

# **MMS / FERC Guidance on Regulation of Hydrokinetic Energy Projects on the OCS**

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## **Chapter 1 – Introduction**

The staffs of the U.S. Department of the Interior’s Minerals Management Service (MMS) and the Federal Energy Regulatory Commission (FERC) are issuing this guidance as part of an ongoing effort to clarify jurisdictional responsibilities for hydrokinetic projects in offshore waters on the Outer Continental Shelf (OCS). The goal is to develop a cohesive, streamlined process that will help accelerate the development of hydrokinetic (i.e., wave, tidal, and ocean current) energy projects, consistent with the Memorandum of Understanding (MOU) between the U.S. Department of the Interior and FERC (executed April 9, 2009, see Attachment A).

As recognized by the MOU, MMS has jurisdiction to issue leases on the OCS for hydrokinetic projects, and FERC has jurisdiction to issue licenses for these same projects. This guidance document is 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 format of frequently asked questions (FAQs) to address regulatory issues. The FAQs are divided into the following topic areas: general requirements and definitions; provisions for obtaining a lease and license; municipalities and competition; lease and license terms; financial assurance requirements; fee structures; hybrid project considerations; straddle projects; and contact information.

This document is intended to explain and provide more detail about the roles of the MMS and the FERC in authorizing the use of the OCS for hydrokinetic activities. Information relating to design, construction, and operations requirements, as well as inspection and compliance procedures, is not included. Such information will be developed as hydrokinetic projects are authorized and subsequently may be incorporated as appropriate. This document is not a substitute for the statutes and regulations governing MMS renewable energy leases and FERC licenses. It is not intended to be a rule or regulation. MMS and FERC may later promulgate regulations if they find it necessary. Further, this guidance is not designed or intended to anticipate every possible scenario that could arise in developing hydrokinetic projects on the OCS. For specific guidance, prospective lessees, licensees, and other participants should rely on relevant statutes and regulations, and information and instructions provided by agency contacts, supplemented as necessary with your own source for legal advice.

This document may be revised periodically, as warranted by statute and regulation or policy changes as lessons are learned during hydrokinetic development on the OCS. The dates of any revisions will be annotated in this document. The most current version is available on [www.mms.gov](http://www.mms.gov) and [www.ferc.gov](http://www.ferc.gov).

## **Chapter 2 – General Requirements and Definitions**

### **1. Who should use this guidance?**

Use this guidance if you are interested in developing a hydrokinetic project on the OCS.

Contact the agencies to discuss individual project proposals.

## **2. What is the OCS?**

The OCS includes all submerged lands, subsoil, and seabed lying between the seaward extent of the States' jurisdiction (approximately 3 nautical miles from shore, or 3 marine leagues for Texas and the Gulf coast of Florida) and the seaward extent of federal jurisdiction (approximately 200 nautical miles or more from shore). If you wish to determine the exact boundary or coordinates of the OCS near your project area, contact the MMS office with authority for the area of interest and/or see <http://www.mms.gov/ld/maps.htm>.

## **3. What is a hydrokinetic project?**

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.

## **4. Who can operate a hydrokinetic project on the OCS?**

In order to operate a hydrokinetic project on the OCS, you must be one of the following nonfederal entities as identified by the Federal Power Act: (1) a citizen of the U.S.; (2) an association of citizens of the U.S.; (3) a corporation organized under the laws of the U.S. or any State; (4) a State; or (5) a municipality. Certain federal agencies have their own federal authority to operate a hydrokinetic project on the OCS, but will still need to obtain a lease from MMS before doing so.

## **5. May I apply for an MMS lease or a FERC license if my proposed project is located in a National Marine Sanctuary, a National Park, National Monument, or Wildlife Refuge?**

Neither MMS through its leasing authority nor FERC through its licensing authority can approve a project in a National Park or Monument located on the OCS. For MMS, the same restriction applies to National Marine Sanctuaries and Wildlife Refuges located on the OCS. Depending on the individual authorization, FERC may be authorized to issue hydrokinetic licenses in such sanctuaries and refuges. Contact FERC with specific questions.

