

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

AquaEnergy Group Ltd.

)

P-12752-000

**PROTEST OF THE UNITED STATES
MINERALS MANAGEMENT SERVICE**

Pursuant to Rule 211 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.211 (2006), the Minerals Management Service (“MMS”) of the United States Department of the Interior (“the Department”) hereby submits this Protest.

BACKGROUND

On November 22, 2006, AquaEnergy Group Ltd. (“AquaEnergy”), filed with the Commission an application for a preliminary permit for the Coos County Offshore Wave Energy Project (the “Project”), pursuant to the applicable hydroelectric provisions of the Federal Power Act (“FPA”).¹ AquaEnergy’s preliminary permit application states that the Project is proposed to be located “within federal and state waters in the open ocean about 2-4 miles from shore”² Our review of the AquaEnergy permit application confirms that the Project is proposed to be located at least partially outside of Oregon’s seaward boundary of three nautical miles, and would therefore be at least partially situated on the Outer Continental Shelf (“OCS”) subject to federal jurisdiction and

¹ 16 U.S.C. §§ 791(a) – 825(r).

² AquaEnergy Preliminary Permit Application, dated November 21, 2006, Section A.2., Initial Statement, Project Location.

control pursuant to the Federal Outer Continental Shelf Lands Act (43 U.S.C. 1331 *et seq.*).³

On December 1, 2006, the Commission issued a notice accepting AquaEnergy's application for filing and soliciting motions to intervene, protests and comments.⁴ For the reasons discussed below, MMS disputes the Commission's authority under the FPA to issue permits or licenses for wave energy projects proposed to be situated on the OCS. Furthermore, as explained below, the MMS has serious environmental and ocean management concerns with the Commission's existing regulatory scheme under Part I of the FPA as applied to these types of technologically distinct projects situated on the OCS. MMS therefore respectfully submits this letter protesting the Commission's ongoing review of AquaEnergy's preliminary permit application.

PROTEST

1. The Commission's jurisdictional authority under Part I of the Federal Power Act does not extend to projects located outside the traditional three-mile boundary of the United States territorial sea.

Section 23 of the FPA defines those facilities that are required to be licensed by the Commission:

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States . . . except under and in accordance with . . . a license granted pursuant to [the FPA].⁵

³ The OCS is defined as the area of submerged lands lying seaward of a state's coastal boundary. Generally, a state's seaward boundary is three (3) nautical miles from its coastline. Texas and the Gulf Coast of Florida have seaward boundaries extending nine (9) nautical miles.

⁴ See Commission Notice of Application Accepted for Filing and Soliciting Motions to Intervene, Protests, and Comments, issued December 1, 2006 (Project No. 12752-000).

⁵ 16 U.S.C. § 817 (emphasis added).

The FPA defines “navigable waters” as:

those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.⁶

Even if this definition can appropriately be interpreted to include some ocean waters, it should not be interpreted to include any waters beyond the traditional three mile boundary of the United States territorial sea. This limitation is evident in other federal statutes and associated implementing regulations—

The Clean Water Act (33 U.S.C. 1251 et seq.):

The term “navigable waters” means the waters of the United States, including the territorial seas.⁷

The term “territorial seas” means the belt of the seas measured from the line of ordinary low water along the portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.⁸

The Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.):

⁶ 16 U.S.C. § 796(8).

⁷ 33 U.S.C. § 1362(7).

⁸ 33 U.S.C. § 1362(8).

The term “navigable waters” means the waters of the United States, including the territorial sea.⁹

The term “territorial seas” means the belt of the seas measured from the line of ordinary low water along the portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.¹⁰

For purposes of permitting pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403):

The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the baseline (The Territorial Seas). Wider zones are recognized for special regulatory powers exercised over the outer continental shelf (See 33 CFR 322.3(b)).¹¹

For purposes of the Artificial Reef Program of the National Fishing Enhancement Act of 1984 (33 U.S.C. 2101 et seq.):

The term “waters covered under this chapter” means the navigable waters of the United States and the waters superjacent to the Outer Continental Shelf as defined in section 1331 of Title 43, to the extent such waters exist in or are adjacent to any State.¹²

On December 27, 1988, President Reagan issued a Proclamation that extended the territorial sea to twelve (12) miles from the coastal baseline to conform with accepted

⁹ 33 U.S.C. § 2701(21).

¹⁰ 33 U.S.C. § 2701(35).

¹¹ 33 C.F.R. § 329.12 (2006). Section 4(e) of the Outer Continental Shelf Lands Act (43 U.S.C. § 1333(e)) extended the authority of the Secretary of the Army to prevent obstructions to navigation in navigable waters of the United States to artificial islands, installations, and other devices located on the seabed, to the seaward limit of the Outer Continental Shelf. See 33 C.F.R. §§ 320.2(b), 322.3(b) (2006). There is no similar provision in either the FPA or the OCS Lands Act that expands the Commission’s jurisdiction under Part I of the FPA.

