



LEGAL UPDATE

New Regulations on Offshore Power Generation

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(i) Overview

Following the enactment of Decree No. 10,946/2022 ("Decree"), the Brazilian legal framework for offshore power generation projects has been further regulated by (i) MME¹ Ordinance No. 52/2022 ("Ordinance"); and (ii) MME/MMA² Joint Ordinance No. 03/2022 ("Joint Ordinance"), which are the result of public consultations Nos. 134/2022 and 135/2022, held by MME in September.

The Ordinance establishes the rules and additional guidelines for the assignment of use of offshore areas for power generation, while the Joint Ordinance instructs for the creation of the Unified Portal for Managing the Use of Offshore Areas ("PUG-Offshore³"). Both the Ordinance and the Joint Ordinance became effective simultaneously on November 1, 2022. For a better understanding of this new regulatory structure, we present below the key provisions of each diploma.

(ii) MME Ordinance No. 52/2022

The Ordinance applies to offshore projects for power plant operation under the regime (i) of independent power production; or (ii) self-production. Although addressed by the Decree, the Ordinance clarifies that the free use assignment for technological research and development projects will be regulated by a specific MME ordinance.

The use assignment for implementing hybrid power projects in oil and gas E&P areas is also not encompassed by the Ordinance, which expressly sets forth that use assignment will not be granted in relation to prisms overlapping with:

- a. Areas under oil and natural gas E&P contracts;
- b. Areas awarded under bidding procedures with the respective oil and natural gas E&P contracts pending signature; and
- c. Pre-Salt and strategic areas.

Pursuant to both the Decree and the Ordinance, such projects will be regulated by a joint diploma to be issued by the Brazilian National Electric Energy Agency ("ANEEL") and the National Agency of Petroleum, Natural Gas and Biofuels ("ANP").

Brazilian National Electric Energy Agency's Role.

In line with the Decree, the Ordinance delegates to ANEEL the attribution to execute the Use Assignment Agreements and to perform all administrative acts necessary for its formalization. Such acts may include:

¹ Ministry of Mines and Energy.

² Ministry of Environment.

³ Portal Único de Gestão do Uso das Áreas Offshore.

- Execution, termination and amendment of Use Assignment Agreements;
- Promotion of public tenders to offer prisms defined by the MME, under the Planned and Independent Assignments procedures; and
- Definition of calculation and payment methods, as well as the applicable sanctions for default or delay and discounts in payments due to the Federal Government.

ANEEL is also responsible for setting the technical, operational, economic-financial and legal requirements for qualification purposes of companies interested in participating in the tender procedure.

The Ordinance requires ANEEL to prioritize the use of the PUG-Offshore platform to manage the offshore areas. PUG-Offshore allows for the monitoring of proceedings, visualization of areas in use and required, submission of requirements for use assignment, request for a Declaration of Prior Interference ("DIP"), presentation of documents and issuance of reports. PUG-Offshore will also centralize the process of issuance of DIPs by other relevant governmental authorities⁴. For more information on PUG-Offshore, please refer to the next section on the Joint Ordinance.

Planned Use Assignment and Independent Use Assignment

The Decree established two categories for the use assignment of areas: (i) the Planned Use Assignment, in which the prism is defined by the MME and subsequently auctioned to the bidders; and (ii) the Independent Use Assignment, in which the prism is indicated by an interested party. The Ordinance established more detailed provisions for both categories, which we consolidated in the table below:

Planned Use Assignment Procedure	Independent Use Assignment Procedure
<p>Step 1. Prism identification studies to be conducted by the Energy Research Company ("EPE"), observing the specific criteria established under the Ordinance (e.g. area availability, distance between coastline, and energy potential competitiveness). Such identification may be conducted by EPE's own initiative or at MME's request.</p> <p>The prism identification studies may also be conducted by interested companies, upon a public call made by EPE. This does not restrict nor prevents the company from participating in the tender where the prisms will be offered.</p>	<p>Step 1. Interested companies to apply in PUG-Offshore submitting required information, such as the purpose of the use assignment, prism location, preliminary estimated energy production potential, studies, as well as the technical, financial and economic capacity of the interested company.</p> <p>The interested company must also submit a financial guarantee in the amount defined by ANEEL at the time of the application. Such guarantee will not be executed in case the company is not the winning bidder of the tender.</p>

⁴ Navy and Aeronautics Command, IBAMA, Chico Mendes Institute (ICMbio), ANP, Ministries of Agriculture, Tourism and Infrastructure, and Brazilian Telecommunications Agency (ANATEL).

