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)*
(PUBLISHED BY THE MINERALS MANAGEMENT SERVICE
OF THE DEPARTMENT OF THE INTERIOR)

On December 30, 2005, the U. S. Department of the Interior's Minerals Management Service (MMS) issued an Advance Notice of Proposed Rulemaking on Alternative Energy-Related Uses on the Outer Continental Shelf (OCS), 70 Fed. Reg. 77345 (2005), seeking comments on the development of a regulatory program to implement the Energy Policy Act of 2005, Section 388. Specifically, the MMS is seeking comments regarding energy development from all sources other than oil and gas and for alternate uses of existing OCS facilities.

Staff of the Federal Energy Regulatory Commission (Commission) appreciates the opportunity to provide comments on the Advance Notice prepared by MMS.

The Commission's Jurisdiction over Ocean Wave Hydroelectric Projects

Section 388(a) of the Energy Policy Act of 2005 amends the Outer Continental Shelf Lands Act (OCLSA), 43 U.S.C. § 1337, to authorize the Secretary of the Interior to grant leases, easements, and rights-of-way on the Outer Continental Shelf for oil and natural gas exploration, development, production, storage, or transportation, and for the production or support of production, transportation, or transmission of energy from sources other than oil and gas for activities "*not otherwise authorized by the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.), the Ocean Thermal Conservation Act of 1980 (42 U.S.C. 9101 et seq.), or other applicable law . . . .*" (Emphasis added)

In addition, section 388's amendment of the OCSLA includes the following language: "Nothing in this subsection displaces, supersedes, limits, or modifies the jurisdiction, responsibility, or authority of any Federal or State agency under any other Federal law."

Hydropower development in offshore navigable waters is subject to the Commission's jurisdiction. Section 23(b)(1) of the Federal Power Act (FPA), 16 U.S.C. § 817(1) (2000) provides that

> "[i]t 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, powerhouse, or other work incidental thereto

> across, along, or in any of the navigable waters of the United, or upon any part of the public lands of reservations of the United States . . . except under and in accordance with the terms of . . . a license granted under this part."

In *AquaEnergy Group, Ltd.*, 102 FERC ¶ 61,242 (2003), the Commission rejected the assertion by a project proponent that a proposed wave energy hydroelectric facility, to be located in Makah Bay, 1.9 miles[1] off the coast of Washington, was not subject to the Commission's jurisdiction. The Commission explained that section 3(8) of the FPA, 16 U.S.C. § 797(8), 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 . . . are used or suitable for use for the transportation of persons or property in interstate or foreign commerce . . ." Because the United States has asserted jurisdiction over the waters in which the proposed project would be located, and because the project would include facilities on the ocean bed within the boundaries of federal lands (a national marine sanctuary), the Commission concluded that the project was required to be licensed.

The Commission's approach to jurisdiction over offshore hydropower projects is based on the plain language of the FPA (particularly the definition of navigable waters). Section 388 of the Energy Policy Act of 2005 does not appear intended to alter the existing jurisdiction of any federal agency. Therefore, since the Commission in *AquaEnergy Group, Ltd.*, asserted its jurisdiction over offshore energy hydropower projects prior to passage of the Energy Policy Act of 2005, this savings clause makes clear that section 388 does not alter this jurisdiction.

In summary, given that the Commission's responsibilities under the Federal Power Act (FPA), 16 U.S.C. § 791, et seq. (2000), include authorizing the private development of hydroelectric facilities on all navigable waters of the United States including oceans up to at least 12 nautical miles offshore, we respectfully submit that the Commission has jurisdiction to license offshore energy hydropower projects. Section 388 appears to have been intended to fill a regulatory gap for activities not otherwise authorized by applicable law. In our view, there was not a regulatory gap with respect to hydropower development in offshore navigable waters, nor is there one following enactment of the Energy Policy Act of 2005.

<u>Opportunities for MMS/FERC Cooperation in the Commission's Integrated Licensing Process (ILP)</u>

[1] The *AquaEnergy Group* changed the proposed project location to a distance 3.17 miles off the coast of the State of Washington in its Request for Expedited Rehearing of Order Finding Jurisdiction and Revisions to Project Description arguing that at a distance greater than 3.0 miles from the coast of Washington the project would be beyond FERC jurisdiction (Request for rehearing at 6, November 1, 2002). The Commission specifically rejected this argument in its Order Denying Rehearing (February 8, 2003).

