

September 22, 2008

TO: Land Conservation and Development Commission

FROM: Richard Whitman, Director

SUBJECT: **Agenda Item 8, October 15 - 17, 2008 LCDC Meeting**

**REQUEST TO INITIATE RULEMAKING AND CONVENE AN ADVISORY
COMMITTEE REGARDING AMENDING THE OREGON TERRITORIAL SEA
PLAN FOR WAVE ENERGY POWER GENERATION FACILITIES**

I. AGENDA ITEM SUMMARY

This item is a report to the Commission regarding a proposed work group to consider amendments to OAR 660, division 36 (Ocean Planning) to adopt a new chapter to the Oregon Territorial Sea Plan that will include mandatory policies that will apply to state and federal agency approvals for the location and operation of wave energy power generation facilities in the Oregon Territorial Sea.

This report discusses need, issues and proposed timelines, and recommends appointment of an advisory committee and Commission liaison to guide the project.

For additional information, please contact Bob Bailey, Coastal Division Manager or Paul Klarin, Coastal Policy Analyst. Bob can be reached at 503-373-0050, ext. 281, or at bob.bailey@state.or.us. Paul can be reached at 503-373-0050 ext. 249 or at paul.klarin@state.or.us.

II. SUMMARY OF RECOMMENDED ACTION:

The department recommends the Commission initiate rulemaking to convene a work group to discuss issues and recommend amendments to OAR 660, division 36 to amend the Territorial Sea Plan for the of wave power generation facilities in state waters.

III. BACKGROUND

The Governor's March 26, 2008 Executive Order No. 08-07, Directing State Agencies to Protect Coastal Communities in Siting Marine Reserves and Wave Energy Projects,

directs the department to “seek recommendations from the Ocean Policy Advisory Council (OPAC) concerning appropriate amendments to Oregon’s Territorial Sea Plan, reflecting comprehensive plan provisions on wave energy projects. On or before July 31, 2009, DLCD shall begin the process to develop proposed amendments to Oregon’s Territorial Sea Plan for consideration by LCDC for such amendments.” The order directed DLCD to provide final amendment recommendations to the commission on or before December 1, 2009. The order directs the department to submit the Territorial Sea Plan amendment to the National Oceanic and Atmospheric Administration (NOAA) for incorporation as an enforceable policy of the Oregon Coastal Management Program under the federal Coastal Zone Management Act. Lastly, the order calls on OPAC to work with Oregon Sea Grant and the Oregon Coastal Zone Management Association to provide outreach and education on wave energy development.

On that same date, the State of Oregon and Federal Energy Regulatory Commission (FERC) signed a Memorandum of Understanding to “coordinate the schedules and procedures for review of wave energy projects in the Territorial Sea and to ensure coordinated review of proposed wave energy projects that is responsive to environmental, economic, and cultural concerns while providing a timely, stable, and predictable means for developers of such projects to seek necessary approvals”. The MOU provides that FERC will, in issuing a permit or license, “consider the extent to which the proposed project is consistent with the Oregon plan”. In addition, FERC will also “consider any terms and conditions that are recommended by Oregon under section (10)(a)(3) or the Federal Power Act (FPA) to ensure consistency with the Oregon Plan”.

When completed, the commission will adopt the amendment to the Territorial Sea Plan by reference. The commission’s authority to amend the Territorial Sea Plan is derived under ORS 196.471 Territorial Sea Plan Review Requirements: (1) The Land Conservation and Development Commission shall review the Territorial Sea Plan and any subsequent amendments recommended by the Ocean Policy Advisory Council to either the Territorial Sea Plan or the Oregon Ocean Resources Management Plan and make findings that the plan or amendments:

- (a) Carry out the policies of ORS 196.405 to 196.515; and
 - (b) Are consistent with applicable statewide planning goals, with emphasis on the four coastal goals.
- (2) After making the findings required by subsection (1) of this section, the commission shall adopt the Territorial Sea Plan or proposed amendments as part of the Oregon Coastal Management Program.
- (3) If the commission does not make the findings required by subsection (1) of this section, the commission shall return the plan or amendments to the council for revision. The commission may specify any needed revisions.

(4) Upon adoption of the Territorial Sea Plan or subsequent amendments the commission may, after consultation with affected state agencies, identify amendments to agency ocean or coastal resource management programs necessary to conform to the provisions of the adopted plan. [1991 c.501 §20; 1993 c.18 §35]

The Ocean Policy Advisory Council responsibilities in amending the Territorial Sea Plan are prescribed by 196.443 Duties of Council. (1) The purposes of the Ocean Policy Advisory Council are to: (a) Periodically review the Territorial Sea Plan and submit recommendations for the plan to state agencies represented on the council. The council shall recommend deletions to the Territorial Sea Plan of all site designations and management prescriptions to the Land Conservation and Development Commission.

