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Siting Renewable Energy Projects on the Outer Continental Shelf:

Spin, Baby, Spin!

Peter J. Schaumberg and Angela F. Colamaria*

INTRODUCTION

The Minerals Management Service ("MMS") recently finalized new regulations, Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf ("final rules"), that establish an entirely new regulatory regime for renewable energy development on the Outer Continental Shelf ("OCS").¹ This includes projects for wind, wave, current, and solar energy as

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1. See Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. 19638 (April 29, 2009) (to be codified at 30 C.F.R. pts. 250, 285, 290).

well as other emerging technologies.

MMS has regulated oil and gas development on the OCS for over fifty years, and the renewable energy rules are structured similarly to other MMS rules (e.g., oil and gas leasing and development; conveyance of OCS sand and gravel). Despite experience with managing mineral resources on the OCS, MMS is now implementing and managing a regulatory regime for an industry in its infancy when compared to the mature, and financially secure, oil and gas industry. There are fundamental differences between oil and gas production and renewable energy development. In administering the rules, MMS must provide sufficient flexibility to accommodate proven renewable energy technologies like wind energy, as well as emerging wave, current, and other technologies, many of which have not yet been commercially demonstrated or even conceived. MMS also will need to give increasing attention to balancing competing interests for uses of the OCS. Finally, MMS will be coordinating administration of some renewable energy technologies on the OCS with the Federal Energy Regulatory Commission ("FERC").²

Renewable energy opportunities on the OCS are a key component to securing this Nation's energy independence. The offshore wind energy sector, in particular, has grown exponentially worldwide. Opportunities for development on the OCS will likely accelerate the pace of that expansion. In addition, recent experience with high energy prices and the instability associated with dependence on foreign sources of supply are creating opportunities for developers to initiate projects on the OCS with newer technologies, such as tidal, wave, and thermal energy. The OCS final rules are important in that they create the potential for renewable energy to displace a portion of U.S. fossil fuel use. Such a shift will generate environmental benefits, reduce U.S. dependence on foreign sources of energy, and create new renewable energy jobs.

This article summarizes the final rules as well as the existing statutory and regulatory framework into which the final rules are

2. See Memorandum of Understanding Between the U.S. Department of the Interior and the Federal Energy Regulatory Commission (April 9, 2009), available at http://www.mms.gov/offshore/AlternativeEnergy/PDFs/DOI_FERC_MOU.pdf [hereinafter MOU].

introduced. It also discusses whether the final rules will effectively foster renewable energy production on the OCS given a national interest in launching a viable and robust renewable energy industry. It explains that, while the rules provide a mechanism for developing renewable energy projects on the OCS, they also impose significant regulatory burdens and financial hurdles that may delay such development or, for some smaller companies, prevent any development at all. For example, for commercial leases, the final rules require at least two environmental reviews before commercial construction can begin. This will result in years of delay before any commercial electric power can be generated. Similarly, the rules do not allow applicants to place any data collection equipment on a proposed lease area until extensive site assessment reviews are completed and approved. This approval could take up to two years depending on the type of project. In addition, the final rules include only limited safeguards to prevent abuse of the competitive leasing process. Finally, the final rules often lack deadlines by which MMS will complete certain duties or issue approvals under the rules. This uncertainty will make it difficult for applicants to provide timing estimates to investors and other necessary parties. These issues as well as yet to be discovered implementation challenges await companies as they work to develop renewable energy projects.

MMS' AUTHORITY TO AUTHORIZE OFFSHORE RENEWABLE ENERGY PROJECTS

A. Outer Continental Shelf Lands Act

The OCS includes the area under the submerged lands, subsoil, and seabed, lying between the seaward extent of the states' jurisdiction and the seaward extent of Federal jurisdiction. Essentially, state waters extend three nautical miles from shore (except on the Gulf Coast of Texas and Florida where state waters extend three leagues, or approximately nine miles).³

3. 43 U.S.C. § 1331(a) (2006) (defining "Outer Continental Shelf" to mean "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its

The Outer Continental Shelf Lands Act ("OCSLA"),⁴ enacted on August 7, 1953, charged the Secretary of the Interior with the administration of mineral exploration and development of the OCS. It granted the Secretary the authority to issue leases to the highest qualified bidder on the basis of sealed competitive bids.⁵ The OCSLA also provided guidelines for implementing an OCS oil and gas exploration and development program, and authorized development of other minerals such as sand and gravel.

Pursuant to the authority granted under the OCSLA, MMS has issued thousands of oil and gas leases that currently produce a substantial portion of the domestic oil and gas supply.⁶ MMS has also issued extensive regulations governing leasing and operations on the OCS which have been in effect for decades.⁷

B. Energy Policy Act of 2005

Prior to 2005, OCSLA's provisions addressed only mineral development on the OCS. When the Cape Wind project in Massachusetts was proposed, uncertainty arose over which Federal agency, if any, had authority to regulate renewable energy projects on the OCS. Congress resolved this issue in 2005 by passing the Energy Policy Act of 2005 ("EPAAct").⁸ Section 388 of the EPAAct amended the OCSLA and gave the Department of the Interior ("DOI") new authority to regulate Federal OCS renewable energy.⁹ It also gave DOI authority to make portions of the oil and gas infrastructure available for alternative uses.

The MMS is the agency within DOI responsible for leasing

jurisdiction and control").

4. 43 U.S.C. §§ 1331 *et seq* (2006).

5. 43 U.S.C. § 1337(a)(1) (2006).

6. MMS has issued approximately 8,000 OCS oil and gas leases. U.S. Dep't of the Interior, Minerals Mgmt. Serv., *Leasing Oil and Natural Gas Resources, available at Outer Continental Shelf*, <http://www.mms.gov/ld/PDFs/GreenBook-LeasingDocument.pdf>. "The approximately 43 million leased OCS acres generally accounts for about 15 percent of America's domestic natural gas production and about 27 percent of America's domestic oil production." See Welcome!, Offshore Energy & Minerals Management (OEMM), <http://www.mms.gov/offshore> (last visited Feb. 27, 2009).

7. 30 C.F.R. pt. 250 (2008).

