

TO: California Marine Renewable Energy Working Group

FROM: Laura Engeman, California Ocean Protection Council

RE: Memorandum of Understanding between the Federal Energy Regulatory Commission and the California Natural Resources Agency, the California Environmental Protection Agency and the California Public Utilities Commission Regarding Coordinated Review of Hydrokinetic Facility Authorizations in Marine Waters within the State of California

A Memorandum of Understanding between the State of California and the Federal Energy Regulatory Commission (FERC) was executed on May 13, 2010 (attached). This document represents a template for cooperation between state and federal officials on hydrokinetic energy projects in California marine waters—within 3 nautical miles of the coast line-- to coordinate application review schedules, encourage pilot projects prior to commercial development, and to coordinate environmental review, where possible.

As outlined in the agreement, the California Natural Resources Agency, the California Environmental Protection Agency, and the California Public Utilities Commission will coordinate with the following California agencies to ensure that the MOU purposes are met: the California Coastal Commission, the San Francisco Bay Conservation and Development Commission, the California State Lands Commission, the California Department of Fish and Game, the California Energy Resources Conservation and Development Commission, the California State Water Resources Control Board, California Parks and Recreation and the California Ocean Protection Council (OPC).

The following are the primary responsibilities of the California agencies as part of this MOU:

- **Inform FERC when a permit application has been received.**
- **Coordinate informational requests and sharing existing information on projects as each agency becomes aware of a permit application.**
- **Coordinate with FERC on a schedule for reviewing applications, identifying potential issues, and determining information and studies necessary for state and federal project authorizations. This includes coordinating of National Environmental Policy Act (NEPA), California Environmental Quality Act (CEQA) and Coastal Zone Management Act (CZMA) consistency determination.**
- **Develop hydrokinetic project siting recommendations to be submitted to the Commission for consideration during project review.**
- **Confer with the Bureau of Ocean Management, Regulation, and Enforcement (formerly Minerals Management Service) for projects that are located on the Outer Continental Shelf.**
- **Share information from project developers regarding their facility's technical specifications, including energy production, potential for electricity generation,**

operating history, outages, use of fossil fuels, first point of interconnection to the Western Energy Coordinating Council (WECC) transmission system, etc.

- **Designate primary management contacts**

OPC will provide logistical and managerial support for the implementation of the MOU. OPC staff will use the California Marine Renewable Energy Working group meetings as the primary avenue for implementing the MOU, however other project specific meeting may also be held to further coordinate reviews of the project.

**MEMORANDUM OF UNDERSTANDING BETWEEN
THE FEDERAL ENERGY REGULATORY COMMISSION
AND
THE CALIFORNIA NATURAL RESOURCES AGENCY, THE CALIFORNIA
ENVIRONMENTAL PROTECTION AGENCY AND THE CALIFORNIA
PUBLIC UTILITIES COMMISSION**

**REGARDING COORDINATED REVIEW OF HYDROKINETIC FACILITY
AUTHORIZATIONS IN MARINE WATERS WITHIN THE STATE OF
CALIFORNIA**

I. Information and Background

California has a goal of producing 33 percent of its electricity from renewable energy sources by 2020. Powerful wave energy off the coast of California has the potential to serve as an additional renewable energy source for California. Currently, several energy technology developers and utilities have expressed interest in testing and deploying devices in the marine waters within the state of California in an effort to harness the state's wave energy. California supports the development of this new energy source if implemented effectively, efficiently, and in compliance with all state and federal environmental standards and public trust needs.

The Federal Energy Regulatory Commission (the Commission) has authority to license under Part I of the Federal Power Act, 16 U.S.C. §§ 791a *et seq.* (FPA) non-federal wave and tidal energy projects, also referred to as hydrokinetic projects, located in California state marine waters. California has authority under federal law regarding hydrokinetic projects located in, and adjacent to its marine waters, including the Submerged Lands Act of 1953, 43 U.S.C. 1301; Coastal Zone Management Act (16 U.S.C. §§ 1451 *et seq.*), the Clean Water Act (33 U.S.C. §§ 1251-1387), the National Historic Preservation Act (16 U.S.C. §§ 470 *et seq.*), and the FPA. California state law also includes provisions applicable to regulating and siting hydrokinetic projects in its marine waters, including proprietary leasing authorization, authorization to use waters and the seabed of the state, authorization to use the shoreline, and authorization for marine uses that may impact marine life. [*E.g.*, California Organic Act, Cal. Const., Art. III, § 2; Cal. Gov. Code, §§ 170, 171; Cal. Harbors and Nav. Code § 107; California Coastal Act (Cal. Pub. Res. Code § 30000, *et seq.*)].

