

FERC S AQUA ENERGY DECISION: TESTING THE OCEAN WATERS

Carolyn Elefant
Law Offices of Carolyn Elefant
www.his.com/israel/loce

As if energy development in the oceans was not sufficiently regulated, what with the Corps of Engineers permitting authority under Section 10 of the Rivers and Harbors Act, Mineral Management Service issuance of leases for oil and gas production on the Outer Continental Shelf, the need for a consistency determination from the state agencies under the Coastal Zone Management Act and numerous other regulatory requirements, now the Federal Energy Regulatory Commission, with its order in Aqua Energy Group, DI02-3-01, 102 FERC ¶ 61,242 (February 28, 2003)¹ has taken the proverbial plunge into ocean regulation (FERC). In the Aqua Energy order, the FERC, via its power to license hydroelectric plants under the Federal Power Act, has declared that ocean energy projects located up to twelve miles out to sea must obtain a FERC license as a prerequisite to project construction and operation. This article briefly discusses the FERC s order and more importantly, the implications not only for ocean energy developers but for also for developers of other marine renewables and the other agencies that regulate offshore development.

A. What Was the Basis for the FERC s Decision in Aqua Energy to Regulate Ocean Energy Projects?

1. FERC Jurisdiction

For roughly eighty years, FERC has been the agency charged with licensing

¹ The Aqua Energy decision is available at Ms. Elefant s website at <http://www.his.com/israel/loce/ocean.html>. Copies of AquaEnergy s 35 page petition filed at FERC can be obtained by request from Ms. Elefant at loce@his.com

hydro projects developed by private developers and state and federal agencies.² The FERC's authority to require licenses for hydro projects derives from the Federal Power Act. Under the Federal Power Act, a license is required for any hydroelectric project (1) located on navigable waters; (2) located on federal lands (including reservations) or (3) constructed after 1935 on commerce clause waters and affecting the interests of interstate commerce. See Section 23(b), Federal Power Act. Significantly, the Federal Power Act only covers hydroelectric projects, i.e., projects which use water to generate electricity. So projects which use water to produce compressed air or mechanical energy do not require a license. See Building 69, 63 FERC ¶ 61,066 (1993)(finding no jurisdiction over project which will produce compressed air for hydroponic farm and thus is not a hydroelectric project); Tufflite Plastics, 13 FERC ¶ 61,016 (1980)(finding no license required for hydro-mechanical project). Similarly, projects which use water indirectly, for instance, as coolant in a steam-electric plant are not considered hydroelectric. Chemehuevi Tribe of Indians v. Federal Power Commission, 420 U.S. 395, 403 (1975)(finding that Commission has no jurisdiction over water based steam power plants).

In addition, the Federal Power Act also offers a narrow definition of the term project which consists of:

a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit and all storage, diverting or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected

² FERC does not license or regulate federal hydro dams such as Hoover or Grand Coulee which were authorized by federal statute and constructed and managed by federal power authorities.

primary transmission system, all miscellaneous structures used...

Section 3(11), FPA.

2. AquaEnergy s Arguments

The Aqua Energy Makah Bay project is comprised of four small floating buoys anchored to the sea bed which contain wave energy converters that transform waves into electricity. The electricity is transported to a substation onshore via an underwater transmission line. The 1 MW, prototype project would be located three miles from shore in the Olympic Coast Marine Sanctuary.

AquaEnergy contended that FERC jurisdiction did not apply because the Makah Bay Project was not a conventional hydropower project as defined by the Federal Power Act - the floating buoy system had no powerhouse, reservoir or conduits. Moreover, the system did not use hydro technology - which harnesses the falling power of water - but rather, a technology which uses the power of ocean waves. FERC summarily dismissed this argument - FERC seemed to assume that because the project used water to generate hydropower, it was a hydroelectric project. FERC also held that the floating buoys which contained generators were powerhouses under the statutory definition.

FERC then determined that the Makah project was subject to FERC jurisdiction because of its location on navigable waters (FERC defined navigable waters as extending up to twelve miles out per an Executive Order which declared US jurisdiction to that limit) and also its location on federal lands.³

³ The federal lands finding is somewhat unique to this project since a portion of the project was located on an Indian reservation and also

B. Who Is Affected by the FERC's Order?

Most immediately, developers of ocean energy projects are affected by the FERC order, as they will be required to participate in the FERC licensing process. And the FERC ruling applies to ALL ocean developers, whether or not they are exclusively in state waters. What most ocean energy developers do not understand about FERC jurisdiction is that it applies to hydro projects on navigable waters - and according to FERC, navigable waters can be within state or federal jurisdiction.

At the same time, the FERC order does not directly affect the regulatory system (such as it is) currently in place for offshore wind, e.g., with the Corps taking the lead on project development. FERC's order does NOT directly apply to offshore wind or solar development because these types of renewables use sun or wind, not water (i.e., hydro) as the source of generation.

Still, the FERC's order indirectly affects the entire scheme of offshore regulation in place - something which FERC apparently did not recognize in issuing its order. For example, states such as Massachusetts are currently contemplating state zoning of ocean waters three miles offshore. The state's ability to manage its own waters, however, would be hampered if ocean developers could circumvent state authority by going directly to FERC for project licenses. Likewise, an ocean developer could seek a permit or license from FERC which grants exclusive rights to study or develop the area covered by the license. By getting a FERC permit, an ocean developer could effectively tie up a region and attempt to block offshore wind or other permitted offshore uses (e.g.,

because the project is located in a federally managed sanctuary, which the Commission found was effectively a federal land.

aquaculture or offshore hydrogen). Currently, there is no formal system in place for determining priority between a Corps issued permit and a FERC license (and at first blush, the FERC license appears to confer firmer usage rights than a Corps permit), so the potential for all kinds of conflict exists. FERC also gives licensees authority to condemn state owned property - could a situation arise where ocean entities seek FERC licenses to condemn state lands and then sell this valuable property to the highest bidder?

All of these questions have arisen simply because of FERC's insistence on involving itself in an offshore licensing regime without examining the broader policy implications. And with so much focus on offshore wind, it is likely that the FERC issues can slip below the radar, lying in wait to cause problems down the line. As developers, the agencies and Congress take steps towards resolving the best way to regulate offshore uses, they must take care to address these FERC issues as part of the strategy, whether or not those issues do not have an immediate impact at on their interests at present.