

OSMB RULEMAKING 101



Oregon State Marine Board
Quarterly Meeting
Gold Beach, OR | July 28, 2022

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Policy and Environmental Program Manager
Oregon State Marine Board

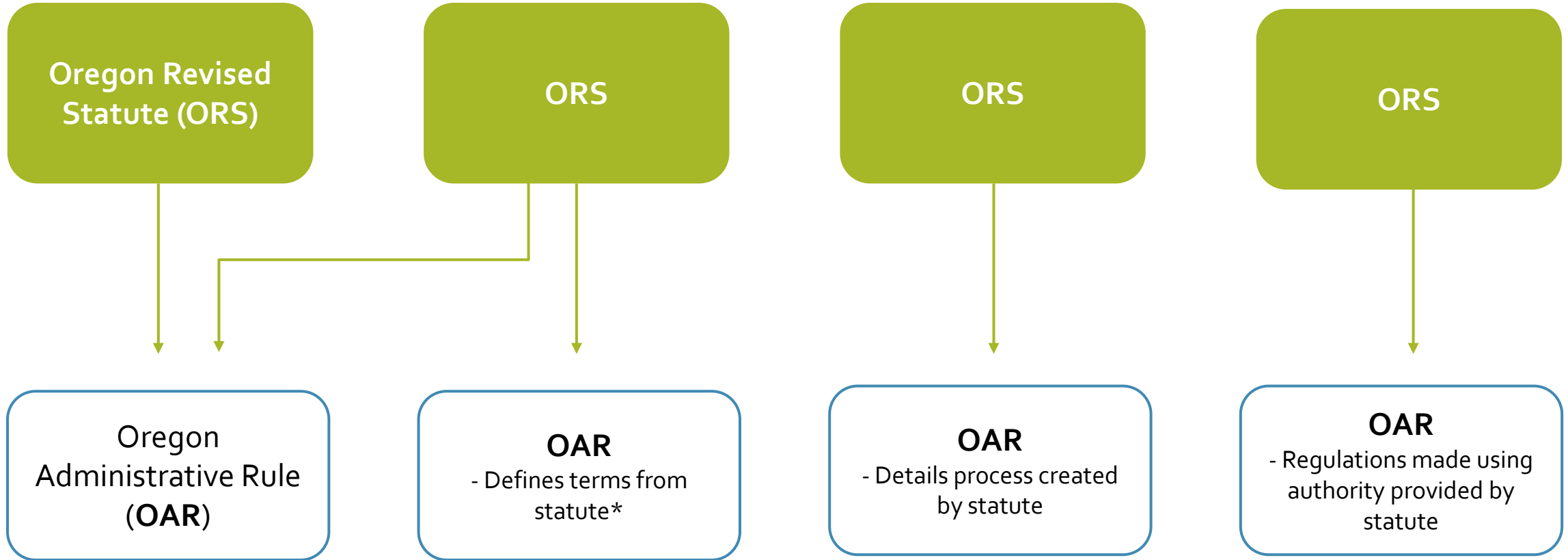
We can initiate rulemaking and propose rules on anything involving boats whenever we want?

Who is “we”?

- Very little distinction between the five-member Board and agency in statute.
 - Board must meet at least once every three months and appoints the Director. Most other procedures are based on traditional policy and subject to change at the Board’s discretion.
- Agency staff *can* complete rulemaking process without Board involvement, but Board would need to provide guidance to the Director on the use of this authority.

No... must have statutory authority, most from Oregon Revised Statutes 830.110 and 830.175.

Oregon State Law



ORS 830.100: Powers and duties of the board; rules.

830.110 Powers and duties of board; rules.

In addition to the powers and duties otherwise provided in this chapter, the State Marine Board shall have the power and duty to:

(1) Make all rules necessary to carry out the provisions of this chapter. The rules shall be made in accordance with ORS chapter 183.

...

