

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CHARLES CIECKO and DAVID)	
YAMAMOTO,)	
)	
Petitioners,)	Court of Appeals No. A156130
)	
v.)	
)	
DEPARTMENT OF LAND)	
CONSERVATION AND)	
DEVELOPMENT,)	
)	
Respondent.)	
)	

BRIEF OF AMICUS CURIAE

LINCOLN COUNTY, CURRY COUNTY, COOS COUNTY,
DOUGLAS COUNTY, TILLAMOOK COUNTY AND CLATSOP COUNTY
IN SUPPORT OF PETITIONERS

Judicial Review of an Administrative Rule of the Oregon Department of Land
Conservation and Development

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STATEMENT OF AMICUS CURIAE

Lincoln County, Curry County, Coos County, Douglas County, Tillamook County and Clatsop County (collectively “Counties”) have been granted permission by the court to file an *amicus curiae* brief in support of Petitioners.¹ Counties are active participants in ocean planning, which is the substantive area of concern in the challenged rule. It is important to Counties that their legally delegated role in ocean planning be preserved and protected. The challenged rule abrogated that role. Counties adopt the statement of the case and assignment of error submitted by Petitioners.

SUMMARY OF ARGUMENTS

LCDC must follow both state law and its own procedural policies in rulemaking, including those contained in the Territorial Sea Plan (TSP)². It failed to do so in the Part 5 amendment process.

The importance of adhering to required regulatory procedures was best captured by Justice Gillette when he opined:

¹ Lane County was unable to timely join the Counties in being an *amicus* party. However, Lane County joins its fellow coastal counties in support of this challenge. (App-1) All seven coastal counties represented on the Ocean Policy Advisory Council support this effort.

² Petitioners’ opening brief, at pages 3-4, cites the authority for taking judicial notice of the TSP and the Oregon Ocean Resources Management Plan (Ocean Plan). It also cites the links maintained by LCDC / DLCD to the full content of the TSP and Ocean Plan.

“[A] general admonition (applicable to all administrative agencies * * *) that administrative rules, once made, must be followed, in order for the public to have a reliable road map as to the actions that its government claims to be entitled to take.” *Marshall’s Towing v. Department of State Police*, 339 Or 54, 58 n 5, 116 P3d 873 (2005).”

Petitioners carefully lay out the Land Conservation and Development Commission’s (LCDC) legal failures under applicable statutes and procedural policies in their opening brief. Counties fully support Petitioners’ position that (1) the Ocean Policy Advisory Council (OPAC) recommended plan amendments are required to form the only basis for LCDC’s findings review and consistency determinations, ORS 196.471; (2) the text and context of the framework of prior and current statutes and procedural policies support Petitioners’ interpretation of OPAC’s and LCDC’s respective authority and role; (3) the particular intent of ORS 196.471 governs the amendment process, and any additional general authority granted LCDC under ORS chapter 183 can complement, but not be inconsistent or conflict with that express particular intent; (4) the 2013 amendments to ORS 196.471 reiterates the authority already existing under law; and finally (5) LCDC’s actions in adopting recommendations significantly differing from OPAC’s recommendations violates the procedural framework outlined above.

Counties initially will identify the Counties’ historical participation in OPAC. Counties will next show the substantive differences between OPAC’s

recommendations and the final amendment adopted by LCDC. These changes are significant to Counties, to their interests in ocean planning, and to the impacts of the decision on the state / county role in future planning processes.

Counties further underscore that an improper rulemaking process was followed by LCDC by:

- (1) Outlining the original TSP creation and amendment process enacted as Oregon Laws 1991, chapter 567, which created OPAC and delegated authority to OPAC to adopt and amend the Plan subject to LCDC review. That authority has never been abrogated and continues to this day. LCDC departed from the legal standard contained in the delegation to OPAC in the Part 5 amendments. ORS 183.400(4)(b).
- (2) Examining LCDC's own procedural policies, recommended by OPAC, and contained within the adopted TSP, enumerating OPAC's role. These policies parallel and implement the requirements of ORS 196.471 as set forth by Petitioners. The policies preclude LCDC from making its own amendments to the plan, independent of the OPAC recommendations. LCDC failed to follow this procedural mandate.
- (3) Challenging in the alternative LCDC's findings which either (a) hold that the OPAC recommendations met the consistency

requirements of ORS 196.471. This would require LCDC to adopt OPAC's recommendations, which it did not do; or (b) show that LCDC failed to make the required findings under ORS 196.471 as to the OPAC recommendations. Either alternative would require invalidation of the rule.

- (4) Finally, and only in the alternative, identifying additional areas where LCDC failed for the adopted amendment to make all the necessary consistency findings under law for policies contained within the TSP. These failures are further procedural errors requiring invalidation of the rule.

ARGUMENT

I. Introduction

“Oregon’s Coastal Communities are comprised of distinct local economies that share a common connection to the ocean and its resources. Coastal Communities and ocean users have a wealth of knowledge about maintaining nearshore marine resources and their input is essential to developing informed recommendations for marine reserves, wave energy development and other new uses of the ocean. Oregon can stimulate and strengthen the coastal region’s economic vitality by encouraging development of new sustainable industries while preserving existing livelihoods in commercial and sport fishing, ocean recreation, tourism, forest products and agriculture.” Executive Order No. 08-07, Governor Theodore R. Kulongoski, March 26, 2008. (ER-176)

This excerpt from the referenced Executive Order Titled “Directing State Agencies to Protect Coastal Communities in Siting Marine Reserves and Wave

Energy Projects” embodies the priorities, policies and practices which have governed the relationship between the state and local governments concerning ocean planning since the adoption of Oregon’s Ocean Resource Management Act (Act) in 1987.

