

UNITED STATES OF AMERICA
Before the
FEDERAL ENERGY REGULATORY COMMISSION

Notice of Inquiry and)
Interim Statement of Policy regarding) **FERC Docket RM07-8-000**
Preliminary Permits for)
Wave, Current, and Instream)
New Technology Hydropower Projects)

COMMENTS OF LINCOLN COUNTY, OREGON

The following comments of Lincoln County, Oregon, are in response to the Commission’s *Notice of Inquiry and Interim Statement of Policy regarding Preliminary Permits for Wave, Current, and Instream New Technology Hydropower Projects*, 118 FERC ¶ 61,112 (2007) (hereinafter “NOI”).¹

Lincoln County Supports Strict Scrutiny Standard with Certain Improvements

Nearly all comments received thus far have encouraged the Commission to continue to use a “strict scrutiny” standard.² The many advantages of such a standard have already been thoroughly explained in comments received by the Commission, so Lincoln County will avoid repetition of those advantages.³

¹ Published in the Federal Register on March 30, 2007, thus resulting in a NOI response deadline of April 30, 2007. 72 Fed Reg 9281.

² See, e.g., Comments of Washington Department of Natural Resources (March 16, 2007), Ocean Power Delivery (April 13, 2007), Hydropower Reform Coalition (April 17, 2007), Tulalip Tribes (April 17, 2007), Maine State Planning Office (April 17, 2007), Portland General Electric Company (April 23, 2007), Connecticut Department of Environmental Protection (April 24, 2007), Long View Associates (April 24, 2007), Wavebob Limited (April 26, 2007), and the United States Department of the Interior (April 27, 2007).

³ Among many others, one key benefit was highlighted by Commission Chairman Kelliher upon opening this docket: “In my view, our interim policy supports continued development of this new technology, while guarding against site banking.” Statement of FERC Chairman Joseph T. Kelliher (February 15, 2007).

Some comments have also suggested various improvements to the Commission's interim strict scrutiny standard. Lincoln County supports many of those comments,⁴ but will focus on specific improvements that Lincoln County urges the Commission to consider and adopt in this rulemaking proceeding.

Lincoln County and Ocean Wave Energy

Ocean wave energy is an exciting and developing renewable energy technology. Unlike intermittent wind power, ocean wave power is baseload, which means we don't have to back it up with fossil fuels. Ocean wave energy also has the potential for significant economic development.⁵ As it turns out, the Oregon Coast is one of the World's best locations for development of ocean wave energy.

Lincoln County is located on the Central Oregon Coast, and offers additional advantages for the development of ocean wave energy: (1) Lincoln County is home to the Port of Newport, whose extensive fishing fleet has the capacity to service ocean wave energy conversion devices; (2) Lincoln County is home of the Hatfield Marine Science Center of the Oregon State University, a leader in developing this new technology; and (3) Lincoln County is the home of the Central Lincoln People's Utility District, a consumer-owned electric utility that has taken an active leadership role in encouraging the development of ocean wave energy.

However, as other comments have noted, the development of ocean wave energy has the potential to seriously damage fisheries.⁶ Commercial and recreational fishing are critically

⁴ In particular, Lincoln County strongly supports the comments and suggested improvements expressed by the United States Department of the Interior (April 27, 2007).

⁵ "Commercially successful wave power developments will generate and sustain a significant number of primary and secondary jobs within the region." Comments of Wavebob Limited, page 4 (April 26, 2007).

⁶ See Comments of the Mid-Atlantic Fishery Management Council (March 19, 2007), the Tulalip Tribes (April 17, 2007), and Robert Cinq-Mars (April 11, 2007).

important to Lincoln County's economy.⁷ However, Lincoln County does not oppose the development of ocean wave energy. Just the opposite: Lincoln County believes that renewable fisheries and renewable ocean wave energy can coexist and be mutually supportive, if ocean wave energy is developed in a responsible and careful manner and the interests of our local fisheries and other users are recognized and protected. Therefore, Lincoln County respectfully provides the following proposed improvements to the strict scrutiny standard:

Improvement Proposal 1: Intergovernmental Cooperation

As stated in the NOI, "[t]he Commission has construed the term 'navigable water' to include waters off the U.S. coast,"⁸ and therefore the Commission has asserted regulatory jurisdiction under Part I the Federal Power Act. However, the Minerals Management Service (MMS) of the United States Department of the Interior has also asserted jurisdiction, at least as to the outer continental shelf (*i.e.*, beyond 3 nautical miles), thus resulting in a conflict between FERC and MMS.⁹

Although Lincoln County would like the Commission to have jurisdiction, Lincoln County believes the Commission currently lacks jurisdiction as a matter of law.¹⁰ However, the Commission has ruled otherwise, and will therefore proceed with jurisdiction and rulemaking:

⁷ See Lincoln County's Comments in FERC Docket AD06-13-000, *Comments for the Record: FERC meeting of December 6, 2006, regarding wave and tidal power development*, in which Lincoln County noted that commercial fisheries are an over \$100 million annual industry for Lincoln County.

