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## The Role of State Planning Law in The Regulation and Protection of Ocean Resources

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# THE ROLE OF STATE PLANNING LAW IN THE REGULATION AND PROTECTION OF OCEAN RESOURCES

*Edward J. Sullivan* ©

- I. INTRODUCTION
- II. STATE PROPRIETARY AND REGULATORY AUTHORITY
  - A. *Public Access and Ocean Resources*
  - B. *The Regulatory Context*
- III. OCEAN RESOURCE PROTECTION THROUGH STATE PLANNING AND  
REGULATION
  - A. *Goal 19*
  - B. *Oregon Legislative Interest in Ocean Policy and the  
Oregon Ocean Resources Management Plan*
  - C. *Goal 19 Implementing Administrative Rules and The  
Oregon Territorial Sea Plan*
  - D. *The Pacific Ocean Resources Compact*
  - E. *Marine Reserves and Protected Areas*
- IV. THE NEXT FRONTIER: UPDATE OF THE ROCKY SHORES OTSP  
ELEMENT
- V. CONCLUSIONS

## THE ROLE OF STATE PLANNING LAW IN THE REGULATION AND PROTECTION OF OCEAN RESOURCES

*Edward J. Sullivan*<sup>1</sup> ©

### I. INTRODUCTION

Common notions of planning law do not generally extend beyond the intersection of land and the ocean; nevertheless, the need to protect and allocate public resources is as necessary within state jurisdictional boundaries for oceans as it is for upland areas. Traditionally, ocean resource protection, and management have been seen as a federal responsibility and the subject of international agreements and understandings.<sup>2</sup>

There are several contributing factors to the complexity of ocean resources management and protection. One, in the United States at least, is the general division of ocean space adjacent to the coastline into state jurisdiction (0-3 nautical miles), federal jurisdiction (3 - 12 nautical miles for seabed jurisdiction and 0 - 200 statutory miles for an Exclusive Economic Zone), and international jurisdiction for waters beyond waters in which the United States has an interest. Another factor is that ocean space and ocean resources are public, rather than private, resources and while they may be available for use or acquisition by private individuals or businesses via permits, leases, or other legal entitlements, they exist and

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1. B.A., St. John's University (N.Y.), 1966; J.D., Willamette University, 1969; M.A. (History), Portland State University, 1973; Urban Studies Certificate, Portland State University, 1974; M.A. (Political Thought), University of Durham (1998); Diploma in Law, University College, Oxford, 1984; LL.M., University College, London, 1978.

The author expresses his gratitude to current and former staff of the Oregon Department of Land Conservation and Development's Coastal Program, in particular, Robert Bailey, Jon Christenson, Andy Lanier and Patty Snow, as well as to Cameron La Follette of the Oregon Coast Alliance and Steve Shipsey of the Oregon Department of Justice, all of whom contributed valuable insights and comments for this article.

2. U.S. Comm'n on Ocean Policy, *An Ocean Blueprint for the 21st Century, Primer on Ocean Jurisdictions: Drawing Lines in the Water* (2004), [https://govinfo.library.unt.edu/oceancommission/documents/full\\_color\\_rpt/03a\\_primer.pdf](https://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/03a_primer.pdf) [<https://perma.cc/W4UK-XYYP>].

are used in a complex public environment of overlapping and sometimes competing public interests as expressed through a variety of laws. As a result, public agencies that manage these ocean resources (e.g., ocean fisheries, oil and gas development) frequently have complex public decision-making mechanisms to account for diverse public points of view. Finally, resource management and protection are made difficult by the dynamic, fluid nature of the marine environment, its vast size, its harsh conditions, the transitory or seasonal presence of resources, and in many cases inadequate information. “Yet, increasing uses of the ocean, especially within state and federal waters, require that coastal states and coastal nations create planning and management programs to protect the marine environment from harm and ensure sustainable [use] of ocean resources into the future.”<sup>3</sup>

Our oceans contain a myriad of resources – biological, mineral, and recreational that are both preserved and exploited. Pollution risks, conflicts among uses, and overutilization of ocean resources necessitate a level of planning and regulation.

That need has not always been acknowledged. Nor is the effort to plan and conserve ocean resources universal. Indeed, it is not universal in the United States. The planet suffers from gyres of plastic waste that plague our oceans.<sup>4</sup> Species in oceans are overfished and face the prospect of species extinction.<sup>5</sup> Pollution threatens our waters and those species that use them.<sup>6</sup>

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3. Email from Robert Bailey, former Ocean Resources Regulator, State of Oregon, to author (January 4, 2019) (on file with the author).

4. Nat’l Oceanographic and Atmospheric Admin., *Garbage Patches: How Gyres Take Our Trash Out to Sea*, NOAA Ocean Podcast, <https://oceanservice.noaa.gov/podcast/mar18/nop14-ocean-garbage-patches.html> [<https://perma.cc/HM4S-YC4D>]; Shaena Montanari, National Geographic Society, *Plastic Garbage Patch Bigger than Mexico Found in Pacific* (July 25, 2017), <https://news.nationalgeographic.com/2017/07/ocean-plastic-patch-south-pacific-spd/> [<https://perma.cc/Q5AQ-8UAZ>].

5. See Krysten Jetson, *Impact of Overfishing On Human Lives*, Marine Science Today (Apr. 9, 2014), <http://marinesciencetoday.com/2014/04/09/impact-of-overfishing-on-human-lives/> [<https://perma.cc/6FAZ-USUP>]; Environmental Defense Fund, *Overfishing: The Oceans' Most Serious Environmental Problem*, <https://www.edf.org/oceans/oceans-most-serious-problem> [<https://perma.cc/YBP8-GV28>].

6. N. L. Nemerow, United States Department of Energy, Office of Scientific and Technical Information, *Stream, lake, estuary, and ocean pollution*, 2nd edition, <https://www.osti.gov/biblio/7030475> [<https://perma.cc/7YEM-QAFK>]; National Geographic, *Marine Pollution* (Apr. 27, 2010), <https://www.nationalgeographic.com/environment/oceans/critical-issues-marine-pollution/> [<https://perma.cc/AHL3-TEAN>].

Protection of ocean resources is made more difficult by the fact that oceans are frequently national borders and involve security concerns and conflicts,<sup>7</sup> other conflicts over harvesting of marine life,<sup>8</sup> and the use of the oceans to provide renewable energy (e.g., marine hydrokinetic, solar and wind)<sup>9</sup> and non-renewable (e.g., mineral)<sup>10</sup> resources. Thus, while traditional state and local planning and land use regulations of upland areas are acceptable to most parties, they are not common in dealing with our oceans. This is notwithstanding the risks posed by the lack of information, policy and public participation in protecting ocean resources and determining their use.

While federal ocean policy focuses upon defense, energy production, natural resource extraction, international commerce and pollution, this paper argues that states have a planning and regulatory role for ocean resources similar to their traditional roles in planning and regulation. To some extent, this role has been recognized for over four decades in the enactment and implementation of the federal Coastal Zone Management Act (CZMA),<sup>11</sup> under which states may, in addition to their authority to plan and regulate uses within their territorial waters, undertake those activities with regard to uses otherwise within the federal sphere, subject

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7. See generally Federation of American Scientists, *The Oceans and National Security* (1998), [https://fas.org/man/dod-101/navy/docs/nat\\_sec\\_316.html](https://fas.org/man/dod-101/navy/docs/nat_sec_316.html) [<https://perma.cc/TJ78-WDMS>]; see also Michael J. Lawrence, et al., *The Effects of Modern War and Military Activities on Biodiversity and the Environment*, NRC Research Press (2015), <http://www.nrcresearchpress.com/doi/pdf/10.1139/er-2015-0039> [<https://perma.cc/8LMU-XWL2>].

8. See World Bank, *Oceans, Fisheries and Coastal Economies* (Sept. 25, 2018), <http://www.worldbank.org/en/topic/environment/brief/oceans> [<https://perma.cc/2DN9-2Y7U>]; see also CQ Researcher, *Fishing Rights and Territorial Waters* (1963), <https://library.cqpress.com/cqresearcher/document.php?id=cqresre1963090400> [<https://perma.cc/7WNB-L9EY>].

9. See, e.g. Bureau of Ocean Energy Management, *Ocean Current Energy*, <https://www.boem.gov/Ocean-Current-Energy/> [<https://perma.cc/S3MC-2KTJ>]; Bureau of Ocean Energy Management, *Offshore Solar Energy*, <https://www.boem.gov/Offshore-Solar-Energy/> [<https://perma.cc/7GQB-XV97>]; Science Daily, *Huge energy potential in open ocean wind farms in the North Atlantic* (Oct. 9, 2017), <https://www.sciencedaily.com/releases/2017/10/171009154949.htm> [<https://perma.cc/82V3-3VAR>].

10. Jon Letman, *The Race Is On to Mine the Deep Sea—But Scientists Are Wary*, National Geographic (Aug. 29, 2018), <https://www.nationalgeographic.com/environment/2018/08/news-race-to-mine-deep-sea-drones-seafloor-environmental-impact/> [<https://perma.cc/G3VR-8XRC>]; Rahul Sharma, *Environmental Issues of Deep-Sea Mining* (2015), <https://www.sciencedirect.com/science/article/pii/S1878522015000776> [<https://perma.cc/8C4N-GMTN>].

11. See generally 16 U.S.C. §§ 1451–64 (1972) (amended 2005).

to a state program certification process.<sup>12</sup> While, save for this shared authority under the program certification process, the federal government retains primacy in planning and regulating uses in coastal areas.<sup>13</sup> That

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12. See Nat'l Oceanic and Atmospheric Admin., *Coastal Zone Management Act*, <https://coast.noaa.gov/data/Documents/OceanLawSearch/Summary%20of%20Law%20-%20Coastal%20Zone%20Management%20Act.pdf> [<https://perma.cc/U6U8-J8ZL>]. The most recent explication of the CZMA is CONG. RESEARCH SERV., R45460, COASTAL ZONE MANAGEMENT ACT (CZMA): OVERVIEW AND ISSUES FOR CONGRESS (2019), <https://crsreports.congress.gov/product/pdf/R/R45460> [<https://perma.cc/6WTW-EQXW>].

13. The changes in federal ocean resources policy have generated various state responses. In Oregon, those changes in emphasis from conservation to exploitation were met with skepticism. See Email from Robert Bailey, to author (Jan. 5, 2019) (on file with author) stating:

Federal ocean policy has begun to transition from a collection of sector-based policies (e.g. defense, fisheries regulation, oil and gas extraction, commerce and navigation) many of which emerged over nearly sixty years following World War II (e.g. the 1953 Outer Continental Shelf Lands Act, which defined and asserted the interests of the United States in the ocean floor and resources adjacent to the coast; the Magnuson Fisheries Conservation Act of 1976, which created 200-mile fishery conservation zones around the U.S.) to a more integrated, comprehensive policy that incorporates the interests of Indian tribes and coastal states along with those of the federal government. In 2010, President Barack Obama signed Presidential Executive Order 13507 that established a National Policy on Stewardship of the Ocean, Our Coasts, and Great Lakes. This policy resulted from more than a decade of work to create a coherent, comprehensive federal ocean policy and stemmed directly from a 2009 presidential memorandum establishing an Interagency Ocean Policy Task Force to develop such a policy. The advent of state-level ocean resources planning and management programs in states such as Oregon, Massachusetts, and California were a major factor creating this policy. As a result of E.O. 13507, regional ocean planning bodies were created involving federal agencies, coastal states, and Indian tribes with goal of developing regional ocean plans based on the principles of "marine geospatial planning" to identify and resolve the myriad of ocean uses, jurisdictions, resources, and management policies present in those regions.

See National Ocean Counsel, *National Ocean Policy Implementation Plan* (2019), <https://obamawhitehouse.archives.gov/administration/eop/oceans/policy> [<https://perma.cc/344N-AEWK>]; see also Healthy Oceans Coalition, *Current State of U.S. Ocean Policy* (2019), <https://healthyoceanscoalition.org/our-work/ocean-policy> [<https://perma.cc/DKM7-HVC3>].

President Donald Trump rescinded this Executive Order in June 2018, replacing it with Executive Order 13840 Regarding the Ocean Policy to Advocate the Economic, Security, and Environmental Interests of the United States which replaced a stewardship-based approach to ocean policy with one more centered on economic development and national security. The executive order also removed the requirement that coastal Indian tribes participate in regional ocean partnerships. Despite this change, which may prove to be temporary in the longer term political

level of government recognizes that states have more familiarity with ocean resources. Thus, traditional deference to state and local governments in planning and land use regulation in upland areas has become a credible analogy that may be replicated beyond the shoreline as well through the program certification process.

This paper suggests that Oregon presents an excellent example as to how this federal-state-local partnership for planning and regulation of ocean resources could work. However, there was a slow start to, and much controversy over, the content and direction of that program before it began to achieve its objectives.

## II. STATE PROPRIETARY AND REGULATORY AUTHORITY

### A. *Public Access and Ocean Resources*

Unlike most other states, Oregon asserts ownership in the navigable waters within its boundaries, as well as adjacent dry sands and its ocean resources.<sup>14</sup> Space does not permit an extended discussion of state claims

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landscape of federal policy, it is clear that the U.S. is moving toward a more comprehensive approach to ocean planning and that coastal states, such as Oregon, will continue to be a participant in federal ocean planning.

See Harvard Law School Environmental & Energy Law Program, *National Ocean Policy Executive Order* (2018), <https://eelp.law.harvard.edu/2018/09/national-ocean-policy-executive-order/> [<https://perma.cc/USN3-3TQK>].

E-mail from Robert Bailey, former Ocean Resources Regulator, State of Oregon, to author (Jan. 5, 2019) (on file with author).

14. Other states have different claims to coastal waters as a result of their legal and social history. As Robert Bailey notes:

Oregon, as nearly all states, gained jurisdiction of the seabed beneath navigable waters from Mean Lower Low Water seaward three nautical miles upon admission to the Union (states bordering the Gulf of Mexico have jurisdiction over three marine leagues, nearly 12 miles).

However, the state legislature (ORS 390.605) in 1968 defined an “Ocean Shore” that extends from Extreme Low Water to a Beach Zone line (defined in ORS 390.770) that encompasses shore areas covered by the ebb and flow of tides (“wet sands”) as well as a “dry sands” area of adjacent upland beach. It is that dry part that is unique to Oregon.

