

# Advanced Hydro Projects to Benefit from End of Turf War Between Federal Agencies

by Adam Wenner and Sue Cowell, in Washington

An agreement between FERC and Department of Interior should pave the way for the development of hydrokinetic projects on the U.S. outer continental shelf (OCS). The OCS is the undersea area that slopes from the continent of the United States to the deep ocean and is defined as the “submerged lands, subsoil, and seabed, lying between the seaward extent of the states’ jurisdiction and the seaward extent of Federal jurisdiction.” Pursuant to the Submerged Lands Act of 1953, states have jurisdiction over the submerged lands that, with the exception of Louisiana, Texas and the gulf coast of Florida, extend three nautical miles from the coastline. Federal jurisdiction over the OCS, defined pursuant to international law, generally extends 200 nautical miles from the shore.

Section 388 of the Energy Policy Act of 2005 was intended to clarify the Department of the Interior’s jurisdiction over renewable energy projects on the OCS, by authorizing the Department of the Interior to grant leases, easements or rights-of-way for renewable energy projects on the OCS. Although Section 388 resolved jurisdictional questions regarding the development of wind, solar and some other types of renewable energy projects, it spawned a dispute between the Federal Energy Regulatory Commission (FERC), the U.S. agency charged with licensing hydropower projects, and the MMS, an agency within the Department of the Interior which is responsible for the management of mineral resources (*e.g.*, natural gas and oil) on the OCS.

FERC jurisdiction over hydrokinetic projects on the OCS is based on provisions of the Federal Power Act that confer FERC jurisdiction over hydroelectric licensing activities in “navigable waters” and “streams or other bodies of water over which Congress has jurisdiction.” A FERC license authorizes the licensee to construct, operate and maintain a hydropower project for a term of up to 50 years. In the past, the MMS had asserted that FERC only had licensing jurisdiction over such projects that are located in state waters (*i.e.*, from the shore to the boundary of the OCS nearest to the shore), but not on the OCS.

## A Question of Authority

Historically, FERC licenses were granted to traditional hydro-

power projects in which a dam or other impoundment was used to generate power. Licensed projects were located on navigable rivers, streams, reservoirs or other bodies of water in the U.S. A FERC license is required to develop a hydrokinetic project if it is located on any of these bodies of water, and the FERC has issued two licenses for such projects – Makah Bay Offshore Wave Pilot Project, located 1.9 nautical miles offshore of Watch Point in Clallam County, Washington, and Mississippi Lock and Dam No. 2, an in-river current facility located on the Mississippi River near Hastings, Minnesota.

FERC recognized that the evolving nature of hydropower project technology necessitated adjustments to its traditional permitting and license procedures. In response, FERC developed a process so that developers could test the technology of “pilot” projects and could determine appropriate size and gather information on the environmental effects of new technologies. Under FERC’s “Hydrokinetic Pilot Project Licensing Process,” a developer can obtain a short-term license to develop a hydrokinetic project, subject to the following limitations:

- (1) the license term is limited to five years;
- (2) the project must be small, generally less than 5 MW;
- (3) the project may not be in an environmentally or otherwise sensitive location;
- (4) FERC will monitor the project carefully and if unacceptable risks to the public or the environment occur, FERC can require the project to be altered, shut down, or removed, with site restoration required; and
- (5) the licensee must remove the project and restore the site at the end of the license term, unless the licensee receives a standard FERC license. In that case, site requirements will be evaluated in the licensing process, and if the project is licensed, in most cases there will be no requirement to remove the facilities used for the pilot project.

The Federal Power Act grants a FERC-licensed project the authority to exercise the power of eminent / *continued page 2*

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domain to acquire lands or property needed to construct or operate the hydropower project, if the developer is unable to obtain these properties through voluntary agreements with the property owners. However, in the case of licensed projects on the OCS, the authority of a FERC licensee to acquire land or property by the use of eminent domain or by agreement conflicts with the jurisdiction of the MMS to issue leases, easements and rights-of-way on the OCS.

### Drawing the Lines

On April 9, 2009 FERC and the MMS issued a MOU to clarify the respective agencies' jurisdiction over hydrokinetic projects on the OCS and to help better define the process to develop renewable energy projects on the OCS. The key provisions of the MOU are that:

- (1) MMS has exclusive jurisdiction with regard to the production, transportation, or transmission of energy from non-hydrokinetic renewable energy projects on the OCS, including renewable energy sources, such as wind and solar;
- (2) MMS has exclusive jurisdiction to issue leases, easements, and rights-of-way regarding OCS lands for hydrokinetic projects; and
- (3) FERC has exclusive jurisdiction to issue licenses for hydrokinetic projects on the OCS.

