

UNITED STATES OF AMERICA
Before the
MINERALS MANAGEMENT SERVICE
of the
DEPARTMENT OF THE INTERIOR

Alternative Energy and)
Alternate Uses of Existing Facilities) Docket ID: MMS–2008–OMM–0012
on the Outer Continental Shelf;)
Proposed Rule)

COMMENTS OF LINCOLN COUNTY, OREGON

The following comments of Lincoln County and the Fishermen Involved in Natural Energy (FINE) Committee are in response to the notice of proposed rulemaking published by the Minerals Management Service (MMS) in the Federal Register on July 9, 2008.¹

Although the proposed rulemaking deals with many new and emerging energy technologies, as well as alternate use of existing facilities on the Outer Continental Shelf (OCS), Lincoln County and FINE will focus their comments and suggested rule improvements to alternative energy, and ocean wave energy in particular, as that is the technology being developed along the Lincoln County coast.²

As stated at the MMS meeting in Portland on August 14, 2008, Lincoln County and FINE applaud MMS and its strong efforts to move forward in a thoughtful manner, promoting the development of alternative energy, while at the same time protecting the environment and existing important uses of the OCS.

Lincoln County and FINE are therefore suggesting two minor rule improvements to help avoid some unnecessary conflicts and take advantage of recent lessons learned.

¹ 73 Fed Reg 39376 to 39504.

² See Potential Alternative Energy Technologies on the Outer Continental Shelf, Argonne National Laboratory, ANL/EVS/TM/06-5 (2006) for a comprehensive review of the various new and emerging technologies; see also Programmatic Environmental Impact Statement for Alternative Energy Development and Production and Alternate Use of Facilities on the Outer Continental Shelf, Final Environmental Impact Statement, Minerals Management Service (2007), <http://www.ocsenergy.anl.gov/documents/fpeis/>; Technology White Paper on Wave Energy Potential on the U.S. Outer Continental Shelf, MMS (2006); White Paper Submitted to the Western Governors Association Clean and Diversified Energy Advisory Committee: Ocean Wave Energy Conversion Technology, EPRI (2005); and Ocean Wave Energy, a 21st Century ocean of opportunity for environmental conservation and baseload renewable energy caught in a 20th Century legal framework, Lincoln County (PowerPoint presentation before the Oregon Joint Ocean Policy Committee) (2007), <http://www.co.lincoln.or.us/counsel/OWEL/20070403-PowerPoint-handout.pdf>.

1. 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. As it turns out, the Oregon Coast is one of the World's best locations for development of ocean wave energy.³

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 facilities; (2) Lincoln County is home of the Hatfield Marine Science Center of the Oregon State University, a world leader in developing ocean wave energy 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 responsible development of ocean wave energy.

However, as noted by MMS throughout its rulemaking notice and its Programmatic Environmental Impact Statement (PEIS), the development of ocean wave energy has the potential to seriously damage fisheries. Commercial and recreational fishing are critically important to Lincoln County's economy (over \$100 million annual industry for Lincoln County).

But 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 the environment and our local fisheries and other important users are recognized and protected.

2. Note Regarding Jurisdictional Conflict

As already recognized by MMS, the Federal Energy Regulatory Commission (FERC) has asserted jurisdiction over ocean wave energy devices pursuant to Part I of the Federal Power Act, including areas within the OCS.⁴ However, MMS has also asserted that same jurisdiction (at

³ See Sea Power, OSU engineers are working with coastal communities to tap offshore energy, Oregon State University (2006), http://oregonstate.edu/terra/2006spring/includes/2006spring_seapower.pdf; see also Survey and Characterization of Potential Offshore Wave Energy Sites in Oregon, EPRI Report E21 EPRI WP-OR-003 (2004).

⁴ See AquaEnergy, 102 FERC ¶61,242 (2003); see also *Wave, Tidal, and In-Stream Energy Projects: Which Federal Agency Has the Lead?*, Congressional Research Service report RS 22721 (2008).

least as to the OCS), thus resulting in a conflict between FERC and MMS.⁵ Lincoln County believes FERC to be in error as a matter of law.⁶ 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.⁷

In the meantime, Lincoln County has urged FERC, and likewise urges MMS, to adopt rules, policies, and intergovernmental agreements between FERC and MMS, and other federal, state, and local regulatory agencies, 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 FERC 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 regulatory stability necessary to effectively develop this emerging technology. Second, it would facilitate intergovernmental cooperation to streamline regulatory processes.

