

Final Report

Review And Development Of Nearshore Legal And Policy Framework For Community-based Management Opportunities In Port Orford, Oregon.

Prepared under a grant from the National Sea Grant Law Center August 2008



MRAC
Americas

Suzanne Iudicello Martley, JD

Sherry L. Bosse, JD

Jennie Harrington



Acknowledgements

The author wishes to thank the people of Port Orford for their hospitality and enthusiasm for the project; SeaGrant Legal Foundation for support of the research; Bob Trumble at MRAG for making it possible to do this work on a shoestring, and Sherry Bosse for her patient and meticulous assistance with multiple drafts. Finally, special thanks go out to Leesa Cobb for her unflagging optimism and faith in grassroots organizing.

Any errors are entirely mine. S. Iudicello

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Summary

The fishing community of Port Orford, Oregon has been working for several years to develop a community-based fishery management system. The fleet envisions an area-based approach described by their historic fishing grounds that provides responsibility for planning, access, resource management, allocation, research and monitoring at the local level.

A community organization, the Port Orford Ocean Resources Team (POORT), received a grant from the National Sea Grant Legal Foundation to explore whether their vision was possible under existing state and federal law. POORT has been working simultaneously on many fronts—describing community resource use, collecting socio-economic information, devising goals and strategies for organizing, conducting collaborative research projects with state and federal managers, and participating in numerous state planning efforts. The legal project has focused on the links between POORT's goals and state and federal management structures. Project investigators looked at federal and state law, case studies of community-based management in other areas, and interviewed experts, managers and practitioners to answer the following questions:

1. Does federal law permit Port Orford to develop and implement local management strategies to promote sustainability for specific marine species and adjacent marine areas, including state and federal waters?
2. Does Oregon state law permit Port Orford to develop and implement local management strategies to promote sustainability for specific marine species and adjacent marine areas, including state and federal waters?

The short answer is “maybe,” and depends largely on whether the Port Orford Stewardship Area (See Figure 1) is intended as a conceptual framework, within which stakeholders will pursue their goals through existing decision-making and authority structures, or whether they want authority to implement management within the stewardship area themselves.

On the one hand, the proponents have often described what they want as “policy space,” or “a seat at the table,” which argues for a conventional—though enhanced—participatory role. On the other hand, the list of functions they describe in their vision and goal statements really are the core functions of resource management. This report explores options under the conventional fishery management framework on the federal and state level, a state process for designation of marine protected areas, and a hybrid approach that combines fishery and coastal management authority under a cooperative area management structure.

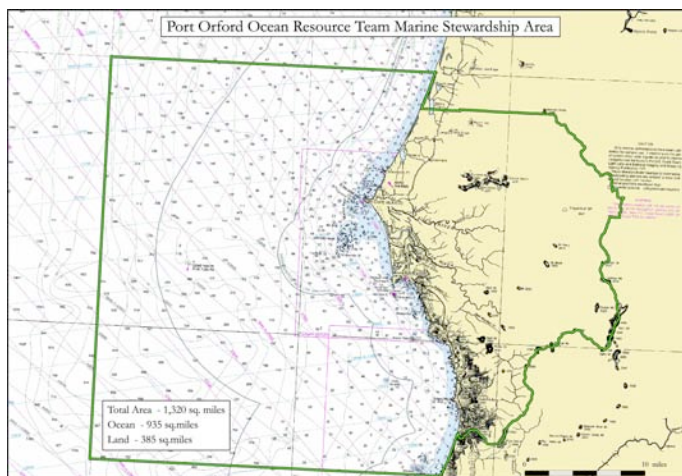


Figure 1. Map of Port Orford Stewardship Area. The Port Orford Ocean Resources Team has enlisted fishermen, scientists and elected officials in defining ecological and economic goals for zoning an area that encompasses the community's historic fishing grounds. The Stewardship Area concept is aimed at conserving local fisheries while maintaining access to the resources on which the community relies.

The degree of authority that may be devolved to Port Orford stakeholders under the various scenarios, using principles of community-based fishery management as a guide, is summarized in Table 1. The arrow indicates the least to the highest degree of potentially devolved authority

Table I. Comparison of devolved authority under four management frameworks.

Approach	Marine Protected Area designations under state process	Area management under nearshore groundfish plan (LAMP)	Special Area Management Plan under Coastal Zone program	Limited Access Privilege Program with community sustainability plan
Accountability	State accountable and responsible	Stakeholder input gathered as part of process	Accountability shared among state, federal, local	Stakeholders accountable and responsible.
Authority	Management agency in control	State managers in control unless change in statute	New entity created with shared authority	Federal managers still retain overall authority
Stakeholder role	Nomination, advisory, collaborative	Consultation, advocacy, advisory.	Stakeholders set direction, agency takes action	Stakeholders decide within allocation and implement decision



Community-based fishery management, in its purest form, is a system in which fishermen and their communities exercise primary responsibility for stewardship and management, taking part in decision-making on all aspects of their fishery. There are degrees of responsibility that may be allowed under U.S. law, but many that are not. With the exception of fisheries conducted by Native American treaty tribes, private persons cannot exclude others from access to the coast or to the sea. This exclusivity is at the heart of the bundle of rights that forms the basis of CBFM. As a general principle, stronger rights to a fishery will make a community more capable of exercising key management functions. These rights include ownership, leases, access rights, other property rights, and treaty rights. In the United States, with a few exceptions, fishing communities do not enjoy these rights.

However, there are also “duties” of stewardship, as well as rights that make up the bundle of functions and tasks that comprise fishery management. Table 2 illustrates where the authority for those functions lies under U.S. and Oregon law, and what roles are shared among federal, state and local institutions and stakeholders. Port Orford is one of many fishing communities in the U.S. that have been looking at community-based management with increased attention, and the community was identified as a highly desirable site for a pilot program in a report that evaluated potential for CBFM in U.S. fishing communities. The community has defined a set of goals using principles of CBFM:

- Define the Port Orford Community Stewardship Area including boundaries, biological and physical features, resources, embedded marine protected areas (MPA), and areas defined for fishery and non-fishery activities;
- Develop a Community Stewardship Area Access Plan that includes harvest policy options for a community-based stewardship model;
- Create an Integrated Research Plan that will help identify and develop nearshore collaborative research to determine overall and local resource sustainability and appropriate harvest rates, while minimizing the risk of localized depletion of nearshore species;
- Develop a Resource Monitoring Plan that supports data needs for science, stock assessments and regulatory compliance;
- Provide infrastructure to carry out high quality research by locating a Research Station in Port Orford;
- Identify and foster key partnerships for collaboration and funding.

Table II. Location of authority for fishery management functions in Oregon.

Management Function	NMFS	Council	Other federal	State	County/city	Community (fishermen)
1. Policy making and evaluation						
Scoping problems		X	X	X		X
Setting objectives		X	X	X		
Long range planning	X	X	X	X	X	
Research			X	X		X
Public education		X	X	X	X	X
2. Productive capacity of the fishery						
Monitoring habitat	X		X	X		
Monitoring condition of stock	X			X		
3. Compliance with rules						
Implementation and enforcement			X	X	X	
4. Fishery harvest						
Stock assessment	X			X		
Harvest planning		X		X		
Harvest monitoring	X			X		
5. Fishery access						
Membership/exclusion		X		X		
Harvest allocation		X		X		
Transfer of membership		X		X		
6. Resource use coordination						
Planning the coordination of different harvest regimes and strategies	X	X	X	X		X
7. Returning optimum value						
Supply planning						X
Product quality				X		X
Product diversity						X

When this list is compared to the functions outlined in Table 2, elements of the goal statements can be distributed among the functions as shown in Table 3 below. Activities that Port Orford describes as goals and may participate in under current law and regulation are highlighted. POORT already is taking several approaches toward these goals: expansion of opportunities for area based management through revisions to the state’s fishery management plan for nearshore groundfish, and possible nomination of local areas in a process convened by the governor to create a system of marine reserves. These two frameworks will get them the “seat at the table” aspect of their vision, but not the entire goal set. They would not address portions of the proposed stewardship area that lie beyond state waters, nor do either of these approaches tackle the fundamental elements of setting catch limits, allocating them, monitoring and enforcing them. The desired functions that are not presently devolved to the community level can be seen as gaps.

Table III. Gaps in current management structure for realizing Port Orford goals.

Management Function	Port Orford Goals	NMFS	Council	Other federal	State	County/city	Community (fishermen)
1. Policy making and evaluation							
Scoping problems	Determine sustainability		X	X	X		X
Setting objectives	Minimize risk of local depletion		X	X	X		
Long range planning		X	X	X	X	X	
Research	Provide research infrastructure			X	X		X
Public education	Identify and foster partnerships		X	X	X	X	X
2. Productive capacity of the fishery							
Monitoring habitat	Monitoring plan	X		X	X		
Monitoring condition of stock	Stock assessments	X			X		
3. Compliance with rules							
Implementation and enforcement	Monitoring that supports compliance				X	X	X
4. Fishery harvest							
Stock assessment		X			X		
Harvest planning			X		X		
Harvest monitoring		X			X		
5. Fishery access							
Membership/exclusion	Develop access plan; define area		X		X		
Harvest allocation	Harvest policy options; area definitions		X		X		
Transfer of membership			X		X		
6. Resource use coordination							
Planning the coordination of different harvest regimes and strategies		X	X	X	X		X
7. Returning optimum value							
Supply planning							X
Product quality					X		X
Product diversity							X

To get at the portions of the stewardship area that are in federal waters and in upland watersheds, two federal approaches may provide POORT additional means to move toward community-based management. A Special Area Management Plan created under the Coastal Zone Management Act creates a planning structure that would enable the community to engage state, federal and local entities in a framework that covers not only fisheries, but has mechanisms to deal with water quality, coastal development and other shore-based issues. A Community Sustainability Plan as provided under the Magnuson Stevens Fishery Conservation and Management Act, while confined to the fishery management arena, provides the reach out to the federal waters contained in the proposed Stewardship Area and creates a new mechanism for perhaps the most important aspect of community-based management: the ability to define the community and limit access to its resources.

In exploring Port Orford's range of options for implementing its stewardship area, the legal project compiled a statutory review, case studies in area-based management, interviews with managers and practitioners who have experience with collaborative, community-based approaches, and conducted a review of findings with a panel of experts. Table 4 below

summarizes the legal and policy framework, identifies legal hurdles or gaps in authority. Detailed descriptions of the pertinent laws, policies, programs and agencies are provided in Sections I & II. Additional descriptions of state and federal laws, agencies and programs that are relevant, but not directly related to the recommended options, can be found in Appendix A. The case studies of community-based management experience from other areas are contained in Appendix B. Issues and obstacles are analyzed in Section III. The four most promising options are shown in Table 1 and recommended in Section IV. They are:

1. The amendment of Oregon's nearshore groundfish plan to enable area management approaches for some species. This might also include a proposal for legislative enactment of a local area management plan such as the one adopted in Sitka, Alaska. This action would address elements of the goals related to harvest policy options, collaborative research, and minimizing depletion of nearshore species. It can serve as one step in a series of building blocks leading to a larger action.
2. The nomination of two areas off Port Orford for inclusion in the proposed Marine Reserve Network. Designation of marine protected areas within the stewardship area would take advantage of a policy process that is underway to achieve elements of the goals related to embedded marine protected areas and areas defined for non-fishery activities. Port Orford stands out as one of very few port communities on the coast supporting marine reserve designation. The action could occur within a larger plan.
3. Although it would be a complex and long-term undertaking, the creation of a Special Area Management Plan under the framework of the CZMA and Oregon's Coastal Management Program has the advantage of encompassing both seaward and landward goals of POORT's vision. It also has the potential to create a structure under which POORT could engage all the necessary parties: federal and state fishery managers, state land use planners, county commissioners, forest managers, coastal zone interests, tourism and other economic interests and stakeholders. It is the only approach that would enable the community to tackle the entire stewardship area as an ecosystem without getting tangled in the management patchwork that overlays it. One missing piece in the SAMP approach, as well as the first two, is the lack of access control.
4. Unless Port Orford can limit access to the resources on which the community depends, it cannot realize the full benefits of community-based management. There will always be "free riders" who enjoy the benefits of their conservation activities, voluntary performance standards, habitat protection and other measures that protect local resources. The approach that would close this loophole is to develop a community sustainability plan with a limited access privilege program as provided for in the most recent revision of the Magnuson-Stevens Act. The advantage of this approach is that the community could design a limited access privilege program for some portion of the total allocation of federal fisheries in which the fleet participates, tailor that program with its community-based principles, and then propose a sustainability plan that tracks the vision for the stewardship area.

In combination, these elements provide the building blocks for implementation of the stewardship area and the management goals envisioned by the community. They have the potential of employing existing authority to create a mechanism to devolve some management functions to the community. Whether all the functions described in the goals could be taken on

at the community level would depend on the specific form of the agreements, plans and measures developed under each of the approaches.

Although the analysis is based on law, policy, events and circumstances as they existed in Oregon from March 2007 to March 2008, there are elements of this study that are generally applicable to coastal communities anywhere in the United States. Communities around the coast are seeking ecosystem-based approaches to management, calling for finer spatial resolution in research, stock assessment, monitoring and harvest limits, conducting planning to respond to loss of working waterfront, and coping with the stresses of coastal development. Federal tools are generally available, though may differ from region to region based on the regional fishery management councils and state coastal zone programs. Case studies illustrate that regions outside Oregon have chosen sector allocations, individual fishing quotas, community quotas, local area management, co-management and cooperative research as satisfactory approaches to community-based management. While all these frameworks were permissible to some degree under U.S. or applicable state law, some required legislative or

Table IV. Existing legal and policy framework for realizing Port Orford goals.

congressional action.

Law, policy or process	Jurisdiction	Permit POORT goals	Permit goals with legislative action	Permit goals with administrative action
CZMA	Federal, with state participation; coastal including watershed	Partial	Requires state action	NOAA, OCMP, DLCD work cooperatively to approve plans
CZMA SAMP	Interagency, multi-stakeholder	Yes	May require legislative action	Would require development, approval of plan, participation by multiple agencies
MPRSA	Federal, beyond 3 miles, non-fishery	No	N/A	N/A
MSFCMA	Federal waters, fisheries only	No	Change would require congressional action	Actions must be approved by Pacific Council
Pacific Council trawl IFQ	Federal waters; Port Orford excluded	No	N/A	N/A
Pacific Council sector	Federal waters, sector designated in FMP	Yes	Not required	Would require amendment to groundfish FMP
MSFCMA EFH	Federal waters, designated area	Partial	N/A	Council action could designate HAPC
MFCMA LAPP	Federal, fisheries	Yes	May be required for state portion	Community develops plan, approval at council & NOAA
Oregon Beach Bill	State shores; access protected	Partial	N/A	N/A

Law, policy or process	Jurisdiction	Permit POORT goals	Permit goals with legislative action	Permit goals with administrative action
OCCC/LCDC	State land and waters	Partial	May be required	May be required
Oregon LUPA	Basis for watershed protections, zoning.	Partial	N/A	Action at county level
ORMA	Territorial Sea; basis for OPAC and MR process	Partial	N/A	N/A
Terr. Sea Plan	State waters, with additional concerns	No	N/A	N/A
ODFW and F&W Commission	State waters; statute defines regulatory authority for comm. fish	No	Any change would require action	Commission action required to approve plans, catch limits, seasons, etc.
Nearshore strategy	State waters	No	Undergoing revision	Commission action required to approve plan amendments
Revision of groundfish plan	State waters; nearshore; groundfish	Partial	May be required	Commission action required to approve plan amendments
Governor's MR process	State waters	Partial	Will be required	Will be required
Cooperative research	Federal and state waters	Partial	Not required	Not required

Introduction

Port Orford, Oregon, like many small fishing communities in the United States, faces the challenge of preserving its traditional fishing history in the face of coastal population growth, resort and recreational developments that encroach on working waterfront, the environmental effects of logging, agriculture and transportation. On top of these pressures common to most coastal areas, the Port Orford fleet also must grapple with curtailed fishing opportunities that resulted from rebuilding requirements for depleted Pacific groundfish stocks, competition from displaced fleets who have access to their traditional fishing grounds, and lack of a seafood business infrastructure to place their catch on a competitive basis with the rest of the Pacific coast fleet.

Although they participate in various management forums, stakeholders in the marine resources of the Orford reef have expressed frustration at the lack of success in accomplishing their objectives. They claim the current management framework at the federal and state level has not provided tools to manage at a scale sufficient to capture local distinctions. They want to devise the potential to focus on the special qualities of the reef, to protect them, and yet maintain access to resources. To this end, they are incorporating principles of community-based fishery management in their goals and plans (see box).

The concept of community-based fishery management (CBFM) has drawn extensive interest around the world, and communities in the U.S. have been looking at its principles with increased attention. In September 2004, the first of a series of national meetings was convened in Kennebunkport, Maine to evaluate potential for CBFM in U.S. fishing communities.¹ The report reviewed at the workshop identified Port Orford, Oregon as a highly desirable site for a pilot program. Port Orford representatives participated in further meetings of CBFM practitioners in Del Mar, California (2005), Sitka, Alaska (2005), and St. George, Alaska (2006), and Connecticut in November 2007. They hosted a Fisherman's Knowledge Exchange in Port Orford in May 2007.²

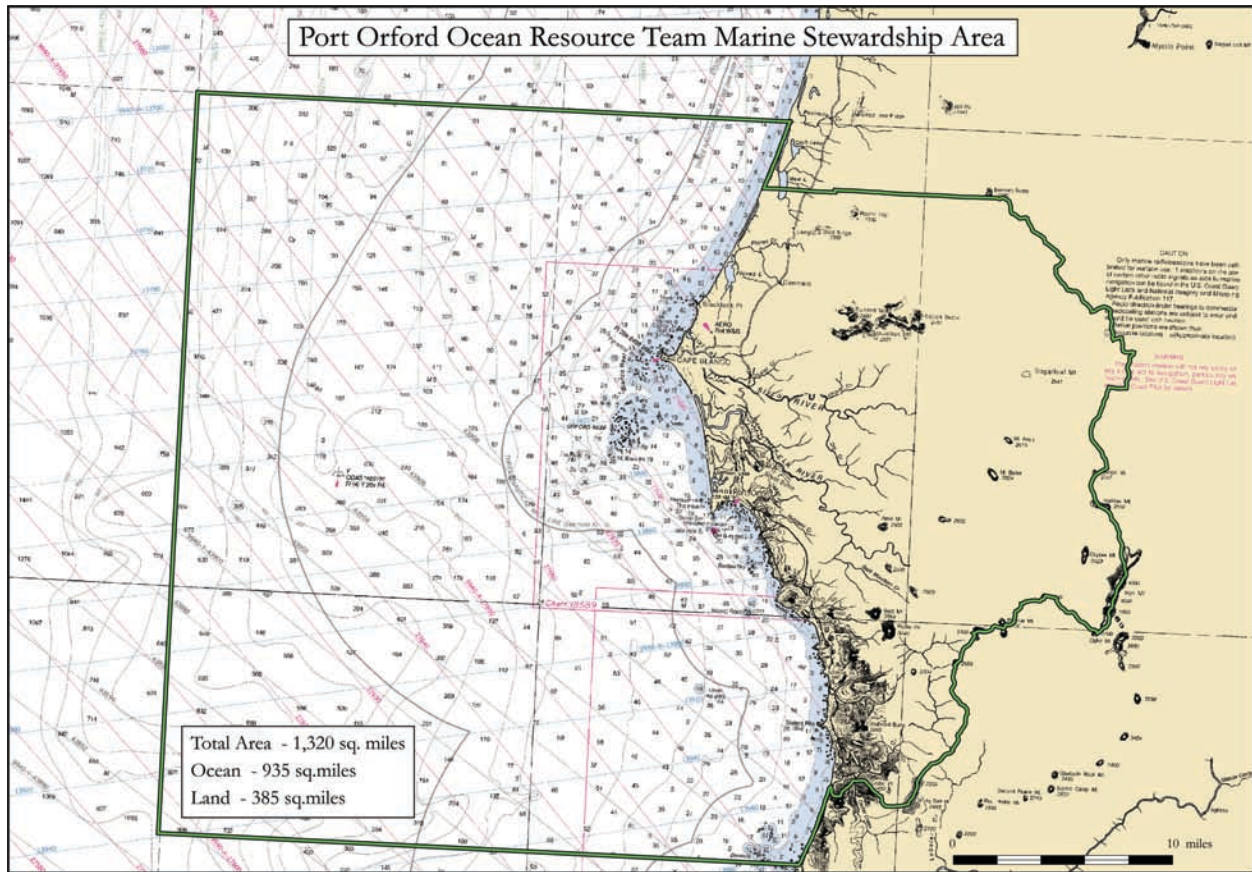
The community of Port Orford has mapped a "stewardship area," a specifically bounded section of the adjacent marine environment, where it could play a greater role in research, management, and conservation of local resources (Figure 1). An ongoing theme in community efforts is to "find a seat at the table" where fishery management is discussed and decided—whether that "table" is a federal fishery management council, a state commission, or an administrative planning process.