8. See The Energy Policy Act of 2005, Pub. L. No. 109-58, § 119 Stat. 594 (2005) [hereinafter EPAAct].

9. 43 U.S.C. § 1337(p) (2006).

and development on the OCS. Under this new law, MMS may issue a lease, easement, or right-of-way on the OCS for activities that, among other things: "produce or support production, transportation, or transmission of energy from sources other than oil and gas; or . . . use, for energy-related purposes or for other authorized marine-related purposes, facilities currently or previously used for activities authorized under this Act."¹⁰ MMS is required to issue leases, easements, and right-of-ways competitively unless MMS determines that there is no competitive interest in a proposed project area.¹¹ MMS is also required to "establish royalties, fees, rentals, bonuses, or other payments to ensure a fair return to the United States for any lease, easement, or right-of-way."¹²

On December 30, 2005, MMS issued an Advance Notice of Proposed Rulemaking ("ANPR") for rules that would implement Section 388 of EPAct.¹³ MMS issued the proposed rules on July 9, 2008 and published the final rules on April 29, 2009.¹⁴ Not surprisingly given the authority granted by the OCSLA, the final rules are modeled very closely on the structure of MMS' oil and gas regulations.

C. Jurisdictional Issues

One challenge to finalizing the rules was the uncertainty that existed regarding which Federal agency had authority to regulate hydrokinetic (e.g., wave, current) energy development on the OCS. Both MMS and FERC claimed jurisdiction over these projects based on differing interpretations of the Federal Power Act ("FPA")¹⁵ and section 8(p) of OCSLA, as amended by the EPAct. Indeed, FERC formally rejected MMS' claims that the FPA does

10. 43 U.S.C. § 1337(p)(1) (2006).

11. 43 U.S.C. § 1337(p)(3) (2006).

12. 43 U.S.C. § 1337(p)(2)(A) (2006).

13. Advance Notice of Proposed Rulemaking: Alternative Energy-Related Uses on the Outer Continental Shelf, 70 Fed. Reg. 77345 (proposed Dec. 30, 2005).

14. Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, *supra* note 1; see also Alternative Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 73 Fed. Reg. 39376 (proposed July 9, 2008) [hereinafter *Alternative Energy and Alternate Uses Proposed Rules*].

15. 16 U.S.C. §§ 791 *et seq* [hereinafter *FPA*].

not grant FERC jurisdiction over hydrokinetic projects on the OCS and that section 388 of the EPO Act granted MMS exclusive authority to issue leases, rights of way, and other approvals for OCS renewable energy projects.¹⁶ A more complete description of the jurisdiction dispute is provided in Section IV.B.

The jurisdictional uncertainty between MMS and FERC was resolved on April 9, 2009 in a Memorandum of Understanding ("MOU") signed by DOI and FERC.¹⁷ Under the MOU, MMS has exclusive jurisdiction over leasing and development of offshore wind and solar projects and has exclusive jurisdiction to issue leases for hydrokinetic projects on the OCS. FERC, on the other hand, has exclusive jurisdiction to grant licenses for OCS hydrokinetic projects once they have first obtained a lease from MMS. Although the MOU clarifies authority for hydrokinetic projects, further coordination between MMS and FERC in developing policies and managing the regulatory process for hydrokinetic projects will be required.

SUMMARY OF MMS' FINAL RULES

The final rules offer two kinds of leases for renewable energy development – commercial and limited. Commercial leases have a twenty-five-year operating term and can be used to generate electricity. Limited leases are available for up to five years. They can be used for testing and site assessment and for the generation and sale of limited amounts of electricity. Limited leases confer no right to subsequent commercial development, but MMS may give weight to the limited lessee in the commercial sale process in some cases.

Both commercial and limited leases will be issued either through a competitive process, if more than one developer is interested in the proposed area, or via a noncompetitive process if there is only one applicant. A commercial lease also will include a project easement for transmission lines, etc. on the OCS to transmit the generated power to shore.

The summary below includes only the final rules' most significant and substantive provisions and follows the format and

16. See 125 FERC ¶ 61,045 (Oct. 16, 2008) (Pacific Gas & Electric Company Project Nos. 12781-001, 12781-002, 12779-001, and 12779-002).

17. MOU, *supra* note 2, at 1-2.

structure of the final rules.

A. Subpart A – General Provisions¹⁸

This section describes the MMS' authority and the purpose of the final rules. The final rules provide that MMS has authority to issue regulations and oversee access and development on the OCS for renewable energy and alternate use of existing facilities. For hydrokinetic projects, a project applicant must first obtain a lease from MMS and then seek a license from FERC. Another agency that will be actively involved in the regulatory process is the U.S. Army Corps of Engineers ("the Corps"). Under the final rules, authorization of geological and geophysical and related site assessment surveys will be the responsibility of the Corps, and project applicants will need to coordinate with both MMS and the Corps to ensure that proposed activities meet the agencies' permitting and information requirements.

The general provisions also describe project applicant qualifications and certain fees. To qualify for a lease or grant, MMS will require an applicant to demonstrate through documentation that it has the technical and financial capabilities to construct, operate, maintain, and terminate/decommission the requested project. Regarding fees, MMS has authority under the Independent Offices Appropriation Act of 1952¹⁹ and Office of Management and Budget Circular A-25, "User Charges," to implement cost recovery.²⁰ In the final rules, MMS will impose case-by-case fees to recover unique processing costs such as preparation of an Environmental Impact Statement ("EIS").²¹ However, since the agency has no idea what its processing costs will be for this new program, MMS is not requiring any additional processing fees at this time (but expects to do so in the future as the program matures).

18. Authority for Subpart A *see* 30 C.F.R. §§ 285.100 – 285.118 (2009).

19. 31 U.S.C. § 9701 (2006).

20. *See* Oil, Gas, and Sulphur Operations and Leasing In the Outer Continental Shelf (OSC) – Cost Recovery, 70 Fed. Reg. 49871 (proposed Aug. 25, 2005) (to be codified at 30 C.F.R. pts. 250, 256).

21. *See* 30 C.F.R. § 285.111 (2009); *see also infra* Section V for a discussion of EIS and other environmental requirements.

B. Subpart B – Issuance of OCS Renewable Energy Leases²²

1. Noncompetitive Issuance of Leases

The process for noncompetitive lease issuance is, in part, based on the process MMS uses for conveyance of OCS sand and gravel. To obtain a noncompetitive lease under the final rules, an applicant must first submit a lease request and acquisition fee to MMS. The request can be unsolicited (*i.e.*, without a “call” from MMS) and must describe the area the applicant is interested in for a possible lease, as well as the applicant’s objectives and proposed facilities. The request must also include a “general schedule of proposed activities” and any available data/information on renewable energy or environmental conditions in the area.²³ The request must additionally contain a statement from appropriate state authorities “that the proposed activity conforms with state and local energy planning requirements,” documentation showing the applicant is qualified to hold a lease, and an acquisition fee.²⁴

MMS then publishes a notice of the request and considers comments received to determine if there is any competitive interest in the area. If there is no competitive interest, MMS publishes that determination in the Federal Register. Within sixty days of MMS’ publication of a determination of no competitive interest, the applicant must submit its plans to MMS for assessing the site’s development potential. This initial plan is termed a Site Assessment Plan (“SAP”) for commercial leases (a General Activities Plan (“GAP”) is required for a limited lease). MMS will review the SAP/GAP, coordinate with affected Federal agencies, state and local governments, and affected Indian tribes in its review, and then simultaneously issue the lease or grant and approve the SAP/GAP, with conditions, as applicable.²⁵ If the

22. Authority for Subpart B *see* 30 C.F.R. §§ 285.200 – 285.238 (2009).

23. 30 C.F.R. § 285.230(c)-(d) (2009). Requested data shall include “resource data and information used to evaluate the area.” 30 C.F.R. § 285.230(d). This data will be exempt from public disclosure to the extent allowed by law. *Id.*

24. 30 C.F.R. § 285.230(e) (2009).