¹² 33 U.S.C. § 2105(3) (emphasis added).

international law.¹³ However, the Presidential Proclamation states that “[n]othing in this Proclamation . . . extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom. . . .” (emphasis added). Accordingly, as evidenced above, most federal statutes continue to refer to the territorial sea’s original three-mile boundary. Therefore, absent subsequent legislation expanding its authority beyond the traditional three-mile boundary, the Commission’s hydropower licensing jurisdiction could not extend into the OCS.

MMS contends that the Commission has incorrectly interpreted the definition of “navigable waters” under the FPA to support its contention that it has hydropower licensing jurisdiction over projects located in ocean waters beyond the traditional boundary of the United States territorial sea.

2. *MMS has federal regulatory authority over wave energy projects sited on the OCS.*

Section 388(a) of the Energy Policy Act of 2005 (P.L. 109-58, the “EPAct”), amended section 8 of the OCS Lands Act (43 U.S.C. § 1337) to authorize the Secretary of the Interior (the “Secretary”) to grant leases, easements or rights-of-ways authorizing activities on the OCS that produce or support production, transportation, or transmission of energy from sources other than oil and gas.¹⁴ The Secretary has delegated this authority to the MMS. To implement this authority, now codified in 43 U.S.C. § 1337(p), MMS is developing regulations and is concurrently preparing a programmatic Environmental Impact Statement (“PEIS”) pursuant to the National Environmental Policy Act (“NEPA”). The PEIS will assess the environmental impacts of alternative energy

¹³ Presidential Proclamation No. 5928, 54 Fed. Reg. 777.

¹⁴ 43 U.S.C.A. § 1337(p)(1)(C) (Thomson/West Supp. 2006).

projects on the OCS, including wave energy projects such as the proposed Project. MMS anticipates publishing a notice of proposed rulemaking and draft PEIS in the spring of 2007.

On December 30, 2005, MMS issued an Advance Notice of Proposed Rulemaking on Alternative Energy-Related Uses on the OCS (the “ANPR”) seeking comments on the development of a regulatory program to implement the authority granted by Section 388 of the EPCA.¹⁵ In comments submitted on February 28, 2006, Commission staff asserted jurisdiction under the FPA over the development of “ocean wave hydroelectric projects” on all navigable waters “including oceans up to at least 12 nautical miles offshore”¹⁶

In support of this contention of jurisdiction, Commission staff, in their comments to the ANPR, looked to two general provisions of Section 388 that were included by Congress merely to emphasize that Section 388 was not intended to displace, supercede, or modify the existing jurisdiction, responsibility or authority of any federal or state agency.

The first general provision cited by Commission staff in its comments to the ANPR, now codified at 43 U.S.C. § 1337(p)(1), provides that MMS may not require a lease, easement or right-of-way for any activities that are “otherwise authorized in this Act, the Deepwater Port Act of 1974 (33 U.S.C. § 1501 et seq.), the Ocean Thermal Energy Conversion Act of 1980 (42 U.S.C. § 9101 et seq.), *or other applicable law*”

¹⁵ 70 Fed. Reg. 77345.

¹⁶ See Comments of the Federal Energy Regulatory Commission Staff on the Advanced Notice of Proposed Rulemaking on Alternate Energy-Related Uses on the Outer Continental Shelf (RIN 1010-AD30), submitted February 28, 2006.

(emphasis added). Commission staff appears to take the position that Congress intended the elaborate and comprehensive hydroelectric licensing provisions of the FPA, and the Commission's implementing regulations, to come within the generic exception for "other applicable law." The MMS believes that if Congress had intended such a pervasive statute to apply to these types of projects, it would have expressly referred to the FPA along with the Deepwater Port Act and Ocean Thermal Energy Conversion Act.

The second provision in Section 388 cited by Commission staff in their comments to the ANPR, now codified at 43 U.S.C. § 1337(p)(9), provides that "[n]othing in [new subsection 1337(p) of the OCS Lands Act] displaces, supercedes, limits, or modifies the jurisdiction, responsibility, or authority of any Federal or State agency under any other Federal law." In citing to this provision, Commission staff asserts that its jurisdiction under Part I of the FPA extends to wave energy projects located on the OCS. However, the Commission staff's sole authority for this assertion of jurisdiction is the Commission's own decision in *AquaEnergy Group, Ltd.*, 102 FERC ¶ 61,242 (2003).¹⁷ In *AquaEnergy*, the Commission concluded that it had authority under Part I of the FPA to require a license for a wave energy project proposed to be located 3.17 miles off the coast of the State of Washington. This decision was not subjected to judicial review pursuant to 16 U.S.C. § 8251(b). On information and belief, *AquaEnergy* was the first time the Commission ever asserted jurisdiction under the FPA for a wave energy project on the OCS. By means of its own decision in *AquaEnergy*, Commission staff contends

¹⁷ While *AquaEnergy* involves the same applicant as in this proceeding, the 2003 *AquaEnergy* decision relates to a separate wave energy project off the coast of Washington located within a national marine sanctuary, referred to as the Makah Bay offshore wave energy pilot project. On information and belief, no preliminary permit was issued for the Makah Bay project. *AquaEnergy* recently submitted an application to the Commission for a license to begin development of the project. MMS does not have authority under Section 388 of the EPAct to authorize wave energy projects located within the National Marine Sanctuary System. See 43 U.S.C. § 1337(p)(10).

that their regulatory authority over traditional hydropower electric projects extends to wave energy conversion technologies located on the OCS – a position that is unprecedented in the 86-year regulatory history of Part I of the FPA and its predecessor statute, the Federal Water Power Act of 1920.