In a vision statement reported in its stewardship plan in November 2007, POORT says it wants the local fishing community to "plan an active and significant role in the management of their historic fishing areas. Port Orford residents are committed to taking care of, and holding

¹ M.L. Weber and S. Iudicello. *Obstacles and Opportunities for Community-based Fisheries Management in the United States* (2005), [hereinafter CBFM in U.S.]

² Practitioners from around the country gathered to provide ideas and advice. Summary report of the meeting on file with authors.

Figure 1. Port Orford Stewardship Area



responsibility for, the resources on which the future of their fisheries depends.”³ The community and the fleet, through the Port Orford Ocean Resource Team (POORT),⁴ have approached the stewardship area issue from several angles: cooperative research with state and federal managers, resource use documentation through a project using local knowledge and GIS, participation in ongoing state venues such as the Ocean Policy Advisory Council, participation in the federal management process at the Pacific Fishery Management Council, endorsements at city level, and communicating and connecting with fishermen in other communities testing CBFM approaches. Most recently, POORT is working on nomination of a marine reserve.

The organization spent much of 2007 honing its objectives for the stewardship area through stakeholder interviews and defined its goals and objectives, as well as possible research projects in the stewardship plan. Among the community-based management principles

³ Stewardship Plan. Prepared for POORT by Pacific Marine Conservation Council and Golden Marine Consulting (November 2007).

⁴ POORT was founded in 2001 as a community-initiated and locally operated nonprofit organization. It conducts projects, including assistance to fishermen eligible for disaster relief, resource information collection, coordination of voluntary donations of fish to the local food bank, development of socioeconomic community profiles, and advocating a framework for local participation in area management. It has an advisory board of fishermen. Seventy percent of local boat-owners participate in one or more POORT activities. Pers comm with L. Cobb (September 2007).

that informed the goals is a call for a research plan that is appropriate to the scale and ecosystem characteristics of the reef and to the character of the fishing fleet in the community. Along the entire spectrum of possible power sharing strategies, POORT wants to explore co-management, community-based management, area management, zoning, access and other possibilities, along with existing collaborative and advisory roles.

POORT's aim is to formulate a plan for managing access to the stewardship area, to protect critical near-shore habitat from destructive fishing practices, and to develop information and capacity in Port Orford to join the policy dialogue about designation of marine protected areas in Oregon and on the Pacific Coast as a whole. If POORT can create a stewardship area as a tool to sustainably manage marine resources on the traditional fishing grounds off Port Orford, proponents believe that they can both protect the quality of the coastal environment that makes Port Orford unique⁵ and promote a stable, local natural-resource economy. Concern over loss of working waterfront and maintaining the character of coastal communities is evident not only in Port Orford, but in communities along the entire coast. Although there is significant support for the application of community-driven, area-based management structures, none have yet been implemented in the United States on the west coast. Thus, if a community stewardship area is developed for Port Orford and the Orford reef complex, it will be the first of its kind in the nation.

A critical missing piece of information, if Port Orford is to move forward, is whether the current legal framework for fishery management will allow the community to propose and implement its ideas. Although it is well settled that fishery management measures may not discriminate among U.S. citizens, there is no experience with co-management schemes outside tribal co-management established by case law.⁶

With support from SeaGrant Legal Foundation, this project reviewed and described the current near-shore marine management policies and laws of the state of Oregon and related federal policies and laws regarding community-based fishery management. The objective was to investigate whether the laws of Oregon and the U.S. would permit the community of Port Orford to pursue its community-based management vision by seeking to address the following questions:

Does federal law permit Port Orford to develop and implement local management strategies to promote sustainability for specific marine species and adjacent marine areas, including state and federal waters?

⁵ In a proposal to one of its grantors, POORT argued that effective ecosystem-based management would need to be applied at a finer resolution than current management practices, using information from smaller, area-based units. It cited the report by the U.S. Ocean Commission and Pew Ocean Commission on the principle that one approach is not appropriate in all circumstances. In its report, the Pew Commission states: "Given the variability among ecosystems, the inherent variability within a single ecosystem, and our incomplete knowledge of their structure, functioning, and history, it is not possible to write a single definition that specifies the elusive state of health for all ecosystems." AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE (2003) at 32.

⁶ See National Standard 4. 16 U.S.C. 1851(a)(4) (stating that "[c]onservation and management measures shall not discriminate between residents of different states"); Alaska Factory Trawlers Assn v. Baldrige. 831 F.2d 1456 (9th Cir. 1987).

Does state law permit Port Orford to develop and implement local management strategies to promote sustainability for specific marine species and adjacent marine areas, including state coastline and waters?

The short answer is “maybe,” and depends largely on whether the Port Orford Stewardship Area is intended as a conceptual framework, within which stakeholders will pursue

their goals through existing decision-making and authority structures, or whether they want authority to implement management within the stewardship area themselves.

On the one hand, the proponents have often described what they want as “policy space,” or “a seat at the table,” which argues for a conventional—though enhanced—participatory role. On the other hand, the list of functions they describe in their vision and goal statements really are the core functions of resource management. In their definitive study of CBFM, Pinkerton and Weinstein describe a set of functions and tasks that comprise management.⁷

Table 1 illustrates where the authority for those functions lies under U.S. and Oregon law, and what roles are shared among federal, state and local institutions and stakeholders. Port Orford’s goals describe some functions that can be performed by stakeholders: “determining sustainability” (scoping problems), “providing research infrastructure” (research), “identify and foster partnerships” (public education). But others, like minimizing risk of depletion, defining access, setting harvest limits, monitoring and compliance are functions held by public managers.

Port Orford Goals

- Define the Port Orford Community Stewardship Area including boundaries, biological and physical features, resources, embedded marine protected areas (MPA), and areas defined for fishery and non-fishery activities;
- Develop a Community Stewardship Area Access Plan that includes harvest policy options for a community-based stewardship model;
- Create an Integrated Research Plan that will help identify and develop nearshore collaborative research to determine overall and local resource sustainability and appropriate harvest rates, while minimizing the risk of localized depletion of nearshore species;
- Develop a Resource Monitoring Plan that supports data needs for science, stock assessments and regulatory compliance;
- Provide infrastructure to carry out high quality research by locating a Research Station in Port Orford;
- Identify and foster key partnerships for collaboration and funding.

⁷ E. Pinkerton and M. Weinstein. *Fisheries that work: Sustainability through community-based management*. (1995).

Table 1. Location of authority for fishery management functions in Oregon.

Management Function	NMFS	Council	Other federal	State	County/city	Community (fishermen)
1. Policy making and evaluation						
Scoping problems		X	X	X		X
Setting objectives		X	X	X		
Long range planning	X	X	X	X	X	
Research			X	X		X
Public education		X	X	X	X	X
2. Productive capacity of the fishery						
Monitoring habitat	X		X	X		
Monitoring condition of stock	X			X		
3. Compliance with rules						
Implementation and enforcement			X	X	X	
4. Fishery harvest						
Stock assessment	X			X		
Harvest planning		X		X		
Harvest monitoring	X			X		
5. Fishery access						
Membership/exclusion		X		X		
Harvest allocation		X		X		
Transfer of membership		X		X		
6. Resource use coordination						
Planning the coordination of different harvest regimes and strategies	X	X	X	X		X
7. Returning optimum value						
Supply planning						X
Product quality				X		X
Product diversity						X


The review found that neither existing state nor federal law could devolve management authority to the community to the degree found in textbook community-based approaches outside the U.S. The current management framework could allow some, but not all of Port Orford's goals for the stewardship area. The second phase of the investigation looked into the potential to incorporate more elements of local, community-based or co-management approaches within current law, either by administrative or programmatic revision, engaging in emerging policy change, or seeking legislative change.

Taking pieces of state and federal laws and programs and ongoing policy processes and fitting them together provides a possible pathway for Port Orford to get, if not all the way, at least part of the way to their vision of a locally-managed stewardship area. This report explores

options under the conventional fishery management framework on the federal and state level, a state process for designation of marine protected areas, and a hybrid approach that combines fishery and coastal management authority under a cooperative area management structure. The degree of authority that may be devolved to Port Orford stakeholders under the various scenarios, using principles of community-based fishery management as a guide, is summarized in Table 2. The arrow indicates the least to the highest degree of potentially devolved authority.

Table 2. Comparison of devolved authority under four management frameworks.

Approach	Marine Protected Area designations under state process	Area management under nearshore groundfish plan (LAMP)	Special Area Management Plan under Coastal Zone program	Limited Access Privilege Program with community sustainability plan
Accountability	State accountable and responsible	Stakeholder input gathered as part of process	Accountability shared among state, federal, local	Stakeholders accountable and responsible.
Authority	Management agency in control	State managers in control unless change in statute	New entity created with shared authority	Federal managers still retain overall authority
Stakeholder role	Nomination, advisory, collaborative	Consultation, advocacy, advisory.	Stakeholders set direction, agency takes action	Stakeholders decide within allocation and implement decision



Methodology

The project used legal research, policy research, and stakeholder interviews to investigate the applicability of CBFM in Oregon’s nearshore waters. Legal research examined national, state, and tribal frameworks and case law. These are summarized in Sections I, II and Appendix A. On the policy side, the project team looked at case studies from other jurisdictions, such as New England’s locally managed shellfish fisheries, Alaska’s Community Development Quotas and Community Quota Entities programs, the Pribilof Islands Cooperative, Sitka area management, and Cape Cod’s sector allocation. The policy research includes examination of case studies where area-based management frameworks have been applied to fishery management. In consultation with POORT, Ecotrust, Surfrider and PMCC, MRAG staff analysts developed a list of practitioners, managers, and policy makers to interview. A summary of the policy interviews and the write-up of the case studies are included as Appendix B.

Another mechanism built into the legal and policy investigation was the use of a review panel at about midway in the project. This panel was made up of one representative from each of the project partners (other than the investigators) and outside legal and policy experts. This panel reviewed a draft of the report and discussed a set of questions related to several possible

options.⁸ The options and review questions are provided in Appendix C. The panel comments and revisions were incorporated into subsequent drafts of the report.

Besides revisions in response to the review panel and stakeholder comments, updated material resulting from community interviews, further refinement of stewardship area objectives, and other concurrent policy advocacy by POORT (through February 2008) was incorporated in this final report. Results of the project were presented at the Public Interest Environmental Law Conference at the University of Oregon on March 6, 2008, in a panel discussion that included project partners Leesa Cobb of POORT, Pete Stauffer of Surfrider, two members of the review panel, Cheryl Coon and Eugene Bricklemeyer, and the principal investigator. A recording of the panel is available on the PIELC website.⁹ Results also will be presented at the July 2008 Coastal Society meeting.

What is Community-Based Fishery Management?

Community-based fishery management (CBFM) is a concept that has been explored in the literature of sociology, anthropology, and resource economics. In community-based systems, local residents who have a substantial stake in the fishery manage the local resources. In its purest form, CBFM is a system in which fishermen and their communities exercise primary responsibility for stewardship and management, including taking part in decision-making on all aspects of management, including harvesting, access, compliance, research, and marketing. Other features of CBFM include local control, a focus on the ecosystem rather than on specific species, power sharing, and a common interest in and responsibility for common resources. Approaches emphasize the importance of collaborative and adaptive information, transparency, fairness, and how resource use is fundamental to the cultural, economic, and social fabric.¹⁰

For several reasons, CBFM in its purest form would be impossible in U.S. fisheries, except for fisheries managed by Native American treaty tribes. For instance, the public trust doctrine, which in American law provides for public access to the coast, the ocean, and fishery resources, hinders communities from excluding outsiders from access to local resources—a key element of CBFM abroad. Second, within regional economies and even most local economies, fishing does not play as large an economic role as in the Philippines or Japan.¹¹

⁸ The review panel met on August 21, 2007, in Portland at the Jean Vollum Natural Capital Center. Panel members included Bob Bailey, Division Manager of the Oregon Coastal Management Program; Bo Bricklemeyer, President of the Aquatic Resources Conservation Group; Patty Burke, Manager of the Oregon Department of Fish and Wildlife Marine Resources Program; Cheryl Coon, Conservation Manager for the Audubon Society of Portland; Penny Dalton, Director of Washington Sea Grant; Randy Fisher, Executive Director of the Pacific States Marine Fisheries Commission, Rod Moore, Executive Director of the West Coast Seafood Processors Association, Steve Shipsey, Assistant Attorney General, Oregon Department of Justice Natural Resources Section; Thane Tiensen, Attorney, Landy Bennett Blumstein LLP; Matt Weber, Economic Analyst, Ecotrust; and Chris Wold, Associate Professor, Lewis & Clark Law School.

⁹ The audio file may be downloaded from <http://www.pielc.org/2008/recordings.html>.

¹⁰ CBFM in the U.S., *supra* note 1 at 21-27. For a discussion of the efficacy of approaches, see J. Boevers, *Benefits and Limitations of Community-based Management* (May 2007).

¹¹ See “Lessons Learned Outside the United States,” in CBFM in the U.S. *Id.* at 18-27.



View of Port Orford harbor and boat dock

As a result, when combined with the pressures of declining resources, the history of open access to U.S. fishery resources has contributed to current fishery management practices in the United States, which might best be described as the antithesis of CBFM. It typically focuses on single species, not ecosystems. It places fishers in an adversarial role *vis-a-vis* resource managers. It rewards history of high catches and penalizes small, diversified fleets. It is federalized, not local. It is highly scientific and has only recently begun to embrace local ecological knowledge. Even the federal regional fishery management council system, which was designed to take advantage of the knowledge of people who actually fish, has become politicized and professional.¹²

Notwithstanding these constraints, several approaches can be used to promote sustainable, locally managed fisheries in the distinct conditions of the United States.

¹² See, e.g., Josh Eagle et al. *Taking Stock of the Regional Fishery Management Councils*. Pew Ocean Science Series (2003); General Accounting Office, *Fishery Management: Problems Remain with National Marine Fisheries Service's Implementation of the Magnuson-Stevens Act* (2000). Many studies on fairness, balance and conflict of interest in the council system have been published since the enactment of the Magnuson Act in 1976. See, e.g. 1977 report to Congress, W.J. Hargis, et al (1986); GAO, (2000); Hanna et al, (2000); National Academy of Public Administration (2002).

Why Port Orford?

Port Orford is a few miles from Cape Blanco, the westernmost point in the continental United States and completely exposed to Pacific storms. With a population of about 1,000 residents, Port Orford has not experienced the growth seen in other communities on Oregon's south coast.¹³ The growing market for tourist second homes in Port Orford is straining the ability of residents to own homes, afford rentals, and pay real estate taxes.¹⁴

Port Orford's fishing fleet has a long history and tradition. The community faces population growth, economic pressures to "gentrify" its working waterfront, and increasing catch constraints related to rebuilding West Coast groundfish stocks. To meet these challenges, the community of Port Orford is interested in creating a "stewardship area," a specifically bounded section of the adjacent marine environment, where it could share management authority. Its goal is to formulate a plan for managing access to the stewardship area, to protect critical near-shore habitat from destructive fishing practices, and to join the policy dialogue about designation of marine protected areas in Oregon and along the Pacific Coast.

POORT and its allies in promoting a Port Orford stewardship area maintain that marine resource management on the Pacific Coast is out of balance, citing current management and data collection practices that are applied on a scale inconsistent with the diversity of marine ecosystems and human communities they are intended to maintain.¹⁵ According to POORT literature, they have watched ecosystem integrity degrade while small-boat fishing communities are driven out of business by regulations developed under the auspices of rebuilding stocks. As an alternative, community advocates have developed, among other proposals, what they call a "Cape to Cape" approach that matches "the spatial scales of interest for coastal communities with those naturally found within marine ecosystems . . . regional scales that recognize the unique relationships between local stocks and the fishing communities that depend on them."¹⁶

As an alternative, POORT is proposing area-based management on a scale that accounts for local economic and environmental diversity. The organization and its supporters are looking to protect the integrity of the Orford Reef ecosystem and provide a tangible, replicable example of balancing sustainable fishing with conservation by matching the needs of a fishing-dependent community with the sustainability of the marine ecosystem. At the same

¹³ The U.S. Census Bureau estimates Port Orford's 2006 population to be 1,164. The 2000 U.S. Census counted 1,153 Port Orford residents. U.S. Census Bureau, Population Finder, http://factfinder.census.gov/servlet/SAFFPopulation?_event=Search&_name=Port+orford&_state=04000US41&_county=Port+orford&_cityTown=Port+orford&_zip=&_sse=on&_lang=en&pctxt=fph.

¹⁴ In the 1990s, the state placed a moratorium on building in Port Orford until the city fixed a problem with its sewage outfall, one of the reasons underlying atypical growth in the Port Orford area. The outfall problem has been fixed, and the moratorium lifted, and Port Orford's lagging growth may change. Port Orford Ocean Resource Team contracted for a set of studies on management of the watershed, water quality standards, and regulatory agencies. See Appendix D.

¹⁵ POORT is joined in promoting area-based management to protect the Orford Reef ecosystem by community members, including the fleet and local officials, as well as regional environmental groups and academics.

¹⁶ Pacific Marine Conservation Council. *Consensus Statement on Spatial Management of West Coast Fisheries* (August 2006).

time, their vision of area management includes protection of local aesthetic resources by preserving nearshore reef system features that extend above the ocean surface. These features are renowned for their unique beauty. They are recognized as exceptional underwater locations, comparable to features in the islands of Palau and the Great Barrier Reef.¹⁷ In the words of Bob Bailey, Division Manager of the Oregon Coastal Management Program, the Port Orford Stewardship Area “has got a lot of crunch” – it is one of the remaining special places in the ocean.¹⁸ Red Fish Rocks is one such nearshore area that provides a variety of bottom features and hosts birds, marine mammals, and numerous fish species.

Port Orford has characteristics that closely align with the characteristics of the communities where community-based management is successfully practiced outside the U.S.: small boat fleet, pattern of fishing close to home port, fishing in multiple fisheries, historical fishing practice that disperses effort over area and fisheries, organized fleet with an active fishermen’s marketing association, a racially homogenous fishing community,¹⁹ and a high interest in local science and research. Because of these factors, Port Orford is well suited as a pilot case for CBFM in the United States.



Redfish Rocks has been nominated by Port Orford as a site for consideration by the Governor’s marine reserves task force.

¹⁷ Proposal to The Laura Jane Musser Fund (Sept. 5, 2006). Document with author.

¹⁸ Comment by Bob Bailey at the Port Orford Sea Grant Project Review Panel Meeting, Portland, Or.(Aug. 21, 2007)

¹⁹ Nearly all the fishers are Caucasian Americans. CBFM in U.S. *supra* note 1, at 68.

The Setting

Fishing has been a mainstay in Port Orford since it was founded in the mid-19th century, and it remains a primary economic activity in the area. Approximately 30 percent of the labor force is employed by commercial fishing or other marine-related business,²⁰ although estimates of fishery-related employment vary considerably depending on the source.²¹ The nearest sizable town, Coos Bay, is an hour away from Port Orford. Peer pressure within the community to embrace or enforce rules is significant, in part because, in the words of one participant: “When you come into port, you have to look everybody in the face. We have multi-generational fishing families here.” According to advocates at POORT, Port Orford’s fishing families are growing, with new and young participants looking to enter the fishery.

Port Orford is home to a fleet of approximately 40 fishing vessels, with 35 commercial and three charter vessels operating year-round.²² Former salmon trollers,²³ these vessels

²⁰ Ecotrust, *Port Orford Socioeconomic Analysis of Fisheries Resources: Building Capacity For Community-Based Resource Management* 8 (June 30, 2005) [hereinafter *Port Orford Socioeconomic Analysis*]. This figure represents about 10 percent of the town’s total population, because about 27% of Port Orford’s population is retired and more than a third of its residents aged 21-64 qualify as disabled. *Id.*

²¹ A port official claims 325 fishing related jobs in Port Orford alone, while the Pacific Fishery Management Council estimates fishery-related jobs at 400 for an area that includes Port Orford, Gold Beach and Brookings. Pacific Fishery Management Council, Final EIS, 2007-08 Groundfish Harvest Specifications & Amendment 16-4. Chapter 7 at 482-483. Other studies have reported 87 commercial fishermen in Port Orford at, with between 100 and 150 residents finding direct or indirect employment from the commercial fishing sector. Ecotrust, *supra* note 12, at 3-4.

²² Ecotrust, *supra* note 20, at 8.

²³ The salmon fishery in the Port Orford area collapsed in 1990s, when Southern Oregon and Northern California Coast (SONCC) coho salmon (*Oncorhynchus kisutch*) were listed as a threatened species under the federal Endangered Species Act. U.S. Fish & Wildlife Service, *Endangered and Threatened Wildlife and Plants; Threatened Status for the Southern Oregon/Northern California Coast Evolutionarily Significant Unit of Coho Salmon*, 62 Fed. Reg. 3308 (Jun. 18, 1997). An anadromous species, SONCC coho salmon spend a portion of their lives in the ocean but spawn and mature in the Klamath River, which flows from Southwestern Oregon through Northern California to the Pacific Ocean. Klamath River water has been diverted from the river for a major (and contentious) Bureau of Reclamation federal irrigation project since the early 1900s, and it is also home to several hydroelectric dams owned and operated by PacifiCorp. During the last century, SONCC coho populations plummeted, from an estimated 50,000 to 125,000 wild coho in the 1940s to fewer than 6,000 in 1996. See Pacific Coast Fed’n of Fishermen’s Ass’ns v. Bureau of Reclamation, 426 F.3d 1082, 1086-87 (9th Cir. 2005) (discussing Klamath salmon populations in a decision invalidating an operating plan for the Klamath River irrigation project because it failed to comply with Endangered Species Act requirements).