25. Alternatively, the lessee/grantee may submit a combined SAP and Construction and Operations Plan (“COP”) for commercial leases, although as a practical matter such a scenario is not likely since at this early stage the applicant will not likely know the design of its commercial facility. *See* 30

applicant accepts the lease conditions, MMS will issue a lease. If the applicant rejects the conditions of the lease, no lease is issued and the acquisition fee is forfeited.

2. Competitive Issuance of Leases

For some or all areas of the OCS, MMS may publish a public notice of a Request for Interest to solicit expressions of interest in leasing. MMS will use the information received from this process to determine whether there is competitive interest for scheduling sales and issuing leases. It may also issue a "national, regional, or more specific schedule of lease sales pertaining to one or more types of renewable energy."²⁶

For areas in which there is competitive interest, MMS will implement a process similar to the current process for conveying OCS oil and gas rights. MMS will issue a "call" for information/nominations and will solicit public comments. The call will solicit information from potential bidders and affected parties concerning areas to be considered for leasing. Once an area is subject to the competitive lease sale process, no unsolicited requests for leasing in that area will be considered until the lease sale process has concluded.²⁷

Potential lessees must then provide a general description of their proposed activities, environmental data, and other documentation similar to that provided under the noncompetitive lease process. MMS will then identify the area to be considered for leasing and will prepare the environmental compliance documentation necessary to comply with applicable laws such as the National Environmental Policy Act ("NEPA"),²⁸ Coastal Zone Management Act ("CZMA"),²⁹ and Endangered Species Act ("ESA").³⁰ As described more fully below, the leasing stage is one of two environmental reviews that must be conducted under

C.F.R. § 285.601(d) (2009).

26. 30 C.F.R. § 285.210 (2009).

27. 30 C.F.R. § 285.231 (2009).

28. 42 U.S.C. §§ 4331–4335 (2004).

29. 16 U.S.C. §§ 1451–1465 (2006).

30. 16 U.S.C. §§ 1531–1544 (1999). The NEPA review for a draft EIS will include one or more public hearings. See Preamble, Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. 19638, 19659 (April 29, 2009) [hereinafter *Preamble to the Final Rules*].

NEPA before a proposed project can begin producing electric power.³¹

MMS will then publish a Proposed Sale Notice which starts a sixty-day public comment period and includes lease conditions, the bidding method, the official lease form, and other information. The Proposed Sale Notice is followed by a Final Sale Notice, which starts a thirty-day notification period. MMS may also decide to end the competitive process before the Final Sale Notice if it has reason to believe that competitors have withdrawn.³²

MMS will then hold an auction in which interested parties bid for the lease rights. MMS will use one of four auction formats: sealed bidding, ascending bidding (similar to the auction format of the popular www.eBay.com website), two-stage bidding, or a multiple-factor auction.³³ The multiple-factor auction may consider financial bid variables (e.g., rental rate, operating fee, and variable cash bonus) as well as nonmonetary variables (e.g., technical merit, environmental factors, and whether the bidder has a power purchase agreement or is a certified winner of a competitive process conducted by an adjacent state).³⁴ In the event of a tie, except in the first stage of a two-stage bidding auction, one additional round of bidding will be conducted in order to determine the winning bidder.³⁵

In the Proposed and Final Sale Notices for commercial leases, MMS will specify the use of one of six bidding systems: (1) a cash bonus with a constant operating fee rate (the operating fee rate is a percentage of the value of the power generated, described more fully below); (2) a constant operating fee rate with a fixed cash bonus; (3) an initial operating fee rate for use in a sliding operating fee calculation with a fixed cash bonus; (4) a constant operating fee rate followed by a cash bonus (two-stage auction format only); (5) the starting value for a fee rate to be used in calculating a sliding operating fee followed by a cash bonus (two-stage auction format only); or (6) a multiple-factor combination of

31. See *infra* Section V for a description of NEPA as well as various other environmental laws applicable to renewable energy development.

32. 30 C.F.R. § 285.212 (2009).

33. 30 C.F.R. § 285.220(a) (2009).

34. *Preamble to the Final Rules*, 74 Fed. Reg. 19663.

35. 30 C.F.R. § 285.223 (2009).

nonmonetary and monetary factors.³⁶ For limited leases, the bid variable will be a cash bonus, with a minimum bid specified in the Final Sale Notice.

As discussed below in Section IV, the bidding process, as adopted, does not impose criteria to ensure that only “bona fide” bidders enter the competitive leasing process. Thus, it may be relatively easy for a person or organization with no intention of developing a renewable energy project to force an otherwise noncompetitive project into the competitive bidding process or, once MMS holds an auction, to “bid up” the price of the winning bid. MMS intends to address bid evaluation procedures in implementation guidance and to publish the details of bid evaluation criteria in the sale notices, but the final rules do not set forth any minimum standards.

If MMS accepts a bid, it will send the lessee three copies of the lease form. Within ten business days, the lessee must execute the lease form and pay the balance of any bonus bid as well as provide financial assurance bonds. Lessees must pay the first six months’ rental within forty-five days.³⁷

3. Commercial Leases

As noted above, MMS can issue both commercial or limited leases. Commercial leases provide the lessee full rights to apply for and receive the authorizations needed to assess, test, and produce renewable energy on a commercial scale. A commercial lease includes the right to a project easement across the OCS for transmission lines, etc.

If a commercial lease is issued competitively, the lessee has a Preliminary Term of six months (from the effective date of the lease) to submit a SAP. If the commercial lease was issued noncompetitively, there is no Preliminary Term, and the lessee must submit the SAP within sixty calendar days of the date MMS issues a public notice of a determination of no competitive interest. The SAP will undergo appropriate NEPA environmental review as MMS completes its leasing decision.³⁸

After MMS approves the SAP, the five-year Site Assessment

36. 30 C.F.R. § 285.221 (2009).

