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Oregon's Marine Reserves and Protected Areas

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Introduction

The establishment of Oregon's first network of marine reserves, encompassing 3% of Oregon's Territorial Sea with an additional 5.75% in adjacent marine protected areas and a shorebird conservation area, has been a work in progress for over 12 years. Even now, only two of the five potential complexes are fully under regulation. Getting to this stage has required not only consistent administrative and legislative pushes, but also consistent efforts to bring together disparate interests.

What Are Marine Protected Areas and Marine Reserves?

In Oregon, a marine reserve is generally an area where no fishing, hunting, drilling, mining, or similar uses are allowed. Oregon's Ocean Policy Advisory Council ("OPAC") defined a "marine reserve" as "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." OPAC, Oregon Marine Reserve Policy Recommendations, Appendix C, at 1 (Nov. 29, 2008) ("OPAC Recommendations"), available at <http://www.oregon.gov/LCD/OPAC/Pages/workinggroups.aspx>; see also OAR 141-142-0015(6).

By contrast, an Oregon marine protected area (“MPA”) only implements partial regulation of extractive activities. OPAC defined “marine protected areas” as “any area of the marine environment that has been reserved by Federal, State, territorial, tribal, or local laws or regulations to provide lasting protection *for part or all* of the natural and cultural resources therein . . .” *Id.* (emphasis added) (citing Exec. Order 13,158, May 26, 2000, 65 Fed. Reg. 34,909); *see also* OAR 141-142-0015(5).

The regulatory reality is less simple. Oregon’s marine reserves and protected areas are under the jurisdiction of Oregon Department of Fish and Wildlife (“ODFW”), the Department of State Lands (“DSL”), and the Parks and Recreation Commission, each of which have issued protective regulations. DSL issues the regulations that delimit the territory of each marine reserve and protected area. OAR 141-142-0025 through -0095. Additional regulations follow the general framework of prohibiting all extractive uses in marine reserves and allowing some in marine protected areas.

Once fully effective, a general ODFW regulation will prohibit “[t]ake, including fishing or hunting, of any fish or wildlife species” within marine reserves. OAR 635-012-0050(1). “Take” is defined as *directed*, that is, “to fish for, hunt, pursue, catch, capture or kill or attempt to fish for, hunt, pursue, catch, capture or kill.” *Id.* Fishing by hook and line from shore is also prohibited. OAR 635-012-0050(2). This regulation is narrower than some federal laws and regulations which prohibit harassment of the subject wildlife, or which directly address habitat modification. *See* 16 U.S.C. § 1632(19), 50 C.F.R. § 17.3 (defining “take” under the Endangered Species Act); 16 U.S.C. § 1362(13) (defining take under the Marine Mammal Protection Act to include harassment); 16 U.S.C. § 703 (take “by any means or in any manner” is prohibited by the Migratory Bird Treaty Act).

Within marine protected areas, land-based hook-and-line fishing is generally allowed. Some protected areas have allowances for the salmon or crab fisheries or specifically designate the protected fish. *See, e.g.*, OAR 635-012-0140(2). At Cape Perpetua’s seabird protection area, the only prohibition will be on take of certain seabird forage species, including herring, sardines, and anchovies. OAR 635-012-0100.

The land-based regulations are already in full effect. The Parks and Recreation Department forbids “molest[ing]” or “disturb[ing] the[] habitats” of any wildlife. OAR 736-029-0040(1)(c). Removal of any “living or non-living natural products from the ocean shore” is also prohibited. OAR 736-029-0040(1)(a). These regulations apply between the extreme low tide line and the vegetation line. OAR 736-029-0030(8).

Finally, DSL’s regulations restrict the availability of future access or removal-fill permits within marine reserves or protected areas. Such an authorization or permit will only be granted by the Department to further the purposes of the marine area. OAR 141-142-0020(1). This policy statement has the potential to be of significant consequence, as it precludes most development projects on or near any marine protected area or reserve.

Action Before 2009

President Clinton's 2000 Executive Order set the stage for significant expansion of MPAs nationwide, as it directed the Secretaries of Commerce and the Interior to establish a national network of marine areas. Also in 2000, Governor Kitzhaber directed OPAC to consider and make recommendation on marine reserves, protected areas and marine sanctuaries within Oregon's Territorial Sea, the three geographical miles spanning from the coastline outward as defined by ORS 196.405(5).

