

Oregon Parks and Recreation Commission

February 27, 2024

Agenda Item: 9b

Action

Public Comment Allowed: **No**

Topic: Request to adopt –Amending Territorial Sea Plan Rocky Habitat Site Designation (OAR 736-021-0090)

Presented by: Katie Gauthier

Background: The Oregon Land Conservation and Development Commission (DLCD) adopted amendments to Oregon’s Territorial Sea Plan Rocky Habitat Management Strategy in April 2023. As a part of this update, rocky habitat sites are now eligible for one of three management designations: Marine Research Area, Marine Garden/Education Area and Marine Conservation Area. Goals, regulations and management practices differ for each type of designation.

The management areas and their respective goals were designated by LCDC after an extensive review process led by the Ocean Policy Advisory Council. To comply with the updated plan and management goals now included in the Rocky Habitat Management Strategy, OPRD will need to update our rule language around collection of marine plants and macroalgae in marine reserves and marine protected areas in OAR 736-021-0090(4)(b).

In addition, when opening 736-021-0090 for changes, we proposed removing language in section (3) that refers to requirements for enrolled tribal members to obtain a permit from OPRD prior to collecting natural products. This language is outdated and does not reflect current agency practices. Prior to proposing opening rulemaking, the agency offered consultation to all nine federally recognized tribes.

The proposed rule was open for public comment on October 1 and closed on November 3. A public hearing was held on October 26 and had one person attend and provide oral comments. A full copy of all comments received are available on the [agency rulemaking website](#). One written comment was submitted on behalf of the Coquille Indian Tribe (included in Attachment C).

Based on requested changes in the comment, staff will make amendments to the proposed language and seek further consultation with additional tribes. The amended proposed language was reopened for public comment from December 1 to January 4. No additional public comment was received. While no tribe officially requested consultation, during staff-to-staff conversations with one tribe, did encourage the agency to ensure definitions for tribes eligible for traditional use under the OAR match those in the traditional use procedure under development. Agency staff are currently meeting with tribes as part of the development of a new traditional use procedure.

Prior Action by Commission: Commission approved opening rulemaking in September 2023.

Action Requested: Adopt amendments to 736-021-0090 update requirements for collection of marine plants and macroalgae in marine reserves and marine protected areas and remove requirements for a department issued special tribal use permit for traditional use collection.

Attachments: Attachment A – proposed rule amendments- marked copy
Attachment B – proposed rule amendments- clean copy
Attachment C- summary of comments received

Prepared by: Katie Gauthier

9b: Attachment A: Marked Copy

736-021-0090

Cultural, Historic, Natural and Wildlife Resources

(1) A person may not excavate, injure, destroy or alter an archaeological site or object or remove an archaeological object located on the ocean shore state recreation area, unless the department has authorized that activity by a permit issued under ORS 390.235 and OAR 736-051-0060 to 736-051-0080.

(2) Except with the written permission of the department or as allowed by sections (3) or (4) of this rule, a person may not:

(a) Pick, cut, mutilate, trim, uproot, or remove any living vegetation;

(b) Dig up or remove any sand, soil, rock, historical or fossil materials; or

(c) Place, remove, roll, move any stones, logs or other objects to gain access to the ocean shore state recreation area.

(3) A persons who is an enrolled member of an Indian Tribe as defined in ORS 97.740 may collect natural products as part of their traditional cultural heritage or as authorized in any agreement between an Indian Tribe and the Department, in accordance with procedures established by the department and in state rules. Upon request by a park employee, a person collecting natural products under this section must present tribal enrollment identification. ~~or a department-issued Special Tribal Use Permit.~~

Removal for Personal Use:

(4) A person may remove small quantities of natural products from the ocean shore state recreation area for personal use without a permit as provided in subsections (a) and (b). However, the department may restrict removal of natural products to specific areas of the ocean shore state recreation area, by quantities of material, and by time of year.

(a) Souvenirs that may serve as a reminder of a person's ocean shore visit and may include a small quantity of agates and other rocks, driftwood, and similar non-living items collected for non-commercial, personal use in accordance with ORS 390.705 and 390.725. For items such as agates, sand and cobble, each person collecting must use an individual container and may not combine collections in the same container with another person. Unless otherwise restricted by the department, a person may remove:

(A) Agates and other non-living items such as shells, stones, and fossils loose on the ground, in small quantities, defined as no more than a one-gallon volume container per person per day; up to three gallons per person per calendar year.