The MOU generally requires that hydrokinetic projects on the OCS satisfy the substantive requirements of both agencies. For example, FERC licenses require that the licensee comply with all terms and conditions that the MMS attaches to the applicable leases, easements and rights-of-way associated with these projects. FERC and the MMS further agree that FERC will not issue licenses for an OCS hydrokinetic project unless the applicant has obtained a lease, easement or right-of-way from the MMS for the site. By agreeing to this approach, FERC implicitly abandoned its eminent domain authority, with the result that the MMS can veto the development of an OCS project by refusing to grant a necessary lease, easement or right-of-way to a FERC license applicant. Conversely, the MMS will include a requirement in all leases, easements and rights-of-way for OCS hydrokinetic projects that construction of the project cannot commence unless the project developer has received a FERC license or otherwise has been notified that no license is required.

One aspect of the MOU that has raised concern is the requirement of each agency to comply with the National Environmental Policy Act (NEPA). Federal agencies are required to assess the environmental impacts and alternatives associated with "major Federal actions significantly affecting the quality of the human environment." NEPA compliance is generally satisfied through preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS) (which is generally more detailed and requires more information than an EA). The industry is concerned that the MMS and FERC will duplicate NEPA reviews. The MMS has not addressed this issue in its final rule, which establishes the framework by which the MMS grants leases, easements, and rights-of-way for renewable energy project activities on the OCS. Industry advocates are seeking legislation, administrative rulemaking or guidance which will address the potentially duplicative NEPA reviews.

### Applying the Rules

On April 22, 2009, the MMS released its final rule, entitled "Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf," (the MMS OCS Rule), which implements the authority provided by Section 388 of the Energy Policy Act of 2005. The rule takes effect on June 29, 2009. The MMS OCS Rule establishes the framework and process under which the MMS grants leases, easements, and rights-of-way for renewable energy project activities on the OCS. The rule also notes that such projects must comply with all applicable federal laws, regulations and statutes (*e.g.*, NEPA, Endangered Species Act, Coastal Zone Management Act, Clean Air Act, and the Clean Water Act). This rule also stipulates that a percentage of revenues from such projects will be shared with nearby coastal states.

Under the MMS OCS Rule, the MMS will issue leases on the OCS for commercial development, site assessment and technology testing and right-of-way and rights-of-use and easements in connection with supporting renewable energy activities. The MMS will issue these rights on a competitive basis, using competitive auctions, unless it makes a determination that there is no competitive interest.

The MMS OCS Rule provides for two types of leases – commercial leases and limited leases. A commercial lease will allow access and operational rights to produce, sell and deliver power on a commercial scale over an

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operating term of 25 or more years. The commercial lease will include the right to an easement to install transmission lines and other structures for the purpose of the lease. Importantly, the lease will not contain limits on the amount of energy produced or sold.

In contrast to the commercial leases, limited leases have a shorter operating term (*i.e.*, five years) and allow access for site assessment, or for site assessment, development and testing of technology. The MMS may allow limited sale of electricity produced in connection with testing activities. The limited lease cannot be converted to a commercial lease. A limited lease holder would need to go through the commercial leasing process as a new applicant; however, the MMS has indicated that limited lease holders may receive some preference in the competitive commercial lease process.

The MMS will use rights-of-way and rights-of-use to provide access on OCS for those renewable energy projects subject to a lease or approval issued under a different authority (*e.g.*, transmission line between states that must cross the OCS). Regardless of the type of access requested, the MMS must comply with requirements of NEPA and the Coastal Zone Management Act. The frequency and timing of these reviews depends on the type of access requested and whether the process is competitive or noncompetitive.

Although the MMS notes that NEPA compliance can be satisfied through an EA or EIS, MMS notes that, at least initially, an EIS will be required. After the MMS gains more experience with these projects and a better understanding of any environmental impacts associated with renewable energy projects, the MMS may decide to use EAs to assess the impacts of these projects.

The MMS OCS Rule also establishes rental fees and operating fees for renewable energy projects on the OCS. The rent for commercial leases is \$3 per acre per year (unless otherwise established by the MMS) and annual operating fees are established by a formula set forth in the rule. ©

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