MMS respectfully asserts that the Commission is not permitted to expand its authority under the FPA to include the OCS.¹⁸ It is reasonably clear that Congress, when drafting the EAct, did not believe the FPA granted the Commission the authority over wave energy projects on the OCS that it currently asserts. Notwithstanding the fact that the EAct amends and makes several references to the FPA, including references to the provisions containing the Commission’s hydroelectric licensing authority,¹⁹ there is no reference in Section 388, Subtitle C or elsewhere in the EAct, suggesting that the FPA would somehow apply to wave energy projects on the OCS. Even though an entire subtitle of the EAct is dedicated to the Commission’s hydroelectric authority,²⁰ Congress did not see fit to except or even reference such authority within Section 388, despite including explicit exceptions for other less pervasive statutes. MMS contends that Congress did not deem such an exception necessary because the Commission was not thought to have such authority under the FPA or any other statute to regulate the development or operation of wave energy facilities on the OCS.

¹⁸ See, e.g., *Little Falls Fibre Company v. Henry Ford & Son*, 249 N.Y. 495, 501 (1928), aff’d 280 U.S. 369 (1929) (referring to the Federal Power Commission, “excess of jurisdiction is a necessary ground for judicial review to maintain the supremacy of law and keep administrative boards to the exercise of their delegated powers.”).

¹⁹ See, e.g., Subtitle C—Hydroelectric to Title II—Renewable Energy of EAct, §§ 241 – 246.

²⁰ *Id.*

3. ***The Commission's existing regulatory scheme for hydroelectric licensing is inappropriate for wave energy projects on the OCS.***

Certain Commission processes are inappropriate for wave energy projects on the OCS. Listed below are some of MMS's general concerns with the existing FERC regulatory process, as applied to ocean wave energy projects on the OCS.

- Preliminary permits essentially cordon off large areas for the first applicants rather than for the best applicants. In regulating a mature industry, the preliminary permit process provides predictability to investors. As ocean energy projects are experimental at this time, preliminary permits basically tie up areas that may support other uses or more efficient technologies or proposals.
- A license period of 30 to 50 years seems too long a time period to allow exclusive use of prototype projects with uncertain project-specific and cumulative impacts.
- Experimental operations and prototype testing have uncertain environmental impacts and should not be licensed without adequate monitoring by federal resource agencies that can require modifications to prevent undesired impacts.
- Project size should not exempt projects from adequate regulation. Whether small or large, they can present hazards to navigation, displace other users (e.g., oil and gas development, fishing, shipping, pipeline access, recreation, and military uses), and have environmental and socio-economic impacts.

- Wild and Scenic Rivers and Wilderness Act lands are protected by the Commission, but there do not appear to be similar protections afforded to essential fish habitat, national marine sanctuaries, and other types of marine protected areas.
- The Commission has no apparent provisions for bonding or other suitable financial arrangement to cover decommissioning and site restoration costs to ensure timely removal of unprofitable or inoperative units.
- The Commission licensing process does not provide for sharing of revenues with affected coastal states. Section 388 of the EPAct mandates that the Department share with affected states a specified portion of all revenues received by ocean wave and other alternative energy projects sited within three miles of a state's seaward boundary.²¹

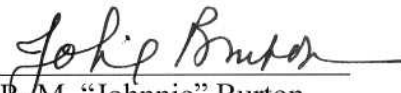
CONCLUSION

For the reasons discussed above, MMS respectfully contends that the Commission does not have authority to permit or license these types of ocean energy projects situated on the OCS. Such activities on the OCS are expressly authorized and regulated by the MMS, through delegation of the Secretary, pursuant to Section 388 of the EPAct. Accordingly, MMS asks that the Commission reject this permit application and, furthermore, cease processing all similar types of permit applications for wave energy projects proposed on the OCS.

²¹ See 43 U.S.C. § 1337(p)(2)(B).

Until this matter is resolved, the Department will continue to provide resource comments, under separate cover, on the specific proposal(s) through the Commission permitting and licensing process.

Respectfully submitted,


R.M. "Johnnie" Burton
Director
Minerals Management Service

Dated:

30 January 2007

CERTIFICATE OF SERVICE

I certify that I have on this day caused a copy of the foregoing Protest to be served upon each person designated on the official service list compiled by the Commission's Secretary in this proceeding.

Dated in Washington, D.C., this 30th day of January 2007.

A handwritten signature in black ink, appearing to read 'T. C. Woodworth', written over a horizontal line.

Thomas C. Woodworth
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