E-mail from Robert Bailey, former Ocean Resources Regulator, State of Oregon, to author (Jan. 7, 2019) (on file with author). See *United States v. California*, 332 US 19, 32-34 (1947) (discussing the history of the establishment by the United States of a three-mile territorial sea).

to things other than ocean resources. However, those claims are dealt with elsewhere<sup>15</sup> and, if anything, enhance the state's claims to proprietary and regulatory jurisdiction of ocean resources. Suffice it to say that Oregon became a state in 1859 and the Act of Congress Admitting Oregon into the Union specified that the new state was on an "equal footing" with the 13 original states, so that the state was entitled to ownership of "navigable waters" and all tidally influenced waters within its boundaries.<sup>16</sup> In addition, the state asserted its ownership in almost all of the "dry sand" areas along the Pacific Ocean through legislation.<sup>17</sup> The final piece of this legislation was the Oregon Beach Bill, discussed below, definitively declaring the ownership interest of the state.<sup>18</sup> The issue of ownership of the dry sand areas was resolved in the Oregon Supreme Court, which upheld the rights of the state under the English doctrine of "custom."<sup>19</sup> Against this background, we examine the state's interest in ocean resources.

The State of Oregon claims both proprietary and regulatory jurisdiction over those portions of the territorial waters of the United States.<sup>20</sup> Thus, the state asserts a wide variety of interests in and under

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15. See Sullivan, *Shorelands Protection in Oregon*, 33 J. Env. L. & Lit. 129, 133-137 (2018) [hereinafter Sullivan, *Shorelands Protection in Oregon*].

16. See *Doctrine of the Equality of the States*, Justia Law, <https://law.justia.com/constitution/us/article-4/15-doctrine-of-the-equality-of-states.html> [<https://perma.cc/Z92H-C9AJ>]; See also Oregon Admission Act, ch. 33, § 1, 11 Stat. 383, 383-84 (1859) (fixing the western boundary of the state at one marine league (three nautical miles) from the shoreline).

17. 1899 Or. Laws §§ 4817 B-C; 1913 Or. Laws, ch. 47 (forming the State Highway Commission which controlled this "state highway."); Oregon Parks and Recreation Department, *Oregon's Beaches: A Birthright Preserved* 17 (1977), [https://oregonstateparks.org/index.cfm?do=main.loadFile&load=\\_siteFiles%2Fpublications%2Foregon\\_s-beaches-birthright-preserved113001.pdf](https://oregonstateparks.org/index.cfm?do=main.loadFile&load=_siteFiles%2Fpublications%2Foregon_s-beaches-birthright-preserved113001.pdf) [<https://perma.cc/3E2Y-8QBB>] (revising the law, the legislature declared ownership of the beaches to be "vested" in the state under 1947 Or. Laws, ch. 493); 1965 Or. Laws, ch. 368 (revising the law, the legislature changed the designation of the beaches from public highway to public recreational area); 1967 Or. Laws, ch. 601.

18. OR. REV. STAT. §§ 390.610(1)-(2) (2017).

19. State ex rel. Thornton v. Hay, 462 P.2d 671, 678 (Or., 1969). The issue was revisited in *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or., 1993), cert. denied, 510 U.S. 1207 (1994) (Scalia, J. and O'Connor, J. dissenting); See also McDonald v. Halvorson, 780 P.2d 714 (Or., 1989) (limiting the scope of the doctrine).

20. Oregon Department of State Lands, *Oregon's Territorial Sea* <https://www.oregon.gov/dsl/WW/Documents/TerritorialSea.pdf> [<https://perma.cc/Y79Z-9VBH>]; see also Oregon Coastal Management Program, Department of Land Conservation and Development, *Ocean Planning* <https://www.oregon.gov/LCD/OCMP/Pages/Ocean-Planning.aspx> [<https://perma.cc/A446-4HP8>].

those waters with regard to such matters as fishing, cable laying, wind and wave energy facilities, marine reserves, and oil and gas leasing.<sup>21</sup>

All private lands in Oregon are planned and zoned under a statewide planning program that implements state policy.<sup>22</sup> Thus, policy makers, watchdog public interest groups, and involved citizens oversee the establishment, maintenance, and enforcement of ocean resources policy, uses, and regulatory tools. These players also monitor changes to plans and regulations (as well as new plans and regulations), as well as create individual development proposals.<sup>23</sup>

### B. *The Regulatory Context*

By 1973, when Oregon started its current land use program, the Oregon Coast had already received planning and regulatory attention. First, the establishment of public ownership interests on Oregon shorelands through the “Beach Bill,”<sup>24</sup> was critical to the success of public regulatory efforts along the Oregon Coast.

Second, in 1969, the Oregon legislature enacted Senate Bill 10 (hereinafter “SB 10”), legislation that required every local government with planning and land use regulatory powers to adopt a comprehensive plan and zoning regulations to govern non-federal lands in the state (i.e. private and state-owned lands).<sup>25</sup> Despite the limited effect of SB 10, there was apparent support for planning and land use regulation in the state.

Two early planning efforts related specifically to the Oregon Coast.<sup>26</sup> One was the formation of the Oregon Coastal Conservation and

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21. The extent to which oil and gas leasing and production is a matter of State concern is disputed. *See* note 46 and accompanying text. With regard to the other issues, the Federal government has largely recognized the role of state regulatory power.

22. OR. REV. STAT. §§ 197.175(1)–(2) & 197.250 (2017). *See generally* Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961-2011*, 45 J. Marshall L. Rev. 357 (2012) [hereinafter “*Quiet Revolution*”].

23. Sullivan, *Quiet Revolution*, *supra* note 22, at 375.

24. H.R. 1601, 54th Leg., Reg. Sess. (Or. 1967), <http://www.govoregon.org/beachbill/text.html> [<https://perma.cc/M5XT-KA4Q>].

25. Sullivan, *Quiet Revolution*, *supra* note 22, at 364. The legislation was referred to the people (who ultimately approved it) but there was more than a year’s delay in its effectiveness as a result. That, coupled with inadequate funding and the political awkwardness of having the Governor undertake the planning and regulatory functions in default of local governments, demonstrated a need for another approach.

26. The Oregon Coast includes those portions of Clatsop, Tillamook, Lincoln, Lane, Douglas, Coos and Curry Counties and numerous watersheds. Oregon Coastal Management Program, *Oregon’s Coastal Zone*, OREGON.GOV, <https://www.oregon.gov/LCD/OCMP/Pages/Coastal-Zone.aspx> [<https://perma.cc/YH8X-HM4N>]; Interactive map

Development Commission (OCC&DC) to make recommendations regarding coastal planning and land use regulation.<sup>27</sup> The OCC&DC was established in 1971.<sup>28</sup> Section four of the 1971 legislation required OCC&DC to prepare a report for the Governor and Legislature by January 17, 1975, as well as a “proposed comprehensive plan for the preservation and development of the natural resources of the coastal zone.”<sup>29</sup> This legislative interest in the Oregon Coast predated the enactment of the federal Coastal Zone Management Act.<sup>30</sup> That Act provided funding and standards for state management of coastal areas, including the Great Lakes.<sup>31</sup> Besides providing funds for coastal planning, the Act had a

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of the Oregon Coastal Zone, <https://www.coastalatlant.net/czfindex/> (last visited May 13, 2019).

27. Sullivan, *Protecting Oregon’s Estuaries*, 23 *Ocean & Coastal L.J.* 373, 377 n.10 (2018).

28. OR. REV. STAT. § 191.120 (1973); 1971 Or. Laws 1118 (Ch. 608 § 2).

29. OR. REV. STAT. § 191.140(2) (1973); 1971 Or. Laws 1118 (Ch. 608 § 4(2)).  
According to the State:

Oregon’s designated coastal zone stretches from the Washington border on the north, to the California border on the south; bound on the west by the extent of the state’s territorial sea (generally 3 nautical miles offshore) and extending east to the crest of the Coast Range. There are a few exceptions to the eastern boundary: (a) the Columbia River, where the coastal zone extends to the downstream end of Puget Island; (b) the Umpqua River, where the coastal zone extends to Scottsburg; and (c) the Rogue River, where the coastal zone extends to Agness.

The Oregon Dep’t of Land Conservation & Dev., A Citizens Guide to the Oregon Coastal Management Program (2001) <https://www.oregon.gov/LCD/OCMP/Pages/Where-FC-Applies.aspx> [<https://perma.cc/FH9G-CLRR>]; *see also* 16 U.S.C. § 1456(c)(1)(a) (1972 & Supp. 2017) which explains the limits of federal consistency; *see also* E-mail from Robert Bailey, former Ocean Resources Regulator for the Oregon Department of Land Conservation and Development, (Dec. 3, 2018) (on file with author) (hereinafter “Bailey Oregon Ocean History Review”); for a more detailed history of the Oregon Coastal program generally and the Ocean Management program consistency in particular; *see also* OR. ADM. R. 660-035 (2019). Rules and procedures for state participation in federal consistency review; *see also* OREGON COASTAL MGMT. PROGRAM, DEP’T OF LAND CONSERVATION & DEV., FEDERAL CONSISTENCY REVIEW. <https://www.oregon.gov/LCD/OCMP/Pages/Federal-Consistency-Review.aspx> [<https://perma.cc/GR6K-DNBU>].

30. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64 (1972 & Supp. 2015, 2016, 2017); *see also* 16 U.S.C.S § 1451 (West, Westlaw 115-334 through Pub. L. No. 115-385 (excluding Pub. L. No. 115-334)).

31. The CZMA includes coastal areas in 35 states and territories, including American Samoa, Guam, the Northern Mariana Islands, Puerto Rico and the Virgin Islands. CONG. RESEARCH SERV., *supra* note 12, at 3. The stated goal of the Act was to “preserve, protect, develop, and where possible, to restore or enhance the resources of the Nation’s coastal zone.” 16 U.S.C. § 1452(1) (1972 & Supp. 2015, 2016, 2017).

“consistency provision” requiring federal agencies coordinate their programs to be consistent with federally approved coastal management plans that were adopted by states.<sup>32</sup> The funds and the coordination and consistency provisions were significant incentives to spur coastal planning and regulation in Oregon.<sup>33</sup> This included the ultimate adoption of coastal goals binding on local plans and land use regulations, discussed below,<sup>34</sup> and spurred state coordination of its own related programs.

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32. CONG. RESEARCH SERV., *supra* note 12, at 3.

In large part due to the adoption and implementation of the Coastal Goals, the Oregon Coastal Program has been determined to meet the federal standards, so as to allow for more extensive state management in what would otherwise be within exclusive federal jurisdiction. *See OFFICE FOR COASTAL MGMT. ET AL., FINAL EVALUATION FINDINGS: OREGON COASTAL MMT. PROGRAM NOV. 2006 TO SEPT. 2016*, 1 (2017) <https://coast.noaa.gov/czm/media/OregonCMP2017.pdf> [<https://perma.cc/W77G-JLA7>]. (Indeed, the concepts contained in the CZMA were the building blocks of the Coastal Goals. Letter from Matt Spangler, DLCD Senior Coastal Policy Analyst, to author (Mar. 21, 2017) (on file with the author).) *See also* Memorandum from Assistant Attorney General Cheryl Coodley at the DOJ on An overview of the Relationship Between Goal 19 and the Goal 19 Administrative Rules, Federal Consistency and Senate Bill 630, 3 (Dec. 11, 1987) (on file with author). (The CZMA required these federal activities to be “consistent” with an approved state coastal resource program including: “activities [that] . . . ‘directly affect’ the coastal zone[,] [f]ederal licensed or permitted activities . . . [that] affect land and water uses in the coastal zone[,] [o]uter continental shelf activities affecting land or water uses in the coastal zone[,] and [s]tate and local government applications for federal assistance [that] affect the coastal zone.” However, that advice also suggested that state influence over oil and gas leasing was limited.)

*See also* OFFICE OF COASTAL MGMT., NOAA, FEDERAL CONSISTENCY (2019), <https://coast.noaa.gov/czm/consistency/> [<https://perma.cc/F9AY-S26G>]; *see also* CONG. RESEARCH SERV., *supra* note 12, at 1 (According to the Congressional Research Service, states “can perform reviews of federal agency actions in coastal areas known as *federal consistency determination reviews*.”).

For an evaluation of the Oregon Program, *see OFFICE FOR COASTAL MGMT. ET AL., FINAL EVALUATION FINDINGS: OREGON COASTAL MMT. PROGRAM NOV. 2006 TO SEPT. 2016* (2017) <https://coast.noaa.gov/czm/media/OregonCMP2017.pdf> [<https://perma.cc/W77G-JLA7>]. A recent evaluation of the Oregon Coastal Program indicates that it continues to meet federal standards for ongoing maintenance;

*See OFFICE FOR COASTAL MGMT. ET AL., FINAL EVALUATION FINDINGS: OREGON COASTAL MMT. PROGRAM NOV. 2006 TO SEPT. 2016* (2017) <https://coast.noaa.gov/czm/media/OregonCMP2017.pdf> [<https://perma.cc/W77G-JLA7>].

33. Sullivan, *Shorelands Protection in Oregon*, *supra* note 15 at 164 n.9 (2018)(citing E-mail from Matt Spangler, Senior Coastal Policy Analyst, Department of Land Conservation and Development(Mar. 21, 2017) (on file with author)).

34. *Id.* Matt Spangler, a former coastal county planning director and now Senior Coastal Policy Analyst for the Department of Land Conservation and Development (DLCD), points out the mutually enforcing relationship between the federal Coastal Zone Management Act and Oregon’s coastal goals:

When SB 100, discussed below, later provided statewide land use planning authority in 1973, the new Land Conservation and Development Commission (LCDC) was authorized to delegate functions to the OCC&DC.<sup>35</sup> In 1975, the OCC&DC filed its *Final Report – March 1975*<sup>36</sup> and a set of Regional Land Use Planning Goals and Guidelines for the Coastal Zone (April, 1975),<sup>37</sup> which were the basis for what would become LCDC's Coastal Goals. The legislature assigned OCC&DC's planning functions to LCDC and then repealed the statutes creating OCC&DC.<sup>38</sup>

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[T]he funding and federal consistency incentives that you describe as key aspects of the CZMA are contingent upon a state's gaining and maintaining federal approval for an overall coastal management program. To gain federal approval, programs do have to meet certain substantive federal policy standards for the management and protection of coastal resources. In Oregon's case, our federally approved coastal management program is based on our statewide system of land use planning (along with a few other key state agency regulatory authorities). The objective of creating a coastal management program that could gain federal approval was a strong impetus for the adoption of the four coastal goals, which were added to the original Statewide Planning Goals in 1976/77. Many of the management concepts incorporated into the coastal goals were thereby strongly influenced by the substantive requirements of the CZMA, . . . As a side note, Oregon's coastal management program gained federal approval in 1977, the same year the coastal goals became effective, and was the second state program in the nation to do so, after Washington's.

