



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

April 10, 2007

Louise Solliday
Director
Oregon Department of State Lands
775 Summer Street N.E., Suite 100
Salem, Oregon 97301-1279

Re: Legal Authority of State Land Board to Establish Marine Protected Areas within the
Territorial Sea
DOJ File No. 141025/GN0930-03

Dear Ms. Solliday:

Secretary of State Bill Bradbury has requested legal advice regarding the State Land Board's authority to establish and manage Marine Protected Areas within the Territorial Sea. This letter addresses the State Land Board's constitutional, common law, and statutory authority to establish Marine Protected Areas, and the effect of other state and federal laws on that authority. This letter identifies the sources of authority for such areas, and highlights possible issues, rather than providing a comprehensive analysis of the interplay among and implications of various sources of State Land Board authority to establish Marine Protected Areas.

In summary, our legal advice is that the State Land Board may create *marine protected areas* under its constitutional and statutory authorities. To create fully-protected *marine reserves*, however, the State Land Board would need to act in concert with other agencies, both state and federal, that have authority in Oregon's territorial sea.

Analysis

Marine Protected Areas are a management tool that may be utilized to achieve a variety of objectives by designating an area of ocean as subject to use restrictions or exclusions. Presidential Executive Order 13158 defines "Marine Protected Area" 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." 65 Fed Reg 34,909 § 2 (2000) (Presidential Executive Order No. 13158). Types of Marine Protected Areas include marine gardens, marine parks, marine refuges, marine sanctuaries, and marine reserves. The objectives served by creating Marine Protected Areas may include conserving living marine resources or habitat, maintaining biological diversity, protecting threatened or endangered species, preserving submerged archaeological resources, or

other scientific, educational, or recreational purposes. The types and levels of protection and regulation of use vary among the types of Marine Protected Areas, from limits on boating speed and the harvest of living marine resources, to restrictions that completely and permanently protect areas from all types of human disturbance. This latter form of complete protection from human disturbance is commonly known as a marine reserve. This memorandum does not address marine reserves in any detail, focusing instead on the Land Board's general authorities to establish limitations on uses of tidal submerged lands through some form of Marine Protected Area.

The Territorial Sea refers to the seabed and overlying water column in the area extending three nautical (or geographical) miles from the coastline of the state, an area of roughly 1,000 square miles.¹ Pursuant to the federal equal footing doctrine, *Martin v. Waddell*, 41 U.S. (16 Pet) 367, 410 (1842), and the federal Submerged Lands Act, 43 USC §§ 1301-1315, the State of Oregon has "title to and ownership" over the "lands beneath navigable waters," which includes the area described as the Territorial Sea.² The Submerged Lands Act specifies that "title to and ownership of" such lands includes "the natural resources within such lands and waters" and vests the "right and power to manage * * * said lands and natural resources" in the respective states. 43 USC § 1311(a)(1). Under Oregon law, the legislature has granted the Department of State Lands "exclusive jurisdiction over all ungranted tidal submerged lands owned by the state." ORS 274.710(1). "Tidal submerged lands" are defined as "* * * lands lying below the line of mean low tide in the beds of all tidal waters within the boundaries of this state as heretofore or hereafter established." ORS 274.705(7). In addition, the term "land" is generally defined in ORS chapter 274 to include water. ORS 274.005(5). Nevertheless, although the Department of State Lands has jurisdiction over the seabed and its natural resources, it does not have exclusive jurisdiction over all matters concerning tidal submerged lands or the overlying waters or the resources present in the water column.³

¹ ORS 196.405(5) defines "territorial sea" for purposes of the Oregon Ocean Resources Management Act to mean "the waters and seabed extending three geographical miles seaward from the coastline in conformance with federal law." However, in 1988, President Ronald Reagan proclaimed a 12-mile territorial sea for the United States of America under the 1982 United Nations Convention on the Law of the Sea. Although the proclamation extended the territorial sea for purposes of international law, it did not alter domestic law. For purposes of this memo, references to the "territorial sea" relate to the state's seaward boundary at three nautical miles.

² 43 USC section 1301(a)(2) defines "lands beneath navigable water" to mean in part:

"all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State[.]"

