

Routine Program Change

Updating Oregon’s Enforceable Policies Regarding Threatened or Endangered Plants

O.R.S. §§ 564.100-564.994

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 changes to Oregon’s statutes regarding threatened and endangered species. Oregon requests concurrence that these updates constitute a Routine Program Change.

Section II.A describes the relevant program in ORS Chapter 564. 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 564

Oregon’s program for protection of threatened and endangered plants was enacted in 1987 and has been subsequently amended. These provisions were not previously incorporated by Oregon into its OCMP. The attached table includes the full listing of statutory provisions in ORS chapter 564 addressing threatened and endangered plants. This is in order to ensure that the full current program is part of the OCMP and establishes the 2013 Edition of the Oregon Revised Statutes as the effective baseline for all of these statutory provisions, should they be further amended in the future. We are also attaching the full current versions of the statutes.

Updates are summarized as follows:

ORS §§ 564.100–564.110, 564.125. These sections define terms for the sub-chapter and identify the basic authorities and requirements of the Director of Agriculture with regard to threatened and endangered plants, such as establishing and revising a list of endangered and threatened plant species, promulgating rules to establish programs to protect and conserve those species, establishing a system of permits for scientific taking of those species, promulgating rules to enforce the prohibition on taking those species, and acquiring habitat for the protection of those species.

ORS § 564.115. This section requires that, prior to taking, authorizing, or financing any activity on state land, the state agency must determine that the activity is consistent with a state protection or conservation program under ORS 564.105(3) or otherwise will not appreciably reduce the likelihood of endangered or threatened plant species survival. Without such a determination the activity must be

modified to comply with recommended alternatives, undertake mitigation measures, or pass a cost-benefit analysis. This section also requires consultation among states and state agencies in efforts to protect threatened and endangered species.

ORS § 564.120. This section prohibits the take, import, export, transport, purchase, or sale of any threatened species or endangered species (or attempt to do so), unless otherwise allowed.

ORS § 564.130. This section authorizes an agency to hold confidential, other than to the land owner, information concerning the location of a threatened or endangered species if unlawful taking likely would occur if the location is disclosed.

ORS § 564.135. This section clarifies that this sub-chapter and other specific state laws do not require an owner of private land to take action to protect a threatened or endangered species.

ORS §§ 564.991–564.994. These sections establish penalties for violations of this chapter. A violation of the prohibition on taking, selling, etc. endangered or threatened species under ORS 564.120 is a Class A misdemeanor. A violation of another section of this chapter is a Class A violation.

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 statutes implementing the threatened and endangered plants program of ORS Chapter 564 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 permit 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: 564.100, 564.105, 564.115, 564.120, 564.991, and 564.994. The attached table identifies these with an X and describes the content of each section.

These policies are rendered enforceable by the permit required in 564.105; by the authority of the Director of Agriculture to protect and conserve the native threatened species or endangered plants of Oregon in 564.105; by prohibited actions in 564.120; and by the required program consistency and protections of threatened and endangered plants for any activities on state lands under 564.115. Enforcement implementation includes penalties under 564.991 and 564.994.

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.

1. Uses subject to management.

This submittal does not identify new uses subject to management. Protection of plant species is not a use. Protection of endangered species has previously been a part of the OCMP, as demonstrated by incorporated sections of ORS chapter 496 (protecting wildlife species).

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.

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.

Wildflowers; Threatened or Endangered Plants

Statutes to Be Incorporated into the Program

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective ¹	Statutory History
THREATENED OR ENDANGERED PLANTS						
564.100	Definitions for ORS 564.100 to 564.135	Defines key terms for ORS 564.100 to 564.135	X		1987	<ul style="list-style-type: none"> • Enacted in 1987
564.105	Responsibility to protect and conserve native plants; rules	Makes the Director of Agriculture responsible for protecting and conserving endangered and threatened native plant species of the state and requires specific tasks, including establishing a system of permits for scientific taking of said species and adopting rules to carry out ORS 564.105 to 564.120	X		1987 2009	<ul style="list-style-type: none"> • Enacted in 1987, amended in 2009
564.110	Listing threatened or endangered species; rules	Identifies authorities and requirements of the Director of Agriculture in listing and delisting species on the endangered and threatened			1987 1999 2003 2011	<ul style="list-style-type: none"> • Enacted in 1987, amended in 1999, 2003, 2011