OPAC has directed its Territorial Sea Plan (TSP) workgroup to consider amendments to the Territorial Sea Plan for wave energy. However, OPAC has decided that TSP workgroup shall consist solely of OPAC members and will not, therefore, allow for the participation of other stakeholders and interested parties. The department has informed OPAC that it will request authorization from the commission to form the advisory committee, and it is anticipated that the OPAC TSP workgroup and agency advisory committee will work closely together, and share some membership.

The commission last amended the Territorial Sea Plan in 2000, when, with the advice of OPAC, it revised Part One Ocean Management Framework to add section (G) including a preamble, goals and policies, and added Part Four: Uses of the Seafloor – section (A) Telecommunication Cables, Pipelines, and other Utilities. The department, based on discussions with OPAC members, Oregon Sea Grant, OCZMA and other state agency staff, has concluded that it would not be feasible to meet the timeline set by the EO for amending the Territorial Sea Plan, unless the process is initiated immediately. The memo from agency staff outlining the timeline and tasks is included in the commission packet. It describes, in general terms, how that process must proceed in order for OPAC to fulfill its advisory role, and for the department to meet the December 2009 deadline to deliver a draft Territorial Sea Plan amendment to the commission.

IV. RECOMMENDATION

The department believes that the Territorial Sea Plan does not provide sufficient policy guidance and spatially explicit directions for locating wave energy facilities. The applicable provisions of OAR Chapter 660, division 36, do not appear to anticipate the development of wave energy sources. A rulemaking effort to amend the Territorial Sea Plan to provide policy guidance and the allocation of specific areas for the development of wave energy facilities would benefit future applicants and decision makers, as well as citizens, industry, fishing interests and coastal communities and others affected by wave energy generation decisions.

Timeline: Staff recommends that LCDC approve the formation of an advisory committee and delegate the selection of advisory committee members to the department at its October 15–17 meeting in Prineville. The department will ask LCDC to approve the membership of the advisory committee at its subsequent meeting in December 4-5 in Tillamook. This would then be followed by no fewer than six to eight advisory committee meetings, and proposed administrative rule changes no sooner than December 2009. This is expected to be a long and complex rulemaking.

Citizen Involvement: The procedures for public involvement under the Commission’s “Citizen Involvement Guidelines for Policy Development” will be followed in this process (Attachment D). This includes: (1) consultation with the Citizen Involvement Advisory Committee (CIAC) throughout the process; (2) establishing and publicizing a schedule of work group meetings and LCDC meetings to provide opportunities for citizen participation; (3) having rulemaking information available in paper form and available on the agency’s website; and (4) providing opportunities for citizens to comment directly to the department and Commission. The procedures for citizen involvement will be utilized when the workgroup meets and when the Commission engages the public in the rule amendment process.

A mailing list is being created by the department to provide information and to notify interested persons of advisory committee and Commission hearings. Information will be available on the agency’s website. Persons with questions about this rule amendment process should contact Bob Bailey or Paul Klarin. Persons interested in being included on the mailing list should contact Bryan Gonzalez, at 503-373-0050, ext. 322, or by e-mail at bryan.gonzalez@state.or.us.

Workgroup: The department recommends the Commission delegate the selection of the advisory committee member to the department. The list of the agencies and stakeholders that will comprise the wave energy advisory committee includes:

Tim Josi, LCDC Liaison (Workgroup Chair)
Coastal County
Coastal City
Tribal
Citizen at Large
Oregon Department of Energy
Oregon Department of Fish and Wildlife
Oregon Department of State Lands
Oregon Parks and Recreation Department
Oregon Department of Water Resources
Oregon Coastal Zone Management Association
Oregon Wave Energy Trust
Oregon Policy Advisory Council Territorial Sea Workgroup Member
Oregon Dungeness Crab Commission
Oregon Salmon Commission

Recreational \ Charter fishing
Coastal Local Advisory Committee (2)
Wave Industry (2)
Oregon Shores Conservation Coalition
Ocean Environmental - Our Ocean
Ocean Recreation (non fishing) - Oregon Surfrider Foundation
Coastal Electric Power Cooperative
Electric Utility - PGE
Coastal Port

The names of the representatives will be supplied at the December 4- 5 Commission meeting in Tillamook.

Proposed Motion:

I move that the Commission authorize the department to appoint an advisory committee to consider and propose amendments, as appropriate, to OAR 660, division 36 (Ocean Planning), to amend the Territorial Sea Plan for the of wave power generation facilities in state waters.

ATTACHMENTS

- A. Executive Order 08-07
- B. Memorandum of Understanding between the Federal Energy Regulatory Commission and the State of Oregon.
- C. DLCD interoffice memorandum outlining the process and timeline for the TSP process.
- D. LCDC's Citizen Involvement Guidelines for Policy Development