*Id.* (quoting E-mail from Matt Spangler, Senior Coastal Policy Analyst, Department of Land Conservation and Development(Mar. 21, 2017)(on file with author)).

35. OR. REV. STAT. § 197.055 (1975) (repealed 1977).

36. See <http://library.state.or.us/repository/2010/201009281418312/part1.pdf> [<https://perma.cc/8563-KJZC>]. That report also included recommendations for the Continental Shelf off Oregon which became the basis for a proposed statewide planning goal entitled Goal 19, Continental Shelf Resources, later adopted as Goal 19, Ocean Resources. Robert Bailey, *supra* note 14.

37. Land Conservation and Development Commission, Regional Land Use Planning Goals and Guidelines for the Coastal Zone (Apr., 1975) (on file with the author).

38. 1977 Or. Laws Ch. 664. As noted in a discussion of another Oregon coastal goal:

In 1972, Congress passed the Coastal Zone Management Act to provide funding and standards for state management of coastal areas, including the Great Lakes. Besides providing funds for coastal planning, the Act had a "consistency provision" requiring federal agencies to undertake their programs consistent with federally approved coastal management plans adopted by states. Both the funds and the consistency provisions were significant influences that spurred coastal planning and regulation in Oregon, including the adoption of coastal goals. In large part due to the adoption and implementation of the Coastal Goals, the Oregon Coastal Program has been determined to meet the federal standards, so as to allow for more extensive state management in what would otherwise be within exclusive federal jurisdiction.

The land use planning recommendations of the OCC&DC were controversial because that Commission was required to navigate between strongly held development and conservation interests, as well as strong political views about state versus local control of coastal resources. Ultimately, the OCC&DC recommendations were forwarded for consideration and adoption by LCDC, which had a statewide perspective in lieu of one in which the participants focused exclusively on the Oregon coast.

The second effort occurred in 1973, when the passage of SB 100 significantly changed planning and land use regulation in Oregon.<sup>39</sup> SB 100 ended the unmanaged delegation of those regulatory functions to local government, provided the mechanism for adopting state land use policies and mandated their incorporation into binding and required local comprehensive plans, to which non-federal governments and private landowners must conform.<sup>40</sup> This legislation created LCDC, which was charged with assuring compliance with these state land use policies, expressed in the statewide planning goals, supplemented with additional binding administrative rules that provided specificity.<sup>41</sup>

Ultimately, LCDC adopted nineteen statewide planning goals, four of which (adopted in 1976) used OCC&DC recommendations for coastal planning and land use regulation.<sup>42</sup> These goals provide for the following coastal policies:

- Goal 16: Estuarine Resources: To recognize and protect the unique environmental, economic, and social values of each estuary and associated wetlands; and [t]o protect,

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Sullivan, *Shorelands Protection in Oregon*, *supra* note 15, at 131. (footnotes omitted).

39. 1973 Or. Laws Ch. 80.

40. See Sullivan, *Quiet Revolution*, *supra* note 22 (fuller description of the Oregon land use system); see also, text accompanying *supra* notes 11-13. As demonstrated later in this article, state and local governments under the Coastal Zone Management Act may regulate some federal lands and functions.

41. See OR. REV. STAT. §§ 197.225-50 (2017) (regarding the goals); see also OR. REV. STAT. § 197.040(1)(c) (2017) (regarding administrative rules).

42. See generally DEPT. OF LAND CONSERVATION AND DEV., PART ONCE: OCEAN MANAGEMENT FRAMEWORK, OREGON TERRITORIAL SEA PLAN, Parts A, B, (1994), <https://www.oregon.gov/lcd/OCMP/Pages/Territorial-Sea-Plan.aspx> [<https://perma.cc/6JYG-FSDR>]; INTERVIEWS WITH MEMBERS OF THE OREGON CONSERVATION & DEVELOPMENT COMMISSION, 1971-75, Or. Coastal Zone Mgmt. Ass'n. (2004). Governor Hatfield had complained of the destruction of coastal beauty and the "[t]wenty [m]iserable [m]iles" of bad development at the coast. John Terry, *A Mark Hatfield Memory: The Governor and the Cub Reporter*, *The Oregonian* (Aug. 13, 2011), [https://www.oregonlive.com/O/index.ssf/2011/08/a\\_mark\\_hatfield\\_memory\\_the\\_gov.html](https://www.oregonlive.com/O/index.ssf/2011/08/a_mark_hatfield_memory_the_gov.html) [<https://perma.cc/QQR4-GELP>].

maintain, where appropriate develop, and where appropriate restore the long-term environmental, economic, and social values, diversity and benefits of Oregon's estuaries.<sup>43</sup>

- Goal 17: Coastal Shorelands: To conserve, protect, where appropriate, develop and where appropriate restore the resources and benefits of all coastal shorelands, recognizing their value for protection and maintenance of water quality, fish and wildlife habitat, water-dependent uses, economic resources and recreation and aesthetics. The management of these shoreland areas shall be compatible with the characteristics of the adjacent coastal waters; and [t]o reduce the hazard to human life and property, and the adverse effects upon water quality and fish and wildlife habitat, resulting from the use and enjoyment of Oregon's coastal shorelands.<sup>44</sup>
- Goal 18: Beaches and Dunes: To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and dune areas; and to reduce the hazard to human life and property from natural or man-induced actions associated with these areas.<sup>45</sup>
- Goal 19: Ocean Resources: To conserve marine resources and ecological functions for the purpose of providing long-term ecological, economic, and social value and benefits to future generations.<sup>46</sup>

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43. OR. DEPT. OF LAND CONSERVATION AND DEV., OREGON'S STATEWIDE PLANNING GOALS & GUIDELINES: GOAL 16: ESTUARINE RESOURCES 1 (1984), <https://www.oregon.gov/lcd/OP/Documents/goal16.pdf> [<https://perma.cc/V62B-836Y>] [hereinafter GOAL 16].

44. OR. DEPT. OF LAND CONSERVATION AND DEV., OREGON'S STATEWIDE PLANNING GOALS & GUIDELINES: GOAL 17: COASTAL SHORELANDS 1 (1999), <https://www.oregon.gov/lcd/OP/Documents/goal17.pdf> [<https://perma.cc/2TKV-LD3A>] [hereinafter GOAL 17].

45. OR. DEP'T OF LAND CONSERVATION AND DEV., OR STATEWIDE PLANNING: GOAL 18, BEACHES AND DUNES, 1 (1988), <https://www.oregon.gov/lcd/OP/Documents/goal18.pdf> [<https://perma.cc/57AJ-YULD>] [hereinafter GOAL 18].

46. OR. DEP'T OF LAND CONSERVATION AND DEV., OR STATEWIDE PLANNING: GOAL 19, OCEAN RESOURCES, 1 (2001), <https://www.oregon.gov/lcd/OP/Documents/goal19.pdf> [<https://perma.cc/47QQ-KZDB>].

In its original (1977) form, Goal 19 provided a clear priority for management and protection of renewable resources, required information to understand the impacts of proposed activities and required impact assessments by public agencies with respect to

These goals are construed so as to provide for an overall policy of conservation of coastal resources. Overall, they provide for a careful process of evaluation of local plans that are coordinated with state agencies, and actions, including collection of relevant information and establishment of local policies consistent with these goals to provide for implementation of those policies in local land use regulations.

### III. OCEAN RESOURCE PROTECTION THROUGH STATE PLANNING AND REGULATION

#### A. *Goal 19*

The statewide planning goals set out binding state land use policy. Goal 19 deals with that policy towards Oregon's ocean resources. In its present form, the goal provides strong policy direction to federal, state and

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certain ocean resources. Memorandum from OR. Dep't of Justice to Ocean Res. Mgmt. Task Force (Dec. 11, 1987) (on file with author). See Bailey, *The Oregon Ocean Resources Management Program: A State-Level Ocean Management Initiative*, 34 *Ocean & Coastal Management* 205-224 (1997), <https://www.sciencedirect.com/science/article/pii/S0964569197000197> [<https://perma.cc/ZG5E-P8GS>][hereinafter, Bailey, "*Ocean Article*"] (Describing the Goal before its substantial amendment in 2000).

The development of bi-partisan Oregon Ocean Resources policies evolved, step by step, beginning under Oregon Governor Robert Straub, a Democrat, the workshops of OCC & DC, and hearings and work sessions of LCDC in adopting the coastal goals. On January 24, 1977, Governor Straub issued Executive Order EO-77-1, directing the formation of a task force to conduct a two year study and to report and respond to proposed federal oil and gas leases on the Oregon Outer Continental Shelf (OCS), and *inter alia*, to "recommend a permanent structure within state government for dealing with Outer Continental Shelf activities." The report was delivered to the new governor, Victor Atiyeh, a Republican, in January 1979, and recommended that the Department of Land Conservation be given this task. Co-Chairs of the OCS Task Force were Dr. Edward T. LaRoe III, Chief Scientist of NOAA's Office of Coastal Zone Management, and Fred Miller, Ph.D. (Economics), the Director of the Oregon Department of Energy. The OCS Task Force report affirmed Goal 19 as the fundamental policy for ocean resources and recommended that higher priority should be given to the protection of renewable resources than to the development of non-renewable (oil and natural gas) ocean resources. The Task Force further recommended establishment of a multi-agency advisory panel staffed by DLCD. Governor Atiyeh had opposed federal OCS leasing adjacent to Oregon in Northern California (Lease Sale 53), an activity that concerned the state and its governor and eventually led to the adoption of policies of restricting or prohibiting certain activities in Oregon's territorial waters, such as oil and gas leases. Communication from Jon Christenson, member of the OCS Task Force and co-author (Jan. 20, 2019) (on file with author).

local public agencies, as well as private parties. A copy of the current version of the goal is found in the appendix. The policy direction given by the goal may be divided into three parts:

First, the goal establishes the priority to “conserve marine resources and ecological functions” over development of non-renewable ocean resources.<sup>47</sup> Thus, fish and other living marine organisms are valued over energy development, commerce and mining, and danger to renewable marine resources must be avoided.<sup>48</sup> Further, the goal speaks to an “Ocean Stewardship Area,” where the state has declared it has “interests in the conservation of ocean resources”<sup>49</sup> and stated those interests as:

- Ocean resource uses and activities directly affect the interests of the State of Oregon;
- Oregon has management interests in oil and gas exploration and development, marine mineral mining, marine transportation and ports, marine birds and marine mammals, intertidal areas, ocean fisheries, oil spills, recreation, cultural resources, aesthetic qualities, and water and air quality;
- Oregon shares management responsibilities and interests in concert with federal resource management agencies.<sup>50</sup>

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47. GOAL 19, *supra* note 46, at 1.

48. GOAL 19, *supra* note 46, at 3. See LCDC Final Order 13-OCMP-001842 (2013) at 18-19, *quoted in* OR. ADMIN. R. 660-036-0005 (2013) (discussing the adoption of Part Five of the OTSP).

49. *Id.* The goal describes this area as one “where natural phenomena and human uses can affect uses and resources of Oregon’s territorial sea” and describes that area as including “the state’s territorial sea, the continental margin seaward to the toe of the continental slope, and adjacent ocean areas.” *Id.* The goal specifically limits the Stewardship Area and disclaims any intent to “change the seaward boundary of the State of Oregon, extend the seaward boundaries of the state’s federally approved coastal zone under the federal Coastal Zone Management Act, affect the jurisdiction of adjacent coastal states, alter the authority of federal agencies to manage the resources of the United States Exclusive Economic Zone, or limit or otherwise change federal agency responsibilities to comply with the consistency requirements of the federal Coastal Zone Management Act.” *Id.* A map illustrating this area may be found at “Oregon Ocean Info” a website provided and maintained by the Oregon Department of Land Conservation and Development. Oregon Ocean Information, *Oregon Stewardship Area*, (Aug. 2009), [https://www.oregonocean.info/index.php?option=com\\_content&view=article&id=37:osu-press-release-8-12-09-new-funds-will-help-create-oregons-most-accurate-seafloor-mapping-system-&catid=24:seafloor-mapping-news-articles&Itemid=30](https://www.oregonocean.info/index.php?option=com_content&view=article&id=37:osu-press-release-8-12-09-new-funds-will-help-create-oregons-most-accurate-seafloor-mapping-system-&catid=24:seafloor-mapping-news-articles&Itemid=30) [https://perma.cc/398S-BPSR].

50. *Id.* Bailey, *Ocean Article*, *supra* note 46, at 217-18 (describing this “stewardship area” as extending 50-80 miles from the Oregon territorial sea).

Both the priority of renewable marine resources over development of non-renewable ocean resources and the declaration of an Ocean Stewardship Area continue previous themes already found in Goal 19 before its revision in 2000 and reflect increased focus on these topics by the legislature and ocean resource communities.<sup>51</sup>

The revised goal sets forth the following policies for the state's role in the Stewardship Area:

- Use all applicable state and federal laws to promote its interests in management and conservation of ocean resources;
- Encourage scientific research on marine ecosystems, ocean resources and uses, and oceanographic conditions to acquire information needed to make ocean and coastal-management decisions;
- Seek co-management arrangements with federal agencies when appropriate to ensure that ocean resources are managed and protected consistent with the policies of Statewide Planning Goal 19, Ocean Resources, and the Territorial Sea Plan; and
- Cooperate with other states and governmental entities directly and through regional mechanisms to manage and protect ocean resources and uses.<sup>52</sup>

These broadly stated objectives give considerable discretion to those state agencies administering the goal through rule making and permitting, discretion that has as yet been barely tested.