LCDC has found that local governments do not have any direct planning responsibility or authority for the territorial sea³, but instead exercise their planning authority through the Act, codified as ORS 196.405 to 196.515.⁴ The Act, through the years, established, then strengthened significant roles and responsibilities for coastal communities and delegated specific authority to OPAC and its predecessors to prepare and adopt ocean plans. A brief examination of the role of coastal participation explains why the Counties are deeply concerned about LCDC’s failure to comply with statutory authority and applicable rulemaking procedures and felt compelled to join the challenge to the adopted rule.

II. Coastal Communities Legislatively Mandated Representation

Oregon Laws 1987, chapter 576, section 8 (SB 630) established the Ocean Resources Management Task Force as the lead agency for Ocean Planning in 1987 for development of an ocean resources management program

³ Order 13-OCMP-001842, In the Matter of Amending OAR 660-036-0005, Part Five of the Territorial Sea Plan. (October 7, 2013, LCDC Order, ER-28, citing ORS 201.370(2)).

⁴ Counties do not agree with this assertion, but it is not before the Court at this time. See ORS 196.465 and arguments on page 27 of this *Amicus* Brief.

under the newly established Oregon Ocean Resources Management Act. The Oregon Legislature established the Task Force to include state agency and other statewide stakeholders and also included broad representation from coastal communities. Designated coastal interests representing Counties, commercial and recreational fisheries, and other historic ocean users were guaranteed a legislatively mandated role in creating the coordinated elements of what has become the Oregon Ocean Resources Management Plan and Program. *Id.* § 14.

Building upon the early work of the Task Force, the 1991 Oregon Legislature strengthened the role of coastal participation and representation in ocean planning with the replacement of the Task Force with the Ocean Policy Advisory Council (OPAC). Or Laws 1991, chapter 501, §§ 6 and 19. Representation on OPAC by commercial and charter fishing appointees was doubled (providing for north coast and south coast representatives). Other enumerated coastal stakeholder positions were added - - for coastal conservation or environmental groups and ports and local governments. Two non-renewable resource development seats (mineral and oil and gas positions) on the Task Force were removed from the newly created Council, reflecting the expression of Oregon opposition to ocean extractive industries. Of the three public members on OPAC, at least one now was required to be a coastal resident. *Id.*

Twelve years later, in 2003, the Oregon Legislature once again amended the law and reinforced the role and authority of coastal representatives on OPAC in several particulars: first, coastal county representation was doubled to provide north and south coast members and a requirement added that the county representatives appointed by the Governor were subject to county governing bodies' consultation and approval; next by requiring that the coastal city representative now be chosen upon advice of the Oregon Coastal Zone Management Association; then by reducing the public membership by one but retaining the requirement that one seat be held by a coastal resident; by providing the Council elect the OPAC chair from among its members rather than the position being appointed by the Governor; and finally by moving the Council outside the governor's office and converting state agency representatives to non-voting member status. Or Laws 2003, chapter 744, § 8.

As such, since the establishment of ocean planning authority in 1987, the coast's significant interests in, and relationship to, the ongoing process of ocean resource management is both legislatively established and operationally implemented through our participation in OPAC. It is therefore vital to our interests and the public confidence in the ocean management system that the role of OPAC in developing, implementing and amending the Oregon Ocean Resources Management Program, including the Territorial Sea Plan (TSP), be

recognized, preserved and protected. Unfortunately, it has not been in the LCDC's actions in adopting Part Five to the TSP.

III. Significant Differences between OPAC Recommendations and LCDC's Adopted Amendment

Counties are most concerned with the policy recommendations concerning Renewable Energy Facility Suitability Study Areas (REFSSAs) and the Plan Map and Area Designations around these REFSSAs.⁵ LCDC's adopted amendment differed from the OPAC recommendations. These differences are significant.

First, it should be noted that marine renewable energy facilities are only categorically prohibited from 10% of the Territorial Sea. (ER-18). For the other 90% of the territorial sea, marine energy renewable facilities have varying levels of standards that have to be met to be sited. But these facilities are not excluded on this 90% of the remaining territorial sea. *Id.* So while marine energy facilities may be guided into smaller areas, REFSSAs, they can be located in significantly larger parts of the territorial sea.

Second, there are substantial regulatory and practical constraints (spatial and temporal) on where and when fisheries activities can be carried out within Oregon's Territorial Sea. It was understood by OPAC that significant portions

⁵ REFSSA (Renewable Energy Facility Suitable Study Areas) is one of several designations of areas of the territorial sea made as part of this amendment. A through explanation of all the designations can be found in Part Five Appendix B: Map Designations. (Rec-64-65).

of the Territorial Sea are also not available for fisheries uses. The presence of complex logistical considerations and competition for the same spaces between marine renewable energy interests and other historical users of the ocean underscored the need to support community-level engagement processes to leverage the expertise of fishermen, other mariners and coastal interests to inform the state (and federal) regulatory frameworks such as the TSP Part Five amendment process. That need was reflected in OPAC's recommendations, including recommended designations of REFSSAs for marine renewable energy uses and in textual language. So while LCDC may attempt to say these differences are minor, they are not.

There were three additional REFSSA sites chosen by LCDC that were opposed by OPAC votes.

A modified Camp Rilea proposal out to one nautical mile, was approved by OPAC by a 9 to 1 vote based on Goal 19 fishing concerns and the determination that the resources and uses deserved protection under the Resources and Uses Conservation Area (RUCA) standards. (ER-35). The final version recommended by DLCD and adopted by LCDC tripled the area of the REFSSA to three nautical miles, in areas identified by OPAC as having conflicting Goal 19 fisheries uses. *Id.* As noted below, Camp Rilea is of special concern to Clatsop County which supports the general area, but again with concerns about impacts on fishing. DLCD admits that Camp Rilea is a "high

use fisheries area and would not normally have met the criteria for identifying a prospective REFSSA.” (ER-55) ⁶. The expanded area was included based on “special and unique circumstances”. *Id.* OPAC did not agree.

