



To: Alex Marquardt, Coastal Mariculture Specialist, Oregon Sea Grant

From: Catherine Janasie, Research Counsel II (Sr.) and Stephanie Otts, Director

Re: Leasing Framework for Mariculture in Oregon (NSGLC-26-04-06)¹

Date: August 21, 2026

Advisory Summary Overview

Oregon Sea Grant contacted the National Sea Grant Law Center to gain a greater understanding of the barriers in mariculture permitting in Oregon. Oregon Sea Grant worked with the Oregon Coastal Mariculture Collaborative to develop a list of priority legal research questions related to the leasing framework in the state. The National Sea Grant Law Center's research findings for each question are presented below.

There is language prohibiting mussels and clams in both the Oregon Revised Statutes (ORS) and Oregon Code of Administrative Regulations (OAR). Would both need to be changed simultaneously?

Legislative action would be needed first to expand the type of species that may be cultivated on shellfish plat leases. Currently, the Oregon Department of Agriculture (ODA) has statutory authority to “investigate and classify those state lands that are suitable for oyster, clam or mussel cultivation.” Or. Rev. Stat. § 622.240. New plat applications are limited to oyster cultivation. Or. Rev. Stat. § 622.250. Mussels and clams may only be cultivated on oyster plats that were in effect on June 1, 1997. Or. Rev. Stat. § 622.250. These statutory provisions are incorporated into ODA regulations at Or. Admin. R. 603-082-0040.

The Oregon Legislature placed the commercial cultivation of oysters under the regulatory authority of ODA in 1981. Or. Op. Att’y Gen. OP-5644 (1984). The language referring to mussel and clam culture was added in 1997 by H.B. 3110. A review of the legislative history provides some evidence that the species limitations were an intentional choice by the Oregon Legislature. During a legislative work session of the House Committee on Agriculture and Natural Resources in 1997 related to H.B. 3110, there was an exchange during comments given by Ron Phillips, President of the Oregon Shellfish Association (page 7). At one point, a Representative Schrader makes a remark related to Subsection 4, of Section 4 to clarify that the existing plat owners will not have access under this legislation to the full plat they now have as an effort to encourage

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others to come into the market. Ron Phillips responded that the intent is to limit the amount of clams and mussels and let it evolve slowly so they can evaluate it.

The Legislature would need to take action to amend Or. Rev. Stat. § 622.250 to permit ODA to issue leases for species other than oysters, mussels, and clams. If such legislation were passed, the ODA would subsequently be able to amend their regulations to implement this expanded authority.

Interestingly, the Legislature has granted ODA limited authority to add to the definition of shellfish by regulation, but only in the shellfish sanitation context. Or. Rev. Stat. § 622.180 states that “The department also, by rule, may add to the definition of shellfish, and subject to regulation under ORS 622.010 (Definitions) to 622.180 (Powers of department), any aquatic animals regulated as shellfish under the federal National Shellfish Sanitation Program.” Note that this authority does not extend to the shellfish plat leasing provisions as they are found in Or. Rev. Stat. §§ 622.210 - 622.360.

The legislature defined shellfish in Or. Rev. Stat. § 622.010(5) to mean all edible species of oysters, clams and mussels “either shucked or in the shell, fresh or frozen, whole or in part and intended for human consumption.” The definition also includes all edible species of scallops “either shucked or in the shell, fresh or frozen, whole or in part, except when the final product is the shucked adductor muscle only, and intended for human consumption.”

The ODA regulatory definition within the shellfish sanitation provisions does not have any additional species. Or. Admin. Reg. 603-100-0000 (5). This may be due in part to the limited nature of the authority. ODA only has the authority to add aquatic animals regulated as shellfish under the NSSP. The NSSP Model Ordinance (2023) defines shellfish as all species of bivalve mollusks (e.g. oysters, clams, mussels, cockles) and scallops ([Ordinance](#), page 9). Unless there are species beyond these four that are of interest to the state’s shellfish industry, there would be no need for ODA to exercise this authority.

Currently, there is not a regulatory framework for seaweed. Would it require change in regulatory statutes to have ODA or DSL oversee commercial seaweed aquaculture? Would the existing site registration permit be viable (or modifiable) for commercial seaweed aquaculture?