⁸ See NOI, ¶ 4 and note 5, citing the Commission's decision in *AquaEnergy*, 102 FERC ¶61,242 (2003).

⁹ See, e.g., Protest of the United States Minerals Management Service filed in *Ocean Wave Energy Partners*, FERC Docket P-12750 (February 16, 2007).

¹⁰ This belief therefore colors at least a part of what Lincoln County would like to see the Commission adopt by way of rulemaking.

As noted in the NOI, the Commission asserted jurisdiction by way of its decision in *AquaEnergy*, 102 FERC ¶61,242 (2003).¹¹

Lincoln County has taken affirmative steps to resolve the jurisdictional conflict between FERC and MMS, including asking members of Congress to pass legislation that clarifies jurisdiction over ocean wave energy.¹²

In the meantime, Lincoln County urges the Commission to adopt rules, policies, and intergovernmental agreements with MMS and other federal, state, and local regulatory agencies

¹¹ The case began when AquaEnergy filed a declaration regarding a proposed ocean wave energy project in Makah Bay, Washington (Makah Bay is on the Pacific Ocean at the Northern tip of the Olympic Peninsula). The National Oceanic & Atmospheric Administration (NOAA) of the United States Department of Commerce filed a motion to intervene on behalf of the National Marine Sanctuary Program (NMSP) and the National Marine Fisheries Service (NMFS). NOAA expressed concern about the proposed project under numerous federal acts, including the National Marine Sanctuaries Act and the Magnuson-Stevens Fishery Conservation Act. NOAA also indicated that “the proposed project is to be located within navigable waters and will be connected to the interstate grid which is part of, and in interstate commerce” and therefore “FERC has proper jurisdiction over the proposed project and should exercise that jurisdiction.” The Commission’s Director of Energy Projects agreed and issued an abbreviated order finding that the proposed project would be located in “a navigable waterway as defined by Section 3(8) of the Federal Power Act,” thus providing the Commission with jurisdiction. *AquaEnergy*, 101 FERC ¶ 62,009. In response, AquaEnergy filed an extensive request for rehearing in support of its position that the Commission’s Federal Power Act jurisdiction does not extend to ocean wave energy. In its ruling on the matter, the Commission noted that AquaEnergy had failed to provide legislative history to support its position that territorial waters off the United States coast were not navigable waters for purposes of Part I of the Federal Power Act. *AquaEnergy*, 102 FERC ¶ 61,242 (2003), at 5 ¶ 12 and note 5. The Commission concluded otherwise, and also concluded that an ocean wave energy conversion device is a “power house” for purposes of the Act. Lincoln County believes the Commission to be in error on both counts: (1) The legislative history that AquaEnergy did not provide would have informed the Commission that the precise purpose of the language relied upon for navigable water jurisdiction was added for the express limited intent of including shoals within that definition (*see* Kerwin, *Federal Water-Power Legislation* (1926), pages 203-204, 252-3, 256, 259); and (2) a “power house” is a term that refers to a specific component of a traditional hydroelectric project (*see* www.ferc.gov/students/whatisferc/history.htm, referring to en.wikipedia.org/wiki/Hydroelectric, which contains an illustrative graphic demonstrating this point).

¹² This request has been made directly to members of Congress, as well as through the Oregon Legislature. *See* House Joint Memorial 22-A, www.leg.state.or.us/07reg/measpdf/hjm1.dir/hjm0022.a.pdf, the operative language for which is:

The Congress of the United States of America is respectfully urged to include the following proposed language in an amendment to the Federal Power Act, 16 U.S.C. 791a et seq.:

The Federal Energy Regulatory Commission is granted jurisdiction over ocean wave energy conversion devices located in the territorial waters of the United States from the shoreline to 12 nautical miles out to sea. Jurisdiction shall be exercised pursuant to Part 1 of the Federal Power Act, except that the commission shall adopt rules specific to ocean wave energy conversion devices. Those rules shall include, but are not limited to, provisions that provide for expedited processing for a preliminary permit or a license for such devices and for state and local government input regarding location and anchoring of, and electric transmission from, devices prior to the filing of an application for a preliminary permit or a license.