(13) Make rules for the uniform navigational marking of the waters of this state. Such rules shall not conflict with markings prescribed by the United States Coast Guard. No political subdivision or person shall mark the waters of this state in any manner in conflict with the markings prescribed by the board.

(14) Make rules regarding marine toilets and their use consistent with the prevention and control of pollution of the waters of this state and not in conflict with the rules of the Oregon Health Authority or the Environmental Quality Commission.

...

(16) Make rules regulating water ski course markers, ski jumps and other special use devices placed in the waters of this state. Such rules may regulate the installation and use of the devices and may require a permit.

(17) Adopt rules necessary to carry out and enforce the provisions of ORS 830.950 and 830.955. The rules shall include but need not be limited to:

(a) The kinds of protective covering or physical barriers that are acceptable to be used between a submersible polystyrene device and the water.

(b) Guidelines for the use of submersible polystyrene devices for the repair or maintenance of existing docks or floats.

(18) Adopt rules providing for establishment of a Safe Boating Education Course to be made available to courts and law enforcement agencies within this state for use as a sentencing option for those individuals convicted of boating offenses.

...

ORS 830.175: Regulations for specific areas; rules.

830.175 Regulations for specific areas; rules.

(1) The State Marine Board, upon consideration of the size of a body of water and traffic conditions, may make special regulations consistent with the safety and the property rights of the public or when traffic conditions become such as to create excessive congestion, relating to the operation of boats in any waters within the territorial limits of any political subdivision of this state. The regulations may include, but need not be limited to, the establishment of designated speeds, the prohibition of the use of motorboats and the designation of areas and times for testing racing motorboats.

...

(4)(a) The board may make special regulations relating to the operation of boats on the Willamette River within the Willamette River Greenway, including the establishment of designated speeds or other methods to manage boat wake energy, as may be needed for the protection of the shoreline, public and private property, fish and wildlife habitat and vegetation. When adopting regulations under this subsection, the board shall take into consideration the statewide land use planning goals and guidelines adopted by the Land Conservation and Development Commission to protect, conserve and maintain the natural, scenic, historical, agricultural, economic and recreational qualities of lands along the Willamette River Greenway.

...

Other Examples – ~50 throughout ORS 830

830.220 Fire extinguishers; rules. (1) Every motorboat shall carry on board, fully charged and in good condition fire extinguishers of a type **required by the board by rule.**

(2) The State Marine Board **shall make rules for fire extinguishers** in accordance with ORS chapter 183.

830.447 Optional charter boat licensing; rules. (1) The State Marine Board, **by rule, shall provide for optional charter boat licensing** if the boat is used to carry fewer than seven passengers for hire for angling, sightseeing or other recreational purposes.

830.624 Permit requirements for person 14 years of age or older; exceptions; rules. (1) Except as provided in subsections (3) and (4) of this section, a person 14 years of age or older shall carry a waterway access permit while operating a nonmotorized boat that is at least 10 feet in length or a sailboat that is at least 10 feet but less than 12 feet in length, **in the manner provided by the State Marine Board by rule.** The person shall present proof of a permit upon request by a peace officer.

830.646 Fees; rules. (1) The State Marine Board, **by rule, shall establish and collect issuance and renewal fees for towed watersports endorsements.**

(2) The amount of the fees may not exceed the amount to register a motorboat that is 20 feet in length.

830.810 Certificate of title; exceptions; rules; application fees; penalty fee. (1) Except as otherwise provided in this subsection, a person may not operate a boat for which an identifying number is required under ORS 830.705, 830.710, 830.770, 830.780 to 830.805 and 830.830 to 830.870, unless the owner has secured from the State Marine Board a certificate of title for the boat.

...

(4) The board **shall establish, by rule, penalty fees for late application for certificates** required by this section or ORS 830.710. A penalty fee may not exceed \$50.

Rulemaking authority is not always clear

830.215 Personal flotation devices; rules. (1) All boats must carry at least one United States Coast Guard approved personal flotation device in good and serviceable condition for each person on board. Each device must be of an appropriate size for the person for whom it is intended and must be readily accessible whenever the boat is in use. As used in this subsection, a personal flotation device is not “readily accessible” if it is stowed in a locked compartment or locker or is otherwise not immediately, physically available to persons on board the boat in case of an emergency.