## **6. Do I need a lease and a license for a hydrokinetic project offshore from a U.S. territory or possession?**

The MMS does not have the authority to issue leases for hydrokinetic and other renewable energy resources in federal waters located offshore a U.S. commonwealth or territory. The OCS Lands Act restricts the MMS' leasing authority to OCS lands located offshore the coastal states. You will need a license to construct or operate a hydrokinetic project offshore from a U.S. territory or possession.

## **7. Can I operate a hydrokinetic project on the OCS without a FERC license?**

Unless you are a federal agency, you must have a FERC license to operate a hydrokinetic project on the OCS. A federal agency must still obtain a lease from MMS and follow MMS' regulations regarding construction and operation, as if the project were a non-

hydrokinetic project.

**8. Can I test a hydrokinetic project on the OCS with a commercial lease?**

Yes, you may test a hydrokinetic project on the OCS with a commercial lease. Because you generally must have a license from FERC to construct and operate a hydrokinetic project on the OCS for the purpose of developing electric power, you may want to consider applying for a license for a pilot project, which is designed to allow you to test a hydrokinetic project, and to gather information on environmental and other effects of hydrokinetic devices. To be licensed as a pilot project, a proposed hydrokinetic project must be: (1) small; (2) short term; (3) not located in sensitive areas based on FERC’s review of the record; (4) removable and able to be shut down on short notice; (5) removed, with the site restored, before the end of the pilot license term (unless a new license is granted); and (6) initiated by a draft application in a form sufficient to support environmental analysis. For more information on hydrokinetic pilot projects, consult FERC’s white paper ([http://www.ferc.gov/industries/hydropower/industry/hydrokinetics/pdf/white\\_paper.pdf](http://www.ferc.gov/industries/hydropower/industry/hydrokinetics/pdf/white_paper.pdf)).

However, in certain circumstances, you may conduct limited testing with a commercial lease without a license under your MMS Site Assessment Plan (SAP), if: (1) the technology in question is experimental; (2) the proposed facilities are to be utilized for a short period for the purpose of conducting studies necessary to prepare a license application; and (3) power generated from the test project would not be transmitted into or displaced from the interstate electric grid and would therefore not constitute “developing electric power” for purposes of the Federal Power Act (FPA) (See Verdant Power, 111 FERC ¶ 61,024, clarified at, 112 FERC ¶ 61,143 (2005)).

**9. Can I test a hydrokinetic project under a limited lease?**

Yes, in certain circumstances, you may conduct limited testing without a license under an MMS limited lease, if: (1) the technology in question is experimental; (2) the proposed facilities are to be utilized for a short period for the purpose of conducting studies necessary to prepare a license application; and (3) power generated from the test project would not be transmitted into or displaced from the interstate electric grid and would therefore not constitute “developing electric power” for purposes of the FPA (See Verdant Power, 111 FERC ¶ 61,024, clarified at, 112 FERC ¶ 61,143 (2005)). Although MMS’ regulations provide for a short-term, limited lease to test devices and assess sites, if a FERC license is required, MMS would not proceed with a limited lease but would instead proceed with a commercial lease.

**10. Can I convert a limited lease to a commercial lease?**

No. You must obtain a commercial lease.

**11. If I have a license for a pilot project, can I transition to a standard license?**

Yes. If you have a license for a pilot project, FERC will consider your application for a license with standard terms as an application for relicensing.

## **Chapter 3 – Procedures for Obtaining a Lease and License**

### **1. What are the relevant regulations and where do I find them?**

The MMS regulations for hydrokinetic leases are found at 30 C.F.R. Part 285 and the FERC regulations for licenses are found at 18 C.F.R. Parts 4 and 5.

### **2. If I am a nonfederal applicant pursuing a hydrokinetic project on the OCS, do I need to pursue both an MMS lease and a FERC license?**

Yes. FERC will not issue a license to you unless you hold a commercial lease from MMS.