37. 30 C.F.R. § 285.503 (2009).

38. 30 C.F.R. § 285.661 (2009).

Term begins. During this term, the lessee may conduct site assessment activities and prepare and submit a Construction and Operations Plan ("COP"), which is a detailed description of the project. MMS will undertake another NEPA review before approving the COP. The Operations Term begins on the day MMS approves the COP and lasts for twenty-five years, unless a longer term is negotiated. Alternatively, an applicant may submit a SAP and COP simultaneously, in which case the Site Assessment Term would begin on the date MMS approves the SAP/COP.

The first six months of rental fees, set at \$3 per acre for commercial and limited leases, are due within forty-five days of receiving the lease copies from MMS. Rental fees for the next twelve months and for each subsequent year during the Site Assessment Term are due at the beginning of each year for the entire lease area until the lessee begins commercial production of electricity, after which lessees of commercial leases must pay an annual operating fee based on the capacity to generate electric power on the lease.

4. Limited Leases

Limited leases are available, with a term of up to five years, for site assessment or to test new renewable energy technology. The limited lease may include terms that allow the applicant to sell power generated during technology testing, within certain limits (e.g., up to 5 megawatts) and operating fees are not charged (though rental fees do apply).³⁹ For hydrokinetic projects, if FERC determines that a license or exemption would not be required for the limited lease proposed, MMS would proceed with the limited lease issuance. However, if FERC determines that a license or exemption would be required, MMS would instead proceed with a commercial lease issuance.⁴⁰ A limited lease would include the right to a project easement if necessary, and an applicant can renew this form of lease.

The limited lease confers no preference right for subsequent commercial build out/development.⁴¹ Indeed, there is no way to

39. *Preamble to the Final Rules*, 74 Fed. Reg. 19647.

40. *Id.* at 74 Fed. Reg. 19657.

41. However, MMS stated in the preamble to the final rules that it will consider multiple factors, see 30 C.F.R. § 285.220, in reviewing a competitive

automatically convert a limited lease into a commercial lease. At the end of the limited lease, the lessee will have to go through the noncompetitive/competitive commercial lease issuance process (with a risk of being outbid) if it wants to build a commercial project on that site. Therefore, MMS encourages applicants that may want to develop commercially, but are not sure whether the area is commercially viable, to apply for a commercial lease instead of a limited lease. Developers may also consider simultaneously requesting a limited lease for a portion of the area covered by a commercial lease application. MMS stated in the preamble to the final rules that it anticipates being able to process and issue a limited lease in as little as six months, thereby allowing for the construction and operation of limited facilities, such as a meteorological tower to begin collecting data, while the commercial lease is processed over a longer period of time.⁴² If the project or area does not prove successful, the applicant can relinquish the limited lease as provided in Subpart D.

For limited leases issued competitively, the applicant has a Preliminary Term of six months (beginning on the effective date of the lease) to submit a GAP. If MMS receives a GAP that satisfies the requirements of §§ 285.640–285.647 (see discussion *infra*), the six-month term will be automatically extended for the period of time necessary for MMS to conduct a technical and environmental review of the GAP. If there is no competitive interest, no Preliminary Term would apply. The applicant must submit, and MMS must approve, the GAP before MMS will issue a limited lease.

Each limited lease has a five-year Operations Term (beginning on the date MMS approves the GAP) for conducting site assessment, technology testing, or other noncommercial activities.

lease application and may indicate, in the lease terms, a preference for the limited lease lessee in any subsequent conveyance of commercial rights. See *Preamble to the Final Rules*, 74 Fed. Reg. 19657–58.

42. *Preamble to the Final Rules*, 74 Fed. Reg. 19658.

C. Subpart C – Rights-of-way Grants and Rights-of-Use and Easement Grants for Renewable Energy Activities⁴³

In addition to leases, MMS has the authority to grant uses of the OCS for renewable energy development activities not related to a commercial or limited lease authorized under the final rules.

Rights-of-way (“ROW”). MMS may issue ROW grants to allow for the construction and use of a cable or pipeline across the OCS for the purposes of gathering, transmitting, or otherwise transporting electricity generated from renewable energy projects (either on the OCS or from projects not located on the OCS)⁴⁴ (e.g., from a state-issued renewable energy lease, across the OCS, to shore). MMS will consider authorizing, on a case-by-case basis, renewable energy ROWs that support the transmission of energy from oil and gas sources that is combined with energy from non-oil and gas sources, so long as renewable sources constitute the primary energy being transmitted.⁴⁵

Rights-of-Use and Easement (“RUE”). MMS may issue grants to authorize use of a designated portion of the OCS for the placement and operation of a facility or installation that supports the production, transportation, or transmission of electricity or energy from renewable energy sources not on the OCS (e.g., to support renewable energy activities on a state-issued lease).

Alternate Use RUEs. MMS may issue grants for alternate uses of existing facilities. Under this authority, MMS could allow new uses for currently operating or abandoned oil and gas platforms such as helicopter bases or medical facilities. MMS is proposing to allocate responsibilities between the existing lessee and facility owner (e.g., the oil and gas lessee and/or operator) and the holder of the Alternate Use RUE.

For each of the grants, if no competitive interest exists (after notice/call), the grants would be issued noncompetitively. It is important to note that a lessee does not need a ROW grant or RUE grant for a project easement authorized under Subpart B in order to serve the lease. A commercial lease includes the right to a project easement which would be issued to allow the lessee to

43. Authority for Subpart C see 30 C.F.R. §§ 285.300 – 285.316 (2009).

44. 30 C.F.R. § 285.300 (2009).

45. *Id.*

install gathering, transmission, and distribution cables across the OCS to transmit electricity. The project easement would be issued upon approval of the COP (for commercial leases) or GAP (for limited leases). MMS will not issue ROW or RUE grants for installing site assessment facilities. Such facilities require a lease.⁴⁶

D. Subpart D – Lease and Grant Administration⁴⁷

Subpart D of the final rules addresses penalties for noncompliance with rules pertaining to a lease or grant; assignment and designation of operators; and suspension, renewal, termination, relinquishment, and cancellation of leases and grants.

Lease or Grant Assignment. Lessees may assign all or part of the lease or grant interest, subject to MMS approval. Assignees are jointly and severally liable for the performance of all obligations under a lease or grant with each prior lessee who held an interest at the time the obligation accrued.

Lease or Grant Suspension. Lessees may request suspension of a lease or grant, which would extend the running of the term of the lease or grant.