Our objective in the ILP is twofold. First, we are committed to working cooperatively with the MMS to ensure that its concerns regarding protection of OCS resources will be fully considered in the licensing process. Second, we want to avoid regulatory duplication for the offshore energy hydropower industry.

We have enclosed two exhibits showing the steps in the ILP. These exhibits show milestones, timeframes, and several opportunities for MMS to participate. Exhibit A is an ILP Flowchart. Exhibit B indicates the steps in the process where MMS can be involved.

In conclusion, Commission staff thanks the MMS for its work on this important rule, and looks forward to working cooperatively with MMS on expeditious licensing of offshore energy hydropower projects.

Any questions or comments on this submission may be directed to Edward A. Abrams at 202-502-8773.

Sincerely,

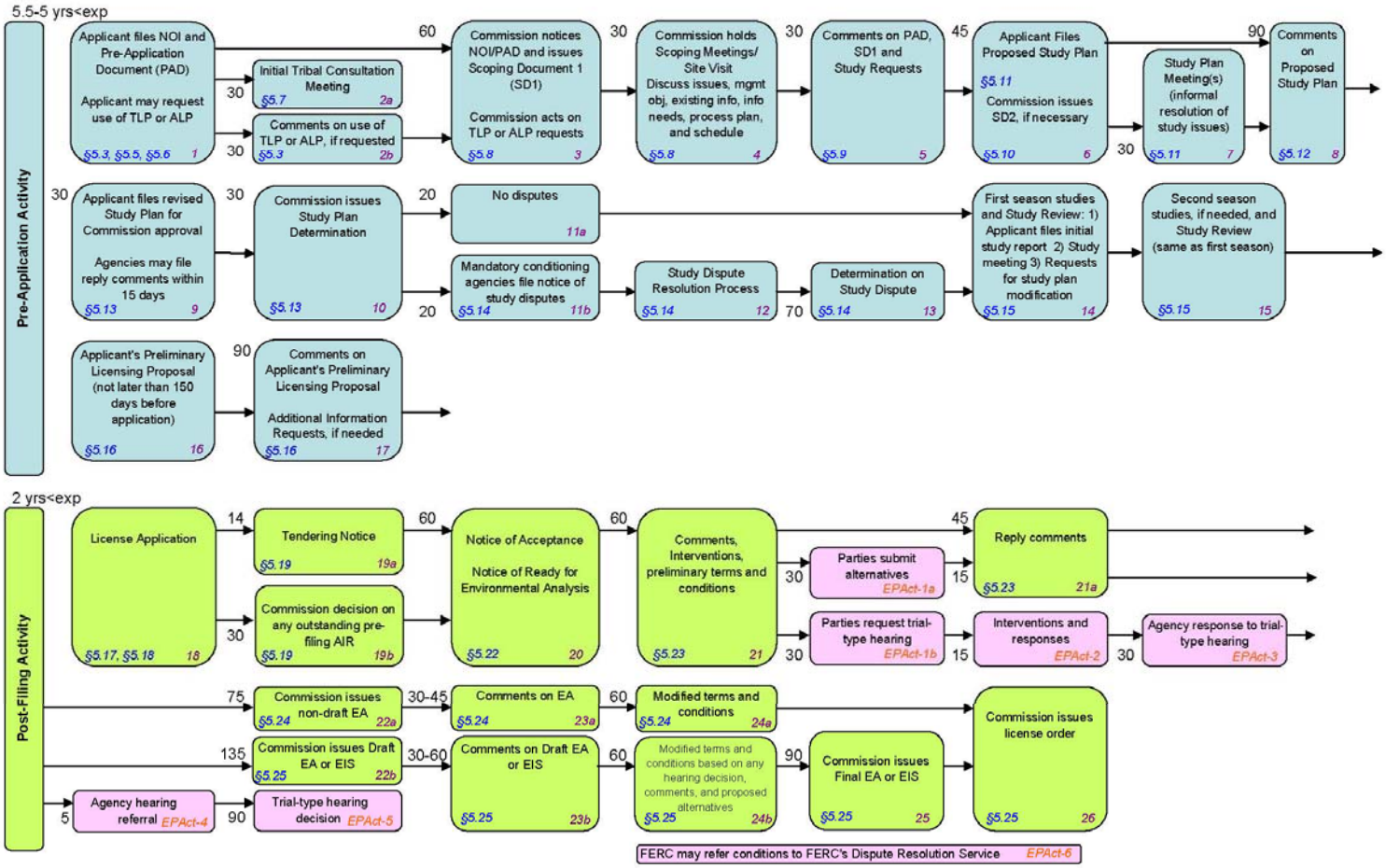
(signed, February 28, 2006)