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51. Letter from OR. Ocean Policy Counsel to Land Conservation and Dev. Comm'n (Jan. 22, 2013) (on file with author). That letter also reflected the legal consensus that ocean renewable energy was to be classified as a non-renewable resource, but suggested that, in addition to OPAC, established under OR. REV. STAT. §§196.438 -.448 to act as a forum and expert policy advisory agency for the state's coastal program, a Territorial Sea Plan Advisory Committee be established and include representatives of the ocean renewable energy sector, although the Council was seen as the primary advisory body on ocean policy matters. This position is consistent with Executive Order 08-07, by then Governor Kulongoski, requiring DLCD to seek advice from the Council regarding Territorial Sea Plan Amendments. The reserve program officially began on March 26, 2008 when Governor Ted Kulongoski entered Executive Order 08-07. OR. Exec. Order No. 08-07 (March 26, 2008) *Directing State Agencies to Protect Coastal Communities in Siting Marine Reserves and Wave Energy Projects* at [https://www.oregon.gov/gov/Documents/executive\\_orders/eo0807.pdf](https://www.oregon.gov/gov/Documents/executive_orders/eo0807.pdf) [<https://perma.cc/BN5G-N45R>]. This advisory body is in addition to a technical advisory body established by the legislature under OR. REV. STAT. §§196.451 -- .453 to provide overall technical advice to the Council.

52. GOAL 19, *supra* note 46, at 3.

Second, the goal follows the lead of many of the statewide planning goals and all of those focused on specific geographical areas (*viz.* the Willamette River Greenway and the Oregon Coast) and places a premium on information prior to action<sup>53</sup> and requires state and federal agencies to “assess the reasonably foreseeable adverse effects” of an action on the Oregon Territorial Sea Plan (OTSP), discussed below, and on state estuaries and shorelands, as required by the other coastal goals.<sup>54</sup>

Finally, the goal sets out three implementation requirements that are specifically designed to assure the lofty objectives of the goal are realized. There are three types of such requirements.

The first type deals with the uses of ocean resources and is composed of three subcategories. The first subcategory repeats language found in the other coastal goals to the effect that federal and state actions relating to ocean resources and uses of the territorial sea must “maintain and, where appropriate, restore long term benefits derived from renewable marine resources,”<sup>55</sup> which illustrates the conservation orientation of the underlying coastal policies. The second subcategory enjoins “protection” of four specific ocean resources: (1) renewable marine resources (*i.e.*, living marine organisms), again prioritizing them over the development of

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53. *Id.*

54. *Id.* See also Oregon DLCD, *A Citizen’s Guide to the Oregon Territorial Sea Rocky Shores Amendment* (May 2018), <https://www.oregonocean.info/index.php/ocean-documents/planning/territorial-sea-plan2/1586-tsp-rsms-citizens-guide-finaldraft-10-9-17/file> [<https://perma.cc/R27G-YZVP>] (describing the planning history and continuing planning process for the territorial sea).

55. GOAL 19, *supra* note 46, at 2. The parallels with other coastal goals are obvious. Goal 16, Estuarine Resources, contains a policy, *inter alia*:

To protect, maintain, where appropriate develop, and where appropriate restore the long-term environmental, economic, and social values, diversity and benefits of Oregon’s estuaries.

GOAL 16, *supra* note 43, at 1.

Goal 17, Coastal Shorelands, contains a policy that, *inter alia*:

To conserve, protect, where appropriate, develop and where appropriate restore the resources and benefits of all coastal shorelands, recognizing their value for protection and maintenance of water quality, fish and wildlife habitat, water-dependent uses, economic resources and recreation and aesthetics.

GOAL 17, *supra* note 44, at 1.

Finally, Goal 18, contains a policy that, *inter alia*:

To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and dune areas.

GOAL 18, *supra* note 45, at 1.

non-renewable resources; (2) the “biological diversity of marine life and the functional integrity of the marine ecosystem;” (3) “important marine habitat,” including that in estuarine areas, as more specifically detailed in the goal requirements, and (4) certain “areas important to fisheries,” again as detailed in the goal.<sup>56</sup> The third subcategory requires public agencies to “protect and encourage the beneficial uses of ocean resources” and to comply with the OTSP.<sup>57</sup>

The second category of implementation requirements relates to management of ocean resources and contains seven different, but related, sets of policy directives:

- a. That management be adaptive to account for variable physical conditions, the changeable status of resources and individual or cumulative impacts;
- b. That conditions or use limitations be used to protect or shield other uses and resources;
- c. That special management area plans deal with unique management needs for resource protection and utilization through interagency cooperation;
- d. That public agencies, including Indian tribal governments, cooperate and coordinate resource protection programs;
- e. That regional cooperation and governance by public agencies be used to address common or shared ocean resource management issues;
- f. That public involvement in ocean resource management be fostered; and
- g. That, when information is limited, precautionary approaches be taken with regard to ocean resource management.<sup>58</sup>

The final set of implementation requirements concern contingency plans, requiring federal and state agencies that approve or take actions that could result in unforeseen and significant risks to ocean resources to “establish appropriate contingency plans and emergency procedures” to deal with potential damage to the marine or estuarine environment, resources or uses that may be affected.<sup>59</sup> All three sets of implementation requirements demonstrate a conservationist ethic, a cautious approach to

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56. GOAL 19, *supra* note 46, at 2.

57. *Id.*

58. *Id.*

59. *Id.*

potential damage to ocean resources from human activity, and a priority of marine life over resource exploitation.<sup>60</sup>

*B. Oregon Legislative Interest in Ocean Policy and the Oregon Ocean Resources Management Plan*

For about ten years, Goal 19 was the principal state policy towards Ocean Resources in Oregon. In 1987, however, the legislature passed the Oregon Ocean Resources Management Act, which established the Oregon Ocean Management Program, and the Oregon Ocean Resources Management Plan (the “Ocean Plan”) was the outcome of a task force to formulate state ocean resources policy.<sup>61</sup> The Plan was presented to the Oregon Legislature on June 1, 1990 and was adopted by LCDC as part of the Oregon Coastal Management Program in August of that year.<sup>62</sup>

The Ocean Plan does not assert state jurisdiction beyond the three-mile limit boundary of the state, but does suggest that the state has an interest in the “stewardship area” between the three-mile limit and the 200-mile Exclusive Economic Zone which must foster “principles of

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60. The legislature has weighed in with findings regarding particular policy issues. One set of findings declares that the state “is unwilling to risk damaging sensitive marine environments or to sacrifice environmental quality to develop offshore oil and gas resources.” OR. REV. STAT. §196.410(3). Another set stresses the importance and fragility of ocean resources and lack of sufficient knowledge to deal with human impacts on ocean resources, likely made to use the “precautionary approach” taken by the implementation requirements of Goal 19, to foster a conservative and conservationist view of permits and programs that affect ocean resources. OR. REV. STAT. §196.415.

61. The Task Force was established under §§8-14, 16 and 18 of the Oregon Ocean Resources Management Act of 1987, ch. 576, Or. Laws. 1987. The direction of the task force was set out *inter alia* in certain state findings and policies enacted by the legislature in §§3-4, definition of the state Oregon Coastal Management Program (§5), definitions (§6) and designation of responsible agencies (§§7, 15), the planning process and plan elements (§§19-21). The Act was substantially revised in 1991 among other things to provide for OPAC, which succeeded the Task Force, and the adoption and recognition of the status of the Oregon Territorial Sea Plan, and coordination with local government plans. Ch. 501, Or. Laws 1991. The legislation was also less substantially revised by ch. 744, Or. Laws 2003. *See also* Bailey, *Ocean Article*, *supra* note 46, at 209-210, 214-15 (describing of the Territorial Sea Plan through 1997).

62. The Or. Ocean Res. Mgmt. Task Force, OREGON’S OCEAN RESOURCES MANAGEMENT PLAN, 5 (1991) <https://www.gpo.gov/fdsys/pkg/CZIC-gc1005-2-o74-1991/pdf/CZIC-gc1005-2-o74-1991.pdf> [<https://perma.cc/7BMC-6R5Y>]. The document asserts that state agencies may not act inconsistently with the plan, but need not elevate plan provisions over other statutory priorities. The Ocean Plan was never submitted for approval to NOAA under the CZMA, as it took a policy stand inconsistent with the federal Department of the Interior on oil and gas leasing, which “made approval of the plan highly unlikely.” Bailey, *Ocean Article*, *supra* note 46, at 214-15.

ecologically sound ocean resources management.”<sup>63</sup> The broad policies in the plan, which deal with all ocean resources within the stewardship area are consistent with the approach of the state legislature and emphasize conservation over development.<sup>64</sup> It is apparent that the Task Force saw the Ocean Plan as advisory in nature (except as to state agencies)<sup>65</sup> rather than a series of binding policies,<sup>66</sup> which characterizes the OTSP. This

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63. The Or. Ocean Res. Mgmt. Task Force, *supra* note 62. Robert Bailey, who dealt with ocean resources for DLCD offers this observation of the role of the Ocean Plan:

That was the product of the Ocean Resources Task Force created by the 1987 legislature. It was really nothing more than a big fat report to the legislature, complete with recommendations on a wide range of topics. It was never submitted to NOAA for approval under the CZMA as part of the OCMP precisely because it pertained to federal waters. But it was created through such an inclusive and detailed process that the legislature wanted to acknowledge its work as being the policy basis for amending ORS 196 to basically transform the Task Force process into a permanent management structure with OPAC and a Territorial Sea Plan, etc. Thus[,] the legislation creating the ocean program refers to the OORMP as one of the basic elements of an overall ocean program. And, indeed, many of the recommendations of the OORMP had an after-life, such as the Ocean Stewardship Area (which found its way into revised Goal 19 in 2000) and recommended policies for offshore rocks and islands, intertidal areas, and bird and mammal habitat (which were the basis for developing the Rocky Shores Strategy in the initial Territorial Sea Plan). And, from time to time (such as when the current Administration proposes offshore oil and gas leasing) someone refers to the policies in the OORMP as an indicator of long-term state policy...but none of these policies are enforceable.

E-mail from Robert Bailey, former Ocean Resources Regulator for the Oregon Department of Land Conservation and Development, (Dec. 4, 2018) (on file with author).

64. Among other issues, these policies deal with Ocean Stewardship, Ocean Resources Conservation, with special regard to Habitat Protection, Ocean Fisheries, Marine Birds and Mammals, Intertidal Plants and Mammals, Marine Water and Air Quality, Oil and Gas, Oil Spills, and Marine Minerals. See Appendix G, Territorial Sea Plan (1994) [https://www.oregon.gov/lcd/OCMP/Documents/otsp\\_app-g.pdf](https://www.oregon.gov/lcd/OCMP/Documents/otsp_app-g.pdf) [<https://perma.cc/QEU5-YPMS>].

65. It is true, as the Ocean Plan asserts, that state agencies cannot act contrary to its provisions. See also OR. REV. STAT. §196.485 (2017). However, the plan does not bind federal agencies, nor does it bind private persons undertaking actions beyond the three-mile limit. On the other hand, the Territorial Sea Plan binds the state and private parties and the federal government to the extent permitted by the CZMA. It is also true that the Ocean Plan must be “compatible” with acknowledged plans of affected local governments under OR. REV. STAT. §196.465. However, local governments do not exercise any planning for ocean resources of the territorial sea under OR. REV. STAT. § 201.370(2) (2017). Thus, given the unlikely nature of conflicts beyond the three-mile limit (and the coverage of uses within that limit under the Territorial Sea Plan), this is not a heavy burden.

66. The Or. Ocean Res. Mgmt. Task Force, *Supra* note 62, at 173. Nevertheless, the Oregon Department of Justice did not view the Ocean Plan as an empty gesture when the original 1987 legislation (S.B. 630) was under consideration:

conclusion appears to follow from a combination of lack of proprietary and regulatory jurisdiction beyond the three-mile limit of the state and the formal adoption and apparent responsibility for administration and enforcement of the OTSP that the state asserts as binding within that three-mile jurisdictional limit.

C. *Goal 19 Implementing Administrative Rules and The Oregon Territorial Sea Plan*

In adopting statewide land use policies through the goals, LCDC also has the delegated power to interpret the goals through more detailed administrative rules,<sup>67</sup> which are as binding as a legislative enactment or the goals themselves. The presence of rules marks the importance of a goal, for those rules may be adopted in a relatively short time, compared with the cumbersome process for goal amendments<sup>68</sup> and address interpretive issues in a more timely manner.

Goal 19 does have an administrative rule chapter to carry out its broad policies, a chapter dealing with Ocean Planning.<sup>69</sup> These rules reflect the parallel legislative initiative that began in 1987 to formulate and implement the Oregon Ocean Resources Management Program described above.

A brief diversion is in order to explain this parallel legislative initiative. The genesis for this program initiative occurred in 1987 as a reaction to a proposal by the Reagan Administration for leasing offshore

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What happens at the conclusion of the planning process? The Plan itself will contain only recommendations. One possibility is that that is all the S.B. 630 process is intended to achieve. But it appears that the legislature intended that those recommendations would be the basis for initiation of agency rulemaking, and needed legislative changes, in order to insure that agency statutory authorities and administrative rules are made consistent with the Plan.

Memorandum from Oregon Department of Justice to Ocean Resources Management Task Force (Dec. 11, 1987) (on file with author). The advice went on to say that, while consistency may or may not be required in a given circumstance, the state would have a "meaningful voice regarding federal activities affecting the state's coastal zone" with an adopted plan. On this point, *see* note 29 on the limits of the "consistency" provision of the CZMA. Finally, the advice noted the legislature's clear intent to make the Territorial Sea Plan binding within the three-mile limit.

67. OR. REV. STAT. §197.040(1)(c) (2017).

68. *Compare* OR. REV. STAT. §§197.225-.245 *with* OR. REV. STAT. §§183.325-.410.

