

INSIGHTS

Fate of Ocean Power Projects Requires FERC and Interior Cooperation

October 22, 2008

Jurisdictional jockeying between FERC and the Department of Interior threatens development of Outer Continental Shelf (OCS) ocean power projects. The issue calls out for agency cooperation and possibly an interagency agreement similar to that between FERC and the U.S. Forest Service for licensing and permitting hydroelectric projects on Forest Service lands. Absent such cooperation, the matter will have to be resolved by the courts. The dispute flared most recently when Pacific Gas & Electric Co. asked FERC to issue preliminary permits for two sites located partially in state waters and partially on the OCS. PG&E contemplates placing between 8 and 200 wave energy conversion devices in water with depths of 60 to 600 feet and delivering the energy from the two projects via underwater cables connected to the PG&E transmission grid. The two projects would each generate about 40 MW. FERC considers them hydroelectric projects because they generate electricity through ocean waves. While Interior does not contest FERC's jurisdiction over such projects in state waters, it contends that FERC has no authority over the OCS sites. Interior argues that "navigable waters" (the touchstone for FERC jurisdiction) does not include waters beyond the 3 mile boundary of the U.S. territorial waters. Interior's position derives from the definition of navigable waters in a number of statutes, including the Clean Water Act and the Rivers and Harbors Act of 1899. Rejecting this argument, FERC says the Federal Power Act (FPA) definition of navigable waters is broader and extends to "bodies of water over which Congress has jurisdiction" under the commerce clause, including OCS waters. FERC also asserts authority under the FPA to issue licenses for projects located on "lands and other interests in lands owned" by the U.S., again including the OCS. By empowering Interior to lease the OCS for non-oil and gas energy sources, the Energy Policy Act of 2005 (EPAAct 2005), according to Interior, made Interior the lead agency for OCS wave energy projects. Not so, says FERC, asserting EPAAct 2005 limited Interior's authority to OCS activities *not otherwise authorized* by "other applicable law" and that hydro licensing is otherwise authorized by the FPA. No end to the debate is in sight.