Lease or Grant Termination. The lease or grant can be terminated for three reasons. First, the lease or grant will terminate upon its expiration date. Second, the lease or grant can be cancelled upon a finding by MMS that it was obtained via fraud or misrepresentation or if the lessee/grantee was not in compliance with the rules. Third, the lease or grant can be relinquished. Lessees may surrender the lease or grant by submitting an application and making all outstanding payments due. The relinquishment takes effect on the date MMS approves the application.

Lease or Grant Renewal. Lessees may request renewal of a lease or grant, but MMS will not approve a lease renewal request that involves development of renewable energy not originally authorized in the lease or grant. While the lessees renewal request is pending a decision by MMS, the lessee may continue to operate despite expiration of the original lease or grant.

46. *Preamble to the Final Rules*, 74 Fed. Reg. 19671.

47. Authority for Subpart D see 30 C.F.R. §§ 285.400 – 285.437 (2009).

E. Subpart E – Payments and Financial Assurance Requirements⁴⁸

Subpart E provides a payment structure for renewable energy leases and grants to ensure a fair return to the government for use of the OCS, as required by the OCSLA/EPAct. This Subpart also contains provisions to ensure that lessees and grant holders provide the required financial assurance on their leases or grants.

Rentals. MMS will apply a rental fee of \$3 per acre for commercial and limited leases, and \$5 per acre for project easements and ROW or RUE grants. This fee is lower than the fee charged for OCS oil and gas leases, which are typically set at \$6.25 per acre.⁴⁹

Operating Fees. Once the lease begins commercial production of electricity, the lessee must pay an annual operating fee, which continues throughout the Operations Term. If a lease is developed in phases, then both rent and operating fees may be due on different parts of the commercial lease during the same time period. Rent would continue to be due on the portions of the lease not authorized for commercial development, and operating fees would be required for the commercial operations portion of the lease. The operating fee is a percentage of the value of the electricity capable of being generated from the lease and is determined as follows:

Operating Fee = installed capacity x hours per year x capacity factors x power price x operating fee rate

The operating fee MMS adopted is not based on the actual amount of electricity produced or the actual price the producer received for that electricity. Instead, the operating fee is based on the design capacity of the project and published wholesale prices for electricity. This is an important issue because actual production and sales volumes will be different than the design capacity. Thus, MMS' operating fee methodology is different than most Federal lease royalty valuation schemes where the lessee pays a royalty based on the actual amount and value of production, not a theoretical calculation.

The operating fee rate will be specified in the Final Sale

48. Authority for Subpart E see 30 C.F.R. §§ 285.500 – 285.543 (2009).

49. *Preamble to the Final Rules*, 74 Fed. Reg. 19680.

Notice for competitive commercial leases, and in the lease instrument for those issued noncompetitively. Unless specified otherwise, MMS intends to set the operating fee rate at 2 percent for each year of the Operations Term. Depending on what type of bidding system MMS uses for competitive lease sales, bidders will be able to bid a constant or sliding scale operating fee rate greater than 2 percent (for use in the above calculation) subject to a fixed cash bonus.

Acquisition Fee. MMS set an acquisition fee for leases issued noncompetitively. The fee is \$0.25 per acre and will be due with the lease application. In the event MMS does not issue a noncompetitive lease, the acquisition fee will be returned to the applicant. Although MMS adopted a low fee in order to encourage renewable energy development, this acquisition fee may prove so low that it invites potentially frivolous applications which could tie up large areas of the OCS.

Financial Assurance. Applicants for commercial leases must obtain a lease-specific \$100,000 bond (or other similar financial assurance) in order to be awarded the lease. An additional bond/assurance is required for SAP approval, and a third decommissioning bond or other pledged financial instrument is due before MMS will approve the COP or before FERC issues a license for a hydrokinetic project. The amount of these additional bonds will be determined by MMS and will be based on the type and number of activities planned. Applicants for limited leases, ROWs, or RUEs must obtain a minimum financial assurance of \$300,000. The actual surety levels will be determined by MMS based on the complexity, number, and location of all planned OCS facilities. MMS will allow lease or grant holders to meet these financial assurance requirements by demonstrating their financial strength and reliability (through, for example, submission of audited financial statements and evidence of the companies' stability and reliability) or by the use of a third-party guarantee.⁵⁰

Revenue Sharing. MMS is required, under the OCLSA, to equitably distribute 27 percent of revenues derived from qualified projects to coastal states.⁵¹

50. 30 C.F.R. §§ 285.527, 285.528 (2009).

51. See 43 U.S.C. § 1337(g) (2006); OCSLA amendments of 1985, P.L. 99-272, § 100 Stat. 82 (1985).

F. Subpart F – Plans and Information Requirements⁵²

The lessee, grant holder, or operator must submit the appropriate plan (SAP, COP, or GAP) to MMS for review and approval before beginning any activities covered by that plan. MMS will use the information for compliance with NEPA, CZMA, and other Federal environmental laws.⁵³ To this end, the final rules impose specific requirements for each stage of the leasing process as described below.

1. Site Assessment Plan (“SAP”)

The SAP describes the surveys the lessee plans to perform (and other activities proposed to be conducted for the characterization of a commercial lease), including any project easements or testing of technology devices. At a minimum, the SAP will describe how the lessee will conduct various resource assessment surveys (*e.g.*, meteorological and oceanographic data collection). If the lessee proposes to install facilities on the OCS (*e.g.*, meteorological towers), it must submit information related to project design, shallow hazards, and geological, biological, and socio-economic resources, among others, as part of the SAP.

MMS anticipates that any physical characterization surveys (*e.g.*, geological and geophysical surveys or hazards surveys) and baseline environmental surveys (*e.g.*, biological, archaeological, or socioeconomic surveys) would be conducted prior to preparation of the SAP in coordination with, and under the authority of, the Corps.⁵⁴ The results of these surveys must be included in the SAP.

Environmental Requirements. The SAP must also demonstrate how the developer will conduct the proposed activities to comply with relevant Federal environmental and natural resources statutes (*e.g.*, CZMA,⁵⁵ ESA,⁵⁶ Marine Mammal

52. Authority for Subpart F *see* 30 C.F.R. §§ 285.600 – 285.659 (2009).

53. *See infra* Section V for discussion of the various laws applicable to renewable energy development.

54. Such surveys typically would qualify under the Corps’ Nationwide Permit program.

55. 16 U.S.C. §§ 1451–1465 (2006).

56. 16 U.S.C. §§ 1531–1544 (2006).

