

FERC Affirms Jurisdiction over Hydrokinetic Projects on the OCS

On October 16, the Federal Energy Regulatory Commission (FERC) strongly affirmed its jurisdiction over wave energy projects on the outer continental shelf (OCS). FERC's decision is notable because its assertion of jurisdiction over hydrokinetic projects on the OCS has been, and is likely to continue to be, a matter of intense dispute between FERC and the Minerals Management Service (MMS) of the Department of the Interior (Interior)—a dispute which hampers the timely development of certain offshore renewable energy projects.

BACKGROUND

In response to growing concerns about global climate change and states' quest to meet renewable energy portfolio standards, the development of emerging technologies to capture wave, current, and tidal energy—collectively referred to as “hydrokinetic” technologies—has gained momentum in recent years. FERC has estimated that the development of projects utilizing such technologies could more than double the amount of clean, renewable, emissions-free hydropower produced in the United States. In response to such interest, legislators and regulators have been actively working to develop new regulatory regimes—and adapting existing ones applicable to traditional hydroelectric projects—to hydrokinetic projects.

Under the Federal Power Act (FPA), FERC is tasked with permitting and licensing hydropower projects on “navigable waters,” “streams or other bodies of water over which Congress has jurisdiction” (i.e., “Commerce Clause waters”), and “public lands and reservations of the United States.” Historically, this has consisted of traditional hydroelectric projects—with a dam, reservoir, and powerhouse—on inland rivers. Recently, however, in an effort to encourage the development of emerging hydrokinetic technologies, FERC has developed a policy for processing preliminary permit applications for hydrokinetic projects, and, over the last few years, FERC has issued more than 100 preliminary permits for both in-river and offshore hydrokinetic projects. Until now, however, none of those permits has been for projects on the OCS.

MMS oversees energy development on the OCS—that is, submerged lands lying seaward of a state's coastal boundary, which is generally three miles from its coastline—under the Outer Continental Shelf Lands Act (OCSLA). Traditionally, this has entailed oil and gas projects.

Ironically intended to clarify regulatory authority over alternative energy projects located on the OCS, the Energy Policy Act of 2005 (EPAAct) set the stage for continuing uncertainty regarding federal regulatory jurisdiction over hydrokinetic projects on the OCS. Section 388 of EPAAct amended the OCSLA by authorizing the Secretary of the Interior to grant leases, easements, and rights-of-way on the OCS for activities that “produce or support production, transportation, or transmission of energy from sources other than oil and gas” EPAAct limited this regulatory authority, however, to activities not otherwise authorized by applicable law. In addition, Section 388 included a savings clause stating that “[n]othing in this subsection displaces, supersedes, limits, or modifies the jurisdiction, responsibility, or authority of any Federal or State agency under any other Federal law.”

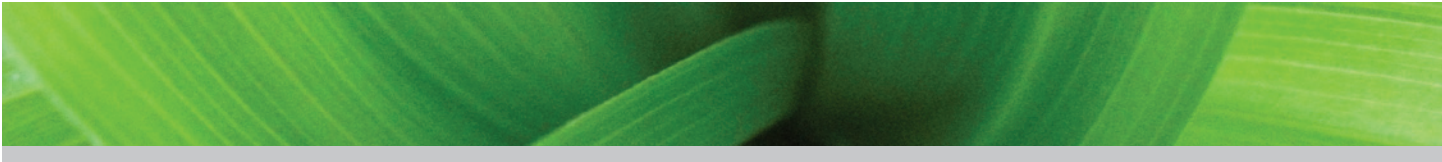
Pursuant to its authority under EAct, MMS has been actively working to implement regulations for alternative energy development on the OCS. Most recently, in July 2008, MMS issued proposed regulations to provide a regulatory framework for leasing and managing alternative energy projects, including hydrokinetic projects, on the OCS. In its comments on MMS's rulemaking, FERC adamantly opposed MMS's jurisdiction over hydrokinetic projects, claiming that FERC alone has jurisdiction over such projects. Nonetheless, FERC and MMS have drafted (but not executed) a memorandum of understanding that would use the resources and authorities of both agencies to regulate hydrokinetic projects in all offshore areas.