Inclusion of the Camp Rilea area also garnered considerable opposition from fishing interests in public meetings. (ER-102-103, 107, 109). Public testimony on the area off Camp Rilea identified it as an area of high value to the small boat day-crab boat fishery out of the Columbia River. (ER-102-103, 107, 109; Rec-250). Because these small boats have to cross the Columbia River Bar (one of the most dangerous bars in the world during the winter crab season) they have to time their transits across the bar to coincide with safe conditions on the bar—usually high water or a flood tide. This very significantly limits the distance from the mouth of the Columbia that this group can travel to fish, which is further limited by the state boundary—no Oregon crabbers can fish off the State of Washington (out to 200 miles) unless they possess a State of Washington crab permit. (ER-102-103, 107, 109; Rec-250).

The Nestucca REFSSA site was lower ranked by the TSPAC advisory committee than other areas not included as REFSSAs (ER-47), and was voted to not be included by OPAC in a 10 to 1 vote. (ER-35) OPAC noted major concerns with Goal 19 fishing protections in this area, too. *Id.* These were

⁶ This was part of LCDC’s findings, dated January 14, 2013 (ER-43-121), adopted in its final Order, dated October 7, 2013. (ER-30).

significant areas and issues to OPAC. *See* OPAC Recommendations to LCDC, (ER-31-42). This area encompasses over 2.1 square miles. (ER-55).

A third REFSSA area, the Reedsport OPT 50 MW site⁷, also was significantly altered from the OPAC recommendation. An original pilot test area, the OPT 10 buoy site was included in OPAC's recommendations based on a Federal Energy Regulatory Commission (FERC) granted permit which grandfathered in a much smaller portion of this site. This was designated a Renewable Energy Permit Area (REPA) based on the permit already issued. The final site was significantly enlarged to allow a commercial sized utility development of 50 megawatts. This site was not recommended by OPAC. Contrary to DLCD's assertions, OPAC had not "left these for the commission to consider" (ER-48). It was voted down 6 to 5. (ER-35)

The expanded OPT 50 MW area as finally adopted falls within a Resources and Uses Conservation Area (RUCA), which LCDC categorizes as having "very stringent standards" to allow for marine renewable energy development. (ER-18) LCDC acknowledges that "the resources and uses inventory data indicates it [this area] is a high effort fishing area, especially for Dungeness crab". (ER-56) The 50 MW area is large enough to hold 100 buoys. The total area of the REFSSA is 5.25 square miles (ER-56), which is well more than 10 times the size of the area included in the grandfathered REPA Area.

⁷ MW means megawatts.

The record (Rec-72) contains a Map which shows the relative size of the grandfathered area (REPA 2) and the final REFSSA added (REFSSA 3).

The Reedsport OPT 50 MW site was added with a condition that if OPT abandoned the site, it would revert to a RUCA designation. (ER-30) OPT did subsequently abandon the site after the TSP was amended. (App-2-4). That does not change the fact that its inclusion was a significant deviation from the OPAC recommendations.

IV. The TSP Adoption and Amendment Process

A. OPAC's delegated authority in preparing, adopting and amending the TSP was statutorily established and has not changed. LCDC departed from the legal standards required under ORS 196.471.

By 1991 it was clear that OPAC's responsibility, not LCDC's, was to both prepare and **adopt** the initial TSP **and** recommend future amendments to the TSP and Ocean Resources Management Plan. Or Laws 1991, chapter 501, §§ 8, (1)(a) and (c), 19 and 20. Petitioners have articulated the statutory framework and administrative procedures under which this process operates in Petitioners' opening brief, pages 8-16.

Examination of the full language of the 1991 enactment, sections 19 and 20 as adopted, compared with the current law reveals that nothing has changed

from the initial structure for plan adoption up through the challenged actions required for plan amendment.⁸

Moreover, policies in the LCDC adopted TSP itself support and clarify OPAC's authority in the plan amendment process. LCDC's actions effectively redefine and limit OPAC's role in the challenged Part Five adoption process. Those actions were contrary to those policies and further evidence the invalid procedure followed by the agency.

Oregon Laws 1991, chapter 501, sections 19 and 20 provided (additions in **boldface**, deletions *italicized and bracketed* []):

“**Section 19.** Section 15, chapter 576, Oregon Laws 1987 is amended to read:

Sec. 15. (1) By July 1, [1991] **1994** the [State Land Board] **Ocean Policy Advisory Council** shall adopt a plan for management of [the] resources and uses of the [submerged and submersible lands of the] state territorial sea **and ocean shore.** [consistent with the purposes of the 1987 Act and] **The Territorial Sea Plan shall be based on** the policies and recommendations of the Oregon Ocean Resources Management Plan.

(2) **The Territorial Sea Plan may include:**

(a) **More detailed analyses of and implementation strategies for issues, policies and recommendations of the plan;**

(b) **Policies or standards applicable to local government, state and federal agency plans or actions within or affecting resources and uses of Oregon's territorial sea;**

(c) **Special subarea management plans to resolve multiple conflicts in specific areas; and**

⁸ Counties support Petitioners' arguments, opening brief, at pages 16-18, for how to interpret the effect of the 2013 amendments to ORS 196.471, Or Laws 2013, chapter 416, section 1, which establish new timelines.

(d) Recommendations to the commission⁹ for improvement or amendments to the Oregon Coastal Management Program.

[2] (3) The [State Land Board] Ocean Policy Advisory Council shall submit the Territorial Sea Plan to the Land Conservation and Development Commission for [certification consistency with the state-wide planning goals] adoption as part of the Oregon Coastal Management Program.