69. OR. ADM. CD. 660.

lands for oil, gas, and hard mineral exploitation.<sup>70</sup> The legislature created an Ocean Resources Task Force to prepare an Oregon Ocean Resources Management Plan by 1990 to plan for the area from the coastline to the 200-nautical mile limit of the federal Exclusive Economic Zone (EEZ).<sup>71</sup> The resultant Oregon Ocean Resources Management Act dealt with state interests in both Oregon territorial waters and the 200-mile EEZ beyond the three-mile limit of Oregon's territorial jurisdiction.<sup>72</sup> The other

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70. During the Christmas holidays 1983, the U. S. Department of Interior Mineral Management Service (MMS) released a Draft Environmental Impact Statement (DEIS) proposing approximately 44 million-acre (180,000 square kilometers) lease in a huge undersea canyon off southern Oregon and northern California. U. S. DEPARTMENT OF INTERIOR/MINERAL MANAGEMENT SERVICE, DRAFT ENVIRONMENTAL IMPACT STATEMENT, i, ii (1983). "Furore . . . surrounds . . . plans to sell the leases for areas on the ridge caught everyone by surprise. Ian Anderson, *America is Ready to Mine Pacific Floor*, NEW SCIENTIST, May 10, 1984, at 6. "There's not too many people they didn't offend," Michael Herz, executive director of the conservation-minded Oceanic Society said . . . " *Id.* Sophisticated sonar imaging mapping was initiated in May 1984 by the British research ship *Farnella* for mining companies. *Id.* For a discussion of Gorda Ridge, see Porter Hoagland III, *The Conservation and Disposal of Ocean Hard Minerals: A Comparison of Ocean Mining Codes in the United States*, 28 NAT. RESOURCES J., 451 (1988). The Speaker of the Oregon House of Representatives, Grattan Kerans, refused to allow the Oregon Department of Geology & Mineral Industries (DOGMI) to collaborate with the U.S. Department of Interior MMS unless information collected was made public [Legislative Emergency Board 1984], Personal Communication with Jon Christenson, a former NOAA OCZM Pacific Regional Manager, and legislative aide (Jan. 22, 2019) (on file with author).

A more complete discussion may be found in Bailey, *Ocean Article*, *supra* note 46, which discusses the history, key elements, characteristics, ocean governance relationships and accomplishments of the Oregon program. Suffice it to say that the declaration of the Exclusive Economic Zone for the area within 200 miles of an American Shoreline and subsequent action by the Reagan administration to consider leasing ocean bottom areas for mining were a strong incentive for the Oregon legislature to become involved with ocean planning, including areas beyond the territorial three-mile limit.

71. *Ocean Policy in Oregon*, OR. OCEAN INFO., <https://www.oregonocean.info/index.php/ocean-policy/64-ocean-policy-in-oregon> [<https://perma.cc/XL38-7YKC>]. The various components of the plan may be found at Or. Dep't of Land Conservation & Dev., *Ocean Planning*, OREGON.GOV., <http://library.state.or.us/repository/2011/201102111426135/> [<https://perma.cc/3FGN-U2BC>]. See Bailey *Ocean Article*, *supra* note 46, at 206.

72. See OR. REV. STAT. §§196.405-196.515 (2017). Oregon defines the "territorial sea" (and thus state jurisdiction) to include "the waters and seabed extending three geographical miles seaward from the [state's] coastline," as opposed to the larger EEZ. OR. REV. STAT. §§196.405 (2017). The initial 1987 legislation is found at ch. 576, Or. Laws (1987). For a discussion on the interconnected nature of federal and state ocean resources planning, see Alexandra Hoffman & Richard Hildreth, *Legal Aspects of Ecosystem-based Management (EBM): Implementation in Oregon Coastal Management*, 12 INT'L. J. OF ENV'T SUSTAINABILITY 15 (2016), [https://law.uoregon.edu/images/uploads/entries/Hoffman\\_Hildreth\\_EBM\\_5th\\_edition.pdf](https://law.uoregon.edu/images/uploads/entries/Hoffman_Hildreth_EBM_5th_edition.pdf) [<https://perma.cc/H7R2-GWLD>].

ultimate outcome was the OTSP, which covered the area within that three-mile limit over which the state could exercise jurisdiction.<sup>73</sup> The 1987 Act established a new ocean management structure, the Oregon Ocean Resources Management Program (also known as the Oregon Ocean Management Program), which, as subsequently amended, now provides:

To ensure the conservation and development of ocean resources affecting Oregon consistent with the purposes of ORS 196.405 to 196.515, a program of ocean resource planning and management is established. This program shall be known as the Oregon Ocean Resources Management Program and is part of Oregon's coastal management program.<sup>74</sup>

This Program consists of those portions of an Oregon policy element (i.e., statutes, goals, rules, local plans, and land use regulations) approved by the Secretary of Commerce under the CZMA, OPAC or its successor,<sup>75</sup>

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73. Oregon Coastal Management Program, *Territorial Sea Plan*, DEPT. OF LAND CONSERVATION & DEV., <https://www.oregon.gov/lcd/OCMP/Pages/Territorial-Sea-Plan.aspx> [<https://perma.cc/6T99-FSLS>]. For a discussion as to the position of the plan in Oregon ocean policy, *See Oregon Territorial Sea Plan*, DEPT. OF LAND CONSERVATION AND DEV., Part One, <https://www.oregonocean.info/index.php/ocean-documents/planning/territorial-sea-plan2/1569-otsp-part-i-a-history-of-ocean-planning-in-oregon/file> [<https://perma.cc/Q6SH-JKNB>].

74. OR. REV. STAT. § 196.425 (2017). Two of the first actions of the new program included a contract for the preparation of a baseline publication, the Oregon Oceanbook, a layman's guide to offshore ocean and marine resources, based on academic, planning, and regulatory expertise. This work resulted in the establishment of an informal network of contacts among the marine science community, funded by the federal Office of Ocean and Coastal Resource Management. A second project was preparation and publication of the *Oregon Territorial Sea Management Study*, an analysis of state laws, programs, and management capacity up to that time, which would form a baseline for further research, planning, and regulation. Bailey, *Ocean Article*, *supra* note 46, at 208, 211; *see generally* James W. Good & Richard Hildreth, *Oregon Territorial Sea Management Study*, OR. DEP'T. OF LAND CONSERVATION & DEV. (1987). The Office of Ocean and Coastal Resource Management is now known as the Office For Coastal Management. *See* NOAA OFFICE FOR COASTAL MGMT., <https://coast.noaa.gov> [<https://perma.cc/YCJ7-CJ4F>].

75. OR. REV. STAT. § 196.425 (2017). OPAC comprises representatives of the Governor and seven state agencies (as non-voting members), two elected government body representatives from the northern and southern coastal counties respectively, an elected coastal city representative, and representatives of specific interest groups (fisheries, conservation groups, ports) and two public representatives for a total of fifteen voting and eight nonvoting members. Bailey, *Ocean Article*, *supra* note 46, at 212. The Oregon Senate must confirm all of the voting members, except city and county representatives and representatives of the public. Appointed members have four-year terms, but serve at the pleasure of the Governor. OR. REV. STAT. § 196.438 (2017).

those portions of the Ocean Plan consistent with the Act and the OTSP reviewed by OPAC and submitted to its constituent agencies.<sup>76</sup>

OPAC does not adopt the OTSP; that task is given to the state's land use agency, the Land Conservation and Development Commission (LCDC).<sup>77</sup> Instead, OPAC is advisory to the State Ocean Resources Program and composed of public and private representatives of interest groups with special expertise in ocean resource management. However, it is different than most advisory bodies in that its recommendations on the Territorial Sea Plan must either be adopted by LCDC or returned to the Council for reconsideration. This adds a modicum of influence on ocean

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In Bailey, *Ocean Article*, *supra* note 46, at 206, 211, the author describes the Oregon Coastal Management Program as "integrated," i.e., including local comprehensive plans and land use ordinances, as well as state programs and authorities regarding coastal resources, such as fish and wildlife, water quality, removal-fill, and public access. The National Oceanic and Atmospheric Administration (NOAA) approved the program in 1977 under the Coastal Zone Management Act of 1972 and, by a June 1995 amendment, approved the Territorial Sea Plan as part of that program. Bailey, *Ocean Article*, *supra*, note 46 at 206, 215.

76. OR. REV. STAT. §196.425(4) (2017); OR. REV. STAT. § 196.465(1) (2017). The adopted Sea Plan must be "compatible with the acknowledged comprehensive plans of adjacent counties and cities." OR. REV. STAT. § 196.465(1) (2017). A process is provided to assure such compatibility. The statutes provide a similar consultation and information sharing process for both state and federal agency program coordination. *See* OR. REV. STAT. §§ 196.455, 196.485 (1991).

77. OR. REV. STAT. § 196.471 (1993). LCDC has adopted The Territorial Sea Plan (1994) by OR. ADMIN. R. 660-036-0000 (1995), and amended the same with respect to development of renewable energy facilities or other related structures, equipment, or facilities by an amendment to that plan under OR ADMIN. R. 660-036-0005 (2013). *See also* Oregon Coastal Management Program, *Oregon Territorial Sea Plan*, DEPT. OF LAND CONSERVATION & DEV. Part Five, [http://www.oregon.gov/lcd/OCMP/Documents/Part\\_5\\_FINAL\\_10082013.pdf](http://www.oregon.gov/lcd/OCMP/Documents/Part_5_FINAL_10082013.pdf) [<http://perma.cc/SS95-T33L>].

LCDC has adopted the Ocean Resources Management Plan (1990 and 1994) by OR. ADMIN. R. 660-036-0010 (1995). These issues are covered in additional detail below.

OPAC must recommend any amendments to that Plan before their submission to LCDC for review. OR. REV. STAT. § 196.471(1) (2017). The statute provides for the LCDC review process, including required findings for consistency with relevant statutes and adopted policies. OR. REV. STAT. § 196.471(1)-(3) (2017). If LCDC wishes to amend the plan further, it must return the proposed amendments to OPAC for its response. OR. REV. STAT. § 196.471 (3) (2017). Although Plaintiffs raised only procedural issues, the underlying issue in *Ciecko v. Dep't of Land Conservation & Dev.* was the designation of a area offshore from Nestucca\Pacific City in Tillamook County as a possible energy facility site, to which Petitioners objected. *Ciecko v. Dep't of Land Conservation & Dev.*, 415 P.3d 1122, 1124-25 (Or. Ct. App. 2018). The site has since been removed and a revised Part Five of the Territorial Sea Plan is expected to be adopted by LCDC in May 2019. *See* email from Andy Lanier and Patty Snow (Jan. 22, 2019) (on file with author).

resource policy that renders OPAC composition and voting power significant.<sup>78</sup>

In adopting, amending, and administering the Oregon Ocean Resources Management Act, the legislature has taken a strong policy position skeptical of offshore oil and gas leasing, enacting findings stressing the rich biological resources of the coast, providing for other necessary or traditional uses (fishing and navigation) and asserting that it is an area in which oil spills cannot be contained and concluding that “Oregon is not willing to risk damaging sensitive marine environments or to sacrifice environmental quality to develop offshore oil and gas resources.”<sup>79</sup>

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78. Robert Bailey notes the struggle for OPAC membership and voting rights over the years:

The OPAC was conceived of in 1991 legislation as a policy coordination mechanism for the state agencies with ocean management responsibilities and authorities, along with other ocean stakeholders, and chaired by the Governor's representative on behalf of the Chief Executive Officer for the state. Staff to the OPAC was to be provided by the Department of Land Conservation and Development because of its responsibility for implementation of Goal 19. All members, including state agencies, were voting members. This arrangement was changed in 1993 by the legislature in response to what was felt by some coastal legislators as the ability of the Governor to unduly influence the decisions of the OPAC by ordering the seven state agencies to vote as a bloc. State agencies became non-voting ex-officio members and the chair was to be elected by the remaining voting members. The OPAC thus took on the identity of a stakeholder advisory committee, with ex-officio members, rather than a state agency policy coordinating committee. This change meant that, in some instances, the interests of the OPAC and the interests of the state differed and thus has required the Office of the Governor to occasionally convene relevant state agencies as an informal "Ocean Cabinet" to discuss and coordinate state agency policy on various ocean issues such as designation of marine reserves and planning for siting of ocean renewable energy facilities.

See email from Robert Bailey, former Ocean Resources Regulator for the Oregon Department of Land Conservation and Development (Jan. 3, 2019) (on file with author).

79. See OR. REV. STAT. § 196.410 (2017). This language was coupled with a prohibition on leasing, explore, develop or produce oil, gas, or sulphur resources until June 30, 1995. See S.B. 1152, 65th Leg. Assemb., Reg. Sess. (Or. 1989). An extended prohibition on such activities under 2010 Or. Laws, §1 Ch. 11, was extended indefinitely in 2019 by S.B. 256, 80th Leg. Assemb., Reg Sess. (Or. 2019), now 2019 Or. Laws, Ch. 14.

Additionally, the provisions of the territorial sea plan appear to be hostile to these activities. This conservationist bent of these statutes is also reflected in the state's policy for the use of ocean resources in OR. REV. STAT. § 196.420 (2017). For a description of the OTSP through 1997, see Bailey, *Ocean Article*, *supra* note 46, at 215-17, in which the author attributes the strength of the program to its enactment by the state legislature,

We return now to Goal 19, Ocean Resources Goal, which on its face provides strong policy direction but which, in fact, has been superseded by these other actions. As a long-time DLCD staff member familiar with the program observes:

[W]hile it offered what appeared to be a strong policy statement about the state's ocean resources, the original Goal 19 was really very ambiguous and of little practical value. It was written with the best of intentions by a staff and a commission that, unlike land-based planning, had little idea of the practical and policy difficulties of planning for and managing the ocean, so it was mostly unused except as a rallying cry against the threat of offshore oil and gas drilling and marine mineral mining in federal waters during the Reagan Administration. Local governments did not implement it although several counties included a generalized description of ocean resources along their shore. State government agencies did not have the capacity to carry it out or incentive to do so because there were no specific standards for them to meet and no coordinating mechanism centered on ocean management responsibilities and authorities. Goal 19 was thus somewhat of an orphan until the Oregon Ocean Resources Management Act (ORS 196) came along in 1987 and began the effort to build a state level ocean resources management program for the state's ocean resources which, with the adoption of the Territorial Sea Plan in 1994, usurped Goal 19 as the operational and policy framework for state agencies. Amendments to ORS 196 in 1991 absolved local governments of the responsibility to implement Goal 19. And then the 2000 amendments to Goal 19 acknowledged that the mechanisms in the Territorial Sea Plan were the means by which to carry out Goal 19. It is this dual relationship of the current Goal 19, a statewide planning goal, and the directives of state law that define Oregon's approach to ocean resources management. Clearly, Goal 19 was fundamental to the eventual creation of a full-fledged ocean resources management program. But today Goal 19 mostly hides in the background.<sup>80</sup>

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support by the executive branch, its character as a phased extension of the then-existing program and its role in federal-state cooperation.

