon Revised Statute (ORS) 196.435 states: "The Department of Land Conservation is designated the primary agency for coordination of ocean resources planning. The department is

designated the State Coastal Management Agency for purposes of carrying out and responding to the Coastal Zone Management Act of 1972.”

In this role, the department is the state’s lead agency for federal consistency review as outlined in Section 307(c) of the Coastal Zone Management Act (CZMA). To carry out this function, the agency follows the requirements outlined in 15 CFR, Part 930 and OAR 660-Division 35-Federal Consistency.

In 1988, OAR 660-Division 35 was adopted by the Land Conservation and Development Commission to guide state’s “federal consistency” review of federal actions or permits as authorized under the CZMA and applicable federal rules. The department submitted division 35 to the Office of Ocean and Coastal Resource Management (OCRM) at the National Oceanic and Atmospheric Administration (NOAA) on December 21, 1988, for approval and integration into the state’s Coastal Management Program. On January 17, 1989, NOAA denied the state’s request over concerns that state rules went beyond federal rules, thus creating the potential for inconsistent administration of the state requirements.

During the intervening years, the department has discussed rule revisions with NOAA and with state and federal legal counsel. The department included a rule revision task in the annual federal grant work program for many years, but the task was repeatedly deferred pending completion of federal rule updates by NOAA. In 2006 NOAA completed its rule update after passage of the Energy Policy Act of 2005 resolved several long-standing issues and significantly revised the Secretarial appeal process for energy projects under jurisdiction of the Federal Energy Regulatory Commission (FERC). Thus it is now possible, and desirable, for the state to adopt revised rules that conform to federal requirements.

#### **IV. DESCRIPTION OF PUBLIC PARTICIPATION**

The department will follow statutory and administrative rule notice and public participation requirements. Because this proposed rulemaking is a technical change to existing rules to conform to federal requirements, we do not recommend appointment of a rules advisory committee.

#### **V. DECISION MAKING CRITERIA AND PROCEDURES**

The proposed rules must be consistent with the provisions of ORS Chapter 196, 197, 183, the Attorney General’s Model Rules of Procedure and the provisions of 15 CFR, Part 930.

#### **VI. DRAFT MOTION**

Motion: To initiate rulemaking to conform the provisions of OAR 660-Division 35 (Federal Consistency) to the current federal rules outlined in 15 CFR Part 930.