[(3) This plan shall be the basis for the rules to be adopted by the Division of State Lands for administrating activities and uses within the territorial sea.]

Section 20. (1) The commission shall review the Territorial Sea Plan and any subsequent amendments recommended by the 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;**
- (b) Are consistent with applicable statewide planning goals, with emphasis on the four coastal goals; and**
- (c) Are compatible with adjacent county comprehensive plans as required in subsection (5) of this section.¹⁰**

(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 finding 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 plans necessary to conform to the provisions of the adopted plan.”

Consistent with this 1991 legislative mandate OPAC, not LCDC or another state agency - - previously the State Land Board - - was conferred the

⁹ Commission means LCDC. See footnote 11 below.

¹⁰ Note: Section 20. (1)(c) was subsequently repealed by Oregon Laws 1993, chapter 18, section 35 because the reference was to a nonexistent subsection.

statutorily delegated authority and responsibility to prepare and adopt the initial TSP. OPAC carried out those responsibilities from 1992 through August of 1994 through an OPAC sponsored series of public workshops and public meetings. That process is not only fully delineated, but is incorporated into and continues to be part of the adopted TSP to this date. This was the initial framework for the TSP's development and implementation. This framework continues to be the LCDC adopted procedure governing TSP amendments. *See Oregon Territorial Sea Plan, Adopted 1994, Part One: Ocean Management Framework, section B. Ocean Policy Advisory Council, Section 2 Planning Process.*

Subsequently, in conformance with section 20 of the 1991 laws, the OPAC adopted plan was presented to LCDC. LCDC reviewed the OPAC recommended plan and found it carried out the policies in ORS 196.405 to 196.515 and was consistent with the Statewide Planning Goals. LCDC adopted OPAC's TSP as OAR 660-036-0000 in 1994, through the administrative rulemaking process, making the findings required by law. The procedures identified in the adopted TSP were, and continue to be, applicable to LCDC's rulemaking process to this day. Legislatively, section 20 set forth

above, codified as ORS 196.471, continued to apply through 2013 as the framework for LCDC review and action on the TSP.¹¹

B. The TSP has procedural rules, recommended by OPAC and adopted by LCDC, to amend the TSP. These rules mirror and implement the statutory framework and delegated authority of OPAC under ORS 196.405 to 196.515. LCDC failed to follow these procedures.

As noted on page 14 of Petitioners' opening brief, OPAC's work did not end with the initially adopted TSP. OPAC has a "continuing obligation to recommend amendments as needed to both the Oregon Resources Management Plan and the Territorial Sea Plan * * * [by] proposing necessary amendments to LCDC * * * to make sure the plan remains relevant and workable." Oregon Territorial Sea Plan, Part One: Ocean Management Framework, Section F. Plan Implementation, Subsection 2 Changing the Plan, adopted by LCDC as OAR 660-036-0000 in 1994. This is consistent with and implements OPAC's statutorily delegated duties under ORS 196.443.

As also noted on page 14 of the opening brief¹², under the LCDC promulgated rules adopting the original TSP, later TSP amendments are

¹¹ Two minor changes occurred in ORS 196.471 between 1991 and 2013. The first, a technical change, removed subsection (1)(c) which referenced another nonexistent subsection. Or Laws 1993, chapter 18, section 35. The second substituted for the denominations "commission" and "council" the full names of the Land Conservation and Development Commission, and the Ocean Policy Advisory Council through a broad authorization for legislative counsel to set forth the full names for this and many other commissions, boards, agencies and officers within the entirety of the ORS, if not set forth in the first reference in the statutory section. Or Laws 1997, chapter 249, section 277.

required by Part One, Section F, Subsection 2 of the TSP to follow the same process as the **initial** plan adoption: OPAC recommends, LCDC reviews and makes required findings, then adopts the recommendations (or refers the recommendations back to OPAC if the findings are not made with respect to the OPAC recommendations). It is instructive, then, to review the promulgated adoption process in the initial TSP to see how these additional procedural requirements carry out this legislative mandate.

The Oregon Territorial Sea Plan, Part One Ocean Management Framework, Section F. Plan Implementation, Subsection 1(d) Adoption and Approval of the Territorial Sea Plan, adopted by LCDC as OAR 660-036-0000 in 1994 provides:

“The Council [OPAC] first must recommend the plan for adoption to the Land Conservation and Development Commission. Then, LCDC must make findings that the Territorial Sea Plan:

- carries out the policies of the Ocean Management Act;
- is consistent with the applicable statewide planning goals, with emphasis on the four coastal goals; and
- is compatible with adjacent comprehensive plans.¹³

¹² Referencing Oregon Territorial Sea Plan, Part One: Ocean Management Framework, Section F.2.e.

¹³ The first two findings - - carrying out the policies of the Act and consistency with statewide planning goals - -were required in section 20 of the 1991 Act. They are codified and continued today in ORS 196.471(1)(a) and (b). The third finding of compatibility was originally codified as ORS 196.471(1)(c). It referenced a nonexistent subsection and was redundant, so was removed from ORS 196.471 in a 1993 amendment to the statute. Compatibility of local plans is still required under ORS 196.465(1).

After making these findings, LCDC will adopt the Territorial Sea Plan and **any subsequent amendments**, through rule making. (emphasis added).

If the LCDC cannot make the required findings, **it cannot itself amend the Territorial Sea Plan. Instead, LCDC must send the plan back to the OPAC for additional work.**” (emphasis added).

LCDC is not authorized to amend the TSP outside of the recommendation of OPAC. The only alternative is to send the plan, or any subsequent amendment to the plan, “back to OPAC for additional work.” This language in the TSP is consistent with and implements the Act. ORS 196.471(1) to (3).

