ENERGY & INFRASTRUCTURE BULLETIN

December 2018

New Act to Promote Offshore Wind Power in Japan's Territorial Waters

Mori Hamada & Matsumoto

Takahiro Kobayashi
+81 3 5223 7768
takahiro.kobayashi@mhmjapan.com

Shigeki Okatani
+81 3 5220 1862
shigeki.okatani@mhmjapan.com

Yoshihito Kuramochi
+81 3 6266 8568
yoshihito.kuramochi@mhmjapan.com

I. Background of the Act

The Act on Promotion of Use of Marine Areas for Development of Marine Renewable Energy Generation Facilities (the "Act") was enacted on November 30, 2018, and subsequently promulgated on December 7, 2018.

This Act is part of the Japanese government's policy to promote offshore wind power at various levels, which has become a priority in the government's maritime policies, in its efforts to address carbon emissions and encourage industrial development.

The government amended the Ports and Harbors Act two years ago to include provisions for regulation of the use of marine areas around ports (*kouwan kuiki*, or port areas) for renewable energy projects. However, until now, there has not been any legal framework at the national level regarding the use of marine areas outside port areas (such marine areas are generally called "*ippan kai-iki*", which literally means "general marine areas"), despite the fact that such marine areas generally have much larger areas available to accommodate the installation of power generation facilities. Accordingly, it has been widely pointed out that (i) financing of offshore wind power projects is difficult due to a lack of legal framework to ensure the long-term occupancy of such marine areas, and (ii) it is difficult to reach agreement with the local community due to the absence of a framework to accommodate the interests of relevant stakeholders (including existing users of such marine areas).

In order to address these problems, the Act established a legal framework to ensure the long-term occupancy of Japan's territorial waters and internal waters (excluding port areas, the use of which is already regulated under the Ports and

Harbors Act, as mentioned above) and to accommodate the interests of a developer as well as existing users of marine areas targeted for the development of marine renewable energy projects.[1]

The effective date of the Act will be specified in a cabinet order within a period not exceeding four months from the day of promulgation. The Cabinet is also supposed to publish, by the effective date, a basic policy to promote the use of marine areas for the development of marine renewable energy generation facilities (the "Basic Policy") (Article 7).

II. Main features of the Act

The Act has two main features, which are summarized as follows[2]:

1. The Act establishes special zones for the development of marine renewable energy generation facilities (each a "Promotion Zone") and introduction of systems to approve occupancy plans and grant occupancy approval.

In relation to such Promotion Zones, the Act:

(1) provides for the procedures for the designation of a Promotion Zone, the tendering of an operator, and the approval of occupancy;

(2) grants authority to the Minister of Land, Infrastructure, Transport and Tourism ("MLIT Minister") to approve occupancy plans and to supervise the operator;

(3) provides for the procedure for the approval of occupancy plans through a public tender process (and, as the occupancy plan includes the procurement price, such tender process would also include the tender for the procurement price under the feed-in tariff program for renewable energy (the "FIT Program")); and

(4) provides that the maximum occupancy period of a Promotion Zone is 30 years.

[1] According to the definition in the Act, the applicable energy sources are not limited to wind power, but include other renewable energy sources stipulated in Article 2, Paragraph 4 of the Act on Special Measures Concerning Procurement of Electricity from Renewable Energy Sources by Electricity Utilities (the "Renewable Energy Act") as designated by an ordinance as being available for electricity energy sources in marine areas (Article 2, Paragraph 3). However, as wind power seems to be the main form of marine renewable energy being targeted by the Act for the time being, we will focus our commentary in this bulletin on the application of this Act to offshore wind power projects.

[2] The contents of the Act is the same as the bill that was submitted to the 196th ordinary session of the National Diet (the Japanese legislative branch) in March 2018 except for an additional provision requiring the MLIT Minister to provide operators with information on ports available for transporting personnel and materials (Article 27).

2. The Act also sets out the process for the establishment of a Council in respect of each Promotion Zone.

(1) The members of a Council will include relevant authorities who will confirm whether the proposed project is consistent with their respective regulations.
(2) The Council carries out consultation with existing users of the relevant marine areas and other stakeholders.
(3) The Council's opinion will be considered in the process of designating a Promotion Zone (see section 2(4) of part III below).

In the following sections, we will introduce the details of the Act and discuss the remaining issues. Unless otherwise stated, a reference to an article hereafter means an article of the Act.