### **3. How do I obtain a lease and a license for a hydrokinetic project on the OCS?**

If MMS has not published a Request for Interest (RFI) for an area in which you have an interest in leasing, you may submit an unsolicited request for a lease following the requirements of 30 C.F.R. 285.230. You should include your particular area of interest, a description of your objectives and proposed facilities, a general schedule of activities, any environmental or resource data available, a statement that your proposed activity conforms with State and local energy planning requirements, initiatives, or guidance, and documentation that you are qualified to hold a lease as set forth in 30 C.F.R. 285.213. You must also submit one copy of your Pay.gov confirmation receipt page that you will receive when you make your required acquisition fee payment, as specified in 30 C.F.R. 285.500.

If MMS, in response to an unsolicited request or on its own, publishes an RFI in an area to determine whether competitive interest in an area exists or not, you should submit a response with the information required in 30 C.F.R. 285.213, including your particular area of interest, description of your objectives and proposed facilities, a general schedule of activities, any environmental or resource data available, documentation that you are qualified to hold a lease, and any other information specified in the RFI.

If MMS issues a determination that there is no competitive interest for the site, you will need to submit a SAP within 60 days. A SAP describes the activities you plan to perform for the characterization of your lease and includes the results of your physical characterization surveys and baseline environmental surveys.

If there is competitive interest in hydrokinetic development on the described area, MMS will publish a Call for Information and Nominations (Call). Your response to the notice must include the information listed in 30 C.F.R. 285.213. Following the environmental review and documentation, MMS will announce the terms of the lease sale through publication of notices, and you will submit your bid to MMS according to the specified requirements. Upon receipt of the required payments and properly executed lease forms, MMS will issue a lease to the successful bidder. If you receive the lease, you must file your SAP within six months of obtaining the lease.

You will begin FERC's licensing process when you file a Pre-Application Document

(PAD), which includes all existing, relevant, and reasonably available information gained through consultation with federal, state, and local resource agencies, Indian tribes, non-governmental organizations, and members of the public (stakeholders). In the PAD, you 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 SAP.

After you have conducted your information gathering studies, you will file a final license application with FERC. Your application will 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 necessary drawings and maps. For hydrokinetic projects, the FERC application takes the place of MMS' Construction and Operations Plan (COP).

**4. If I am seeking an MMS lease under the competitive lease sale process, when may I begin the FERC licensing process?**

Under the competitive lease sale scenario, FERC will begin processing an application only after MMS has issued a lease, making it clear that you are the applicant with site access. Therefore, you should file your PAD with FERC after your lease has been issued. You may wish to file a PAD with FERC at the same time you submit the SAP to MMS (within 6 months of lease issuance) to enable the agencies to conduct joint public scoping, if appropriate, and you may proceed with licensing studies while MMS conducts its environmental review of the SAP, if necessary. We encourage you to discuss combining supporting documents with MMS and FERC.

**5. If I am seeking an MMS lease noncompetitively, when may I begin the FERC licensing process?**

You may begin your FERC application process at any point following MMS' determination of no competitive interest. You may wish to simultaneously file your PAD with FERC and your SAP with MMS (within 60 days of MMS' determination), so that the agencies may conduct joint public scoping. You may proceed with licensing studies while MMS conducts its environmental review of the SAP, if necessary.

You should be aware that by proceeding with both the lease and licensing processes simultaneously, you risk incurring costs prior to knowing whether you will receive a lease and what conditions will be part of the lease. Nevertheless, by streamlining the two processes, your overall process may be completed more quickly and efficiently. We encourage you to discuss with MMS and FERC early in the process what approach might be best for your proposed project.

**6. When do I need to submit a Site Assessment Plan (SAP) to MMS and how does it relate to FERC's Pre-Application Document (PAD)?**

If MMS determines there is no competitive interest for the site on the OCS that you have requested, your SAP is due within 60 days from the date that MMS determines that there is no competitive interest. If you have been selected as lessee through the competitive lease process, your SAP is due within six months from the date the lease is issued.

