



FEDERAL ENERGY REGULATORY COMMISSION

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FERC Asserts Jurisdiction over Outer Continental Shelf Hydroelectric Projects

The Federal Energy Regulatory Commission (FERC) today said it has jurisdiction over hydroelectric projects located on the Outer Continental Shelf (OCS), pointing to laws that define the Commission's role.

FERC addressed the jurisdictional question, raised by the U.S. Department of the Interior (Interior), 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 in the OCS off the California coast. The projects are the Humboldt Project off the coast of the Samoa Peninsula in Humboldt County near Eureka, and the Mendocino Project off the coast of Fort Bragg in Mendocino County.

"I am confident that today's decision puts to rest any questions about FERC's jurisdiction over hydroelectric projects on the OCS," FERC Chairman Joseph T. Kelliher said. "This will allow applicants, local, state and federal agencies, and other interested groups to work together more effectively and expeditiously to develop appropriate projects that utilize our renewable ocean resources."

Commissioner Philip Moeller said the development of viable hydrokinetic resources needs a streamlined process like FERC's. "It is indisputable that renewable energy is a valuable resource and hydrokinetic projects could harness a vast resource of new hydropower," he said. "Instead of legal battles, my preference, and this Commission's, has been to reach out to federal agencies and states to work in a cooperative manner to the same goal: timely development of a new renewable power resource in a responsible manner after input from all affected stakeholders."

Interior has asserted that FERC only has jurisdiction to issue licenses and preliminary permits for projects within state waters, which for most states is defined as extending three miles offshore. Projects beyond state waters are considered to be located in the OCS.

But FERC says the Federal Power Act (FPA) gives it two bases of authority to issue preliminary permits and licenses for hydroelectric projects located on the OCS. First, the law expressly grants FERC jurisdiction to license in "navigable waters" without limitation as well as in "streams or other bodies of water over which Congress has jurisdiction." That, FERC said, means the Commission has jurisdiction over hydropower projects such as those being studied under the permits issued in these proceedings.

The second authority is for those projects located on "reservations" of the United States. FERC concludes that the OCS is land owned by the United States, qualifying it to be a "reservation" under the FPA. "The Supreme Court of the United States has consistently held that the United States owns the submerged lands off its shores, beginning from the low-water mark," FERC said.

Finally, FERC addressed comments by Interior about the meaning of the Energy Policy Act of 2005





(EPAAct 2005) as it relates to the jurisdiction question for hydroelectric projects located on the OCS. Interior asserted that EPAAct 2005 intended for Interior to be the lead federal regulatory authority over wave and ocean current energy projects in the OCS.

In today's order, FERC notes that EPAAct 2005 does not limit the scope of its authority over hydroelectric power or withdraw FERC jurisdiction over projects in the OCS. "To the contrary, Congress expressly preserved the Commission's comprehensive hydroelectric licensing authority under the FPA by including two saving clauses....," FERC said.

FERC Chairman Kelliher stressed today that FERC recognizes the role of Interior, which through the Minerals Management Service (MMS) manages lands on the OCS. There is no conflict with FERC's role as the licensing agency, he said.

"We have proposed a Memorandum of Understanding (MOU) with MMS that carefully delineates the roles of the two agencies in a manner that respects both our licensing, and Interior's resource, roles," Kelliher said. "We stand ready to enter into the MOU to clarify those roles."

A preliminary permit gives the holder of a permit priority over the site for three years while the holder studies the feasibility of developing the site. It does not authorize construction of any kind. A license authorizes construction and operation of a hydroelectric facility.

Today's order also finds that although two local governments, the City of Fort Bragg and Mendocino County, asserted that they did not receive personal notification from FERC of the filing of the preliminary permit applications, only Mendocino County acted in a timely manner once it received actual notice of the application in order to preserve its right to intervene. As a result, Mendocino County's request for late intervention is granted. However, the order finds that Mendocino has not provided grounds for the Commission to revoke the Mendocino Project permit or to reopen that proceeding. The order also denies motions for late intervention in both proceedings by FISH Committee.