(B) Sand: no more than a five-gallon volume container per person per day; up to 20 gallons per person per calendar year.

(C) Cobble: no more than a five-gallon volume container per person per day; up to 10 gallons per person per calendar year.

(D) Driftwood, for non-commercial purposes, as follows:

(i) No more than one cubic yard (3 ft X 3 ft X 3 ft) per person per day; up to three cords per person per calendar year.

(ii) Driftwood removal is restricted to wood that can be loaded by hand only. A person may not use mechanized loading or removal equipment. The department must approve chainsaw use.

(iii) A person may not remove wood embedded in the beach or in dune banks from the ocean shore state recreation area.

(iv) A person may not disturb, cut, mutilate or remove ancient tree stumps, including but not limited to those found on the ocean shore state recreation area at the Neskowin “ghost forest.”

(b) Living or non-living seaweed and marine plant harvesting or collecting for non-commercial, personal consumption is allowed as provided in paragraphs (A) through (H) of this subsection. The department may restrict removal of aquatic vegetation to certain species, areas of the ocean shore state recreation area, quantities, and time of year.

(A) A person may harvest living seaweed and marine plants annually beginning March 1 and ending June 15.

(B) A person may harvest non-living seaweed and marine plants all year. However, in any western snowy plover-managed area, a person may not harvest non-living seaweed and marine plants during seasonal closures beginning March 15 and ending September 15.

(C) A person may not cut or disturb eel grass (*Zostera* spp.), surf grass (*Phyllospadix* spp.) or sea palm (*Postelia* sp.) in any area.

(D) A person may not harvest or collect any species listed on the “Rare, Threatened and Endangered Species of Oregon” published by the Oregon Biodiversity Information Center.

(E) A person may harvest no more than a one-gallon volume container per day; up to three gallons per calendar year.

(F) Each person collecting must use an individual container and may not combine collections in the same container with another person.

(G) A person may harvest only by hand using a knife or similar instrument. A person may only harvest live vegetation by cutting or picking; tearing or using tined instruments, such as rakes or forks, is prohibited. A person may remove loose or drift plants. A person may not remove or disturb a holdfast.

(H) A person may not pick, cut, mutilate, trim, uproot, remove or attempt to take or possess any living or non-living plants or seaweeds in:

(i) marine reserves;

~~(ii) and marine protected areas; or~~

~~(iii) Aincluding all areas designated for Rocky Habitat Site Management (Marine Research Areas, Marine Gardens (Marine Education Areas), Marine Research Areas, and Marine Conservation Areas) under Oregon Territorial Sea Plan Part Three unless specifically allowed under management goals for the designated site or authorized under 736-021-0090(3)., marine protected areas, marine gardens, intertidal research reserves, and wildlife or habitat refuges.~~

(5) For any area of the ocean shore state recreation area that is also either a marine reserve or marine protected area, regulations pertaining to collection or removal of natural products are provided in division 29, OAR chapter 635, division 12, and OAR chapter 141, division 142.

(6) In order to remove or collect quantities of natural products greater than the limits listed in this rule, a person must obtain a special-use permit from the department.

Removal for Commercial Use:

(7) In order to remove or collect natural products for commercial use, a person must obtain a permit as provided in OAR chapter 736, division 20.

Other Collecting Activities:

(8) Fishing, shellfishing, and collecting of other marine invertebrates for personal or commercial use are regulated by the Oregon Department of Fish and Wildlife (ODFW) under rules in OAR chapter 635.

(9) A person may engage in recreational prospecting as provided in this section. However, the department may restrict disturbance or removal to specific areas of the ocean shore state recreation area, by quantities of material, and by time of year.

(a) A person may remove sand from the ocean shore state recreation area for personal prospecting use. A person may remove a maximum of one five-gallon volume container per day; for up to 20 gallons per person per calendar year.

(b) Equipment is limited to hand-operated instruments;

(c) A person may not use motorized equipment, including solar, battery operated pumps, or other similar motorized devices;

(d) A person may not use chemicals, heavy metals or other aids to separate metals;

(e) A person may not prospect in waters of the state without written permission from ODFW regarding in-stream work periods. A person may not interrupt or divert water flow or in any way restrict the movement of fish or wildlife;

(f) A person may not disturb, take, or move wildlife, vegetation or other natural resources in the prospecting process;

(g) If a person moves rocks in the prospecting process, the person must return the prospecting area to original condition before leaving the ocean shore state recreation area;

(h) A person may not prospect in any western snowy plover-managed area, during seasonal closures beginning March 15 and ending September 15;

(i) A person may not disturb more than one cubic yard of materials at any individual site, or more than a total of five cubic yards within a one-quarter mile radius; and

(j) A person may not stake or file a mining claim or leasehold location.