This question is best answered by comparing kelp and other seaweeds to the process for shellfish, which is governed by both ODA and the Oregon Department of State Lands (DSL). ODA’s authority relates to the growing of shellfish as an agricultural activity and resides in the sections of the statute related to food safety and sanitation. DSL’s authority relates to the authorization of the use of state lands. Each of these authorities will be discussed separately below.

The ODA shellfish statutory and regulatory provisions do not apply to seaweed. These provisions exclusively apply to shellfish, defined to include oysters, clams, mussels, and scallops. Therefore, in order for ODA to have similar authority over kelp or other seaweeds, legislative action would need to be taken. This conclusion is further supported by the fact that



ODA's authority over shellfish aquaculture is tied to statutory language stating that aquaculture is an agricultural activity. Or. Rev. Stat. § 622.220. In addition, the shellfish aquaculture provisions reside in the section of the statute related to food and sanitation; kelp or other seaweed aquaculture would likely raise similar concerns. Even though kelp and other seaweeds are different food products from shellfish, states often have the same department oversee their culture and handling. Therefore, ODA would be a logical choice by the legislature to oversee seaweed aquaculture as it applies to water quality and food safety.

One additional thing to note is that Or. Rev. Stat. § 622.220 specifically differentiates shellfish aquaculture from the harvest of native shellfish in the state, which is under the jurisdiction of the State Fish and Wildlife Commission. As it relates to seaweed, DSL has express statutory authority over the wild harvest of seaweed, in conjunction with the State Fish and Wildlife Commission. Under a statutory provision entitled "Leasing kelp fields," Oregon law states that DSL may lease submerged lands "for the purpose of harvesting kelp and other seaweed after consultation with the State Fish and Wildlife Commission." Or. Rev. Stat. § 274.885. DSL has previously leased state lands for this purpose (see *Fanning v. Oregon Div. of State Lands*, 950 P2d 353 (Or Ct App 1997)) and still allows for recreational harvest. However, current DSL regulations do not allow for the commercial harvest of seaweeds. Division 125 of the DSL regulations states in the Policies provision: "Notwithstanding the provisions of ORS 274.885, the Department will not allow or authorize the removal of kelp or other seaweed for commercial purposes." Or. Admin. Code 141-125-0110.

As the shellfish process shows, DSL does have the authority to lease state lands for aquaculture. However, in its definition of aquaculture, DSL lease regulations state that kelp is governed by special use permits, not the aquaculture lease process:

Aquaculture means the culture, farming, or harvesting of food fish, shellfish, and other plants (**exclusive of kelp which is governed by Division 125 of the Department's administrative rules for special use permits**) and animals in fresh or salt-water areas. Aquaculture practices include, but are not limited to, the hatching, seeding or planting, cultivating, feeding, raising, and harvesting of planted or natural species so as to maintain an optimum yield, and the processing of plants or animals. Or. Admin. R. 141-082-0255. (Emphasis added).

The DSL issues special use permits to authorize the harvesting of wild kelp from state lands. No provision in Division 125 of the DSL's regulations currently authorizes the leasing of state lands for seaweed aquaculture. However, the inclusion of "other plants" in the definition of aquaculture raises questions about what species that reference was meant to cover. Noting that seaweeds aren't technically plants, it would be worth clarifying with DSL about whether the culture of seaweed species, other than kelp, could be authorized through a state lands lease. In addition, it would be helpful to know whether DSL interprets its current prohibition on the commercial wild harvest of seaweed to also apply to commercial seaweed aquaculture.

Would requiring a lease amendment require a change in the ORS or OAR? If created, how would the amendment impact other agencies?

Depending on how the ODA interprets the extent of their authority, a lease amendment or modification process could be adopted by the ODA through a regulatory change codified in the OAR. No legislative change should be necessary.

A lease from the ODA is required for the commercial cultivation of molluscan shellfish on state-owned tidelands as legislatively authorized by Or. Rev. Stat. §§ 622.210 - 622.220. The statute outlines the process for new applications, which includes a mandatory public notice period. Or. Rev. Stat. § 622.250. In the public notice, applicants must state the “type of operation the applicant proposes to conduct and must describe the area to be planted with oysters.” Or. Rev. Stat. Ann. § 622.250. The statute is silent regarding lease term limits or changes to approved shellfish plat leases. According to ODA [Shellfish Aquaculture Leasing Process for State-Owned Lands](#), a lease remains in effect indefinitely with no requirement to reapply unless an applicant wishes to change the terms of lease. Lease holders must submit annual reports to ODA and pay annual cultivation fees and use taxes. Or. Rev. Stat. §§ 662.270; 622.290.