(2) The State Marine Board by rule shall classify types of personal flotation devices and specify which types are approved for various classes of vessels. The rules must be consistent with, but may not exceed those regulations promulgated by the United States Coast Guard.

(3) Notwithstanding the classification by the State Marine Board of the types of personal flotation devices approved for various classes of vessels pursuant to subsection (2) of this section, a person operating a boat on any section of waters rated class III or higher on a commonly accepted scale of river difficulty, and all passengers in the boat, shall wear a properly secured personal flotation device. The personal flotation device must be of a type prescribed by rules adopted by the State Marine Board.

830.260 Muffling devices. The exhaust of every internal combustion engine used on any motorboat shall be effectively muffled by equipment so constructed and used as to muffle or suppress the noise of the exhaust in a reasonable manner.

The use of cutouts or open exhaust stacks is prohibited, except:

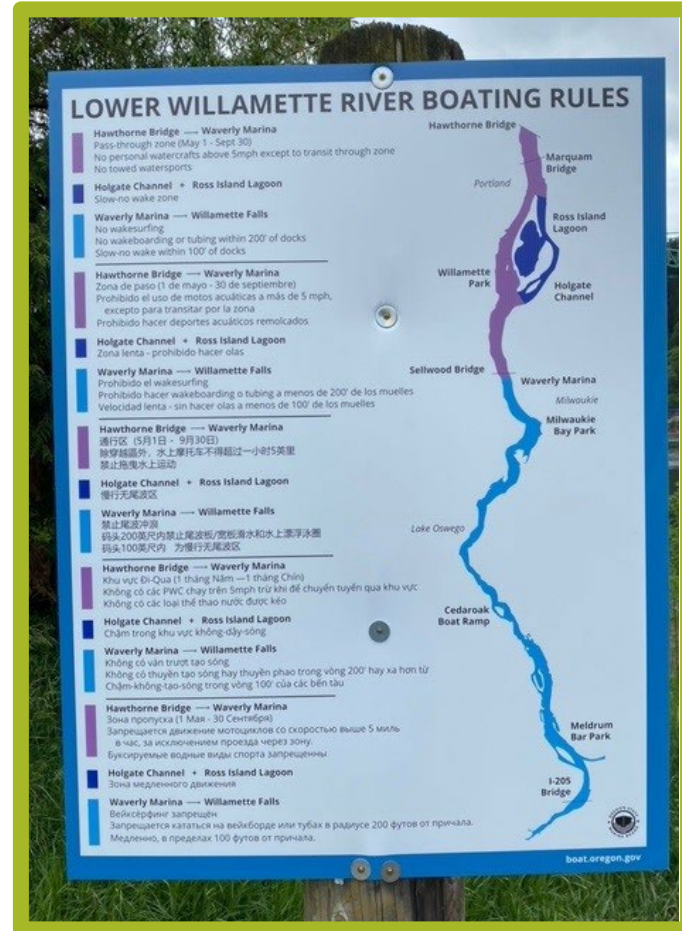
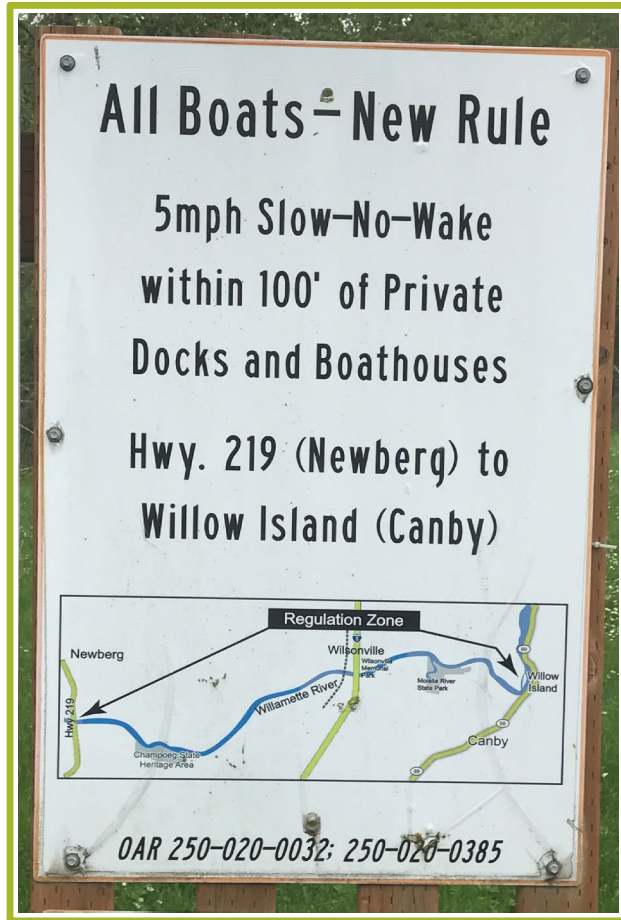
(1) On motorboats competing in a regatta, race or trial for speed records authorized as provided in ORS 830.375.

