

Elizabeth R. Mitchell
17555 E Kirtlan Way
Fort Bragg CA 95437
707-962-0617
Bethmi@mac.com

May 20, 2008

Re: Comments to Minerals Management Service (MMS), U.S. Department of the Interior, on MMS Docket ID MMS-2008-OMM-0020 (Lease Nominations for Alternative Energy Activities on the Outer Continental Shelf) and MMS Docket ID MMS-2007-OMM-0072 (New Leases of Submerged Lands for Alternative Energy Activities on the Outer Continental Shelf – Information Collection 1010-NEW)

Dear Minerals Management Service:

These comments are being submitted on behalf of Elizabeth R. Mitchell (as an individual) and Fishermen Interested in Safe Hydrokinetics (hereinafter “**FISH Committee**”). Contact information is c/o Elizabeth R. Mitchell, 17555 E Kirtlan Way, Fort Bragg, California, 95437, 707-962-0617, Bethmi@mac.com. The **FISH Committee** is an unincorporated association of fishing organizations based in Fort Bragg, California, and is the stakeholder organization for the local fishing community with respect to wave energy development. Members of the FISH Committee fish off both Mendocino and Humboldt Counties in Northern California and/or own fishing-related businesses.

We are particularly concerned with wave energy projects that are currently being authorized in the Pacific Ocean off Mendocino and Humboldt Counties in Northern California, including two projects by the Pacific Gas and Electric Company (PG&E) known as the Mendocino and Humboldt WaveConnect Projects. Three-year preliminary permits were issued for the PG&E projects by the Federal Energy Regulatory Commission (FERC) on March 13, 2008 in FERC Docket Nos. P-12781 and P-12779. On April 14, 2008, the Department of the Interior filed Requests for Rehearing in both FERC docket numbers, on the grounds that FERC has no jurisdiction on the Outer Continental Shelf (OCS). MMS announced in a Federal Register notice dated April 18, 2008 that it intends to issue leases to PG&E for the portions of these projects that will be placed on the OCS.

These comments are submitted in response to requests for public comment contained in two MMS Federal Register notices: 1) MMS Docket ID MMS-2008-OMM-0020 , 73 Fed. Reg. 21152-55, April 18, 2008 (correction published at 73 Fed. Reg. 23490-91, April 30, 2008), “Announcement of nominations and processing priorities, inquiry on competing nominations for proposed limited alternative energy leases, and request for comments from interested and affected parties,” and 2) MMS Docket ID MMS-2007-OMM-0072, 73 Fed. Reg. 21363-75, April 21, 2008, “Notice of a new information collection (1010-NEW) and request for comments.”

COMMENT NO. 1: We urge MMS to defer issuance of any leases for alternative energy development, including limited leases for resource assessment and technology testing, until such time as its final regulations implementing Section 388 of the Energy Policy Act of 2005 [43 USC 1337(p)] are issued. To date, MMS has completed a Programmatic Environmental Impact Statement and established an Alternative Energy and Alternate Use Program to authorize and regulate OCS activities pursuant to its new authority. MMS is in the process of developing proposed regulations that should be finalized by the end of the year, and that will supersede whatever actions MMS takes to issue limited leases now.¹

This is the appropriate regulatory model for MMS to follow for all OCS leases, including limited leases for resource assessment and technology testing. Not only will it ensure that all legally-required regulatory mandates have been met before leases are issued, it will make the process more efficient by eliminating duplication of effort in gathering information and performing environmental analyses for site-specific conditions and effects of technology testing. It will also prevent duplication of effort in obtaining the other governmental approvals that are required by Section 9 of the draft standard lease form.

The only foreseeable benefit to issuing limited leases now is to obtain data during favorable ocean weather conditions in the Summer and Fall of 2008. However, it is unlikely that limited leases will be issued in time for lessees to gear up in 2008, or that the lessees, PG&E in particular, have funding, research plans, contracts, or consultants in place to take advantage of a limited lease during the Summer and Fall of 2008. Therefore nothing is lost by postponing issuance of limited leases until MMS's regulations are final, and issuing the leases in 2009. This would also avoid the problem that occurred in Newport, Oregon, in the Fall of 2007, when a large test buoy sank, and impending bad weather was given as a reason not to remove it from the seabed until Spring or Summer of 2008.