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	Statutory History
		species list; outlines the petitioning and review process for listing and delisting species				
564.115	Protection and conservation programs; action by state agencies; alternatives; findings required if agency fails to adopt alternatives	Requires the State Department of Agriculture to consult with other states having a common interest in particular threatened and endangered species; requires state agencies (prior to taking, authorizing, or financing any activity on state land) to determine that such activities are consistent with a state protection or conservation program under ORS 564.105(3) or otherwise will not appreciably reduce the likelihood of endangered or threatened plant species survival; sets procedures regarding endangered and threatened species for activities on state lands	X		1987	<ul style="list-style-type: none"> Enacted in 1987
564.120	Transactions in threatened or endangered species; restrictions; prohibition	Prohibits the take, import, export, transport, purchase or sale of any threatened species or endangered species (or attempt to do so) other than as allowed under ORS 564.105; prohibits the take or attempt to take any threatened species or endangered	X		1987	<ul style="list-style-type: none"> Enacted in 1987

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective ¹	Statutory History
		species without obtaining permission from the land owner or lessee				
564.125	Director of Agriculture authority to acquire plant habitat	Authorizes the Director of Agriculture to acquire habitat for the protection of threatened species or endangered species			1987	<ul style="list-style-type: none"> Enacted in 1987
564.130	Confidentiality of information regarding threatened or endangered species; circumstances	Authorizes the director of the appropriate agency to hold confidential, other than to the land owner, information concerning the location of a threatened or endangered species if unlawful taking is likely to occur if the location is disclosed			1987	<ul style="list-style-type: none"> Enacted in 1987
564.135	Effect of law on commercial forestland or private land; effect on other laws	Clarifies that ORS 564.100 to 564.130 and other specific state laws do not require an owner of private land to take action to protect a threatened or endangered species; notes that habitat may be protected as a biological site under ORS 527.610 to 527.770 and 527.992; notes that species threatened and endangered species may be subject to protection under ORS chapters 195, 196 and 197			1987	<ul style="list-style-type: none"> Enacted in 1987
PENALTIES						

ORS Section	Current Title	Description	Enf. Policy	Last OCRM Approval	Updates Adopted & Effective¹	Statutory History
564.991	Penalties	Declares violation of this chapter to be a Class A violation	X		1963 1999	<ul style="list-style-type: none"> Enacted in 1963, amended in 1999
564.994	Penalty for violation of ORS 564.120	Declares violation of ORS 564.120 to be a Class A misdemeanor	X		1987	<ul style="list-style-type: none"> Enacted in 1987

**Text of ORS Chapter 564 Statutes Included in the July 24, 2014 RPC
2013 Edition Oregon Revised Statutes**

THREATENED OR ENDANGERED PLANTS

564.100 Definitions for ORS 564.100 to 564.135. As used in ORS 564.100 to 564.135:

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

(2) “Director” means the Director of Agriculture.

(3) “Endangered species” means:

(a) Any native plant species determined by the department to be in danger of extinction throughout any significant portion of its range.

(b) Any native plant species listed as an endangered species pursuant to the federal Endangered Species Act of 1973 (P.L. 93-205, 16 U.S.C. 1531 et seq.), as amended.

(4) “Plant” means any member of the plant kingdom, including the seeds, roots or parts thereof, native to this state.

(5) “Species” means any species or its subspecies or variety, whichever is the first taxonomic subspecific category for the plant in question.

(6) “Take” means to collect, cut, damage, destroy, dig, kill, pick, remove or otherwise disturb.

(7) “Threatened species” means:

(a) Any native plant species the director determines by a finding of fact is likely to become an endangered species within the foreseeable future throughout any significant portion of its range.

(b) Any native plant species listed as a threatened species pursuant to the federal Endangered Species Act of 1973 (P.L. 93-205, 16 U.S.C. 1531 et seq.), as amended. [1987 c.686 §8]

564.105 Responsibility to protect and conserve native plants; rules. The Director of Agriculture has the responsibility to protect and conserve the native plants of this state that are threatened species or endangered species. In carrying out that responsibility, the director:

(1) Shall conduct investigations of plant species native to this state and determine whether any such species is a threatened species or an endangered species.

(2) By rule, shall establish and publish, and from time to time may revise, a list of plant species that are threatened species or endangered species.

(3) By rule, shall establish programs for the protection and conservation of plant species that are threatened species or endangered species. As used in this subsection, “conservation” means the use of methods and procedures necessary to bring a species to the point at which the measures provided under ORS 564.105 to 564.120 are no longer necessary. The methods and procedures include, but are not limited to, activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation and transplantation.

(4) By rule, shall establish a system of permits for scientific taking of threatened species and endangered species under terms and conditions that the director determines will minimize the impact on the species taken.