(2) On racing motorboats while the boat or equipment on the boat is being tried or tested in compliance with ORS 830.350.

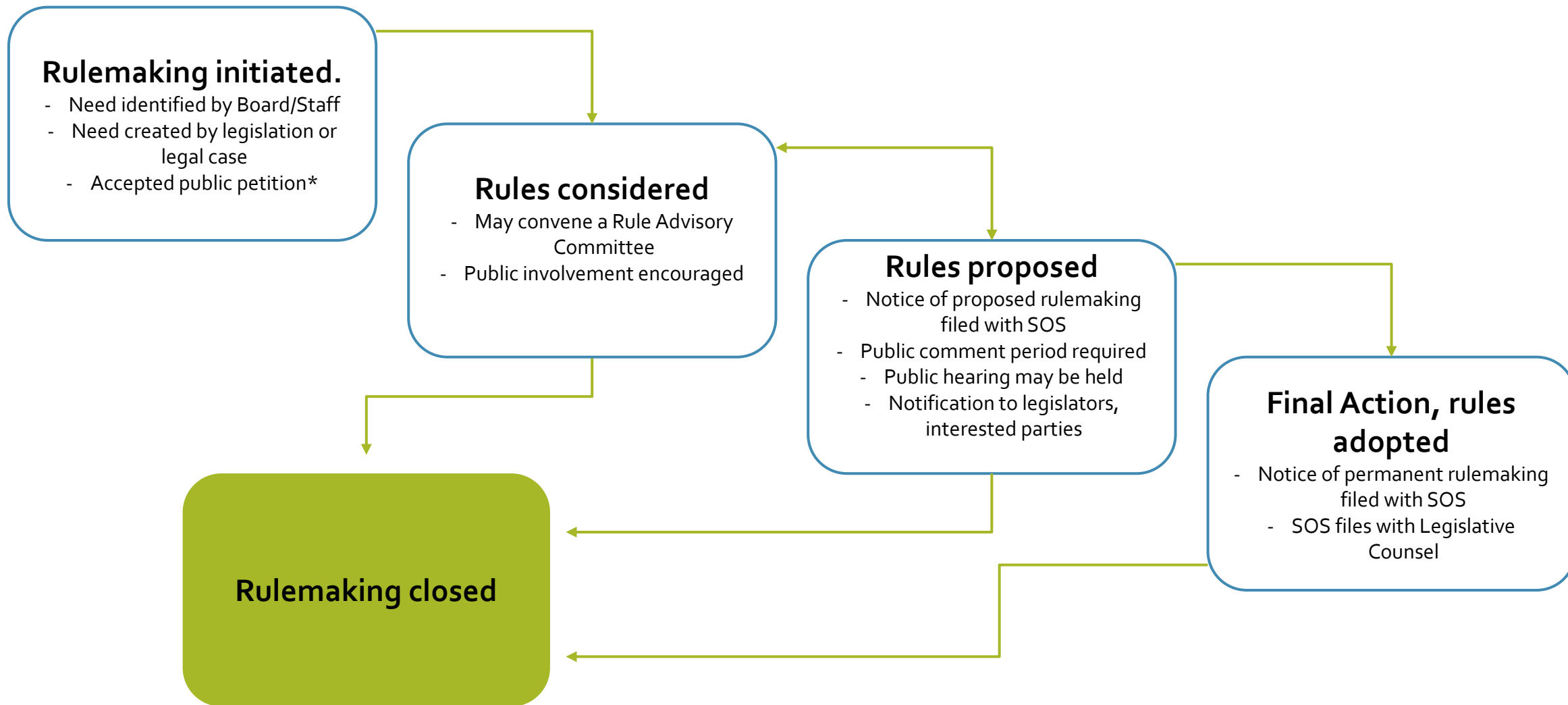
Application to all noise from boats??

