

MMS and FERC Issue Guidance for Renewable Energy Development on the OCS

On August 4, 2009, the Minerals Management Service (MMS) of the Department of the Interior (Interior) issued new guidelines for the implementation of its renewable energy program on the Outer Continental Shelf (OCS). The “Guidelines for the Minerals Management Service Renewable Energy Framework” (Guidelines) include a joint MMS / Federal Energy Regulatory Commission (FERC) guidance document specific to the regulation of hydrokinetic energy projects on the OCS. The Guidelines provide developers of renewable energy projects on the OCS with additional insight into the process of applying for and obtaining the MMS lease—and, for hydrokinetic projects, the FERC license—required for such projects.

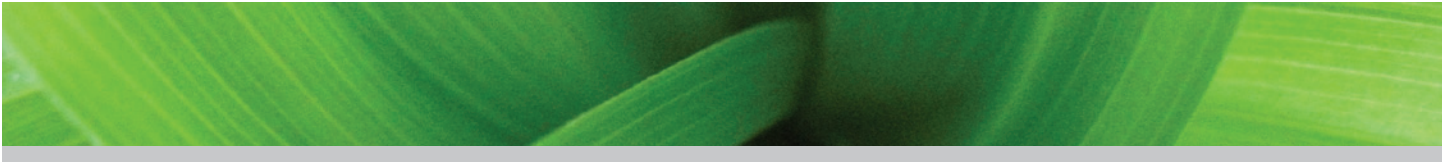
BACKGROUND

The Guidelines follow MMS’s issuance of final regulations (see April 24, 2009 Issue Alert “MMS Issues Final Regulations Governing Renewable Energy Projects on the OCS”) implementing its program to grant leases, easements, and rights-of-way for renewable energy projects on the OCS. Those regulations, in turn, followed Interior’s execution of a Memorandum of Understanding (MOU) (see April 10, 2009 Issue Alert “FERC & MMS Sign Agreement Clarifying Jurisdiction Over Renewable Energy Projects on the OCS”) with FERC regarding MMS’s and FERC’s joint jurisdiction over hydrokinetic—wave, tidal, and ocean current—energy development on the OCS. Pursuant to the MOU, and as reflected in MMS’s final regulations, MMS has exclusive jurisdiction with regard to the production, transportation, and transmission of energy from non-hydrokinetic energy projects on the OCS, such as wind and solar. FERC has exclusive jurisdiction to issue licenses for the construction and operation of hydrokinetic energy projects on the OCS, but developers must first obtain a lease for such projects from MMS. The MOU and final regulations provide that MMS may attach terms and conditions to the leases for hydrokinetic projects on the OCS, and the MOU obligates FERC to include such terms and conditions in any license subsequently issued for such projects.

The MOU addressed only in very general terms how FERC and MMS would exercise their overlapping jurisdiction for hydrokinetic projects. And, while MMS’s final regulations set forth the general procedures for applying for and obtaining a lease or other MMS authorization for a renewable energy project on the OCS, they provided little additional information about how the developer of such a project on the OCS should proceed with obtaining the required authorizations. The Guidelines serve to assist developers in understanding the final regulations applicable to all renewable energy projects on the OCS, and the MMS / FERC guidance document specifically explains and provides additional detail about the agencies’ roles in approving hydrokinetic energy development on the OCS.

GUIDELINES

The MMS Guidelines are the initial installment of the agency’s effort to guide developers through the MMS lease process established in the final regulations for renewable energy projects on the OCS. The Guidelines—which



include the first six of eleven planned chapters—provide further detail and information requirements regarding: qualification requirements for project developers; maps, descriptions, and definitions; the lease and grant conveyance process; lease and grant administration; and payments. Subsequent chapters of MMS’s guidelines will address additional aspects of the agency’s renewable energy framework for the OCS, including: financial assurance requirements; plans and information requirements; requirements for facility design, fabrication, and installation; environmental and safety management, inspection, and facility assessment requirements; and decommissioning requirements.

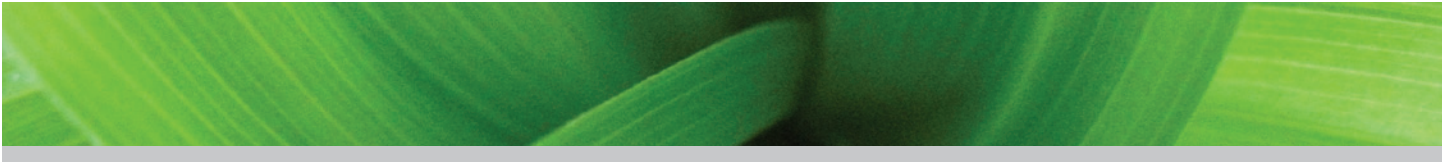
MMS is required under the Outer Continental Shelf Lands Act (OCSLA) to issue leases competitively, unless, after publication of a Request for Interest (RFI), MMS determines that there is no competitive interest. The Guidelines, therefore, detail each step in the competitive leasing process. These are: issuing a Call for Information and Nominations; identifying areas for environmental analysis; publishing a Proposed Sale Notice and Final Sale Notice; conducting an auction; and awarding the lease. Although there are detailed steps in the competitive leasing process, MMS states in the Guidelines that it anticipates that the initial leasing of renewable energy sites on the OCS will be driven by unsolicited applications, which MMS will review on a case-by-case basis and may result—after publication of the RFI—in a non-competitive leasing process. In a competitive leasing process, a developer must file its Site Assessment Plan (SAP) with MMS within six months after obtaining the lease. In a non-competitive process, the SAP is due within 60 days of MMS’s determination of no competitive interest.

