



September 14, 2021

TO: Columbia River Gorge Commission

FROM: Krystyna Wolniakowski, Executive Director
Joanna Kaiserman, Senior Planner
Jeff Litwak, Counsel

SUBJECT: Action Item: Approve Rulemaking for New Gorge Commission Land Use Ordinance

Actions Requested

Authorize staff to start the rulemaking process using the attached draft rule. Staff may continue to fix typos and internal inconsistencies as it prepares the rulemaking drafts and rulemaking notices after the Commission authorizes the draft for rulemaking.

Background

In October 2020, the Gorge Commission adopted a revised Management Plan for the National Scenic Area and in February 2021, the Secretary of Agriculture concurred on the Management Plan. On March 16, 2021, the Gorge Commission transmitted the revised Management Plan to the counties, which starts the 270-day clock in the National Scenic Area Act for counties to adopt revisions to their National Scenic Area land use ordinances. In accordance with sections 7(c) and 8(l) of the National Scenic Area Act, the Gorge Commission must enact a National Scenic Area ordinance for counties that do not enact their own ordinance. Klickitat County has never enacted its own land use ordinance, so the Gorge Commission has always enacted its own land use ordinance for Klickitat County. The Gorge Commission observe the same 270-day clock in the National Scenic Area Act for adoption of its own land use ordinance.

The Management Plan contains goals, objectives, policies, and guidelines for each resource topic (scenic, cultural, natural, and recreation) and each land use designation. The Plan also contains some policies and many guidelines for specific types of development and land uses, and application and review process requirements. The land use ordinance incorporates the guidelines from the Management Plan and a few policies that the guidelines reference as approval criteria.

County Ordinance Policy 1 in the Management Plan specifies that the counties may adopt provisions that vary from the guidelines in the Management Plan so long as those provisions provide greater protection for Gorge resources. The Commission has always allowed counties to make non-

substantive text changes to allow the counties to incorporate their National Scenic Area ordinance into their own codes. The Gorge Commission’s draft ordinance uses this same approach.

Although the National Scenic Area Act uses the term “land use ordinance,” and the Commission and staff refer to the ordinance as an “ordinance.” the Commission adopts the ordinance as a “rule” using “rulemaking” procedures in state administrative law parlance. Staff may use the terms “ordinance” and “rule” interchangeably and the terms “adopt” and “rulemaking” interchangeably.

Staff gave a progress report on the draft ordinance for Klickitat County at the Commission’s July 2021 meeting. Staff has now completed a draft of the ordinance—a new Commission Rule 350-082. The Commission’s longstanding practice has been to review draft rules and authorize staff to start the rulemaking process.

Rulemaking Process

The National Scenic Area Act requires the Gorge Commission use the more restrictive of the states’ statutes relating to administrative procedure, which includes rulemaking. The Gorge Compact and Gorge Commission’s administrative procedure rule require the Gorge Commission publish its rule in both states prior to enacting the rule. In Oregon, draft rules and rulemaking notices are published in the Oregon Bulletin. In Washington draft rules and rulemaking notices are published in the Washington State Register.

The Commission must submit its notice of proposed rulemaking and draft rule to the Washington Code Reviser by October 6, 2021 (and preferably a week or more before that to give Code Reviser staff to review the filing for technical errors) to be able to hold a hearing on the draft rule at the Commission’s December 14, 2021 meeting (which complies with the timeline in the National Scenic Area Act for adoption of land use ordinance). The Commission must file the draft rule and rulemaking notice by October 31 in Oregon to hold its adoption hearing in December.

The Commission may make changes to the draft rule at the December rulemaking hearing to correct typos, cross-reference errors, and add clarity to the draft. Public comment on the draft rule and staff’s continued review will likely identify such changes for the Commission to consider at the December hearing.

Introduction to the Draft Land Use Ordinance

The tracked changes shown in the draft are changes that staff made after incorporating the revised Management Plan text into the ordinance. The draft does not show the Management Plan revisions. The tracked changes in the draft show changes made to the revised Management Plan text or to the development review process provisions transferred from the current land use ordinance. Each rule number is bookmarked for easier scrolling and to see the outline.

The tracked changes shown are not all the text changes. Staff has made many non-substantive changes to the text from the Management Plan that it does not show in tracked changes in this draft.

