



Oregon

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TO: Land Conservation and Development Commission

FROM: Brenda Ortigoza Bateman, Ph.D., Director
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SUBJECT: **Agenda Item 6, September 22-23, 2022, LCDC Meeting**

RULEMAKING: ADOPTION OF EXCEPTION CRITERIA FOR SHORELINE PROTECTION OF PUBLIC, OCEAN FRONTING ROADS

I. AGENDA ITEM SUMMARY

Department of Land Conservation and Development (DLCD or department) staff will ask the Land Conservation and Development Commission (LCDC or commission) to adopt a new reason under the Land Use Planning Goal 2 exception process to allow structural shoreline protection for public ocean-fronting roads built prior to 1977.

Purpose. The purpose of this rulemaking is to provide an option for structural shoreline protection from coastal erosion for essential lifeline routes (such as Highway 101) along the coast, while also balancing the protection of Oregon's public beaches and coastal resources.

Department staff will brief the commission on the steps that led to this rulemaking, the rulemaking process, the proposed rule addition, and the potential impacts of the proposed rule addition.

Objective. Adoption of new exception criteria within Goal 2: Land Use Planning to allow structural shoreline protection for certain public, ocean-fronting roads subject to Goal 18: Beaches and Dunes.

For further information about this report, please contact Meg Reed, Coastal Shores Specialist at 541-514-0091 or meq.reed@dlcd.oregon.gov.

II. BACKGROUND

The commission initiated the Ocean-fronting Public Road Protection Rulemaking in July 2021. As proposed, a specific reason will be added to the Goal 2 exception process rules, specifically OAR 660-004-022, to allow structural shoreline protection from

coastal erosion for public, ocean-fronting roads and highways built prior to 1977 through a local government goal exception process.

A. SHORELINE ARMORING RESTRICTIONS OF GOAL 18

Structural shoreline protection, or shoreline armoring, is the placement of structural material on the coastline with the intention of minimizing the risk of coastal erosion to development. On the Oregon coast, this mostly takes the form of riprap revetments or seawalls. Currently, under Goal 18, only certain types of development that existed as of January 1, 1977 are eligible to apply for shoreline armoring permits. ‘Development’ is defined as houses, commercial and industrial buildings, and vacant but improved subdivision lots. Under the current goal language, roads such as Highway 101 are not eligible for shoreline armoring, even those that were developed prior to 1977.

The intention of this provision of Goal 18 is to limit the placement of shoreline protection structures, which effectively places a cap on the amount of ocean shore that may be hardened. This policy helps to limit the negative cumulative impacts of such hardening. Shoreline armoring fixes the shoreline in place, traps sediment, and causes scouring and lowering of the beach profile, which can result, over time, in the loss of Oregon's public beaches. New development must account for shoreline erosion through non-structural approaches, such as increased setbacks, moveable development, or vegetated dunes and bluffs. In the face of increased ocean erosion occurring with climate change, limiting hard structures and allowing natural shoreline migration is a critical policy tool for conserving and maintaining Oregon's public beaches.

However, public facilities and roads, including those that were developed prior to 1977, are not currently included in the definition of development eligible for shoreline armoring under Goal 18. In particular, some sections of state Highway 101 and other city and county roads are oceanfront and vulnerable to the hazards of coastal erosion. While there may be options for roads to be removed or re-routed in some areas, in other areas this option may be extremely costly; may impact sensitive habitats; and/or may be infeasible because of the mountainous and landslide-prone coastal terrain. In some cases, use of shoreline armoring for public road protection may provide the greatest public benefit.

B. ROAD PROTECTION OPTIONS AND HISTORY

In 2019, DLCD staff convened a focus group of interested stakeholders, local government staff, and state agencies to review the equity and consistency of the shoreline armoring provision of Statewide Planning Goal 18. Focus group members considered information related to the practical, political, technical, and scientific aspects of the shoreline armoring requirements. The focus group concluded its work in September 2019 with several proposals for next steps, one of which was to commence rulemaking to create a specific land use planning goal exception option in OAR 660-

004-0022 for public roads developed prior to January 1, 1977. While this change would not guarantee approval of a goal exception, it could help streamline the goal exception process with local governments for roads that fit these criteria.