Protection Act,⁵⁷ Clean Water Act,⁵⁸ etc.).⁵⁹ The lessee must provide one copy of the its CZMA consistency certification, stating that the proposed activities comply with the coastal state's approved coastal management program. Each SAP must undergo appropriate NEPA review. If it is a competitively-issued lease, MMS will conduct the NEPA and CZMA review during the lease sale and additional review during the SAP review would not occur unless significant new information on environmental impacts or changes in impacts of the project are presented in the SAP. For noncompetitive leases, the NEPA review for the lease issuance decision occurs simultaneously with the SAP review. The applicant will be required to forward a copy of the SAP, the CZMA consistency certification, and associated data to the affected state's CZM agency. As appropriate, MMS will coordinate with relevant Federal, state, and local agencies throughout the process. MMS will also seek cost recovery from the lessee to pay for the environmental review.

Upon completion of the technical and environmental reviews, MMS may approve, disapprove, or approve with modifications. If the SAP is not approved, MMS will inform the lessee of the reasons and will allow an opportunity to resubmit a revised plan addressing the concerns identified.

Activities Under a SAP. Once the SAP is approved, the lessee may start activities approved in the SAP that do not involve construction of significant or complex facilities. If MMS determines that a facility is significant or complex, the applicant must submit a Facility Design Report and Facility Fabrication and Installation Report (see Subpart G) as well as a Safety Management System (see Subpart H) before any construction can begin. The lessee may then begin construction upon notification from MMS that it has no objections, or if MMS fails to respond within sixty calendar days of receipt of the report. The lessee must notify MMS in writing within thirty calendar days of completing construction and installation activities under the SAP. The lessee must also certify compliance with the SAP annually.

57. 16 U.S.C. §§ 1361–1407 (2006).

58. Federal Water Pollution Prevention and Control ("Clean Water Act"), 33 U.S.C. §§ 1251–1376 (1987).

59. See *infra* Section V for a description of these various laws.

(Such certification must include summary reports and a statement identifying any mitigation measures and their effectiveness.)

Completion of SAP Activities. If SAP activities are complete before the Site Assessment Term has expired, and the lessee timely submits a COP describing the continued use of existing facilities approved under the SAP, the lessee may keep such facilities in place while MMS reviews the COP. The lessee is not required to decommission any SAP facilities that are authorized to remain in place under an approved COP. If after review of the COP, MMS determines the SAP facilities may not remain in place, the lessee must decommission them.

2. Construction and Operations Plan ("COP")

The COP describes the lessee's construction, operations, and conceptual decommissioning plans, including any project easements. It must describe all planned facilities to be constructed including onshore and support facilities.⁶⁰

The COP must be submitted and approved before the lessee conducts any activities pertaining to construction of facilities for commercial operations on a commercial lease. It must be submitted at least six months before the end of the five-year Site Assessment Term. However, it can also be submitted at the same time as the SAP.

Site Approval Requirements. Before MMS will approve the proposed site, the lessee must conduct and submit the results of surveys addressing shallow hazards, as well as geological (relevant to design and siting of the facility), biological, socio-economic, geotechnical, and archaeological resources. The lessee must also submit an overall site investigation report which integrates the findings of the hazards and geological surveys in addition to other siting considerations such as the potential for instability of slopes and cyclic loading.

Environmental Requirements. The lessee must submit certain information to assist MMS in completing the required NEPA documentation. The lessee must also provide one copy of its

60. The required project-specific information (e.g., structural design, cables and pipelines, description of any vessel to be used, nomination of a certified verification agent, etc.) is described in 30 C.F.R. § 285.626 of the final rules.

CZMA consistency certification, stating that the proposed activities comply with the coastal state's approved coastal management program. The COP must also include an oil spill response plan, pursuant to 30 C.F.R. Part 254, as well as a Safety Management System.

Processing and Approval of the COP. Before the end of the five-year Site Assessment Term, the lessee must submit and receive MMS approval of the COP before beginning any development and production activities. Once submitted, MMS will notify the lessee if any necessary information/data is missing. MMS will then prepare the appropriate NEPA analysis. It will also forward a copy of the COP and the CZMA consistency certification and associated data to the state's CZM agency. As appropriate, MMS will coordinate with relevant Federal, state, and local agencies. Upon completion of technical and environmental reviews, MMS may approve, disapprove, or approve with modifications. If the COP is not approved, MMS will inform the lessee of the reasons and will allow an opportunity to resubmit a revised plan addressing the concerns identified.

Activities under the COP. After the COP is approved, construction must be commenced by the date given in the COP (*i.e.*, a reasonable schedule of construction activity showing significant milestones leading to the commencement of commercial operations). Before construction can begin, the lessee must submit to MMS a Facility Design Report and a Fabrication and Installation Report.⁶¹

The lessee may commence commercial operations thirty calendar days after a Certified Verification Agent ("CVA") has submitted to MMS the final Fabrication and Installation Report for the fabrication and installation review.⁶² Lessees may request that MMS waive the requirement to use a CVA, but even if MMS waives the requirement to use a CVA the project engineer must perform the same duties and responsibilities as the CVA.⁶³ The lessee must notify MMS in writing at least seven calendar days before commencing commercial operations. Due to all the

61. See *infra* Section III.G. for further discussion regarding the Facility Design Report and the Fabrication and Installation Report.

62. 30 C.F.R. § 285.708 (2009).

63. 30 C.F.R. § 285.626 (2009).

required environmental reviews, MMS approvals, and state consultations, this point in the leasing process could easily occur five to six years after the applicant first submitted a notice of interest.

Cessation of COP Activities. The lessee must notify MMS within five business days any time it ceases commercial operations without an approved suspension. If commercial operations are completed or ceased for an indefinite period which extends longer than six months, MMS may cancel the lease, and the lessee will be required to initiate the decommissioning process.

Compliance Certification. The lessee must annually certify compliance with the COP. Such certification must include summary reports; a statement identifying any mitigation measures and their effectiveness; and any other information requested by MMS as provided by § 285.105(i).

3. General Activities Plan ("GAP")

For limited leases, ROW grants, and RUE grants, the lessee must submit a GAP which covers all activities on the lease or grant including site assessment, development, operations, and decommissioning. The GAP must contain the results of geophysical and geological surveys, hazards surveys, archaeological surveys, if required, and baseline collection studies (e.g. biological). As noted above, responsibility for authorization of geological, geophysical, and related site assessment surveys is the responsibility of the Corps, not MMS, and in many cases the activities will be authorized under the Corps' Nationwide Permit Program. If applying for a project easement or constructing a facility deemed by MMS to be complex or significant, additional information must also be submitted.⁶⁴

The GAP must be submitted and approved before the lessee conducts any activities on a limited lease, ROW grant, or RUE grant. For competitive limited leases, the lessee must submit the GAP within six months of lease issuance. For noncompetitive limited leases, the GAP must be submitted within sixty calendar days after MMS issues a determination that there is no competitive interest. In the case of grants, the GAP must be

64. 30 C.F.R. § 285.645 (2009).

submitted within six months of grant issuance. The requirements and process for approval of the GAP are similar to those of the SAP. Like the SAP and COP, the GAP must undergo the appropriate NEPA reviews and must comply with relevant Federal statutes. MMS would then decide whether to approve or disapprove the GAP.