You are receiving this staff report and draft ordinance earlier than staff typically sends Commission meeting materials to give you time to review it. Staff encourages you to review the entirety of the draft land use ordinance. To help understand where staff is proposing some type of substantive change, this staff report provides two tables. The first table shows the most significant changes to

the development review process *relative to the process in the existing ordinance*. The second table shows *clarifications to the text of the Management Plan* that staff proposes for the land use ordinance to make implementation of the ordinance clearer and more intentional. Staff believes these clarifications are consistent with your intent in the Management Plan but will readily consider your comments and public comments that explain otherwise.

Revised Development Review Process

Staff has made significant changes to the development review process guidelines in addition to incorporating new requirements from the Revised Management Plan. Most of the development review process guidelines are not in the Management Plan. Consequently, counties and the Gorge Commission have flexibility to create a review process that makes sense for them, provided, of course, that the process uses the minimum procedures in the Management Plan.

The development review process in the current land use ordinance (Commission Rule 350-81) was written in 1994 for the first land use ordinance (Commission Rule 350-80). The Commission made small changes to these process provisions over time. The draft ordinance uses the same general process but adds more details to codify current practice. The most significant changes are:

Development Review Process Revisions (Compared to Current Land Use Ordinance)		
Rule No. 350-082-	Page	Explanation
0080(5)	26	Added a new provision that allows the Executive Director to require that applicants revise an application or submit a new application to resolve compliance issues on a parcel, including issues discovered during review of the original application.
0080(8)(b) & (8)(n)	26 & 28	Added holders of easements and partial interests as required signatories on land use applications. This incorporates the decision from a prior Commission appeal decision, <i>GLW Ventures, Inc. v. Skamania County, USDA Forest Service v. Skamania County</i> COA-S-13-02, 13-03 (consolidated cases) (May 14, 2014), and the decision of the Skamania County Superior Court affirming the Commission’s appeal decision, <i>GLW Ventures, LLC v. Skamania County</i> , Skamania County Super. Ct. No. 14-2-00071-7 (Dec. 17, 2015).
0080(9)	28	Deleted a long list of additional application requirements that was taken from requirements throughout the land use ordinance (deletion not shown in track changes). Staff uses a checklist for this, so referencing the additional requirements in the rule is unnecessary. This is replaced with a statement that the Executive Director may require certain additional information, such as land surveys, professionally drawn site plans, and proof of prior land use and building permits, which reflects the staff’s current practice.
0080(10)	28	Added a requirement that Firewise information be provided in the application handbook, consistent with the new policies in GMA Large Scale Agriculture, Small-Scale Agriculture, and Residential Land Use Designation that says that the reviewing agency shall provide information on Firewise standards to landowners at the time of application.

0090	28	Added a statement that the Executive Director may require a pre-application conference. Staff's experience during the past few years is that applicants submit more complete materials after meeting with staff. In many cases, staff also does a site visit as part of that pre-application conference. This site visit give staff the opportunity to tell applicants when they need to adjust the location of proposed development to comply with setbacks and to give applicants advice about color, screening, and other aspects of proposed development.
0110(1)(h)	29	Added the revised Management Plan provision specifying that notices of development review sent to the tribal governments shall request comments, recommendations, or concerns relating to the protection of treaty rights, including rights to access, hunt, fish, and gather, and shall include a site plan and may include supplemental information and a proposed treaty rights protection plan.
0110(2)(b)	30	Clarified that notices of development review will be sent to easement holders and other persons with a partial interest in the land; this follows the new provisions in 0080(8) requiring these interests to sign National Scenic Area applications.
0110(3)	30	Added a new provision stating that the Executive Director may require a new notice of a proposed development whenever there is a significant change to the application at any point in the review process. This reflects current law in both states.
0130(1)(d)(B)	32	The Management Plan specifies that only the appellants in an appeal to the Gorge Commission may receive confidential information relating to treaty rights and cultural resources. Staff believes the intent was that all parties in an appeal could receive this information if that information was at issue in the appeal. Staff changed the reference to "appeal parties and their representatives."
0140	33– 34	Added a new section clarifying current practice when the Executive Director does not receive comments from resource agencies during a comment period. In this situation, the Executive Director still consults with agencies because their review is necessary to make the findings and conclusion required for a land use decision, and the Executive Director sometimes recommends that applicants work directly with the agencies to resolve resource issues.
0150(4) & 0170	34 & 36	Added new provisions on inspections, which reflect current practice. The current rule does not have any provisions relating to inspections.
0150(5)	34	Changed the 72-day time period for the Executive Director to issue a decision on a development review application to 135 days. This reflects the change from "working days" to "calendar days." This is the same amount of time inclusive of holidays and staff leave allowances.
0150(7)	34	Changed this provision to specify that an Executive Director decision becomes final and that construction may only start after the appeal period has expired and no appeal has been filed. Previously, this provision specified that a decision was final unless appealed. This left a 30-day gap in which the decision might or might not be "final." Previously, this provision