³ State regulation and management of tidal submerged lands and the water and natural resources overlying such lands is spread across several state agencies as discussed later in this memorandum. Further, the state's authority over the lands and waters of the territorial sea is not exclusive. Although the federal government expressly relinquished title to submerged lands in the territorial sea, it retained legislative powers to control certain activities. 43 USC section 1314(a) provides in part:

"The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include proprietary rights of ownership, or the rights of management, administration, leasing, use, and development

Constitutional Authority

Under Article VIII, section 5 of the Oregon Constitution, the State Land Board has authority to manage lands under its jurisdiction. The constitution provides that the board “shall manage lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management.” Or Const, Art VIII, § 5(2). This office has previously advised that the language in subsection (2) of section 5 of Article VIII of the Oregon Constitution contemplates that the State Land Board, in managing state-owned lands placed under its jurisdiction by the legislature, may set aside portions of such lands for public uses such as public recreation, parks or scenic enjoyment. 36 Op Atty Gen 150, 222 (1972).⁴

The range of the State Land Board’s policy direction and management options for the lands and natural resources within the territorial sea is determined in part by whether such lands fall within the Board’s jurisdiction as a constitutional source of revenue to the Common School Fund, or whether such lands are otherwise “placed under the Board’s jurisdiction by law.” Article VIII, section 2(1) of the Oregon Constitution provides some sources of the Common School Fund (other sources are provided by statute). This office has previously advised that Article VIII, section 2(1)(d), which describes one source of the Common School Fund as “[t]he proceeds of all property granted to the State, when the purposes of such grant shall not be stated[,]” does not include the state’s submerged and submersible lands, because such lands were not “granted” to the state.⁵ Thus, the proceeds resulting from the management of submerged and submersible lands, including tidal submerged lands, are not a constitutional source dedicated to the Common School Fund. 46 Op Atty Gen 208, 209, 220 (1989).

of the lands and natural resources which are specifically recognized, confirmed, established and vested in and assigned to the respective States and others by section 1311 of this title.”

⁴ But see also, 46 Op Att’y Gen 468 (1992), indicating that there are limits to the State Land Board’s authority to manage lands granted to the state by the Oregon Admissions Act or dedicated to the Common School Fund by the Oregon Constitution. Because tidal submerged lands are placed under the Department of State Land’s jurisdiction by statute (as described in footnote five below), these limitations do not apply.

⁵ This office advised:

“Section 2(1)(d) describes as a source of the Common School Fund ‘[t]he proceeds of all property *granted* to the State, when the purposes of such grant shall not be stated.’ (Emphasis added.) It has been suggested to us that the State’s Admission Act ‘granted’ to the state its submerged and submersible lands and, therefore, such lands are constitutionally dedicated to the Common School Fund by virtue of section 2(1)(d). The state’s title to its submerged and submersible lands was not ‘granted’ to the state but passed as an incident to the transfer to the state of local sovereignty. *United States v. Oregon*, 295 US 1, 14 (1935). Title was not conferred by the Congress but by the Constitution itself. *State Land Board v. Corvallis Sand and Gravel Co.*, 429 US 363, 374 (1977). In our opinion this acquisition of title was not by ‘grant’ within the meaning of section 2(1)(d).” 40 Op Atty Gen 190, 193 n 1 (1980).

Where land is placed under the management of the State Land Board by statute,⁶ the management of such land is governed by any applicable statutory standards and the standard of Article VIII, section 5(2) of the Oregon Constitution. 46 Op Atty Gen 208, 214 (1989). Article VIII, section 5(2) requires that the Board “* * * manage lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resources under sound techniques of land management.” We have previously advised that State Land Board decisions regarding the management of such lands should consider both financial return to the Common School Fund, and conservation of the resource in question using sound techniques of land management. 46 Op Atty Gen 208, 213 (1989). Based on that legal standard we believe that the State Land Board could, if presented with the appropriate factual basis, determine that using an area of tidal submerged land for some purposes and not for others (through the establishment of a Marine Protected Area or otherwise) comply with the constitutional standard under Article VIII, section 5(2).