III. Designation of Promotion Zone

1. Standards for Designation of Promotion Zone

The Minister of Economy, Trade and Industry (the "METI Minister") and MLIT Minister will designate a Promotion Zone in accordance with the Basic Policy (Article 8, Paragraph 1).

An area designated as a Promotion Zone must conform to the following standards:

(1) The marine and other environmental conditions of the area are appropriate for the proposed project;
(2) It is possible to properly locate power generation facilities in the area without hindering sea routes and the use, maintenance and management of ports in and around the Promotion Zone;
(3) It is possible to use the area and the ports near the area in an integrated manner;
(4) The connection to the electricity utilities' power grids will be properly secured in the area;
(5) Fisheries in and around the area will not be affected; and
(6) The area is not currently subject to any other zoning laws.

2. Procedures for Designation of Promotion Zone

A Promotion Zone will be designated pursuant to the following procedures (Article 8, Paragraphs 2 to 6):

(1) Investigation of the proposed area;
(2) Prior announcement of an area to be designated as a Promotion Zone (the proposed designation plan, together with a written statement of the reason for the designation, will be exhibited for two weeks);
(3) Submissions from stakeholders during the two-week disclosure period;
(4) Consultation with the relevant authorities (including the Minister of Agriculture, Forestry and Fisheries and the Minister of the Environment), hearing of opinions from relevant prefectural governors and the Council (see part IV below);
(5) Designation of the Promotion Zone; and
(6) Announcement of the designation of the Promotion Zone.

According to the discussion at the Diet (the "Diet Discussion"), the government will, after the enactment of the Act, (i) promptly provide detailed arrangements to expedite such procedures in an appropriate manner, and (ii) continue a survey (by (among others) inquiring with relevant prefectural officers) of potential Promotion Zones.

3. Issues relating to Designation of Promotion Zone

The first issue is that the Promotion Zone must be located in Japan's territorial waters and internal waters (see Article 2, Paragraph 5). Waters outside of the territorial sea is out of the scope of the Act because, according to the Diet Discussion, to the extent of the government's knowledge, there is no specific plan to use such areas to date. However, the government also suggested that a new legal framework for the use of the exclusive economic zone outside of the territorial sea may be discussed, depending on the actual utilization of the Act and future demand for such use.

Secondly, it is unclear at this stage how the requirement as to grid connection (see section 1(4) above) will operate. Based on the materials which the government submitted to the Subcommittee[3], it seems unlikely that an operator developing an offshore wind power project in the Promotion Zone

[3] See Subcommittee (4th meeting), material No.4 "Promoting Introduction of Power with Geographic Restrictions – the meaning and promotion plans of introduction of offshore wind power" (February 22, 2018) on page 12.

would receive favorable treatment in respect of the grid connection. In addition, it also seems unlikely that the government would ensure that all permissions and approvals necessary for such project can be obtained, although discussion with relevant regulators will be held to some extent in the Council.

Certainty of occupancy is another issue. Occupancy of marine areas within the Promotion Zone by a successful bidder (the "Appointed Operator" (*Sentei Jigyousha*)) in a public tender process (which is explained in section 1 of part V below) is secured to some extent under the Act: once the Promotion Zone has been designated, the MLIT Minister's approval is required for all occupancies of the marine areas within the Promotion Zone (Article 10, Paragraph 1), and where the Occupancy Plan (which is explained in section 2 of part V below) has been approved, only the Appointed Operator may apply for such approval (Article 19, Paragraph 3). However, there are no provisions which forfeit or restrict the rights of stakeholders who did not provide written submissions during the public notice period (see section 2(2) above). Therefore, even after the Promotion Zone is designated, it is theoretically possible that persons who claim a right to use the Promotion Zone (or any other rights in respect of the Promotion Zone) will come forward.

It should also be noted that the written stakeholder submissions (referred to in section 2(3) above) will be merely attached to the material used for the consultations with the relevant authorities (which are referred to in section 2(4) above). Therefore, it will be necessary to consider how such submissions will be dealt with in the course of the actual operation of the Council.

The key performance indicator set by the government in conjunction with the Act is the commencement of commercial operations of offshore wind farms (with stakeholders' consent) in at least five Promotion Zones by Fiscal Year 2030, in which year the government aims to have 10,000,000kW (including 820,000kW offshore) or more of wind power capacity in the total energy mix in Japan. It is noteworthy that, according to the Diet Discussion, five is not the upper limit of the number of Promotion Zones to be designated.

