

RENEWABLE ENERGY PROJECTS ON THE OCS - FERC AND MMS PROVIDE GUIDANCE FOR APPROVALS

The Federal Energy Regulatory Commission (FERC) and the Department of Interior's Minerals Management Service (MMS) jointly issued a document on August 4, 2009 providing detailed guidance on how to secure leases and licenses from those agencies for hydrokinetic energy projects in offshore waters on the Outer Continental Shelf (OCS).

Hydrokinetic projects generate electricity from the motion of waves or the unimpounded flow of tides, ocean currents, or inland waterways. Hydrokinetic projects on the OCS would likely use wave- or ocean-current-based technologies.

BACKGROUND: FERC AND MMS JURISDICTION

FERC and MMS recently settled a turf battle regarding jurisdiction over renewable energy projects on the OCS. See Covington Energy E-Alert, Renewable Energy Projects on the OCS - The Regulatory Path is Clarified, May 7, 2009. The agencies agreed to an MOU that, in a nutshell, provided that:

- All renewable projects must get a lease from MMS
- FERC will license hydrokinetic projects but will not issue a license for an OCS hydrokinetic project until the applicant has obtained a lease, easement, or right-of-way from MMS for the site
- MMS will require that construction and operation for hydrokinetic projects cannot begin without a license from FERC
- MMS will have jurisdiction over non-hydrokinetic projects such as wind and solar.

Separately, MMS issued regulations for leases, easements and rights of way for renewable projects on the OCS. MMS will issue two types of leases: (1) "commercial" leases will convey the access and operational rights needed to produce, sell and deliver power, include an easement right for cables and pipelines to the project, and last about 30 years; and (2) shorter term "limited" leases for site assessment purposes will include access and operational rights for data collection and testing activities, and last 5 years but may be renewed. Leases are issued pursuant to a competitive leasing process unless there is an unsolicited lease request that attracts no competitive interest.

THE GUIDANCE DOCUMENT

On August 4, 2009, the staffs of the MMS and FERC issued a document designed to provide information to applicants and stakeholders about the respective responsibilities of each agency and how to best navigate the process of obtaining a hydrokinetic lease and license on the OCS. It uses a

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format of frequently asked questions (FAQs). The document explains and provide more details about the roles of the MMS and the FERC in authorizing the use of the OCS for hydrokinetic activities and says that it may be revised periodically.

To operate a hydrokinetic project on the OCS, the guidance document states that an entity must have a FERC license and be either a citizen of the U.S., an association of citizens of the U.S., a corporation organized under the laws of the U.S. or any state, a state, or a municipality.

While an MMS lease is generally required for all developers to operate a hydrokinetic project on the OCS and a FERC license is required for all developers except federal agencies, there are some exceptions. Neither MMS nor FERC has authority over projects in a National Park or Monument located on the OCS. A FERC license is required for projects offshore from a U.S. territory or possession, and, depending on the individual authorization, FERC may be authorized to issue hydrokinetic licenses in National Marine Sanctuaries and Wildlife Refuges located on the OCS. MMS has no authority in these areas.

The following additional specific guidance is provided in the document.

OBTAINING A LEASE AND LICENSE

FERC will not issue a license for a hydrokinetic project on the OCS until the developer holds a commercial lease from the MMS. The process and timing for MMS and FERC approvals vary depending on whether competitive interest is expressed for a project area.

MMS anticipates it will take 2 to 2.5 years to complete the lease sale process if there is competitive interest and 1 to 2 years if there is no competitive interest. FERC anticipates being able to issue a license 1 to 2 years after a complete hydrokinetic license application is filed, depending on study time and the completeness of the application. Licenses for pilot projects generally are expected to be issued by FERC as early as six months after submission of a complete application.

The MMS lease process starts by filing certain information, either as an unsolicited request for a lease or in response to an MMS request for information to determine competitive interest in an area. This information generally consists of a description of objectives and proposed facilities, a schedule of activities, any environmental or resource data available, a statement that the proposed activity conforms with State and local energy planning requirements, initiatives, or guidance (for unsolicited requests only), and documentation that the developer is qualified to hold a lease as set forth in MMS regulations. If selected for a lease, a developer must then file a Site Assessment Plan (SAP), which describes the activities the developer plans to perform and the results of physical and baseline environmental surveys.

The FERC licensing process starts by filing a Pre-Application Document (PAD), which includes information gained through consultation with stakeholders. The PAD must identify information and study needs for the proposed project, and provide a process plan or a schedule of upcoming licensing activities. Many of the requirements for the PAD are similar to the requirements for the MMS' SAP. After completing information gathering studies, a final license application must be filed. The application must contain general information about the project, and specific exhibits that include a thorough description of the proposed project and its operation, a draft environmental document, and drawings and maps.

