

Navigating the regulation of ocean hydrokinetics

Ocean hydrokinetic projects, including wave energy devices, are the newest additions to the mix of alternative energy generation projects coming on line. Although the technology and financing of these projects is becoming more viable, the precise contours of government regulation over the siting and operation of these projects remains uncertain.

One area of particular importance relates to regulations for the use of public lands. Washington and Oregon have expressed an intent to regulate hydrokinetic projects within the territorial seas, a boundary extending three miles from the coast. Unlike other forms of energy generation, wave energy is likely to occur only on publicly owned lands because private ownership typically does not exist in ocean waters. Wave energy projects will utilize submerged lands where they are tethered to the ocean floor, and where there are cables on the ocean floor used for transmitting power to shore. The states apparently rely on this permanent or semi-permanent use of public land as the basis for exercising jurisdiction over ocean projects.

Even though Washington and Oregon intend to regulate the siting of wave energy projects, state jurisdiction must take into account any federal jurisdiction over these same submerged lands or projects. State and federal jurisdictions in this area are evolving and often intertwined, and they present complex issues in need of being unraveled.

The Federal Energy Regulatory Commission (FERC) asserted broad jurisdiction over wave energy projects in 2002. In its *AquaEnergy* decision, FERC declared that the *Federal Power Act* (FPA) applies to wave energy conversion because the buoys associated with these devices are “power houses” as that term was intended by the FPA.

FERC also declared that its jurisdiction extended 12 miles out to sea, nine miles farther than the territorial seas have traditionally been measured.

The immediate implication of FERC’s *AquaEnergy* decision was that all wave energy projects would require a hydroelectric license under the FPA. Indeed, FERC has since seen a large number of applications for preliminary permits, the first step in obtaining a hydroelectric license. The long-term implication of FERC’s decision, which FERC and the states may be ignoring, is that it might have removed jurisdiction by the states over wave energy altogether.

The *Submerged Lands Act of 1953* (SLA) informs the full extent of state authority in the territorial seas. Prior to Congress’ enactment of the SLA, a common assumption was that states owned lands beneath all navigable waters, including those lands beneath the territorial seas. That assumption was based in part on the *Equal Footing Doctrine*, the doctrine that provides sovereignty over submerged lands to states upon entry into the Union. The United States Supreme Court departed from this assumption in 1947 when it decided *United States v. California*. The Court held that the *Equal Footing Doctrine* applied only to inland waters and that lands beneath ocean waters fell under the “sole” jurisdiction of the federal government.

Reacting to *U.S. v. California*, Congress enacted the SLA, ceding title of all submerged lands beneath the waters of the territorial seas to the states, including the resources within those waters; however, that cession to the states included three large exceptions. The SLA provided that none of its provisions affected federal authority over navigation, flood control, or the production of power.

Thus, while the states have title to

submerged lands with respect to most activities in the territorial seas, the federal government maintains supremacy for navigation, flood control, and power production. The SLA also expressly excludes “water power, or the production of power from water” from the definition of “natural resources” ceded to the states. Whether the federal government reserved title in the lands beneath the territorial seas for purposes of power generation in the same way it reserved title in power generation as a natural resource is as of yet an untested issue.

In March 2008, FERC issued an order clarifying its grant of a preliminary permit for a project in Makah Bay, Wash. In that order, FERC stated that the project must obtain the right to use state-owned lands, including submerged lands, in the project area. What FERC did not fully address was whether the state actually owns the submerged lands for purposes of power production.

If wave energy conversion is subject to federal regulation under the FPA as FERC asserts, then it almost certainly falls within the third exception of the SLA. If the federal government never ceded that resource or use of submerged lands for that purpose to the states, wave energy conversion devices are more akin to hydroelectric dams, where states have traditionally had little to no authority over how the lands in those projects are used or regulated. Utilities and generators should keep these unanswered questions in mind as they begin encountering regulations affecting their hydrokinetic projects. **NWPPA**

Tommy A. Brooks is an associate at Cable Huston, a full-service law firm representing clients throughout the Pacific Northwest. He can be contacted at either (503) 224-3092 or tbrooks@cablehuston.com.