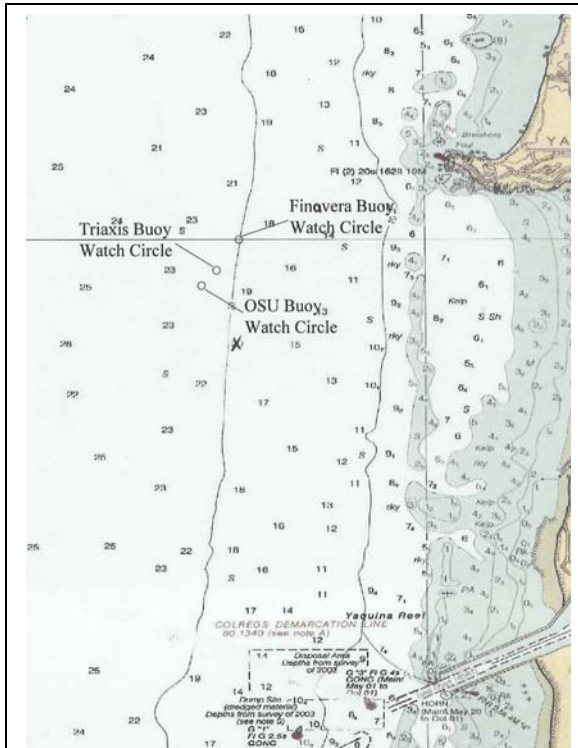
⁵ See, e.g., Protest of the United States Minerals Management Service filed in *Ocean Wave Energy Partners*, FERC Docket P-12750 (February 16, 2007). Lincoln County also strongly supports the substantive contents of that filing, in which MMS methodically pointed out the many serious deficiencies of utilizing Part I of the Federal Power Act to site ocean wave energy devices.

⁶ As noted above, FERC's assertion of jurisdiction stems from its decision in *AquaEnergy*, 102 FERC ¶61,242 (2003). That case began when AquaEnergy (now known as Finavera) 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." FERC'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 FERC with jurisdiction. *AquaEnergy*, 101 FERC ¶ 62,009. In response, AquaEnergy filed an extensive request for rehearing in support of its position that FERC's Federal Power Act jurisdiction does not extend to ocean wave energy. In its ruling on the matter, FERC 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. FERC concluded otherwise, and also concluded that an ocean wave energy conversion device is a "power house" for purposes of the Act. Lincoln County believes FERC to be in error on both counts: (1) The legislative history that AquaEnergy did not provide would have informed FERC 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).

⁷ This request has been made directly to members of Congress, as well as through the Oregon Legislature. See House Joint Memorial 22 (2007), which unanimously passed both the Oregon Senate and Oregon House of Representatives, and is now enrolled, <http://www.leg.state.or.us/07reg/measpdf/hjm1.dir/hjm0022.en.pdf>.

3. Avoiding Conflict By Using Existing Local Facilitation of Siting

As noted previously, the development of ocean wave energy has the potential to seriously damage the environment and fisheries.⁸ However, if ocean wave energy is developed in a responsible and careful manner, those conflicts can be avoided or mitigated.



The sites approved by the FINE Committee for placement of the first ocean wave energy devices on the West Coast are depicted above. Those areas were used by Finavera and Oregon State University in the Fall of 2007, and are planned to be used again this Fall.

What is needed is close consultation with local resources that can help facilitate siting in areas that maximize efficiencies and minimize damage to the environment and to fisheries.

For areas adjacent to a local affected government that has already established a system for facilitating siting of alternative energy facilities on the OCS, this close consultation should occur *before* a site is identified in a request for a commercial lease or a request for interest.⁹

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 the Fishermen Involved in Natural Energy (FINE) Committee, empowered to assist with the siting of ocean wave energy facilities.¹⁰

⁸ See also Assessing the Costs and Benefits of Electricity Generation Using Alternative Energy Resources on the Outer Continental Shelf, OCS Study MMS 2007-013 (2007), page 35: “The placement of offshore energy facilities may compete with regional fishing operations, potentially negatively affecting the local economy.”

⁹ Lincoln County strongly supports the Comments of the United States Department of the Interior filed in FERC rulemaking proceeding RM07-8-000. Those comments included the following statement, among others: “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.”

¹⁰ Lincoln County Ordinance # 446 (2007), codified as Lincoln County Code (LCC) sections 2.4105 through 2.4115, <http://www.co.lincoln.or.us/counsel/OWEL/LCO446.pdf>.

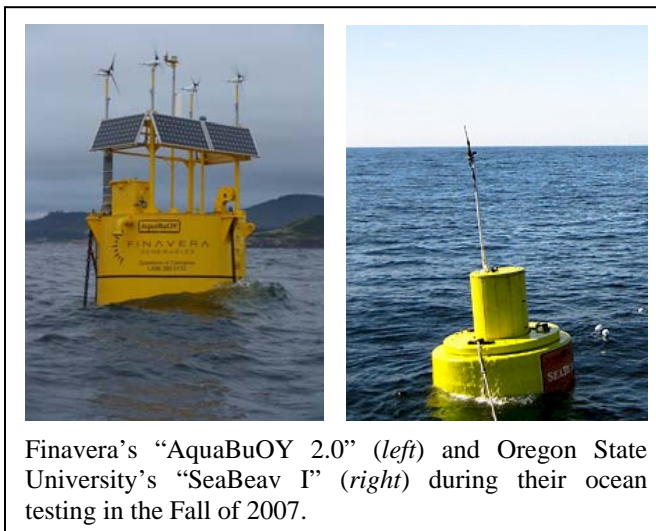
Initially, Lincoln County was viewed by some as presenting barriers to the development of important renewable ocean energy resources.

