



Rulemaking: Issuance of Archaeological Permits

**Public comments received
May 20 through May 26, 2022, 3:30 pm**



Submit a public comment on a rule

Oregon Parks and Recreation Department

Proposed rule change:

Issuance of Archaeological Permits

Commenter name (if provided):

Kimberli Fitzgerald

Location (if provided): Salem, OR

Public comment:

Thank you for the opportunity to comment.

Kimberli

Kimberli Fitzgerald, AICP/RPA (she/her)

Historic Preservation Program Manager

Historic Preservation Officer & City Archaeologist

City of Salem | Community Development Department

555 Liberty St SE, Suite 305, Salem, OR 97301

kfitzgerald@cityofsalem.net | 503-540-2397

Date comment received:

May 26, 2022 08:09 AM

Commenter email (if provided):

kfitzgerald@cityofsalem.net



555 Liberty Street SE / Room 305 • Salem OR 97301-3503 • Phone 503-588-6213 • Fax 503-588-6005
www.cityofsalem.net/planning • www.cityofsalem.net

May 25, 2022

Oregon Parks and Recreation Department
ATTN: Katie Gauthier
725 Summer Street NE, Suite C
Salem, OR 97301
via email: OPRD.publiccomment@opr.oregon.gov

RE: Rulemaking related to ORS 390.235 (Archaeological Permits)
Amendments to OAR 736-051-0000 to 736-051-0090

Dear Members of the Oregon Parks and Recreation Commission and OPRD staff:

I recently served as Chair of the Rulemaking Advisory Committee (RAC) responsible for reviewing proposed amendments to the existing Oregon Administrative Rules related to the requirements for submittal and issuance archaeological permits in Oregon. While the ten member RAC included myself as well as a representative from a County planning department, the involvement from Certified Local Governments (CLGs) who have an obligation to ensure their archaeological resources are protected, was minimal. Overall, there has been minimal outreach to local jurisdictions with existing preservation programs who may be impacted by these rule changes, and it is unclear whether or not they've been given adequate notice to be able to provide meaningful input and testimony regarding the proposed changes to the rules.

There are two substantive amendments that I have serious concerns about which I believe may potentially have significant impacts upon local jurisdictions, especially CLGs. First, the amendments propose to remove planning departments as an 'entity with approval authority' with no opportunity to request notification of permits issued relating to significant archaeological work within our local communities; and second, the conditions under which an expedited archaeological permit can be issued to local jurisdictions who need to complete unplanned, urgent public infrastructure repairs. While I was able to share my concerns previously as part of the RAC, my substantive comments and recommended changes are attached to this letter.

Despite the concerns I've expressed above, this letter serves to underscore the need for the Commission and OPRD's work related to the streamlining of rules associated with the application and issuance of archaeology permits in the state of Oregon. I am privileged to have been part of this first step of the process, and look forward to future public outreach, education and rulemaking which will ultimately serve to better protect our archaeological resources here in Oregon.

Sincerely,

Kimberli Fitzgerald AICP, RPA
Salem Historic Preservation Program Manager/City Archaeologist

Attachments: 1. Fitzgerald Comments

I. Abatement of Unsafe Conditions -Expedited Review of Archaeological Permits

Authorizing Statute: ORS 390.235 and 390.240

736-051-0080 (7)

Current rule: ~~(7)(9)(a)~~ *Notwithstanding the provisions of section (8) of this rule, any person or entity who discovered an archaeological or historic site or burial during construction may request an expedited consultation process. The request may be granted whenever the Director or his or her designee, in consultation with the parties listed in subsection (8)(a) of this rule, determines that the 30-day consultation period provided in subsection (8)(b) of this rule will result in extreme economic hardship to the person or entity making the request, or an undue risk to public health, life or safety, or an undue threat to the site or burial. Examples of situations creating undue risk to public health, life or safety include hazardous material spills, breach of regional flood control facilities, and pipeline failures.*

Proposed revisions: removal of "extreme economic hardship" as a provision (as well as the removal of the definition).