OPAC made a recommendation for a "limited system of marine reserves" in 2002 after conducting a two year review of marine reserves and protected areas within and outside of the United States. Ocean Policy Advisory Council, Rep. and Recommendations to the Governor: Oregon and Marine Reserves, at 1 (2002). Governor Kulongoski also asked OPAC for advice as to whether to establish a National Marine Sanctuary along the entire Oregon coast. OPAC's internal draft stated that "[a]lthough OPAC has yet to systematically test public opinion, the negative informal feedback to date does not make us optimistic about gaining broad-based support for an Oregon Sanctuary." OPAC, Oregon Coast National Marine Sanctuary Proposal, Draft Status Report, Oct. 8, 2006, at 2, *available at* <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDUQFjAA&url=http%3A%2F%2Fwww.oregon.gov%2FLCD%2FOPAC%2Fdocs%2Fmeetings%2Fdraftnmsreport.pdf&ei=11JCUYToJJHSqwHU8IDYDO&usq=AFOjCNGYa7jrOr0Omb1FnyB8TN5r4JIHmg&sig2=6mUxKF63hadtXpkQvJKRcQ&bvm=bv.43287494,d.aWM>.

The process stalled for several years until Governor Kulongoski issued Executive Order 08-07, directing the state, via OPAC and the Oregon Department of Fish and Wildlife (ODFW) to establish a public nomination and recommendation process for marine reserves. Or. Exec. Order No. 08-07 (March 26, 2008), *available at* http://www.oregon.gov/gov/pages/exec_orders.aspx. The proposed areas were to meet two primary criteria: 1) that they be "large enough to allow scientific evaluation of ecological benefits," but 2) "small enough to avoid significant economic or social impacts." *Id.* at 2. In addition, "priority consideration" was to be given to nominations developed by "coastal community nominating teams ... comprised of coastal community members, ocean users and other interested parties." *Id.* at 3.

Of twenty submitted proposals, OPAC recommended six areas move forward for consideration, with two areas, Otter Rock (Depoe Bay) and Redfish Rocks (Port Orford), as pilot marine reserves and four receiving additional socio-economic and ecological information gathering. OPAC Recommendations at 1-2. Governor Kulongoski approved OPAC's recommendations and then requested implementation funding for the 2009-2011 biennium in the Governor's budget. Letter from Governor Kulongoski for OPAC (January 29, 2009), *available at* http://www.oregon.gov/LCD/OPAC/docs/01.29.09_opac-marine_reserves.pdf. DSL established these reserves by regulations effective December 2009. OAR 141-142-0030, -0035, -0040.

House Bill 3013 (2009)

In 2009, the Legislature codified the OPAC recommendations in House Bill 3013, adopting OPAC's definitions of marine reserve and marine protected area. *See* ORS 196.540-555. The bill called for rules to establish, study, monitor, evaluate and enforce the two pilot reserves and to study and evaluate four other recommended sites via an inclusive community based process. Oregon's nine-member Coastal Caucus, the bi-partisan and bicameral group of legislators representing the state's coastal communities, sponsored the legislation. The Legislature supported the bill with unanimous passage by the House and 24-3 vote by the Senate. The legislation was seen as a new path forward for marine reserves and a departure from a sometimes-contentious administrative process.

The community team concept created by H.B. 3013 reflected the need for a "community-based decision making process" that included affected users to ensure any compromises communities and users made in establishing no take marine reserves came from within their community. Letter from ODFW to Coastal Legislators, at 1 (Jan. 25, 2011), *available at* http://www.oregonocean.info/index.php?option=com_docman&task=doc_download&gid=823&Itemid=19. ODFW community teams for Cape Falcon, Cascade Head and Cape Perpetua all recommended proposals to OPAC for creating marine reserves and protected areas, which OPAC and ODFW approved with only some modification. *Id.* at 1-2. The community team developing the Cape Arago/Seven Devils area, a committee of the Port of Coos Bay, made a final recommendation that no reserve be established between Bandon and Reedsport. The final recommendation stated that further consideration could occur after full implementation, study, and reporting on impacts from the five other reserves and protected areas.

Senate Bill 1510 (2012)

During the 2012 Oregon legislative session, the coastal caucus again developed legislation to implement recommendations for the Cape Falcon, Cascade Head and Cape Perpetua sites. Both legislative bodies supported Senate Bill 1510 and the bill passed 25-5 in the Senate and 57-2 in the House. While some stakeholders may have harbored concerns about the effects of marine reserves, the Coastal Caucus sponsored SB 1510 and shepherded it through both bodies. ODFW also supported the bill, testifying in support of it in front of the Senate Committee on Environment and Natural Resources.

Consistent with the community team recommendations, SB 1510 directed ODFW and other state agencies to implement marine reserves and protected areas at Cape Falcon, Cascade Head and Cape Perpetua, while retaining the reserves and protected areas at Otter Rock and Redfish Rocks. SB 1510 dropped any reference to Cape Arago/Seven Devils.