<p>Step 2. ANEEL to verify the availability of the area by (i) analyzing the existence of overlaps between the area and prisms awarded or in the process of being awarded; and (ii) if the area has already been demanded or designated to another project.</p>	<p>Step 2. ANEEL to verify existence of overlaps and availability of the area, and, if ANEEL considers that the area is available the use assignment procedure will be initiated.</p>
<p>Step 3. EPE to request the issuance of the DIPs for the prism and submit a report on the DIPs results for MME's approval. MME to define the prisms that will be tendered.</p>	<p>Step 3. Interested company to request issuance of the DIPs in PUG-Offshore within 90 days counted from ANEEL's approval of the area (Step 2).</p>

Prior Interference Declaration.

The DIP is a mechanism established by the Decree to avoid the interference between the offshore power generation and other activities or facilities. The Ordinance sets forth that a DIP request must include the following information, in addition to specific documents that may be required by each entity:

- a. purpose of the use assignment;
- b. limits and georeferenced coordinates in SIRGAS 2000 or WG-84, in a file in shapefile format;
- c. brief description of the details of the intended project;
- d. indication of the prism isolation area and the structures provided for navigation safety; and
- e. ANEEL's approval on the availability of the area.

The DIP may be issued attesting (i) the inexistence of interferences; (ii) the existence of non-restrictive interferences, conditioned to complementary studies; or (iii) the existence of impeding interferences, as long as they are duly justified.

The entities will have 45 days to issue the DIPs and upon their issuance, it will no longer be possible for the company to solely change the prism's limits and the geographic coordinates. DIPs issued under the Independent Use Assignment procedure must be submitted by company in PUG-Offshore to continue the process.

Tender Process.

The tender process for the use assignment, whether planned or independent, will observe the principles of efficiency and economy of the public administration, and will be conditioned to the identification of prisms available to be tendered.

Observing public interest, the MME will analyze the prisms requested under the Independent Use Assignment, considering the expected offshore energy

potential for the prism, comparative advantages related to the grid, among other criteria defined in the Ordinance.

In line with the Decree, the Ordinance establishes that the bid criteria to select the winning bidder will be the highest economic return to the Federal Government for the use assignment. The guidelines for tenders under the Planned and Independent Assignment, as well as the periodic tender schedule, will be provided under specific MME ordinances.

Use Assignment Agreement.

The Use Assignment Agreement will have a maximum term of 10 years prior to issuance of ANEEL's authorization, whether under the independent power production or self-production regimes. After issuance of the independent power production or self-production authorization by ANEEL, the term of the Use Assignment Agreement will be automatically extended to the same term of the ANEEL's authorization (which is 35 years for wind power projects). The draft of Use Assignment Agreement will be included in the tender protocol and must encompass:

- a.** the annual public price due to the Federal Government and its form of payment;
- b.** the grace period (maximum of 4 years) and conditions for initiating payments due to the Federal Government, when applicable;
- c.** the annual monetary correction of the public price established in the Use Assignment Agreement;
- d.** the termination hypothesis in case of default in the payment of the amounts due for over 90 days;
- e.** the application of fines and arrears on installments not paid by the due date;
- f.** the additions to the annual amount due to the Federal Government when the extension of the term of the Use Assignment Agreement is approved, in case the grant is not obtained, within the contractual term (10 years); and
- g.** the possibility of reducing the annual amount due to the Federal Government in case of (i) anticipation of the schedule; and (ii) compliance with other contractual obligations.

The methodology to calculate the public price to be paid to the Federal Government under the Use Assignment Agreement will be defined in another MME ordinance and may have the participation EPE. Nevertheless, the Ordinance determined some certain guidelines to be observed:

- a. the ponderation/reduction/discount of the amount due to the Federal Government, considering the area reserved for public use; and
- b. the preparation period for offshore energy potential studies and the implementation and decommissioning schedules.

Upon execution of the Use Assignment Agreement, company may request the licenses and authorizations from the public authorities. The execution of the Use Assignment Agreement does not oblige the granting authority to hold auctions in the Regulated Power Market (ACR), Reserve Energy Auctions, Capacity Reserve Auctions, nor any sort of Transmission Auction for the specific purchase of electricity produced by offshore wind power plants.

In case of non-compliance with the provisions of the Use Assignment Agreement, sanctions will be applied, and the contract may be terminated, with no right to compensation and without prejudice to the execution of the financial guarantees provided by company.