80. Bailey Oregon Ocean History Review, *supra* note 29. DLCD first proposed amendments to Goal 19 in 1998 and, after considerable discussion, the amendments were adopted in 2000. See Oregon Ocean Policy Advisory Council, *Proposed Amendment to the Oregon Territorial Sea Plan* (1998) (on file with the author)

A review of the legislative and administrative history of the Oregon Ocean Resources Program bears out this conclusion. Unlike the remaining statewide planning goals, there is no litigation on the meaning or application of Goal 19, which does not deal with land-based activities over which local governments have jurisdiction, no significant discussions on local plan and land use regulation acknowledgments or periodic review decisions before LCDC<sup>81</sup>, and really no discussion of the goal outside the context of these other activities (i.e., the OTSP, the Ocean Plan, and the Pacific Ocean Resources Compact).<sup>82</sup>

The Oregon Territorial Sea Plan (OTSP) has been the most active component of the Oregon Ocean Resources Management Program as its most active and binding element. OPAC formulated that plan under a 1991 legislative directive,<sup>83</sup> and was tasked with four other principal functions:

1. Planning for the protection of the Three Arch Rocks National Wildlife Refuge;
2. Formulation of a kelp leasing program for state waters;
3. Coordination of standards and policies to encourage small scale fishing in underutilized waters; and
4. Planning to discourage overuse of rocky intertidal areas.<sup>84</sup>

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(stating the Goal revisions were necessary in the light of the Ocean Plan and Territorial Sea Plan and more recent scientific information and increased demands for ocean resources).

81. These decisions deal with whether a local government plan or land use regulations comply with applicable statewide planning goals and provide a rich analysis of goal compliance details. See Sullivan, *Quiet Revolution*, *supra* note 22, at 370-71, 375-76. While local governments have planning jurisdiction over lands up to the territorial sea, the Oregon legislature provided in 1987 that the state controls uses within the territorial sea. OR. REV. STAT. § 201.370(2) (2017). The federal government controls uses within the exclusive economic zone beyond the territorial sea.

82. The only exception appears to be some procedural litigation peripheral to these plans in the *Ciecko* case. See *Ciecko v. Dep't of Land Conservation & Dev.*, 415 P.3d 1122 (Or. Ct. App. 2017). Effectively, the OTSP is the comprehensive plan for the ocean. When it is amended, LCDC prepares findings against the Ocean Act and the Goals. Another place where Goal 19 is invoked is in federal consistency reviews. Personal communication with Steve Shipsey, Counsel to Or. Dep't of Land Conservation & Dev., March 19, 2019 (on file with author).

83. 1991 Or. Laws, Ch. 501 established the Council (§6) and authorized it to prepare the OTSP (§§ 8 and 19-20) for presentation and action by LCDC. See also Letter from Robert Bailey, former Ocean Resources Regulator, State of Oregon, to author (Dec. 16, 2018) (on file with author.)

84. Bailey, *Ocean Article*, *supra* note 46, at 219-220.

Following the 1994 adoption of the OTSP, the OPAC must also review and recommend subsequent amendments to the OTSP, as well as the Ocean Plan.<sup>85</sup>

The current OTSP contains binding goals and policies that parallel those found in Goal 19, but appear to have greater credence, given the attention to the plan process by the Oregon legislature, the adoption of the OTSP by LCDC, and the specific focus on its implementation. The goal of the OTSP resonates in tones usually reserved for a statewide planning goal. For example,

The overall ocean-management goal of the State of Oregon is to: conserve the long-term values, benefits, and natural resources of the nearshore ocean and the continental shelf. To achieve this goal, the State of Oregon will: 1. give higher priority to the protection of renewable marine resources than to the development of non-renewable ocean resources; 2. support development of ocean resources that is environmentally sound and economically beneficial to coastal communities and the state; 3. protect the diversity of marine life, the functions of the marine ecosystem, the diversity of marine and estuarine habitats, and the overall health of the marine environment; and 4. seek the conservation of ocean resources within the larger marine region that is of ecologic and economic interest to the State of Oregon.<sup>86</sup>

The OTSP is extensive in its reach – Part I sets out the Ocean Management Framework (agencies, laws and the plan policies); Part II sets out the process for making resource decisions; Part III deals with policies for “Rocky Shores” (coastal promontories and outcroppings) and is being updated; Part IV provides policies for uses on the seafloor; Part V deals

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85. OR. REV. STAT. § 196.443(1) (2017); *see also* Oregon Coastal Management Program, *Territorial Sea Plan*, OREGON.GOV, <http://www.oregon.gov/lcd/OCMP/Pages/territorial-Sea-Plan.aspx> [<http://perma.cc/2SG8-KTM7>].

86. *Compare* Amendment to Oregon Territorial Sea Plan; Part One, *Ocean Management Framework*, DEPT. OF LAND CONSERVATION & DEV., [https://www.oregon.gov/lcd/OCMP/Documents/otsp\\_1-g.pdf](https://www.oregon.gov/lcd/OCMP/Documents/otsp_1-g.pdf) [<https://perma.cc/5MM9-44HZ>, added on May 4, 2001 *with* OR. DEPT. OF LAND CONSERVATION & DEV., *supra* note 43 (discussing statewide planning goals 16-18). Goal 19 is accompanied by policies with language reminiscent of the approach and process taken by the other coastal goals – extensive definitions, a strong effort to “protect” marine resources, a focus on estuary protection, a direction to maintain, and where appropriate, develop those resources, and a permitting process that emphasizes conditions and contingencies. Oregon Coastal Management Program, *Territorial Sea Plan*, OREGON.GOV, Part One (G), [http://www.oregon.gov/lcd/OCMP/Documents/otsp\\_1-g.pdf](http://www.oregon.gov/lcd/OCMP/Documents/otsp_1-g.pdf) [<http://perma.cc/J4RU-ZPZ5>].

with uses of the territorial sea (with special regard to energy facilities and related uses).<sup>87</sup> Parts IV and V provide greater specificity for uses than

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87. See generally *Oregon Territorial Sea Plan*, *supra* note 42 (providing all the components of the OTSP and its appendices). In order to review energy facilities outside its coastal zone under the CZMA consistency provisions, a state must provide a Geographic Locator Description (GLD) for boundaries of a specific area for state coordination in federal consistency review. However, the review requirements differ as to whether the project is inside or outside of the state's territorial waters. Oregon's GLD was prepared by DLCDC and is entitled *State of Oregon Geographic Location Description* that distinguishes Oregon's territorial sea from a "Marine Renewable Energy GLD," which sets out state fishing, navigation, biological, scientific interest, communications, and other interests to be considered in the event a renewable energy project is considered by federal agencies. See also Paul Manson & Andy Lanier, *Managing the Visual Landscape of Oregon's Territorial Sea*, in OCEAN SOLUTIONS EARTH SOLUTIONS, 287 (Dawns J. Wright eds., 2nd ed. 2016) (detailing the methods and results of the Visual Resources Management System).

The federal government recognizes specific areas within coastal waters beyond Oregon's territorial waters where "Federal Licenses and Permits Which Must Be Certified for Consistency with the Oregon Coastal Management Program." See *State Federal Consistency Lists: Oregon's Listed Federal Actions*, OFFICE FOR COASTAL MGMT. NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://coast.noaa.gov/czm/consistency/media/or.pdf> [<https://perma.cc/3K42-JRPU>]. See also Ocean Coastal Management Program, *Where Federal Consistency Applies*, OREGON.GOV, <https://www.oregon.gov/LCD/OCMP/Pages/Where-FC-Applies.aspx> [<https://perma.cc/38HV-NDP7>].

Moreover, the most recent OTSP amendment proposal includes a Visual Resource Inventory Map and analysis of the visual effects of development at 143 selected ocean sites to assist with evaluation of any such development. *Resource Inventory Maps*, OR. OCEAN INFO., <https://www.oregonocean.info/index.php/opac/30-opac-working-groups> [<https://perma.cc/234W-HP6V>]. To buttress its case for visual considerations in federal waters outside the three-mile limit, DLCDC observes:

Oregon's Statewide Planning Goal 19 states that agencies, through programs, approvals, and other actions, shall "protect and encourage the beneficial uses of ocean resources such as...aesthetic enjoyment." This is reiterated in Part V of the Territorial Sea Plan. Oregon's Ocean Shore Management Plan (OPRD, 2005), a FERC approved "comprehensive plan", notes that OPRD, "may identify important 'scenic features' that should be protected from development or other impacts for their scenic value."

Oregon Ocean Information: *Resource Inventory Maps*, OREGONOCEAN.INFO, <https://www.oregonocean.info/index.php/opac/30-opac-working-groups> [<https://perma.cc/UUC2-NH5Q>].

The thrust of this wording is to influence any federal decision outside Oregon territorial waters with this aesthetic as well as other commercial, environmental, or other state policy considerations.

Oregon has been the first or among the first states to have a NOAA certified marine spatial plan, a Visual Resource Inventory, and a federally-recognized Geographic Location

provided in Part II. As suggested by our learned observer above, the OTSP appears to have displaced Goal 19 and is almost exclusively a tool administered by the State, with federal cooperation, and is imposed on private party users of the territorial sea. The OTSP has been amended twice as follows:

1. Uses of the Seafloor -- On December 1, 2000, LCDC adopted a new Part IV, relating to Telecommunication Cables, Pipelines and Other Utilities declaring:

Proper placement of utility easements and installation of fixtures is required to avoid damage to or conflict with other ocean uses, such as commercial fishing, and to reduce or avoid adverse effects on marine habitats.<sup>88</sup>

Part IV establishes policies for protection of other ocean uses, particularly non-renewable resources; avoidance, reduction and mitigation of adverse impacts, and the necessary coordination and communication to realize these objectives.<sup>89</sup>

2. Energy Facilities – In November 2009 and January 2013, LCDC adopted and then revised a new Part V of the OTSP relating to Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities<sup>90</sup> and, consistent with the conservationist approach of state law, the Revised Goal 19, the Ocean Plan and previously adopted portions of the OTSP, declared that:

The requirements of Part Five are intended to protect areas important to renewable marine resources (i.e. living marine organisms), ecosystem integrity, marine habitat and areas important to fisheries from the potential adverse effects of renewable energy facility siting, development, operation, and decommissioning and to identify the appropriate locations for that

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Description. Personal Communication with Andy Lanier, Marine Affairs Coordinator (Jan. 22, 2019) (on file with author).

88. Oregon Coastal Management Program, *Territorial Sea Plan*, OREGON.GOV, Part Four, [https://www.oregon.gov/lcd/OCMP/Documents/otsp\\_4.pdf](https://www.oregon.gov/lcd/OCMP/Documents/otsp_4.pdf) [<https://perma.cc/F9DR-L496>].

89. *Id.* Implementation measures include a policy of burial permitting that controls and coordinates cable location, coordination with other users, and a single point of contact.

90. *Plan History*, OR. OCEAN INFO., <https://www.oregonocean.info/index.php/plan-history> [<https://perma.cc/FQ57-3E3K>].

development which minimize the potential adverse impacts to existing ocean resource users and coastal communities.<sup>91</sup>

The primacy of the conservation of marine resources and ecological functions over other ocean uses, the limitation of energy facilities to designated areas where the likelihood of approval was greater, and an individualized permitting system in which conditions to meet state policy objectives may be imposed on permits were all part of the new system.<sup>92</sup> Plan policies for this topic use the same general approach as for cables and other communication devices in Part IV, protection and the avoidance, reduction and mitigation of adverse impacts, but add in policies regarding information sharing and a preference for pilot projects.<sup>93</sup> The Implementation Requirements for this part of the OTSP are extensive and include provisions relating to:

- Facilities siting;<sup>94</sup>

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91. Oregon Coastal Management Program, *Territorial Sea Plan*, OREGON.GOV, Part Five, [https://www.oregon.gov/lcd/OCMP/Documents/Part\\_5\\_FINAL\\_10082013.pdf](https://www.oregon.gov/lcd/OCMP/Documents/Part_5_FINAL_10082013.pdf) [<https://perma.cc/UD8G-V9J4>].

92. *See id.* The cautious, perhaps skeptical, approach is found in the introduction to this segment:

Renewable energy facilities development may present opportunities to apply technologies that rely on wind, wave, current or thermal energy, which may potentially reduce the environmental impact of fossil fuels. Oregon prefers to develop renewable energy through a precautionary approach that supports the use of pilot projects and phased development in the initial stages of commercial development. If developed in a responsible and appropriate manner, in accordance with the requirements of this Part and other applicable state and federal authorities, renewable ocean energy may help preserve Oregon's natural resources and enhance our quality of life.

*Id.* at 1; *see also* Kristina G. Schmunk Kraaz, *The Legal Landscape of Wave Energy Pilot Projects on the Oregon Coast*, 30 J. ENVTL. L & LIT. 341 (2015).

93. *Territorial Sea Plan*, *Supra* note 91, at 4-5.

94. *Id.*; *see also Territorial Sea Plan Part Five: Marine Renewable Energy Development*, OR. ADMIN. R. 660-036-0005 (2013). For waters within the Territorial Sea, projects are permitted only in designated areas and if allowable under Oregon law, while the State asserts consistency with the OTSP and applicable and enforceable policies the Oregon Coastal Management Program is required. In addition the State has proprietary economic interests in territorial waters.

The limited areas where renewable energy facilities are permitted is illustrated by Part V's classification system. *Id.* There is the REEA (Renewable Energy Exclusion Area), where no such facilities are permitted; the PUMA (Proprietary Use and Management Area), where siting of such facilities is permissible if they comply with state standards; the RUCA (Resource Use Conservation Area) and RUMA (Resource Use Management Area), where these uses could be permitted after review of their potential adverse effects; the REFSSA (Renewable Energy Facility Suitability Study Area), areas with the least conflict with Goal

- Public agency input through state agency coordination and review by a federal, state, local government and stakeholder Joint Agency Review Team (JART);<sup>95</sup>
- More detailed Resource and Use Inventory and Effects Evaluation and Special Resource and Use Review Standards;<sup>96</sup>
- Application and associated fees;<sup>97</sup>
- An extensive operations plan;<sup>98</sup>
- Facilities for the testing and evaluation on new devices undertaken by the Northwest Marine Renewable Energy Center;<sup>99</sup> and
- Mandatory program reviews at least every seven years.<sup>100</sup>

*D. The Pacific Ocean Resources Compact*

Another related set of state policies that influence the interpretation and administration of the goal is the proposed Pacific Ocean Resources Compact, a 1991 agreement to be authorized by Congress in which Oregon would join Washington, Alaska, Hawai'i, and California to assist in the management of Pacific Ocean resources, deal with oil spills and other hazards, collect information and enact, administer, and enforce relevant rules.<sup>101</sup> Robert Bailey, who worked on ocean issues with LCDC for many years, describes the proposed role of the Compact as follows:

The genesis of the Pacific Ocean Resources Compact was spurred by the Reagan Administration's proposed leasing for offshore oil and gas in federal waters off Washington, Oregon, and Northern California, followed by a proposal for seafloor mineral mining on

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19, but permits must meet the TSP and applicable state and federal law; and the REPA (Renewable Energy Permit Area), where permits have been previously issued. *Id.*

95. *Oregon Territorial Sea Plan*, *supra* note 91, at 5-7.