The SAP and PAD have many common elements. For example, the information required to describe the overall project and the existing environment is very similar in a SAP and PAD. In meeting the requirements for the SAP and PAD, the common components may be combined.

**7. Do I need to prepare a Construction and Operations Plan (COP) for a hydrokinetic project?**

No. COPs are not required for hydrokinetic leases that require a FERC license. Your FERC license application replaces the MMS COP for a hydrokinetic project. A FERC license will require compliance with the terms of the lease, and a license cannot be issued before the issuance of the lease.

**8. Without a COP, how will I obtain an MMS easement for the project's transmission line?**

A hydrokinetic lease issued by MMS includes the right to one or more project easements for the purpose of installing transmission cables. After FERC issues the license for the project including the primary transmission line, FERC will inform MMS, and MMS will incorporate into your lease as an addendum an easement covering the portion of the project's primary transmission line located on the OCS.

**9. How can I minimize the required number of environmental reviews or enhance the agencies' ability to cooperate on NEPA documentation?**

The number of NEPA reviews and environmental consultations will vary from case to case. When the MMS and FERC processes are aligned, the agencies will combine their NEPA processes, if possible. For non-competitive leases, a joint NEPA document may be possible if an applicant is prepared to file a complete license application and an MMS lease application simultaneously, as might be the case with a pilot project.

Environmental consultations on the project also may be consolidated. For a competitive lease, elements of NEPA, such as scoping, may be combined for efficiency. When multiple NEPA documents are necessary, each document will build on relevant information in the prior documents, regardless of the lead agency. We encourage you to communicate with MMS and FERC early in the process if you have a project-specific proposal for combining NEPA documents and procedures.

**10. How long does it take to obtain an MMS lease? A FERC license?**

If there is competitive interest in an area, MMS anticipates it will take 2 to 2.5 years to complete the lease sale process; this includes consultations and environmental review(s). If there is no competitive interest, MMS anticipates it will take 1 to 2 years to issue a lease, depending on the complexity of the activities proposed.

FERC anticipates being able to issue a license 1-2 years after a complete hydrokinetic license application is filed. The amount of time it takes you to conduct studies under the FERC pre-filing process and how thoroughly you satisfy the application requirements will be the primary factors in determining the total length of time required to obtain a FERC license. Pilot project licenses generally are expected to be issued as early as six months after submission of a complete application.

## Chapter 4 – Municipalities and Competition

### **1. I am a municipality under the Federal Power Act. How will that be factored into the lease/license decision?**

If you are seeking municipal preference for a FERC license, you should notify MMS of your status in your unsolicited request or in response to the RFI or Call. If municipal interest is indicated, MMS may incorporate considerations such as “public benefit” or “State and local needs” into the auction format. Potential state and municipal licensees should be aware that FERC will only accept a license application from a leaseholder.

### **2. How will FERC address competition following or during the leasing procedures?**

Competition for an OCS site will occur during the lease sale process. FERC will only accept a license application from the leaseholder.

## Chapter 5 – Lease and License Terms

### **1. What are the preliminary, site assessment, and operations terms under a hydrokinetic competitive lease?**

If issued competitively, your commercial lease will have a preliminary term of six months beginning on the date of your lease to prepare and submit your SAP, a site assessment term of five years beginning on the date that your SAP is approved by MMS, and an operations term as provided in your FERC license.

### **2. What are the site assessment and operations terms under a non-competitive hydrokinetic lease?**

If issued noncompetitively, your commercial lease will have a site assessment term of five years beginning on the date of your lease and an operations term as provided in your FERC license.