The hydroelectric dams and irrigation draws on the Klamath River continue to decimate salmon populations. In 2006, low salmon populations led to the cancellation of the commercial season for Klamath River salmon. See Peter Sleeth, *Three Hundred Protesters in Astoria Assail Fish Policies*, THE OREGONIAN, Mar. 24, 2006 (discussing the impact a moratorium on salmon fishing off the Oregon and California coasts would have on fishing communities). Among its other activities and services, POORT assists salmon trollers in applying for disaster relief aid.

PacifiCorp has been engaged in renewing its license to operate the dams for several years. In late 2006, NOAA Fisheries rejected a PacifiCorp proposal to transport salmon around the dams as part of the relicensing process, and concluded that fish ladders on four of the dams may be necessary to protect salmon populations on the Klamath. Because the modifications necessary to install fish ladders on the aging dams will be extremely expensive, PacifiCorp is entertaining the prospect of dam removal, a course of action commercial fishermen, environmentalists, and Tribes have long argued is necessary to revitalize Klamath salmon populations. See Blaine Harden, *U.S. Orders Modification of Klamath River Dams: Removal May Prove More Cost-Effective*, WASH. POST Jan. 31, 2007 (reporting that dam modification would cost \$300 million, over \$100 million more than the estimated cost of removing the dams). By 2005, the number of SONCC coho returning to spawn in the Klamath River had dropped to between 4.1 and 5.4 percent of historic levels. Thomas P. Good et al., *Recovery Planning for Endangered Species Act-listed Pacific salmon: Using Science to Inform Goals and Strategies*, 32 FISHERIES 417, 427 (2007).

switched to longlining in the 1990s, targeting groundfish species.²⁴ At about that time, several species of Pacific groundfish were designated as overfished.²⁵ The resulting restrictions on catch hit hard along the entire coast, including Port Orford, where more than 70 percent of the port's vessels depend on groundfish.²⁶ The fleet also fishes for crab and tuna, among other species. In the late 1990s, the fleet began to develop a live-fish fishery for China rockfish, kelp greenling, canary rockfish, and cabezon, which bring in a higher price, allowing the fleet to land much less fish and still make a living.²⁷ Port Orford also is the principal site for sea urchin landings in Oregon and at one time operated an urchin processing plant. The sea urchin fishery, dependant on Asian markets, experiences "boom and bust" economic cycles, however, and the plant has closed.²⁸ In 2003, Port Orford accounted for just 0.6 percent of Oregon's catch by volume but approximately 3 percent of the value of the state's landings. Landings of high value

²⁴ Pacific groundfish overfishing occurred through the mid-1990s, although the stocks were not considered overfished or subject to overfishing at the time. When the council adopted its groundfish FMP in the 1980s, the council did not have scientific information about the stocks and capped catch limits at then-current levels – which had increased dramatically over the decade before reaching a zenith in 1982. As stock assessments were performed, catch levels were set at a constant level of the current stock size, calculated from a stock's life history and fishery information. In 1996, however, Sustainable Fisheries Act required catch limits to be set using biomass-based targets and thresholds and consider overall stock depletion. When these new policies were applied to the groundfish fishery, the council discovered that many stocks were overfished. Further study revealed that Pacific groundfish were unexpectedly unproductive, and constant fishing had steadily depleted the stocks at levels exceeding the level of replenishment. Steve Ralston, *The Groundfish Crisis: What Went Wrong?* NFMS, <http://montereybay.noaa.gov/reports/2002/eco/harvested.html>.

More than 90 different species are managed under the Pacific Coast Groundfish Plan, including rockfish, flatfish, lingcod, cabezon, kelp greenling, Pacific cod, Pacific whiting, sablefish, sharks, skates, and other species. Many types of gear are used to capture these species, and management measures include a variety of area and time restrictions, gear restrictions, quotas, annual harvest restrictions and other measures. Pacific Fishery Management Council, *Backgrounder: Groundfish*. May 2007.

²⁵ NMFS notified the Pacific Fishery Management Council on March 3, 1999, that bocaccio was overfished, triggering a rebuilding plan requirement. See, *Status of Fisheries of the United States, Report to Congress*. NMFS October 1999. The Secretary of Commerce announced the determination of a commercial fishery failure on January 19, 2000. Several groundfish species have been rebuilt in the decade since the groundfish disaster, including bocaccio, widow rockfish, and darkblotched rockfish. Dover sole, lingcod, thornyhead, several flatfish species, and sablefish complex (including blackgill rockfish) also appear to have healthy populations. However, other species have not staged similar comebacks and continue to struggle. Canary rockfish and yelloweye rockfish populations have not yet rebounded, and the hake fishery may be faced with harvest reductions due to low stocks. Further, there is scant data regarding the status of many stocks, especially nearshore species managed within state waters. September 2007 "Statement of Participants: What we agree on," Working group convened in 2006-2007 to develop a consensus statement of Oregon citizens' views on marine resources to be presented to OPAC. See also *infra* notes 79-86 and accompanying text (discussing Oregon's Nearshore Groundfish Strategy).

²⁶ Ecotrust, *supra* note 20, at 6. Because groundfish are caught in a multi-species fishery, to rebuild the overfished stocks, catches of all groundfish were severely restricted. In 2004 preparatory to the 2005-2006 fishing season. Amendment 16 to the Pacific Groundfish Fishery Management Plan included harvest specifications, a rockfish conservation area, and other measures. The FEIS is available at <http://www.pcouncil.org/groundfish/gfspx/gfspx05-06.html>.

²⁷ The live fish market brings in higher prices, at up to \$6.25 per pound, compared with just \$0.40 per pound for trawl-caught fish. Golden, *supra* note 2 at 11-12. In 2003, the port landed 1.2 million pounds of fish, worth \$2.0 million, according to state of Oregon statistics. By comparison, in 1990, before the switch to a live-fish fishery, it landed 6.4 million pounds of fish, worth just \$3.1 million.

²⁸ In the past, facilities in town also processed salmon, crab, and other species, but none remain in operation, *supra* note 1 at 68-69.

species including salmon, halibut and crab, brought combined fishing revenues in 2005 to more than \$2.4 million.²⁹

There is little fishing related infrastructure in Port Orford. Apart from the pier and the two cranes, there is cold storage and ice to be had at one of the fish plants, and the port sells fuel. Vessels tend to go elsewhere for repairs. Other marine businesses include a tackle store, and a dive operator is interested in opening a shop at the port. The same nearshore reef complex that makes Port Orford a center for the live fish fishery also attracts recreational fishermen and divers. Prospects for fishing-related tourism may improve with the passing of a local ordinance that would allow overnight camping.

The reef has been exploited under both open access (state) and limited entry (federal) guidelines.³⁰ Entry was fairly easy and inexpensive: small boat, outboard motor, and a commercial fishing license. Fishers from areas outside Port Orford—some vessels displaced from California, which has more-stringent inshore rules—entered the reef fishery.³¹ The community worked with the Oregon Department of Fish and Wildlife (ODFW) and the state legislature to develop a limited-entry program to protect against overcapacity in 2003.³²

Although a portion of the Port Orford fleet fishes black cod, tuna, and salmon in both state and federal waters, rockfish species inhabiting the reef in nearshore waters are an important target for the fleet.³³ Because all the vessels in the Port Orford fleet are less than 40 feet in length, many do not venture far offshore or up the coast.³⁴ The four dozen vessels in the Port Orford fleet belong to local families who fish for a living. All the boats are owner-operated. Port Orford is unique in that the fishers actually hoist the vessels out of the water every day to protect them from the severe weather, a practice that the community began in the 1800s. The “port” is a parking lot. Because there is limited space on the dock for gear or to accommodate vessel repair, most Port Orford fishers put their boats on trailers and tow them home to work on them, using a broom to raise utility wires in town to get the boats down the street.

Fishing opportunity, both commercial and recreational, across the Pacific coast has diminished sharply in recent years as a result of the decline of certain groundfish species. Fishing quotas have been reduced to allow for rebuilding, but managers are trying to reduce fishing capacity as well. Port Orford’s longline fleet has been severely affected by the decline in Pacific coast groundfish. All the current proposals under consideration for quota or rights-based

²⁹ Golden, *supra* note 2 at 5.

³⁰ See Section I for a discussion of state and federal management regimes.

³¹ Interview with Leesa Cobb (September 19, 2007). Notes on file with author.

³² Oregon Legislature, 2003, <http://www.leg.state.or.us/03reg/measures/hb3100.dir/hb3108.en.html>.

³³ Not only do rockfish tend to remain on their reefs, but biologists now believe that there are separate, very localized populations of several rockfish species off the Washington and Oregon coasts. See, e.g., S.A. Berkeley, M.A. Hixon, R.J. Larson, and M.S. Love (2004). *Fisheries sustainability via protection of age structure and spatial distribution of fish populations*. *Fisheries* 29(8):23-32.

³⁴ The Port Orford fleet stays within 18 miles of shore, except for when boats are fishing for tuna, when they may travel as far as 100 miles out to sea. The Port can accommodate vessels with a maximum length of 44 feet and maximum width of 15 feet. Ecotrust, *supra* note 20, at 3.



The “port” at Port Orford is a parking lot. Boats are hoisted out of the water daily and placed on trailers, a practice that has been going on since the 1800s.

programs to reduce effort in the west coast groundfish fisheries, however, are aimed at the trawl fleet, so none of those proposed measures would be available to Port Orford’s fleet.³⁵

Since 2002, a project to develop community-based management for the Port Orford ocean area has been underway. POORT works with most boat owners in the community, and a number of vessel owners have volunteered to serve on POORT’s all-fisherman advisory board. The organization’s community advisory board includes Port Orford’s planning commissioner, as well as representatives from the port, the city council, and the chamber of commerce.³⁶ It has received support from Oregon State University, Oregon Department of Fish and Wildlife, NOAA Fisheries, and Oregon’s Coastal Zone Program. The group has enlisted the partnership of other conservation organizations in its vision, including Pacific Marine Conservation Council, EcoTrust, Surfrider and others.³⁷ The fishermen and community members who share POORT’s vision for the marine stewardship area see sustainability as a set of behaviors and practices that protect local stocks for the long term, prevent fishery collapses, and keep “common species common.” Such practices include both protection and restoration of habitat, and protection of forage fish and prey species as well as commercially valuable stocks.

The project has held community meetings, set up a local office, conducted port sampling for nearshore rockfish, donated hundreds of pounds of fish fillets to the local food bank, convened a science advisory committee, and developed a data base of local scientific and user

³⁵ The fixed gear fleet, which includes Port Orford’s longline vessels, did receive approval in 2001 for a permit stacking program for sablefish. The program enabled limited entry permit holders to combine up to three permits (“stacking”) as a way to reduce effort. See Amendment 14 to the Oregon Groundfish FMP. 66 Fed. Reg. 41152 (August 7, 2001).

³⁶ Pers. comm. Leesa Cobb (Sept. 19, 2007).

³⁷ A listing of reports and studies conducted by these partners in support of the Stewardship Area is included as Appendix D.

information on the area's marine resources. One of the greatest concerns in Port Orford is the inappropriate scale of information collection by the management agencies, both the NOAA Fisheries and the State of Oregon. According to Leesa Cobb, the community of Port Orford is fishing on a discrete ecosystem. Yet, the regulations for catch limits are governed by coast-wide trawl survey data measured hundreds of miles away, even though trawl survey tactics don't work on a high relief like the Orford Reef. In response, one of the major elements of the Port Orford CBFM project has been to collect, consolidate and combine information from a variety of sources to develop a more accurate picture of the area's marine resources. The project has collected existing scientific data from NOAA nautical charts, used a local vessel to complete with



The Port Orford Ocean Resource Team office

ODFW a sidescan sonar survey of the Orford Reef, pulled several years of data from the ODFW nearshore rocky shores inventory, obtained a bathymetric grid and geologic habitat map from OSU, and gathered other data sets using internet sources. In addition, the project collected experiential knowledge about the Port Orford ocean area from commercial fishers, fish buyers, recreational fishers, bird watchers, divers, kayakers, and others, using data from interviews about the spatial distribution of various marine

resources and human uses to develop a GIS process that has documented local resource use and created a baseline community inventory of biological resources and human activities.

In May 2007, in cooperation with the Pacific Marine Conservation Council, Port Orford hosted a Fisherman's Knowledge Exchange, bringing together fishermen who are currently involved in area-based management projects in other regions.³⁸ The meeting provided numerous options for how the Port Orford fleet might approach managing its stewardship area. Representatives from the State of Oregon cautioned during the meeting that while ODFW might be open to efforts in collaborative stewardship, co-management of public resources was probably not on the table because in its view, the terminology has become associated with issues specifically stemming from disputes over tribal treaty rights.³⁹

In July 2007, Oregon announced its intent to create a network of marine reserves along the coast as part of "an overall strategy to manage marine waters and submerged lands using

³⁸ Participants included fishermen and community advocates representing the Maine based Area Association of California; the Island Institute; Environmental Defense; Oregon Department of Fish and Wildlife and Oregon State Police Marine Patrol.

³⁹ See *infra* notes 21-24 and accompanying text in Appendix A (discussing tribal treaty rights and the *Boldt* decision).

an ecosystem-based approach.”⁴⁰ Since then, Oregon Gov. Ted Kulongowski has issued a statement requesting that OPAC propose no more than 10 potential reserve sites under this program, and reiterated the state’s commitment to work with coastal communities throughout the reserve designation process.⁴¹ The proposed process initially anticipated publication of goals and objectives in fall 2007 and called for nominations of areas by spring 2008.⁴² Although the timeline for developing goals and objectives was extended, the deadline for reserve nominations was projected for Spring 2008. Port Orford stewardship area proponents are taking a close look at this process, examining questions of access, zoning and other issues, as another potential tool to create both the policy and conservation space they seek.

In the meantime, interviews with the fleet and other community stakeholders in summer 2007 focused on specific objectives for a stewardship area and how proposals might be developed to tackle those issues. The process resulted in a stewardship area plan completed in January 2008.

Regardless of what path the community takes, or what tools it employs, proponents of the stewardship area wanted to know what a community can do with area designation and management.

This project was proposed to review and describe the current near-shore marine management policies and laws of the state of Oregon and related federal policies and laws regarding community-based fishery



The position closest to the hoist on the dock is awarded to the oldest fisherman in Port Orford. Though Jack Guerrin is retired, his daughter Mary Linda fished his boat until recently.

⁴⁰ Marine Reserve Working Group, Ocean Policy Advisory Committee, MARINE RESERVE NOMINATION GUIDELINES INFORMATION SHEET (July 13, 2007) [*hereinafter* MRWG GUIDELINES].

⁴¹ Gov. Theodore Kulongowski, *Statement to Oregon Fishing Industry Representatives* (Nov. 1, 2007).

⁴² The program, as initially conceived, envisioned nominations for areas to be both included in, and excluded from, designation as marine reserves. *Id.* OPAC later reconsidered accepting proposals for excluded areas, and as of December 2007, the provision allowing proposals to explicitly exclude areas from reserve designation had been eliminated. Draft Summary of Nov. 30, 2007 OPAC meeting. Available online at http://www.oregon.gov/LCD/OPAC/meetings_shtml.

management to support various projects of the Port Orford Ocean Resource Team (POORT), Ecotrust, the Pacific Marine Conservation Council and Surfrider. The objective was to investigate whether the laws of Oregon and the U.S. would permit the community of Port Orford to pursue its community-based management vision.

Section I provides the legal framework for fishery management in the United States and the State of Oregon. Section II examines the framework for coastal management. Section III analyzes the objectives of the Port Orford fleet and community within the current framework, explores several possible approaches to achieving community-based fishery management and describes where policy or legal gaps exist. Section IV makes recommendations on how Port Orford might develop the four most promising approaches. In the conclusion, the authors discuss how these approaches are applicable to other coastal and fishing communities in the United States.



Glen Burkhow aboard the Eagle III

Section I. Legal Framework for Fishery Management

Fishery management in the United States is spread among several jurisdictions: federal, state, and international. Because fish populations often overlap jurisdictions, management is shared among several states, between the federal government and the states, or between the federal government and other countries through bilateral or multilateral agreements. Ocean resources are considered public trust resources, and are open to access by all citizens.

Since 1976, the United States has asserted authority over all living marine resources within 200 miles of its shores. Within this larger zone, the federal government has exclusive management authority for fisheries that occur in the so-called U.S. Exclusive Economic Zone or EEZ. The EEZ is that area of the ocean that extends from the seaward boundaries of the coastal states (3 nautical miles, in most cases) to 200 miles off the coast of the United States. (Texas, the Florida Gulf Coast, and Puerto Rico have fishery jurisdictions extending nine nautical miles offshore.) The individual states exercise management authority over fisheries that occur within their territorial waters, both fresh and saltwater. Interstate compacts and commissions on the Atlantic, Gulf, and Pacific coasts provide coordination for shared resources among the states.

This section describes the federal and state legal regimes for fishery management off Oregon's coast. Generally, the state has authority over fisheries out to three miles, and the federal government has authority from 3 to 200 miles. Oregon also asserts a state interest in fishery resources out to 50 miles (ORS §506.755). Along with the material presented below, Appendix A contains a description of the federal agency structure. The Pacific States Marine Fisheries Commission, the Northwest Indian Fisheries Commission and case law related to the Boldt Decision, which also apply to fishery management, but are not directly applicable to the options analyzed for Port Orford in this report also are summarized in Appendix A. Other federal laws, such as the Endangered Species Act, Marine Mammal Protection Act and the National Environmental Policy Act,⁴³ affect fishery management, but will not be discussed in detail here.

Magnuson Fishery Conservation and Management Act

A turning point in the evolution of commercial and recreational fishing in the United States was the passage of the Magnuson Fishery Conservation and Management Act (MSA). Before passage of the Act by Congress in 1976, most regulation of fisheries was carried out by individual states and focused on fisheries within state waters—that is, within three miles of shore, except off western Florida, Texas, and Puerto Rico where the boundary is roughly nine miles offshore.⁴⁴

⁴³ It should be noted that the recent amendments to the Magnuson Act call for substantial effort by NOAA Fisheries and the President's Council on Environmental Quality to integrate and coordinate requirements of NEPA and M-SA in fishery management planning. Public comment on the process is posted on a website at <http://www.nmfs.noaa.gov/msa2007/publiccomments.htm>. No final rule was issued following publication of a proposed rule and comment period. 73 Fed. Reg. 27998 (May 14, 2008).

⁴⁴ A description of the administrative structure of fishery management is provided in Appendix A.

The purpose of the MSA was to prevent overfishing, especially by foreign fleets, and to allow overfished stocks to recover. It “Americanized” the fishing off the U.S. coast by establishing the Fishery Conservation Zone to exclude foreign fishing vessels.⁴⁵ This zone was later expanded to include activities besides fishing, and a U.S. Exclusive Economic Zone (EEZ) was declared in 1983.⁴⁶ Although some fish stocks recovered, such as Atlantic herring and mackerel, the initial FCMA essentially replaced foreign overfishing with domestic overfishing.⁴⁷ The Magnuson Act created the fishery management council system and set standards by which these bodies would manage fisheries in their regions. The national standards (as amended) are provided in the box at right.

In the 30 years since the law was implemented, every Congress but three⁴⁸ has amended or reauthorized some aspect of American fishery management. Significant reform occurred in 1996 with passage of the Sustainable Fisheries Act⁴⁹ (renaming the FCMA the Magnuson-Stevens Fishery Conservation and Management Act)⁵⁰ and in 2006 with further directives from Congress to halt overfishing.

The Sustainable Fisheries Act of 1996 addressed overfishing in the national standards, definitions and requirements for councils, and in fishery management plans. The law was amended to prohibit fishing more than maximum sustainable yield for economic or social reasons and mandated that fishery management plans define overfishing using “objective and measurable criteria for when the fishery . . . is overfished.” (16 U.S.C. 1853(a)(10)). The Sustainable Fisheries Act gave councils deadlines for updating their fishery management plans, for stopping overfishing, and rebuilding depleted fisheries. Without council action, the Secretary of Commerce was mandated to step in to take conservation measures.

While the FCMA was previously silent on the issue of bycatch, the Sustainable Fisheries Act included a definition of bycatch and a new national standard calling for action to avoid bycatch or minimize it where it cannot be avoided.⁵¹ Bycatch reduction is now part of required conservation and management measures in all fishery management plans.

⁴⁵ 16 U.S.C. §1821, Pub. L. 95-354 (1976).

⁴⁶ Presidential Proclamation 5030, Exclusive Economic Zone of the United States of America. 48 Fed. Reg. 10605 (March 10, 1983).