SB 1510 had three important provisions that aim to ensure implementation of the protected areas and reserves does not have undue negative effects on coastal communities. First, the bill required that ODFW report to the Legislature on its progress with the work plan required by

HB 3013. The work plan includes preparation of biological and socioeconomic assessments, Territorial Sea baseline data and community involvement. ORS 196.545(2). Second, SB 1510 provides that ODFW may not ban fishing in any marine reserve or protected area until the baseline data is collected. SB 1510, § 3. Third, the bill requires ODFW to report back to the Legislature in ten years on the effects of the established protected areas and reserves. The report must assess “social, economic, and environmental factors related to the protected areas.” *Id.* at § 4(2)(b)(A).

DSL and ODFW undertook rulemaking throughout 2012, establishing the three new protected areas and setting out the planned activity restrictions. To date, ODFW has collected the required baseline data only for the first two sites, Otter Rock and Redfish Rocks. Thus those are the only marine reserves and protected areas where any fishing restrictions are currently in place. OAR 635-012-0040(1)(b).

Oregon’s Marine Reserves and Protected Areas

Cape Falcon

Oregon’s network of marine reserves and protected areas encompass less than nine percent of the state’s waters, but consists of very diverse and unique ecologically important areas. The most northern reserve, Cape Falcon, is found along Oregon’s north coast north of Cannon Beach and adjacent to Oswald West State Park. The Cape Falcon site consists of a marine reserve and two marine protected areas. Cape Falcon is home to 14 seabird nesting colonies inhabited by common murrelets, black oyster catchers and marbled murrelets as well as 2 pinniped haulouts. It contains deep coldwater habitat and supports important populations of rockfish, halibut and Pacific herring.

Cascade Head

Moving south, the second marine reserve/MPA complex is found at Cascade Head, north of Lincoln City and Siletz Bay. The site contains a marine reserve buffered by three MPAs to the north, west, and south of the marine reserve. The complex contains 73 emergent rocks, which are sites of “high biodiversity, 27 seabird colonies and 2 pinniped haulouts. Cascade Head is a major upwelling center, generating productive waters that influence areas farther south.” Cascade Head Analysis of ODFW Recommendation at 8 (December 3, 2010), *available at* http://www.oregonocean.info/index.php?option=com_docman&task=cat_view&gid=250&Itemid=146.

Otter Rock

Otter Rock Marine Reserve can be found just south of Depoe Bay along the central coast. It is strictly a no-take marine reserve covering 1.3 square miles. Otter Rock marine reserve is meant to protect subtidal kelp habitat, rocky intertidal organisms and habitat as well as protections for

juvenile and adult groundfish. ODFW, Draft Otter Rock Site Management Plan at 11 (2013), available at http://www.oregonocean.info/index.php?option=com_docman&task=cat_view&gid=97&Itemid=146. The marine reserve consists of three prominent islands that are a part of the Oregon Islands National Wildlife Refuge and support several seabird nesting colonies and pinniped haulouts. *Id.* at 12, 30.

Cape Perpetua

Cape Perpetua is located between Heceta Head and Yachats along the central coast and consists of a marine reserve, two marine protected areas north and south of the marine reserve and a seabird conservation area reaching from the shore to the edge of the Territorial Sea. The unique geological and biological features of the area make it home to key species like eulachon smelt (an ESA-listed species), crabs, rockfish species and larger predators like sharks and marine mammals. The complex boasts a seabird conservation area given the region's rich diversity of seabirds, including 15 seabird nesting sites and being located within the Central Coast Marbled Murrelet Important Bird Area. The area has a high concentration of murrelets listed under the Endangered Species Act (ESA).

Redfish Rocks

Redfish Rocks marine reserve and marine protected area create the southern boundary of the Oregon network of marine reserves, just south of Port Orford along the southern Oregon Coast. It is the second of the two pilot marine reserves. The Redfish Rocks site contains a marine reserve covering 2.6 square miles and a complementary adjacent MPA covering another 5.8 square miles. ODFW, Redfish Rocks Marine Reserve Site Management Plan at 10 (2012), available at http://www.oregonocean.info/index.php?option=com_docman&task=cat_view&gid=97&Itemid=146&limitstart=10. Redfish Rocks is part of a "complex of temperate water rocky reefs" that includes emergent rocks and islands and supports extensive kelp beds. *Id.* at 13. The focus of protections for the site is to protect those species whose home range is centered on the Redfish Rocks.

The 2013 Report and Beyond

ODFW reported back to the Legislature on January 17 of this year with a comprehensive work plan for implementing the five marine complexes. ODFW, Oregon Marine Reserves Program Work Plan (January 17, 2013), available at http://www.oregonocean.info/index.php?option=com_docman&task=doc_download&gid=1240&Itemid=19. The agency plans to finalize site management plans for each area by 2015 and to review the plans every five years thereafter. Ongoing monitoring is designed to collect data on both ecological and human dimensions, using local fishing vessels wherever possible. ODFW's budget for the current biennium projects to approximately \$1.7 million, with the lottery and State Parks major sources of funding. OCAP will work with one of Oregon's universities to prepare a report on the program within 10 years.