Memorandum of Understanding Regarding Coordinated Review of Hydrokinetic Facility Authorizations in California Marine Waters

II. The Parties

This Memorandum of Understanding (MOU or Agreement) is entered into by and between the California Natural Resources Agency, the California Environmental Protection Agency, and the California Public Utilities Commission ("California Parties") and the Commission (collectively referred to as "Parties"). This Agreement will become effective as of the latest date shown on the signatures page(s), which are attached to this Agreement and incorporated herein.

III. The Purpose

This Agreement seeks to develop a procedure for coordinated and efficient review of proposed hydrokinetic projects that is responsive to environmental, economic, and cultural concerns, while providing a timely and predictable means for developers of such projects to seek necessary state and federal approvals. This procedure will include study, monitoring, and evaluation of the energy potential and economic viability of hydrokinetic projects, as well as the environmental, economic, cultural and other effects of these projects. Where lawful, relevant information will be shared among the Parties and, will inform decision-making concerning request for authorizations for hydrokinetic projects within California marine waters.

The California Parties will coordinate with the following California agencies to ensure that the purposes outlined in this Agreement are met: the California Coastal Commission, the San Francisco Bay Conservation and Development Commission, the California State Lands Commission, the California Department of Fish and Game, the California Energy Resources Conservation and Development Commission, the California State Water Resources Control Board, California Department of Parks and Recreation and the California Ocean Protection Council. These agencies are herein referred to as the "California agencies".

IV. Principles of the Agreement

1. The Parties mutually agree to support timely processing of applications, consistent with all state and federal review requirements, for regulatory and other approvals required for hydrokinetic projects in California marine waters to promote clean, renewable sources of energy.
2. The Parties recognize that any pilot project license or other license issued by the Commission for a hydrokinetic energy project in California state waters must give equal consideration to power and development purposes and the purposes of energy conservation, the adequate protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other

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aspects of environmental quality for beneficial public purposes. [16 U.S.C. § 797(e); § 803(a)(1)(2000).]

3. The Parties acknowledge that California intends to develop hydrokinetic project siting recommendations that would include guidelines for siting consistent with state marine protection laws, navigation needs; commercial, recreational and fishery habitat needs; and other public trust and state authorized marine uses. California may submit these guidelines as part of a comprehensive plan, or other process to the Commission for consideration. The Commission agrees that it will consider incorporating these guidelines as permit or license conditions to the fullest extent possible. In addition, the Commission agrees to consider any terms and conditions recommended by California under section 10(a) of the FPA.
4. California recognizes that a Commission license may not be required under Part 1 of the FPA in certain limited circumstances for the testing of hydrokinetic new technology [111 FERC ¶ 61,024]. Therefore, there may be wave and tidal energy projects that proceed on an experimental basis without a Commission license while additional data concerning the effects of such projects are gathered. Regardless, the Parties acknowledge that required California permits, leases, or licenses must be obtained for any proposed project. These permits, leases, or licenses will require hydrokinetic technology performance reporting and study results, and safeguards to ensure that the project will not have a significant adverse effect on environmental, economic, and cultural resources.
5. The Parties agree to encourage applicants to seek pilot project licenses prior to a full commercial license to allow adequate testing of untested devices or device operations before commercial deployment. For pilot project licenses in California marine waters, the Commission will consider limiting the footprint and/or the number of devices that can be tested in order to minimize environmental risk. In addition, the Commission will require that pilot projects have a short term (around five years), not be located in sensitive areas, include a standard condition requiring project alteration or shutdown in the event that there was an unacceptable level of environmental effect, and require decommissioning and site restoration at license expiration if a standard license is not sought, consistent with the Commission-issued White Paper on Hydrokinetic Pilot Project Licensing (April 14, 2008). California permits, leases, or licenses will require hydrokinetic technology performance reporting and study results, and safeguards to ensure that pilot projects will not have a significant adverse effect on environmental, economic, and cultural resources.
6. When any of the Parties becomes aware that a prospective applicant may seek a preliminary permit or license from the Commission to study or develop a hydrokinetic project in California marine waters, the Party obtaining the information will promptly notify the designated representative of the other Party. The California Parties, in cooperation with other California agencies, will work

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with the Commission to coordinate review of the project, identify potential issues, and determine information and studies necessary for issuing required state and federal project authorizations. The Parties will consult with prospective applicants and stakeholders in determining appropriate information and study needs.

