

## MMS Issues Final Regulations Governing Renewable Energy Projects on the OCS

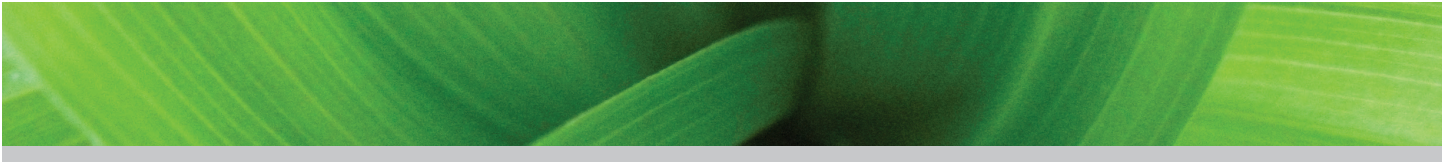
On April 22, 2009, the Minerals Management Service (MMS) of the U.S. Department of Interior (DOI) issued its long-awaited final regulations implementing its authority under Section 388 of the Energy Policy Act of 2005 (EPA 2005) to grant leases, easements, and rights-of-way for renewable energy projects on the Outer Continental Shelf (OCS). The issuance of the final regulations follows the recent Memorandum of Understanding (MOU) entered into by DOI and the Federal Energy Regulatory Commission (FERC) resolving their long-standing jurisdictional dispute over the regulation of hydrokinetic (*e.g.*, wave, tidal, current) projects on the OCS. That MOU clarified that MMS will issue leases, easements, and rights-of-way for renewable energy projects on the OCS, while FERC will continue to have exclusive jurisdiction to issue licenses for hydrokinetic projects under Part I of the Federal Power Act and exemptions from licensing under the Public Utility Regulatory Policies Act of 1978 for the construction and operation of such projects on the OCS. (The MOU is discussed in further detail in Van Ness Feldman's recent issue alert, "FERC & MMS Sign Agreement Clarifying Jurisdiction Over Renewable Energy Projects on the OCS.")

The final rule, for the most part, retains the regulatory framework that MMS outlined in its July 2008 proposal. Yet, MMS made several significant changes in response to comments on the proposed rule, including allowing limited electricity sales from limited lease projects, some streamlining of the environmental review process, and permitting consideration of non-monetary criteria in assessing bids at auction.

### LEASING

The final regulations continue to provide for two categories of leases—commercial and limited leases—that can be awarded through competitive and non-competitive processes, and they maintain the preference for competitive leasing. As under the proposed rule, a commercial lease grants the developer full rights to apply for and receive authorization to assess, test, and produce renewable energy on a commercial scale over the long term. MMS will issue 30-year commercial leases, with a 6-month preliminary term (for competitively awarded leases only), a 5-year site assessment term, and a 25-year commercial operations term. Commercial lease holders will be required to pay rent and operating fees based upon the anticipated gross value of electricity to be generated by the lease. MMS will establish operating fees for hydrokinetic activities requiring a FERC license on a case-by-case basis, accounting for the nascent stage of the technologies' development and the fact that FERC also may require payments from the project developer.

A limited lease grants access and operational rights for site assessment and development and testing of new or experimental renewable energy technology, for a term of up to 5 years. In a significant change from the proposed rule, limited leases also will allow the holder to sell, distribute, or put to commercial use a limited amount of power generated during technology testing, thereby allowing the lessee to recoup some of the costs of its limited lease



activities. The holder of a limited lease will not be required to pay an operating fee for the sale of power, but must pay rentals.