LCDC used this process in adopting Ocean Policies and Rocky Shore Management at Cape Arago amendments to the Territorial Sea Plan in 2001. OAR 660-036-0003 and OAR 660-036-0004. *See* Petitioners’ opening brief at page 9. Then DLCD Director Benner in his Agenda Item transmittal memorandums to LCDC on both amendments warned that if the required findings were not made with respect to the OPAC recommended amendments to the TSP that “the Commission cannot make changes * * * on its own motion.”¹⁴

LCDC also utilized this procedure in adopting the initial Part Five amendments containing the textual and policy elements of the Plan in 2009. *See*

¹⁴ The quoted language is found in Petitioners’ opening brief at App 6 and App 13, and the full memorandums are found at App-5-17 in the opening brief.

Petitioners' opening brief at page 9. LCDC received and acted upon the OPAC recommendations.¹⁵ (ER-134-135).

But for this challenged rule, LCDC stepped outside the legislative authority established under the Act for TSP amendments and its own adopted administrative review procedures in the TSP to consider and adopt recommendations made by the Department of Land Conservation and Development (DLCD) outside of those submitted by OPAC.

C. LCDC either (a) made the required consistency findings under ORS 196.471 and the TSP for the OPAC recommendations but failed to then adopt the OPAC recommendations or (b) failed to make the required consistency findings under ORS 196.471 and the TSP against the OPAC recommendations. In either case, the rule as adopted failed to follow required statutory and rulemaking procedures and is invalid.

To justify an alternative course of action while at the same time argue it acted in accordance with the Act and adopted TSP procedures, LCDC first acknowledges, then disregards, its obligations to make consistency findings against the OPAC recommendations. Then LCDC asserts that it **could** have made the findings that the OPAC recommendations met the requirements of ORS 196.471. *See* Order 13-OCMP-001842, In the Matter of Amending OAR

¹⁵ A one word modification was made in the OPAC recommendation - - from the word "promote" originally proposed to the OPAC recommended "facilitate", and LCDC chose "encourage" the statutory term in ORS 196.420. That change was addressed in the original proceeding (ER-165), and remained in the amended Part Five recommendations from OPAC. (ER-63).

660-036-0005, Part Five of the Territorial Sea Plan. (October 7, 2013, LCDC Order, ER-3-30). Specifically, the LCDC Order states:

“If, the Commission is unable to make the findings with regard to the OPAC recommendations, as set forth in ORS 196.471, then the Commission is obligated to return OPAC’s recommendations to that body. That is not what happened in this rulemaking, however.

* * * * *

[T]he Commission could have made the findings required by ORS 196.471 with regard to OPAC’s recommendations * * * ” (ER-15).

Initially, Counties believe that LCDC did find the OPAC recommendations were consistent with ORS 196.471. The Court should determine that LCDC in fact did find the OPAC recommendations consistent with the necessary findings, but failed to then adopt the OPAC recommendations as required under the statute. This is the preferred outcome, as outlined in Petitioners’ opening brief.

Alternatively, the Court may determine that what LCDC did was the opposite: LCDC determined that the OPAC recommendations failed to comply with ORS 196.471. By choosing to review and adopt alternative recommendations LCDC, in effect, and contrary to anything it states otherwise, found that the OPAC recommendations did not meet the requirements of ORS 196.471. Most notably, LCDC found that the OPAC recommendations were inconsistent with the statewide planning goals, specifically Goal 19, as

interpreted by LCDC for the first time in the adoption review process. LCDC found:

“The final OPAC recommendation does differ with the plan adopted by the Commission in several instances related to the inclusion or definition of specific text, and in the selection and delineation of two REFSSA sites in the Plan Map and Area Designations. The Commission considered implementation of Goal 19 in resolving those differences in adopting Part Five.” (ER-16)¹⁶.

Under this alternative examination, based on what was adopted by LCDC compared with what was recommended by OPAC, here is how the findings contradict the conclusion that LCDC could have found (and did find) the OPAC recommendations were consistent with Goal 19:

OPAC recommended a policy denominated as Flexible Siting, described as having marine renewable energy developers and local stakeholders collaborate on what was deemed as “micro-siting” of projects within larger areas. Recommendations of OPAC, January 22, 2013. (ER-34). Coupled with that recommendation was a limitation on the total area within the territorial sea devoted to REFSSAs and three specific site recommendations. (ER-34-35).

LCDC rejected the OPAC recommendations, finding that the REFSSAs recommended were “too small and too few to provide adequate opportunity for

¹⁶ Other *Amici* address issues with the textual differences between the OPAC recommendation and the LCDC adopted language for the Proprietary Use and Management Area (PUMA) designation concerning the requirement “has been agreed to by the authorized users” to site facilities. Counties support those other *Amici* positions.

testing or development of most marine renewable technologies.” (LCDC Order, ER-17). LCDC goes on to find that the

“OPAC REFSSA site recommendations would limit the areas where marine renewable energy projects could site to an extent that is **more protective than required** by the applicable statutes and Goal 19. As a result, the Commission had the discretion to expand the REFSSA areas on a limited basis, so long as it could still make the findings required by ORS 196.471.” (emphasis added) (ER-18).

In so finding, LCDC’s only logical and possible conclusion, contrary to anything else it might claim or find, is that the OPAC recommendations were inconsistent with the statutes and Goal 19. That triggers the requirement to send the amendment back to OPAC.

D. Alternatively, the necessary consistency and compatibility findings under law were not made.

The question of consistency with Goal 19 for the LCDC adopted version of the amendment is not directly before the Court at this time¹⁷, but it was of paramount concern to the Counties. A thorough vetting of the requirements of the Goal was not completed because the recommendations were not referred back to OPAC as required by law. To the extent additional consistency determinations were made (or not made) contrary to established procedures in ORS 196.471, LCDC was required to either adopt the OPAC recommendations or return the recommendations back to OPAC, not adopt the DLCD alternatives.