(5) Shall cooperate with the State Fish and Wildlife Commission in carrying out the provisions of ORS 496.172.

(6) Shall adopt administrative rules to carry out the provisions of ORS 564.105 to 564.120.

(7) Shall set priorities for establishing programs under this section after consideration of available funds and the immediacy and seriousness of the threat to any listed species. [1987 c.686 §9; 2009 c.11 §77]

564.110 Listing threatened or endangered species; rules. (1) The lists of threatened species or endangered species established pursuant to ORS 564.105 (2) initially shall include those species listed as of May 15, 1987, as a threatened species or an endangered species pursuant to the federal Endangered Species Act of 1973 (P.L. 93-205, 16 U.S.C. 1531 et seq.), as amended.

(2) The Director of Agriculture, by rule, may add or remove any plant species from either list, or change the status of any species on the lists, upon a determination that the species is or is not a threatened species or an endangered species.

(3) A determination that a species is a threatened species or an endangered species shall be based on documented and verifiable scientific information about the species' biological status. To list a species as a threatened species or an endangered species under ORS 564.100 to 564.130, the director shall determine that the natural reproductive potential of the species is in danger of failure due to limited population numbers, disease, predation or other natural or man-made factors affecting its continued existence. In addition, the director shall determine that one or more of the following factors exist:

(a) That most populations are undergoing imminent or active deterioration of their range or primary habitat;

(b) That overutilization for commercial, recreational, scientific or educational purposes is occurring or is likely to occur; or

(c) That existing state or federal programs or regulations are inadequate to protect the species or its habitat.

(4) Determinations required by subsection (3) of this section shall be made on the basis of the best scientific and other data available to the State Department of Agriculture, after consultation with federal agencies, other interested state agencies, other states having a common interest in the species and interested persons and organizations.

(5)(a) Any person may petition the department to, by rule, add, remove or change the status of a species on the list.

(b) A petition shall clearly indicate the action sought and shall include documented scientific information about the species' biological status to justify the requested action.

(c) Within 90 days of receipt of a petition, the department shall respond in writing to the petitioner indicating whether the petition presents substantial scientific information to warrant the action requested.

(d) If the petition is found to present such information, the department shall commence rulemaking.

(e) If the petition is denied, the petitioner may seek judicial review as provided in ORS 183.484.

(6)(a) Notwithstanding subsections (1) to (5) of this section, the department shall take emergency action to add a species to the list of threatened species or endangered species if it determines there is a significant threat to the continued existence of the species.

(b) The department shall publish notice of such addition in the Secretary of State's bulletin and shall mail notice to affected or interested persons whose names are included on the department's mailing list for such purposes.

(c) Such emergency addition shall take effect immediately upon publication in the Secretary of State's bulletin and shall remain valid for a period no longer than one year, unless during the one-year period the department completes rulemaking procedures as provided in subsections (1) to (4) of this section.

(7)(a) The director shall periodically review the status of all threatened and endangered plant species listed under ORS 496.004, 496.171 to 496.192, 498.026, 564.040 and 564.100 to 564.135.

(b) Each species shall be reviewed at least once every five years to determine whether substantial, documented scientific information exists to justify its reclassification or removal from the list, according to the criteria listed under subsection (3) of this section.

(c) If a determination is made to reclassify a species or remove it from the list, the department, within 90 days, shall commence rulemaking to change the status of the species. [1987 c.686 §10; 1999 c.59 §177; 2003 c.14 §350; 2011 c.319 §22]

564.115 Protection and conservation programs; action by state agencies; alternatives; findings required if agency fails to adopt alternatives. (1) In developing protection and conservation programs pursuant to ORS 564.105 (3), the State Department of Agriculture shall consult with other states having a common interest in particular threatened species or endangered species and with other affected state agencies.

(2) In furtherance of programs to conserve or protect threatened species or endangered species under ORS 564.105 to 564.115, state agencies shall consult and cooperate with the department and any other state agency that has established programs to conserve or protect threatened species or endangered species. Before a state agency takes, authorizes or provides direct financial assistance to any activity on land owned or leased by the state, or for which the state holds a recorded easement, the state agency, in consultation with the department, shall:

(a) Determine that the action on land owned or leased by the state or for which the state holds a recorded easement is consistent with a program established by the department pursuant to ORS 564.105 (3); or

(b) If no program has been established for the listed species, determine whether such action has the potential to appreciably reduce the likelihood of the survival or recovery of any species of plant that is threatened or endangered.