Under a MMS competitive lease sale scenario, FERC will begin processing a license application only after MMS has issued a lease. Under a non-competitive scenario, however, developers may begin the FERC application process at any point after MMS' determination of no competitive interest in the project area. Under either scenario, developers may wish to file the PAD with FERC at the same time the SAP is submitted to MMS. This will enable the agencies to conduct joint public scoping, if appropriate, and allow the developer to proceed with licensing studies while MMS conducts its environmental review of the SAP, if necessary. However, by proceeding with both the lease and license processes simultaneously, a developer risks incurring costs prior to knowing whether it will receive a lease and what conditions will be part of the lease.

The number of NEPA reviews and environmental consultations will vary from case to case but the MMS and FERC will combine their NEPA processes, if possible.

MUNICIPALITIES AND COMPETITION

Because FERC will only accept a license application from a leaseholder, competition for an OCS site will occur during the lease sale process. Therefore, if municipal preference is sought for a FERC license, a developer should notify MMS of its status in its unsolicited request or in its response to the request for information for determining competitive interest.

LEASE AND LICENSE TERMS

A commercial lease will have a site assessment term of 5 years and an operations term as provided in the FERC license. Although MMS has a baseline commercial lease operations term of 25 years, longer lease terms may be negotiated to correspond with the operations term in the FERC license or to accommodate the term for a relicense of a pilot project.

FERC can issue licenses (and relicenses) for up to 50 years and the term is based on a number of factors, including size of the development and mitigation measures required under a license. Pilot projects may have short license terms of approximately five years.

Leases may be assigned and licenses may be transferred but both require an application to MMS or FERC, respectively.

FINANCIAL ASSURANCE REQUIREMENTS

MMS financial assurance requirements apply to all activities on the OCS under both commercial and limited leases, including pilot projects. Generally, developers will be required to provide a series of bonds over the life of the commercial lease. Prior to issuance of a lease, developers must provide \$100,000 in an acceptable form of security and may also be required to provide a supplemental bond prior to approval of the SAP, depending on the activities to be conducted during the site assessment phase. Developers may also be required to provide a supplemental bond in an amount determined by MMS before FERC will issue a license. Finally, once facilities are installed or being installed on a commercial lease, developers will be required to provide a decommissioning bond.

FEE STRUCTURES

While both MMS and FERC are required to assess fees or annual charges, the agencies will coordinate to ensure that the overall fees for OCS hydrokinetic projects are fair and appropriate.

MMS requires an initial, one-time payment to obtain a lease followed by on-going, annual payments when the term of the lease commences. The initial payments vary depending on whether a developer is submitting a request for a noncompetitive lease or responding to a competitive auction process. For a noncompetitive lease, there is an acquisition fee, typically \$0.25 per acre, at the time the request is submitted. In a competitive lease bidding process, MMS requires a bid deposit at the time a bid package is submitted. If the bid wins an auction, the balance of the bonus bid amount offered is payable to MMS prior to issuing a lease.

The on-going payments to MMS consist of annual rent and operating fees set by MMS based on the terms associated with the non-competitive submittal or as an outcome of a competitive auction process. Annual rental is paid from the date of lease issuance until project operations commence, at which time the annual operating fee applies. Annual rental payments for a transmission line easement become due once the FERC license is issued.

FERC annual administrative charges are set by dividing FERC's calculated fiscal year program costs among all licensees according to licensees' installed capacity. FERC does not have a method for assessing charges for off-shore land.

HYBRID PROJECT CONSIDERATIONS

A hybrid project is a project that includes technologies that generate electricity from more than one form of renewable energy, one of which is hydrokinetic. Developers must acquire a lease from MMS that covers both technologies. MMS will determine the scope of renewable energy activities that may be allowed on a lease

STRADDLE PROJECTS

Straddle projects are hydrokinetic projects that straddle the boundary dividing state waters and the OCS. Developers must obtain a lease from MMS for the OCS portion of a straddle project. A FERC license is required for both the OCS and state waters portion of a straddle project. Having a licensed project in state waters next to the OCS does not provide any priority to developing a neighboring site on the OCS.

The guidance document (MMS / FERC Guidance on Regulation of Hydrokinetic Energy Projects on the OCS) may be found on the FERC website (www.ferc.gov) under "What's New" for August 4, 2009.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Clean Energy & Climate Industry Group:

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