Marine Board statutes prevent local jurisdictions from superseding ORS 830 or rules adopted under its authority

830.040 Contrary local laws prohibited. No political subdivision of this state may enact or enforce any law contrary to the provisions of this chapter.



Permanent Rulemaking Overview



Rulemaking Procedures: ORS 183.310 to 183.355; OAR 137 Division 1



“Rulemaking Closed”

- Most policy work of the agency, including conflict mitigation, occurs outside of formal rulemaking.
- Staff consistently solves problems and advances boating opportunities while providing for safety without rulemaking.
 - Coordination with law enforcement partners.
 - Facilitating meetings with stakeholders and relevant local, state, and federal agencies.
 - Attending local meetings to inform of OSMB’s role.
 - Providing informational buoys and signs to deter activities causing conflict.
 - Outreach, print and digital materials, and other media to promote safe and equitable use of waterways.
- Initiating rulemaking proceedings should be considered after other avenues are exhausted or are ineffective.*

CAUTION BOATERS

When Diver Down flags are displayed, divers are in the immediate area.

Keep clear and operate at slow speeds when you see these flags.



PRECAUCION NAVEGANTES

Cuando las señales de buzos en el fondo estén desplegadas, personas se encuentran buceando en los alrededores.


Mantégase alejado y opere a velocidad baja cuando vea estas señales.



Visit Boat.Oregon.gov for more information
Para más información, visita Boat.Oregon.gov

Filing Public Notice of Proposed Rulemaking

- Notice in the Oregon Bulletin for at least 21 days
 - Published on the first of every month
- Notice to OSMB interested parties list at least 28 days prior to effective date of rule
- Notice to applicable legislators at least 49 days prior to effective date of rule
- Notice contents
 - Objective, simple summary statement of proposed rule
 - Manner in which interested persons can comment on proposed rule, including hearing dates
 - Citation(s) to statutory authority
 - Statement of need for the rule
 - List of documents relied upon during rule development
 - Fiscal Impact Statement, including impacts to units of government and the cost of compliance on affected small businesses
 - If no Advisory Committee was convened, an explanation of why
 - A statement identifying how adoption of the rule will affect racial equity in this state