Common Law Authority

Under the common law, the King has both the title to and dominion over the sea and all of the lands below high water mark that are within the jurisdiction of the Crown of England. *Bowlby v. Shively*, 152 US 1, 11 (1893). The title to such lands belongs to the King as the sovereign, while dominion is vested in him as the representative of the nation and for the public benefit. *Id.* On that subject, the common law of England became part of the law of this country and state, except so far as modified by the constitution, statutes or usages of the state or by the Constitution and laws of the United States. *Bowlby*, 152 US at 14, 52. By the Submerged Land Act, Congress “recognized, confirmed, established and vested in and assigned to” the states “title to and ownership of” the lands within the boundaries of the territorial sea, and the natural resources within such lands and waters. 43 USC § 1311; 45 Op Atty Gen 137, 139 n 1 (1986). The state has not modified the common law rule that title is in the state as trustee for the public, and, for such purpose, the state has dominion and control over the tidal submerged lands, 36 Op Atty Gen 150, 174 (1972), subject to some degree of federal control of commerce, navigation, national defense and international matters as may affect tidal submerged lands. See note 3 *ante*.

Fundamental to ownership are the owner’s property rights relating to the use of the property, including the right to use the property, and the power to exclude non-owners from the property. State authority as owner must be exercised consistent with its common law role as trustee for the public. The public trust doctrine is a common law doctrine that provides that submerged and submersible lands are subject to the rights of the public to use them to carry out navigation, commerce, fishing, and recreation uses. *Morse v. Division of State Lands*, 34 Or App 853, 859, 581 P2d 520 (1978), *aff’d* 285 Or 197, 590 P2d 709 (1979), *Corvallis Sand and Gravel v. Land Board*, 250 Or 319, 333-337, 439 P2d 575 (1968). The state, as trustee for the public, is responsible for preserving and protecting these public rights of use of the waters. See *Oregon Shores v. Oregon Fish and Wildlife*, 62 Or App 481, 493, 662 P2d 356 (1983). Subject

⁶ The responsibility for management of tidal submerged lands has been given to State Land Board by statute. ORS 274.710.

to governmental regulation, a member of the public normally would have the right to utilize the state's tidelands and the water over them for navigation and commerce, fishing and recreational purposes. 50 Op Atty Gen ___, 2005 Or AG Lexis 1 (Opinion No. 8281, April 21, 2005); 35 Op Atty Gen 844, 855-858 (1971). Nationally, the public has also looked to state governments to protect the public interest in environmental protection, research, and preservation of scenic beauty and cultural heritage under the public trust doctrine in tidelands, in the water column, and in submerged lands below navigable waters. See U.S. Commission on Ocean Policy, *An Ocean Blueprint for the 21st Century*, Final Report at 71. No single governmentally-protected public trust interest is absolute. The State Land Board may balance competing interest of the general public in executing its public trust responsibility. See, *Morse v. Oregon Division of State Lands*, 285 Or 197, 200-204 (1979) (public trust doctrine in Oregon prohibits *substantial* impairment of public uses). In sum, we believe that the State Land Board may establish Marine Protected Areas in appropriate circumstances consistent with the public trust doctrine.

Statutory Authority of the Land Board and DSL

As noted above, the State Land Board through the Department of State Lands has statutory authority over "tidal submerged lands." ORS 274.710 provides the Department of State Lands with jurisdiction over "all ungranted tidal submerged lands owned by this state" and requires the Department to "administer and control all tidal submerged lands[.]" This statute provides the Department with jurisdiction over both the seabed and the overlying water column included in the state's territorial seas. Other statutes provide the Department with express authority to grant leases and easements for a variety of uses of tidal submerged lands. The Department acts under the policy directives and management review of the State Land Board. ORS 273.041; ORS 273.171; 46 Op Atty Gen 306, 312 (1989). Therefore, the Board may direct the Department regarding the administration and management of the lands of the territorial sea under its jurisdiction pursuant to ORS 274.710.

Jurisdiction over tidal submerged lands under ORS 274.710 means that the Department also has specific statutory authority to coordinate with other administrative bodies for the management of certain areas of the territorial sea. As amended by Oregon Laws 2003, chapter 744, section 3, ORS 196.408(3) now authorizes state agencies that have jurisdiction over water areas, the seabed and resources adjacent to offshore rocks and islands to "coordinate with adjacent states and federal agencies to develop programs and regulations to manage uses and activities of ocean areas adjacent to coastal cliffs and offshore rocks and islands managed within the National Wildlife Refuge System." There are six National Wildlife Refuges along the Oregon Coast, including the Oregon Islands National Wildlife Refuge, which is comprised of over 1,400 rocks, reefs, and islands, and two headlands along the length of the Oregon Coast.

