

OREGON OCEAN POLICY ADVISORY COUNCIL

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Director, Department of Parks and
Recreation



John A. Kitzhaber M.D., Governor

January 22, 2013

Marilyn Worrix, Chair
Land Conservation and Development Commission
635 Capitol Street NE, Ste 150
Salem, OR 97301

Re: OPAC recommendation for Amendments to
Part Five of Oregon Territorial Sea Plan

Dear Chair Worrix and Commissioners:

Before proceeding with the recommendation for amendments to the Territorial Sea Plan (TSP) Part Five, a brief look at the history behind the state Ocean Policy Advisory Council (OPAC), as documented in the TSP, may prove useful as a backdrop to the discussion.

Background

In 1977, LCDC adopted Statewide Planning Goal 19, Ocean Resources. Until enactment of the Oregon Ocean Resources Management Act in 1987 (ORS 196.405 to 196.485), Goal 19 was the fundamental policy element for ocean resources in the state's land-use planning program.

During the period from 1987 to 1990, and pursuant to requirements of state law, the Oregon Ocean Resources Management Plan (Ocean Plan) was prepared and adopted as part of the state's coastal management program.

The Ocean Plan created a broad policy framework for the entire Ocean Stewardship Area off Oregon, which extends seaward to the toe of the continental slope. Within the Ocean Stewardship Area, and as noted in the principal policies of the Ocean Plan (TSP App. G), the state will "give priority to renewable resources over non-renewable resources." As discussed later in this letter, ocean renewable energy is a "non-renewable resource" for ocean planning and management purposes.

In addition to a broad policy framework, the Ocean Plan also recommended creation of an Ocean Policy Advisory Council to prepare a plan for managing the resources and activities in the state's territorial sea (0-3 nautical miles).

In 1991, the Legislature established the state Ocean Policy Advisory Council. And in 1994, OPAC completed the Oregon Territorial Sea Plan, which LCDC adopted as part of the state's coastal management program and NOAA approved as an amendment to Oregon's federally-approved coastal management program.

In 2003, the Legislature modified the composition of OPAC, but its duty under ORS 196.443 to advise the governor, state agencies, and local governments on ocean resources management issues remained unchanged. OPAC membership is shown in the left margin on page one of this letter.

One of the changes in the 2003 legislation was to distinguish between voting and non-voting OPAC members. Language was also added to one of the state policies under ORS 196.420 that OPAC work closely with coastal local governments "to incorporate in its activities coastal local government and resident concerns, coastal economic sustainability and expertise of coastal residents."

Another duty of OPAC under ORS 196.443 is to advise LCDC on amendments to the TSP. Under ORS 196.471, LCDC is required to review any such amendments recommended by OPAC and determine if the amendments are consistent with applicable statewide planning goals, like Goal 19. If not consistent, then LCDC is to return the amendments to OPAC for revision.

In 2000, Goal 19 was amended for the first time. Goal 19 asserts, as the Ocean Plan did, that Oregon's ocean interests extend for the entire Ocean Stewardship Area. Likewise, Goal 19 also requires that higher priority be given "to the protection of renewable marine resources – i.e., living marine organisms – than to the development of non-renewable ocean resources."

That same goal language is also found in TSP Part One, section G., Ocean Management Goals and Policies, which LCDC adopted and added to the TSP in May 2001. The introductory paragraph to the goals and policies states they are "mandatory for ocean resources planning and management; all actions by local, state, or federal agencies that affect the ocean resources of the state shall be consistent with them."

As noted generally over the course of this TSP amendment process, ocean renewable energy is a "non-renewable resource" for Goal 19 purposes. More specifically, and at the request of OPAC and its TSP Working Group (TSPWG), OPAC legal counsel advised OPAC and TSPWG earlier last year that the reference in Goal 19 to "development of non-renewable resources" includes ocean renewable energy.