### **3. How is the lease term determined or adjusted?**

Though MMS provides a baseline determination that commercial leases will have an operations term of 25 years, longer lease terms may be negotiated (see 30 C.F.R. 285.235(a)(3)) to correspond with the operations term in your FERC license or to accommodate the term for a relicense of a pilot project. Lease duration may be lengthened by an automatic extension for plan review (see 30 C.F.R. 285.235) or by a suspension (see 30 C.F.R. 285.415-421), and leases may be renewed (see 30 C.F.R. 285.425-429). Leases may be relinquished (see 30 C.F.R. 285.435) or cancelled (see 30 C.F.R. 285.437).

### **4. How is a FERC license term determined?**

FERC license terms are set based on a number of factors, including size of the development and mitigation measures required under a license. Under the FPA, FERC can issue an original license for a term of up to 50 years, and a relicense for a term of between 30 and 50 years. Appropriate pilot projects may have short license terms of approximately five years in keeping with the early stage of the technology, expected small size of the projects, required safeguards, and the experimental nature of the efforts.

## **5. Can a leaseholder assign the lease? Can a licensee transfer the license?**

Yes. Both MMS and FERC regulations require pre-approval for a lease assignment and a license transfer, respectively. A leaseholder must apply for an assignment from MMS (see 30 C.F.R. 285.408) and a licensee must apply for a transfer from FERC (see 18 C.F.R. Part 9). Lessees and licensees are encouraged to consult with MMS and FERC staff before applying for a lease assignment or transfer.

## **Chapter 6 – Financial Assurance Requirements**

### **1. How will financial assurances be managed on the OCS?**

On the OCS, the MMS requirements for financial assurance will apply for all activities under both limited and commercial leases, including pilot projects.

### **2. What financial assurances do I need to provide MMS?**

MMS' financial assurance requirements can be found at 30 C.F.R. 285.511-537.

You will need to provide various amounts of financial assurance to MMS, depending on the types of activities you propose to conduct on your lease and the type and number of facilities you propose to construct and install on your lease.

Generally, you will be required to provide a series of bonds over the life of your commercial lease. Prior to issuance of your lease, you will need to provide an acceptable form of security in the amount of \$100,000. You may also be required to provide a supplemental bond prior to approval of your SAP, depending on the activities that you will conduct during your site assessment phase. You may also be required to provide a supplemental bond in an amount determined by MMS before FERC will issue a license for your project. Finally, once facilities are installed or being installed on your commercial lease, you will be required to provide a decommissioning bond.

## **Chapter 7 – Fee Structures**

### **1. What types of fees or annual charges will I have to pay?**

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 is required to establish fees, rentals, bonuses, or other payments to ensure a fair return to the United States for any lease issued on the OCS for hydrokinetic projects (see 43 U.S.C. 1337(p)(2)). MMS has published regulations addressing fees at 30 C.F.R. Part 285, Subpart B – Issuance of OCS Energy Leases (200-238) and Subpart E – Payments and Financial Assurance Requirements (500-543). More information is available at <http://www.mms.gov/offshore/RenewableEnergy/index.htm>.

FERC licensees are required to pay reasonable annual charges for costs of administration of Part I of the FPA, and for use of tribal lands, government lands, and government structures (see 16 U.S.C. 803(e)). FERC has published regulations at 18 C.F.R. Part 11.

## **2. How are MMS' payments determined?**

You will be required to make initial, one-time payments to obtain a lease followed by on-going, annual payments when the term of the lease commences. The initial payments vary depending on whether you are submitting a request for a noncompetitive lease or responding to a competitive auction process. If you are seeking a noncompetitive lease, you must submit an acquisition fee, typically \$0.25 per acre unless otherwise set by MMS, at the same time you submit the request for the noncompetitive lease. This acquisition fee will be applied to any bonus bid deposit you subsequently submit should MMS decide that the lease must be offered competitively.

If you are interested in bidding on a competitive lease, MMS requires that you include a bid deposit at the same time you submit your bid package. If you win an auction, the balance of the bonus bid amount you offered is payable to MMS prior to issuing you a competitive lease.