in a manner that renders the jurisdictional conflict moot. This would serve two purposes. First, it would ensure that if a federal court were to hold that the Commission does not have jurisdiction, the progress made in reliance upon that jurisdiction would not fall like a house of cards. This will provide the industry with the stability necessary to effectively develop this emerging technology. Second, it would facilitate intergovernmental cooperation to streamline regulatory processes.¹³

Improvement Proposal 2: Local Facilitation of Siting Decisions

As noted previously, the development of ocean wave energy has the potential to seriously damage fisheries.¹⁴ However, if ocean wave energy is developed in a responsible and careful manner, those conflicts can be avoided or mitigated. Unfortunately, the current preliminary permit process is not conducive to avoiding those conflicts.

As noted in other comments, the preliminary permit process is designed to facilitate the siting of dams on rivers.¹⁵ It is ill-suited to the siting of ocean wave energy conversion devices. What is needed is close consultation with local resources that can help facilitate siting in areas

¹³ “Close collaboration with federal and state resources agencies will not only promote regulatory efficiency but resource protection.” Comments of Maine State Planning Office, page 2 (April 17, 2007).

¹⁴ “There is a great deal of concern expressed locally in areas where permits are applied for and awarded; by individuals, organizations and municipalities whose lives have been impacted by the moving water resources for generations.” Comments of Robert Cinq-Mars, (April 11, 2007).

¹⁵ “The Commission’s rules governing preliminary permits have remained essentially unchanged for 20 years and predate the recent emergence of new technologies. They were developed, and remain appropriate, for evaluating potential conventional hydropower projects on the nation’s rivers and streams. However, as the NOI recognizes, they may not be applicable to projects proposing to use new technologies.” Comments of Long View Associates, page 4 (April 24, 2007). *See also* Comments of Portland General Electric Company (April 23, 2007) (the Commission’s existing rules “were developed – and appropriate for – conventional hydro projects on the nation’s rivers and streams” but “may be less applicable” to new technologies such as ocean wave energy).

that maximize efficiencies and minimize damage to fisheries. This close consultation should occur *before* a site is identified in a preliminary permit or license application.¹⁶

Lincoln County and its partners have taken a leadership role in this area by forming an ocean wave energy team, with representatives from all key stake-holders. In addition, Lincoln County has also created a Fishermen Involved in Natural Energy (FINE) Committee, empowered to assist with the siting of ocean wave energy devices.¹⁷ Lincoln County is also undertaking actions with the Oregon Sea Grant / Port Liaison Project program to further involve all local stakeholders in the siting process through public forums in Lincoln County.

This teamwork has recently resulted in the approval of three sites for the placement of demonstration projects this Summer.¹⁸ “Testing of these devices is likely the best way to fully evaluate potential impacts.”¹⁹

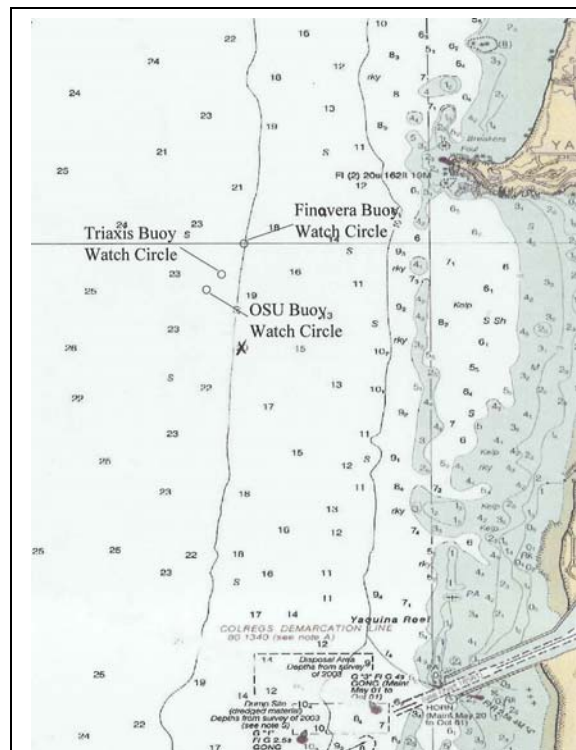
¹⁶ “Given the potential for dramatic large scale impacts to fish and wildlife resources by these projects, we believe that early consultation and encouragement to begin studies sooner would provide up-front opportunities to ensure potential developers have information on affected resources and potential project effects before they file an application.” Comments of the United States Department of the Interior, page 2 (April 27, 2007). *See also* Comments of Hydropower Reform Coalition, page 6 (April 17, 2007) (“A few meters’ difference (let alone a few hundred) could make an enormous difference in a project’s impact on the environment, recreation, or other public values”). This lack of advance planning in the preliminary permit process has led Lincoln County to preemptively file a preliminary permit application for the entire Lincoln County coast (*Lincoln County Wave Energy Power Project*, FERC Docket P-12727), as well as intervene and file comments in preliminary permit proceedings (*Ocean Wave Energy Partners*, FERC Docket P-12750), in order to call attention to this grave deficiency.