⁴⁷ M. Weber, *FROM ABUNDANCE TO SCARCITY* (2002), at 177-178; J.P. Wise, *FEDERAL CONSERVATION AND MANAGEMENT OF MARINE FISHERIES OF THE UNITED STATES* (1991) at 7.

⁴⁸ The 103rd Congress began the reauthorization process that resulted in the 1996 amendments; numerous bills were introduced in the 107th and 108th Congresses, but none enacted.

⁴⁹ See S. Iudicello, *Overfishing Lures Legislative Reforms*. FORUM FOR APPLIED RESEARCH AND PUBLIC POLICY (1996) at 19-23; Iudicello et al, *Putting Conservation into the Fishery Conservation and Management Act: the Public Interest in Magnuson Reauthorization*, TULANE ENVTL. L. J. (1996), 339-347.

⁵⁰ The Office of Sustainable Fisheries website (<http://www.nmfs.noaa.gov/sfa/>) provides a summary of the law. See also, *Implementing the Sustainable Fisheries Act: Achievements 1996 – Present*, National Marine Fisheries Service, NOAA (June 2003).

⁵¹ 16 U.S.C. §1802 (2) defines bycatch. The national standards state that conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch. 16 U.S.C. §1851a(9).

Protection of essential fish habitat was explicitly cited as a purpose of the law, and the SFA required councils to develop measures to identify and protect essential fish habitat in fishery management plans by minimizing, to the extent practicable, the effects of fishing on EFH.⁵² The National Marine Fisheries Service conducted an extensive public process to begin the task of identifying essential fish habitat and published interim final rules in late 1997.⁵³ In 2000, several environmental and fishing groups filed suit to challenge a number of the plans, and a federal district judge in the District of Columbia held that while the EFH provisions complied with the Magnuson Act, the Environmental Assessments for the plans violated the National Environmental Policy Act (NEPA) because they did not consider sufficient alternatives.⁵⁴ The Pacific Fishery Management Council description and identification for essential fish habitat for Pacific Coast groundfish was initially approved in 1999. Among the plans challenged in 2000, it was reissued in 2006 as part of Amendment 19 to the groundfish management plan.⁵⁵ The designation of HAPC included estuaries, canopy kelp, seagrass, rocky reefs and several discrete areas of interest linked to specific considerations. Areas off Oregon where specific gear prohibitions (no bottom contact gear) were promulgated were Thompson Seamount and President Jackson Seamount.⁵⁶

Although there is no requirement for ecosystem-based approaches to management, the 1996 amendments called for a report to Congress on the topic. That report and other emphasis on ecosystem approaches led to formation of a task force that produced guidelines for ecosystem-based approaches to fishery management. The notion that fisheries should be managed as part of a larger whole was not new with the 1996 amendments but the requirement for the report to Congress⁵⁷ led to specific action. NMFS published strategic guidance for ecosystem-based management approaches, sponsored workshops and symposia, and several councils incorporated or are beginning to incorporate ecosystem considerations into their planning documents. The Pacific Council has held joint sessions of its habitat committee and ecosystem-based fishery management interests, reviewed the state of the science, practices in other regions and summarized current and potential steps to move toward an ecosystem-based approach.⁵⁸

⁵² 16 U.S.C. §1853a(7); 16 U.S.C. §1855b(1)-(4).

⁵³ 62 Fed. Reg. 66531-66559 (Dec. 19, 1997).

⁵⁴ *American Oceans Campaign v. Daley*, Civil Action No. 99-982(GK) (D. D.C. 2000) alleged that the New England, Gulf of Mexico, Caribbean, Pacific and North Pacific councils did not meet the EFH requirements of the law; see 67 Fed Reg 5962, 5963 (Feb 8 2002) (responding to the court's directive to complete a sufficient NEPA analysis for Amendment 11 to the Pacific Groundfish FMP).

⁵⁵ 71 Fed. Reg. 27,408 (May 11, 2006). Descriptions of essential fish habitat, maps, descriptions of fishing gear impacts, and location of conservation areas are included as appendices to the final environmental impact statement and are available online at www.pcouncil.org/groundfish/gffmp/gfa19.html

⁵⁶ NMFS Northwest Region. RECORD OF DECISION, *Final Environmental Impact Statement for Essential Fish Habitat Designation and Minimization of Adverse Impacts*. Notice of Availability 70 Fed. Reg. 73233 (Dec. 9, 2005).

⁵⁷ D. Fluharty, Chair, Ecosystems Advisory Panel, *Report to Congress* (1998).

⁵⁸ PFMC, Supplemental Attachment 4 (April 2007) *Draft Summary Minutes of a Joint Session of the Habitat Committee and the Ecosystem Based Fishery Management Subcommittee of the Scientific and Statistical Committee* (Nov. 14 2006).

A national standard calling for analysis of the effects of fishery management measures on fishing communities was added late in the deliberations on the Sustainable Fisheries Act. Disputes among members about what was a “fishing community” nearly jeopardized passage of the reforms in 1996. The original intent of House-proposed language was to recognize and protect small, family-owned operations, particularly on the west coast where the effects of the new overfishing provisions were certain to cause economic hardship for the groundfish fleet.⁵⁹ An eventual understanding was achieved that “community” included any place “where vessel owners, operators, and crew or U.S. fish processors are based.”⁶⁰

The national standard required managers to “take into account the importance of fishery resources to fishing communities to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such

NATIONAL STANDARDS

1. Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield (see Glossary) from each fishery for the United States fishing industry.
2. Conservation and management measures shall be based on the best scientific information available.
3. To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and inter-related stocks of fish shall be managed as a unit or in close coordination.
4. Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.
5. Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources, except that no such measure shall have economic allocation as its sole purpose.
6. Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.
7. Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.
8. Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data that meet the requirements of paragraph (2), in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.
9. Conservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.
10. Conservation and management measures shall, to the extent practicable, promote safety of human life at sea.

⁵⁹ See, e.g., statement of Rep. George Miller at H11441 Cong. Rec. (Sept. 27, 1996). The concern arose over differences of opinion about whether a “fishing community” included the ports of distant water fleets. Statement of Sen. Slade Gorton at S10814 Cong. Rec. (Sept. 18, 1996).

⁶⁰ See NOAA Fisheries legislative history at <http://www.nmfs.noaa.gov/sfa/sfaguide/102.htm>.

communities.” Floor managers for the legislation, and later NMFS in its guidance on implementation of the new law, were careful to point out that consideration of the economic impacts of management on fishing communities took a back seat to conservation standards such as stopping overfishing or rebuilding stocks. “Deliberations regarding the importance of fishery resources to affected fishing communities, therefore, must not compromise the achievement of conservation requirements and goals of the FMP.”⁶¹ Of particular relevance to this report is the further explanation in agency guidance that “This standard does not constitute a basis for allocating resources to a specific fishing community nor for providing preferential treatment based on residence in a fishing community.” Guidance goes on to call for socioeconomic impact analysis

as part of fishery management plan development, describes data requirements for making such analyses, and demands both long and short term impact analysis of various management alternatives.⁶²

The most recent reauthorization, called the Magnuson Stevens Reauthorization Act (MSRA) was completed in late 2006 and signed into law in January 2007.⁶³ The new law requires the regional fishery management

councils to develop annual catch limits for all fisheries that are based on scientific recommendations and at a level that prevents overfishing. It requires scientific and statistical committees of the councils to provide recommendations for fishing levels and to disclose financial conflicts of interest. Fishery managers are directed to develop rebuilding plans that end overfishing immediately, and will be held accountable if they allow annual catch limits to be exceeded. A strengthened habitat protection measure authorizes councils to restrict the use of destructive fishing gear in areas containing deep sea coral habitat. The law also requires the



Glenn Burkhow and Blaine Steinmetz offload the day's catch of black cod at the Port Orford dock.

⁶¹ 62 Fed. Reg. 41918, Aug. 4, 1997.

⁶² NMFS had been criticized for many years for its lack of capacity to conduct socioeconomic impact analysis. Whether it was the demands of National Standard 8, recommendations of several external reviews, or a string of losses in litigation, the agency has since beefed up its staff and work in the areas of economics, sociology and anthropology. The reauthorized M-SA explicitly sets a standard of “best available” for social sciences as it previously had for biological science in a revision of National Standard 8 (16 U.S.C. §1861(a)(8)).

⁶³ Magnuson-Stevens Fishery Conservation and Management Act, as amended through Jan. 12, 2007. Pub. L. 109-479, U.S.C. §1801 et. seq.

Secretary of Commerce to establish a nationwide, regionally-based cooperative research and monitoring program.

Along with new requirements for annual catch limits, integration of NEPA and management plan procedures and international measures, the amendments include extensive provisions aimed at increased application of rights-based programs, including limited access privilege programs (LAPPs).⁶⁴ The LAPP provision includes new standards that affirm public ownership of the fish resources in U.S. waters, periodic reviews of the programs, measures to protect small-boat fishermen's access to fisheries, and specifies a term limit of 10 years on quota shares.

Of potential interest to Port Orford are provisions that provide for "sustainability plans" that may be developed by fishing communities.⁶⁵ Not only did Congress address many of the concerns that interest groups raised about access privileges and quota share programs, but it also took special note of fears of consolidation and the potential for quota programs to "ignore the community and next-generation fishermen who were not part of the initial allocation and could be forever priced out of the fishery."⁶⁶ Accordingly, the MSRA now provides for limited access privilege program shares to be issued to communities and regional fishing associations.⁶⁷ To do so, the community must "develop and submit a community sustainability plan to the Council."⁶⁸

The NMFS published a call for comments on guidelines for LAPP programs, but the guidelines were not published as of March 1, 2008.⁶⁹ POORT submitted comments, which are included as Appendix F. The agency has stated it will classify 11 current quota programs as LAPPs, and expects six more to come on line including the West Coast Trawl Groundfish IFQ under development.⁷⁰ As of this writing, further action on guidelines had been postponed in

⁶⁴ 16 U.S.C. §1853 (a).

⁶⁵ 16 U.S.C. §1853a (c)(3)(A).

⁶⁶ S.Rpt.109-229 at 25. The intent of Congress regarding the kind of communities for which this provision is designed is spelled out in report language: The Committee intends the Councils to consider as "traditional" those uses that pre-date contemporary commercial fishing in smaller, isolated communities that can demonstrate historic dependence on combination fisheries or participation in the fishery during years that may not fall within the qualifying period for individual LAPPs. S.Rpt.109-229 at 27.

⁶⁷ S.Rpt at 27.

⁶⁸ 16 U.S.C. 1853a(c)(3)(A)(IV). The council must consider criteria for participation by eligible communities, including:

- Traditional fishing or processing practices.
- Dependence on the fishery.
- Relevant social and cultural framework.
- Economic barriers to access.
- Existence and severity of projected economic and social impacts associated with implementation of limited access privilege programs.
- Expected effectiveness, transparency and equitability of the plan; and
- The potential for improving economic conditions in remote coastal communities. (16 U.S.C. §1853a(c)(3)(B) (i)-(vi)).

⁶⁹ An update on the LAPP website posted April 23, 2008, stated: NOAA Fisheries is analyzing the comments, and evaluating the legal, technical and policy implications, as it determines the topics that will be addressed in the national guidance.

⁷⁰ Available online at <http://www.nmfs.noaa.gov/sfa/PartnershipsCommunications/lapp/index.htm>.

deference to other priorities.⁷¹ A set of core principles, based on a 2005 GAO examination of stakeholder participation in limited access programs include the following:

- Use an open and clearly defined decision-making process;
- Make key information readily available and understandable;
- Actively conduct outreach and soliciting stakeholder input;
- Involve stakeholders early and throughout the decision-making process;
- Foster responsive, interactive communication between stakeholders and decision makers;
- Use formal and informal participation methods; and
- Include all stakeholder interests.⁷²

Oregon Fishery Management Framework

Authority to manage fish and wildlife matters is one of the fundamental states' rights created with statehood and affirmed by the courts over the years.⁷³ Like many coastal states, Oregon has a framework that includes general policy statements, statutes providing for specific actions or programs, delegation of authority to an agency, research, planning and enforcement by the agency, promulgation of regulations by an appointed commission, and provision for stakeholder participation in commission action.

Commercial fisheries in Oregon are governed by Chapter 506, Title 42 of the state code, Oregon Revised Statutes. Policy statements on fisheries can be found in the Territorial Sea Plan and in a statement of policy made by the Legislative



Angler fishes from the rocks just off Port Orford harbor.

⁷¹ Agency statement available online at <http://www.nmfs.noaa.gov/msa2007/limitedaccesspp.htm>

⁷² GAO Report and principles available online at <http://www.nmfs.noaa.gov/sfa/PartnershipsCommunications/lapp/index.htm>.

⁷³ When the FCMA was enacted in 1976, it was explicit in affirming that federal fishery management did not pre-empt state fishery management within state waters. 16 U.S.C. 1856(a) (1976). For a more detailed look at the origins of state wildlife and fishery management law, see, M.J. Bean, M.J., THE EVOLUTION OF NATIONAL WILDLIFE LAW(1983) at 10-44 or B.J. McCay, OYSTER WARS AND THE PUBLIC TRUST(1998).

Assembly declaring the “special interest” the State of Oregon has in maintaining the health and productivity of its marine resources. (506.750 [1974 c.3 §1]) ORS 496.090 creates the Fish and Wildlife Commission and 496.124 establishes a Fish Division within the Department of Fish and Wildlife. The duties and authority of the commission are specified in the statute, including authority to set seasons, limits, manner of harvest in regulations. Statutes define conservation, set up the licensing and limited entry⁷⁴ programs for Oregon fisheries, specify closed areas,⁷⁵ provide for enforcement of regulations and set amounts of penalties. The Marine Resources Program of ODF&W is responsible for monitoring, sampling, research and management of commercial and recreational marine fisheries. Management measures for specific fisheries, such as gear requirements, seasons, area closures, handling and reporting requirements, and other measures are found in regulations published by the department.⁷⁶

ODFW Framework / Nearshore Groundfish Strategy

Port Orford fishermen hold 37 of the state’s 72 nearshore permits,⁷⁷ and POORT has been involved in the ongoing development of the state’s Nearshore Groundfish Strategy. The Oregon Department of Fish and Wildlife (ODFW) Marine Resources Program developed a Nearshore Groundfish Strategy (NGS) in response to the 2002 federal State Wildlife Grants Program.⁷⁸ The NGS was conceived to provide management recommendations with ODFW’s jurisdiction as “a first step in examining nearshore fish and wildlife management issues in a broader social and ecological context.”⁷⁹ The Oregon Fish and Wildlife Commission approved *Oregon’s Nearshore Marine Resources Management Strategy* in December 2005, and ODFW has since been engaged in planning for the Nearshore Strategy’s implementation.⁸⁰

The NGS describes Oregon’s “key” nearshore habitats and resources, factors that affect each habitat, and the human uses dependant upon each.⁸¹ For purposes of the NGS, “nearshore ocean” is defined to encompass the area from the mean high-tide line offshore to a depth of 30 fathoms. At Port Orford, this line falls well inside the state three-mile territorial sea

⁷⁴ Oregon first limited entry to ocean salmon troll fisheries in 1980. Limited entry now applies to Columbia river salmon (508.775), ocean troll salmon (508.801), pink shrimp (508.880), Dungeness crab (508.921), scallop (508.840), sea urchin (508.760), black/blue rockfish (508.945), black/blue rockfish with nearshore endorsement (508.951), roe-herring, bay clam, sardine (508.960).

⁷⁵ Commercial fishing is prohibited in certain streams and rivers, including several in Curry County. ORS511.306.

⁷⁶ A summary of regulations, as well as the complete Oregon Administrative Regulations, are available online at <http://www.dfw.state.or.us/fish/commercial>.

⁷⁷ Port Orford Ocean Resource Team, Fishermen’s Board Consensus Statement, Sept. 27, 2007, <http://oceanresourceteam.northcurry.net/?m=200709>.

⁷⁸ The Department of Interior and Related Agencies Appropriations Act of 2002 provided \$80 million in State Wildlife Grants to be distributed by the U.S. Fish & Wildlife Service. 115 Stat. 414, Pub. L. 107-63. To be eligible, states were required to submit a Comprehensive Wildlife Conservation Plan, or a commitment to develop such a plan, to the U.S. Fish & Wildlife Service by Oct. 1, 2005.

⁷⁹ Oregon Department of Fish & Wildlife, THE OREGON NEARSHORE STRATEGY 6-7 (2005) [hereinafter NEARSHORE STRATEGY], available at <http://www.dfw.state.or.us/MRP/nearshore/strategy/Strategy.pdf>.

⁸⁰ Oregon Department of Fish & Wildlife, Nearshore Resources Planning Project, <http://www.dfw.state.or.us/MRP/nearshore/strategy.asp>.

⁸¹ NEARSHORE STRATEGY, supra note 79, at 89.

boundary.⁸² The NGS identifies fifty-three “strategy species” as those species present in the state’s nearshore environment that are in greatest need of management attention.⁸³ The NGS makes 16 recommendations for ODFW to take action in nearshore groundfish management, divided between three categories: Education and Outreach, Research and Monitoring, and Management and Policy. Management and Policy recommendations include developing a Nearshore Commercial Fishery Management Plan (in development); developing Native Fish Conservation Plans (as part of the state Native Fish Conservation Policy); reviewing the Recreational Groundfish Fishery Management; Estuarine Fish and Wildlife Management; Shellfish Conservation and Harvest Management Plan; and Interagency Management Coordination.⁸⁴

To implement the NGS, ODFW has focused on the strategy’s recommendations, in particular Recommendation 12, which recommends developing a Commercial Nearshore Groundfish Plan. An interim plan adopted in 2002 is in place, but developments since the plan’s adoption, including limited entry in some fisheries, has spurred ODFW to concentrate on developing a new plan. In revising the Commercial Nearshore Groundfish Plan, ODFW is developing a single plan that will address the state’s need for a Recreational Groundfish Plan (as suggested in NGS recommendation 13) and a Shellfish Management Plan (suggested by recommendation 15), along with a commercial plan. As of October 2007, ODFW had developed a draft framework for a comprehensive plan, which addresses which fish will be covered by the plan, explores the statutory framework the state must operate under, explains the public participation elements in plan development, and lays out guidelines for consistency.

ODFW plans to write individual sector fishery management plans based on this framework, starting with the commercial fishery sometime in 2008. As of October 2007, ODFW was in the process of holding scoping meetings, processing industry feedback, developing a draft, and planning for an industry and advisory committee. The draft framework is currently in revision and unavailable to the public. It was to be presented to the state Fish and Wildlife Commission in December 2007,⁸⁵ but the minutes of the meeting did not indicate any action.⁸⁶

Oregon Marine Heritage Reserves

In June 2007, the Governor’s Natural Resources Office announced an initiative to develop a system of Marine Heritage Reserves in the state’s coastal waters. Marine reserves have been defined by the state to an area within the state’s territorial sea protected from “all

⁸² NEARSHORE STRATEGY, *supra* note 79, at 25.

⁸³ NEARSHORE STRATEGY, *supra* note 79, at 26-27. The NGS also identified a number of “watch species” that were not considered to be in need of immediate management attention, but may require future state management action. *Id.* at 31.

⁸⁴ NEARSHORE STRATEGY, *supra* note 79, at 97-100.

⁸⁵ Telephone conversation with Cristin Don, Interim Habitat & Nearshore Project Leader ODFW Marine Resources Program (Oct. 12, 2007).

⁸⁶ Minutes of Oregon Fish and Wildlife Commission, Salem, Oregon (Dec. 6-7, 2007). Available online at <http://www.dfw.state.or.us/agency/commission/minutes/07/december/index.asp>

extractive activities.”⁸⁷ The objectives to be accomplished by this system of marine reserves include designing reserves “to help sustain, conserve and protect marine life populations, including those of economic value, and rebuild those that may be depleted.”⁸⁸ The state will accept proposals for reserves from individuals, groups, and agencies between October 2007 and April 2008, which will be reviewed by OPAC, after a Science and Technical Advisory Committee presents alternatives to the Marine Reserve Working Group, and the Governor’s office is slated to make its final determinations in fall 2008. As of March 2008, POORT was making plans to nominate one or more reserve sites.



View off Port Orford beach toward the area that has been nominated in the Oregon Marine Reserves Process

⁸⁷ MRWG GUIDELINES, *supra* note 40.

⁸⁸ Draft Oregon Marine Reserve Objectives for the OPAC Marine Reserve Working Group Meeting (July 16, 2007) [*hereinafter* MR OBJECTIVES].

Section II. Legal Framework for Coastal Management

This section describes federal and state laws governing coastal resources, management and planning, specifically, the Coastal Zone Management Act and Oregon statutes and programs implementing that federal policy.