96. *Id.* at 7-22. These standards are, in addition to other state law requirements, regulated by the Department of State Lands which is charged with licensing permits in state-owned lands and waters. *See* OR. ADMIN. R. no. 141-140-0010-0040 (2018) ("Rules Governing the Placement of Ocean Energy Conversion Devices On, In or Over State-Owned Land within the Territorial Sea").

97. *Oregon Territorial Sea Plan*, *supra* note 91, at 23.

98. *Id.* at 23-27.

99. *Id.* at 27-28. This entity is now known as the Pacific Marine Energy Center.

100. *Id.* at 28.

101. *See* OR. REV. STAT. §§ 196.175-196.185 (2017). The compact allows for the admission of the Province of British Columbia, should the provincial legislature and Congress consent. The Compact also deals with funding and member withdrawal.

the Gorda Ridge, a geologic seafloor feature within the newly-proclaimed U.S. Exclusive Economic Zone (EEZ) off the southern Oregon and northern California coasts. The Western Legislative Conference had an Ocean Resources Committee and among the members were state legislators from Oregon, Washington, and California, including Oregon State Senator Bill Bradbury, the chief sponsor of legislation that had created Oregon's Ocean Resources Management Program. Senator Bradbury, along with committee members from Washington and California devised a kind of political long shot to try to gain more control over ocean uses on the continental shelf off the three states. They agreed to concurrently introduce legislation in their respective state legislatures to create the Pacific Ocean Resources Compact with the aim of creating an interstate compact that, subject to Congressional approval, would assume the duties and responsibilities of the federal government for ocean resources management off the three West Coast states. Legislation was introduced in all three states but enacted and signed into law only in Oregon. The idea eventually expired as time and events moved on and with the demise of the federal proposals for oil, gas, and mineral leasing. Interestingly, the idea of broad regional ocean management, with state involvement, was revived by the Obama Administration in 2010 through Executive Order 13547 that established the National Ocean Policy which called for creation of regional ocean planning bodies, including one for the West Coast, and marine spatial planning for the entire Exclusive Economic Zone.<sup>102</sup>

It does not appear that the Compact has been a significant factor in ocean resources policy in Oregon.

#### *E. Marine Reserves and Protected Areas*

Beginning in 2009, the Oregon legislature authorized a process whereby the Oregon Department of Fish and Wildlife (ODFW) may, following certain studies, designate Marine Reserves<sup>103</sup> within the

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102. Letter from Robert Bailey, former Ocean Resources Regulator, State of Oregon, to author (Dec.16, 2018) (on file with author).

103. See Oregon Ocean Policy Advisory Council, *Oregon Marine Policy Recommendations, A Report to the Governor, State Agencies and Local Governments from OPAC*, OREGONMARINERESERVES.COM [http://oregonmarinereserves.com/content/uploads/2016/02/OPAC\\_Marine-Reserves-Policy-Recommendations-2008.pdf](http://oregonmarinereserves.com/content/uploads/2016/02/OPAC_Marine-Reserves-Policy-Recommendations-2008.pdf)

territorial sea in which the taking of fish and other marine species may be prohibited or limited.<sup>104</sup> Thus far, five such reserves have been designated and managed under a pilot program managed by ODFW:

- Redfish Rocks near Port Orford
- Cape Perpetua, south of Yachats
- Otter Rock, between Newport and Depoe Bay
- Cascade Head, south of the headland and extending along the Lincoln City beachfront
- Cape Falcon, between Cannon Beach and Manzanita<sup>105</sup>

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[<https://perma.cc/2N9K-AHLX>]; Oregon Ocean Information, *Oregon's Marine Reserve System*, OREGONOCEAN.INFO, [https://www.oregonocean.info/index.php?option=com\\_content&view=category&layout=blog&id=9&Itemid=2](https://www.oregonocean.info/index.php?option=com_content&view=category&layout=blog&id=9&Itemid=2) [<https://perma.cc/6GSW-LTGK>]. The state describes a “marine reserve” as follows:

A marine reserve is an area within Oregon's Territorial Sea or adjacent rocky intertidal area that is protected from all extractive activities, including the removal or disturbance of living and non-living marine resources, except as necessary for monitoring or research to evaluate reserve condition, effectiveness, or impact of stressors.

*Id.*; see also LEG. POLICY AND RES. OFFICE, MARINE RESERVES, BACKGROUND BRIEF, (Oct. 12, 2018), <https://www.oregonlegislature.gov/lpro/Publications/Background-Brief-Marine-Reserves-2018.pdf> [<https://perma.cc/YC6A-LAJD>].

104. See OR. REV. STAT. §§ 196.540-196.555 (2017). The Oregon Fish and Wildlife Commission (ODFW) has adopted rules for marine reserves at, OR. ADMIN. R. 635-012 *et. seq.* (2011); See also Or. Dep't of Fish & Wildlife, *A Deeper Understanding* OREGONMARINERESERVES.COM, <http://oregonmarinereserves.com/>

[<https://perma.cc/9SAM-RY88>]. From the beginning of the program, the Governor in signing OR. Exec. Order No. 08-07 (Mar. 26, 2008), *supra* note 51, designated the State's Department of Fish and Wildlife to take the lead on acting on OPAC recommendations for such reserves as they relate to energy projects. The legislature then authorized the designation process in its next regular session in 2009 and designated two pilot project sites, Otter Rock and Redfish Rocks by 2009 Or. Laws ch. 847 §1, and added other sites in 2012, 2012 Or. Laws ch. 27 § 2.

105. OR. DEP'T OF FISH & WILDLIFE, *A Deeper Understanding* (2016), <http://oregonmarinereserves.com> [<https://perma.cc/9SAM-RY88>]; Memorandum from Curt Melcher, deputy director of ODFW, to Kevin Hayden, Legislative Administrator, *Report on development of an [Oregon Department of Fish and Wildlife] Marine Reserves Program Work Plan*, (Jan. 17, 2013), [https://www.oregonlegislature.gov/citizen\\_engagement/Reports/2013\\_ODFW\\_Report%20on%20the%20Development%20of%20an%20ODFW%20Marine%20Reserves%20program%20work%20plan.pdf](https://www.oregonlegislature.gov/citizen_engagement/Reports/2013_ODFW_Report%20on%20the%20Development%20of%20an%20ODFW%20Marine%20Reserves%20program%20work%20plan.pdf) [<https://perma.cc/2XXT-4J7F>]. Establishment of the Marine Reserves program followed complex coordination among state and federal agencies as advised by the Oregon Department of Justice in advice dated April 10, 2007 (on file with the author). In response to the legislation, ODFW has adopted an extensive research and protective program. See also Oregon Shores Conservation Coalition, *Marine Reserves*, <https://oregonshores.org/marine-reserves> [<https://perma.cc/VCX8-S2DL>]. The Coalition also notes that a protected marine area

Following the direction of the 2012 legislature, ODFW monitors these areas for habitat changes, the volume and nature of fish and other biological resources, and the effects of climate change.<sup>106</sup> The possibility of limiting or prohibiting fishing in these areas has caused the fishing industry, sports fishermen and others, to register deep concerns over the reserves proposal, even before any legislation was passed.<sup>107</sup> To allay the fears of the commercial fishing community, the legislature prohibited adoption of fishing by rule until after ODFW had collected certain baseline data.<sup>108</sup>

For the five designated marine reserves, it is unlawful to “take”<sup>109</sup> any fish or wildlife species, including through fishing or hunting or to take any fish species from the ocean, using hook-and-line from the bank shoreward of the marine reserve, unless specifically authorized.<sup>110</sup> ODFW also

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adjacent to the reserves is also managed by ODFW. *See also* (2012) Or. Laws. ch. 27 § 4. OPAC’s scientific and technical advisory committee must report to the legislature in 2022 and 2023 “regarding the establishment, study, monitoring, evaluation and enforcement of the pilot marine reserves, marine reserves, marine protected areas and seabird protection area,” presumably so that the legislature may reaffirm, modify or repeal the reserve program.

106. Or. Dep’t of Fish & Wildlife, *Ecological Monitoring*, OREGONMARINERESERVES.COM, <http://oregonmarinereserves.com/science/ecological/> [https://perma.cc/BW9U-774S].

107. The prospect of such limitations or prohibitions even before the reserves legislation was passed bothered commercial fishermen. Brian Bullock, *Fishermen Oppose Proposed Marine Reserves*, CURRY COUNTY PILOT June 7, 2002, <https://www.currypilot.com/csp/mediapool/sites/CurryPilot/News/story.csp?cid=4276075&sid=919&fid=151>. The 2012 expansion of the program also incited opposition. Cassandra Profita, *Oregon Senate Passes Marine Reserves Bill*, OR. PUB. BROADCASTING (Feb. 7, 2012), <https://www.opb.org/news/blog/ecotrope/oregon-senate-passes-marine-reserves-bill/> [https://perma.cc/AZ94-TKM7]. These economic concerns and their political and social manifestations have also been the subject of academic studies. Martin D. Smith et al., *Political economy of marine reserves: Understanding the role of opportunity costs*, PNAS.ORG (Oct. 26, 2010), <https://www.pnas.org/content/107/43/18300> [https://perma.cc/J8V9-2M59]; Or. Dep’t of Fish & Wildlife, *Oregon Marine Reserves: Human Dimensions Monitoring Report 2010-2011*, [http://oregonmarinereserves.com/content/uploads/2016/02/HumanDimensionsResearch\\_Report\\_ODFW\\_2014.pdf](http://oregonmarinereserves.com/content/uploads/2016/02/HumanDimensionsResearch_Report_ODFW_2014.pdf) [https://perma.cc/MY4J-T5XY].

108. OR. REV. STAT. § 196.542(1) (2017). Subsection (2) of this same statute also requires that the data gathering and other marine reserves activity “shall use local resources where feasible and practical.” *Id.* at § 196.542(2).

109. OR. ADMIN. R. 635-012-0030(9) (2012). “Take” means to fish for, hunt, pursue, catch, capture, or kill, or attempt to do the same with respect to a given species. *Id.*

110. OR. ADMIN. R. 635-012-0050 (2012). The boundaries of both marine reserves and marine protected areas are found in OR. ADMIN. R. 635-012-0040 (2012). For geographic

regulates taking of certain species in nine “protected areas”<sup>111</sup> (adjacent to Marine Reserves) as well, where these regulations are less stringent.<sup>112</sup> Together, the reserves and protected areas provide a base for scientific research, conservation of species, and allow for breeding stocks to regenerate. They have both public agency<sup>113</sup> and private<sup>114</sup> support.

#### IV. THE NEXT FRONTIER: UPDATE OF THE ROCKY SHORES OTSP ELEMENT

The existing OTSP notes that the state’s rocky shores are important to the state.<sup>115</sup> The Oregon Department of Parks and Recreation elaborates:

Rocky shores are a defining feature of the dramatic 360-mile long coastline of Oregon. Tidepools, cliffs, rocks, and submerged

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depiction of Marine Reserves and Protected Areas, *see* Or. Sport Fishing Reg., Management Designations for Marine Areas, <http://www.eregulations.com/oregon/fishing/management-designations-marine-areas/> [<https://perma.cc/24F6-VJGC>]. In addition, Oregon has seven “Marine Gardens,” available to visitors to view nearshore marine life. Jenna B. Feehan, *Gardens of Intertidal Wonder*, COAST EXPLORER (June 14, 2010), <http://coastexplorermagazine.com/features/marine-gardens-on-the-oregon-coast> [<https://perma.cc/TJ6C-JUBX>].

111. OR. ADMIN. R. 635-012-0070 (2012). Despite concerns similar to those of the commercial fishing industry, there was some support of the program by Native American Tribes. Sabra Marie TallChief Comet, *Informing Oregon’s Marine Protected Area (MPA) Baseline Past and Present Tribal Uses of Marine Resources*, PORTLAND STATE U. (2017), [https://seagrant.oregonstate.edu/sites/seagrant.oregonstate.edu/files/y-18-001\\_informing\\_oregons\\_marine\\_protected\\_area\\_baseline\\_past\\_and\\_present\\_tribal\\_use\\_of\\_marine\\_resources.pdf](https://seagrant.oregonstate.edu/sites/seagrant.oregonstate.edu/files/y-18-001_informing_oregons_marine_protected_area_baseline_past_and_present_tribal_use_of_marine_resources.pdf) [<https://perma.cc/W4J9-UF6V>].

112. Terry Richard, *Five Oregon Marine Reserves bring offshore protection for animals, plants*, OREGONLIVE (July 16, 2015), [https://www.oregonlive.com/travel/index.ssf/2015/07/five\\_oregon\\_marine\\_reserves\\_br.html](https://www.oregonlive.com/travel/index.ssf/2015/07/five_oregon_marine_reserves_br.html) [<https://perma.cc/Z83J-UFEW>].

113. Or. Dep’t of Fish & Wildlife, *Our Partners*, OREGONMARINERESERVES, <http://oregonmarinereserves.com/partners/> [<https://perma.cc/2LES-HXDP>]. This article sets out the Oregon agencies supporting the reserve program. *Id.*

114. Oregon Marine Reserves Partnership, THE OCEAN FOUNDATION, <https://www.oceanfdn.org/projects/hosted-projects/oregon-marine-reserves-partnership> [<https://perma.cc/3PKG-C6HX>] (setting out a host of private supporters of the program.)