Comment #1: The proposed rule as written does not allow for inadvertent discoveries by local jurisdictions who are completing public infrastructure repairs. The model as presented in the rule is that the applicant or property owner completes the appropriate clearance review prior to beginning their project which is appropriate for public maintenance and construction projects where there is time to plan appropriately. However, the reality is that most local jurisdictions don't have the capacity to do the kind of comprehensive archaeological survey and study of their infrastructure needed - in order to ensure that they are fully aware of any potential archaeological resources that they may inadvertently discover while completing sometimes urgently required repair of public infrastructure. Often their only feasible alternative in these situations is to utilize this economic hardship clause. Should this hardship clause be removed, adding additional language to allow public jurisdictions to be able to utilize this expedited permit process in situations where urgent repair is needed will result in improved compliance with this statute and a reduction in the loss or damage to archaeological resources.

Comment #2: Summary Abatement. In certain situations, it is unsafe for a public jurisdiction to wait 48 hours to repair public infrastructure. The language within this section is not clear and objective making it difficult for local jurisdictions to clearly understand under what circumstances repair work is allowed when a truly serious life/safety situation is occurring. In many cases waiting 48 hours (and longer if it is a weekend/holiday)- is not reasonable and would in fact be dangerous to the community. Therefore, a provision clarifying that the abatement of an unsafe or dangerous condition should be allowed before the permit is issued provided appropriate notification is given to the SHPO, LCIS and the tribes.

Recommended edits:

The following edits to the rule are recommended to better ensure that local jurisdictions are reasonably able to comply with the statute:

OAR 736-051-0080 (7) Any person or entity who **has completed (post)** SHPO and appropriate tribe clearance review **for a project, or inadvertently** discovers **while repairing public infrastructure**, an archaeological object, site, human remains, burial, historic cemetery, funerary object, sacred object, or object of cultural patrimony, may request an expedited 48-hour permit review. The request may be granted if the Director or their designee, in coordination with entities with approval authority determine the 30-day permit review period of this rule will result in an undue risk to public health, life or safety, or an undue threat to the archaeological object, site, human remains, burial, funerary object, sacred object, or object of cultural patrimony. Examples of situations creating undue risk to public health, life or

safety include: repair of existing public infrastructure (ie. utilities within the right of way), hazardous material spills, breach of regional flood control facilities, and pipeline failures. Examples of creating undue threat to an archaeological object, site, human remains, burial, historic cemetery, funerary object, sacred object, or object of cultural patrimony include: erosion, susceptibility to theft, prolonged exposure to the elements, and proposed construction related activities.

(a) If the Director or his or her designee determines that an expedited review request is warranted, the following procedures apply:

(A) The applicant shall submit an expedited permit application for the Director or his or her designee to send out to entities with approval authority for review;

(B) During the following 48 hours (excluding Saturday, Sunday, and any legal or tribal holidays), entities with approval authority may respond to the permit application with their approval, approval with conditions, or object. No response within 48 hours is considered approval. If any entity with approval authority objects in writing to an expedited review, the director of his or her designee will not proceed with the expedited review;

(C) (1) The applicant may proceed when the permit is issued.

(2) The summary abatement of unsafe or dangerous condition where the 48-hour review delay constitutes an imminent and serious threat to public safety shall be allowed before the permit is issued with prior notification to the Director or their designee and the tribes identified by LCIS.

(d) For purposes of this section, excluding burials, funerary objects, sacred objects, or any objects of cultural patrimony, expedited 48-hour permit reviews are only available if prior consultation with the most appropriate tribes, and SHPO has occurred.

II. REMOVAL of Local Planning Departments as Entity with Approval Authority/Notice of Issued Permit

Statute: ORS 390.235

(1)(c) No permit shall be effective without the approval of the state agency or local governing body charged with management of the public land on which the excavation is to be made, and without the approval of the appropriate Indian tribe.