Coastal Zone Management Act Overview

Congress enacted the Coastal Zone Management Act (CZMA) of 1972⁸⁹ to protect resources in the nation's coastal zone⁹⁰ by "encourag[ing] and assist[ing] the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone."⁹¹ Congressional policies promoted through this legislation included supporting programs that provide for protecting natural resources in the coastal zone, such as fish and wildlife, as well as their habitat;⁹² managing development to protect natural resources and existing uses of coastal waters;⁹³ supporting comprehensive planning, conservation and management of living marine resources;⁹⁴ encouraging the development of special area management plans (SAMPs) to protect "significant natural resources;"⁹⁵ and encouraging members of the public, as well as state and local governments, to participate in programs designed to carry out the purposes of the CZMA.⁹⁶

Congress enacted the CZMA to address concerns about unclear divisions between local, state, and federal jurisdiction over coastal resources, a situation that stymied earlier efforts to place checks on the increasing pressures on coastal resources during the 1960s. To address these problems with coastal management, Congress first passed the Marine Resources and Engineering Development Act of 1966,⁹⁷ establishing the Commission on Marine Science, Engineering and Resources (the Stratton Commission). The CZMA grew out of the Stratton Commission's report, which concluded that ineffective state management was the primary problem in the coastal zones, and the most effective way to resolve this problem on the federal side would be to encourage state action through funding incentives and other cooperative

⁸⁹ 16 U.S.C. §§1451-1465, Pub. L. 92-583 (October 27, 1972) .

⁹⁰ The CZMA defines "coastal zone" to include "the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches ... The Zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters, and to control those geographical areas which are likely to be affected by or vulnerable to sea level rise." 16 U.S.C. § 1453(1).

⁹¹ 16 U.S.C. § 1452(2)

⁹² *Id.* § 1452(2)(A).

⁹³ *Id.* § 1452(2)(C).

⁹⁴ *Id.* § 1452(2)(J).

⁹⁵ *Id.* § 1452(3). See also notes 118-127 and accompanying text (discussing SAMPs).

⁹⁶ *Id.* § 1452(4).

⁹⁷ 33 U.S.C. §§ 1101 et. seq.

management mechanisms.⁹⁸ The CZMA differs significantly from other landmark federal environmental laws that Congress enacted during the same era, such as the Clean Water Act or Clean Air Act, by providing incentives for states to develop and administer coastal management programs but making no requirement that states develop their own programs.⁹⁹

The Federal Consistency Requirement

In addition to funding incentives, which have decreased over the last thirty years, the CZMA also includes a federal consistency requirement, which requires federal activities that affect the coastal zone must be consistent with state coastal management programs developed under the CZMA.¹⁰⁰ The CZMA definition of “coastal zone,” however, excludes land “which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers, or agents.”¹⁰¹ When a mining company challenged California’s authority to impose environmental conditions pursuant to the state CZMA on mining activities conducted according to federal regulations on national forest land, the Supreme Court, in *California Coastal Commission v. Granite Rock*, held that “even if all federal lands are excluded from the CZMA definition of coastal zone the CZMA does not automatically preempt all state regulation of activities on federal lands.”¹⁰² Because the Court concluded that the federal laws regulating the mine were best characterized as “land use” regulations, they did not preempt state “environmental” regulations which required the activity to be conducted in a manner that caused the least amount of environmental damage possible.¹⁰³ The Attorney General of Oregon filed an *amicus* brief in support of the California Coastal Commission.¹⁰⁴

Oregon’s Attorney General also filed an *amicus* brief in *Interior v. California*, in which the Supreme Court again addressed CZMA consistency determinations.¹⁰⁵ Here, the state of California filed suit against the Secretary of Interior, arguing that a proposed sale of oil and gas leases on the outer continental shelf was subject to the CZMA consistency requirements. The Supreme Court rejected California’s argument, noting that because lease sales authorized only preliminary exploration which “has no significant effect on the coastal zone,” and further, because the 1978 amendments to the OCSLA required consistency review only at the actual exploration and development stages of oil and gas deposits on the outer continental shelf.¹⁰⁶

⁹⁸ Joseph J. Kalo, et. al., COASTAL AND OCEAN LAW CASES AND MATERIALS 191 (2002).

⁹⁹ 16 U.S.C. § 1455.

¹⁰⁰ 16 U.S.C. § 1456(c).

¹⁰¹ 16 U.S.C. § 1453(1).

¹⁰² *California Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 593 (1987).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 575.

¹⁰⁵ 464 U.S. 312, 314 (1984).

¹⁰⁶ *Id.* at 342-43; 43 U.S.C. § 1340(c)(2). The CZMA also requires a consistency determination at the exploration and development stages of oil and gas leases. 16 U.S.C. § 1456(b).

The Court's holding that oil and gas leases were not subject to CZMA consistency review¹⁰⁷ was eventually reversed by Congress in the 1990 Coastal Zone Management Act Reauthorization Amendments. The 1990 Amendments provided a presidential exemption to final determinations that a proposed federal activity is inconsistent with a state CZMP.¹⁰⁸ They further required



An artist paints the view overlooking Port Orford harbor.

applicants for federal licenses and permits to conduct activities “in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone” to submit a “certification” that the proposed activity is consistent with the state program,¹⁰⁹ and required similar certification of any plans for exploration or development on the outer continental shelf.¹¹⁰

Off-shore oil and gas leasing on the outer continental shelf off the coast of Oregon was cancelled by President George H.W. Bush in a 1990 Executive Order. In 1998, an

Executive Order issued by President Clinton extended this cancellation through 2012 and permanently banned new leasing in National Marine Sanctuaries.

State CZMP Program Requirements

Coastal Zone Management Program requirements are detailed in §306 of the CZMA. To be approved under the CZMA, state coastal zone management programs must include the following elements: identify the boundaries of the coastal zone subject to the program; define permissible land and water uses within the coastal zone which have a “direct and significant” impact on the coastal zone; an inventory of areas of particular concern; identification of how the state intends to control land and water uses; guidelines on how uses are prioritized; description of the state’s organizational structure for implementing the management program; definition of the term “beach” and planning process for public access to beaches; planning process for energy facilities; a planning process for assessing the effects of and evaluating the ways to control shoreline erosion; the state has coordinated its program with local and regional plans; provides for “adequate consideration of the national interest involved in planning for, and

¹⁰⁷ *Id.* at 343.

¹⁰⁸ 16 U.S.C. § 1456(c)(1)(A).

¹⁰⁹ *Id.* at §1456(c)(3)(A).

¹¹⁰ *Id.* at § 1456(c)(3)(B).

managing the coastal zone” such as energy facilities; procedures where specific areas may be designated for preservation or restoration for their conservation, recreational, ecological, historical, or esthetic values; the program provides for inventorying and designating areas containing one or more coastal resources of national significance and provide standards for protecting such resources; and the management program provides for public participation in consistency determinations, permitting, and similar decisions.¹¹¹ Amendments or modifications of approved programs must be authorized by the Secretary before state implementation.¹¹²

CZMA History

The CZMA, which is administered by NOAA, has been amended a number of times in the 35 years following its enactment. In 1976, Congress amended the CZMA to address states’ failure to designate coastal areas suitable for energy development, created the Coastal Energy Impact Program to provide financing to coastal states affected by outer continental shelf energy development, and extended state consistency review authority to include offshore oil and gas exploration and development.¹¹³ In 1980, Congress reauthorized CZMA funding through 1985 and amended the CZMA to requires states to use up to 30 percent of their federal funds to further federal policies, including protecting coastal resources; controlling coastal development; site facilities related to national defense, energy, fisheries, recreation, and transportation; increase recreational access; redevelop damaged forestland; and assist in the management of living marine resources.¹¹⁴ The 1980 amendments also functioned to reduce the amount of grant money available to states, encourage states to develop SAMPs and made funding available for state programs aimed at inventorying and designating resources of national significance.¹¹⁵ The next set of amendments established procedures for reviewing changes in state coastal management programs, established the National Estuarine Reserve Research System (which evolved from the CZMA’s original National Estuarine Sanctuaries Program) and set requirements for designating estuarine reserves, and authorized federal grants to states for acquiring water rights and land rights necessary for long-term management.¹¹⁶

In 1990, Congress again reauthorized the CZMA and amended the consistency provisions to provide broad state authority¹¹⁷ and repealed the 1976 Coastal Energy Impact Program with the more limited Coastal Zone Enhancement Grant Management Fund, and created a new Coastal Zone Enhancement Grant Program to encourage states to improve plans

¹¹¹ 16 U.S.C. § 1455(d).

¹¹² 16 U.S.C. § 1455(e)(3). Not all changes to state programs require federal approval, however. Changes that are “routine program implementation” need not have federal approval, while an “amendment” which includes “substantial changes in, or substantial changes to enforceable policies related to” a coastal management program requires federal approval. 15 C.F.R. §§ 923.80-84.

¹¹³ Coastal Zone Management Act Amendments of 1976, Pub. L. No. 94-370.

¹¹⁴ Coastal Zone Management Improvement Act of 1980, Pub. L. No. 96-464.

¹¹⁵ *Id.*

¹¹⁶ Coastal Zone Management Reauthorization Act of 1985, Pub. L. No. 99-272.

¹¹⁷ This provision overturned the Supreme Court decision in *Interior v. California*. See *supra* notes 102-105 and accompanying text; 464 U.S. 312 (1984).

in several areas, including SAMPs and ocean resources planning.¹¹⁸ In 1996, amendments focused on promoting aquaculture.¹¹⁹ Most recently, in 2004, the CZMA was amended to address hypoxia and algal bloom.¹²⁰

Special Area Management Plans (SAMPs)

Special Area Management Plans (SAMPs) are strategic planning tools developed to address a specific management issue or set of issues in a specific geographic area which are authorized by the CZMA. SAMPs have been used to address a wide range of coastal management issues that were not adequately addressed by existing local, state, or federal policies, including watershed and resource management, water quality, coastal habitats, endangered species, economic development, hazards, and cultural resource preservation.¹²¹ A few SAMPs have included provisions addressing fishery resources. Because each SAMP is tailored to address a specific set of problems unique to a specific area, they vary widely from plan to plan, with some addressing a single issue, while others may take a more comprehensive approach and address a range of marine issues in a particular area. Successful SAMPs have strong support from local governments and citizens alike, and involve federal and state agencies with regulatory authority, as well as other interested stakeholder groups.¹²²

SAMPs originated in a 1980 amendment to the CZMA, where the term “special area management plan” was defined to mean “a comprehensive plan providing for natural resource protection and reasonable coastal-dependent economic growth containing a detailed and comprehensive statement of policies; standards and criteria to guide public and private uses of lands and waters; and mechanisms for timely implementation in specific geographic areas within the coastal zone.”¹²³ A funding mechanism for SAMPs was incorporated into the 1990 CZMA amendments as part of the Coastal Zone Enhancement grant program, where the definition of “coastal zone enhancement objective” was written to include “[p]reparing and implementing special area management plans for important coastal areas.”¹²⁴

Massachusetts’ Pleasant Bay Resource Management Plan, a SAMP adopted in 2003 addressing a wide range of issues, provides an example of a SAMP addressing fishery resources.¹²⁵ This SAMP also addresses water quality, habitat protection, wetland protection, watershed planning, shoreline structures, safety and navigation in waterways, access, and historic resources. The fishery component of the SAMP includes requirements for refining

¹¹⁸ Coastal Zone Management Reauthorization Amendments of 1990, Pub. L. No. 101-508.

¹¹⁹ Coastal Zone Protection Act of 1996, Pub. L. No. 104-150.

¹²⁰ Harmful Algal Bloom and Hypoxia Amendments Act of 2004, Pub. L. No. 108-456.

¹²¹ NOAA Coastal Services Center, *The Coastal Management SAMP of Approval*, <http://www.csc.noaa.gov/magazine/2003/06/samp.html>.

¹²² *Id.*

¹²³ 16 U.S.C. § 1453(17).

¹²⁴ 16 U.S.C. § 1456b(6).

¹²⁵ Pleasant Bay Resource Management Alliance, Pleasant Bay Resource Management Plan April 2003, *available at* <http://www.pleasantbay.org/newplan.htm>.

shellfish regulations, conducting fishery assessments, developing best management practices for aquaculture, and monitoring invasive species in the area.

Oregon's 17 Estuary Management Plans, prepared according to Planning Goal 17 (see *discussion below*), are SAMPs.¹²⁶ Oregon's estuary management plans have been developed to address specific issues in a particular estuary based on its estuary classification: natural, conservation, shallow draft development, or deep draft development.¹²⁷ Port Orford is located between the Sixes River and Elk River estuaries, both of which are classified as natural – “Estuaries lacking maintained jetties or channels, and which are usually little developed for residential, commercial or industrial uses. They may have altered shorelines, provided that these altered shorelines are not adjacent to an urban area. Shorelands around natural estuaries are generally used for agriculture, forestry, recreation and other rural uses. Natural estuaries have only natural management units.”¹²⁸

Coastal Management in Oregon

The following section describes coastal management, land use planning and coastal and shoreline management laws and agencies of the State of Oregon. A timeline of state policies and actions is provided in the box on page 36 and a description of agencies and their activities in the box on page 37.

Public beach access has a long history in Oregon. The state adopted the Oswald West Act¹²⁹ in 1913, which declared the wet sand portion of the state's ocean beaches to be a public highway.¹³⁰ In 1967, the state legislature passed the Oregon Beach Bill, declaring the public right to beach access to continue in perpetuity.¹³¹

Oregon's Beach Bill defines “ocean shore” to include “the land lying between extreme low tide of the Pacific Ocean and the statutory vegetation line as described by ORS 390.770¹³² or the line of established upland shore vegetation, whichever is farther inland.”¹³³

¹²⁶ See NOAA, Ocean and Coastal Resource Management, *Examples of SAMPs*, http://coastalmanagement.noaa.gov/issues/special_examples.html (listing example SAMPs in a number of coastal states, including Oregon).

¹²⁷ Inforain, *Oregon Estuary Planning Requirements*, http://www.inforain.org/mapsatwork/oregonestuary/oregonestuary_page5.htm.

¹²⁸ *Id.*

¹²⁹ Oswald West served as Oregon's governor from 1911-1915.

¹³⁰ As a public highway, the Department of Transportation, Highway Division was initially granted management responsibility of the state's beaches. A 1965 law transferred authority over the wet sand portion of Oregon's beaches to the state Parks and Recreation Department. The 1967 Beach Bill reaffirmed this authority and extended the agency's management authority to include the dry sand portion of beaches up to the vegetation line. Oregon Parks and Recreation Dept., *Ocean Shore Management Plan 11* (Jan. 2005), available at http://www.oregon.gov/OPRD/PLANS/docs/masterplans/osmp_hcp/FinalOceanShoresMP052305.pdf.

¹³¹ Or. Rev. Stat. § 390.600 (2005); Oregon Department of Land Conservation and Development, *Oregon Coastal Management Program Coastal and Estuarine Management Program 7* (Dec. 2005), available at http://egov.oregon.gov/LCD/OCMP/CELCP_2006.shtml.

¹³² Or. Rev. Stat. § 390.770 identifies the vegetation line along the coast using the Oregon Coordinate System.

¹³³ Or. Rev. Stat. § 390.605(2).

In the Beach Bill, the legislature declared state policies to 1) “forever preserve and maintain the sovereignty of the state heretofore legally existing over the ocean shore of the state from the Columbia River on the north to the Oregon-California line on the south so that the public may have the free and uninterrupted use thereof”;¹³⁴ 2) “recognizes that over the years the public has made frequent and uninterrupted use of the ocean shore and recognizes, further, that where such use has been legally sufficient to create rights or easements in the public through dedication, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public rights or easements as a permanent part of Oregon’s recreational resources”; 3) declares all public rights or easements legally acquired in the ocean shores confirmed and vested exclusively in the state to be held and administered as state recreation areas; and 4) that “it is in the public interest to do whatever is necessary to preserve and protect scenic and recreational use of the ocean shore.”¹³⁵ The Department of Parks and Recreation has authority to facilitate public beach access¹³⁶ and authority to protect, maintain, and promulgate rules regarding public beach use.¹³⁷

In 1969, two years after the Beach Bill was enacted, the Oregon Supreme Court issued what would become a landmark decision in *Thornton v. Hay*, which relied on the common law doctrine of custom to conclude that the public has a right to use the dry-sand area of the state’s beaches for recreational purposes up to the vegetation line.¹³⁸ In *Thornton*, the owners of a Cannon Beach inn appealed a state-issued injunction preventing them from erecting a fence in the dry sand area of their oceanfront property. The court applied a seven-part test from Blackstone’s Commentaries for determining when the doctrine of custom establishes the public’s right to access, and held that “the custom of the inhabitants of Oregon and of visitors in the state to use the dry sand as a public recreation area is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed.”¹³⁹ More than two decades later, the Oregon Supreme Court reaffirmed *Thornton* when it decided *Stevens v. City of Cannon Beach*.¹⁴⁰ Like *Thornton*, *Stevens* also involved a Cannon Beach hotel owner’s challenge to the state’s decision to deny it the ability to develop the beach. Here, the landowner filed suit against the state alleging its refusal to issue a permit to build a seawall that would have allowed a hotel to be constructed on two dry sand oceanfront lots constituted a regulatory taking. The landowners argued that because they had acquired ownership of the land before the state’s 1969 *Thornton* decision using the common law doctrine of custom to prevent

¹³⁴ Or. Rev. Stat. §390.615 declares the state of Oregon holds title to the shores of the Pacific Ocean between the ordinary high tide line and extreme low tide, excepting portions that had been divested by the state prior to July 5, 1947. Or. Rev. Stat. §390.620 prohibits the state from alienating its rights to the shore (except as provided by statute).

¹³⁵ Or. Rev. Stat. § 390.610.

¹³⁶ Or. Rev. Stat. § 390.632.

¹³⁷ Or. Rev. Stat. § 390.660.

¹³⁸ 462 P.2d 671 (Or. 1969).

¹³⁹ *Id.* at 678.

¹⁴⁰ 854 P.2d 449 (Or. 1993).

development on the property constituted a compensable taking under the Supreme Court's decision in *Lucas v. South Carolina Coastal Commission*.¹⁴¹

The Oregon court rejected this argument, reasoning that the Lucas rule did not affect the lower court's holding in this case because the common law doctrine of customary use of dry sand areas was a background principle in Oregon property law, therefore the landowners never had the property right to the dry sand area they claimed to have been "taken" by the state regulatory scheme.¹⁴² In *Macdonald v. Halverson*, however, the Oregon Supreme Court held that the doctrine of custom did not create a public right of access to the dry sand area of all the state's ocean beaches.¹⁴³ In *Macdonald*, the court concluded that the beach at issue – Little Whale Cove – was distinguishable from Cannon Beach, at issue in *Thornton*, because there was no evidence here that the public had ever customarily used this beach, a remote inlet separated from the ocean by a rocky sill. The court held that a beach must either be "similarly situated" to the beach at issue in *Thornton* or independently fulfill the seven requirements necessary to establish a public right to use the beach on the basis of custom.

These cases began the articulation of Oregon's coastal stewardship policies, and the decade following *Thornton* saw significant legislative action to plan for, protect, and preserve Oregon's coast and ocean resources.

Land Use Planning in Oregon

In the late 1960s and early 1970s, as the state experienced rapid population growth, Oregonians concerned about unchecked development in the state became interested in controlling land use.¹⁴⁴ In response, the state passed a number of landmark land use laws during that era. Along with the 1967 Beach Bill, the Oregon legislature passed SB 10 in 1969, requiring the state's cities and counties to engage in planning and zoning. Because its provisions were not enforceable, this bill did not have the far-reaching effects of later legislation mandating statewide land use planning. In 1971, Oregon passed SB 687 (ORS 191), creating the Oregon Coastal Conservation Commission (OCCC). OCCC's responsibilities included developing coastal land and water resource policies; inventorying and evaluating coastal resources, hazards, and needs; and developing methods of implementing a comprehensive coastal management program. After OCCC completed its mission in 1975, the legislature dissolved it, and LCDC assumed responsibility for developing and implementing the coastal management program as part of the statewide land-use planning program.

¹⁴¹ In *Lucas*, the Supreme Court held that regulations which prevented all economically viable uses of property constituted a taking subject to several exceptions found in background principles in common law. 505 U.S. 1003, 1032 (1992).

¹⁴² 854 P.2d at 456-457.

¹⁴³ 780 P.2d 725 (Or. 1989).