Another source of specific statutory authority that the Department holds is ORS 273.563 to 273.591. In these statutes, the legislature found a need to protect natural areas that "represent the full range of Oregon's natural heritage resources," and directed the Natural Heritage Advisory Council and the Department of State Lands to establish a program for dedicating Natural Areas. Former Governor Kitzhaber suggested that the Department of State Lands should "assist the Oregon Natural Heritage Advisory Committee in ensuring that representative marine

habitats are identified and designated in the Oregon Natural Heritage Plan.” See Letter from Governor Kitzhaber to the Ocean Policy Advisory Council dated November 13, 2002, page 2. The 2003 revised *Oregon Natural Heritage Plan* approved by the State Land Board at its February 10, 2004 meeting briefly discussed marine protected areas in Chapter 6: “Coast Range Ecoregion.” The Plan states

“[b]etter inventory and classification is needed to define the ecological resources offshore. Fortunately, this is a major focus of ongoing research to examine the potential use of marine reserves to protect fish and marine habitats.” *Oregon Natural Heritage Plan* (2003) at 36.

ORS 273.563(10) defines “natural area” to mean

“a unit of land or water or both may be considered for dedication under ORS 273.563 to 273.591 and that has substantially retained its natural character, or, if altered in character, shall in addition to its natural heritage resource values, be valuable as habitat for plant and animal species or for the study and appreciation of the natural features.”

Tidal submerged land includes both land and water that may meet the criteria to qualify as a “natural area.” The Natural Heritage Council, an advisory body to the State Land Board, is charged with identifying natural areas and is to focus on those areas that are “rarest, most threatened, or underrepresented[.]” ORS 273.581. Currently, the territorial seabed contains natural areas that may be underrepresented in the 2003 Oregon Natural Heritage Plan. The Department of State Lands has statutory authority to dedicate land under its jurisdiction as a natural heritage conservation area. ORS 273.586. Subject to the Natural Heritage Council’s review, the State Land Board has authority to place sites onto the register. ORS 273.581(4). Thus, the State Land Board, upon advice of the Council, may dedicate one or more areas of the territorial sea as a natural heritage conservation area, which would be a type of Marine Protected Area.

The State Land Board has express statutory authority over tidal submerged lands. That authority includes the ability to manage the seabed. The State Land Board may coordinate in management of tidal submerged lands with adjacent states and federal agencies to manage uses of ocean areas adjacent to the six National Wildlife Refuges along the Oregon Coast. Additionally, the State Land Board may dedicate one or more areas of the territorial sea as a natural heritage conservation area.

Statutory Authority of Other State Agencies

Although the Department of State Lands has exclusive jurisdiction over all ungranted tidal submerged lands owned by this state under ORS 274.710(1), and the Department is the only agency with a proprietary interest in tidal submerged lands, other statutory provisions provide regulatory authority over particular activities to other agencies of the state.⁷ Those specific

⁷ The legislature had found that “there are many state agencies with particular regulatory or program interests in the ocean, its resources and uses” and that there was no coordinated and comprehensive plan for the state’s ocean

statutory grants of regulatory authority must be considered in the administration of tidal submerged lands, so as to give effect to all statutory authorizations. ORS 174.020(2) and 174.010.⁸ A brief description of some of the specific statutory authorities of other state agencies in the territorial sea follows below.

- The Department of Agriculture has both leasing and regulatory functions regarding oysters, and oversight authority over the seafood commodity commissions.
- The Department of Environmental Quality (DEQ) has an overall mandate to regulate pollution and to protect water and air quality that includes activities in the territorial sea. DEQ also has oil spill response and prevention responsibilities.
- The Department of Fish and Wildlife (ODFW) regulates animal harvest, has responsibility for protection of threatened and endangered species, and is assigned the role of marine biological consultant in several statutory leasing and permitting programs. The State Fish and Wildlife Commission has review and approval authority over Ocean Policy Advisory Council proposals to amend the Oregon Ocean Resource Management Plan to include Marine Protected Areas or Marine Reserves. ORS 196.443(1)(d); Or Laws 2003, ch 744, § 9.
- The Department of Geology and Mineral Industries (DOGAMI) has regulatory authority related to operations for oil, gas, or geothermal exploration and extraction in the territorial sea. DOGAMI also provides consultation to DSL regarding survey work in the territorial sea and undertakes coastal hazards assessment.
- The Department of Land Conservation and Development is the state's Coastal Zone Management Agency for federal coastal management consistency purposes. ORS 196.435(1). DLCDC has indirect regulatory authority within the territorial sea through the state agency coordination requirements and Statewide Land Use Planning Goal 19. ORS 197.180 generally requires that state agencies "shall carry out their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use" in compliance with goals. The statewide planning goal for ocean resources is "[t]o conserve marine resources and ecological functions for the purposes of providing long-term ecological economic, and social value and benefits to future generations." Goal 19. The implementation requirements for Goal 19 require state agencies to, *inter alia*, protect important marine habitat. Implementation Requirement 1.b.3.

