

## FERC & MMS Sign Agreement Clarifying Jurisdiction Over Renewable Energy Projects on the OCS

On April 9, 2009, the Federal Energy Regulatory Commission (FERC) and the U.S. Department of the Interior (Interior) signed a Memorandum of Understanding (MOU) regarding jurisdictional oversight of hydrokinetic and other renewable energy projects on the Outer Continental Shelf (OCS). Under the MOU, Interior's Minerals Management Service (MMS) will have exclusive jurisdiction with regard to the production, transportation, or transmission of energy from non-hydrokinetic renewable energy projects on the OCS, such as wind and solar. The agencies will split jurisdiction with respect to hydrokinetic energy projects on the OCS: MMS will have exclusive jurisdiction to issue leases, easements, and rights-of-way, while FERC will have exclusive jurisdiction to issue licenses and exemptions for the construction and operation of hydrokinetic projects, although it will no longer issue preliminary permits for such projects. While the MOU removes a longstanding impasse regarding jurisdiction of hydrokinetic projects on the OCS, it also raises some significant questions and leaves many issues unresolved.

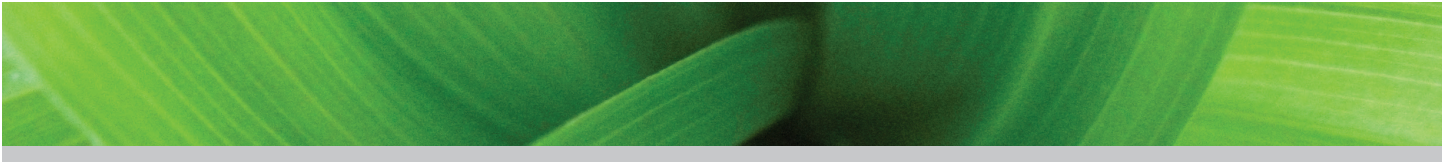
### BACKGROUND

Hydrokinetic ocean energy projects generate electricity through the motion of waves or the unimpounded flow of tides or ocean currents. As discussed in more detail in Van Ness Feldman's recent issue alert, FERC and MMS have long been embroiled in a jurisdictional dispute over hydrokinetic projects on the OCS. FERC has asserted jurisdiction over hydrokinetic projects located on the OCS under the Federal Power Act (FPA), which gives FERC exclusive authority to license hydropower projects on "navigable waters" of the United States. MMS, which traditionally has overseen development of oil and gas projects on the OCS under the Outer Continental Shelf Lands Act (OCSLA), also has asserted jurisdiction over hydrokinetic projects located on the OCS pursuant to its authority under the Energy Policy Act of 2005 (EPA 2005). EPA 2005 amended the OCSLA by authorizing Interior to grant leases, easements, or rights-of-way on the OCS for the production of energy from sources other than oil and gas. For several years, this jurisdictional dispute between FERC and MMS has resulted in delay and uncertainty for developers of hydrokinetic energy, and held up MMS's issuance of final regulations governing its oversight of renewable energy projects on the OCS.

The Obama Administration's pledge to make development of offshore renewable energy a priority appears to have prompted MMS and FERC to settle this jurisdictional dispute.

### HYDROKINETIC DEVELOPMENT UNDER THE MOU

The MOU clarifies how FERC and MMS will exercise their overlapping jurisdiction over hydrokinetic projects on the OCS. With respect to MMS, the MOU provides that MMS will have the authority to attach terms and conditions to leases, easements, and rights-of-way, and that FERC will include these terms and conditions in the license or exemption it issues under the FPA. MMS will conduct any necessary environmental reviews, including



National Environmental Policy Act (NEPA) review, for leases, easements, and rights-of-way, and the MOU confirms that FERC may become a cooperating agency for the preparation of MMS's NEPA documents. While MMS may issue leases or other authorizations for hydrokinetic projects on the OCS, the MOU provides that any such authorizations will prohibit construction and operation until FERC issues a license or exemption for the project.