¹⁴⁴ Oregon Department of Land Conservation and Development, A Citizen's Guide to the Oregon Coastal Management Program, A CITIZEN'S GUIDE TO THE OREGON COASTAL MANAGEMENT PROGRAM 2 (2001), available at <http://www.oregon.gov/LCD/docs/publications/citizngid.pdf> [hereinafter CITIZEN'S GUIDE TO THE OCMP]

In 1973, the Oregon legislature passed the state's landmark comprehensive statewide Land Use Planning Act, commonly referred to as SB 100.¹⁴⁵ SB 100 required the Oregon Land

OREGON'S ACTIONS FOR OCEAN AND COAST

1913 Oswald Act passed
1967 Beach Bill enacted
1968 Constitution amended to extend seaward boundary
1969 Thornton Decision public use of beaches affirmed
1973 Land Use Planning Act enacted
1974 South Slough Estuarine Research Reserve created
1977 Coastal Management Program adopted
1977 Ocean Stewardship Area declared
1987 Ocean Resources Management Act enacted
1990 Ocean Plan adopted
1991 Ocean Policy Advisory Council convened
1994 Territorial Sea Plan adopted
2000 Ocean Stewardship Area affirmed
2002 Marine Reserves recommended by OPAC
2004 Measure 37 passed
2006 Coastal zone management program reviewed by NOAA
2007 Marine Heritage Reserve Process begun
2008 Marine reserve sites nominated

Conservation and Development Commission (LCDC) to develop statewide planning goals for Oregon, and LCDC adopted the state's first fifteen goals addressing land use.¹⁴⁶ In response to the federal CZMA, LCDC later created four additional statewide planning goals addressing coastal issues.¹⁴⁷ Goal 16 addresses Estuarine Resources; Goal 17 addresses Coastal Shorelands; Goal 18 addresses Beaches and Dunes; and Goal 19 addresses Ocean Resources.¹⁴⁸ Goal 5, which addresses natural resources, is also potentially relevant to projects involving coastal resources. Goal 5 requires local comprehensive plans to inventory and plan for natural resources, scenic and historic areas and natural resources.¹⁴⁹

SB 100 also created the Department of Land Conservation and Development (DLCD), the administrative body that implements the land use policies developed by LCDC. SB 100 assigned cities and counties, state agencies, and LCDC specific responsibilities for implementing its provisions. LCDC has authority to adopt statewide planning goals and administrative rules, approve locally-adopted comprehensive plans, review and approve local plans, and review any amendments to plans or implementing

¹⁴⁵ Or. Rev. Stat. §§ 197.005-197.430 (2005).

¹⁴⁶ The first 15 goals are: 1) Citizen involvement; 2) Land use planning; 3) Agricultural lands; 4) Forest lands; 5) Natural resources, scenic & historic areas, and open space; 6) Air, water and land resources quality; 7) Areas subject to natural disasters and hazards; 8) Recreational needs; 9) Economic development; 10) Housing; 11) Public facilities and services; 12) Transportation; 13) Energy conservation; 14) Urbanization; and 15) Willamette River Greenway. Goals 16-19 address ocean and coastal issues and are discussed *supra* note 7 and in the accompanying text. The full text for each of the nineteen statewide planning goals is available on the LCDC website: <http://www.lcd.state.or.us/LCD/goals.shtml>.

¹⁴⁷ Eugene C. Bricklemyer, Jr., et. al., *Preservation of Coastal Spaces: A Dialogue on Oregon's Experience with Integrated Land Use Management*, 9 OCEAN & COASTAL L. J. 2239, 251 (2004).

¹⁴⁸ Or. Admin. Rev. §§ 660-015-0010; 660-36 (2005); LCDC, *Statewide Planning Goals and Guidelines*, available at http://www.lcd.state.or.us/LCD/goals.shtml#Statewide_Planning_Goals.

¹⁴⁹ Plans must inventory eleven resources, which include riparian corridors, wetlands, wildlife habitat, federal wild and scenic rivers, state scenic waterways, groundwater resources, approved Oregon recreational trails, natural areas, wilderness areas, energy resources, and cultural areas. In addition, Goal 5 encourages local governments and state agencies to maintain inventories of historic resources, open space, scenic views, and mineral resources. CITIZEN'S GUIDE TO THE OCOMP *supra* note 144 at 12.

ordinances. Cities and counties must adopt comprehensive plans in compliance with statewide planning goals, make land use decisions that conform with the state approved plans, and amend plans and ordinances for implementing the plans to meet changing needs and to comply with new requirements. State agencies must also follow statewide planning goals and coordinate programs and permits affecting land use with city and county plans. Port Orford is located in Curry County, which adopted its current land plan in 1983. The Curry County comprehensive land use plan has been amended several times but the county has not yet developed a revised plan.

Lands between the ordinary high water mark and the coastal shorelands boundary established in the land plan are considered “shorelands.” The boundary extends at least fifty feet inland, unless there is a road within fifty feet of the shoreline, and may extend further inland if certain resources are present.¹⁵⁰ Goal 17 established dual objectives for shoreland planning: setting aside land for uses that must be located along the shore and

Agencies Managing Coastal Resources

Authority over coastal resource management in Oregon is divided among a number of state agencies, as well as local and federal government entities.

The U.S. Army Corps of Engineers is responsible for navigation improvements and, under §404 of the Clean Water Act, dredge and fill permits. The Department of Environmental Quality (DEQ) is responsible for cleaning up toxic or hazardous waste sites, sewage disposal, and water quality.

The NOAA Office of Coastal Zone Management approves Oregon’s management plan. The Department of Land Conservation and Development (DLCD) is the coastal program coordinator for federal “consistency” with the state coastal program developed under the CZMA.

The Oregon Coastal Management Program (OCMP) is the plan developed under CZMA and is administered by DLCD.

The Ocean Policy Advisory Council (OPAC) advises and makes recommendations on ocean management, including amendments to the plans and programs.

The Division of State Lands (DSL) administers the beds and banks of navigable waters and submerged lands, as well as regulates removal and fill activities that impact wetlands. DSL is also responsible for seabed leases for oil, gas, and minerals, as well as leases for telecommunications cables.

The Department of Geology and Mineral Industries (DOGAMI) is responsible for regulations regarding oil and gas drilling and mineral mining regulations, including offshore.

The Land Conservation and Development Commission (LCDC) develops statewide planning goals, including goals for coastal issues such as estuarine resources, shorelands, beaches and dunes, and ocean resources.

Above the mean high water line, the Oregon Parks and Recreation Department (OPRD) manages more than 100 state parks and waysides in the coastal zone, as well as administers the Oregon Coast Hiking Trail and Bike Route, scenic waterways, and historic preservation planning. OPRD is also responsible for beach permits and the dry sands recreation areas of the state’s beaches. City and county government land use plans and ordinances also affect coastal parks and beach access above the mean high water line.

The Department of Fish and Wildlife (ODFW) regulates fishing and hunting, regulates fish hatcheries, and advises other state agencies about habitat protection. ODFW also is responsible for biological consultation and marine research. The state Health Division monitors water quality in public water systems and monitors water quality for shellfish and oysters.

¹⁵⁰ Resources which may require a shoreland boundary to extend more than 50 feet inland include Sites Especially Suited for Water Dependent Uses, migration and restoration sites, dredged material disposal sites, riparian vegetation, coastal hazard areas, significant habitats, public access, and exceptional aesthetic resources. CITIZEN’S GUIDE TO THE OCMP at 16.

protecting the natural fringe between land and water.¹⁵¹ The shorelands designated in the Curry County Plan include 85 miles of coastline and make up almost a third of the Oregon Coast. The shoreline in Curry County is predominately made up of narrow sand beach with a sea cliff immediately inland, although coastal dunes have developed in a few locations in the county.

The Curry County coastal planning area includes all lands west of U.S. Highway 101 and the coastal shorelands boundary parallels the highway in much of the county. It also includes lands east of the highway that are next to the Rogue River and Chetco River estuaries.¹⁵² The coastal shoreland segments in the Port Orford area are described in the Curry County plan to include Segment 6, from the Elk River to the city of Port Orford, which is a short segment of ocean bluff and sand beach where the shoreline boundary follows the top of the cliff to the north end of the Lake Garrison spit, and extends 100 feet inland from the mean high tide line. Segment 7, which includes the city of Port Orford, has a coastal shoreland boundary defined by the City of Port Orford's comprehensive plan. Segment 8, which extends from the city of Port Orford to Euchre Creek, is predominantly cliffed and the coastal shoreland boundary is defined to follow the top of the cliffs, except at the sandbar located at the mouth of Myrtle Creek, where



Rocky shoreline north of Port Orford dock.

the boundary extends 100 feet inland from the mean high tide line.¹⁵³ Several areas of scenic quality are located in the immediate vicinity of Port Orford. Cape Blanco, the westernmost point in the contiguous states, is six miles north of Port Orford, the Port Orford Heads are located in the city of Port Orford and shelter both the port and the city, and Humbug Mountain, a prominent mountain with dramatic ocean-side cliffs, is four miles south of Port Orford.¹⁵⁴

¹⁵¹ Goal 17 defines coastal shorelands to include lands directly affected by the ocean's hydraulic actions, adjacent areas with geologic instability, areas of vegetation which serve to stabilize the shoreline, significant biological habitats, areas supporting water-dependant or water-related uses, areas of exceptional aesthetic or scenic quality, and coastal headlands.

¹⁵² Curry County Comprehensive Plan, Aug. 1, 1983, at 317.

¹⁵³ Curry County Comprehensive Plan at 319.

¹⁵⁴ *Id.* at 326.

Coastal Management Program

The NOAA Office of Coastal Zone Management (OCZM) approved the Oregon Coastal Management Program (OCMP) in May 1977. The plan was most recently evaluated by NOAA in October 2006.¹⁵⁵ The state has delegated DLCD authority to administer the OCMP.¹⁵⁶ The department is responsible for consistency reviews in Oregon, while OCMP issues coastal management decisions.

The plan is based on the four coastal planning goals developed under SB 100 (estuarine resources, coastal shorelands, beaches and dunes, ocean resources), and includes coastal city and county comprehensive land use plans, state law, and state agency regulations.¹⁵⁷ OCMP has been criticized by environmentalists for its limited authority — it does not provide direct review authority over local decisions or plan implementation, and it does not have control over other state agency policies that may affect the coastal environment.¹⁵⁸ While Oregon's statewide planning law requires every city and county to develop a comprehensive plan based on the Planning Goals, there is no statewide agency with authority to review how these plans are implemented for their affects on coastal resources.¹⁵⁹

Under the state's plan, DLCD reviews federal projects, federal permits, and licenses; Outer Continental Shelf exploration, development, and production permits and licenses; and any federal grants which may affect Oregon's coastal zone for consistency with statewide planning goals 16-19, as well as any applicable coastal city and county comprehensive plans and land use regulations.¹⁶⁰ Objections to proposed federal activities in Oregon's coastal zone based on a consistency determination are "rare."¹⁶¹ Recent consistency concerns have arisen in the context of a proposed Liquefied Natural Gas (LNG) terminal near Astoria. Northstar Natural Gas, which proposed building the terminal, filed a certification of consistency for the project in December 2006.¹⁶²

Oregon is home to the first Estuarine Marine Reserve designated under the CZMA, the South Slough Estuarine Research Reserve, established under CZMA §315 in 1974.¹⁶³

¹⁵⁵ NOAA, Final Evaluation Findings, Oregon Coastal Management Program, *available at* <http://coastalmanagement.noaa.gov/mystate/docs/OregonCMP2006.pdf>.

¹⁵⁶ U.S. Department of Commerce, NOAA, State of Oregon Coastal Management Program, Final Environmental Impact Statement (1977).

¹⁵⁷ Oregon Department of Land Conservation and Development, Oregon Coastal Program Overview, http://www.oregon.gov/LCD/OCMP/OCMP_Intro.shtml.

¹⁵⁸ Bricklemyer, *supra* note 147, at 254.

¹⁵⁹ Bricklemyer, *supra* note 147, at 255.

¹⁶⁰ Regulations for implementing consistency determinations are at Or. Admin. Rev. §§ 660-035; federal regulations are at 15 C.F.R. § 930. Oregon's CZMA coordinator is Dale Blanton.

¹⁶¹ Oregon Coastal Management Program, FAQ on Federal Consistency Review, http://egov.oregon.gov/LCD/OCMP/FedCon_FAQ.shtml.

¹⁶² Oregon, Bradwood Energy LNG, http://www.oregon.gov/ENERGY/SITING/BLLNG.shtml#Miscellaneous_Documents.

¹⁶³ 16 U.S.C. § 1461. Oregon South Slough Estuarine Research Reserve, <http://www.oregon.gov/DSL/SSNERR/historyform.shtml>.



Sandy beach north of Port Orford with reef features in the distance.

Ocean Jurisdiction Policy

Oregon's westward boundary was extended in the state's constitution in 1968 to include "boundaries or jurisdiction of this state an additional distance seaward under authority of a law heretofore or hereafter enacted by the Congress of the United States."¹⁶⁴ Under the federal 1953 Submerged Lands Act, states have jurisdiction over a territorial sea consisting of ocean waters adjacent to their coasts up to three miles seaward.¹⁶⁵ Oregon's territorial sea encompasses about 1000 square miles.¹⁶⁶ Drawing on its CZMA authority to make consistency determinations in federal actions off its coast, Oregon has articulated a policy interest in promoting the state's interest in ocean waters westward from its coast, extending to the slope of the continental shelf, which in places lies nearly 50 from the coast, although the state's actual legal authority is limited to waters within 3 nautical miles of the coast.¹⁶⁷

The state has established an ocean resource management policy to develop and maintain an ocean resource program to ensure effective participation in federal programs, such as the consistency determinations allowed under the CZMA.¹⁶⁸ To accomplish state legislative goals of conserving the state's coastline and adjacent ocean waters, the state has passed legislation expressing legislative goals of asserting the state's interests "as a partner with federal agencies" in management of ocean resources within the EEZ and continental shelf off its coast.¹⁶⁹

¹⁶⁴ Oregon Constitution, Art. XVI, § 2.

¹⁶⁵ 43 U.S.C. §§ 1301-1315.

¹⁶⁶ Coon C. & M. Mackey, Legal Authority in Oregon's Territorial Sea, unpublished ms (October 2007).

¹⁶⁷ Oregon's westward boundary was extended in the state's constitution in 1968 to include "boundaries or jurisdiction of this state an additional distance seaward under authority of a law heretofore or hereafter enacted by the Congress of the United States." Oregon Constitution, Art. XVI, § 2. Under the federal 1953 Submerged Lands Act, states have jurisdiction over a territorial sea consisting of ocean waters adjacent to their coasts up to three miles seaward. 43 U.S.C. §§ 1301-1315.

¹⁶⁸ Or. Rev. Stat. § 196.415(6).

¹⁶⁹ *Id.* § 196.420(3).

In 1987, the Oregon legislature enacted the Ocean Resources Management Act (ORMA).¹⁷⁰ The ORMA established a state Ocean Resources Management Program (ORMP), which included portions of the OCMP, a to-be-established Ocean Policy Advisory Council (OPAC),¹⁷¹ and the Territorial Sea Plan.¹⁷² In 1991, the governor officially convened the OPAC. OPAC's duties and responsibilities include reviewing the Territorial Sea Plan, advising LCDC and other state government agencies regarding ocean management, recommending amendments to the ORMP. OPAC is explicitly prohibited from establishing fishing seasons, harvest allocations, geographic restrictions, or other harvest restrictions. OPAC recommended that Oregon establish a system of limited marine reserves in 2002, a process which stalled until the recent June 2007 call by the Governor's Natural Heritage Office to establish a system of Marine Heritage Reserves.¹⁷³

Oregon's Ocean Plan, adopted by the state Ocean Policy Advisory Council (OPAC) in 1990, addresses both Oregon jurisdictional waters (those waters from the mean low tide line out three nautical miles) and waters off the state's coast included in the United States' Exclusive Economic Zone (EEZ). The Ocean Plan emphasizes state interests within the Ocean Stewardship Area (OSA), which extends from the mean high water line seaward across the continental shelf to the bottom of the continental slope.¹⁷⁴ The OSA began as a policy recommendation in the Oregon Ocean Resources Management Plan, adopted in 1990 and was later incorporated into statewide planning goal 19, in 2000.¹⁷⁵ Goal 19, adopted in 1977 and amended in 2000 to include the OSA, established the state's interest in an OSA. The OSA was defined to indicate a state territorial sea that extends from the continental margin seaward to the toe of the continental slope, although it is clear to specify that the OSA was not intended to alter the seaward boundaries of the federally-approved coastal zone.

Although Oregon does not claim any ownership interest in waters between 3 nm and 50 nm, it has express policy interests within the OSA in ocean resource uses and activities that directly affect the state's interests. These activities and interests include 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; and shares its management responsibilities and interest in conjunction with federal agencies.¹⁷⁶

Oregon's Ocean Plan provides that the state will both “[c]onserve living marine resources, including biological communities and habitats” and “[d]evelop marine management

¹⁷⁰ Or. Rev. Stat. §§ 196.405–196.485.

¹⁷¹ See Or. Rev. Stat. §§ 196.438; 196.443 (outlining OPAC's membership composition and duties).

¹⁷² The Territorial Sea Plan was adopted in 1994. ORS § 196.471.

¹⁷³ See *supra* notes 40-42 and accompanying text (discussing the 2007 proposal to establish an Oregon Marine Heritage Reserve system).

¹⁷⁴ Oregon Coastal Management Program, Ocean Stewardship Area, http://www.oregon.gov/LCD/OCMP/Ocean_Policies.shtml#Ocean_Stewardship_Area.

¹⁷⁵ Oregon Coastal Atlas, <http://www.coastalatlantlas.net/learn/settings/ocean/index.asp>.

¹⁷⁶ *Id.*

areas, where needed, to provide increased opportunities for public recreation, to protect biological habitats, and/or to advance scientific understanding of the ocean.”¹⁷⁷ The Ocean Plan sets forth factors to be considered in determining whether to increase protection of a critical habitat in an area, including 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 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.”¹⁷⁸ Marine protected areas, including marine reserves, may be established consistent with the Ocean Plan and its recognition that the state’s “need to preserve certain resources or qualities of the marine ecosystem should take priority over human activities or resource uses.”¹⁷⁹

The state articulated its policy in the OSA to “seek appropriate co-management arrangements with the federal government . . . ; Coordinate and cooperate with adjacent states and encourage regional approaches to management of ocean areas, where appropriate; Involve local governments and the public in ocean resource management decisions; Develop 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.”¹⁸⁰

The Territorial Sea Plan provides authority for enforcement of a number of resource management decisions and coastal management policies. Pursuant to legislative intent, the drafters of the plan list as mandatory:

1. all of Part Two: Making Resource Use Decisions; and
2. specific sections within Part Three: Rocky Shores Management Strategy:
 - B.1. Rocky Shores Policy Framework: Goal, Objectives, Policies;
 - C.1. Mandatory Policies for Site Management;
 - C.2. Mandatory Policies for Amending the Rocky Shores Strategy;
 - F.2. Management Categories
 - G.1.-39. Site Designations & Management Prescriptions¹⁸¹

Interest in the Territorial Sea Plan has grown recently with the advent of wave energy project proposals along the Oregon coast. The plan not been amended since 2000, though one of OPAC’s explicit responsibilities is review and revision of the plan.¹⁸²

¹⁷⁷ Ocean Plan at 48.

¹⁷⁸ Ocean Plan at 53.

¹⁷⁹ Ocean Plan at 53.

¹⁸⁰ *Id.*

¹⁸¹ Oregon Territorial Sea Plan at Part One, page 3.

¹⁸² Coon, *supra* note 165.

Section III. Issues and Analysis

Whether federal or state law will permit the fleet at Port Orford to manage their stewardship area depends on the specific rights and duties stakeholders want to undertake. POORT and its members have identified a stewardship area off the community that

Table 3. Summary of permissible activities under current state and federal law.

Management Function	POORT goal statements	Federal law	State law
1. Policy making and evaluation			
Scoping problems	Define stewardship area	X	X
Setting objectives	Define fishery, non-fishery areas*	X	X
Long range planning	Develop Access Plan		
Research	Provide research infrastructure		
Public education	Identify and foster partnerships	X	X
2. Productive capacity of the fishery			
Monitoring habitat	Monitoring plan		
Monitoring condition of stock	Monitoring plan		
3. Compliance with rules			
Implementation and enforcement	Monitoring that supports compliance Abide by effort controls and limits Protect juvenile fish	X	X
4. Fishery harvest			
Stock assessment			
Harvest planning	Determine appropriate harvest rates		
Harvest monitoring	Develop monitoring plan		
5. Fishery access			
Membership/exclusion	Develop access plan; define area, local preference, recognition comes with participation*	X	X
Harvest allocation	Harvest policy options; area definitions*		
Transfer of membership		X	X
6. Resource use coordination			
Planning the coordination of different harvest regimes and strategies	Diversify fishing livelihoods	X	X
7. Returning optimum value			
Supply planning	Promote owner-operator fisheries	X	X
Product quality	(See draft performance standards)	X	X
Product diversity	Develop markets, recognize opportunities	X	X

*These activities described in the Stewardship Area Plan are possible in a policy fashion, as recommendations from the community to state and federal managers. However, the community could actually implement and execute these activities independently under a rights-based system such as a limited access privilege program.

encompasses traditional fishing grounds. Within the stewardship area, which includes both state and federal waters, as well as upland areas incorporating key watersheds, they want to protect local stocks, prevent the effects of unsustainable fishing, restore habitat and conserve species diversity. They have emphasized the importance of locally relevant research and monitoring, at a scale and resolution that applies to the particular features of the Orford Reef and the nearshore groundfish species that inhabit it.

On the economic side of the equation, they want to see higher yields, better prices, marketing opportunities, means to attract funding for research, and an improvement in their negotiating position in the management setting. They want to ensure that local fishermen who are willing to abide by the stewardship area principles have an advantage of access to local resources.