		also specified that a landowner who starts construction during the appeal period did so at their own risk. Thus, if an appeal was filed, the landowner might have to restore land or change a land use or development as a result of an appeal. Staff does not believe this will cause delays for landowners. In Klickitat County, landowners must have a National Scenic Area decision before Klickitat County will issue county required permits. In staff's experience, Klickitat County usually takes between 3 and 6 weeks to issue required permits after the date of an Executive Director decision.
0150(8)	34	Added a new section that authorizes the Executive Director to withdraw a decision during the appeal period if they discover a fact or legal issue that would materially change the decision—such as the need to impose new conditions of approval, remove improper conditions of approval, or change a decision from an approval to a denial or vice-versa. The Executive Director has done this infrequently over the past 30+ years—fewer than 10 times.
0180(2) & (3)	37	Clarified the process for reviewing changes to approvals. Changed the descriptor from “minor changes” to “slight changes” to avoid inadvertently linking this use of the term “minor” to the use of the term “minor” in section 4(f) (urban area boundary revisions) in the Act and Management Plan. Also, in the past, applicants have asked to use this process for changes after they completed a development, but the Executive Director believes the original intent was to approve minor changes only prior to or during construction.
0220		Deleted the application and procedure section for expedited review uses because it duplicated the standard review process, except for a shorter public comment period, which is incorporated into the standard review process in a new 0120(2) (deletion not shown).

Clarifications to Management Plan Text

While moving new text into the land use ordinance, Staff has inserted some clarifications in the draft ordinance to be clearer and more intentional for implementing the Management Plan. Many of the clarifications are non-substantive. Below is a description of the clarifications that substantively change Management Plan text. These clarifications are also shown in tracked changes in the draft land use ordinance accompanying this staff report. Where the clarification involves SMA provisions, staff has consulted with Forest Service staff, which agrees with those clarifications.

Important: if staff has misunderstood the Commission's intent in any of these clarifications, you can authorize rulemaking with direction to staff to adjust the draft as needed to reflect your intent.

Clarifications to the Management Plan Text		
Rule No. 350-082-	Page	Explanation
Throughout		Removed all uses of “/” (e.g., “and/or,” “GMA/SMA”) and changed to “and” or “or.” The use of a “/” is inherently ambiguous because it is used to signal the term is either conjunctive or disjunctive. There are court decisions that

		discourage use of “/.” The only exception in this ordinance is “emergency/disaster response,” which is a specialized term.
Throughout		Replaced most cross-references described in text with references to rule numbers. Staff has left a few where the text added clarity.
Throughout		Removed duplicative cross-references. For example, 0370(3)(b) referred to standards that were already listed in (3) as applicable to all uses listed in (3). Staff left duplicative cross-references where the duplication showed emphasis (e.g., references to protection of cultural and natural resources in 350-082-0240(3)(a) on page 66 of the draft).
Throughout		Clarified guidelines that refer to the Scenic Resources Implementation Handbook to ensure the handbook is used as guidance, not as a standard for new development. One example is in 350-082-0620(3)(a)(B)(iv) on page 156.
Throughout		Corrected references to “wetlands, streams, ponds, lakes and riparian areas” to “water resources,” which is the new term used in the Revised Management Plan. Also corrected similar references to wildlife and plants and mitigation plans to use updated terms. Staff missed a few places where these changes should have been made in the Revised Management Plan
Throughout 0400-0560, except 0530		Added new lead paragraphs that specify the guidelines apply where a list of allowable uses in the land use designation section. A few of the uses in this section of the ordinance had such a lead paragraph. Most did not. That distinction could be an ambiguity—whether the uses without reference to the land use designation are permitted anywhere in the National Scenic Area. For 350-082-0530, the Columbia River Bridge at Hood River/Bingen/White Salmon will terminate in urban areas at both ends. The Columbia River does not have a land use designation.
0050	2	Added a new section clarifying that the ordinance uses calendar days, and calculating due dates when deadlines fall on weekend or legal holiday.
0070		Staff removed the definition of “fire break” because that term is not used in the Management Plan (deletion not shown).
0070(89) & (175)	12 & 22	Added definitions of “general management area” and “special management areas.” This helps clarify the use of the GMA and SMA acronyms.
0070(122)	16	Added “soil productivity” to the definition of natural resources. The SMA provisions for natural resources include soil productivity, so this addition ensures consistency between the definition of natural resources and the SMA natural resource provisions.
0200(2)	38	Added examples of what constitutes a change to an existing structure based on past applications where the Executive Director determined changes to certain elements of a structure required review.
0210(1)(e)	41	Clarified that only one 60-square foot free-standing renewable energy structure is allowed on a parcel without review. This prevents a situation where a landowner may want to construct multiple 60-square foot structures to create a single larger array. Landowners may apply for additional renewable energy structures as an expedited use or review use.