While individuals on OPAC have changed since its formation, our recommendation is similar to that provided by our predecessors many years ago in response to industrialization of the ocean with potential offshore oil and gas drilling – development must not adversely impact Oregon's way of life. Go slow, take a precautionary approach, protect existing Goal 19 resources and uses, and evaluate the effects of small-scale development before allowing larger projects to proceed.

This approach is consistent with language in the preamble in TSP Part One, section G., Ocean Management Goals and Policies:

Oregon places special emphasis on conserving renewable ocean resources because these are expected to provide greater long-term benefits to the state from food production, recreation, aesthetic enjoyment, navigation, and ecosystem stability than non-renewable marine resources.

When OPAC started to work on TSP Part Five in 2008, it recognized there were no seats on OPAC representing the ocean renewable energy sector. OPAC recommended that LCDC establish a TSP Advisory Committee (TSPAC) to include representation from that field so their interests were heard. That is the Oregon way.

Many modifications to the initial OPAC recommendation were made in light of the work done by TSPAC. Both OPAC and TSPAC agree on many parts of their recommendations. But where they differ, LCDC should give greater weight to the OPAC recommendation. Below are reasons why.

As already noted under ORS 196.443 (duties of council), it was anticipated that not all topics and issues would be addressed in the initial TSP. Moreover, TSP Part One, subsection F.2., Changing the Plan, also noted how amendments are to be made:

After the Territorial Sea Plan is adopted by the LCDC, the Council [OPAC] has a continuing obligation to recommend amendments as needed to both the Oregon Ocean Resources Management Plan and the Territorial Sea Plan. Although the Territorial Sea Plan appears to be a complete document, it is not a completed plan. Rather, the Council has committed itself to a continuous process of addressing new issues and proposing necessary amendments to LCDC to make sure that the plan remains relevant and workable. The LCDC will make any amendments to the plan through official rule making.

And in TSP Part One, subsection F.2.e., Council Approval and Submittal to LCDC, it further noted:

The Council [OPAC] will approve any plan amendments in the same manner as the initial plan and will submit the amendment, along with any needed amendments to the Ocean Plan, to the LCDC for adoption.

It is clear, under both statute and the TSP document itself, that OPAC has the primary advisory role to LCDC on amendments to the TSP. This was also recognized in Executive Order No. 08-07 (page 4), when then-Governor Kulongoski directed that “DLCD shall seek recommendations from OPAC concerning appropriate amendments to Oregon’s Territorial Sea Plan, reflecting comprehensive plan provisions on wave energy siting projects.”

OPAC Recommendation

Attached to this letter are the notes from the facilitator’s flipchart notes at the January 3-4, 2013 OPAC meeting in North Bend. These notes reflect the discussion and recommendation from that

meeting. There is general agreement among OPAC, TSPAC, and DLCD staff as to much of the work product now before LCDC for consideration.

Initially, OPAC discussed buffer distances around Important, Sensitive, or Unique (ISU) areas. OPAC rejected including these distances in TSP Part Five by voting (9-yes, 2-no) to instead include language in the document that directed applicants to consult with ODFW regarding these distances prior to filing an application. This language is now included in subsection g.3)(a)iii on page 19 of the document. However, agency staff has since inserted buffer distances in a new subsection g.3)(a)iv found on page 20 of the document. As noted on page 2 of the attached notes, OPAC requested this letter include the names of the OPAC voting members who had preferred including buffer distances in the document. Those two members were Paul Engelmeier and Robin Hartmann.

Also, and as noted on page 3 of the attached notes, OPAC requested this letter include an OPAC declaration of intent that “significant reduction” and “minimize” be more clearly defined in TSP Part Five for future users of the document, and to develop measurable thresholds for these terms. Agency staff has since included a definition for “minimize” in Appendix A of the document.

OPAC also recommended, as noted on page 2 of the attached notes, to add a sentence to the introductory paragraph in TSP Part Five, under section B.3 on JART Project Review Process, noting the intent of the JART process is “inclusiveness, especially people in the impacted area.” That language has not been inserted in the document.