(3) If a state agency determines that a proposed action on land owned or leased by the state, or for which the state holds a recorded easement, has the potential to appreciably reduce the likelihood of the survival or recovery of any species that is a threatened species or an endangered species, it shall notify the department. Within 90 days, the department shall recommend reasonable and prudent alternatives, if any, to the proposed action which are consistent with conserving and protecting the affected species.

(4) If a state agency fails to adopt the alternatives identified under subsection (3) of this section, after consultation with the department, it shall make findings to demonstrate that:

(a) The potential public benefits of the proposed action outweigh the potential harm from failure to adopt the alternatives; and

(b) Reasonable mitigation and enhancement measures shall be taken, to the extent practicable, to minimize the adverse impact of the action on the affected species.

(5) When an action under this section is initiated by a person other than a state agency, the agency shall provide final approval or denial of the proposed action within 120 days of receipt of a written request for final determination.

(6) An action initiated by a person other than a state agency that has met the standards or mitigation requirements of a federal agency for a particular species under the federal Endangered Species Act of 1973 (P.L. 93-205, 16 U.S.C. 1531 et seq.), as amended, shall be deemed to meet the requirements of ORS 564.100 to 564.130.

(7) The provisions of this section do not apply to lands acquired through foreclosures of loans made pursuant to programs of the Department of Veterans' Affairs. [1987 c.686 §11]

564.120 Transactions in threatened or endangered species; restrictions; prohibition. (1) Except as otherwise provided pursuant to ORS 564.105, no person shall take, import, export, transport, purchase or sell, or attempt to take, import, export, transport, purchase or sell any threatened species or endangered species.

(2) No person shall take or attempt to take any threatened species or endangered species without first having obtained permission from the person who owns or leases the land upon which the species is growing. When land is owned by the State of Oregon and leased for private use, permission to take or attempt to take a threatened species or endangered species must first be obtained from the Director of Agriculture. [1987 c.686 §12]

564.125 Director of Agriculture authority to acquire plant habitat. The Director of Agriculture is authorized, on behalf of the State of Oregon, to acquire habitat, or interests therein, the State Department of Agriculture considers necessary for the protection of threatened species or endangered species. Acquisition may be by gift, grant, devise, purchase, exchange or any other method by which the department is authorized to acquire real property. [1987 c.686 §14]

564.130 Confidentiality of information regarding threatened or endangered species; circumstances. (1) Notwithstanding ORS 192.410 to 192.505, the director of the appropriate agency may hold confidential, and refuse to disclose, information concerning the location of a threatened or endangered wildlife or plant species upon a determination that, based on prior experience, unlawful taking is likely to occur if the location is disclosed.

(2) In no instance shall the director of the appropriate agency refuse to disclose information concerning the location of a threatened or endangered wildlife or plant species to the owner of lands on which the species is known to exist. [1987 c.686 §15]

564.135 Effect of law on commercial forestland or private land; effect on other laws. (1) Nothing in ORS 564.100 to 564.130 is intended, by itself, to require an owner of any commercial forestland or other private land to take action to protect a threatened species or endangered species, or to impose additional requirements or restrictions on the use of private land.

(2) Notwithstanding any other provision of law, nothing in ORS 496.004, 496.171 to 496.192, 498.026, 564.040 and 564.100 to 564.135 or ORS 527.610 to 527.770 and 527.992 shall be interpreted to require protection of a species listed under ORS 564.100 to 564.130 or its habitat on private forestland.

(3) The existence of a species listed under ORS 564.100 to 564.130 on privately owned forestland shall not require protection of its habitat as a biological site under ORS 527.610 to 527.770 and 527.992. However, if other elements exist that qualify such habitat as a biological site, such habitat may be protected as a biological site under ORS 527.610 to 527.770 and 527.992.

(4) Species listed under ORS 564.100 to 564.130 may be subject to protection under ORS chapters 195, 196 and 197 provided that the full process of inventory and analysis required by any open spaces, scenic and historic areas and natural resources goal is fulfilled and included in any acknowledged land use plan or amendment. [1987 c.686 §16]

564.910 [Repealed by 1953 c.488 §2]

PENALTIES

564.990 [Repealed by 1963 c.461 §34]

564.991 Penalties. Subject to ORS 153.022, violation of this chapter and regulations authorized by ORS 564.040 is a Class A violation. [1963 c.461 §31; 1999 c.1051 §200]

564.994 Penalty for violation of ORS 564.120. Violation of ORS 564.120 is a Class A misdemeanor. [1987 c.686 §13]