In terms of governance, the community has embraced community-based fishery management set out in the Sitka Declaration, a statement of principles adopted at a meeting of fishery stakeholders in 2005 (see Appendix E). They also have adopted a set of operating principles or performance standards to govern fishing practice within the stewardship area.¹⁸³

Table 3 arrays these desires, objectives, and principles along the axes of the Pinkerton and Weinstein list of fishery management functions, providing a summary of what is permissible in the present framework. This array illustrates that while the community has some ability to participate in planning, policy making and business development, the key bundle of rights related to assessing and allocating the resource, who gets access to it and how much they may take are firmly in the hands of public resource managers at state and federal levels. The analysis that follows examines the rights and responsibilities community members have in the stewardship area to make policy, monitor productive capacity, enforce rules, control access, limit harvest, plan harvest strategies and return optimum value.

Policy making. Fishermen enjoy the same rights as other citizens to influence decisions regarding management of the fishery made by the National Marine Fisheries Service, Pacific Fishery Management Council, and the Oregon Department of Wildlife and Fisheries through the Fish and Wildlife Commission. “We haven’t cracked the federal level yet,” says Cobb, “but it will come.” The community has been more successful at the state level, serving on an advisory group revising framework documents, and recently proposing inclusion of language in amendments to the nearshore groundfish plan that would keep area management and community-based management as options for the future. They may prepare a detailed proposal for the Fish and Wildlife Commission, with a request for specific authority, but the request was not complete at the time of this writing.

The impression that they are left out of the process was a key factor motivating Port Orford stakeholders to venture into community-based management. They claim not to have a seat at the table, although they participate in various management forums. Whether they are left out of the process or lack the political and economic clout to affect the outcome of management

¹⁸³ Stewardship Plan, *supra* note 3 at 13-14.

decisions is open to debate, but some of the attributes of the community that make it susceptible to CBFM are the very attributes that may make it ineffective in the political arena of fishery management.

The case of Pacific groundfish is an example of the types of situations that motivate communities to try community-based approaches. In their analysis of candidate fisheries, Weber and Ludicello concluded:

In our interviews, we found urgency in protecting the resource as a common impetus for change, but not the only impetus to move communities toward alternatives. Who gets the resource, and where the income goes are also important motivators. A shift from local to non-local fleets, consolidation of access to the resource, vertical integration of catching and processing, dependence of the rest of the community on healthy fisheries are also trends that have motivated communities to take a hand in their own fate.

In fishery after fishery, interviews with community fishing activists revealed a chain of circumstances in which small boat fleets, close to home, with flexible fishing styles were shut out of single-species fisheries once entry was limited. Because these fishermen fished for what was available, they had insufficient catch history on any one species to qualify for limited fisheries. Because they fished at the margins, they had insufficient capital to buy into licensed or quota fisheries. “Highliners” were rewarded with licenses, quota shares, days-at-sea, and even awards and recognitions from the fishing press. Speed, efficiency and volume were recognized by the management system.¹⁸⁴

In the case of Port Orford, Cobb describes it this way: “Other people come and go but everybody here is here to fish at this scale. We could have left, but we haven’t.”

The expert review panel provided differing perspectives on Port Orford’s choice to retain the historic character of its fishery. On the one hand, some members disagreed with the notion of community management, calling it a “balkanization” of coastal fisheries that would make management too cumbersome and inconsistent. This perspective suggested that the fleet respond to competition by becoming more like their competitors: bigger boats, improved infrastructure, more strategic political action at council and commission. Other panel members, however, thought that Port Orford had the potential to start from the quality of its marine environment, emphasize the special character of the area, distinguish itself by the diversity of coastal resources, and devise proposals that fostered its unique use factors.



¹⁸⁴ CBFM in U.S., *supra* note 1, at 89.

Productive capacity. As indicated in the table, the current legal framework does not provide any authority for local people to have a hand in managing the productive capacity of the fishery. The only formal responsibilities that fishermen have are to comply with regulations. The productive capacity of the Orford Reef has been a priority issue since POORT was organized. Advocates are concerned that catch limits are based on an inappropriate scale of information. Both the Pacific Fishery Management Council and Oregon DF&W set regulations according to trawl surveys that POORT argues are not reflective of conditions in the reef's discrete ecosystem, and they have argued for years for area-specific monitoring.

Since the 1990s, cooperative research—a joint venture that uses fishing boats and fishermen to conduct surveys or at a minimum provide a platform for state or federal managers and scientists—has become increasingly common.¹⁸⁵ However, the research and monitoring activity is generally done under contract, and extends only through the data gathering phase, generally not in survey design, data analysis, publication of results or taking any action to change exploitation in responses to the data.¹⁸⁶ Port Orford has not missed opportunities to participate in this type of activity, and cooperated with state and federal managers in several cooperative research projects, including port sampling, a rockfish survey and providing platforms for sea lion and sea urchin surveys. Their office provides space for the SeaGrant Port Liaison Project and as a contact point for the West Coast Observer Program. More recently, POORT has entered into negotiation on a memorandum of agreement with Oregon DF&W to conduct research and monitoring activities.¹⁸⁷

Enforce rules. The Port Orford fleet has honored its own understanding of expected behavior and best practices (such as refraining from setting crab pots where fishers are using salmon nets), but boats from outside the area have not followed local practice or were unaware of it. These conflicts were part of the impetus for creation of the stewardship area, according to Cobb.¹⁸⁸ The proposed stewardship area plan envisions voluntary compliance with agreed upon rules, and monitoring to insure that users are fishing according to recommended practice. But to date the plan does not describe any direct enforcement activity, and relies on peer pressure and commitment to stewardship area goals to keep fishers on the straight and narrow. It is unclear whether they intend public authorities to enforce their private rules, to write the private rules into state law, or rely entirely on voluntary compliance. Peer pressure and voluntary compliance are not unheard of in the fishery context. In the 1990s, the Alaska Groundfish Data Bank published the names of vessels and skippers (the so-called “dirty dozen”) whose bycatch rates exceeded

¹⁸⁵ For more detail on cooperative research, see National Research Council, COOPERATIVE RESEARCH IN THE NATIONAL MARINE FISHERIES SERVICE (2004).

¹⁸⁶ In the NAS study, the panel found that responsiveness to stakeholder suggestions on design and implementation of cooperative research projects not only had the potential to improve science, but also to achieve other fishery management benefits. *Id.* at 112, 117.

¹⁸⁷ Pers. comm. Leesa Cobb (August 2008).

¹⁸⁸ Pers. comm. Leesa Cobb (September 2007).

the fleet norm, and more recently Bering Sea trawlers have used real time catch information to warn skippers off “hot spots” to avoid regulated salmon bycatch.¹⁸⁹

Control access. The degree of participation of fishermen in management and operation of a marine fishery flows from the types of use and management rights fishermen hold. Use or access rights determine who can go fishing, while management rights determine who can participate in deciding how much fishing can go on. The ability to define access¹⁹⁰ is a key precondition for community-based fishery management, whether as an annual license, a right to a share of an overall quota, an exclusive right to an area, a right to use a certain type of gear and so forth.¹⁹¹ Currently, state and federal authorities control access to marine fisheries.

Licensed fishermen from Port Orford have open access to finfish fisheries in state waters.



Crab pots stacked on Port Orford dock.

Limited entry permit holders have access to specific fisheries. Those who fish in federal waters have limited entry permits with endorsements for some species, such as black cod. All the proposals for quota or rights-based programs to reduce effort in the west coast groundfish fisheries are aimed at the trawl fleet, so none of those proposed measures would be available to the Port

Orford fleet. In amendments to the MSRA in 2006, Congress added new provisions for a program communities can use to create limited access privileges, and propose their own plan for management, but Port Orford—which, like many fishing communities opposed quota-based programs in the 1990s—is not ready to take that route.¹⁹² The agency has published core

¹⁸⁹ See, e.g., *Fisheries Bycatch: Consequences & Management*. University of Alaska SeaGrant College Program Report No. 97-02 (1997); Marine Fish Conservation Network, *Turning a Blind Eye* (June 2006).

¹⁹⁰ While the literature on access refers to “rights,” participants in the Sitka Declaration (Appendix E), including Port Orford representatives, consider access a “privilege,” except in the case of aboriginal or treaty rights.

¹⁹¹ CBFM in U.S. *supra* note 1 at 77.

¹⁹² The community appears to be concentrating first on state waters, but the possibility of exploring a LAPP for the federal water fisheries may lie in the future. Pers. comm. L. Cobb (Aug. 14, 2008). See Appendix F.

principles for LAPPs, and provided guidance to fishery management councils as a technical memorandum.¹⁹³ No rule on the provision had been promulgated as of July 2008.

Limit and allocate harvest. At the heart of the stewardship area plan is Port Orford's vision to "plan an active and significant role in the management of their historic fishing areas. Port Orford residents are committed to taking care of, and holding responsibility for, the resources on which the future of their fisheries depends."¹⁹⁴ Under current state and federal law, Port Orford advocates may urge policies and practices they think will protect their historic fishing areas, but they don't "hold responsibility." Bridging this gap is one of the largest obstacles to realizing their vision for the Stewardship Area.

POORT has made strides over its history in working with the Oregon Department of Fisheries and Wildlife, serving on committees that develop plans, and contributing to the creation of the Nearshore Management Strategy. They have participated in monitoring projects, conducted cooperative research, and engaged state managers in their planning and outreach activities. Though they have not achieved responsibility that could be termed "local management" or even "co-management," they continue to negotiate with state fishery managers to find opportunities and mechanisms to devolve more authority to the community.¹⁹⁵

Plan harvest strategies. The Port Orford fleet has a history of diversification, fishing a variety of species at different times of the year, in state and federal waters, and in response to availability. Their historic harvest strategies have been overtaken, however, by state and federal rules that tend to push fishers toward single species strategies. Limited entry and single species

"While the language in the M-SRA on community sustainability plans lies squarely within the provisions on LAPPs, it remains unclear whether such plans might be developed outside the access privilege framework. For example, would an area-management style plan qualify as a "community sustainability plan" without an access privilege element?"

"We urge NOAA Fisheries to provide some clarification in its proposed rule on whether these plans must be developed in conjunction with access privileges."

—Letter from POORT in response to NOAA request for comments on LAPP provisions, September 2007.

¹⁹³ L.G. Anderson and M.C. Holliday, eds. *The design and use of limited access privilege programs*. NOAA Fisheries Service Office of Policy. NOAA Technical Memorandum NMFS-F/SPO-86 (November 2007) [hereinafter LAPP Tech Memo].

¹⁹⁴ Stewardship Plan, *supra* note 3.

¹⁹⁵ After the grant period for this project concluded, POORT completed a Memorandum of Understanding with ODF&W on Sept. 17, 2008. The MOU describes a pilot project in the Port Orford Stewardship Area to implement ecosystem and community based management. The MOU creates a data sharing framework between ODFW and POORT, allows POORT to raise local issues for access and management, and is a pilot program for implementing Oregon's nearshore strategy. Available online at <http://www.oceanresourceteam.org/about/news.php>

permits do not favor fishermen who fish for what is available, because they have not built up the catch history to quality for limited fisheries.

Spatial management, rather than species-based management, is a core principal for the port, and is shared by other advocates of the Stewardship Area. Central to this idea is the need to improve the spatial resolution of current management measures, at population, ecological community, and human community scales. They articulated these views at a “Cape to Cape” meeting of parties in 2006 where the group developed a consensus statement on spatial management. Key ideas were matching the spatial scale of management to the spatial scales of community interest, improving research and management to accommodate both spacial and temporal scales and changes (such as climate shifts), and drawing distinctions between offshore and nearshore management approaches.¹⁹⁶ They have proposed that the approach be tried for Cape Blanco, Cape Mendocino, and Cape Conception.¹⁹⁷ This idea has been pronounced in public forums, and recommended to the Pacific Fishery Management Council in its recent deliberation on amendments to the Pacific groundfish management plan. While the council has reported that it agrees “in concept,” no specific allocations have yet been made.¹⁹⁸



From left, tiger rockfish, cabezon; china rockfish; Daryl Cobb overlooks live fish tanks; refrigerated truck for life fish shipments.

Return optimum value. Two of three of the points in the POORT vision statement have to do with economic value: “Provide high quality, high value seafood products to consumers, and support the economic viability of the Port Orford community.” Port Orford is the primary source of statewide landings of five high value, nearshore species. Though the fleet is nimble enough to switch from tuna to black cod to crab to salmon to rockfish depending on season and availability, landings by value clearly show the dependency of Port Orford’s fishing fleet on the rockfish resources of the local reef systems. In the late 1990s, the fleet began to develop a live-fish fishery for China rockfish, kelp greenling, canary rockfish, and cabezon, which bring in a

¹⁹⁶ PMCC. *Consensus Statement on Spatial Management of West Coast Fisheries* (January 2007).

¹⁹⁷ Bloeser, J. *Cape to Cape—Ecosystem-based fisheries management is a matter of scale*. Coastal Zone 07. Portland, OR (July 22-26, 2007).

¹⁹⁸ Pacific Fishery Management Council) and National Marine Fisheries Service. *Allocation of Harvest Opportunity between Sectors of the Pacific Coast Groundfish Fishery*; DRAFT ENVIRONMENTAL ASSESSMENT INCLUDING REGULATORY IMPACT REVIEW AND INITIAL REGULATORY FLEXIBILITY ANALYSIS (April 2008) at 6.

higher price, allowing the fleet to land much less fish and still make a living. The live fish market brings in higher prices, at up to \$6.25 per pound, compared with just \$0.40 per pound for trawl-caught fish. In 2003, the port landed 1.2 million pounds of fish, worth \$2.0 million. By comparison, in 1990, before the switch to a live-fish fishery, it landed 6.4 million pounds of fish, worth just \$3.1 million. In a cooperative effort to maximize this value, the fleet developed dock facilities to receive, retain and transport live fish to markets in California.

The result of this comparison of what Port Orford wants to accomplish with its Stewardship Area Plan, what it already has achieved with community consensus building and what they *may* undertake under current state and federal law highlights several key points that go to the heart of community based fishery management and reveals where gaps remain.

On the plus side, POORT has struck just the right note in its community organizing. Long-term, collaborative consensus building, small positive steps such as mapping, coalescing around local issues, engaging all sectors of the community, contributing to the food bank, add up to what Weber and Ludicello describe as a low key approach of “subtlety, patience, and respect for local cultural, social, and political dynamics”¹⁹⁹ that is critical to overcoming the lack of cohesiveness and distrust to be found in fishing communities. They point out that a major obstacle to CBFM in the U.S. has been the need for capacity building among fishermen and in fishing communities where costs of organizing and advocacy are significant, especially when pitted against the facility and financial resources of large, well-capitalized fleets.

The years of activity and projects in Port Orford that may not have seemed on a direct trajectory to the Stewardship Area nonetheless contributed to the credibility, influence, and heft of the Port Orford Ocean Resource Team with the fleet and the community at large. After nearly seven years of conversation and activity, the town was ready to embrace the Stewardship Area and did so through its city council and local chamber of commerce in late summer and fall 2008. By the time POORT representatives sat down to hammer out an MOU with state managers that year, the fleet and its representatives had a track record and reputation, not just a “seat at the table.”

Current law allows fishermen and their stakeholder communities to have a “seat at the table.” Whether they are effective in attaining this position or exercising it effectively has less to do with legal obstacles than with political and social ones. The community has placed a priority on issues within Oregon waters and has become increasingly effective in gaining influence at the state level. As stakeholders gain capacity and skill in this area, they may choose to tackle the federal process as a next step.

On the down side, some gaps remain. Although current state and federal law do not provide a role for local communities to take responsibility for determining the productive capacity of their fisheries and setting harvest rates that comport with that capacity, the MOU that Port Orford has executed with Oregon DF&W provides beginning steps toward these important functions of community based fishery management. The agreement provides for development of

¹⁹⁹ CBFM in U.S., *supra* note 1 at 91.

a framework plan that includes a role for the community in research and monitoring, design of regulations to ensure locally appropriate catch levels, and other matters including research design, performance standards for research quality, information sharing, scientific review, and other potential areas of collaboration. The MOU significantly enhances the community role in management, but that role remains advisory and “collaborative.”



Leesa Cobb discusses possible reserve sites with biologist Mark Hixon, atop the headlands at Cape Blaco.

Access and compliance remain the most substantial obstacles in attaining community based-fishery management. Even with the MOU, the only tool the Port Orford fleet has to control who fishes their local grounds and how they fish it (whether participants comport with locally agreed rules and practices) is good will. It remains to be seen whether in development of their “cooperative framework” with ODF&W they can include any access restrictions or management measures that address elements of their Stewardship Area Plan such as defining the fishing area and setting harvest limits.

Significant gaps also remain in realizing the potential benefits of the Stewardship Area in waters beyond three miles, and in the upland areas that contribute to making the waters off Port Orford productive fishing grounds. These are issues that require engagement with federal agencies and with land use planning agencies and land-based resource managers.

The next section provides some possible options for closing the gaps and clearing the obstacles that remain.

Section IV. Recommendations

The Port Orford Ocean Resources Team, its partners and stakeholders have progressed toward their goal of establishing a Stewardship Area where they can apply principles of community based fishery management to use their historic fishing grounds. Table 4 summarizes the existing legal framework and potential for achieving the Stewardship Area goals.

Table 4. Existing legal and policy framework for realizing Port Orford goals.

Law, policy or process	Jurisdiction	Permit POORT goals	Permit goals with legislative action	Permit goals with administrative action
CZMA	Federal, with state participation; coastal including watershed	Partial	Requires state action	NOAA, OCMP, DLCD work cooperatively to approve plans
CZMA SAMP	Interagency, multi-stakeholder	Yes	May require legislative action	Would require development, approval of plan, participation by multiple agencies
MPRSA	Federal, beyond 3 miles, non-fishery	No	N/A	N/A
MSFCMA	Federal waters, fisheries only	No	Change would require congressional action	Actions must be approved by Pacific Council
Pacific Council trawl IFQ	Federal waters; Port Orford excluded	No	N/A	N/A
Pacific Council sector	Federal waters, sector designated in FMP	Yes	Not required	Would require amendment to groundfish FMP
MSFCMA EFH	Federal waters, designated area	Partial	N/A	Council action could designate HAPC
MFCMA LAPP	Federal, fisheries	Yes	May be required for state portion	Community develops plan, approval at council & NOAA
Oregon Beach Bill	State shores; access protected	Partial	N/A	N/A
OSCCC/LCDC	State land and waters	Partial	May be required	May be required
Oregon LUPA	Basis for watershed protections, zoning.	Partial	N/A	Action at county level
ORMA	Territorial Sea; basis for OPAC and MR process	Partial	N/A	N/A

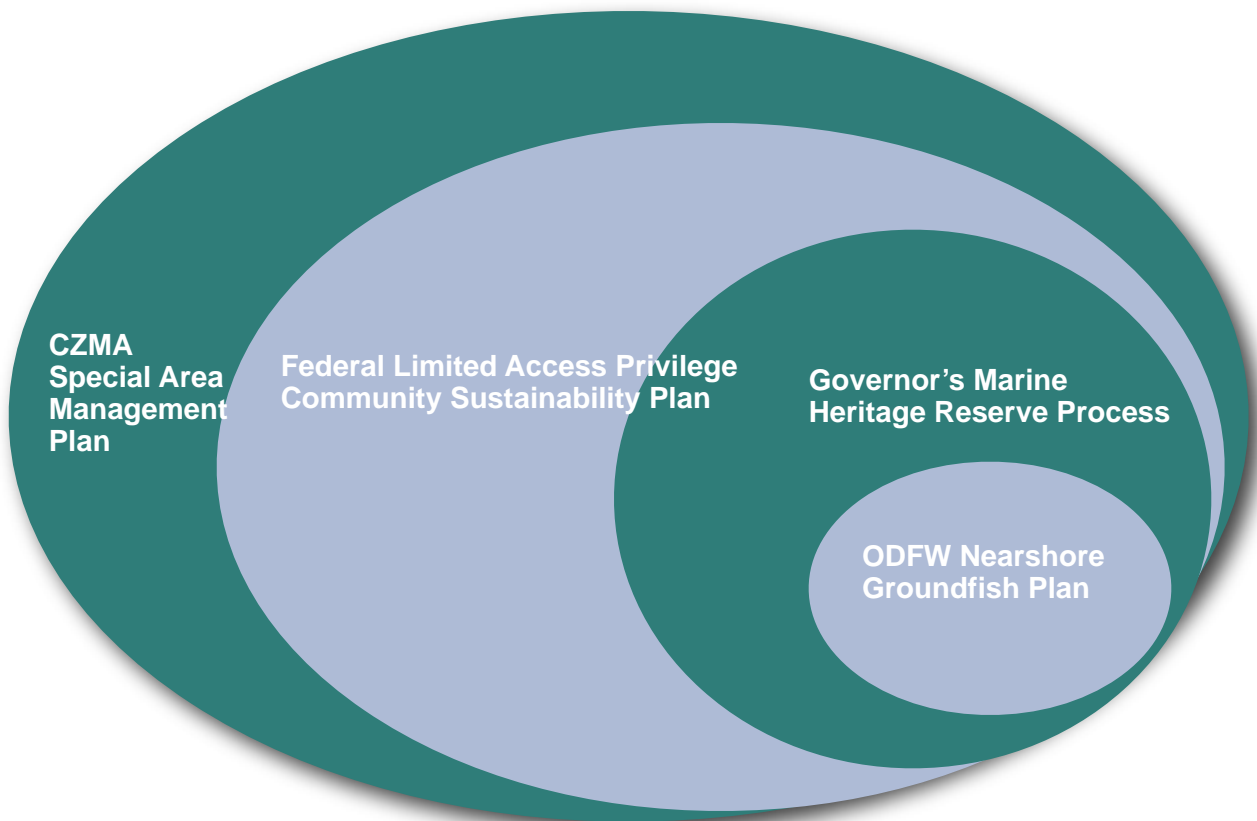
Law, policy or process	Jurisdiction	Permit POORT goals	Permit goals with legislative action	Permit goals with administrative action
Terr. Sea Plan	State waters, with additional concerns	No	N/A	N/A
ODFW and F&W Commission	State waters; statute defines regulatory authority for comm. fish	No	Any change would require action	Commission action required to approve plans, catch limits, seasons, etc.
Nearshore strategy	State waters	No	Undergoing revision	Commission action required to approve plan amendments
Revision of groundfish plan	State waters; nearshore; groundfish	Partial	May be required	Commission action required to approve plan amendments
Governor’s MR process	State waters	Partial	Will be required	Will be required
Cooperative research	Federal and state waters	Partial	Not required	Not required

The rows highlighted in the Table are potential pathways—the Coastal Zone Management Act SAMP process, the Magnuson Act LAPP process, ODF&W’s nearshore groundfish framework revision, and the Governor’s Marine Heritage Reserve process—in the existing legal framework the community might use to address the obstacles and gaps in authority that remain for them:

- Authority to control access to the Stewardship Area;
- Authority to set harvest limits inside the area, appropriate to local conditions;
- Authority to monitor and enforce resource use in the area, including local practices;
- Inclusion of both state and federal water fisheries in management;
- Participation in management of coastal and upland land uses that affect ocean waters.