OFFICE OF THE SECRETARY OF STATE BEV CLARNO SECRETARY OF STATE JEFF MORGAN INTERIM DEPUTY SECRETARY OF STATE		ARCHIVES DIVISION STEPHANIE CLARK DIRECTOR 800 SUMMER STREET NE SALEM, OR 97310 503-373-0701
NOTICE OF PROPOSED RULEMAKING INCLUDING STATEMENT OF NEED & FISCAL IMPACT		FILED 12/14/2020 4:32 PM ARCHIVES DIVISION SECRETARY OF STATE
CHAPTER 250 OREGON STATE MARINE BOARD		
FILING CAPTION: Creates additional boating regulations on the Willamette River from downtown Portland upriver to Willamette Falls		
LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 01/25/2021 12:00 AM <i>The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.</i>		
CONTACT: Jennifer Cooper 503-378-2617 jennifer.cooper@oregon.gov	435 Commercial St NE Suite 400 Salem, OR 97301	Filed By: Jennifer Cooper Rules Coordinator
HEARING(S) <i>Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.</i>		
DATE: 01/18/2021 TIME: 9:00 AM - 1:00 PM OFFICER: Josh Mulhollem ADDRESS: Oregon State Marine Board Virtual Hearing Salem, OR 97301		
SPECIAL INSTRUCTIONS: This will be a virtual hearing. Additional details for how to participate will be posted on our webpage.		
NEED FOR THE RULE(S): These rule amendments are needed to mitigate safety concerns and impacts on shorelines and property associated with boating activities on the lower Willamette River.		
DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE: - Lower Willamette River Rule Advisory Committee meeting materials from December 16, 2019 and January 17, 2020 - Board Meeting materials from the October, 2019; January, 2020; May, 2020; July, 2020; and October, 2020 Meetings of the Oregon State Marine Board		
Rulemaking documents are available for public inspection at the State Marine Board, Director's Office, between 8:30 am - 4:00 pm on regular work days, Monday-Friday.		

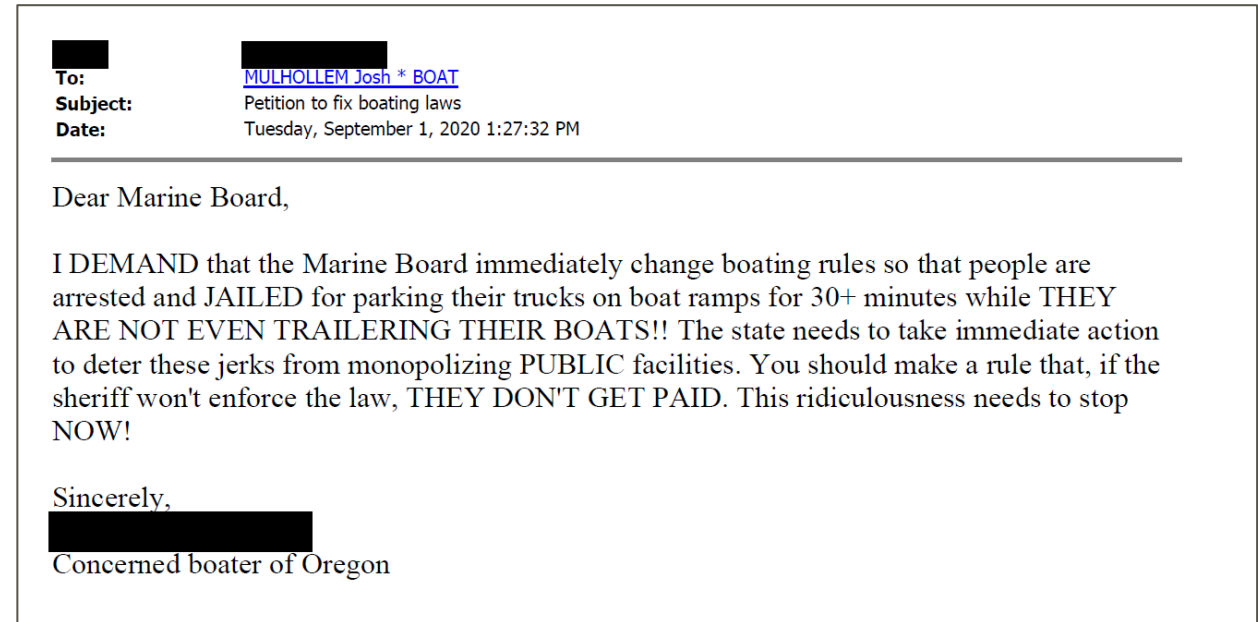
Public Comment

- For all proposed, substantive rule changes, Oregon law requires a minimum 28-day public comment period.
- For potentially controversial rules, an opportunity for oral arguments via rule hearing is recommended, and is required if formally requested
- Formal comment periods allow all parties an equal opportunity to provide views. Consideration of information received outside of comment period is problematic.