OPAC supported Flexible Siting, which is described as having project developers and local stakeholders collaborate on the micro-siting of a project within a larger area, such as the Camp Rilea original site. OPAC also supported that no more than five percent of the total area of the territorial sea be designated as Renewable Energy Facility Suitability Study Areas (REFSSAs).

OPAC voted (9-yes, 2-no) in favor of a cap of two percent of the total area of the territorial sea for ocean renewable energy development (i.e., project build-out based on the area permitted and leased for that use). On the same vote count of 9-2, OPAC rejected a cap of three percent of the total area of the territorial sea for such development.

Contrary to the OPAC recommendation for a two percent total cap on project build-out, agency staff inserted a three percent total cap in a new subsection g.7) (a) on page 25 of the document. The OPAC recommendation, however, is consistent with management measures in Goal 19 and TSP Part One, section G. In particular, the management measures to “place conditions or limit actions to protect or shield other uses and resources” and to “take a precautionary approach to decisions about marine resources and uses when information is limited.”

OPAC also supported a one-third project build-out cap for each of the deep water ports of Astoria, Newport, and Coos Bay (using a 60 nautical mile radius around each port). So, for example, a two percent total cap on project build-out would be 0.67 percent for each deep water port area.

An important issue resulting in different recommendations between OPAC, TSPAC, and DLCD staff, and likely indicative of the varied interests in this process, is designation of proposed areas as

REFSSAs. Many also view the designation of REFSSAs as a barometer of the level of protection the amendments to TSP Part Five will actually afford Goal 19 resources and uses.

The OPAC recommendation for designation of REFSSAs is listed on page 4 of the attached notes. Ten voted in support of this recommendation, with only a single ‘no’ vote.

The initial vote tally to determine level of support for each of the 11 areas under consideration is set out below, from most to least support. The first three areas listed below were recommended to proceed as REFSSAs, and the last three areas listed below were recommended not to proceed as REFSSAs:

<u>Area</u>	<u>Votes For</u>	<u>Votes Against</u>
Lakeside revised	11	0
Camp Rilea alternate (1 nm)	9	1
Nearshore Reedsport alternate	8	0
Gold Beach alternate	6	6
OPT-Reedsport 50 MW	5	6
Camp Rilea	3	3
Nearshore Reedsport	3	3
North Newport	3	5
Langlois	1	9
Nestucca/Pacific City	1	10
Netarts	0	11

For the three areas that OPAC recommended to proceed as REFSSAs, OPAC modified the Camp Rilea area (only out to 1 nm) so as to better protect Goal 19 resources and uses clearly identified as deserving protection under Resources and Uses Conservation Area (RUCA) standards.

Likewise, OPAC recommended an alternate Nearshore Reedsport area so as to better align with protections assured under Goal 19. This was also done in light of the adjacent OPT-Reedsport 50 MW area, which encompassed a RUCA. The third area that OPAC recommended to proceed as a REFSSA was Lakeside revised.

For the three areas that OPAC recommended not to proceed as REFSSAs – Langlois, Netarts, and Nestucca/Pacific City – they included Goal 19 resources and uses clearly identified as deserving protection under either RUCA standards or Resources and Uses Management Area (RUMA) standards. The Commission cannot disregard these Goal 19 protections.

Possible Motions

Finally, and in light of the DLCD staff report and recommendation, in particular for proposed REFSSAs, the following motions are offered for LCDC consideration. Both motions refer to the OPAC recommendation and are consistent with the motions the department listed when LCDC adopted TSP Part Five in 2009 (see attached excerpt from November 5, 2009 staff report). These motions are also consistent with the Commission’s TSP review requirements under ORS 196.471.

Recommended motion:

I move that the commission find that the Territorial Sea Plan Part Five amendment and plan map area designation adoption recommended by OPAC carries out the policies of the Oregon Ocean Resources Management Act and is consistent with applicable statewide planning goals; and further that Territorial Sea Plan Part Five, as amended, be adopted as part of the Oregon Coastal Management Program.