7. Where a prospective applicant seeks to use any Commission licensing process for hydrokinetic projects to be located within California marine waters, the Commission and the California Parties, with assistance from the California agencies, agree to confer, as early in the process as practical, in order to reach agreement on a schedule for processing the application as expeditiously as practicable, while ensuring sufficient time for the necessary state and federal reviews. Such a schedule to be issued by the Commission will include proposed timelines for review of the application, issuance of any environmental document required, and the issuance by California and federal agencies of any permits, licenses, and leases that may be required under federal or California law. To the extent feasible, the California Parties will complete any actions required of them within timeframes established in the schedule. Notwithstanding the foregoing, the California Parties will complete such actions by deadlines established by law.
8. The Parties further agree that they will use their best efforts to encourage other federal agencies and stakeholders that have an interest in a proposed hydrokinetic energy project within California marine waters to help develop and comply with a coordinated schedule for the review of the project.
9. The Parties agree that they will work to coordinate their environmental reviews of any proposed hydrokinetic projects within California marine waters and subject to Commission licensing jurisdiction, so that documents prepared by the Commission for review under the National Environmental Policy Act 42 USC §§ 4231 *et seq.* (NEPA) may, to the extent practicable and permitted by California law, be used by California to satisfy the requirements of the California Environmental Quality Act (CEQA) [Public Resources Code section 21000, *et seq.* and 14 Cal. Code Regs. 15000, *et seq.*] and other similar requirements that are enforceable policies of California's Coastal Zone Management Program under the CZMA, or any other required actions to be taken by California. The Parties also agree to consult with stakeholders, including project developers and local communities, concerning the design of studies and environmental measures (including adaptive management and mitigation).
10. Where a prospective applicant seeks to use any Commission licensing process for hydrokinetic projects to be located within California marine waters and/or the adjacent Outer Continental Shelf, the Parties agree to confer, as early in the process as possible, with the Minerals Management Service to schedule federal processing of the application and review under NEPA in a manner that is coordinated and does not create two separate review processes for California.

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11. The Parties recognize that the Commission cannot issue a license for a hydrokinetic facility within California marine waters that will affect any land or water use or natural resource of California unless the California Coastal Commission or the San Francisco Bay Conservation and Development Commission concurs that the project will be consistent with the enforceable policies of California's approved Coastal Management Program or waives concurrence. Any such license will also include, to the maximum extent feasible, the terms and conditions determined by other California agencies (such as those required by CEQA or other state laws and regulations) to be necessary to avoid, minimize, and mitigate damage to fish, wildlife and public trust resources.
12. The Parties recognize that California will evaluate the potential of California hydrokinetic energy projects to meet the state's renewable energy development policies and renewable energy portfolio standard. California also certifies energy facilities as eligible for its renewable portfolio standard. To facilitate California's ability to evaluate hydrokinetic energy potential, the Parties agree to share information from project developers regarding their facility's energy production, including, but not limited to, a facility's nameplate capacity, capacity factor, the electricity generation or potential for electricity generation, operating history, outages, use of fossil fuels, first point of interconnection to the Western Energy Coordinating Council (WECC) transmission system, and, if applicable, power purchase contract awards, during a project's licensing application process and/or license term; provided that dissemination of the information is not otherwise protected from disclosure.
13. The Parties will designate primary management contacts to resolve any procedural issues that may arise in the review of a specific proposed hydrokinetic project within California marine waters. However, nothing in this MOU shall compromise or affect the rights of any party to seek relief through any available administrative or judicial process.
14. Nothing in this MOU requires any party to take any action that is contrary to applicable federal or state law or regulation.

V. Amendment and Termination

15. This MOU may be modified at any time by the mutual written agreement of the Parties. Any of the Parties may terminate this MOU upon thirty (30) days written notice to the other Parties. During this period, the Parties shall make good faith efforts to resolve any disagreement.

**Memorandum of Understanding Regarding Coordinated Review
of Hydrokinetic Facility Authorizations in California Marine Waters**



Jon Wellinghoff, Chairman
Federal Energy Regulatory Commission

Date: 5/13/10



Lester Show, Secretary
California Natural Resources Agency

Date: 5/11/10



Linda Adams, Secretary
California Environmental Protection Agency

Date: 4/29/10



Paul Clanon, Executive Director
California Public Utilities Commission

Date: 5.4.10