Currently, there is no provision in OAR 603 Division 82 (Oyster, Clam and Mussel Leases) for the amendment or modification of approved leases. As stated in the shellfish lease flowcharts, applicants must reapply to change the terms of the lease. That requires a farmer with an existing operation to go through the entire application process again, including the public notice period. Although it appears the ODA has sufficient statutory authority to establish a modification process through regulation, that might not lead to a simplified process.

An examination of the regulations for a parallel leasing process for aquaculture may be informative. A [waterway lease](#) is required from DSL for commercial, industrial, and residential structures, or other similar uses of Oregon-owned waterways. Or. Rev. Stat. § 274.040. Aquaculture facilities require a waterway lease. Or. Admin. R. 141-082-0265(2)(a). They are classified as a “marine Industrial/marine service” activity. Or. Admin. R. 141-082-0255.

As with shellfish plat leases, the statutory provision authorizing DSL to issue waterway leases is silent regarding modification. However, the DSL adopted a modification process through their regulations. The Director of State Lands has broad authority to draw upon, as the Legislature has granted them “full authority with respect to the retention or disposition of all lands subject to the jurisdiction of the department, including but not limited to the management, sale, leasing, exchange or other conveyance of such lands.” Or. Rev. Stat. § 273.171.

Per DSL regulations, the holder of a lease may not change the authorized use or increase the size of the authorized area without prior written authorization from the Department. Or. Admin. R. 141-082-0295. To receive such authorization, the holder must submit an application to DSL along with a \$750 application fee. DSL processes and reviews all applications for changes of the authorized use or for an increase in the authorized area in the same manner as a new lease application. Or. Admin. R. 141-082-0295(5).



The review process for new lease applications involves (1) the offer of a preference right to adjacent riparian property owners, (2) a competitive bidding process if the preference right is waived, and (3) a review and comment period for “appropriate city or county planning department, pertinent state and federal agencies, federally recognized tribal governments, ports and all lessees and adjacent riparian property owners.” Or. Admin. R. 141-082-0280(8). The DSL also has the discretion to provide public notice and opportunity to comment on the application. Or. Admin. R. 141-082-0280(9).

The lease modification process codified by DSL in regulations is therefore functionally similar to the steps ODA currently takes with respect to a requested change to a shellfish plat lease. Per ODA practice, the lease modification is treated as a new lease application, subject to the same process and public comment period. Like DSL, the ODA has broad statutory authority to draw upon if they wished to codify the modification process into regulations. The ODA, for example, is authorized by statute “to make any and all rules and regulations necessary for the administration” of any law they are charged with administering. Or. Rev. Stat. § 561.190. Although such a regulation could increase transparency, the agency is likely to follow a similar approach as DSL and treat the modification as a new application.

What is considered “normal and customary manner” under ORS 622.320? Is this statutory provision what allows public access for recreational (or commercial) shellfish harvest on shellfish plat leases?

The language in Or. Rev. Stat. § 622.320 that refers to the “rights of the public to the use of the waters of this state in a normal and customary manner” has its roots in the Public Trust Doctrine. The Public Trust Doctrine is a legal principle derived from ancient Roman, and later British, law. As adopted in the United States, the doctrine provides that navigable waters and the lands underneath are held by state governments in trust for the public for certain protected uses. In Oregon, submerged and submersible lands “have been accorded special protection to insure their preservation for public water-related uses such as navigation, fishery and recreation.” *Morse v. Oregon Div. of State Lands*, 581 P.2d 520, 523 (Or. Ct. App. 1978). In a case involving oyster beds in Tillamook Bay, the Court of Appeals stated that, “The state, as trustee for the people, bears the responsibility of preserving and protecting the right of the public to the use of the waters for those purposes.” *Oregon Shores Conservation Coal. v. Oregon Fish & Wildlife Comm’n*, 662 P.2d 356, 364 (Or. Ct. App. 1983).