Alternative Motion:

I move that the commission find that the Territorial Sea Plan Part Five amendment and plan map area designation adoption recommended by OPAC does not carry out the policies of the Oregon Ocean Resources Management Act or is not consistent with applicable statewide planning goals, or both; and further that Territorial Sea Plan Part Five be returned to OPAC for revision.

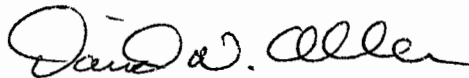
If the Commission chooses the alternative motion, it can also specify any needed revisions, per ORS 196.471(3).

We look forward to presenting the OPAC report and recommendation to the Commission at the January 24, 2013 meeting in Salem.

Best regards,



Scott McMullen, Chair



David Allen, Vice Chair

Attachments:

Facilitator's notes Jan. 3-4, 2013 OPAC meeting
Excerpt from Nov. 5, 2009 DLCD staff report

Notes from January 3 - 4, 2013 OPAC meeting in North Bend, Oregon

(Drafted by facilitator Jane Brass Barth from her flipchart notes;
Edited by OPAC chair and vice-chair and DLCD staff)

The focus of the facilitated section of the January 3rd meeting was Part 5 of the TSP. Each OPAC member was asked to identify any issues s/he wanted to discuss regarding Part 5. All issues were listed on a flipchart and the group began working through the list. This discussion carried over into the morning of January 4th to cover most of the issues and to make decisions on recommended changes to the Part 5 document. The afternoon of January 4th the focus shifted to sideboards and area designations.

Part 5 Issues and Related Recommendations

- Visual Section:
 - Suggestion made by Kris Wall, NOAA, to define the terms *seascape* and *viewshed* in the Appendix A to avoid confusion.
 - Revised language related to visual contrast (page 17) was accepted by OPAC by consensus.
 - OPAC approved by consensus that a score of 24 or more for scenic quality evaluation will be the rating for special areas.

- Financial capacity: Important to OPAC members that applicants for marine renewable energy (MRE) projects be financially viable. One key concern was to not waste state agency time and resources on reviewing applications from entities that do not have the financial capacity to complete the application process. As articulated by Richard Whitman, financial capacity to actually complete a project and to deal with any accidents and eventual decommissioning also are important.
 - OPAC supported the inclusion of a Financial Assurance Plan section within Part 5. This section is directed at assuring "holders" have the capacity to plan, construct, operate and decommission MRE facilities.
 - OPAC supported DSL incorporating financial viability requirements in its MRE application forms and process.
 - OPAC supported the JART process including a review of financial viability. It was unclear how person(s) with expert knowledge in financing large-scale MRE projects would best be included in the JART process. Agencies will work this out.
 - OPAC suggested including general guidance on financial viability in the JART section, but the facilitator's notes do not indicate if draft wording was inserted in the Part 5 document.
 - OPAC supported by consensus inclusion of language offered by Richard Whitman regarding decommissioning.
 - The vice chair, David Allen, initially wanted to require proof of testing of MRE devices prior to application. His concerns were satisfied via these financial viability additions.

- JART membership, roles, and responsibilities
 - OPAC recommended by consensus that Ports be listed on top of page 5, section 3.a.3)
 - OPAC recommended that a sentence be added to the introductory paragraph of section 3 to indicate that the intent is inclusiveness, especially the people in impacted area.
 - OPAC discussed the importance of including people with marine operations and also financing MRE projects in the JART review process. They acknowledged that these people would more likely be involved as contracted resource experts rather than volunteer JART members. OPAC expressed satisfaction in leaving the details of working this out to the DSL.
 - OPAC discussed the potential role of the JART in project monitoring and adaptive management. The main purpose would be to ensure continued public involvement in the adaptive management process. There was not support to convene the JART for this purpose. Rather, OPAC supported by consensus additional language on page 22 in the Agreements section and also adding a public engagement plan within the monitoring plan (page 21).