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

When setting the rent and operating fee terms, MMS considers FERC's administrative charges and information (1) submitted with an unsolicited request for a noncompetitive lease, or (2) received in response to RFI and Call, and other notices published for competitive leasing. See 30 C.F.R. 285.210-232 for specific steps and information requirements in the competitive lease process.

Leaseholders may request that MMS reduce or waive rent or operating fee payments (not to exceed six years of full operation) to encourage continued or additional activity (30 C.F.R. 285.510).

## **3. How are FERC annual charges determined?**

The lessee/licensee begins paying annual administrative and land charges to FERC either when project construction begins (for non-municipal entities) or when the project begins operating (for municipal entities). For all projects over 1.5 megawatts, including those on the OCS, FERC assesses administrative annual charges by dividing its calculated fiscal year program costs among all the licensees according to licensees' installed capacity. FERC collects FPA Part I costs of other federal agencies based on an allocated share of the other agencies' documented fiscal year program costs. For projects occupying federal land, FERC assesses onshore government lands charge on per-acre charges established by the Forest Service on a county-by-county basis and set forth at Appendix A of 18 C.F.R. 11. FERC does not have a method for assessing charges for off-shore land. For projects using a government structure, charges are set at a graduated rate set forth at 18 C.F.R. 11.3. For projects that occupy tribal land, charges are set on a case-by-case basis.

## **Chapter 8 – Hybrid Project Considerations**

### **1. What is a hybrid project?**

A hybrid project, for the purpose of this guidance, is a project that includes technologies that generate electricity from more than one form of renewable energy, one of which is hydrokinetic (e.g., wind- and wave-generation under the same lease).

### **2. How do I pursue a hybrid project (e.g., wind-hydrokinetic)?**

As in a single hydrokinetic lease situation, you would need to acquire a lease from MMS that covers both technologies. MMS will issue a public notice to determine whether competitive interest exists in the potential lease area, and may proceed with either the competitive or noncompetitive lease issuance process.

You must submit a COP to MMS for the construction and operation of the non-hydrokinetic component of your project. A FERC license (but not a COP) is required for the hydrokinetic component of your project.

### **3. Can I modify my project to create a hybrid by incorporating another renewable energy technology?**

If during your lease term, you or another applicant wishes to pursue activities that are not covered by the existing lease, you or the other applicant would be required to request a separate lease, and MMS would evaluate whether or not it conflicts with existing uses prior to making a decision about whether to offer the area for additional lease(s). If joint use of an area is acceptable to both MMS and FERC, MMS will initiate the leasing process to authorize both activities (hybrid). A FERC license is required for any nonfederal hydrokinetic project on the OCS.

### **4. Will MMS allow more than one type of activity on a lease?**

A lease for renewable energy activities may be held for one type of activity (e.g., wind) or for various activities (e.g., wind, wave, ocean current, etc.). MMS will determine the scope of renewable energy activities that may be allowed on a lease and issue a public notice to determine competitive interest. This notice will clearly state the scope of the lease under consideration.

If MMS determines that there is no competitive interest, MMS will follow the non-competitive lease process. If MMS determines that there is competitive interest, MMS will clearly state the scope of the lease offering early in the process and in the subsequent Proposed and Final Sale Notices. If MMS decides to limit competition to one type of activity (e.g., ocean current), MMS will not consider bids for any other type of activity, and the lease will be limited to that activity. If MMS decides to open competition to more than one type of activity or to the full set of hybrid activities, it will consider bids for the individual activities or set of activities identified, and the lease may authorize one or more of those activities. If you submit an unsolicited application, you must define your intended activities because the lease is specific to the type of project.

If you are a nonfederal applicant, you must submit to FERC a license application for the hydrokinetic component of your hybrid project and a COP to MMS for the construction and operation of the non-hydrokinetic component of your project. MMS and FERC will coordinate the interrelated reviews.

## **Chapter 9 – Straddle Project Considerations**

### **1. What are straddle projects?**

These are hydrokinetic projects that straddle the boundary dividing state waters and the OCS.