Thus it will be several years before we know whether Oregon's marine protected areas and reserves deliver on the hoped-for conservation benefits, or what the socioeconomic impacts might be. What we know now is that a comprehensive stakeholder-based approach can keep conservation programs moving in tight budgetary times.

A map of Oregon's Marine Reserves and Protected Areas is available on the next page.

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If you would like to contribute to E-Outlook or have any comments, please contact the E-Outlook Editor, Sarah Liljefelt, at s.liljefelt@water-law.com or (503) 281-4100.

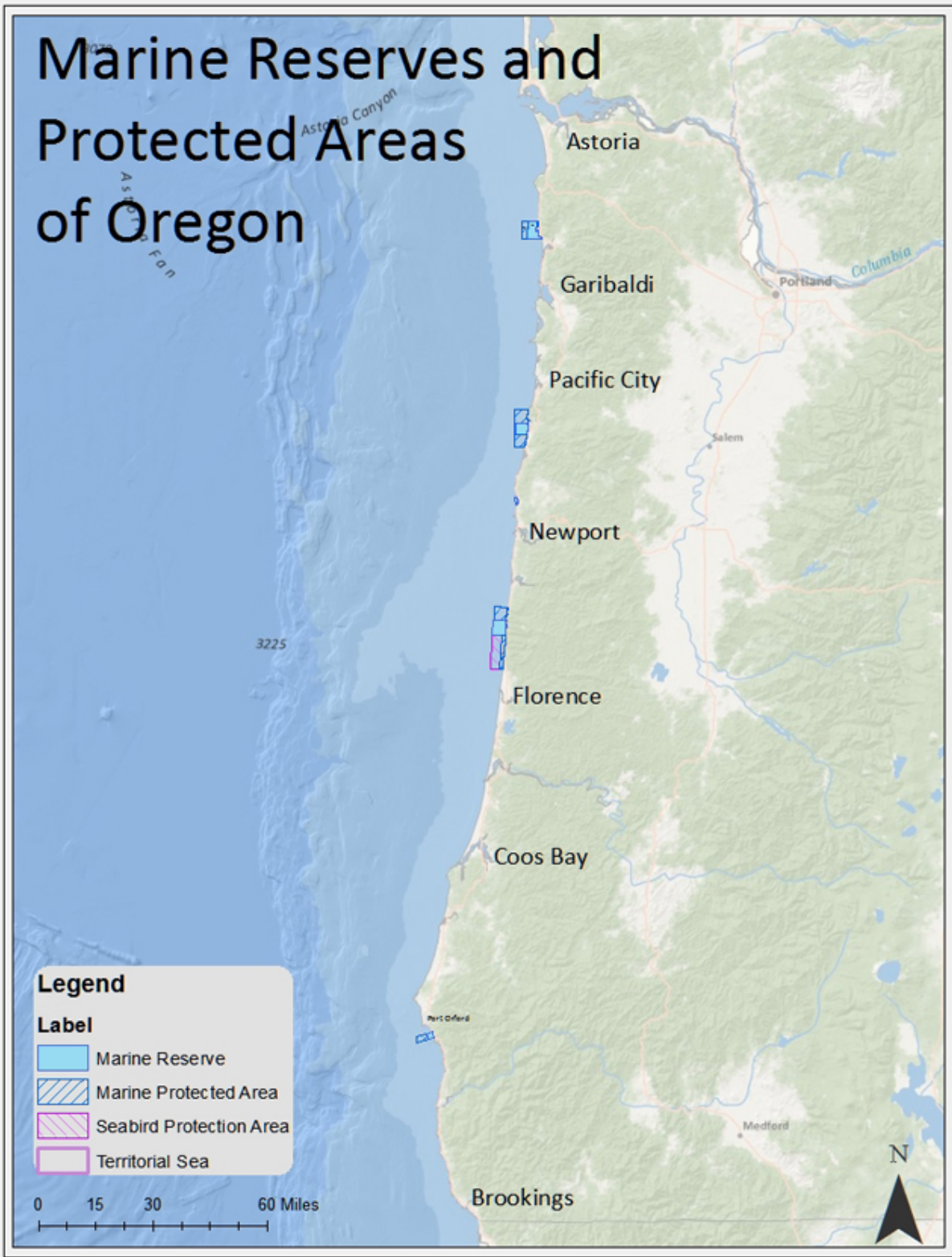


Figure 1: Oregon Network of Marine Reserves. Source: http://www.oregonocean.info/index.php?option=com_content&view=article&id=419&Itemid=138