The final rule strongly encourages a renewable applicant to pursue a commercial lease if it is interested in demonstrating a particular renewable energy technology, but unsure whether it will ultimately lead to commercial production. As under the proposed rule, if a limited lease holder later wishes to pursue a commercial project, the leaseholder must obtain a new commercial lease. Despite industry comments urging it to do so, MMS did not change the text of the rule to provide that a limited lease conveys a preferential right to obtain a commercial lease for the same area, although it did agree that the terms of a limited lease may indicate that the limited lease will give “weight” to the lessee in any subsequent conveyance of commercial rights. The holder of a commercial lease may conduct technology testing during the site assessment term, and may relinquish the lease if the results of the testing do not support commercial development. Alternatively, MMS suggests that an applicant might simultaneously request both a limited lease and a commercial lease, which could provide a more timely and efficient approach to leasing and development in some cases, particularly for wind project developers.

### FERC INTERACTION

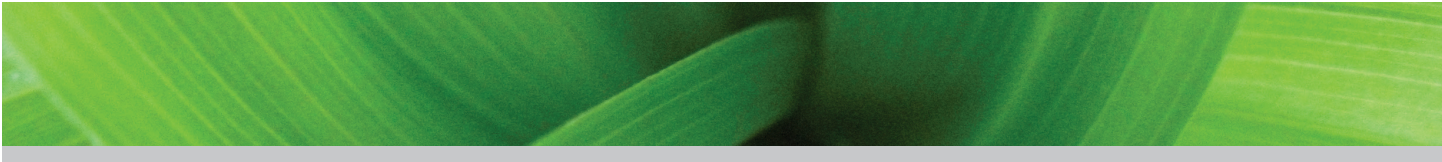
In the final rule, MMS suggests that early coordination with the FERC licensing process will be needed for the issuance of limited leases for hydrokinetic activity. If FERC determines that a license or exemption is not needed, MMS will proceed with a limited lease. However, if FERC determines that a license or exemption is required, MMS will not proceed with a limited lease and will proceed with a commercial lease instead.

### COMPETITION

Like the proposed rule, the final rule favors competition, providing that MMS will use the noncompetitive process only after determining that there is no competitive interest. The final rule establishes four possible auction formats for competitive leasing: Sealed Bidding, Ascending Bidding, Two-Stage Bidding, and Multiple-factor Auction. MMS added the Multiple-factor Auction format in response to comments on the proposed rule. It allows MMS to consider non-monetary factors, such as technical merit, timeliness, financing and economics, and the environment and public benefits. In addition, MMS states that it will consider, among other factors, whether a prospective lessee has a power purchase agreement or is the certified winner of a competitive process conducted by an adjacent State.

### STREAMLINED REVIEW PROCESS

The final rule contains several important changes that could significantly reduce the length of the review process for a competitively issued lease. Based upon comments received on the proposed rule, geophysical and geological surveys, hazard surveys, archaeological surveys, and baseline collection studies conducted for the purpose of preparing the various plans required under the program may be permitted under the authority of the U.S. Army Corps of Engineers and do not require MMS approval. In addition, MMS reduced the maximum number of environmental reviews under the National Environmental Policy Act (NEPA) and the Coastal Zone Management Act (CZMA) for a competitively issued commercial lease from three to two, by combining the lease sale and site assessment activities into one review.



## LOOKING FORWARD

The issuance of the MOU and now the final rules address many of the legal and regulatory uncertainties that have, to date, hampered the development of wind and hydrokinetic renewable energy projects on the OCS, and might help facilitate further renewable energy project development on the OCS. To the extent uncertainties remain, MMS has stated that it will publish a guidance document within the next couple of months to provide more details on the program and describe the type of information that should be submitted in the various plan submittals required under the program.

## FOR ADDITIONAL INFORMATION

With over 80 lawyers and policy professionals in Washington, DC and Seattle, WA, Van Ness Feldman offers comprehensive regulatory, policy advocacy, permitting, and litigation services in connection with the access to and use of natural resources and federally-managed lands. The firm provides counsel and representation to developers of traditional and renewable energy projects in obtaining the various federal authorizations needed to construct and operate their projects. If you would like additional information regarding MMS's new regulations, please contact Jonathan Simon in our Washington, D.C. office, at 202-298-1800 or [jxs@vnf.com](mailto:jxs@vnf.com), or your regular Van Ness Feldman contact.

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