### **2. Do I need a federal lease for a straddle project?**

Yes. You must obtain a lease from MMS for the OCS portion of your straddle project. A FERC license is required for both the OCS and State waters portion of a straddle project.

Early process planning will be essential for the successful execution of straddle projects. FERC would prefer to license the entire project as a whole, which is feasible if the applicant consults with FERC and MMS early in the planning process.

### **3. If I have a licensed project in state waters next to the OCS, do I have any priority to develop the neighboring site within the OCS?**

No. The neighboring OCS waters are subject to the competition requirements of the Energy Policy Act of 2005.

## **Chapter 10 – Contact Information**

### **1. Who should I contact if I have questions?**

If you have additional questions or are planning to apply for a lease and license for a project on the OCS, please contact MMS per the Notice to Lessees, Operators and Applicants for Federal Renewable Energy Leases and Grants and Alternative Use Grants on the Outer Continental Shelf, NTLA No. REN-N01, effective June 22, 2009 at <http://www.mms.gov/offshore/RenewableEnergy/index.htm> and/or Edward Abrams or Stephen Bowler at FERC: [Edward.Abrams@ferc.gov](mailto:Edward.Abrams@ferc.gov), (202)-502-8773; or [Stephen.Bowler@ferc.gov](mailto:Stephen.Bowler@ferc.gov), (202)-502-6861.

**Attachment A**

**Memorandum of Understanding between the U.S. Department of the Interior  
and the Federal Energy Regulatory Commission**

MEMORANDUM OF UNDERSTANDING  
BETWEEN THE  
THE U.S. DEPARTMENT OF THE INTERIOR  
AND  
FEDERAL ENERGY REGULATORY COMMISSION

I. PURPOSE

The U.S. Department of the Interior (DOI) and the Federal Energy Regulatory Commission (Commission) (jointly, Participating Agencies) enter into this Memorandum of Understanding (MOU) to clarify jurisdictional understandings regarding renewable energy projects in offshore waters on the Outer Continental Shelf (OCS), in order to develop a cohesive, streamlined process that would help accelerate the development of wind, solar, and hydrokinetic (i.e., wave, tidal, and ocean current) energy projects.

II. COMMITMENTS OF THE PARTICIPATING AGENCIES

The Participating Agencies agree as follows:

A. The Participating Agencies recognize that: (1) the DOI's Minerals Management Service (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) the Commission has exclusive jurisdiction to issue licenses and exemptions for hydrokinetic projects located on the OCS.

B. MMS will issue leases, easements, and rights-of-way for hydrokinetic projects to be located on the OCS pursuant to Section 8(p) of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1337(p) (2006), and will conduct any necessary environmental reviews, including those under the National Environmental Policy Act (NEPA), related to those actions. The Commission may, at its discretion, choose to become a cooperating agency with respect to the MMS's preparation of an environmental document for any OCS hydrokinetic project.

C. The Commission will not issue preliminary permits for hydrokinetic projects located on the OCS.

D. The Commission will issue licenses under Part I of the Federal Power Act (FPA), 16 U.S.C. §§ 792-823a (2006), and exemptions from licensing under Sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2705 and 2708 (2006), for the construction and operation of hydrokinetic projects on the OCS, and will conduct any necessary analyses, including those under NEPA, related to those actions. The Commission's licensing process includes the active involvement of relevant federal land and resource agencies, including the DOI. MMS may, at its discretion, choose to become a cooperating agency with respect to the Commission's preparation of an environmental document for any OCS hydrokinetic project. If MMS becomes a

cooperating agency, it will not conduct “off-the-record” communications relevant to the merits of the Commission’s licensing or exemption proceeding, including such communications with staff of other non-cooperating DOI agencies regarding preparation of the preferred alternative or about preparation of any recommendations, terms or conditions, or prescriptions filed under Sections 4(e), 10, and 18 of the FPA (16 U.S.C. §§ 797(e), 803, and 811 (2006)). MMS’s participation as a cooperating agency in a Commission-led NEPA review for an OCS hydrokinetic project shall not preclude DOI from intervening, on the behalf of other DOI agencies including, but not limited to, the U.S. Fish and Wildlife Service, the National Park Service, and the Bureau of Indian Affairs, in the licensing or exemption proceeding for that project.