interests. *Former* ORS 196.415(3) (2001). Although the provision that contained that finding was repealed by Oregon Laws 2003, chapter 744, section 4, because the state now has a Territorial Sea Plan, the quoted portion remains accurate.

⁸ ORS 174.020(2) provides: "When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent." ORS 174.010 provides in pertinent part: "[W]here there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

- Under HB 3534 (2003), the Ocean Policy Advisory Council (OPAC) now has specific authority to recommend amendments to the Ocean Resources Management Plan for the establishment of marine protected areas or marine reserves, subject to review and approval of State Fish and Wildlife Commission. ORS 196.443(1)(d); Or Laws 2003, ch 744, § 9. The provisions of the Oregon Ocean Resources Management Act, however, “do not change statutorily and constitutionally mandated responsibilities of other state agencies. *See* ORS 196.435(2), as amended by Or Laws 2003, ch 744, § 7.
- The Oregon Parks and Recreation Department (OPRD) has jurisdiction over the “ocean shore” under ORS 390.635. Under ORS 390.620, OPRD and the State Land Board have concurrent jurisdiction “to undertake appropriate court proceedings, when necessary, to protect, settle and confirm all such public rights and easements in the State of Oregon.”
- The State Marine Board has authority to regulate boating activities in state waters. ORS chapter 830.

In addition to the foregoing statutory provisions that provide regulatory authority over certain activities to other agencies of the state, all state agencies, including the State Land Board, are statutorily required to act in a manner consistent with certain other state policies established for the territorial sea. Specifically, to establish Marine Protected Areas, the State Land Board must act consistently with the Oregon Ocean Resource Management Plan (Ocean Plan), the Territorial Sea Plan, and in compliance with Statewide Planning Goal 19. ORS 196.485; ORS 197.180.

The Ocean Plan sets forth the State of Oregon’s ocean policy.⁹ The establishment of Marine Protected Areas appears to be consistent with the policy and conservation principles of the Ocean Plan. The Ocean Plan states that Oregon will both “[c]onserve living marine resources, including biological communities and habitats” and “[d]evelop marine management areas, where needed, to provide increased opportunities for public recreation, to protect biological communities and habitats, and/or to advance scientific understanding of the ocean.” Ocean Plan at 48. The Ocean Plan provides factors to be considered in case-by-case justifications of increased protection of a critical habitat:

- The ecological significance of the habitat to maintaining ecosystem structure, biological productivity, biological diversity, and representative species assemblages
- The ecological importance of the area to maintaining populations of threatened or endangered species
- The importance of the area in important life history stages of marine organisms, especially special areas used for feeding, courtship, breeding, spawning, nurseries, parental foraging, overwintering, and resting or haul out
- Vulnerability of the biological community and the habitat to the adverse effects of pollutants, noise, seismic testing, habitat alteration, human trespass, and harvest

⁹ This office has advised that to the extent state agencies can constitutionally and statutorily act consistently with the Ocean Plan, they are obligated to do so. *See* DOJ Memo to DLCD director Susan Brody dated October 18, 1990.

- The severity of impacts on the biological community and the habitat from existing or potential uses
- The uniqueness of an area within Oregon's Ocean Planning Area." Ocean Plan at 53.

Establishment of Marine Protected Areas, including marine reserves, may be consistent with the Ocean Plan, which specifically recognizes that "the need to preserve certain resources or qualities of the marine ecosystem should take priority over human activities or resource uses." *Id.*