The Use Assignment Agreement will be considered extinct only after issuance of the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA) certification attesting that the decommissioning or conclusion of activities was made pursuant to the federal environmental licensing rules.



(iii) MME/MMA Joint Ordinance No. 03/2022

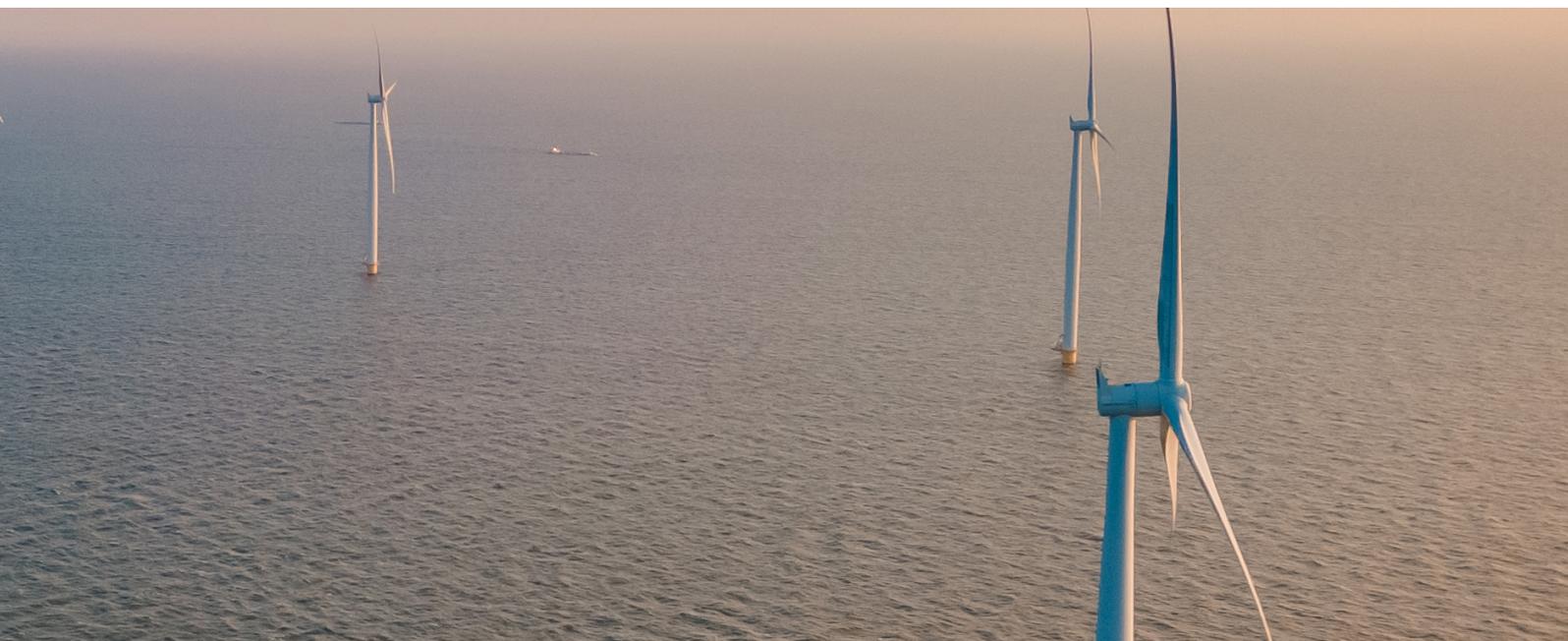
The Joint Ordinance provides for the creation of PUG-Offshore, a system developed with the purpose of centralizing the necessary procedures for obtaining the Use Assignment – planned or independent. Through PUG-Offshore, it will be possible to send documents and information, access and monitor proceedings, as well as to request DIPs.

PUG-Offshore will be available on ANEEL's website and will be a mandatory tool to be used by the Agency itself, and by other institutions involved in the issuance of DIPs, aiming at the optimization of the process. PUG-Offshore may be used free of charge.

(iv) Next Steps

Although the Ordinance and the Joint Ordinance develop several aspects of the legal framework for the offshore wind market, certain key subjects are still pending regulations, such as (i) hybrid power projects in oil and gas E&P areas; (ii) the methodology for calculating the price due to the Federal Government for use assignment; and (iii) free use assignment for technological research and development projects.

Tauil & Chequer in association with Mayer Brown is available to provide any further information and assistance, as well as the following expected updates regarding the Offshore Energy Power Generation.





Also Read:
Brazil Energy Journal:
Offshore Power Generation



Also Read:
Offshore Wind Power: Bill of Law



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