E. The Participating Agencies will coordinate to ensure that hydrokinetic projects meet the public interest, including the adequate protection, mitigation, and enhancement of fish, wildlife, and marine resources and other beneficial public uses. Further, the Participating Agencies will coordinate to ensure that any licenses or exemptions issued by the Commission, and all operations regulated by the Commission, with respect to a lease, easement, or right-of-way shall be consistent with the provisions of Section 8(p) of the OCSLA and other relevant provisions of that Act, the FPA, and other applicable law.

F. MMS may attach terms and conditions to leases, easements, and rights-of-way issued for hydrokinetic projects located on the OCS. The Commission will include in any license or exemption issued for such projects a requirement to comply with all terms and conditions of any OCS lease, easement, and right-of-way.

G. The Commission will not issue a license or exemption to an applicant for an OCS hydrokinetic project until the applicant has first obtained a lease, easement, or right-of-way from MMS for the site thereof.

H. MMS will provide in all leases, easements, and rights-of-way for OCS hydrokinetic projects that construction and operation of the hydrokinetic project cannot commence without a license or exemption from the Commission, except in circumstances where the Commission has notified MMS that a license or exemption is not required.

I. The Commission may inspect OCS hydrokinetic projects it authorizes to ensure compliance with the terms of its licenses or exemptions. MMS may inspect OCS hydrokinetic projects to ensure compliance with the provisions of any lease, easement, and right-of-way it issues. The Participating Agencies will coordinate inspections through the development of joint policies or regulations, as appropriate.

J. Each Participating Agency shall use its own appropriations to carry out its responsibilities under this MOU.

### III. ISSUANCE OF POLICIES AND REGULATIONS

The Participating Agencies agree to work together to the extent practicable to develop policies and regulations with respect to OCS hydrokinetic projects to carry out the purposes of this MOU. This will include, among others, processes to address hybrid (wind/hydrokinetic) projects and projects that straddle the boundaries between state waters and the OCS.

### IV. MISCELLANEOUS

This MOU is strictly for internal management purposes, does not expand or alter the scope of the Participating Agencies' respective authorities, and shall not be construed to create any legal obligation on the part of either agency or any private right or cause of action for or by any person or entity.

### V. PRINCIPAL CONTACTS

Each party hereby designates the following as the initial principal contacts for the agency. These contacts may be changed at the Participating Agency's discretion upon written notice to the other Participating Agency.

DOI: MMS Deputy Director

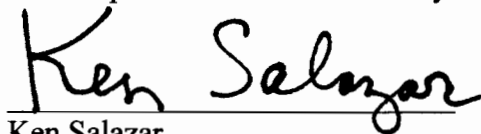
Commission: Director of the Office of Energy Projects

### VI. TERM OF THE AGREEMENT

This MOU shall take effect on the date of the last approving signature specified in Section VII, below. The MOU may be modified only upon the written agreement of the Participating Agencies. The MOU may be terminated 120 days after a Participating Agency provides written notice to the other Participating Agency.

### VII. SIGNATORIES

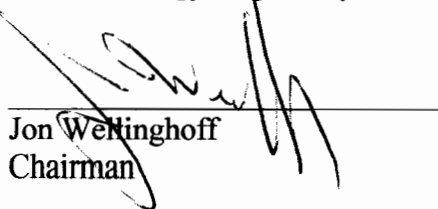
U.S. Department of the Interior by:



Ken Salazar  
Secretary

Date: **APR 09 2009**

Federal Energy Regulatory Commission by:



Jon Wellinghoff  
Chairman

Date: 04/09/09