¹⁷ But may be ripe for an “as applied” challenge at a later time.

LCDC failed to properly rectify conflicts with all elements of Goal 19 and the TSP in adopting its own version of the amended Part Five.

LCDC's own findings acknowledge that the additional REFSSA areas added through DLCD's recommendations have the following consequences:

“The fisheries resource use maps for several of the sites that are being considered [for REFSSAs] do indicate they are subject to high levels of fishing effort. However, the potential REFSSA that are being considered for these locations are relatively small in comparison to the total area that has been delineated as high effort fishing grounds, and several of those potential REFSSA sites were initiated by the local fishing communities.” Findings On the Adoption of an Administrative Rule to Amend the Territorial Sea Plan, dated January 14, 2013 (ER-53), adopted by reference in the LCDC Order. (ER-30).

None of the additional or expanded sites were recommended by OPAC and these additional sites were vigorously contested by the fishing communities. One REFSSA, not at issue, was included and initiated by a fishing group. (“Lakeside revised” site near Reedsport, recommended by Southern Oregon Ocean Resources Coalition, ER-56). But by explicitly recognizing that the additional REFSSA sites contain areas delineated as high effort fishing grounds, specific protections under Goal 19 are triggered. LCDC's findings do not address these protections. Instead, LCDC adopted plan amendments that simply favor expanded marine renewable energy over other resources protected by Goal 19.

Goal 19, Implementation Requirement 1 Uses of Ocean Resources

requires that:

“State and federal agencies shall carry out actions that are reasonably likely to affect ocean resources and uses of the Oregon territorial sea in such a manner as to:

* * * * *

b. protect:

* * * * *

4. areas important to fisheries, which are:

- a) areas of high catch (e.g. high total pounds landed and high value of landed catch); or
- b) areas where highly valued fish are caught even if in low abundance or by few fishers; or
- c) areas that are important on a seasonal basis; or
- d) areas important to commercial or recreational fishing activities, including those of individual ports or particular fleets; or
- e) habitat areas that support food or prey species important to commercially and recreationally caught fish and shellfish species.”

Renewable energy is not referenced in Goal 19. LCDC determined, in this planning process, that renewable energy is not a “renewable marine resource” but neither is it a “nonrenewable resource” as that term is described in Goal 19. LCDC interpreted marine renewable energy as a “beneficial use” in the ocean similar to named uses such as navigation, recreation, food production and uses of the sea floor, protected and encouraged under a different section of the Goal. (LCDC Order, ER-9). OPAC relied on that same interpretation from OPAC legal counsel in its recommendations for amended Part Five. (ER-32).

But LCDC failed to resolve the conflicts between areas identified for specific protection (fisheries) with other encouraged beneficial uses (marine renewable energy) within Goal 19 and the TSP when it revised the OPAC recommendations for amended Part Five.

Furthermore, the adopted TSP adds a clarifying layer of protection and review under this process for fisheries.

Part One of the TSP, Ocean Management Framework, Section G Ocean Management Goals and Policies¹⁸, added to the TSP in 2001 and adopted by LCDC in May of that year¹⁹, established a policy that reads:

“Policy 1: Scope of Authority

It is the policy of the State of Oregon that all local, state and federal plans, programs, and activities that affect the resources and uses of the Oregon territorial sea shall:

* * * * *

C. protect:

1. renewable marine resources from adverse effects of development of non-renewable resources;
2. the biological diversity of marine life and the functional integrity of the marine-ecosystem;
3. important marine habitat, including estuarine habitat;
4. areas important to fisheries;

¹⁸ Oregon Territorial Sea Plan, Part One, Ocean Management Goals and Policies, Amendment to the TSP adopted by LCDC May 4, 2001 and added to the TSP, OAR 660-036-0003.

¹⁹ Based upon the recommendations of OPAC.

5. beneficial uses of ocean resources, such as navigation, food production, recreation, and aesthetic enjoyment **that do not adversely affect the resources to be protected in policy items 1-4, above.**” (emphasis added).

LCDC attempts to interpret “areas important to fisheries” as inclusive only of biological areas of fish production for Goal 19 purposes for the first time in the Part Five amendment process. *See* OPAC legal counsel responses to inquiries (Rec-1021-1022). But the clear language in Goal 19 coupled with Section G, Policy 1 in the TSP is contrary to that interpretation. “Areas important to fisheries” is defined in Goal 19 to include fishing interests, not just biological fish and shellfish as “living marine organisms”. Fisheries are afforded greater protection under Section G, Policy 1 of the TSP, than LCDC has acknowledged or provided.

LCDC does not reconcile that Policy and Goal 19 requirement in the additional REFSSA designations. OPAC raised concerns about compliance with Goal 19 for the additional REFSSAs going so far as to warn “[t]he Commission cannot disregard these Goal 19 protections.” (OPAC Recommendations, ER-35). LCDC not only failed to follow the OPAC recommendations related to Goal 19, but it failed to make findings consistent with its own policy enactments in the TSP. There are no findings concerning Section G, Policy 1 of the TSP cited above in the LCDC Order. (ER-3-30). That policy is part of the Territorial Sea Plan and must be reviewed against the

proposed amendments and found consistent with carrying out both the policies of ORS 196.405 to 196.515, and the applicable statewide planning goals. ORS 196.471. Again, procedurally, this error requires that the rule be invalidated.