Implementing Rules

OAR 736-051-0010/0070 definitions

OAR 736-051-0080 (and 090)

Existing rule (7) *As soon as practicable, but generally not to exceed two working days, the SHPO shall mail copies of the complete application to the appropriate Indian tribe, if any, the land managing agency, Commission on Indian Services, Oregon State Museum of Anthropology, and the applicable local government planning department.*

Proposed new rule language: (6) *The SHPO shall provide the complete application to entities with approval authority for review.*

Proposed amendments and deletions: definitions: “Entity with Approval Authority” (OAR 736-051-0010 and 0070): local governing body removed and replaced with land managing agency; Additional related deletions: *OAR 736-051-0080 (7)*...copies of the permit application shall be mailed to the “applicable local planning department”.

Comment #1: The language in the existing statute clearly identifies the ‘local governing body’ charged with the management of the public land (ie. local planning departments). Local governing body does not mean the same this as the ‘owner’ of the land (they are not interchangeable). Therefore the proposed deletions in these definitions and the defined processes related to notification of local planning departments are not consistent with statute and in fact conflict with the implementation other statutes relating to the responsibility that local planning departments have to ensure historic resources in their jurisdiction are protected- including but not limited to: ORS 197.307(5)(b); ORS 197.307(9)(b)(B); ORS 197.311(5)(a); ORS197.467 and ORS 358.605.

Comment #2: Local Planning Departments are responsible for compliance with Goal 5 and are responsible for identifying any ‘conflicting uses’ (as defined in OAR 660-023-0010) subject to local land use regulations that could adversely affect a significant Goal 5 resource. OAR 660-023-0010 “Resource Category” refers to the resource groups listed in Goal 5 which include sites listed on the National Register of Historic Places. Archaeological sites are a resource type identified by the National Register and therefore are Goal 5 resources that local jurisdictions are responsible for protecting. Local governments have the authority to designate archaeological sites locally as well. For example, the City of Hillsboro has listed two archaeological sites in their Goal 5 local historic inventory.

Comment #3: Without planning department notification and the ability to comment/condition/appeal a proposed archaeological permit within their jurisdiction, it is not feasible for a local jurisdiction to ensure the protection of known significant archaeological sites for which they are responsible under Goal 5 and the associated implementing rules in OAR 660-023-0200.

OAR 660-023-0200 defines the processes local governments are required to comply with in order to ensure that these resources are included in locally adopted Comprehensive Plans. OAR 660-023-0200(3) states that: “Local comprehensive plans should foster and encourage the preservation, management, and enhancement of significant historic resources within the jurisdiction in a manner conforming with, but not limited by the provisions of [ORS 358.605](#)..” This statute states in part: “ *The Legislative Assembly declares that the cultural heritage of Oregon is one of the state’s most valuable and important assets; that the public has an interest in the preservation and management of all antiquities, historic and prehistoric ruins, sites, structures, objects, districts, buildings and similar places and things for their scientific and historic information and cultural and economic value; and that the neglect desecration and destruction of cultural sites, structures, places and objects result in an irreplaceable loss to the public.*”

This also further hinders a local jurisdiction’s ability to comply with Certified Local Government Requirements for protection of significant archaeological resources they are responsible for.

Suggested Language

Should SHPO staff, DOJ and subsequently the Oregon Parks Commission disagree with the statutory interpretation above, and move forward with the removal of local planning departments as an entity with approval authority -as a representative of the League of Oregon Cities, I strongly encourage the following additional language be added to OAR 736-051-0080 (9) in order to better ensure that at a minimum local CLG's are notified of any permits issued in their jurisdiction so that significant archaeological resources can be better protected at the local level:

OAR 736-051-0080 (9)(a) The applicant and entities with review authority will receive a copy of the approved signed permit from the Director or his or her designee; and-

(b) At the request of any local Planning Departments who are responsible for managing the development of lands and the protection of significant archaeological resources within their jurisdiction, and who are Certified Local Governments as defined by the National Park Service and recognized by the Oregon Parks and Recreation Department, the Director or his designee shall provide a copy of the approved archaeological permit authorizing work within their jurisdiction as well as notification of any permit amendments or extensions.