 - Buffers around ISUs: The focus of the discussion was whether to specify buffer distances in Part 5 or leave the specific distances to ODFW guidelines. All members want specificity in a document that applicants can reference. They did not, however, all think that Part 5 was the appropriate document. Points in favor of specifying buffer distances were for transparency. Point against were for flexibility and the unintended application of buffer distances for other uses.
 - First, OPAC agreed by consensus to include rocks as ISUs.
 - OPAC did not come to consensus on whether to include specific buffer distances so it took a vote. OPAC agreed by majority vote to include new language in Part 5 on page 14. That language did not include specific buffer distances, but rather directed applicants to consult with ODFW regarding buffers prior to submitting an application.
 - OPAC will include in its letter to LCDC the number and names of members who preferred including specific buffer distances. (n=2 Robin Hartmann, Paul Engelmeyer.)

 - Estuaries
 - OPAC agreed by consensus to recommend estuaries be considered ISUs. They asked staff to work on the appropriate language by the LCDC meeting.

 - Cumulative effects, *biological/ecological*
 - OPAC agreed by consensus to add the words “but not limited to” on page 9 section 4) A) last sentence before the numbered list.
-

- Cumulative effects, *social and economic*
 - No specific changes to Part 5 were identified. OPAC stressed the importance of continuing to develop tools to measure these fishing and shoreside impacts. They noted the recent work on a tool with OWET funding. They are interested in discussing this topic as part of future OPAC work.

- Terminology: OPAC discussed extensively the lack of clarity in the terms *significant reduction* (page 13) and *minimize*, which is used throughout the document. Examples can be found on page 13 section B). It was noted that the TSP does include a definition of *significance* which could be helpful. Also the term *minimal* is used in places and there was higher comfort with that term than *minimize*.
 - They did not reach agreement on replacement terms or sample %s to include. Rather they chose an aspirational approach.
 - OPAC approved by consensus to forward to LCDC a declaration of intent to
 - A) make these terms and their definitions clearer to future users of the document and
 - B) develop measurable thresholds

- OPAC review of the TSP Part 5
 - The Chair, Scott McMullen, requested that more specific language be added on page 23 indicating that OPAC could review the document without waiting for the 7 year or 1% trigger. No official vote was taken on this, but others supported it and the facilitator's sense is that OPAC would have agreed to this clarification.

Sideboards and REFSSAs

OPAC supported the following sideboards by consensus:

- **Distribution by 1/3 of total build-out cap** in 60-mile radius area around each deepwater port area (Astoria, Newport, and Coos Bay) within the initial 7 year period.

- **Flexible Siting** (i.e., larger sites that allow for specific project site decisions within it to fit the specific technology). Note: During the discussion, staff pointed out that flexible siting was not feasible with the current set of REFSSAs. OPAC members still wanted to show their support for micro-siting as Oregon moves forward with MRE.

- **Maximum total 5% of TS in REFSSA's**

OPAC supported the following sidebar by a majority vote of 9-2. With a separate vote, OPAC did not support a 3% project build-out (vote 2 for, 9 against).

- **Total 2% Project Build out** (the development footprint authorized under a FERC license or an authorization from DSL)

OPAC did not vote on the sidebar supported by TSPAC of "At least 4-5 areas on coast suitable for marine renewable energy counting Camp Rilea and Reedsport OPT 50 megawatt sites." OPAC chose to get to the number of REFSSAs it would support by discussing and voting on individual areas. Before voting, DLCD staff reviewed the area locations and size on Marine Map. Then a subset of OPAC members proposed alternatives to the Camp Rilea and Nearshore Reedsport areas. This group also recommended that the OPT build-out area not be set as a REFSSA, but rather revert to the underlying RUCA. OPAC did not vote on this recommendation alone. Instead, all voting members were asked to vote for what areas they supported as REFSSAs and which they did not support being REFSSAs.