John S. Moot
General Counsel

Attachments: Exhibit A
Exhibit B

Exhibit A

## Integrated Licensing Process and Section 241 of the Energy Policy Act of 2005




*Section 241 of the Energy Policy Act of 2005 in pink.

Exhibit B

**Potential Mineral Management Service (MMS) Roles in the Federal Energy Regulatory Commission's (FERC's) Integrated Licensing Process as Applied to Hydroelectric Project Licensing on the Outer Continental Shelf (OCS)**

| **At this point in the FERC process…** | **…this opportunity is available.** | **Ref. § in CFR 18** | **Box on Flow Chart** |
|---|---|---|---|
| Pre-process… | …the applicant consults the MMS and other parties in the development of the pre-application document (PAD). | Pre-process | Pre-process |
| Within 30 days of FERC notice of commencement of proceeding and scoping (in response to applicant filing of notice of intent [NOI] and PAD)… | …the MMS and other parties participate in a scoping meeting. | 5.8 | 4 |
| Within 60 days of FERC notice of commencement of proceeding and scoping document 1 (SD1)... | …the MMS and other parties provide comments on the PAD and FERC's SD1 including study requests. | 5.9 | 5 |
| The FERC requires applicants to hold an initial study plan meeting within 30 days of the applicant's filing of its proposed study plan… | …and the MMS and other parties participate in the study plan meetings. | 5.11 | 7 |
| Within 90 days of applicant's filing of its proposed study plan... | …interested parties work with the applicant to resolve study disputes informally. MMS and other parties file comments on the proposed study plan. | 5.12 | 8 |
| Within 15 days of the applicant's filing of its revised study plan… | …the MMS and others file comments on the revised study plan. | 5.13 | 9 |
| Within 20 days of the FERC's study plan determination... | …the MMS can file a notice of study dispute with the FERC triggering formal dispute resolution.[2] All participants have access to a technical conference and deliberative meetings. | 5.14 | 11b |
| During the study period… | …the MMS works with the applicant to assure that studies supply needed information and to provide guidance on the preliminary licensing proposal (PLP). | 5.15 and 5.16 | 14, 15, & 16 |
| Within 90 days of the filing of a PLP or draft license application… | …the MMS and others file comments including recommendations as to whether FERC should prepare an EA or EIS. | 5.16 | 17 |

| | | | |
|---|---|---|---|
| Within 60 days of FERC notice of Ready for Environmental Analysis (REA)… | …the MMS can intervene, provide comments, and provide preliminary mandatory terms and conditions.[2] | 5.23 | 21a |
| Within 30 to 60 days of the availability of an EA or DEA or DEIS… | …the MMS and others provide comments on the NEPA document. | 5.24 or 5.25 | 23a or 23b |
| Within 60 days of the close of the comment period on the EA, DEA, or DEIS… | …the MMS provide modified mandatory terms and conditions.[2] | 5.24 or 5.25 | 24a or 24b |
| After the FERC has issued a decision with a license order… | …the MMS can proceed with issuance of leases, easements, and right-of-ways for the project. | 5.25 | 26 |
| If the MMS has filed as an intervener… | …the MMS can file with the FERC for rehearing. | 5.29 | NA |

[2] Here the MMS is assumed to have mandatory conditioning authority based on the definition of the Outer Continental Shelf (OCS) as a reservation. See §3(2) and §4(e) of the Federal Power Act and §3(3) of the Outer Continental Shelf Lands Act.