0270(3)(v) & 0330(3)(g)	82 & 101	Removed references to policies for minimum parcel sizes. These policies are used to establish the minimum parcel sizes on the land use designation map, which is part of the Management Plan, so the minimum parcel sizes are already established. Reference to these policies is confusing because it suggests that decisions must re-evaluate compliance with those policies and could allow new parcels that differ from the minimum parcel size shown on the land use designation map.
0290(1)(a)	94	In the approval criteria for fire protection in forest designations, the Management Plan uses the term “defensible space.” Replaced the term “fuel break” with defensible space and added a requirement to consult with fire professionals to adjust the required defensible space to account for site slope.
0290(1)(i)	95	In the approval criteria for fire protection in forest designations, deleted the sentence, “Structural projections shall be set back from slopes” because the addition in (1)(a) mentioned above requires staff to consult with fire professionals for defensible space requirements as needed on a case-by-case basis.
0300(1)(c)	95	Changed “should” to “shall” to use consistent terms .
0350(3)(t)	106	Added minimum parcel size policies as new guidelines (A) and (B). Here, unlike in the references to policies in 0270 and 0330 that staff removed, there is no minimum parcel size in the Rural Center land use designation, rather minimum parcel sizes are determined on a case-by-case basis, so the policies are the guidelines for determining a parcel size when there is an application for a land division.
370(3)(b)	109	This guideline referred to Management Plan policies. Added the policies as guidelines (A) and (B) to ensure they can be applied here.
0380(3)(c)	113	Removed reference to “policies, guidelines, and conditional use criteria” in this SMA guideline. Gorge Commission and Forest Service staff could not identify which policies and guidelines would apply in addition to those listed in (3) for all land uses in this section.
0410(5)	117	Clarified existing practice that the Executive Director renews hardship permits that have not expired and requires new applications when an applicant has let a permit expire without renewing it.
0450(1)(d)	118	<p>Clarified this provision concerning overnight accommodations to mean that the owner need not be present in the rental dwelling during the rental. Staff has received questions from county planners about this. In response to those questions, staff researched the Commission’s intent and could not find that the Commission discussed whether the owner must be present during the rental.</p> <p>This requirement seems to have been added when staff originally proposed to collapse B & Bs and overnight accommodations into one land use entitled, “overnight accommodations.” The original (and still current) definition of B & B requires the dwelling be owner occupied, so when staff proposed to collapse the uses, it transferred that “owner occupied” language into the new “overnight accommodations” guidelines. On August</p>