The Territorial Sea Plan "creates a fabric of detailed ocean policy, management standards and program recommendations to be adhered to by all relevant agencies when managing marine resources in Oregon's territorial sea." Territorial Sea Plan at *ii*. The Territorial Sea Plan does not affect the State Land Board's authority to establish Marine Protected Areas, but Part Two of the Territorial Sea Plan does provide a process for making decisions about the use of state ocean resources. To the extent that establishment of Marine Protected Areas is a "use" of state ocean resources, the State Land Board would be required to provide inventory information and effects evaluations prior to making any decision that causes the agency to conduct, approve or fund any action. Territorial Sea Plan, Part Two A.2(a)(1). Such an inventory must provide information that is "sufficient to understand the short-term and long-term effects of the proposed decision on the affected resources and uses." Territorial Sea Plan, Part Two, A.2(a)(2). Under certain circumstances, the State Land Board would need to coordinate its activities and to consult with other agencies in its decision-making. The Territorial Sea Plan, Part Two C.1 also provides a consultation process with local governments, the Governor and other state agencies.¹⁰ Thus, although the Territorial Sea Plan provides some procedural requirements that could apply to a decision by the State Land Board to establish Marine Protected Areas, the Territorial Sea Plan does not appear to affect the State Land Board's substantive authority to establish Marine Protected Areas.

Statewide Planning Goal 19, as described above, requires the State Land Board to develop and conduct activities that are likely to affect the resources and uses of the territorial sea in way so as to "conserve marine resources and ecological functions for the purposes of providing long-term ecological, economic, and social values and benefits and to give higher priority to the protection of renewable marine resources – i.e., living marine organisms – than to the development of non-renewable ocean resources." The State Land Board may establish Marine Protected Areas in compliance with the implementation requirements for ocean resource use and management measures of Goal 19 as required by ORS 197.180.

Federal Law

The federal government retains the power to regulate commerce, navigation, power generation, national defense and international affairs throughout Oregon's territorial sea. A number of federal laws apply to the territorial sea and a number of federal agencies have regulatory interests and programs that relate to ocean and coastal resources. The following is a

¹⁰ Note that the Territorial Sea Plan, Part Two, C provisions were pursuant to the requirements of *former* ORS 196.465(2)(f) (1991). That statutory provision is no longer in ORS 196.465. Or Laws 2003, ch 744, § 13.

partial list of these, intended only to provide a sense of the types of federal interests and authorities in the territorial sea that might come into play in designating a system of marine protected areas:

- Executive Order #13158 of May 26, 2000, endorsed by the Bush Administration on June 4, 2001, directs federal agencies to strengthen and expand a national system of Marine Protected Areas by working closely with states. The National Oceanic and Atmospheric Administration (NOAA) is responsible for implementing the Executive Order.
- The Clean Water Act (33 USC §§ 1251-1387) applies to the marine waters. By agreement with the Environmental Protection Agency, DEQ regulates point-source discharges into the ocean under the National Pollution Discharge Elimination System (NPDES). The Army Corps of Engineers regulates the discharge of dredged materials under section 404 of the Act.
- The Coastal Zone Management Act (33 USC §§ 1451 -1465) provides that approved state programs become the operative management programs within the state's coastal zone. Federal actions and programs that have an effect within the coastal zone must be consistent to the maximum extent practicable with the management program. The Oregon Coastal Management Program was approved in 1977 and includes the Oregon Ocean Plan and the Territorial Sea Plan. The CZMA also creates the National Estuarine Research Reserve System and the South Slough Estuary Sanctuary was the first estuarine sanctuary in the United States to be created under the Act.
- The Endangered Species Act (16 USC §§ 1531 - 1544) allows federal agencies to enter into agreements with states to develop and carry out conservation programs for threatened and endangered species. Marine protected areas are a potential component of such programs.
- The Magnuson Fisheries Conservation and Management Act (16 USC §§ 1801- 1882) generally applies beyond the territorial sea out 200 geographical miles; but some fishery management plans developed by regional councils apply within the territorial sea.
- The Marine Mammal Protection Act (16 USC §§ 1361 – 1421h) prohibits the taking and importation of marine mammals, including mammals that historically have been present in the territorial sea -- seals and sea lions, whales, and sea otters.
- The Marine Protection, Research and Sanctuaries Act (16 USC §§ 1431-1434) authorizes the Secretary of Commerce to designate National Marine Sanctuaries. A sanctuary can include both state and federal waters. Of the 13 National Marine Sanctuaries, none are located off the Oregon Coast.
- The National Wildlife Refuge System Administration Act (16 USC §§ 668dd- 668ee) authorizes the creation of National Wildlife Refuges. There are six National Wildlife Refuges along the Oregon Coast (Cape Meares NWR; Three Arch Rocks NWR;

Nestucca Bay NWR; Siletz Bay NWR; Bandon March NWR; and the Oregon Islands NWR and Wilderness Area).