115. Part Three of the OTSP, the *Rocky Shores Management Strategy: Introduction* notes both state proprietary and regulatory interests and the need to have coordinated management of both shoreline areas, which include rocky tide pool areas, as well as associated cliffs, submerged rocks or reefs, and nearby rocks that may be reached by foot from shore (regardless of hazard or inconvenience), and offshore areas, which include underwater reefs and rocky islands accessible only by water in a boat or other means. (These rocks and reefs are all within Oregon’s territorial sea.) Oregon Coastal Management Program, *Territorial Sea Plan*, Part Three, [https://www.oregon.gov/lcd/OCMP/Documents/otsps\\_3-a.pdf](https://www.oregon.gov/lcd/OCMP/Documents/otsps_3-a.pdf) [<https://perma.cc/85WY-DD2Z>].

reefs support an ecologically rich and diverse ecosystem at the boundary of the land and sea along 161 miles (41%) of Oregon's shoreline. These rocky shore areas, particularly the 82 miles (21%) of rocky intertidal habitat, attract thousands of visitors annually. Rocky shores are thus resources of high ecologic, economic, and social value to a wide range of stakeholders from local communities to state agencies and citizens of the world at large.<sup>116</sup>

One of the issues before the working group is further work on the "sensitive sites" noted in Part III of the OTSP.<sup>117</sup> Although the Ocean Plan lists over thirty "sensitive sites," the OPAC has identified seven "priority rock and reef" sites in the OTSP, worthy of special assessment and where specific management actions may be needed.<sup>118</sup> The OTSP emphasizes plan consistency in site management, division of the rocky shores into constituent ecological management units, the priority of science in evaluations, and a plan amendment process to allow development only when criteria, bent towards conservation in doubtful circumstances, are met.<sup>119</sup>

Aside from these site-specific issues, OPAC has chosen to update Part III of the OTSP, Rocky Shores Management generally.<sup>120</sup> This phase will

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116. OR. PARKS & RECREATION DEP'T, *Oregon Rocky Shores*, [https://www.oregon.gov/oprd/NATRES/Pages/RS\\_main.aspx](https://www.oregon.gov/oprd/NATRES/Pages/RS_main.aspx) [<https://perma.cc/8KCF-KHJU>]. The strategy is a combination of a goal and related policies to be implemented by public agencies found in Part Three B of the plan. *Oregon Territorial Sea Plan*, *supra* note 85.

117. *Oregon Territorial Sea Plan*, *supra* note 85, at Part Three (C). *Oregon Territorial Sea Plan*, *supra* note 85, at Part Three (D), contains the state's management plan for various types of ocean resources. Part Three (F) and (G) contain the various categories of sites to be analyzed, management categories and designations (including marine gardens and refuges, research reserves, marine shores, and priority offshore rocks and reefs) and a description of each. *Id.* A separate designation and policy were adopted for Cape Arago in Part Three (H). *Id.*

118. *Oregon Territorial Sea Plan*, *supra* note 85, at Part Three (A)(2).

119. See the description of the existing OTSP in *Oregon Territorial Sea Plan*, *supra* note 85. Recent federal evaluations of Oregon's Coastal Management have generally been positive, with the exception of a failure to deal with non-point water pollution. Oregon Shores Conservation Coalition, *NOAA Completes Evaluation of Oregon Coastal Management Program*, OREGONSHORES.ORG, <https://oregonshores.org/article/noaa-completes-evaluation-oregon-coastal-management-program> [<https://perma.cc/BZY5-DNP5>].

120. Oregon Ocean Information, *Territorial Sea Plan Working Group: Rocky Shores Management*, OREGONOCEAN.INFO, <https://www.oregonocean.info/index.php/opac-working-groups/69-territorial-sea-plan-working-group-rocky-shores-management> [<https://perma.cc/U4SW-H3H9>].

As DLCDC puts it in *Territorial Sea Plan Working Group: Rocky Shores Management*:

result in a coordinated and updated Part III of the OTSP (Rocky Shores), so that the policies and recommended site designations (with recommended development restrictions and resource protections) will be consistent.<sup>121</sup>

One of the outstanding issues faced by the Oregon Coastal Management Program is a loss of certain federal funds under the CZMA and the Clean Water Act because the state does not have a federally approved nonpoint source program for its coastal lands.<sup>122</sup> This failure has

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The Oregon Ocean Policy Advisory Council (OPAC), in accordance with its duties authorized in ORS 196.448 through ORS 196.453, has initiated a review of the Oregon Territorial Sea Plan (TSP) with the intention of recommending amendments to Part Three: Rocky Shores Management Strategy. OPAC will submit any recommendations for amending the TSP to the Land Conservation and Development Commission, which is responsible for adopting amendments to the TSP through a rule making process.

*Id.*

OPAC has established a working group for these amendments in 2008 and reconstituted that group in 2015 to revise this 1994 portion of the OTSP. *Id.*; Or. Ocean Pol’y Advisory Council, *Territorial Sea Plan Part 3: Rocky Shores Management Strategy*, 1, <https://www.oregonocean.info/index.php/opac-documents/workinggroups/tspwg-p3/rocky-shores-update-text-editing/1834-tsp3-main-draft-document-document-12-3-2018/file> [<https://perma.cc/8TUE-AG94>] (Draft). DLCD will assist and administer the working group meetings. Oregon Ocean Information, *Territorial Sea Plan Working Group: Rocky Shores Management*, OREGONOCEAN.INFO  
The latest (January 2019) version of the recommended changes may be found at: Or. Ocean Pol’y Advisory Council, *Territorial Sea Plan Part 3: Rocky Shores Management Strategy*, <https://www.oregonocean.info/index.php/opac-documents/workinggroups/tspwg-p3/rocky-shores-update-text-editing/1834-tsp3-main-draft-document-document-12-3-2018/file> [<https://perma.cc/8TUE-AG94>] (Draft).

121. Or. Ocean Pol’y Advisory Council, *Territorial Sea Plan Part 3: Rocky Shores Management Strategy*, at 7-8, <https://www.oregonocean.info/index.php/opac-documents/workinggroups/tspwg-p3/rocky-shores-update-text-editing/1834-tsp3-main-draft-document-document-12-3-2018/file> [<https://perma.cc/8TUE-AG94>] (Draft). According to DLCD staff, this update will likely continue through 2019 in three phases: revision of Rocky Shores Policies in TSP Part 3, update of resource protection and development requirements for designated management sites, and coordination of the two in a single document. Letter from Deanna Caracciolo, DLCD, (Jan 4, 2019) (on file with author).

122. Outstanding issues are generally oriented to water pollution from forestry practices, such as lack of buffers on non-fish-bearing streams, effects of landslides on water quality, upgrading of “legacy roads” (in operation before more recent environmental laws) to allow fish passage and other environmental requirements, and certain uses of pesticides and herbicides near fish-bearing streams. Letter from Andy Lanier & Patty Snow (Jan. 4, 2019) (on file with author).

led to the loss of 30% of certain federal funds to support coastal environmental efforts, as well as the loss of two state staff.<sup>123</sup>

## V. CONCLUSIONS

In 1997, following adoption of the Ocean Plan and OTSP, Robert Bailey, who was directly involved in both plans for DLCD made a number of observations regarding the Oregon Ocean Management Program that remain accurate today:

1. Because the dynamic nature of ocean resources is different and less amenable to more static considerations that mark other[] land-based[] goals, an ongoing program (rather than an end-state plan that local governments may use to show ultimate development at "full build-out") is more appropriate for management of coastal resources. Neither the federal CZMA certification process nor other planning processes for state agencies and local governments in Oregon can accomplish the state's policies on ocean resources by themselves. Thus, a combination of federal certification and LCDC authority, the political and moral force of the Oregon Ocean Resources Management Program[,] and good science are necessary to preserve those resources and stave off the threat of improvident federal policies.<sup>124</sup>

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123. Email from Andy Lanier & Patty Snow (Jan. 4, 2019) (on file with author); *see* Northwest Env'tl. Advoc. v. Locke, Civ. No. CV09-0017-PK (D. Or., 2010), <https://www.oregon.gov/deq/FilterDocs/CZARA.pdf> [<https://perma.cc/JW4H-WPCP>]; *see also* Oregon Shores Conservation Coalition, *supra* note 119.

124. From its beginnings with the adoption of Goal 19 in 1976, the State of Oregon has insisted that any policy and regulation affecting ocean resources be science-based. In those early years of LCDC, two key Commission members were scientists: Dr. Paul Rudy, Director of the Oregon Institute of Marine Biology at Charleston, Oregon and biologist Ann Squier (later Natural Resources Assistant to Governor Barbara Roberts). Goal 19 was originally aimed towards science and the coordination among state and federal agencies. In its original form, Goal 19 required "all local, state and federal plans, policies, projects and activities which affect the territorial sea shall be developed, managed and conducted to maintain, and where appropriate, enhance and restore, the long-term benefits derived from the nearshore oceanic resources of Oregon." State and federal agency actions were mandated to "develop inventory information necessary to understand the impacts and relationship of the proposed activity to continental shelf and nearshore ocean resources." Agency actions impacting fishery resources were required agencies to "*develop scientific information* on the stocks and life histories of commercially, recreationally and ecologically important species." (emphasis added). Goal 19 required agency actions to "identify and protect areas of important biological habitat" and to "*determine and protect the integrity of the marine ecosystem*, including its natural

2. Good resource planning and resource management takes time, financial resources, expertise, and participation by public agencies (federal, state, and local), and affected private interests (fisheries, tribes, energy providers among others) to make a coastal program work.
3. The program is necessarily political and is unlikely to go away.

From the perspective of its stated purposes and goals of ocean resource conservation and management, the Oregon program as described above has been successful. It has provided administrative machinery to deal with policy detail and permitting, and has periodically reviewed designation and management of significant resource sites. In the last quarter century, however, variations on these observations, and new considerations may be added to our understanding of the criteria for success of the Oregon Ocean Resources Management Program:

1. Perhaps the most important observation, while hardly new, is that any coastal resource management program must be science-based, supported by the academy, and reflect the coordination of public agencies, and have the support of ocean-based communities.<sup>125</sup> The Oregon Program requires an adequate factual base for policies, uses peer-reviewed scientific information and methodologies, and provides a structure in which policies and management criteria are fully vetted in public and filtered through scientific and interest group input, specialist committees and a politically accountable Commission, with ever-present legislative

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biological productivity and diversity." (emphasis added). It was a "priority to certain uses . . . (and that) actions affecting Ocean Resources must be preceded based on an inventory and based on sound information. "Clear priority" was to be given to "proper management and protection of renewable resources." Impact assessments and inventories were the standard. The inventory requirements were never applied to local governments. In its original (1977) form, Goal 19 and its guidelines were instead directed at state and federal agencies to give "priority to certain uses . . . [and that] *actions affecting Ocean Resources must be preceded by an inventory and based on sound information.*"(emphasis added). Goal 19, *supra* note 46.

125. The three most successful state programs under the CZMA seem to be California, Massachusetts, and Oregon, each of which has a marine scientific establishment; Scripps Institution of Oceanography, University of California San Diego in San Diego, California; Woods Hole Oceanographic Institution in Woods Hole, Massachusetts; and the Hatfield Marine Science Center, Oregon State University in Newport, Oregon, respectively. The policy advice for Oregon's Ocean Resources Management Program is guided by a permanent scientific and technical advisory committee chaired by the director of the Sea Grant College program at Oregon State University. OR. REV. STAT. § 196.451 (2017).

oversight. Moreover, the combination of CZMA certification and LCDC planning and regulatory supremacy results in an effective means of realizing public policy.

2. State coastal resource and management programs are a product of their individual, social, economic, and political cultures, which moves them to “own” those programs. Often, a traumatic event focused attention on coastal management, such as the Santa Barbara Oil Spill in 1969, which triggered the formation of the California Coastal Commission by a 1972 initiative,<sup>126</sup> or the Buzzards Bay Oil Spill in Massachusetts in 1969 that led to the passage of the Massachusetts Oil Spill Prevention Act (MOSPA)<sup>127</sup> in 2004 or Oregon’s iconic Beach Bill of 1967 and subsequent litigation that declared the “dry sands” area of the state to be in the public domain.<sup>128</sup> Each of these events attracted political support for legislation and programs for conservation and management of coastal resources.
3. Like the shadow that falls “[b]etween the idea [a]nd the reality” in T. S. Eliot’s poem, *The Hollow Men*,<sup>129</sup> there is a planning and regulatory gap between waters between the three-mile jurisdictional limit and the 200-mile EEZ. Oregon has stated its policy interests in the Ocean Plan. Though those policies sometimes carry only moral weight, they may be a factor in federal consistency review. Congress should fill in this gap and use a process similar to the current certification process to do so.
4. Over the last quarter-century the physical world has quickly changed. The potential for pollution of ocean resources from riparian or shoreland sites as well as the realities of climate change necessitate further planning and regulation by accountable public agencies both within the territorial sea and EEZ limits.
5. The revised planning and regulatory model must deal with policies and regulations to resolve conflicts among resource

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126. See Keith Clarke & Jeffrey Hemphill, *The Santa Barbara Oil Spill: A Retrospective*, YEARBOOK OF THE ASSOCIATION OF PACIFIC COAST GEOGRAPHERS (Darrick Danta, ed., 2002), <http://www.geog.ucsb.edu/~kclarke/Papers/SBOilSpill1969.pdf> [https://perma.cc/39QG-GC3Y].

127. Buzzards Bay Coalition, *Oil Spills*, SAVEBUZZARDSBAY.ORG, <https://www.savebuzzardsbay.org/current-issues/oil-spills/> [https://perma.cc/TRU7-WZNT].

128. See Sullivan, *Shorelands Protection in Oregon*, *supra* note 15, at 134-37.

129. T. S. ELIOT, *THE HOLLOW MEN*, POEMS: 1909–1925 (1925).

users – preservation, commercial uses (recreational and commercial fishing, marine, communication and port uses), and energy providers. The reality is that natural non-renewable resources are dwindling and must take precedence over other uses. However, only politically accountable bodies should set these policies.<sup>130</sup>

The Oregon program is underfunded, subject to sometimes-unenlightened political and economic interests and maddeningly slow, as demonstrated by the Rocky Shores update. However, it is probably the most comprehensive basis for preserving ocean resources and allocating public and private needs in ocean waters. Most importantly, it appears to have broad public support in the state.

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130. It may be useful to note that, unlike the other Statewide Planning Goals, Goal 19 does not directly concern local land use plans and regulations, but rather is a joint concern of state and federal agencies. *See supra* note 80 and accompanying text.