¹⁷ Lincoln County Ordinance # 446, www.co.lincoln.or.us/counsel/OWEL/LCO446.pdf.

¹⁸ The demonstration projects will not involve interconnection to the grid for the sale of power, so a preliminary permit was not sought from the Commission. *See Verdant Power*, 112 FERC ¶ 61,143 (2005). Lincoln County has also been promoting Oregon House Bill 2925 to exempt small demonstration projects from the requirement to obtain a full hydroelectric power plant license from the state (a permit from the Department of State Lands would still be required). *See* www.leg.state.or.us/07reg/measpdf/hb2900.dir/hb2925.en.pdf. The bill unanimously passed the Oregon House of Representatives on April 12, 2007 (57 yes, 3 excused), and unanimously passed the Oregon Senate on April 25, 2007 (26 yes, 4 excused).

¹⁹ Comments of the United States Department of the Interior, page 3 (April 27, 2007).

Lincoln County strongly urges the Commission to adopt rules that require ocean wave energy preliminary permit applicants, **before** applying for a permit, to utilize available local processes designed to assist in the siting of ocean wave energy conversion devices in a manner that maximizes efficiencies and minimizes potential collateral damage.



The three sites approved by the FINE Committee for placement of demonstration projects this Summer are depicted above.

Improvement Proposal 3: Removal of Abandoned Facilities

As noted in a number of comments, the current rules do not address the removal of abandoned facilities.²⁰

Lincoln County is successfully promoting state legislation to ensure that abandoned ocean wave energy facilities are removed. Lincoln County likewise strongly encourages the Commission to adopt similar standards.²¹

²⁰ “Demonstration projects that occur during the period of preliminary permit should be fully removed and sites restored if the project is not licensed within a fixed period of time.” Comments of the United States Department of the Interior, page 3 (April 27, 2007). *See also* Comments of Robert Cinq-Mars (April 11, 2007) (“there are no apparent safeguards in place for such things as the removal of inoperable equipment”).

²¹ Oregon Senate Bill 875-A unanimously passed the Oregon Senate on April 26 (30 yes). www.leg.state.or.us/07reg/measpdf/sb0800.dir/sb0875.a.pdf. The bill is now heading to committee for further clarifying amendments, but appears destined for passage. The legislation not only addresses removal of abandoned

Improvement Proposal 4: Develop Different Rules for Ocean Wave Energy

As can be seen from the above discussion, as well as other comments received in this docket and in docket AD06-13-000, there are distinct differences between an appropriate regulatory scheme for ocean wave energy and traditional hydroelectric projects, as well as differences between ocean wave energy and other new and emerging technologies, such as in-stream tidal power. Lincoln County therefore encourages the Commission to consider developing a separate regulatory regime for ocean wave energy.

Conclusion

Lincoln County applauds the Commission's interim strict scrutiny standard, and urges the Commission to:

- (1) Adopt rules, policies, and intergovernmental agreements with MMS and other federal, state, and local regulatory agencies in a manner that renders the jurisdictional conflict between FERC and MMS moot.
- (2) Adopt rules that require ocean wave energy preliminary permit applicants, **before** applying for a permit, to utilize available local processes designed to assist in the siting of ocean wave energy conversion devices in a manner that maximizes efficiencies, recognizes other ocean users, and minimizes potential collateral damage.
- (3) Adopt rules that ensure the removal of abandoned ocean wave energy devices.
- (4) Adopt a separate regulatory framework for ocean wave energy.

facilities, but also clarifies that ocean wave energy is a renewable energy for purposes of Oregon's renewable energy tax incentive statutes.

On opening this docket, Commissioner Kelly indicated that “[w]e are fortunate to have a role in a cutting edge technology that could lead to cleaner, renewable energy.”²² Lincoln County feels likewise.

Respectfully dated and submitted electronically this 30th day of April, 2007.

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²² Talking Points of Commissioner Suedeen G. Kelly (February 15, 2007).

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