ENERGY INDUSTRY

Legal News℠

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Minerals Management Service Action on Offshore Alternative Energy Developments

Summary: Recently, the U.S. Department of the Interior (DOI), Minerals Management Service (MMS), completed a final environmental impact statement (EIS) supporting offshore alternative energy projects on the Outer Continental Shelf (OCS) as well as other projects that make alternate use of existing facilities on the OCS for energy-related purposes or other marine-related purposes.

Background: Under the Energy Policy Act of 2005, the DOI has authority to develop and implement a program for authorizing alternative energy projects and alternate uses of existing facilities on the OCS (Program). This Program is administered by MMS, a DOI bureau. Because establishment of the Program constitutes agency action with the potential for significant impact on the environment, MMS was required to prepare an EIS. The EIS focused on alternative energy projects in which the industry has expressed an interest and ability to develop from 2007 until 2014. These projects include offshore wind, wave, and ocean current energy capture on the OCS, which includes the submerged lands outside the seaward boundaries of the states, generally beyond three nautical miles from shore (or nine nautical miles in the case of certain states on the Gulf of Mexico) out to the 200 nautical mile limit of exclusive U.S. jurisdiction.

EIS Scope: The EIS considered the proposed action — the establishment of the Program — as well as alternatives to assess potential environmental impacts and identify policies and best management practices. Generally, impacts from all phases of development and production of alternative energy sources on the OCS are expected to be negligible to moderate if the proper mitigation measures are followed. As a result, in December 2007, MMS published their completed EIS in support of establishing the Program on the OCS.

The Program: Under the Program, MMS has jurisdiction over projects on the OCS that may include offshore wind energy, wave energy, ocean current energy, offshore solar energy, and hydrogen generation. However, energy sources such as solar power and the production of hydrogen are not expected to be economically viable on the OCS for research, demonstration, or commercial ventures within the next five to seven years, so they are not included in the EIS analysis.

MMS also has jurisdiction over other projects that make alternative use of existing oil and natural gas platforms in federal waters on the OCS. Such projects may include alternative energy production, aquaculture, research, and monitoring.

Conclusion: It is anticipated that the final EIS supporting the establishment of the Program for authorizing alternative energy and alternate use activities will facilitate the development of offshore

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renewable energy projects, and will be referred to and incorporated in subsequent environmental analyses MMS does to authorize specific wind and other alternative energy projects.

For further information and the full text of the EIS, please visit http://www.ocsenergy.anl.gov.

FERC Issues First License for Hydrokinetic Project

In December 2007, the Federal Energy Regulatory Commission (FERC) issued its first-ever conditional license for a hydrokinetic energy project — the Makah Bay Offshore Wave Pilot Project — to be located in the Pacific Ocean approximately two nautical miles off the coast of the State of Washington. The proposed hydrokinetic project will harness the power of currents, waves, and tides to generate electricity. The electricity will be captured by four 250-kilowatt steel wave energy conversion buoys and then transported along a 3.7-mile-long underwater transmission cable to a power station on the shore.

The FERC license is conditioned upon Finavera Renewables Ocean Energy, Ltd. (Finavera), the licensee for the project, obtaining all state and federal permits for the project. Under the terms of the license, Finavera must begin on-site construction within two years from the date of the license and complete construction within three years from the date of the license. To protect against potential adverse impacts, the license contains various mitigation measures and allows the FERC to shut down or remove the project if it finds that operation negatively impacts the surrounding environment.

This new policy of granting conditional licenses to hydrokinetic projects demonstrates the FERC's policy of improving the ability of project developers to secure financing for these innovative projects and its continued commitment to renewable energy projects.

Utilities in Southwest Power Pool Apply to Terminate Mandatory Purchase Requirement of Power From Qualifying Facilities

In late November 2007, a group of utilities located in the Southwest Power Pool region applied to the FERC to terminate their requirement under the Public Utility Regulatory Policies Act of 1978 to purchase power generated by qualifying facilities greater than 20 megawatts in their service territories. The utilities have argued that they have met their obligation to provide such qualifying facilities with a "meaningful opportunity" to sell capacity to buyers other than the utility to which each facility is interconnected. The utilities have also argued that the lack of a Day 2 market (an independently administered auction-based day-ahead market) in the Southwest Power Pool region does not impede qualifying facilities from making power sales in the region. Finally, the utilities claim that removing the mandatory purchase requirement would force qualifying facilities to become more efficient and to compete with other sellers in the region.

In protest of the utilities' application, many developers of wind energy projects across the nation and a coalition of wind industry participants, including the American Wind Energy Association, have filed protests with the FERC to rebut the utilities' arguments that qualifying facilities have nondiscriminatory access to energy markets. This is a case of first impression before the FERC in which utilities have applied to terminate this mandatory purchase requirement in a region without a Day 2 market for the sales of energy. The FERC will act on this application by the end of January 2008 and, although it is difficult to predict the outcome of such a ruling, the FERC will likely thoroughly scrutinize the economic analyses presented by the parties in making its decision.

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