

February 9, 2012

**Rule Consideration on Boat Operations on Certain Waters in Lane County
OAR 250-020-0221 and on Scenic Waterways OAR 250-030-0030**

Background

01. In October of 2011 an appeal was filed with the Oregon Court of Appeals seeking to invalidate OAR 250-020-0221(10) and OAR 250-030-0030(4). Identical language is contained in two separate sections of OSMB administrative rules and states the following:

Use of internal combustion motors in boats and floatplanes operating on the surface of Waldo Lake is prohibited year round. "Watercraft" includes boats and floatplanes operating on the surface of Waldo Lake. Official use of internal combustion motors in watercraft operated on the surface of Waldo Lake by local, state, or federal governmental officials or agents is allowed for the following activities: search and rescue, law enforcement and fire suppression. Previous approval by the Willamette National Forest Supervisor is required for other activities undertaken by local, state or federal government officials or agents that involve use of internal combustion motors in watercraft operated on the surface of Waldo Lake. Emergency landings of private or governmental floatplanes on Waldo Lake are allowed without previous approval.

02. The arguments raised in the rule challenge can be characterized as follows:

- A. The Marine Board exceeded its statutory authority in promulgating OAR 250-020-0221(10) and 250-030-0030(4), because both rules are indirectly inconsistent with the 10 mph speed limit memorialized in ORS 830.185(2).
- B. The Marine Board failed to follow the procedural requirements of rulemaking in that it conducted sham hearings and then voted only in accordance with the policy preference communicated by the Governor's office, rather than in the exercise of its own independent judgment, in violation of ORS 183.335(4).
- C. The Marine Board failed to follow required rulemaking procedures in amending OAR 250-020-0221 and 250-030-0030 in that it failed to provide adequate fiscal impact statements for either rule, in violation of ORS 183.335(2)(b)(E).
- D. The Marine Board failed to sufficiently coordinate its rulemaking "in cooperation with" the Oregon Department of Aviation in the manner required by law.

03. Arguments B, C, and D are procedural and address the rulemaking process followed during the initial rule adoption. A new rulemaking process will allow us to correct those alleged procedural irregularities and moot the pending rule challenge in relation to those specific procedural aspects.

Process

04. In January a Rules Advisory Committee (RAC) was convened to look at the fiscal impact of a proposed rule on government and small business. The report from that committee is attached. If the rules are reopened, then the statement of economic impact would include the work of the RAC. Reopening the rules would also serve to eliminate the concern of undue influence by the Governor's Office and allow for greater cooperation with the Board of Aviation.
05. If the rule is reopened, then a public comment period will begin on March 1 and continue through the public hearing on April 10 in Eugene in conjunction with our quarterly Board meeting. This hearing will be a special Board meeting during which the Board will have the opportunity to listen to public comment. At its conclusion the Board may make a motion regarding the rule. The Board may readopt the rule, repeal the rule, or amend the rule with new language. If the Board elects not to take action at the hearing, then the rule will remain in place until such time as the Board does take action.

Recommendation

Staff recommends reopening OAR 250-020-0221 and OAR 250-030-0030.

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Fiscal Impact – Prohibition of Internal Combustion Motors on Waldo Lake

01. The Oregon State Marine Board Rule Advisory Committee (RAC) met on January 23 via publicly noticed conference to discuss fiscal impacts related to three potential rules being considered by the Oregon State Marine Board.

02. RAC members include:

- Doug Walker, Columbia River Yachting Association
- Brian Sykes, Bend-area outfitter & guide
- Lt. Ethan Wilson, Oregon State Police Fish & Wildlife Division
- Travis Williams, Willamette Riverkeeper
- Steve Lambert, Jackson County Parks Director
- Erik Weiseth, Small Business Operator (boat livery), Orange Torpedo

03. Related to Waldo Lake, the following questions were asked of the group:

- What financial impacts do you see for state agencies, units of local government and also the public – both boating and non-boating?
- What are the potential costs for small businesses to comply with this new rule?
- Estimate the number of small business and types of business and industries with small businesses subject to the rule?
- Projected reporting, recording and other administrative activities required for compliance, including costs of professional services?
- Equipment, supplies, labor and increased administration required for compliance?

Fiscal Impact and Cost to Small Business

A summary of the RAC discussion follows:

04. Fiscal and Economic Impact: There could be fiscal impacts to county government to provide law enforcement services to enforce this rule. The federal land manager or their concessionaire may see minor fiscal impacts if certain boat operators cease camping at or launching onto the waterway. The rule doesn't prevent operation, just propulsion type. Historic use is generally by non-motorized users, so fiscal impacts should be small.

05. Cost of compliance to small business: There is no direct cost to small businesses to comply with this rule. Since motorized boats are not allowed on the lake, gasoline purchases from fuel suppliers along Hwy 58 may decrease. Motor use on Waldo Lake was typically minor, so impacts will be small.