		<p>12, 2020, the Commission voted to retain the “B & B” land use and add the new “overnight accommodations” land use, suggesting that the Commission intended overnight accommodations to operate different from B & Bs.</p> <p>Clarified that “permanent residence” means “principal residence.” The term principal residence is used in other legal situations and the Executive Director and counties may rely on the landowners’ characterization of the residence in those legal situations or may use the factors in those laws for determining “principal residence” for this guideline (e.g., IRS Pub. 523).</p>
0450(2)	119	<p>For overnight accommodations, the provision for renewing permits uses the terms “reapply” and “renewed,” which is confusing because the terms mean different actions required by the applicant and staff. Clarified when a new permit is required and when a renewal may be approved. The clarified approach is consistent with the Executive Director’s existing practice for hardship dwellings, except that the revised Plan prohibits granting a new permit or renewing an existing permit for overnight accommodations when the applicant has violated the conditions of approval.</p>
0480(4) & (5)	122	<p>Deleted broadly stated references to the wetlands and water resource provisions of the Management Plan as approval criteria for enhancing wetlands and other water resources not associated with a new development or land use. The wetland and water resource provisions apply only to the development or land use in a wetland or water resource. Retained the references to wetland and water resource compensation plans because these are the provisions that apply to the creation, restoration, and enhancement of wetlands and water resources.</p> <p>There is a similar reference in 0480(6) for enhancements in SMAs. As of the date that staff provided this report and draft ordinance to the Commission and public for review, the Forest Service had not opined on clarifying this provision similar to the clarifications for GMA enhancements. If the Forest Service agrees that a similar clarification is appropriate, staff will make that change.</p>
0590(1)(a)(D) (i)	147	<p>Added a third requirement for lot-line adjustments that resolve boundary disputes. The lot line adjustment must not cause an existing development to become out of compliance with a required setback. This was not added to the Management Plan but codifies a prior staff interpretation of the land use ordinance in a recent application.</p>
0600(1)	149	<p>Created a new section on buffer zones and variances in the land use ordinance to bring many of the buffer zones and variance provisions. However, there are many provisions in the cultural and natural resource chapters and elsewhere in the Plan that require a buffer zone and bringing those together into a single section did not make sense; thus added a new (1) that notes there are other buffer zone requirements not in this section.</p>
0620(1)(b)(D) 0630(2)(o)(D) 0630(4)(b)(D)	153 170 173	<p>Added a requirement that new development must be evaluated to be compatible with development approved but not yet constructed. Staff has done this in some but not all development review staff reports. This will ensure staff does this analysis in all staff reports.</p>

0630(3)(c)	171	Deleted this SMA guideline that is really a policy for describing required content for the scenic corridor strategies, not an approval criterion for new development and uses. The strategies were completed in the early 2000s.
0640(1)(d) & 0640(2)(a)(C) (vi)	173, 174 & 175	Defined “large scale uses” (the uses that an applicant (not the Forest Service) must do a reconnaissance survey) to be the same as the list of uses that the low probability exemption does not require (i.e., uses that require a reconnaissance survey in areas of low probability). The two lists were very similar. Staff used the more inclusive of the two lists to create the new single list. Forest Service cultural resource staff reviewed and concurred with this.
0640(2)(a)(A)	174	Clarified the existing example when a use might require a reconnaissance survey and a historic survey.
0640(2)(e)(B) & (D)	178–179	Consolidated these provisions into one by adding ethnographic research into (B). The two provisions were similar, except that (B) required redaction of sensitive information and (D) curiously did not.
0640(2)(g)(A) & 0640(4)(c)(A)	179 & 185	Clarified that if the Executive Director would make a finding inconsistent with the comments submitted by a tribal government, they must justify reaching that opposing conclusion. Previously, these provisions only required justification when reaching an opposing conclusion of only the SHPO.
0660(5)(a)	197	Clarified the provisions for uses in wetlands and other water resources to ensure that a use listed in (3) or (4) that can’t meet its approval criteria can’t be allowed by meeting the approval criteria in (5).
0690(5)(g)	220	Forest Service staff clarified this SMA provision to specify that progress reports on natural resource mitigation need to be submitted until all conditions are met. Without this clarification, the provision did not contain an end date for submitting progress reports.
0720(3)(d)(E)	227	Added the policies for concession standards referenced in the guideline.
0730(1)(h)	231	Deleted this SMA guideline that is really a policy for describing the purpose of recreation intensity classes, not a guideline applicable to proposed new development.

Next Steps and Adoption Timeline

If you approve starting rulemaking, staff will publish the draft and required rulemaking notices in the Oregon Bulletin and Washington State Register. At your December 14 meeting, you will hold a rulemaking hearing and decide whether to adopt the ordinance. This will be a date certain to comply with the requirement in the National Scenic Area Act for adopting an ordinance within 270 days after transmitting the Management Plan to the counties, and because the Commission would need to file new rulemaking notices to change the date.

After you adopt the ordinance, staff will transmit the ordinance to the Secretary of Agriculture for concurrence on the SMA provisions in the land use ordinance. The Secretary has up to 90 days to concur or deny concurrence. If the Secretary does not act within 90 days, the SMA provisions in the ordinance will be deemed consistent with the Management Plan. After concurrence, staff must publish the final rule and do final notices of rule adoption in the Oregon Bulletin and Washington

State Register. The ordinance can be effective 30 days after publishing the final rule and required notices. Following this schedule, staff expects the ordinance will be effective on May 1, 2022.