Finally, LCDC is required to consider and make findings that the amendment is compatible with acknowledged local comprehensive plans.²⁰ ORS 196.465 (1), ORS 196.471 (1). Clatsop County has adopted Goal 19 provisions applicable to the territorial sea, and this process.²¹ Camp Rilea, one of the contested REFSSA areas in Part Five, is expressly identified in the local comprehensive plan. No findings were made in the adopted amendment addressing the local plans. This is another procedural error requiring invalidation of the rule. It is the position of Counties that OPAC's recommendations are compatible with the local comprehensive plan, but LCDC's adopted version is not.

²⁰ The compatibility requirement under the Act with local plans is also noted on page 7, note 4, of Petitioners' opening brief.

²¹ Clatsop County Ordinance 12-04, attached as App-5-7. Counties request the Court take official notice of this ordinance. OEC 202 (7). Note this Ordinance was acknowledged as part of Clatsop County's Comprehensive Plan. ORS 197.625.

CONCLUSION

Counties exercise their planning authority in ocean planning through participation in the Ocean Policy Advisory Council (OPAC). It is imperative that OPAC's authority in ocean planning be properly recognized and respected. LCDC exceeded its statutory authority and failed to follow statutorily established and administratively adopted procedures for amending the TSP based on OPAC's recommendations. LCDC's actions in this process need to be reversed and the rule invalidated.

Respectfully submitted this 27th day of September 2015.

s/ Wayne Belmont²²
Wayne Belmont, OSB #841662
Lincoln County Counsel
wbelmont@co.lincoln.or.us

Attorney for *Amicus Curiae* Counties

²² Counsel acknowledges the exemplary work of Lincoln County Legal Externs Anne Montgomery and Brent Sutton, University of Oregon Law Students, who participated in the County's inaugural extern program focusing on local government and ocean issues. They assisted in researching and writing this brief.

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LANE COUNTY BOARD OF COMMISSIONERS

Jay Bozievich
 Pat Farr
 Sid Leiken
 Pete Sorenson
 Faye Hills Stewart

9/22/15

Wayne Belmont
 Lincoln County Counsel
 225 W. Olive
 Newport, Oregon
 97365

Re: Support for Amicus Brief / Coastal Counties / Oregon Court of Appeals Case No. 156130

Dear Mr. Belmont:

Lane County joins Lincoln, Clatsop, Tillamook, Douglas, Coos and Curry Counties in support of the counties' filing of an *Amicus Brief* in the above referenced case before the Oregon Court of Appeals.

Lane County believes the adoption process used by the Land Conservation and Development Commission (LCDC) for amendments of the Oregon Territorial Sea Plan (TSP), Part 5, was procedurally improper and adverse to County interests in Coastal Ocean Planning.

Although we could not take up this matter officially in time to join as a named party on the Counties' Brief, the Board of Commissioners desires that the Court of Appeals understand that we are also a county with a significant coastal shoreline and thriving coastal communities. As such, Lane County is vitally concerned that local communities' role in Ocean Planning processes are properly and lawfully protected and preserved. LCDC's actions in the TSP amendment process abrogated our trust in that process. That needs to be rectified by invalidating the amendment to the TSP.

We therefore stand in agreement with the Brief submitted on behalf of the coastal counties.

On Behalf of the Lane County Board of Commissioners,

Jay Bozievich, Chair
 Lane Board of County Commissioners

Reedsport OPT Wave Park, LLC
1590 Reed Road, Pennington, New Jersey 08534

By Electronic Filing

February 28, 2014

Ms. Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

**Subject: Reedsport OPT Wave Park Phase III Project (FERC P-13666)
Notice of Surrender**

Dear Secretary Bose,

Reedsport OPT Wave Park, LLC ("OPT") filed a Preliminary Permit on February 2, 2010 with the Federal Energy Regulatory Commission ("Commission" or "FERC") to study the feasibility of a proposed expanded wave energy facility off of Reedsport, Oregon ("Reedsport Expanded Project"). The Commission issued a Preliminary Permit to OPT for the Reedsport Expanded Project on March 15, 2011. The permit expires February 28, 2014.

The Reedsport Expanded Project, a project with a potential capacity of up to fifty (50) MW, anticipated using performance and environmental data from the two prior project phases. These two phases are the single, non-grid connected PowerBuoy ("Phase I") and planned ten (10) PowerBuoy, 1.5 MW ("Phase II") Projects (P-12713). The information from these phases was intended to inform the expanded project ("Phase III") license application and consultation process.

OPT wishes to recognize the State of Oregon's significant effort to facilitate future wave energy build-out along its coast, particularly in making adjustments to its recently updated Territorial Sea Plan to accommodate OPT's three-phased project plans. Due to unforeseen delays in Phase I Project implementation and associated studies, as well as increased project-related costs, however, the Phase II consultation and licensing processes have been severely impacted (see Reedsport OPT Wave Park 2012 Annual Report). Likewise, because the Phase I and Phase II studies and monitoring prescribed in the Reedsport Settlement Agreement (P-12713) were intended to inform consultation and licensing of a final, expanded Phase III Project, that final stage has also been severely impacted. OPT continues to evaluate its Phase I and II implementation options; however, OPT's plans for an expanded Phase III Project are sufficiently uncertain at this time that the company cannot justify requesting an additional three-year preliminary permit extension.

For the foregoing reasons, OPT respectfully surrenders the Preliminary Permit for the Reedsport OPT Wave Park Phase III Project (FERC P-13666).

If you or your staff require any additional information or have questions, please feel free to contact me at mfeatherstone@oceanpowertech.com or (609) 730-0400.

Sincerely,

Reedsport OPT Wave Park, LLC

A handwritten signature in cursive script, appearing to read "Mark A. Featherstone".

By: Mark A. Featherstone
Chief Financial Officer of Sole Member, Ocean Power Technologies, Inc.

cc: P-13666 FERC Service List
Cherise Oram, Stoel Rives
Kevin Watkins, Kevin Watkins Consulting, LLC
Project File

REEDSPORT OPT WAVE PARK, LLC (P-13666) CERTIFICATE OF SERVICE

I hereby certify that I will, within the timeframe and means established in 18 CFR § 385.210, serve the accompanying materials upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Pennington, NJ, this ^{27th mb} 28th day of February 2014.