(10) Scientific research: A person may only engage in scientific research, including product removal for research, pursuant to a written permit from the department's Salem headquarters and any other required state or federal permits. For example, a person who wishes to capture or handle marine and freshwater fish and shellfish and other marine invertebrates for scientific or educational purposes from the waters of Oregon, including the ocean shore state recreation area, must obtain a valid scientific taking permit from the Oregon Department of Fish and Wildlife, as provided in OAR chapter 635, divisions 7 and 43.

(11) Metal detecting: A person may use a metal detector or similar device on the ocean shore state recreation area without a written permit from the department in the areas noted in the "Detecting Allowed" list, published on the OPRD website.

Additional Rules for Natural Resource Protection:

(12) A person may not place items such as logs, rocks, ropes, structural members or other objects; remove, bury, roll stones or other objects; carve, dig caves or sculpt in sand dunes or sea cliffs, in a way that endangers visitors or damages ocean shore resources.

(13) A person may not do any of the following within the ocean shore recreation area:

(a) Hunt, collect, pursue, trap, kill, injure, harass or molest any wildlife, disturb or damage their habitat, disturb tidal pools, gather eggs or other live material, except as allowed in this rule. However, a person may detain or remove injured wildlife for rehabilitation efforts. A person must release injured or orphaned wildlife to a licensed wildlife rehabilitator as soon as feasible and in accordance with OAR chapter 635, divisions 44 and 56.

(b) Feed, give or offer food to wildlife;

(c) Discharge any firearm, pellet gun, bow and arrow, slingshot, paintball gun, or other weapon or device capable of injuring any person or wildlife, except as allowed by section (14).

(14) The director may authorize the use of firearm and other predator control methods by designated individuals for natural resource management purposes.

Rules for Western Snowy Plover Management Areas:

(15) In the western snowy plover management areas the following additional rules apply, which are adopted based on the department's Habitat Conservation Plan for Western (Coastal) Snowy Plover:

(a) Occupied Sites: In areas the department designated as occupied sites for western snowy plovers, the following apply:

(A) All recreation is restricted within dry sand demarked areas beginning March 15 and ending September 15. The department may declare restrictions ended on July 15 due to a discontinuation of nesting. The boundaries of “dry sand” areas may be identified with symbolic fencing (roping), signs, or both.

(B) A person may not operate a motorized or non-motorized vehicle or flying apparatus, including but not limited to kites, gliders and air balloons on the wet sand adjacent to demarked dry sand areas, except persons the department has approved to perform administrative, enforcement or scientific duties.

(C) Dogs are prohibited on the wet sand adjacent to demarked dry sand areas.

(D) Other recreational activities, such as camping and recreational fires, that could not typically occur on wet sand due to waves are also prohibited.

(E) Walking and any other passive activity not otherwise mentioned here are allowed on the wet sand.

(F) Horseback riding on the wet sand of beaches with occupied sites is allowed, unless horseback riding is otherwise restricted by special rules that pertain to areas adjacent to coastal cities and detailed in division 30.

(b) Unoccupied Sites: In areas the department has designated as unoccupied sites for western snowy plovers:

(A) A handler must leash dogs with a leash length of six feet or less and keep the dog under physical control at all times.

(B) Motorized and non-motorized vehicles are prohibited beginning March 15 and ending September 15. The department may declare the restrictions to end on July 15 due to a lack of nesting. The department may allow a person performing administrative, enforcement or scientific duties to use motorized or non-motorized vehicles when on official duty.

(C) The department will use signs placed at approaches to an unoccupied, actively managed area to convey restricted portions and duration to visitors.

(c) To manage the restoration efforts for the western snowy plover, the department will:

(A) Implement the Habitat Conservation Plan for Western (Coastal) Snowy Plover;

(B) Implement specific site plans designed for each area identified in the Habitat Conservation Plan for Western (Coastal) Snowy Plover;

(C) Implement the rules in this section, which apply to department-owned, leased or managed properties, as well as areas owned privately or by local governments that have been identified in the conservation plan or the site plans, and areas adjacent to occupied or unoccupied federal land; and

(D) Take any other action deemed necessary to the restoration effort.