INSTANT PROCEEDING

The instant controversy arises from the February 2007 FERC application of a private developer to study the feasibility of the proposed Mendocino WaveConnect Project, which would be located half a mile to six miles off the coast of Mendocino County, CA, and the proposed Humboldt WaveConnect Project, which would be located two to ten miles off the coast of Humboldt County, CA. For each of the projects, the developer would place between eight and 200 wave energy conversion devices in waters with depths of 60 to 600 feet. Each of the projects also would entail subsea transmission cables up to six miles long, anchors to the ocean floor, mooring lines, and navigational aids, among other features, and each would generate approximately 40 MW. FERC issued preliminary permits for the projects in March 2008. The three-year permits do not authorize project development, but only grant the developer priority status if, following the investigation into the feasibility of the projects, it decides to pursue the projects by preparing and filing a license application. The developer's permit application at FERC pre-dated MMS's proposed regulations, and the developer did not seek independent MMS approval of the proposed projects.

Interior, on behalf of MMS, filed a request for rehearing of FERC's issuance of the preliminary permits, contesting issuance of the permits insofar as they include portions of the OCS. Specifically, Interior argued that, even if the FPA definition of "navigable waters" included ocean waters, FERC's jurisdiction does not extend to projects located beyond the traditional three-mile limit of the states' boundary, where the OCS begins. Interior also argued that, through the passage of EAct, Congress intended for Interior to have lead federal regulatory authority over alternative energy projects, including hydrokinetic projects, sited on the OCS. While recognizing that Section 388 of EAct was not intended to displace or repeal existing authority under applicable law, Interior argued that if Congress had intended FERC's hydropower licensing provisions of the FPA to fall within that exception, it would have clearly stated as much. Moreover, Interior argued that, notwithstanding other references to the FPA in EAct 2005, nothing in the law suggests that the FPA would apply to hydrokinetic projects on the OCS.

In its October 16, 2008 order on rehearing affirming its authority to issue preliminary permits for the Mendocino and Humboldt Projects, FERC rejected Interior's arguments. First, FERC held that the scope of the term "navigable waters" under the FPA is different than under other federal statutes, such as the Clean Water Act, and that the definition of "navigable waters" under the FPA broadly includes waters on the OCS. Therefore,



FERC asserted that its jurisdiction over hydropower projects on “navigable waters” and “Commerce Clause waters,” as granted by the FPA, gives FERC jurisdiction over the Mendocino and Humboldt Projects.

Second, FERC asserted that, notwithstanding its authority to license hydropower projects on navigable waters and “Commerce Clause waters,” it also has jurisdiction over hydrokinetic projects on the OCS through its power to license hydropower projects on “reservations of the United States.” FERC concluded that the submerged lands of the OCS on which the proposed Mendocino and Humboldt Projects would be located are “lands and interests in lands owned by the United States” and, therefore, fall within the FPA’s definition of “reservation.”

Because it concluded that the FPA confers jurisdiction upon FERC over hydrokinetic projects on the OCS, FERC held that EAct’s two saving clauses expressly preserved this authority. EAct, FERC asserted, was intended to fill the gaps of existing law by enabling Interior to grant leases for activities on the OCS which it previously lacked. As there was no regulatory gap to fill with respect to hydrokinetic projects, FERC held that EAct granted Interior no authority over these projects. Moreover, according to FERC, Congress’s recent consideration and rejection of a bill that would have explicitly divested FERC of its licensing authority for hydrokinetic projects on the OCS suggests that Congress is well aware of FERC’s existing authority to regulate such projects, and has chosen not to disturb it.

IMPLICATIONS

As Interior indicated in its request for rehearing, FERC’s assertion of jurisdiction over hydrokinetic projects on the OCS has not yet been judicially tested. Both FERC and MMS have indicated a willingness to work together to develop a process for applicants to seek approval for offshore hydrokinetic projects. Given the substantial jurisdictional conflict between the agencies, however, Interior could seek to challenge FERC’s decision to issue preliminary permits for the Mendocino and Humboldt Projects in the court of appeals, and thereby extend the hotly-contested jurisdictional dispute that currently impedes development of energy projects that capture renewable ocean energy. If Interior does not seek judicial review of FERC’s decision, Congress could step in to resolve the jurisdictional controversy.

In addition, FERC’s holding that the OCS is a “reservation” for purposes of the FPA—perhaps ironically—could give substantial authority to Interior in FERC licensing proceedings for proposed projects on the OCS, by allowing Interior to submit mandatory conditions under Section 4(e) of the FPA. Until this debate is settled, developers seeking to implement hydrokinetic projects on the OCS will have to continue to grapple with the uncertainty of complying with overlapping regulatory regimes of FERC and MMS.

FOR ADDITIONAL INFORMATION

If you would like more information on this decision or other offshore energy projects, please contact Charles Sensiba, Julia Wood, or any member of the firm’s Hydropower Practice group at (202) 298-1800.

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