Section 622.320 codifies this common law public right of access into statute. The ODA has incorporated this language regarding public rights into its regulations at Or. Admin. R. 603-082-0040(4). The DSL has a similar provision protecting public rights within its waterway lease regulations. Or. Admin. R. 141-082-0285. Per DSL regulations, state-owned submerged and submersible land are to remain open to “public trust uses.” Holders of waterway leases may close or restrict public trust uses in limited circumstances subject to approval by the Department.

Our research did not find any court case exploring what the phrase “a normal and customary manner” means. Most likely that phrase would be interpreted by courts to protect traditional

public trust uses in the waters over shellfish plats, including navigation, fishing, and recreation. However, in their exercise of these rights, members of the public may not interfere with the private property rights of shellfish plat holders. Section 622.320 states that properly marked shellfish plats “shall be deemed and protected as private property.” It would be unlawful, for example, for an individual navigating or fishing over the shellfish farm to damage gear or harvest cultured shellfish.

Such public access requirements are common around the country. Most states prohibit aquaculture lease holders from restricting public access for navigation and fishing. U.S. Army Corps of Engineers permits issued under the Rivers and Harbors Act also have similar access requirements.

Is the DLCD consistency review in the ORS or OAR or somewhere else? Is there a mechanism for existing farms to bypass or fast-track this review process?

The Oregon Legislature designated the Department of Land Conservation and Development (DLCD) the State Coastal Management Agency for purposes of carrying out and responding to the federal Coastal Zone Management Act of 1972. Or. Rev. Stat. § 196.435. The DLCD rules implementing this authority with respect to federal consistency can be found at OAR Chapter 660. Additional information is available on the DLCD webpage for [federal permit applicants](#).

As authorized by the CZMA, states with approved coastal management programs have the right to review federal actions affecting coastal uses or resources. Federal actions subject to review include the issuance of permits and licenses. Or. Admin. R. 660-035-0015. The federal requirements and procedures for consistency review can be found in 15 CFR Part 930. The DLCD adheres to these requirements in carrying out their consistency reviews. Or. Admin. R. 660-035-0005.

The DLCD outlines the process for federal consistency review of federal licenses and permits in Or. Admin. R. 660-035-0050. The regulations state that the CZMA review period is six months (180 days). During this period, the DLCD will provide for public participation by notifying interested parties and soliciting comments via the OCMP public notices webpage. When an activity under review requires state or local permits or authorization, “the issued permit or authorization is the only acceptable evidence demonstrating consistency with the enforceable policies” of the state’s coastal management plan. Or. Admin. R. 660-035-0050. An applicant does not have to have all the required state and local permits and authorizations to begin the CZMA review period, but the process cannot be completed until they are obtained.

According to the [DLCD website](#), applicants for most U.S. Army Corps of Engineers Nationwide Permits (NWPs) do not need to submit any material directly to DLCD because they have been granted a concurrence decision in advance. This expedited process is not available to aquaculture farmers as DLCD has exempted NWP 48 (shellfish) and NWP 55 (seaweed) from the advanced concurrence.

The Corps of Engineers published the [2026 NWPs](#) in January. Projects that will not be completed by March 2027, such as ongoing shellfish aquaculture operations, require



reauthorization under the 2026 NWP. If a project does not qualify under the conditions in the re-issued NWP, it must obtain an individual permit or qualify under a regional general permit if available. ([from fact sheet](#)). The 2026 re-issuance involved no major changes to NWP 48 or 55.

The DLCD's concurrence determinations for the 2026 NWPs are available [here](#). The State objected to NWP 48 (shellfish) and 55 (seaweed). The state also objected to NWP 56 relating to finfish aquaculture, but the Corps ultimately decided not to reissue this NWP. Because the state did not grant advanced concurrence, these NWPs always require individual consistency review. In its concurrence letter, the state provided the following rationale:

- Projects utilizing NWP 48 can result in a wide array of ecological effects to estuarine resources in the Pacific Northwest region, as well as impact other shellfish users, degrade estuary habitat unintentionally, or disrupt/impact other aquaculture activities including other native shellfish beds. Additionally, the wide diversity of commercial shellfish mariculture practices affirms the need to evaluate proposed projects on a case-by-case basis through Individual Consistency Review. Policies: Statewide Planning Goals 16, 19; Oregon Territorial Sea Plan, Part 2; ORS 196; ORS 496; ORS 498; ORS 506; ORS 509.

So, there is currently no process by which individual shellfish farms can bypass individual consistency review.