A total of 11 areas were under consideration during the vote. Eleven members voted. The total votes for each area don't always total 11 because some people did not vote for certain areas. The Gold Beach 12 is an unexplained anomaly.

	Votes For	Votes Against
Camp Rilea	3	3
Camp Rilea alternate (only out to 1 nautical mile)	9	1
Netarts	0	11
Nestucca/Pacific City	1	10
North Newport	3	5
OPT 50 megawatt Build-out	5	6
Nearshore Reedsport	3	3
Nearshore Reedsport alternate	8	0
Lakeside revised	11	0
Langlois	1	9
Gold Beach alternate	6	6

Prior to adjourning, OPAC supported the following motion (moved by Fred Sickler; seconded by Susan Morgan) by a vote of 10-1 (n=Robin Hartmann):

OPAC will provide to the Commission the entire results of this meeting, including this tally reorganized from most to least support. It recommends Camp Rilea alternate, Nearshore Reedsport alternate and Lakeside revised areas proceed as REFSSAs. OPAC recommends that Netarts, Nestucca/Pacific City and Langlois areas do not proceed as REFSSAs.

V. LCDC RULEMAKING AUTHORITY AND REQUIREMENTS

The commission is required to review OPAC recommended amendments to the TSP under ORS 196.471(1). The commission reviews the recommended amendments and makes findings that the recommendations carry out the policies of the Oregon Ocean Resource Management Act and are consistent with the applicable statewide planning goals. After making such findings, ORS 196.471(2) requires the commission to adopt the proposed amendments. In addition, the commission is authorized by ORS 197.045 to “perform other functions required to carry out ORS chapters 195, 196 and 197,” and by ORS 197.090, to coordinate “land conservation and development functions with other government entities.”

The department submitted public notices and fiscal impact statements for proposed rules to the Secretary of State, legislative leaders and selected committee chairpersons, and the public on September 15, 2009.

Although the department decided to schedule rulemaking hearings for this matter of its own accord and not in response to a request for a rulemaking hearing under ORS 183.335(3)(a), because the Part Five rulemaking arguably affects or applies to only a limited geographic area, the Department of Justice recommended that the department hold a hearing within that geographic area. The department held the public hearing in Florence on October 23, 2009, and the hearings officer reported those comments in a memorandum distributed to the commission.

VI. SUMMARY

The amendment to the Territorial Sea Plan, Part Five: Use of the Territorial Sea for the Development of Renewable Energy Facilities or Other Related Structures, Equipment or Facilities, is based on the existing policies and implementation requirements of Goal 19 Ocean Resources, the TSP and ORS 196.405 to 196.515. In addition, the OPAC and the TSPAC ensured that the requirements of Part Five would be compatible with other state and federal agency authorities and regulatory requirements that would apply to the permitting, licensing and leasing necessary to authorize the development and use of renewable energy facilities in the territorial sea.

VII. RECOMMENDATION

The department recommends that the commission adopt this staff report as the findings required to adopt the rule to amend the Territorial Sea Plan to add Part Five.

VIII. POSSIBLE MOTIONS

Recommended motion:

I move that the commission find that the Territorial Sea Plan Part Five amendment recommended by OPAC carries out the policies of the Oregon Ocean Resource Management Act and is consistent with applicable statewide planning goals; and further

that Territorial Sea Plan Part Five be adopted as part of the Oregon Coastal Management Program.

Alternative Motion:

I move that the commission find that the Territorial Sea Plan Part Five amendment recommended by OPAC does not carry out the policies of the Oregon Ocean Resource Management Act; is not consistent with applicable statewide planning goals; or both, and further that Territorial Sea Plan Part Five be returned to OPAC for revision.

ATTACHMENTS

- A. Goal 19 Ocean Resources
- B. ORS 196.405 to 575 Oregon Ocean Resources Management
- C. Territorial Sea Plan Part One and Part Two
- D. Proposed rule OAR 660-036-0005