IV. Council

1. Establishment of Council

The Act provides that the METI Minister, the MLIT Minister, and the governors of the relevant prefectures may organize a Council to carry out the necessary consultations for the designation of a Promotion Zone and the

development of a marine renewable energy project within the Promotion Zone (Article 9, Paragraph 1). A Council may also be formed upon request by the governors of the relevant prefectures, in which case the METI Minister and the MLIT Minister should respond to the request (Article 9, Paragraphs 3 and 4). Given this, it is expected that, in practice, a Council would be established in respect of every Promotion Zone.

2. Members of the Council

The Council will consist of the following members (Article 9, Paragraph 2):

(1) the METI Minister, MLIT Minister, and the governors of the relevant prefectures;

(2) the Minister of Agriculture, Forestry and Fisheries and the mayors of relevant municipalities; and

(3) the relevant local fishery association and other stakeholders, academic experts and other persons deemed necessary by the METI Minister, the MLIT Minister and the governors of the relevant prefectures.

Members of the Council are required to respect the outcome of the Council's consultation process (Article 9, Paragraph 6).

3. Advantages and Challenges of the Council

The establishment of the Council is expected to facilitate the development of marine renewable energy projects within the relevant Promotion Zone, as the participants will have an opportunity to voice their interests (and accommodate other participants' interests) in the Council and will be required under the Act to respect the results of discussions in the Council. However, the framework for Council consultations under the Act also presents some challenges in the development of projects, which we explain further below.

(1) Relationship with relevant authorities

The Council framework should enable the Appointed Operator to expect to smoothly obtain permission and approvals for the project, given that the relevant authorities participate in the Council and discuss regulatory issues in that forum.

However, it should be noted that occupancy approval under the Act is not designed to grant all the permissions and approvals necessary for a marine renewable energy project. In addition, the result of the consultations at the Council does not legally bind the authorities in charge of such permissions and approvals (other than the obligation of the Council members to "respect"

the outcome of the consultations in the Council under Article 9, Paragraph 6). Furthermore, some permissions and approvals may be required from authorities who are not members of the Council, and accordingly developers must obtain such permissions and approvals independently of the Council process. For example, developers may need to complete environmental impact assessment procedures separately from the Council process if the Minister of the Environment, who is not a mandatory member of the Council, is not included as a Council member.

(2) Relationship with stakeholders

It is expected that, by having existing users of the marine areas (such as fishermen and shipping companies) participate in the Council, the Appointed Operator and the stakeholders would have an opportunity to better understand each other's respective interests.

However, the framework for Council consultations under the Act does not guarantee that agreements will be achieved among the Council members.

Moreover, as the Appointed Operator will need to negotiate with non-members of the Council outside of the Council consultation process, it will be critical to ensure that, to the extent possible, all stakeholders participate in the Council consultation process.

(3) Key roles of the Council

The Council is expected to remain even after the Promotion Zone is ultimately designated, in order to provide the stakeholders with a forum to discuss new issues in the course of construction, operation, and decommissioning of offshore wind farms. An example in the Diet Discussion was the risk of an offshore wind power project having a material adverse effect on the environment or the fishing industry in the relevant area. In this case, the Council will be an important venue to investigate the cause and plan appropriate countermeasures based on the opinions of the members.

V. Selection of Appointed Operator

1. Formulation of Occupancy Guideline

A developer of a renewable power project in a marine area within a Promotion Zone will be selected and appointed through a public tender process.

Separately for each Promotion Zone, the METI Minister and the MLIT

Minister will provide guidelines on the implementation of the public tender process and on the occupancy of a marine area for the purpose of marine renewable energy generation facilities within a certain Promotion Zone (the "Occupancy Guideline" (*Koubo Senyo Shishin*)) (Article 13, Paragraph 1).

The Occupancy Guideline will stipulate the following items (Article 13, Paragraph 2):

(1) type of power generation facilities;
(2) the area that is to be occupied;
(3) commencement date of occupancy;
(4) proposed output capacity of power generation facilities;
(5) criteria for qualifications of participants in the public tender process;
(6) amount of the guarantee to be provided by bidders;
(7) maximum amount of tariff (per kilowatt);
(8) method of determining the tariff (which will be based on the tenders received);
(9) procurement term under the FIT Program;
(10) deadline for the application for certification pursuant to the Renewable Energy Act by the successful bidder (Appointed Operator);
(11) matters concerning the use of a port;
(12) matters concerning the removal of power generation facilities at the end of the occupancy period;
(13) the effective period for approval of the Occupancy Plan;
(14) matters concerning coordination between the developer of the power project and the relevant authorities;
(15) the evaluation criteria to be used for the selection of the Appointed Operator; and
(16) other matters concerning the implementation of the public tender process and other necessary matters.