COMMENT NO. 2: We strongly object to the secrecy provision in the draft standard lease form at 73 Fed Reg. 21368, April 21, 2008 (Section 11, "Confidentiality"). The draft section says that

To the extent permitted by applicable law, in particular the Freedom of Information Act and implementing regulations, Lessor [the MMS] shall keep confidential all information, including but not limited to studies, surveys, or test reports, received from Lessee [e.g., PG&E] for the duration of the lease term and three years thereafter, unless disclosure is agreed to by the lessee(s) and all relevant third parties.

In its place, we urge that that the following language be used:

¹ We were so advised on May 6, 2008, by Maurice Hill, MMS, at a presentation to the Fort Bragg City Council's Ad Hoc Wave Energy Committee

Unless its release is prohibited by federal law, Lessor [the MMS] shall make public all information received from the Lessee, including but not limited to studies, surveys, and test reports.

MMS's draft language is objectionable for two reasons: 1) disclosure of the information is required by the Open Government Act of 2007, and, 2) secrecy in the context of alternative energy development on the OCS is bad public policy.

1) Nondisclosure is contrary to the Open Government Act of 2007: Pursuant to the "Open Government Act of 2007, " S. 2488 (110th Cong., 1st Sess.), which was signed into law by President Bush on December 31, 2007, the official policy of the U.S. government is a strong presumption in favor of disclosure. Sections 2(3) and (4) of the Open Government Act of 2007 provide that "the Freedom of Information Act establishes a 'strong presumption in favor of disclosure' as noted by the United States Supreme Court in United States Department of State v. Ray (502 U.S. 164 (1991), a presumption that applies to all agencies governed by that Act," and "'disclosure, not secrecy, is the dominant objective of the Act,' as noted by the United States Supreme Court in Department of Air Force v. Rose (425 S.S. 352 (1976))."

2) Secrecy is bad public policy: The affected public is intensely interested in wave energy projects. On January 19, 2008, the City of Fort Bragg and the County of Mendocino organized a full-day "Wave Energy Forum," which has since been described as "the most important ocean energy meeting to date in California." Representatives from wave energy proponents, federal, state, and local agencies, and community and fishing groups, all made presentations. The MMS was represented by Maurice Hill, Alternative Energy Coordinator, Office of Alternative Energy Programs, MMS, Camarillo, California. Public participation in the process and accommodation of stakeholder interests were key topics addressed by all the presenters.

Since the Wave Energy Forum, the proposed wave energy projects have been the topic of several public hearings held by the Mendocino County Board of Supervisors and the Fort Bragg City Council. Stakeholder groups such as the FISH Committee and the Ocean Protection Coalition have organized. Both the Mendocino County Board of Supervisors and the Fort Bragg City Council have formed ad hoc committees on wave energy. A public demonstration and march calling for a moratorium on wave energy was held in Fort Bragg on March 29, 2008.

A crucial issue identified by all affected parties is information, of which there is precious little. With respect to wave energy, little to nothing is known about the technology itself (including whether it will work at all, much less whether its operation withstands cost/benefit analysis), its environmental and economic impacts, its safety implications, and last but not least, its displacement of existing uses of the ocean such as fishing. At these initial stages of the process, the only public benefit from MMS issuing leases for testing on the OCS is to develop this information, which is of vital interest to the affected public, and will only be meaningful if it is disclosed.

We also note that FERC's preliminary permits issued for the PG&E projects on March 13, 2008, do not purport to keep information developed under the permits confidential. FERC also makes the preliminary permit applications themselves public on its Internet site. In contrast, we have not even been able to obtain copies of PG&E's lease nominations to MMS. PG&E refused the written request of the FISH Committee for copies; MMS declined to make a copy available voluntarily, and a Freedom of Information Act request to MMS is still pending.

This type of secrecy fosters an unnecessary atmosphere of suspicion and distrust, and makes meaningful public involvement impossible. We believe that the public is entitled to routine disclosure of not only the lease nominations themselves, but also the "studies, surveys, and test reports" that will be developed under the MMS leases. Access to information is simply essential to stakeholder understanding and participation in wave energy development.

In general, we strongly encourage MMS to establish Internet docket sites for each of its OCS alternative energy leases so that the public will have access to relevant information, and can provide comments at appropriate times. Specifically, the "Project Plans" required by Section 8 of the draft lease terms, and the "Progress Reports" required by Section 10 of the draft lease terms, should be publicly posted to the Internet, along with all "studies, surveys, inspections or test reports" referenced in Section 10. Raw data, analyses, and computational models should be made available upon request.