The options are not mutually exclusive. Indeed, they could be done sequentially in a process of building from one to another, or pieces of each approach could be undertaken simultaneously if the jurisdictions and authority are viewed as “nested” within each other. Actions that must be taken for one process could serve to fulfill a requirement of one of the others. Figure 2 illustrates how each of the options relate to each other and the overall Stewardship Area. The size of the circles is representative of both the effort it would take to accomplish the action and the amount of authority Port Orford might gain over activity in the Stewardship Area.

Figure 2. Comparison of Options



Option 1. Amend nearshore groundfish plan

Port Orford could pursue amendment of Oregon's nearshore groundfish plan to enable area management approaches for some species. This action would address elements of the goals related to harvest policy options, collaborative research, and minimizing depletion of nearshore species. It can serve as one step in a series of building blocks leading to action on a larger scope and scale.

The ODF&W was in the process of revising several fishery management frameworks in 2007-2008, including a nearshore groundfish strategy, which would affect management of the species targeted by the Port Orford fleet. POORT has a representative on the advisory panel for this process, and partner organization PMCC has provided ongoing advice and recommendations to the state.

Among recommendations the group might make are incorporation of their "cape to cape" principles that emphasize area and scale-appropriate spatial management. The Stewardship Area Plan contains numerous specific recommendations for stock assessment, research and monitoring revisions to the nearshore strategy, and these should be proposed as well. As of this writing, POORT was negotiating a Memorandum of Understanding with ODF&W that would create a structure for cooperation on numerous pilot projects and cooperative activities. Such an

MOU would be a useful step. It would provide a structure within which the community and the state could undertake joint or cooperative projects, create a track record for success, build trust and relationships. On the one hand, an MOU is that it is specific to Port Orford, may have time or scope limitations, and does not create permanent shared or devolved authority for management in the stewardship area. On the other hand, if part of the argument Port Orford is making is that its circumstances are unique among Oregon's fishing communities, an MOU



Sign in Port Orford Ocean Resource Team office.

could highlight local use and practice without imposing rules that affect other ports. It could also provide a means to test ideas and approaches that the community and ODF&W would later incorporate into the nearshore strategy.

If an administrative approach (working with ODF&W to revise current strategy and management frameworks) does not accomplish what the community is seeking, they might consider a proposal for legislative enactment of a local area management plan in their stewardship area, such as the one adopted in Sitka, Alaska.

Local Area Management Plans (LAMPs) are "area-specific resource management plans that address local concerns about conservation and allocation between user groups. LAMPs in Alaska can be initiated by the local Alaska

Department of Fish & Game advisory committees and are developed using a consensus decision-making process inclusive of representatives of all users of the resources included in the LAMP."²⁰⁰ Rather than carving out a quota or allocating to a sector, Local Area Management Plans work to maintain a healthy stock and provide equal access to all fishermen through time, area, and catch restrictions at a specific site.

Such an area was developed in Sitka in the mid- to late-1990s to address the decline of halibut in a manner that integrated shared jurisdiction among local, tribal, state, federal and international bodies. (See case studies in Appendix B.) The plan, which was devised through a consensus process and then codified in legislation, restricts commercial fishing and charter boats from halibut fishing in Sitka Sound to allow personal use fishermen and non-guided anglers greater opportunity to catch halibut in close to Sitka. While the circumstances in Port Orford are not precisely analogous to the Sitka case, it may be possible after cooperative ventures with ODFW in the stewardship area, and given the wide community support POORT has garnered for its plan, that a legislative proposal could be developed and advocated. The risk of this approach is opposition from other ports and communities, therefore Port Orford would need to be sure of support from its legislative delegation, ODF&W, neighboring communities and other influential parties before taking a proposal to Salem.

²⁰⁰ See <http://www.goac3.org/initiatives.html>.

Option 2. Nominate marine reserve site or sites

The nomination of areas off Port Orford for inclusion in the proposed Marine Reserve Network would take advantage of a policy process that is underway to achieve elements of the goals related to embedded marine protected areas and areas defined for non-fishery activities. Port Orford stands out as one of very few port communities on the coast supporting marine reserve designation. The action could occur within a larger plan.

Oregon began a process of establishing a network of marine reserves as part of an ecosystem-based approach to manage marine waters. According to program guidelines, the purpose of the reserve network is to “protect, sustain, or restore the nearshore marine ecosystem, its habitats, and species for the heritage values they represent to present and future generations.”²⁰¹

Over a period of years state agencies, advisors, local governments and community stakeholders debated the process and the objectives of reserve sites, including protection of diversity and abundance of species, protection of special natural features, enhancement of areas critical to reproduction, conserve or rebuild populations of economic value, avoid adverse socioeconomic effects on ocean users and dependent communities.²⁰² In the final iteration, OPAC’s policy recommended that a marine reserve be defined 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 affect of stressors.”²⁰³

Port Orford was in on the conversations at the beginning, and was one of the first (and perhaps only) port communities to declare an interest in having a local area in the program. Preliminary marine reserve policy recommendations were made in August 2008. In September, based on those objectives, Port Orford nominated two sites within its Stewardship Area: a Redfish Rocks Research Reserve, and a Bycatch and Discard Reduction Marine Protected

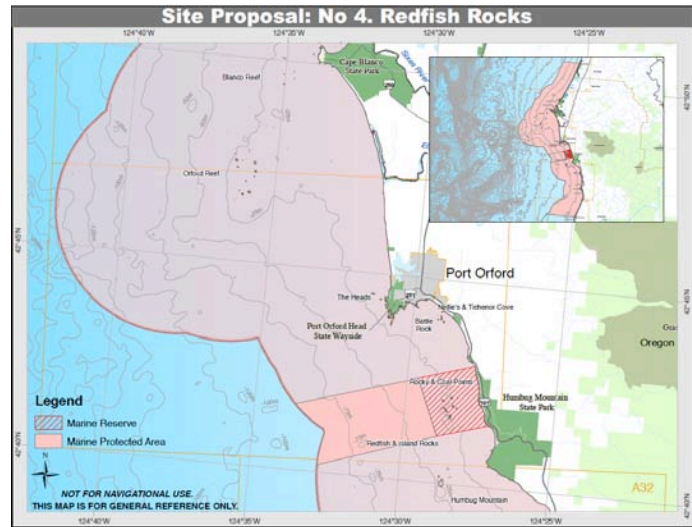


Figure 3. Proposed Research Reserve and protected area at Redfish Rocks. Source: OPAC website.

²⁰¹MRWG GUIDELINES, *supra* note 40.

²⁰² MR OBJECTIVES, *supra* note 88.

²⁰³ OPAC. Oregon Marine Reserve Policy Recommendations; a report to the Governor, State Agencies and Local Governments (October 6, 2008).

Area.²⁰⁴ The Redfish Rocks site was recommended for approval in November 2008 and will be considered by the legislature in 2009.²⁰⁵ While noting these events because of their significance to the Port Orford options, this report does not analyze the policy recommendations, proposal, or site nominations because these events occurred after the end of the project.

Option 3. Create limited access privilege program

Unless Port Orford can limit access to the resources on which the community depends, it cannot realize the full benefits of community-based management. There will always be “free riders” who enjoy the benefits of their conservation activities, voluntary performance standards, habitat protection and other measures that protect local resources. Port Orford’s fleet fishes under both federal limited entry rules and the state’s open access regime. They do not fit the profile for quota-type plans currently under consideration in the federal process, such as the groundfish trawl IQ.

The few examples of community-based fishery management in the U.S. are implemented through various quota systems that assign a portion of a predetermined total allowable catch from an overall fishery to an area, community or gear group, based on requirements developed through the federal management process. The case studies in Appendix B describe three: the Georges Bank Cod Sector managed by the Cape Cod Commercial Hook Fishermen’s Association, the Community Development Quota and the Community Quota Entities programs in Alaska. Pros and cons of these approaches are described in the case studies. Interviews with stakeholders and managers in the programs are summarized. Key characteristics and parameters that surfaced from the case studies and interviews were:

- Importance of choosing appropriate scale
- Well-defined area
- Cooperation and consensus building
- Community engagement
- Catch allocation scheme
- Monitoring and enforcement.

The approach that might serve Port Orford is to develop a community sustainability plan with a limited access privilege program as provided for in the most recent revision of the Magnuson-Stevens Act. The advantage of this approach is that the community could design a limited access privilege program for some portion of the total allocation of federal fisheries in which the fleet participates, tailor that program with its community-based principles, and then propose a sustainability plan that tracks the vision for the stewardship area.

²⁰⁴ Port Orford Ocean Resource Team, Proposal prepared for Oregon Ocean Policy advisory Council (Sept.30, 2008). Available online at <http://www.oceanresourceteam.org/projects/marinereserves.php>

²⁰⁵ OPAC website. Available online at http://www.oregonmarinereserves.net/index.php?option=com_content&task=view&id=300&Itemid=39

There are cautions to this approach. First, Port Orford stakeholders would have to overcome the lingering aversion of fleet members to the notion of any kind of quota or rights-based fishery management. This may have begun as the community shares experience with other fishing communities in meetings and workshops. Second, while NMFS has promised regulatory guidance on creation of LAPPs, none has emerged and no proposed rulemaking was on the calendar as of this writing. A detailed technical memorandum was published in November 2007. The process of creating these programs is centered in the fishery management council process and would proceed as would any FMP or plan amendment. Since effectiveness at the Pacific Council is one of Port Orford's self-identified shortcomings, the fleet may be leery of trying to steer a proposal through the council thicket. Finally, without further published guidance, the LAPP process presents this conundrum, identified in the technical paper: fishing communities may receive limited access privileges as part of an initial allocation, or after a LAP program is in operation. However, as the tech memo authors point out, "FCs cannot be designated until the eligibility criteria have been designed, approved by the Secretary, and published in the Federal Register. This approval can likely be made concurrent with the approval of the overall FMP, but it may not be possible to get that approval prior to the approval of the FMP. Until the FCs have been designated, it is not possible to know for certain how much of the TAC should be allocated to the overall FC segment."²⁰⁶ What that means is that the council has to develop eligibility criteria and a community has to meet the criteria before knowing what or whether there will be some portion of the TAC available for allocation to them.



Day's catch of black cod, one of the federal waters fisheries of the Port Orford fleet.

It was suggested by members of the expert review panel that Port Orford may want to get ahead of the curve, design the outline of a community sustainability plan (which could be the Community Stewardship Area Plan) and propose the plan and an allocation to the council, with or without published guidance. It is possible such a move could serve as a model for the Pacific or other councils who will be grappling with design of these programs. Certainly Port Orford meets the qualifications set out in the law, (see text accompanying notes 66 and 68) and may even qualify under the particular requirement that if harvesting privileges would assist in regional economic development.

A question for the community is whether the federal waters fisheries within the Stewardship Area are susceptible to the kind of allocation that would be made by the council for

²⁰⁶ LAPP Tech Memo, *supra* note 193 at 40.

the region. Given that the Port Orford fleet targets many different species, and most of the current allocation approaches occur under single species (or multiple, but similar species) plans, is there a construct using limited access privileges or quota regimes that would fit their circumstances? They would need to determine what species or assemblage would be part of the program and the nature of the competitors with whom they would need to divide the allocation. An interim step they should consider is one that is called out in the technical memorandum:

At the same time, it may be possible to devolve some management authority to community-based entities which receive LAPs. For example, the Cape Cod Commercial Hook Sector is responsible for regulating the activities of its members so as to maintain the sector's allowable catch limit. This has the potential to improve overall compliance and to lower government management costs. In these cases, it may be prudent to establish operational plans in the form of a sector allocation proposal between the entity and the Council/NOAA Fisheries.²⁰⁷

Port Orford certainly fits the characteristics for sector allocation that emerge from the case studies. Indeed, the Bycatch and Discard Reduction MPA proposed in the marine reserves process approaches sector allocation. What POORT is proposing is no net fisheries within the stewardship area. This could be accomplished through an area restriction or an allocation of a variety of species to hook and line vessels, similar to the Cape Cod program.

Option 4. Create a Special Area Management Plan

Although it would be a complex and long-term undertaking, the creation of a Special Area Management Plan under the framework of the CZMA and Oregon's Coastal Management Program has the advantage of encompassing both seaward and landward goals of POORT's vision. It also has the potential to create a structure under which POORT could engage all the necessary parties: federal and state fishery managers, state land use planners, county commissioners, forest managers, coastal zone interests, tourism and other economic interests and stakeholders. It is the only approach that would enable the community to tackle the entire stewardship area as an ecosystem without getting tangled in the management patchwork that overlays it. One missing piece in the SAMP approach, as well as the first two, is the lack of access control.

According to NOAA's Coastal Services Center, twelve coastal states, including Oregon, have used this provision of the CZMA and the federal resources it affords to develop 31 Special Area Management Plans. The distinguishing characteristics that lend an area to this type planning include the ability to deal with specific qualities and needs of a local site, a desire to create a long-term management scheme rather than an evolving plan, and the ability to scale

²⁰⁷*Id.*, at 42.

down to address a focused objective rather than statewide or coast-wide issues. These attributes relate directly to several of the goals of the Port Orford Stewardship Area.

SAMPs provide a mechanism to integrate multiple authorities and foster citizen involvement at a local level. Types of areas the Coastal Service Center offers as examples for SAMPs include waterfront, a significant resource site or a reef.²⁰⁸ Oregon's estuary management plans were developed under the SAMP process to address specific issues based on classification. Oregon's Coastal Management Program clearly allows a community to pursue a SAMP, but the process is substantial. One member of the expert review panel suggests that the land side of the stewardship area might have more traction as a SAMP than the ocean side, providing a mechanism to link up land use planning, agricultural and forestry uses, water quality concerns and other issues handled by multiple agencies and jurisdictions.²⁰⁹

The ocean side process would have to comport with ORMA, the Ocean Coastal Plan, the Ocean Resources Management Plan and the Territorial Sea Plan. (See discussion in Section II, above.) Even if the community could build consensus to navigate all this process, ultimately LCDC would have to propose a SAMP to the legislature for approval to give enforceability to the plan provisions. Whether a SAMP could extend beyond state waters or whether it could include fishery management components are open questions. Some nearshore SAMPs in other states have addressed fisheries. Clearly the collaboration of Oregon's fishery managers and representatives from the council or other federal fishery management jurisdiction would need to be part of the initial exploratory group.

While pursuit of the SAMP may seem too daunting at this time, it would offer the community a mechanism to work with resource managers in all components of the stewardship area: ocean, coast and upland; federal, state and local; resource protection and economic development.

²⁰⁸ Case studies on use of SAMP in Rhode Island, New York, South Carolina and Massachusetts are available at http://coastalmanagement.noaa.gov/issues/special_casestudies.html.

²⁰⁹ See presentation by E.C. Brickleyer at Public Interest Environmental Law Conference, March 2008. Available online as an audio file audio file at <http://www.pielc.org/2008/recordings.html>.

Conclusion and Final Remarks

The notion of ecosystem-based planning and management has been bandied about for more than a decade, but when it comes down to management on the ground or on the docks, the idea is often overtaken by jurisdictional turf protection. The expert review panel that advised this project in its early stages urged the authors and the advocates in Port Orford to think about the potential of ocean zoning, about an integrated, community-based approach that moves beyond micro-management by single species or single pollutant or single agency brief.

Integration and ecosystem-based approaches have been urged by coastal policy experts, most recently in ocean plans urged upon the Congress by the Pew and U.S. Ocean Commissions.²¹⁰ The Joint Ocean Commission, which grew out of the two earlier efforts and advises federal policy makers on ocean issues, in 2007 applauded west coast Governors for their Draft Action Plan to implement an agreement on ocean health, a document that included ecosystem-based management implementation.

Port Orford advocates may be ahead of the curve in their vision for an integrated plan to protect the community's resources. They are pushing the boundaries of the management system by going beyond conventional fishery approaches, and taking their concerns inland and upland to discuss local activities that affect their resources and livelihoods. The boundaries of their Community Stewardship Area are bold, but scientifically and socio-economically defensible. They have defined the ecosystem from the earliest stages of their program, and continue to bolster the description of the stewardship area with mapping, monitoring, biological and socio-economic studies, collaborative research and consensus building.

Although the Port Orford Ocean Resource Team began its organizational life in a fight over fish, their work quickly encompassed more than just fishery management. Disaster relief, wave energy projects, development of resorts and golf courses, loss of working waterfront, led community advocates to conclude early that they had to look beyond the conventional practices of using fishery management approaches and authorities to achieve the community's goals. The pressures of coastal development are such that they could overrun the most carefully plotted fishery management framework.

While some of the issues and circumstances of Oregon's nearshore fishery and coastal zone management are unique to Port Orford, there are some lessons for other fishing communities that can be drawn from this project, both legal and social.

On the legal side, the 2006 amendments to the Magnuson Stevens Act provide substantial new opportunities for communities, fleets, and fishing organizations to devise sectors or allocations under limited access privilege programs. Though it remains to be seen

²¹⁰ Pew Ocean Commission, AMERICA'S LIVING OCEANS; CHARTING A COURSE FOR SEA CHANGE (May 2003) available online at http://www.pewtrusts.org/our_work_detail.aspx?id=130; AN OCEAN BLUEPRINT FOR THE 21ST CENTURY Final Report of the U.S. Commission on Ocean Policy (September 20, 2004) available online at http://www.oceancommission.gov/documents/full_color_rpt/welcome.html

what guidelines councils will require for development of community sustainability plans, current advice appears to provide considerable flexibility.

Although federal and state fishery managers must operate under laws that put them in charge of the public's resources, there are ways into the process beyond showing up at hearings or commenting on published proposals. Cooperative research is one of the most likely ways into the management realm and provides incentives for both resource managers and community fleets.

Inventiveness is not always discouraged. Creative approaches such as sector allocations, joint monitoring, MOUs, and community quota approaches are all permissible under state and federal law if community advocates are willing to put in the time.

Integration is key. Fishery management agencies are not the only players with whom community advocates can collaborate. Coastal zone officials, port officials, local government, planning commissions all have a stake in the health and vitality of fishing communities and can be enlisted to support the fleet's goals. In some instances, these other legal frameworks may provide an alternative to fishery management approaches.

Developing capacity to do community-based fishery management takes a winding path that detours into local politics, civic responsibility, and caring for one's neighbors. According to Leesa Cobb: "We donated 800 pounds of fish to the local food bank in 2006. It started as a way to get a tax deduction for fish taken under a research permit, and turned into a social issue."

It is important to get by with a little help from your friends. Cobb cites the expertise of partners as a key to their success: "They brought expertise in GIS, fishery science, water quality, organizational development." What started as a small, one-time study by a staff person from an environmental group grew into a widely recognized, vital community program.

Engaging fishermen in organization and capacity building—even if it is on their own behalf—takes time. "It's hard and it's fragile. People want a reason not to do it," Cobb says. Her board is now flourishing after years of trying to get people to commit the time and effort. As one of her board members put it: "It makes me nervous, but we have to do it."



Leesa Cobb at the POORT office.