What Public Comments are:	What Public Comments are not:
- A crucial step in the rulemaking process to allow for public engagement	- A comprehensive look at all sides of an issue
- A great opportunity to gauge sentiments of a rule on directly affected individuals, interested parties	- An indication of the sentiments of marginally or nonaffected individuals
- Easy to submit	- Difficult to submit
- Pieces of information that the Board should seriously consider before a final vote on a rule	- A vote

Public Petitions

- Any member of the public may petition an agency to adopt, amend, or repeal any rule – ORS 183.390.
- To be administratively complete, petitions must include several items per OAR 137-001-0070.
- For administratively complete petitions, a state agency must:
 - Invite public comments on affected rules and whether options exist for achieving the substantive goals of the rule that reduce the negative impact on small businesses
 - Consider the ongoing need for the rule, input from the public, complexity of the rule, overlap with other regulations, change in technology or other conditions since the rule was adopted, and the legal basis for the rule.
- Resources for petitioners, including the sample timeline pictured on the next slide, available at <https://www.oregon.gov/osmb/info/Pages/PetitionRulemakingProcess.aspx>



Not a petition...

Example Timeline for citizen rule petitions

The Board must take action to deny or approve a petition within 90 days after receipt. The agency seeks public comment on rule petitions for a period of approximately 1 to 6 weeks depending on the timing of receipt.

Petitions may be submitted at any time. Depending on the complexity of the petition and the timing of Board meetings, you may expect a response between 45 and 90 days.

- Petitioner submits complete petition via the online form or via email at osmb.rulemaking@Boat.Oregon.gov
- Petition is received by agency staff and evaluated for completeness
- If deemed administratively complete, staff solicit public comment for a period of time between 1 and 6 weeks.
- Agency staff compile and organize comments for the Marine Board

If the Marine Board accepts the petition and directs agency staff to initiate rulemaking, staff:

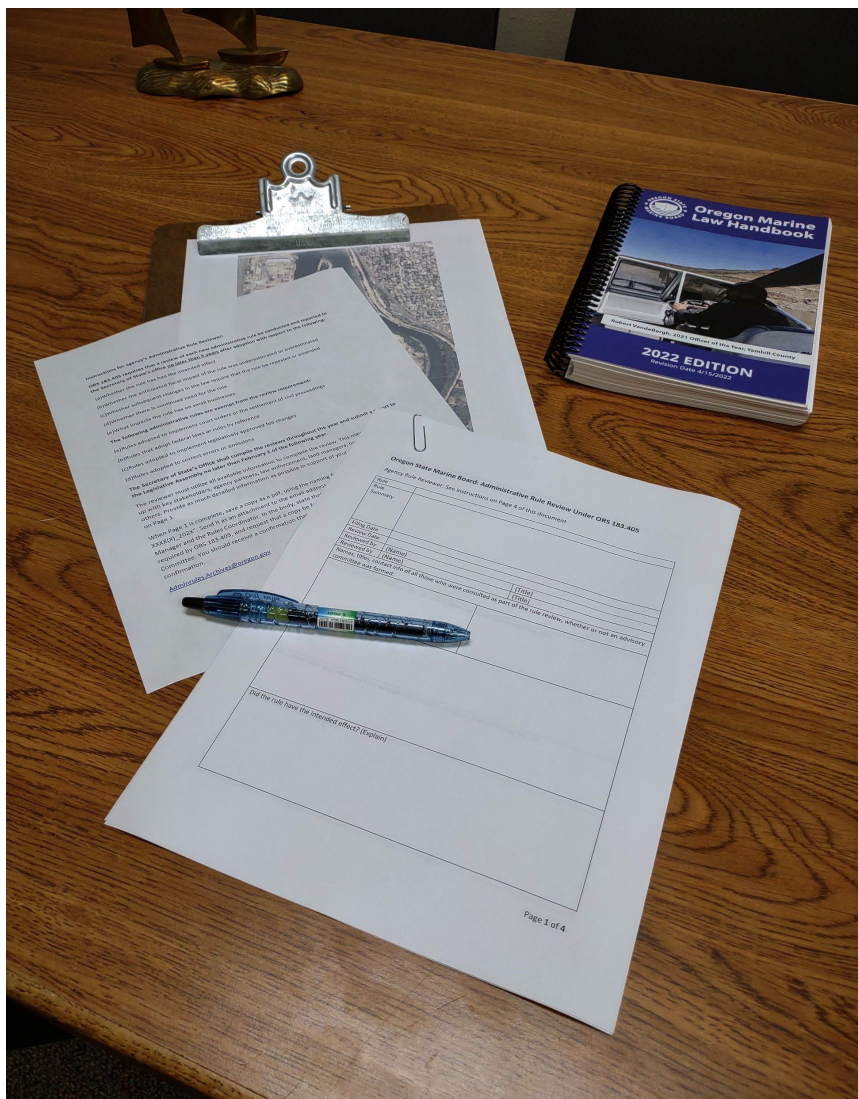
- Will draft the proposed rule language, which may or may not be verbatim from the petition
- Will submit a Notice of Rulemaking to the Secretary of State
- Will solicit further public comment for a period of **at least 30 days**
- May hold a public hearing to provide information to the public about the proposal and to receive oral and written comments