Comment No. 3: Numerous fisheries take place in the geographical areas of the PG&E leases. We hereby request that the areas of those fisheries be mapped and that wave energy technology testing be excluded from those areas. The FISH Committee will provide the information necessary for mapping. General information that has been collected to date is described below. This information focuses on fisheries that take place in MMS jurisdiction seaward of three miles, and omits information on ocean fisheries inside three miles, shoreside fisheries, recreational abalone fisheries, and sea vegetable harvesting, which are also important topics.

1) Commercial Fisheries

Pink Shrimp: A pink shrimp fishery occurs in the Mendocino WaveConnect project area from the three-mile line seaward to 75 fathoms, from 39°30' N. latitude to the north. Placing buoys in this area would disrupt pink shrimp harvesting with the only gear that is used (trawl). It could also disrupt pink shrimp spawning habits. In the Humboldt WaveConnect area, pink shrimp trawling occurs in a portion of the area from April 1 to October 31. Pink shrimp spawn in this area during the rest of the year.

Groundfish trawl gear: The area from the three-mile line seaward to the western boundary of the Mendocino WaveConnect project area is used by trawl fisheries to harvest petrale sole, English sole, sanddabs, skates, and rockfish. The Humboldt WaveConnect area, from 40 fathoms to the seaward border of the site, is used mainly in

the spring and summer months by the trawl fisheries to harvest petrale sole, English sole, sanddabs, Dover sole, skates, sablefish (black cod), and lingcod.

Dungeness crab: Starting at the northern end of the Mendocino WaveConnect project area, the crab fleet fishes from three fathoms out to 60 fathoms, from Kibesillah Rock down to Laguna Point, and from Laguna Point south to 39°22' (Casper), from 30 fathoms to 60 fathoms. In the Humboldt WaveConnect area, the whole site is used by the crab fleet during the season from December 1 to July 15. Most of the activity occurs from the inside boundary out to 50 fathoms.

Slime eel (hagfish): This fishery utilizes the outer area of the Humboldt WaveConnect site.

Salmon: The commercial fleet trolls in both permit areas during their seasons.

Nearshore fisheries: The nearshore fishery area off Fort Bragg runs from Cleone to Beaver Point, from the shore out to 15 fathoms, in rocky areas throughout. Crabbing takes place off Pudding Creek, Hare Creek, and Ten Mile Beach, from 5 fathoms out to 40 fathoms.

2) Recreational Fisheries

The general area for sport fishing in the Mendocino area extends from the Point Cabrillo Lighthouse south of Fort Bragg to Ten Mile River to the north. Fishing takes place in approximately 100-350 foot depths, which are about 0.5 mile to 4.5 miles offshore. Some specific fisheries of concern are:

Recreational crab: Ten Mile Beach, Pudding Creek, Hare Creek (same as commercial, only a little shallower water for sport crabbing).

Salmon: Recreational anglers out of Noyo Harbor range as far south as Point Arena and as far north as Punta Gorda, and seaward out to 15 miles offshore. Salmon can be caught from shore but are most frequently caught at or near the 60 fathom line (360 feet).

Rockfish: Like salmon, recreational anglers out of Noyo Harbor can range from Pt. Arena to Punta Gorda. Most of the boat angling effort is concentrated between the Point Cabrillo Lighthouse, to the south, to the MacKerricker State Park (Cleone reef) to the north. By law, recreational rockfishing occurs only within depths shallower than 120 feet. However, the Recreational Fishing Alliance has an Exempted Fishing Permit that allows fishing for midwater species in waters deeper than 150 fathoms (900 feet), which is more than nine miles offshore. This fishery may be available to all recreational anglers in years to come.

Albacore: Traditionally, anglers focus on the area around the Noyo Canyon, about 15-25 miles from port.

Halibut and other flatfish: Anglers target the areas off Pudding Creek, Ten Mile Beach, the Caspar High Spot, and other sandy or mud flat bottom areas for these species.

Humboldt squid: There is a charter boat fishery for Humboldt squid that fishes year round throughout the coast.

In addition to the ocean fisheries, whale watching tours are also a mainstay of the local tourist industry, and could be adversely affected by wave energy technology testing on the OCS.