A different option, amending Goal 18 directly to include public roads in the definition of development eligible for shoreline armoring, was ultimately considered to be infeasible by the focus group. In 2002, LCDC and the Oregon Transportation Commission attempted a Goal 18 amendment to include Highway 101 in the definition of development eligible for shoreline armoring. However, the goal amendment proposal was ultimately withdrawn because of opposition from multiple parties. Rulemaking to address these roads more specifically through the local government process was seen as a more feasible and balanced approach by the focus group members, particularly because of the minimal miles of exposed oceanfront roads. The proposed goal exception language would operationalize this recommendation of the Goal 18 focus group.

C. RULEMAKING PROCESS

Commissioners formally initiated rulemaking to address these issues in July 2021. The commission's charge to the department has guided the development of the draft rule. Staff have included this charge as Attachment D.

Staff received guidance on the development of the draft rules through a volunteer rulemaking advisory committee (RAC), recruited through an open process. Both the Citizen Involvement Advisory Committee and LCDC provided direction on the interests that should be represented at the rulemaking table. Advisory committee members were selected to provide representation across a range of interests, particularly coastal interests, that are likely to be affected by the rules. The department received 18 applications to serve on the RAC and selected nine people representing a variety of interests, including: local government leadership, public works, state agencies, tourism, small business, transportation, emergency management, environmental advocacy, and coastal recreation. Staff have included the roster of RAC members as Appendix D. The department also sent a letter and follow-up communication to each of the nine federally recognized tribes to solicit interest in participating in the rulemaking process. Staff did not receive indication of interest in this rulemaking process from any of the nine federally recognized tribes.

Advisory committee members met a total of four times to draft rule language. Meetings were held remotely in December 2021, January 2022, March 2022, and August 2022. Staff are grateful for advisory committee members' extensive contributions. Each meeting was livestreamed on YouTube and recordings were made available on the rulemaking webpage after each meeting. A summary of topics discussed and links for more information about each meeting can be found on the DLCD rulemaking webpage: <https://www.oregon.gov/lcd/LAR/Pages/OFPRP.aspx>.

In addition to the RAC meetings, DLCD staff also provided updates on the rulemaking process at coastal planners’ network meetings, beach and dune related workshops, the Local Officials Advisory Committee, and with other agency staff. Staff also responded to inquiries from media outlets, which resulted in a few articles:

- OPB: [Oregon tries to tweak land-use rules to save Highway 101](#)
- OPB: [Oregon’s land-use rules bump up against increasingly crowded shorelines](#)
- Landscape Architecture Magazine: [Slippery Slopes: Better Planning and Stronger Policies are Needed Now to Protect Coastlines Like Oregon’s](#) (subscription only, no weblink)

III. PROPOSED RULE LANGUAGE

Staff have included the final proposed rule text as Attachments B and C. As mentioned above, the proposed rule is an addition to OAR 660-004-0022. This new specific reason exception applies only to public, ocean-fronting roads that were developed as of January 1, 1977, to retain the intention of Goal 18. Below are the key highlights and justifications for the proposed rule language, developed through the aforementioned public process:

<i>Topic</i>	<i>Reasoning</i>
A definition is given for public roads and highways, as well as what types of roads are eligible for this exception, and which are not. Only public bodies that own, operate, or maintain the public roadway may apply for this exception.	This is seeking to prevent private property that is not eligible for shoreline armoring under Goal 18 from using this exception. This also helps to justify the public benefit.
Justification that shoreline armoring will provide a significant public benefit.	If the exception is going to allow more shoreline armoring on the Oregon coast, which will have long term impacts on beaches, there needs to be a clear reason to justify this addition, such as protecting an essential lifeline transportation route.
Feasibility Assessment – evaluation of alternatives to shoreline armoring that do not require a goal exception and why they will not work. Rule language gives several alternatives to evaluate at a minimum.	Requires the applicant to evaluate other potential options besides hard armoring, such as relocating the road, or vegetative plantings to mitigate the erosion. This assessment should answer the question, “Is a goal exception for shoreline armoring the only option in this instance?”
Demonstration of how the proposed addition of shoreline armoring for road protection will minimize its impacts on the public beach and adjacent properties.	If shoreline armoring is the only option, this analysis asks the applicant to show how the negative impacts of that armoring will be minimized, especially to public access of the

	beach and to adjacent property, and how the design of the structure accounts for the impacts of sea level rise.
<p>Avoid or mitigate the long-term and recurring costs to the public of the addition of shoreline armoring.</p>	<p>This language is borrowed and modified from the wetland mitigation program that the Department of State Lands oversees. The intent of this provision is to protect beach habitat and beach access from the impacts of additional armoring. The applicant is required to look at how the proposed project can, in this order: avoid, minimize, rectify, reduce, or compensate for the impacts of the additional shoreline armoring.</p>
<p>Assessment of how the exception requirements of OAR 660-004-0020 are met.</p>	<p>This serves as a reminder that the applicant also must follow the other exception criteria laid out in OAR 660-004-0020, which includes the four standards for a goal exception described in Goal 2.</p>

With each RAC meeting, additional language was added to the rule to address concerns brought up by RAC members. RAC members and DLCD staff had extensive and valuable discussions to develop the language staff proposes in Attachment C. RAC members spent a great deal of time discussing the language within the mitigation section of the rule language, lines 1-12 of page 7, Attachment C. One of the challenges with the proposed mitigation section is that unlike with wetland mitigation, there is no compensation program or set of criteria that exists for beach habitat and beach access. Oregon Parks and Recreation Department (OPRD), staff who participated as a member of the RAC, represents the agency that has jurisdiction over the public beach and any alterations proposed in this area. They do not currently have a set compensation program for beach habitat or beach access. However, the RAC felt strongly that there was a need to keep language in this rule to mitigate and compensate for the impacts of more shoreline armoring, especially armoring constructed by public bodies. RAC members and staff decided that, while there is no specific program currently, this language leaves room for a program in the future and gives enough detail for an applicant to propose mitigation for a shoreline armoring project now. RAC members support the proposed rule language as staff present in Attachment C. A couple members commented that this is a section of the rule that could use some additional detail to ensure the public beach is protected to the maximum extent possible. DLCD staff and legal counsel believe the rule is sufficient as drafted in Attachment C.

Attachment A of this staff report contains the Secretary of State Filing Notice for this proposed rule effort, which contains impact statements for housing, fiscal, and racial equity, as well as the draft rule language as of July 2022. Staff decided to hold one additional RAC meeting in August to work out a few outstanding concerns and issues brought up by members. This meeting resulted in a few, minor changes to the proposed

rule language, which are identified in Attachment B. Attachment C is a clean version of the final proposed rule language for LCDC consideration.

A. POTENTIAL IMPACTS OF NEW GOAL EXCEPTION

About 22.8 miles of Oregon’s coastline are already armored, which is about six percent of the overall coastline. Most of that armoring (92 percent) occurs in Clatsop, Tillamook, and Lincoln counties. About 43 percent of the tax lots along the coast are not eligible for armoring under current policy.

The Oregon Department of Transportation (ODOT) is conducting a study to assess the specific number of miles and locations of Highway 101 that are ocean-fronting and exposed to coastal hazards. While ODOT’s assessment estimates about 14 miles of Highway 101 fit this description, ODOT staff are refining this assessment. This highway, which was first built in the 1920s, is an essential lifeline road that connects coastal communities and provides links to the rest of the State.