2. Selection of Appointed Operator and Approval of Occupancy Plan

A developer who intends to operate a power project in a marine area within a Promotion Zone must submit an Occupancy Plan (*Koubo Senyo Keikaku*) in the public tender process (Article 14, Paragraph 1). The METI Minister and the MLIT Minister will, after examining whether the proposed Occupancy Plan meets certain standards (such as its appropriateness in light of the Occupancy Guideline), evaluate the Occupancy Plan and select an Appointed Operator. Selection of the successful Appointed Operator will take into consideration the plan most appropriate to enable the long-term, stable and efficient

implementation of the marine renewable energy project (Article 15, Paragraphs 1 to 3).

The METI Minister and the MLIT Minister will, in designating the area and period of occupancy, approve that the Occupancy Plan submitted by the Appointed Operator is appropriate (Article 17, Paragraph 1).

An Occupancy Plan should contain, for example, the following items (Article 14, Paragraph 2):

(1) area and period of occupancy;
(2) details, including the timing of implementation, of the power project;
(3) method and schedule of construction;
(4) type, structure, output, and methods of maintenance and management of power generation facilities;
(5) the applicable tariff;
(6) system and ability to coordinate with relevant ministries and agencies and local governments; and
(7) finance plan and business projection.

3. Effect of Selection and Approval

The Appointed Operator will be required to install, maintain and manage the marine renewable energy generation facilities in accordance with its approved Occupancy Plan (Article 19, Paragraph 1).

The MLIT Minister will, upon application for approval by an Appointed Operator, approve an occupancy based on an approved Occupancy Plan (Article 19, Paragraph 2). It is important to note that no other person may apply for approval of occupancy during the period of occupancy of the Appointed Operator (Article 19, Paragraph 3).

According to the Diet Discussion, (i) the approval of occupancy will be granted separately for each facility, not for the whole Promotion Zone, (ii) charge for occupation will be determined by taking into consideration similar charges applicable under other laws or local ordinances and calculation methods used in Europe, and (iii) the charge will be calculated based on, for example, the horizontally projected area of the facilities.

The procurement prices (tariff) and procurement periods for marine renewable power generation facilities will be determined based on the results of the public tender process under the Act, instead of the provisions of Article 3, Paragraph 1 and Article 4 of the Renewable Energy Act (Article 16).

4. Issues concerning the Selection Process of the Appointed Operator

The report of the Committee on the Calculation of the Procurement Price[4] suggested that, once the Act is implemented, the public tender process will be used for the determination of the procurement price (i.e. the tariff under the FIT Program) of the renewable energy generated by projects to which the Act applies. The committee seems to have taken into account the current circumstances of the application process for grid connections, the current offshore wind power market in Europe and the need to minimize, to the extent possible, the public financial burden of the renewable surcharge for the FIT Program. However, the immediate introduction of such public tender processes to offshore wind power projects at this stage may be controversial in the current Japanese market, as there have not been any commercial offshore wind power projects implemented so far and the related industries are not yet well-developed in Japan.[5]

In addition, the Diet Discussion gave some insight on the evaluation of the bidders, as outlined below.

(1) First-mover advantage

How to treat public tender participants who had already proceeded with planning offshore renewable energy generation projects before the implementation of the Act is an issue. The Diet Discussion suggested in this regard that:

(a) Although the proposed procurement price is the most important factor in evaluating bidders, as it directly affects the consumers, other factors (such as the details of the project, finance plan, and business projection, and ability to coordinate with the relevant authorities) will also be taken into consideration in light of ensuring the stability of a long-term project;

(b) In particular, including “coordination with relevant authorities” (please see item (14) in section 1 and item (6) in section 2 above) in the evaluation criteria will give an advantage to developers who have already started discussions with local authorities and stakeholders;

[4] The Committee on the Calculation of the Procurement Price, “Opinions on Procurement Prices from FY2018” (February 7, 2018), page 26.