- The Ocean Dumping Act (33 USC §§ 1401 -1445) regulates ocean dumping of all types of materials, including dredged materials. The Act is administered by EPA and US Army Corps of Engineers.
- The Federal Power Act (16 USC §§ 791-823), the Federal Energy Regulatory Commission has asserted primary regulatory control over ocean wave energy facilities in the territorial sea. *AquaEnergy*, 102 FERC ¶61,242 (2003).
- The Energy Policy Act of 2005 (Pub. L. 105-58) provides the Federal Energy Regulatory Commission authority to site Liquefied Natural Gas (LNG) terminals.

Finally, the Final Report of the U.S. Commission on Ocean Policy recommends that a National Ocean Council, when constituted should develop goals, guidelines, and a uniform process for the design and implementation of Marine Protected Areas.¹¹ Thus, the potential for further federal regulation applicable to the establishment of Marine Protected Areas in the future exists.

Local Government Law

ORS chapter 201 describes the boundaries of all Oregon counties. While the boundary of some coastal counties extends to the western boundary of the state, ORS 201.040 (Clatsop County), ORS 201.290 (Tillamook), the others coastal counties extend to the shore of the Pacific Ocean, ORS 201.060 (Coos), 201.080 (Curry), ORS 201.100 (Douglas), ORS 201.200 (Lane), and ORS 201.210 (Lincoln). ORS 201.370(1) provides that the boundaries of all counties bordering on the Pacific Ocean extend to the western boundary of the state as defined in the Oregon Constitution. Nonetheless, ORS 201.370(2) provides that notwithstanding the provisions of ORS 201.370(1), planning for ocean resources and for submerged and submersible lands of the territorial sea shall be accomplished as set forth in ORS 196.405 to 196.515, the Oregon Ocean Resources Management Program. Local governments do not exercise planning authority in the territorial sea.¹²

¹¹ The U.S. Commission on Ocean Policy, Final Report at 105, provides:

“Recommendation 6–3. The National Ocean Council should develop national goals and guidelines leading to a uniform process for the effective design, implementation, and evaluation of marine protected areas.”

¹² Statewide Planning Goal 19 does not assign any planning responsibility for the territorial sea to local government. Goal 19 does require that “all actions by *local*, state, and federal agencies that are likely to affect the ocean resources and uses of Oregon’s territorial sea shall be developed and conducted to conserve marine resources and ecological functions for the purpose of providing long-term ecological, economic, and social values and benefits and to give higher priority to the protection of renewable marine resources—i.e., living marine organisms—than to the development of non-renewable ocean resources.” Thus, a local government’s onshore land-use plans that affect ocean-resources must be consistent with Goal 19.

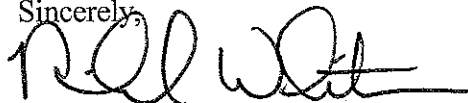
The Territorial Sea Plan, a component of the Oregon Ocean Resources Management Program under ORS 196.425(4), recognizes that local governments may have land use plan provisions that play a role in protecting and managing rocky shore resources or areas. Oregon Territorial Sea Plan at 34. The Territorial Sea Plan does require that state agencies consult with local governments on major ocean developments. *Id.* at 59. The agency must inform the local government of the opportunity to comment regarding the major ocean development, respond in writing to the local governments' comments, and offer assistance to local government if appropriate. *Id.* The Statewide Planning Goal 2 "coordination" provision may also require the State Land Board and Department of State Lands to engage in an exchange of information regarding an affected governmental unit's concerns, put forth a reasonable effort to accommodate those concerns and legitimate interests as much as possible and make findings responding to legitimate concerns.

To create *marine protected areas* under its constitutional and statutory authorities or to create fully-protected *marine reserves*, the State Land Board would need to coordinate with affected local governments.

Conclusion

We believe that the State Land Board may create *marine protected areas* pursuant to its constitutional, common law and statutory authority. In order to create fully-protected marine reserves, however, the State Land Board would need to act in coordination with other agencies, both state and federal, that have regulatory authority in Oregon's territorial sea. The form and scope of coordination will depend on the types and degree of protection the State Land Board desires to accomplish.

Sincerely,



Steven E. Shipsey
Richard M. Whitman
Assistant Attorneys General
Natural Resources Section