Statutory/Other Authority: ORS 390.124, 390.660 & 390.725

Statutes/Other Implemented: ORS 164.775, 358.920, 390.635, 390.660 & 390.725

History:

PRD 1-2013, f. 1-15-13, cert. ef. 2-1-13

PR 9-1994, f. 11-29-94, cert. ef. 12-1-94

9b: Attachment B: Clean Copy

736-021-0090

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Statutory/Other Authority: ORS 390.124, 390.660 & 390.725

Statutes/Other Implemented: ORS 164.775, 358.920, 390.635, 390.660 & 390.725

History:

PRD 1-2013, f. 1-15-13, cert. ef. 2-1-13

PR 9-1994, f. 11-29-94, cert. ef. 12-1-94

9b Attachment C: Summary of Comments and Staff Report

One comment was received in writing during the comment period for proposed rule changes to 736-021-0090.

Below is the full comment and staff recommendation.

Proposed rule change:

Marine plant and Macroalgae collection rule

Commenter name (if provided):

Brett Kenney

Commenter email (if provided):

brettkenney@coquilletribe.org

Date comment received:

October 31, 2023 04:27 PM

Location (if provided): North Bend, OR

Comments to proposed changes to 736-021-0090:

Thank you for the opportunity to comment on the proposed changes to the proposed rule changes relating to *the collection of marine plants and macroalgae in marine protected areas*. I am the Tribal Attorney for the Coquille Indian Tribe, a federally recognized tribal government headquartered in Oregon. The Tribe has authorized me to share a few comments for your consideration:

1. The Tribe has a few comments to the text at 736-021-0090 (3):
 - a. First, the Tribe requests that OPRD replace the definition of “Indian Tribe” based on ORS 97.740. The definition used in that statute includes all federally recognized tribes in the United States. Instead, the Tribe urges OPRD to use the definition of “Eligible Indian Tribe” located at ORS 285C.306, or to craft a new definition referencing those Oregon tribes with substantial ties to the coast: Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, Confederated Tribes of Grand Ronde, Confederated Tribes of Siletz and the Coquille Indian Tribe. This change would be consistent with the Territorial Sea Plan, which calls out the interests of “Oregon coastal tribes” in offshore habitats.
 - b. The Tribe requests that the proposed language to be struck here be reinserted so that tribal enrollment can be documented.
 - c. Finally, the Tribe requests that after the phrase “traditional cultural heritage” the Department insert the phrase, “or as authorized in any agreement between an Indian Tribe and the Department”
2. At 736-021-0090(4)(b)(H), the Tribe requests

- a. The insertion of “or seaweeds” after the phrase “...non-living plants...”
- b. Clarification that members of Indian Tribes (as defined) may access marine reserve and marine protected areas for the purposes identified in 736-021-0090(3).

Thank you.

Staff Response:

- 1) Staff recommend retaining statutory reference in 736-021-0090(3) to ensure it applies to federally recognized tribal members with cultural areas that include Oregon. This aligns with current department policy for tribal traditional use.

The proposed amendments were not initially intended to address tribal traditional use. The main purpose was to address a change in the territorial sea plan. While the rule was open, staff intent was to remove outdated language regarding a permit requirement for traditional use. A request to change a statutory reference for Indian Tribe would move from federally recognized Indian tribes with a cultural area that includes Oregon (ORS 97.740(4)) to only federally recognized Indian tribes in Oregon (ORS 182.162(2)).

Staff recommend retaining the current statutory reference. Changing the statute from a broader definition of Indian Tribe in ORS 97.740(4) to a narrower one included in ORS 182.162(2) would require more extensive tribal consultation that has been untaken as a part of this rulemaking. The department is currently engaged in meaningful conversations with tribes regarding development of a traditional use procedure. Staff recommend delaying any changes to the statutory reference for tribal members until after full consideration through this process. If necessary, a new rulemaking effort could be established to address a change in the statute more appropriately.

- 2) Staff recommend adding requested language under 736-021-0090(3) to include approved collection of natural products under agreements between an Indian Tribe and the department.

Adding language to allow for agreements between Indian Tribes and the department will provide additional flexibility within the agency traditional use procedure.

- 3) Staff recommend adding seaweed to 736-021-0090(7)(H) to clarify this also applies to seaweeds.
- 4) Staff recommend adding language to 736-021-0090(7)(H)(iii) clarifying that collection of natural products is allowed in protected areas by enrolled tribal members. However, changes to Division 29 marine reserves are outside the scope of this rulemaking and staff would advise the commenter to propose changes within that division if desired.