But the opposite is true. Lincoln County's use of teamwork, leadership, and collaboration to avoid conflicts in advance have resulted in the placement of the first ocean wave energy devices on the West Coast.¹¹ "Testing of these devices is likely the best way to fully evaluate potential impacts."¹²

A recent event further highlights the critical importance of local siting and involvement: The first test buoy (Finavera's "AquaBuOY 2.0") sank due to a failed bilge pump.¹³

Because the site was carefully selected by FINE, the potential hazard of the sunken buoy to navigation and other important ocean uses was reduced.

The developer and the local community, including the fishing industry, then worked together to resolve issues and successfully remove the sunken buoy. This prompt and effective cooperation came about because there is an in-place local team.



¹¹ The projects are not in the OCS, and do not involve interconnection to the grid for the sale of power, so a license was not sought from FERC. See *Verdant Power*, 112 FERC ¶ 61,143 (2005). Lincoln County successfully promoted state legislation to exempt small demonstration projects from the requirement to obtain a full license from the State of Oregon (a permit from the Department of State Lands is still required). Enrolled Oregon House Bill 2925 (2007 Oregon Laws, Chapter 212), <http://www.leg.state.or.us/07reg/measpdf/hb2900.dir/hb2925.en.pdf>. Lincoln County also successfully promoted state legislation to ensure that abandoned ocean wave energy facilities are removed, and clarifying that ocean wave energy is a renewable energy for purposes of Oregon's renewable energy tax incentive statutes. Enrolled Oregon Senate Bill 875 (2007 Oregon Laws, Chapter 591), <http://www.leg.state.or.us/07reg/measpdf/sb0800.dir/sb0875.en.pdf>. The early notion that Lincoln County was working to impose impediments to the development of ocean wave energy were misplaced. To the contrary, Lincoln County's actual conduct has been to promote the development of ocean wave energy in a responsible manner that avoids and mitigates needless conflicts with the environment and important existing ocean uses.

¹² Comments of the United States Department of the Interior in FERC rulemaking proceeding RM07-8-000, page 3 (April 27, 2007).

¹³ See "Wave energy buoy sinks day before its removal" *The Oregonian*, November 1, 2007, <http://www.oregonlive.com/oregonian/stories/index.ssf?/base/news/1193887510233470.xml&coll=7>.

4. Suggested Rule Modifications

Lincoln County and FINE strongly applaud MMS for proposing a process that provides for consultation with affected local governments, and for inviting comments on that proposal.¹⁴ We suggest some improvements to those sections to incorporate some of the lessons we have learned from our experience under the FERC process. These improvements would be consistent in carrying out other key parts of the proposed rules,¹⁵ as well as the OCS Lands Act itself.¹⁶

Specifically, Lincoln County and FINE propose the following two improvements:

(1) Add the following sentence to the end of subsection (e) of proposed rule 285.230:

“If the governing body of an affected local government has enacted an ordinance establishing a formal consultation process for selecting areas for the siting of alternative energy facilities in the OCS under this part, you must certify that that you have used, or attempted in good faith to use, that process to identify appropriate parts of the OCS for your proposed alternative energy project.”

(2) Add a new paragraph (5) to proposed rule 285.211(b) to read as follows:

“(5) If the governing body of an affected local government has enacted an ordinance establishing a formal consultation process for selecting areas for the siting of alternative energy facilities in the OCS under this part, before MMS initiates a competitive lease process for part of the OCS involving that affected local government, MMS will first attempt to use that process to identify appropriate parts of the OCS.”

Respectfully dated and submitted electronically this 20th day of August, 2008.

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¹⁴ 73 Fed Reg 39396. “Affected local government” is already defined in the proposed rules. See proposed 30 CFR § 285.112, 73 Fed Reg 39463.

¹⁵ See proposed 30 CFR § 285.203, 73 Fed Reg 39467, providing for consultation with any affected local government; and proposed 30 CFR § 285.102(e), 73 Fed Reg 39461, providing for coordination and consultation with any affected local government, and the possible use of a “task force or other joint planning or coordinating agreement” with MMS.

¹⁶ See subsection 8(p)(7) of the Outer Continental Shelf Lands Act, 43 USC § 1337(p)(7), which provides for coordination and consultation with a local government that “may be affected by a lease, easement, or right-of-way under” the Act.