- Marine Board members assemble for a quarterly Board Meeting
- The Marine Board considers the petition materials and public comments received during public comment period (Board meetings are open to the public, but no comment is taken on the rule petition at the meeting)
- The Marine Board will hold a vote to:
Deny the petition and take no further action — OR —
Accept the petition and direct staff to initiate the rulemaking process

- Marine Board considers the public comments that were submitted during the public comment period for the Notice of Proposed Rulemaking
- Marine Board votes on whether to accept the proposal to adopt, amend, or repeal the rule
- Notice of any resulting adoption, amendment, or repeal of a rule is submitted to the Secretary of State with an effective date.

Board's Role in the Rulemaking Process and other considerations

- A Board Member's role is subjective. We try to balance outside pressures and desires with our stated mission and vision and make decisions accordingly.
- Restrictions on the Board's ability to interact with the public to inform decisions are limited***. Active engagement is encouraged.
 - *Consider public records laws.
 - *One Member can/should not speak for the Board.
 - *3+ Board Members = a quorum.



Rule Review Process

ORS 183.405 requires that a review of each new administrative rule be conducted and reported to the Secretary of State's office no later than 5 years after adoption with respect to the following:

- (a) Whether the rule has had the intended effect
- (b) Whether the anticipated fiscal impact of the rule was underestimated or overestimated
- (c) Whether subsequent changes in the law require that the rule be repealed or amended
- (d) Whether there is continued need for the rule
- (e) What impacts the rule has on small businesses.

The reviewer (agency staff) must utilize all available information to complete the review. This may include following up with key stakeholders, agency partners, law enforcement, land managers, business owners, and others.



Temporary Rulemaking

- Agency may temporarily change a rule without prior notice if deemed practicable. The immediate nature of such rule change must be justified.
- Notice requirements are minimal, but agency must take appropriate actions to make temporary rules known.
- Temporary rules can be in place for up to 180 days.
- Agencies may not use temporary rules to circumvent the permanent rulemaking process.
- OSMB use of temporary rules typically to mitigate short-term safety hazards to boaters (i.e. fires and fire-suppression efforts).

Final Takeaways

- The rulemaking process has rigid statutory sideboards but allows for flexibility in rule consideration and development.
- Staff are tasked with ensuring that we meet our legal requirements.
- Rulemaking often causes consternation among some members of the public. Agency perception and credibility suffers if staff and the Board are not transparent and fair through the process.