

October 17, 2008

FERC Asserts Jurisdiction Over Hydroelectric Projects on the Outer Continental Shelf; Challenges MMS Jurisdiction

On October 16, the Federal Energy Regulatory Commission (FERC) announced its position that it has jurisdiction over the licensing of hydroelectric projects, including wave, tidal and other forms of ocean energy, located on the Outer Continental Shelf (OCS). FERC's jurisdictional claim directly conflicts with the position taken by the U.S. Department of the Interior, Minerals Management Service (MMS), which currently is developing regulations for its Alternative Energy and Alternate Use (AEAU) program. The AEAU program involves the leasing of OCS lands for the development of hydroelectric, wind, solar and other alternative energy projects. FERC's announcement does not assert jurisdiction over OCS wind or solar projects.

MMS's Claim to OCS Jurisdiction

MMS derives its authority over hydroelectric projects on the OCS from Section 388 of the Energy Policy Act of 2005 (EPAAct), which directs the Secretary of the Interior to grant leases, easements or rights-of-way for activities on the OCS that are related to production, transportation or transmission of energy from sources other than oil and gas. MMS asserts that its authority includes OCS hydroelectric licensing activities, as set forth in its proposed rule for the AEAU program. Specifically, MMS states that FERC's jurisdiction is limited to issuing licenses and permits for projects located within state waters, which are generally limited to three miles offshore. MMS currently is reviewing comments received on its proposed rule and has stated that it expects to issue a final rule by the end of 2008.

FERC's Claim to OCS Jurisdiction

FERC asserts that its jurisdiction derives from the Federal Power Act (FPA). Under the FPA, FERC claims that it has jurisdiction to license hydroelectric projects located on "navigable waters" and "streams or other bodies of water over which Congress has jurisdiction." FERC concludes that these waters include the OCS. In addition, FERC contends that the FPA grants it jurisdiction over hydroelectric projects located on "reservations," which are any lands owned by the United States, including OCS lands.

FERC further contends that Section 388 of EPAAct did not alter its existing authority to permit hydroelectric projects in federal waters, but merely established MMS' authority, as a federal land management agency, to issue leases, easements and rights-of-way necessary for such projects.

Continued Dispute

FERC addressed the jurisdictional dispute with MMS in the context of a rehearing order on two preliminary permits issued to Pacific Gas & Electric Co. to study the feasibility of developing wave energy projects on the OCS offshore California. FERC also raised the issue in comments it filed to MMS's AEAU rulemaking, requesting that MMS remove hydroelectric facilities from its proposed program.

Although FERC Chairman Joseph T. Kelliher stated "I am confident that today's decision puts to rest any questions about FERC's jurisdiction over hydroelectric projects on the OCS," this jurisdictional question likely will remain unanswered at least until MMS issues its final AEAU regulations. If MMS concedes

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jurisdiction to FERC in its Final Rule—an unlikely scenario—project developers will have clarification as to the regulatory process required for project authorization. If, on the other hand, MMS continues to assert jurisdiction over hydroelectric power projects on the OCS—the more likely scenario—the jurisdictional uncertainty may continue, leading to regulatory delay for project developers.

FERC's order can be found on the FERC website's eLibrary system in Docket Nos. P-12781 and P-12779.

Sutherland encourages all of its clients with interests in this matter to assess the possible impact on their commercial interests from the potential delay and this interagency jurisdictional conflict, and consider whether any action in response is appropriate.



If you have any questions regarding this alert, or the services we provide, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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