

Energy

E-ALERT

May 7, 2009

Renewable Energy Projects on the OCS - The Regulatory Path is Clarified

In two related actions, the Interior Department smoothed the way for developing wind, solar and hydrokinetic projects on the Outer Continental Shelf (OCS). In the first, Interior Secretary Salazar and Federal Energy Regulatory Commission (FERC) Chairman Wellinghoff finalized a Memorandum of Understanding (MOU) regarding how each agency will exercise its jurisdiction over hydrokinetic and other renewable energy resources. And in the second, Interior's Minerals Management Service (MMS) issued final rules for granting leases, easements, and rights-of-way for renewable projects.

INTERIOR-FERC MEMORANDUM OF UNDERSTANDING

Interior and FERC have been involved in jurisdictional turf battle regarding off shore energy projects for the past few years. Under the Outer Continental Shelf Lands Act and the Energy Policy Act of 2005, MMS has authority to grant leases, easements, and rights-of-way on the OCS for the development of oil and gas resources as well as parallel permitting authority regarding production, transportation, or transmission of energy from additional sources of energy, including renewable energy sources. Under the Federal Power Act, FERC has the responsibility to oversee the development of hydropower resources in navigable waters of the U.S. With such potentially overlapping authority, the two agencies could not agree on which had responsibility for leasing and licensing renewable energy projects on the OCS. This disagreement negatively affected the development of wind, solar and hydrokinetic (i.e., wave, tidal and ocean current) resources.

On April 9, 2009, Chairman Wellinghoff and Secretary Salazar signed an MOU that establishes a cohesive, streamlined process through which Interior's MMS and FERC will lease, license and regulate all renewable energy development activities on the OCS. In a nutshell, all renewable projects must get a lease from MMS, FERC will license hydrokinetic projects, and MMS will have jurisdiction over non-hydrokinetic projects such as wind and solar.

More specifically, the major provisions of the MOU are:

- MMS has exclusive jurisdiction with regard to non-hydrokinetic renewable energy projects (including wind and solar), and FERC has exclusive jurisdiction over hydrokinetic projects.
- MMS jurisdiction includes the production, transportation, or transmission of energy from non-hydrokinetic projects as well as issuing leases, easements, and rights-of-way regarding OCS lands for such projects.
- FERC's jurisdiction includes licensing the construction and operation of hydrokinetic projects on the OCS as well as conducting analyses required under the National Environmental Policy Act. FERC will not issue preliminary permits for such projects.

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- FERC will not issue a license or exemption for an OCS hydrokinetic project until the applicant has obtained a lease, easement, or right-of-way from MMS for the site, and MMS will require, in all leases, easements, and rights-of-way for hydrokinetic projects, that construction and operation cannot begin without a license or exemption from FERC.

The text of the MOU may be found by clicking [here](#) or going to: <http://www.ferc.gov/legal/maj-ord-reg/mou/mou-doi.pdf>

MMS' NEW RULES ON LEASES, EASEMENTS, AND RIGHTS-OF-WAY

On April 29, 2009, MMS issued final regulations that address the process for granting leases, easements and rights of way for renewable energy projects in the OCS, the process for considering proposals for alternate uses of existing OCS facilities, and the method for revenue sharing with nearby coastal states that will apply to such projects.

MMS will issue two types of leases. Commercial leases will convey the access and operational rights needed to produce, sell and deliver power through spot market transactions or a long term contract. Such leases will also include a project easement right to allow the installation of cables to transmit electricity and pipelines to transport other energy products. Commercial leases would last about 30 years. Shorter term limited leases will be issued for site assessment purposes and will convey access and operational rights for data collection and testing activities, including the sale of electricity produced during testing. Limited leases will last five years and may be renewed but may not be converted to commercial leases.

Leases are required to be issued competitively. The steps in the MMS competitive leasing process include a request for interest in a particular area of the OCS, a call for information soliciting comments on the area, a proposed sale notice that includes proposed lease terms, a final sale notice soliciting bids, and the issuance of a lease. The MMS may, however, issue a lease using a non-competitive process in response to an unsolicited lease request if it makes a determination of no competitive interest. Such a determination would be made if the call for interest in the specific lease or grant area received no interest. Once a company acquires a lease, it must submit to the MMS certain plans for development and construction of the project.

An annual rental fee of \$3/acre applies to both commercial and limited leases and an annual fee of \$5/acre applies to easements. Commercial leaseholders with other than hydrokinetic projects must also pay an operating fee once production begins based on installed capacity, hours of operation, capacity factor and power prices. Operating fees for hydrokinetic projects will be determined on a case by case basis. Twenty-seven per cent of the revenues received from a project will be shared with states within certain proximities of the project; the regulations set forth the factors MMS will consider in distributing such revenues.

The MMS will use a somewhat different process for proposals for alternate uses of existing MMS-authorized OCS facilities. The process is started by an applicant filing a request for an Alternate Use Rights of Use and Easement (Alternate Use RUE). The application must be signed by the applicant, the existing facility owner, and the lessee of the area in which the facility is located. If, after public notice, there is no competitive interest, MMS will grant the request. If there is competitive interest, competing applicants must file descriptions of their proposed activities. The MMS will then determine the proposals that are compatible with existing operations and pass environmental review. MMS will issue an Alternate Use RUE to whichever of the proposals MMS deems acceptable and is accepted by the current lessee and owner. If none are accepted by the current lessee and owner,

an Alternate Use RUE will not be issued. MMS will determine conditions and rental and other charges on a case-by-case basis. The MMS regulations take effect on June 29, 2009.

The MMS's notice of the regulations may be found by clicking [here](#), or going to: <http://www.mms.gov/offshore/AlternativeEnergy/PDFs/AD30RenewableEnergy04-22-09.pdf>

If you have any questions concerning the material discussed in this client alert, please contact the following members of our energy practice group:

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