G. Subpart G – Facility Design, Fabrication and Installation⁶⁵

The purpose of this Subpart is to ensure that facilities are designed, fabricated, and installed according to appropriate standards, in compliance with MMS rules, and according to the approved plan. As noted in previous sections, before installing certain facilities described in an approved SAP, COP, or GAP, a Facility Design Report and a Fabrication and Installation Report must be submitted.

A Facility Design Report provides specific details of the design of any facilities, including cables and pipelines, that are outlined in the approved SAP, COP, or GAP. The Report must demonstrate that the design conforms to the lessee responsibilities listed in § 285.105(a).

The Fabrication and Installation Report must describe how the facilities will be fabricated and installed in accordance with the design criteria identified in the Facility Design Report, the approved SAP, COP, or GAP, and generally accepted industry standards and practices. The Report must demonstrate how the facilities will be fabricated and installed in a manner that conforms to the lessee's responsibilities listed in § 285.105(a).

H. Subpart H – Environmental and Safety Management, Inspections, and Facility Assessments⁶⁶

This Subpart describes requirements to prevent or minimize the likelihood of harm or damage to the environment and to promote safe operations, including their physical, atmospheric, and biological components. Operators or lessees must comply with rules regarding air quality, safety, maintenance and shutdowns, equipment failure, adverse environmental effects, inspections,

65. Authority for Subpart G *see* 30 C.F.R. §§ 285.700 – 285.714 (2009).

66. Authority for Subpart H *see* 30 C.F.R. §§ 285.800 – 285.825 (2009).

facility assessments, and incident reporting. The final rules do not require an environmental management system ("EMS"), but MMS states that it endorses this concept.

The structure of the final rules is based on adaptive management. The lessees must generally demonstrate and validate their performance. A lessee/operator must monitor activities and demonstrate that its performance satisfies specified standards in its approved plans. MMS then will require adjustments to mitigation and monitoring activities on a case-by-case basis. Such terms and conditions will be incorporated into the SAP, COP, or GAP.

I. Subpart I – Decommissioning⁶⁷

This Subpart ensures that decommissioning activities comply with regulatory requirements and approvals and that site clearance and facility and transmission line removal are properly performed to protect marine life and the environment and do not conflict with other users of the OCS. Decommissioning must be completed within two years following termination of a lease or grant, and the decommissioning process also requires NEPA review. Explained above are the lessee's requirements to post a bond or other adequate financial assurance to cover the expected decommissioning costs.

J. Subpart J – Rights of Use and Easements for Energy and Marine-Related Activities Using Existing OCS Facilities⁶⁸

Subpart J addresses alternate uses of OCS facilities and is beyond the scope of this article. Briefly, this Subpart explains how applicants can request an Alternate Use RUE as well as the process by which MMS will decide whether and how to issue Alternate Use RUEs. It further explains the terms of such authorizations, required payments, necessary financial assurance, and decommissioning requirements, among others. Examples of an Alternate Use RUE include the use of an existing oil and gas platform to install a renewable energy facility. For existing OCS facilities (*e.g.*, oil and gas platforms) that will be used for

67. Authority for Subpart I *see* 30 C.F.R. §§ 285.900 – 285.913 (2009).

68. Authority for Subpart J *see* 30 C.F.R. §§ 285.1000 – 285.1019 (2009).

alternative purposes, liability responsibilities will be allocated between the existing lessee (oil/gas) and the holder of the Alternate Use RUE.

PRINCIPAL REACTIONS TO PROPOSED AND FINAL RULES

When MMS first proposed the rules in July 2008, opinions regarding the quality of the proposed rules varied depending on the stakeholder involved. Larger, well-capitalized renewable energy companies were generally content with the substantial regulatory and financial requirements set forth in the proposed rules. On the other hand, many of the smaller start-up companies were concerned that the complex regulatory leasing approval process proposed by MMS would make it difficult to obtain necessary capital. In particular, many stakeholders felt that the lengthy timelines for siting and constructing a renewable energy project under the proposed rules were unreasonable and only served to delay U.S. independence from foreign oil.

MMS received hundreds of comments on the proposed rules. We highlight below a few of the more common, significant issues raised in the comments and MMS' treatment of those comments in the final rule.

A. Potential Hurdles Facing Regulated Entities Under the Proposed Rules

1. The Proposed Rules Impose Duplicative Environmental Reviews

Depending on the type of lease or grant requested, the proposed rules would have required as many as three levels of environmental review under NEPA, the CZMA, the ESA, and other applicable laws.⁶⁹ MMS stated in the preamble to the proposed rule that, at least initially, it anticipated that all commercial development projects would have required an EIS for each phase of the project.⁷⁰ Therefore, for commercial competitive leases, a single project would have required three separate environmental reviews at the lease issuance, SAP, and COP

69. See *infra* Section V for a description of these various laws applicable to renewable energy development.

70. *Preamble to the Proposed Rules*, 74 Fed. Reg. 39376.

approval stages. MMS acknowledged that, after the impacts of renewable energy activities on the OCS are better understood, an environmental assessment ("EA")⁷¹ for the various leasing and development phases might be more appropriate. Considering that the use of EAs would not likely happen for many years, the proposed rules would have resulted in significant delays before even the first meteorological tower could be constructed on the OCS for commercial leases.

Presumably, MMS proposed requiring the multiple environmental reviews because it believed such reviews are required in order to comply with the various statutory requirements relating to lease approval and permitting decisions under existing laws. However, there is substantial support under existing NEPA regulations and policies to streamline the proposed environmental review requirements and avoid duplication. The Council on Environmental Quality ("CEQ") NEPA regulations state that, as a policy, to the fullest extent possible, Federal agencies must implement procedures to reduce paperwork and the accumulation of extraneous background data⁷² and must integrate the requirements of NEPA with other required environmental review "so that all such procedures run concurrently rather than consecutively."⁷³ More importantly, agencies are encouraged to employ tiering, where appropriate, "to relate broad and narrow actions and to avoid duplication and delay."⁷⁴ When analyzing broad policies, such as OCS leasing, agencies may "tier" their EISs in order to "eliminate repetitive discussion of the same issues and to focus on the actual issues ripe for decision at each level of environmental review."⁷⁵ When a Programmatic EIS ("PEIS") has been prepared, as in the case of OCS renewable energy leasing,⁷⁶

71. See *infra* Section V.A. for discussion of NEPA requirements for an EIS or EA.

72. 40 C.F.R. § 1500.2(b) (2008); see also 40 C.F.R. § 1500.4 (2008) (describing specific methods by which agencies shall reduce paperwork); 40 C.F.R. § 1506.4 (2008) ("Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.").