MMS / FERC GUIDANCE DOCUMENT

In addition to providing general requirements and information specific to hydrokinetic projects, the MMS / FERC guidance document included in the Guidelines sets forth procedures for obtaining an MMS lease and FERC license, discusses fees and annual charges, and explains considerations specific to hybrid projects (*i.e.*, projects using hydrokinetic energy as well as another renewable energy source, such as wind) and projects that straddle OCS and state waters.

The procedures and timeframe for applying for and obtaining a lease and license for a hydrokinetic project on the OCS differ, depending on whether the MMS lease process is competitive or non-competitive. In a competitive proceeding, FERC will not begin processing a license application until after MMS has issued the lease. Therefore, the guidance document recommends that a developer file its pre-application document (PAD) with FERC after MMS has issued the lease, and at the same time it files the SAP with MMS. If there is no competitive interest, a developer may begin the FERC application process at any time following MMS’s determination of no competitive interest, but the guidance document suggests that a developer file its PAD with FERC when it submits its SAP with MMS. The next major deadline—whether for a competitive or non-competitive process—is the developer’s submission of a license application at FERC, which the guidance document clarifies replaces the Construction Operations Plan (COP) required for non-hydrokinetic renewable energy projects on the OCS.

The agencies warn that, by proceeding with the lease and license process simultaneously, a developer risks incurring costs without knowing whether it will receive a lease and what conditions will be made part of the lease. The guidance document suggests, however, that pursuing both authorizations concurrently may result in a more efficient process by allowing the agencies to conduct joint scoping under the National Environmental Policy Act for their environmental reviews.



MMS anticipates that it will take 2-2.5 years to complete a competitive lease sale process, and 1-2 years to issue a lease if there is no competitive interest. FERC estimates that it will be able to issue a license 1-2 years after a hydrokinetic license application is filed, and as early as 6 months after the submission of an application if the applicant utilizes FERC's pilot license process.

The guidance document also addresses fees and annual charges for hydrokinetic projects on the OCS. Under the OCSLA, MMS is required to charge fees, rentals, and other payments for the use of federal lands. Similarly, under the Federal Power Act, FERC is required to assess reasonable annual charges for the use of federal lands, as well as for the costs of administering its hydroelectric licensing program. The agencies state in the guidance document that they will work together to ensure that the overall fees for OCS hydrokinetic projects are fair and appropriate.

As for hybrid projects, the guidance document clarifies that MMS could issue a single lease to cover both the hydrokinetic and other renewable energy portions of a project. Where there is competitive interest in an area, MMS will decide on a case-by-case basis whether to limit the competition to one type of activity, or to open it to hybrid projects. A developer pursuing a hybrid project that has obtained a lease must submit a COP to MMS for the construction and operation of the non-hydrokinetic component of the project, and submit a license application to FERC (but not a COP to MMS) for the hydrokinetic component.

Finally, as for hydrokinetic projects that straddle state waters and the OCS, the guidance document clarifies that a developer must obtain a lease from MMS for that portion of the project on the OCS, and obtain a FERC license for both the OCS and state water portions of the project. For straddle projects and hydrokinetic projects located exclusively on the OCS, the guidance document emphasizes the importance of engaging both MMS and FERC in early consultation.

CONCLUSION

The MMS Guidelines provide developers with important information regarding the process for obtaining an MMS lease and lease administration. The MMS / FERC guidance document provides additional detail about the process for obtaining the necessary authorizations for hydrokinetic projects specifically, and reflects the agencies' efforts to implement a cohesive, streamlined process for developers to obtain the required authorizations. Still, the guidance document does not address all issues relating to hydrokinetic energy projects on the OCS, such as whether a developer may pursue a FERC exemption, rather than a license for a particular project, and how the application process should proceed under FERC's pilot license process, which does not require the filing of a PAD. Thus, many questions remain about how the leasing and licensing process for hydrokinetic projects on the OCS will work in practice.

FOR ADDITIONAL INFORMATION

Van Ness Feldman provides counsel and representation to utilities and other developers in obtaining permits and licenses from FERC, and leases and other authorizations from MMS. If you would like additional information regarding the regulation of hydrokinetic energy projects, please contact Chuck Sensiba or Julia Wood in our Washington, DC office. For more information regarding non-hydrokinetic offshore renewable energy projects, please contact Jonathan Simon or Sam Kalen in our Washington, DC office. All of our attorneys can be reached at 202-298-1800.

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