DLCD staff also conducted a data analysis of public ocean fronting roads that are not Highway 101. From this analysis, we estimate about 19.5 miles of roads may meet the criteria for this new proposed goal exception, 15.2 miles of which are within state parks. This analysis: includes only roads that parallel the shoreline and not portions that are perpendicular; includes road segments within 100 feet of the “toe of bluff”; excludes road segments that are already armored; and excludes road segments that are along rocky shorelines (these areas are generally not erosive). The highest number of miles of potentially eligible roads are within Clatsop County, then Tillamook, and Curry Counties. There are no or almost no road segments eligible in Douglas and Lane Counties.

These oceanfront road segments do represent many more miles that could become armored in the future. However, not all public bodies responsible for these road segments will want to pursue a goal exception, and some may not be able to meet the proposed rule criteria. For example, some road segments may be more feasibly relocated or removed. Also, it is important to note that any of the public bodies responsible for these roads can currently apply for a goal exception under the current rules. They would follow a general reasons exception process. The proposed rule creates a clearer path for those roads that serve a broad public purpose and offers clear guidance on justifying a goal exception that balances public needs with the important assets and ecosystem services of the public beach.

B. SUMMARY OF PUBLIC COMMENTS RECEIVED

DLCD and the RAC received six written public comments from the start of the rulemaking process through August 2022. Staff have included these comments as Attachment E. These comments came from individuals or organizations representing environmental advocacy, conservation, and coastal recreation interests. Generally, the

comments acknowledge that it may be in the public interest to allow public roads to be armored when no other feasible solution exists, but note that if additional armoring is allowed, it should be thoroughly justified and the impacts to the public beach and beach habitat mitigated. Commentors highlighted that because this topic involves public right-of-way and public beaches, state and local government applicants can and should impose tests on themselves that go beyond a demonstration of immediate need, and that armoring ocean fronting roads should be considered only in the context of a long-term strategy for addressing climate change. Over the course of the four RAC meetings, members discussed these comments and integrated the objective of the suggestion into the rule language to the extent the RAC members thought feasible and within the department's authorities. This resulted in the addition of rule language that requires a feasibility assessment, public benefit justification, and mitigation of armoring impacts. Staff have included the final proposed rule language as Attachment C.

DLCD staff also held a geographic public hearing in Newport on August 23, 2022, at the Newport Public Library. A geographic hearing is required for any rule that applies only to a specific geographic area and not statewide. One person attended the hearing and gave verbal public comment in favor of the proposed rules. The department has not received any comments opposing the proposed rules as of the end of August 2022. The public comment period will end at the LCDC public hearing on September 22, 2022.

IV. RECOMMENDED ACTION

The department recommends that the commission:

1. Review the proposed amendments to administrative rule OAR 660-004-0022 (Attachment B and C);
2. Review rulemaking impact statements (Attachment A);
3. Review public comment received through August 2022 (Attachment E); and
4. Adopt the proposed administrative rule with any amendments.

V. SAMPLE MOTION TO ADOPT RULE

The department recommends that the commission adopt the proposed OAR 660-004-0022(12) to create a new reason under the Land Use Planning Goal 2 exception process to allow structural shoreline protection for public, ocean-fronting roads built prior to 1977.

Recommended motion:

"I move that the Land Conservation and Development Commission adopt OAR 660-004-0022(12) as drafted in Attachment C of Agenda Item 6."

Optional motion:

“I move that the Land Conservation and Development Commission adopt OAR 660-004-0022(12) as drafted in Attachment C of Agenda Item 6 with the following revisions...”

VI. ATTACHMENTS

- A. RULE FILING NOTICE WITH IMPACT STATEMENTS AND JULY 2022 PROPOSED RULE LANGUAGE**
- B. OAR 660-004-0022, FINAL DRAFT RULE (WITH CHANGES IDENTIFIED)**
- C. OAR 660-004-0022, FINAL DRAFT RULE (CLEAN VERSION)**
- D. RULEMAKING CHARGE**
- E. PUBLIC COMMENTS RECEIVED**