Reedsport OPT Wave Park, LLC



By: Mark A. Featherstone

Chief Financial Officer of Sole Member, Ocean Power Technologies, Inc.

**Farm Saechao
Notary Public
New Jersey
My Commission Expires 8-28-18
No. 2437810**

Clatsop County
Goal 19
County-Wide Element

Ocean Resources

Adopted May 24, 2012 - Ordinance 12-04

GOAL 19
Ocean Resources

This plan element implements statewide planning goal 19 within the territorial waters of Clatsop County. Goal 19 reads as follows:

To conserve marine resources and ecological functions for the purpose of providing long-term ecological, economic, and social value and benefits to future generations.

To carry out this goal, all actions by local, state, and federal agencies that are likely to affect the ocean resources and uses of Oregon's territorial sea shall be developed and conducted to conserve marine resources and ecological functions for the purpose of providing long-term ecological, economic, and social values and benefits and to give higher priority to the protection of renewable marine resources—i.e., living marine organisms—than to the development of non-renewable ocean resources.

Ocean Stewardship Area: The State of Oregon has interests in the conservation of ocean resources in the Ocean Stewardship Area, an ocean area where natural phenomena and human uses can affect uses and resources of Oregon's territorial sea/ The Ocean Stewardship Area includes the state's territorial sea, the continental slope, and the adjacent ocean areas. Within the Ocean Stewardship Area, the State of Oregon will:

- ⤴ Use all applicable state and federal laws to promote its interests in management and conservation of ocean resources;
- ⤴ Encourage scientific research on marine ecosystems, ocean resources and uses, and oceanographic conditions to acquire information needed to make ocean and coastal-management decisions;
- ⤴ See co-management arrangements with federal agencies when appropriate to ensure that ocean resources are managed and protected consistent with the policies of Statewide Planning Goal 19, Ocean Resources, and the Territorial Sea Plan; and
- ⤴ Cooperate with other states and governmental entities directly and through regional mechanisms to manage and protect ocean resources and uses.

The Ocean Stewardship Area is not intended to change the seaward boundary of the State of Oregon, extend the seaward boundaries of the state's federally approved Coastal Zone Management Act, affect the jurisdiction of adjacent coastal states, alter the authority of federal agencies to manage the resources of the United States Exclusive Economic Zone, or limit or otherwise change federal agency responsibilities to comply with the consistency requirements of the federal Coastal Zone Management Act.

Information and Effects Assessment Required. Prior to taking an action that is likely to affect ocean resources or uses of Oregon's territorial sea, state and federal agencies shall assess the reasonably foreseeable adverse effects of the action as required in the Oregon Territorial Sea Plan. The effects assessment shall also address reasonably foreseeable adverse effects on Oregon's estuaries and shorelands as required by Statewide Planning Goal 16, Estuarine Resources; Goal 17, Coastal Shorelands; and Goal 18, Beaches and Dunes.

Navigation and commercial and recreational fishing are significant uses in Clatsop County's territorial sea. Clatsop County does not regulate commercial or recreational fishing in the ocean through its Comprehensive Plan or Zoning Ordinance. The County does not regulate commercial or recreational navigation in the ocean through its Comprehensive Plan or Zoning Ordinance. This does not diminish the importance of these activities to the County. Camp Rilea's safety zone extends into the territorial sea. Clatsop County does not directly regulate Camp Rilea's use of the safety zone. This does not diminish the importance of Camp Rilea to the County.

Goals:

To implement statewide planning goal 19 in Clatsop County's territorial sea.

To assure that marine resource management and development in the County's territorial sea occurs in a manner that conserves beneficial use of these resources.

Policies:

1. Clatsop County's territorial sea shall include ocean beds, the water column, and the ocean surface. Beaches, headlands, islands and rocks above the high tide line, and estuaries are not included. The territorial sea shall be managed to conserve marine resources and ecological functions for the purpose of providing long-term ecological, economic, and social value and benefits to current and future generations.
2. The County shall rely on the Oregon Territorial Sea Plan's consultation process as a mechanism for providing input into development proposals in the territorial sea.
3. Ocean resources development in Clatsop County's territorial sea shall be designed, located, and managed in a manner that does not substantially impair the ocean's scenic value, as experienced from the shoreline, or from public parks, highways, public streets, or scenic overlooks in the coastal zone.
4. Ocean resources development in Clatsop County's territorial sea shall be designed, located, and managed in a manner that is respectful of, and addresses the interests and concerns of, residents, visitors, businesses and property owners in the coastal zone, both now and in the future.
5. Clatsop County shall participate in state and federal rule-making and decision-making that affects the County's marine resources, or might conflict with the Comprehensive Plan.
6. The County accepts the background information and analysis in the 1994 Oregon Territorial Sea Plan and 2009 amendments (appendix A).
7. Ocean resources development in Clatsop County's territorial sea shall be designed, located, and managed in a manner that does not negatively impact or effect local government property taxes.
8. The cumulative impacts and effects, both beneficial and harmful, of ocean resources development will be considered when evaluating development proposals in the territorial sea.

**CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND
TYPE SIZE REQUIREMENTS**

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 6,466.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(g).

s/ Wayne Belmont

Wayne Belmont, OSB #841662

CERTIFICATE OF FILING AND SERVICE

I certify that on September 27, 2015, I electronically filed the foregoing brief with the Appellate Court Administrator, Appellate Court Records Section, by using the Oregon Appellate eFiling System; and electronically served the foregoing brief on the following parties using the electronic service function of the eFiling system:

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