[5] According to the Diet Discussion, case studies in Europe indicate that lower procurement prices for marine wind power projects can be achieved by allowing large-scale development in offshore areas where wind conditions are favorable. Therefore, the Act introduced the public tender process in order to achieve an appropriate price level by promoting offshore renewable energy projects to the maximum extent possible.

and

(c) The METI Minister and the MLIT Minister will select a bidder who has submitted an Occupancy Plan that demonstrates its ability to implement a long-term project in the most stable and efficient way, in accordance with the evaluation criteria under the Occupancy Guideline.[6]

(2) Qualifications of participants

The Diet Discussion also touched upon the proposition, based on public opinion, that foreign companies should be excluded from participating in the public tender process because, in general, marine areas within the scope of the Act are public property of Japan. Although the government was of view that such limitation based on nationality is not against trade rules (including WTO rules), as a general principle, foreign enterprises should also be allowed to participate in the process as some may be able to bring their advanced experience in the European market to Japan. In any case, the government considers it essential to ensure the stable operation of projects, which will occupy marine areas for a long period of time, and a cooperative relationship with local communities. In addition, a participants' ability to respond promptly in emergency situations and to communicate with local stakeholders will be an important factor in evaluating the bidders; a similar consideration is also given in the public tender process for the use of port and harbor areas, which requires the participant to have a business office in Japan.

(3) Removal of power generation facilities

According to the Diet Discussion, participants need to give assurance on the removal of the power generation facilities at the end of the occupancy period by stating the method and cost of removal in the Occupancy Plan. As for the measures to be taken in the case the Appointed Operator becomes insolvent, the government is examining cases in foreign countries. It is also noteworthy that the government's recently announced policy aims to introduce a framework for the organization handling tariffs and surcharges under the FIT Program to withhold from the tariff and reserve the funds for removing solar power generation facilities, which framework might also be

[6] The reason why the government mentioned this item (c) in relation to first-mover advantage is unclear from the Diet Discussion. However, it might be possible to say that this criterion is usually in favor of a first-mover.

introduced for offshore wind power projects.

The scope of the obligation to remove was also discussed. According to the Diet Discussion, the relevant governmental authorities are supposed to discuss effective measures, taking into account recent technological innovations (such as the development of easy-to-remove foundation structures) and regulations in foreign countries.

VI. Remaining Issues

In relation to wind power projects (including offshore wind power), developers face the significant challenge in ensuring grid connection within reasonable cost, as well as securing the rights to use project sites. As mentioned above, the Act does not address these issues. The discussions to introduce the Japanese version of "connect and manage" and the efforts to reduce grid connection costs are being considered separately to this Act.[7]

According to the Diet Discussion, the government will consider allowing the Appointed Operator who has not secured a grid connection to acquire grid connection capacity from a successful bidder in a separate offering process for grid connection capacity (*dengen setsuzoku anken boshu* process).

In addition, offshore wind power projects need to separately implement the necessary environmental impact assessment procedure, which in itself has a considerable time and cost. As this is also the case with offshore wind power projects to which the Act applies, the acceleration of such procedures remains a challenge to be addressed in the Japanese government's endeavors to promote offshore wind power.[8]

It should also be noted that the Act established rules applicable to marine renewable energy projects proposed to be located within Promotion Zones, which do not apply to marine renewable energy projects outside a Promotion Zone (i.e., the Act neither prohibits nor approves such projects). This point has been left for future discussion.

VII. Conclusion

In the Diet Discussion, the government showed its intention to swiftly implement the Act and a positive attitude towards addressing issues surrounding offshore wind power projects in Japan: for example (i) improving

[7] See Subcommittee (4th meeting) material No.4 on page 12.
[8] See Subcommittee (4th meeting) material No.4 on page 12.

port facilities to be used for the construction and maintenance of offshore wind farms and (ii) overcoming the shortage of total grid connection capacity, both of which are essential to the promotion of offshore wind power.

Despite the issues outlined above, this Act is definitely a first step towards the development of commercial offshore wind power projects in marine areas outside port areas. We welcome the Act as it will introduce the legal framework regarding the use of Japan's territorial waters and internal waters outside port areas, which have not been subject to any clear legal rule until now. We are hopeful for the prompt implementation of the Act and swift designation of Promotion Zones.

(Contacts)
Public Relations
mhm_info@mhmjapan.com
+81-3-6212-8330
www.mhmjapan.com