Comment No. 4: The Marine Mammal Protection Act generally prohibits the take of marine mammals unless a statutory exception applies. 16 USC 1371(a). “Take” is defined broadly to include acts that have the potential to injure a marine mammal in the wild, or have the potential to disturb a marine mammal in the wild by causing disruption of its behavioral patterns. 16 USC 1362(18). Incidental takes of marine mammals without appropriate authorization are illegal. See, Kokechik Fisherman’s Assoc. v. Sec’y of Commerce, 839 F.2d 795 (D.C. Cir. 1988). Incidental takes of marine mammals in non-fishing activities such as wave energy technology testing must be authorized by a Letter of Authorization issued by the National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NOAA Fisheries). 16 USC 1371(a)(5)(a); 50 C.F.R. 216.104.

There is no question that various species of marine mammals, including whales, sea lions, and seals, frequent the areas of the PG&E projects off Northern California, and that incidental takes of marine mammals in these areas is reasonably foreseeable. Therefore, MMS and the lease applicants must apply for an MMPA Letter of Authorization (LOA) from NOAA Fisheries before a lease can be issued. See, e.g., FERC Docket No. P-12751-000, NOAA Comment on Filing filed Sept. 21, 2007. MMS should make certain that this requirement is enforced.

Comment No. 5: We believe that the draft lease terms are inadequate to protect existing human uses of the ocean, particularly fisheries. For example, Section 3, “Reservations to Lessor,” provides that “Lessor [MMS] reserves the right to authorize other uses on the leased area that will not unreasonably interfere with activities authorized under this lease.” The phrase “unreasonably interfere” implies that the lessee is granted the right to preempt existing uses, including fisheries, and that MMS will aid and abet the lessee by preventing interference by other users in the area. The language should be changed to say that MMS will protect existing uses in the area, including fisheries, and will prevent interference with them by the Lessee.

Comment No. 6: Section 4, “Effective Date and Lease Term,” provides for a 5-year lease term. As stated above, we believe that issuance of any limited leases should await promulgation of MMS’s final regulations. If limited leases are issued before that, they should provide for a lease term no longer than it takes MMS to promulgate final regulations.

Comment No. 7: Section 6, “Rentals,” will require annual rental payments of \$3/acre. It has been pointed out that total rental payments under this provision will probably be less than the cost of a one-bedroom apartment in Manhattan. This is far too little for use of our valuable public water resources.

Comment No. 8: A provision should be added to the “Project Plan” section stating that MMS will make the Project Plan public as soon as it is received, and will accept public comment for 30 days after the Project Plan has been posted on the Internet site established by MMS for this purpose.

Comment No. 9: A provision should be added to the first paragraph of Section 9, “Compliance,” requiring the Lessee to file copies of all necessary governmental approvals with the MMS before commencing activities under the lease.

The second paragraph of Section 9, “Compliance,” is vague and ambiguous, and the standards set forth there may actually differ from applicable laws. For example, how does “undue harm to marine life” relate to the specific provisions of the Marine Mammal Protection Act and the Endangered Species Act? This problem can be cured by adding an introductory phrase that says “In addition to the specific requirements of applicable laws, Lessee further agrees that” etc.

Comment No. 10: Section 18, “Removal of Property and Restoration of the Leased Area on Termination of Lease” gives the Lessee up to one year after the lease ends to remove its property and restore the area. We believe that this is far too long, and that the lessee should be required to remove property and complete restoration immediately after the lease ends in order to minimize physical impacts and other environmental consequences of leaving derelict property on the seabed.

Comment No. 11: The issue of navigational safety is not addressed anywhere by MMS, although “Exhibit ‘B’” on “Technology Testing and Demonstration Activities” attached to the draft lease authorizes “constructing, installing, using, upgrading, maintaining, and removing buoys, turbines, or other devices.” Navigational safety is a critical issue for fishermen and other vessel operators off the Mendocino and Humboldt coasts. The weather in the area can change in an instant, leaving vessels with no choice but to navigate through bad weather. In a gale, if a fishing vessel had to change course to avoid a wave energy device, disaster could ensue. MMS should specify in its regulations and leases how the issue of navigational safety will be addressed, and provide for public input.

Sincerely,

Elizabeth R. Mitchell
17555 E Kirtlan Way
Fort Bragg CA 95437
707-962-0617
Bethmi@mac.com