With respect to FERC, the MOU provides that FERC will not issue a license or exemption for a hydrokinetic project on the OCS until the applicant has first obtained a lease, easement, or right-of-way for the project from MMS. Under the MOU, MMS has the option of becoming a cooperating agency in FERC's NEPA documents. As part of the MOU, MMS has agreed that if it becomes a participating agency it will refrain from "off-the-record" communications relevant to the merits of FERC's proceedings. However, MMS involvement as a cooperating agency will not preclude Interior from intervening on behalf of its other agencies.

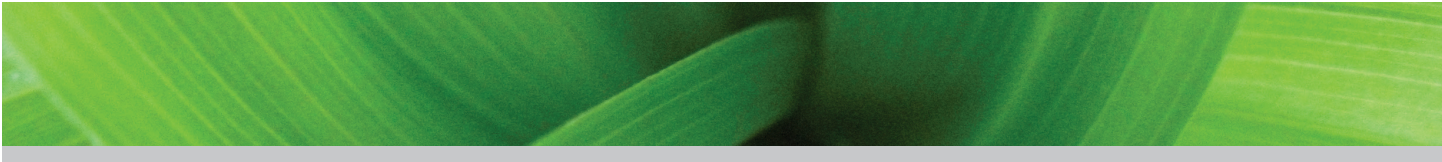
Importantly, the MOU also provides that FERC will no longer issue preliminary permits under the FPA for hydrokinetic projects on the OCS. This marks a major change in FERC's current practices.

## IMPLICATIONS AND UNRESOLVED ISSUES

While the MOU clarifies the jurisdictional roles of FERC and MMS on the OCS, it also raises significant questions and leaves other issues unresolved. By giving both agencies a major role in the authorization of these projects, it is not clear whether the MOU will serve the purposes of spurring development of clean, renewable energy and creating green-collar jobs. Although there may be opportunities to streamline dual NEPA requirements under current federal regulations, the MOU is silent as to how FERC and MMS intend to coordinate their processes to avoid unnecessary duplication in other areas. The fact that MMS has not yet issued final rules regarding the implementation of its authority with respect to renewable energy projects on the OCS only adds to the uncertainty.

Additionally, by providing that FERC will no longer issue preliminary permits for OCS projects, the MOU could serve to impede hydrokinetic development. Developers may no longer have the ability to obtain the priority of application provided by these permits and included in the FPA for the very purpose of promoting investigation and assessment of a potential project site. Relatedly, while FERC's agreement not to issue preliminary permits on the OCS presumably was included in the MOU to prevent site-banking and closure of the site for other OCS resources at the same location, it is not clear whether the MOU actually accomplishes that objective, as the federal power site reservation is created upon the filing of a preliminary permit application. Thus, it is far from clear whether the MOU has alleviated future conflict between FPA applications and applications to MMS for other energy projects at the same location.

Relatedly, the MOU does not address how FERC and MMS will treat the already existing permits for hydrokinetic projects on the OCS, or those permit applications for OCS hydrokinetic projects that are currently pending before FERC. For developers at these stages of the licensing and permitting process, the MOU creates considerable uncertainty for their projects.



Moreover, the MOU fails to address the issue of FERC annual charges and MMS royalty payments. Without such clarification, hydrokinetic developers on the OCS could be subject to both.

Finally, the MOU creates a significant disparity between hydrokinetic projects in state waters and those on the OCS. Projects in state waters will not be subject to MMS's jurisdiction, will be able to secure priority through a preliminary permit, and can take advantage of FERC's recent initiatives to expedite the development of hydrokinetic projects through pilot and conditional licenses. Because hydrokinetic projects on the OCS must first obtain a lease, easement, or right-of-way from MMS, it is not clear whether the purpose of FERC's recent incentive programs can be accomplished for projects on the OCS.

#### FOR ADDITIONAL INFORMATION

Van Ness Feldman provides counsel and representation to utilities and other developers in obtaining permits and licenses from FERC, is experienced in MMS's leasing program, and assists clients in resolving complex policy issues before Congress and federal agencies. If you would like additional information regarding the MOU between FERC and Interior, please contact Chuck Sensiba or Julia Wood in our Washington, D.C. office, at 202-298-1800, or any other attorney in Van Ness Feldman's Hydropower Practice.

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