73. 40 C.F.R. § 1500.2(c) (2008).

74. 40 C.F.R. § 1502.4(d) (2008).

75. 40 C.F.R. § 1502.20 (2008).

76. See DEPARTMENT OF INTERIOR, MINERALS MANAGEMENT SERVICE, FINAL PROGRAMMATIC EIS FOR ALTERNATIVE ENERGY DEVELOPMENT AND

any subsequent site-specific EIS or EA “need only summarize the issues discussed in the broader [EIS] and incorporate discussions from the broader [EIS] by reference and shall concentrate on the issues specific to the subsequent action.”⁷⁷

The duplicative layers of NEPA review mandated under the proposed MMS rules conflicted with these CEQ policies. If, as proposed, MMS mandated preparation of an EIS at the SAP stage of the leasing process,⁷⁸ it likely would be unnecessary to also require an EIS at the COP stage,⁷⁹ particularly because it is highly unlikely that the contours of the proposed action would have changed substantially. Certainly, the area analyzed during the SAP phase of the application process will not have changed substantially if the applicant waits only 12–36 months to submit a COP after approval of the SAP. Therefore, commenters asserted that MMS had authority to combine the NEPA review for each project so that the NEPA review was conducted “concurrently rather than consecutively” on a phase-by-phase basis.

In order to streamline the environmental review process for competitive commercial leases, in the final rules, MMS adopted a combined environmental review for the lease sale and SAP review process. Therefore, under the final rules, MMS will perform one NEPA/CZMA review at the lease sale and will not perform an additional review at the SAP approval stage, unless submittal of the SAP shows additional environmental impacts that were not previously considered during the lease sale review.

2. The Proposed Site Assessment and Development Process Is Inefficient

As proposed, from the point that a lease application is submitted to MMS, it likely would have taken a minimum of six years before any commercial wind project could begin producing electric power. In addition to delaying the benefit of renewable energy development to the U.S. domestic energy portfolio, this extended review process would have created uncertainty for

PRODUCTION AND ALTERNATE USE OF FACILITIES ON THE OUTER CONTINENTAL SHELF (2007).

77. 40 C.F.R. § 1502.20 (2008).

78. See 30 C.F.R. §§ 285.611–613 (2009).

79. See 30 C.F.R. §§ 285.627–628 (2009).

potential investors in OCS renewable energy projects and made financing more difficult to secure.

Under the proposed rules, a project applicant could not place any data collection equipment (such as a meteorological tower) on its commercial lease until SAP approval, and this proposed limitation ensured a lengthy leasing process. Thus, approval could take close to two years depending upon (1) whether the lease was issued noncompetitively or competitively; and (2) the level of NEPA review required for lease issuance and SAP approval. The lessee would then need several additional months to install the equipment.⁸⁰

To address this potential delay, MMS' final rules allow applicants to perform certain surveys and site assessment activities before SAP approval, if authorized by the Corps. The types of activities allowed prior to SAP approval include geophysical and geological surveys, hazards surveys, archaeological surveys and baseline collection studies, and the results must be included in the SAP. This allows the project applicant to begin collecting data and performing studies without waiting until MMS approves the survey process.⁸¹ The final rules further streamline the process by allowing the applicant to begin approved activities that are not deemed to be complex or significant, immediately upon approval of the SAP.⁸² MMS' proposed rules had required the completion of certain additional survey activities before any construction activities could be conducted or technology could be tested.⁸³ MMS also explained in the final rules that an applicant may seek both a commercial lease and a limited lease for the same area. MMS has stated that it

80. Installing data collection equipment is critical to the development of most OCS renewable energy projects, particularly wind projects. The data collection equipment is necessary for collecting data on avian and marine mammal activities in the area of the lease in order to inform the environmental review process and mitigate impacts on these species from commercial operations. Furthermore, depending on the scale of the project and proposed technology, the lessee must collect data for up to a year, or perhaps more, before it can confidently design the layout for its project.

81. However, such surveys must be conducted under the verification of the Army Corps of Engineers.

82. 30 C.F.R. § 285.614(a) (2009).

83. See *Alternative Energy and Alternate Uses Proposed Rules*, *supra* note 14, at 39484 (proposed 30 C.F.R. § 285.614).

expects to be able to issue a limited lease and approve a GAP in six months. This would allow the applicant to install a meteorological tower and begin data collection long before its commercial lease and SAP are approved. Thus, MMS' final rules tried to address some of the inefficiencies in the proposed rules, but it remains to be seen if the agency will be able to issue limited leases within six months.

3. The Proposed Rules Do Not Include Safeguards to Prevent Potential Abuse of the Competitive Leasing Process

While the EPO Act requires competition in OCS leasing, such competition is not required if there is no competitive interest in the same portion of the OCS as the original application. Although the proposed rules described the process for determining whether competitive interest exists, the rules fell short in ensuring that only "legitimate" competitive interests were considered during the lease process. Ensuring legitimate competitive interests influences the time required for obtaining a lease because the difference between competitive and noncompetitive leasing is substantial. Under both the proposed rules and the final rules, the process for competitive leasing could be as much as a year to a year-and-a-half longer than the noncompetitive leasing process. Therefore, many commenters stated that the rules should include standards to prevent improper use of the competitive leasing process merely for purposes of delaying development. This concern was not merely speculative. The Bureau of Land Management recently encountered a situation where a person engaged in the competitive bidding process for oil and gas leases with no intention of paying for the leases acquired.⁸⁴ That person's only purpose was to disrupt the lease sale and "bid up" the price of the leases.

Based on comments received, MMS' final rules require that lease or grant applicants demonstrate the technical and financial capabilities to construct, operate, maintain, and decommission the projects for which authorization is requested. However, the final rules do not include standards to ensure that expressions of

84. Eric Bontrager, *Protests Fail to Stop BLM's Utah Lease Sale*, GREENWIRE (Dec. 22, 2008), (LEXIS, News and Business Library, available at ALLNWS File).

competitive interest are indeed bona fide. If a competing applicant expresses competitive interest, MMS will proceed with the competitive process. Applicants that express a competitive interest but then do not bid lose their acquisition fee. However, the lost acquisition fee is not necessarily enough of a deterrent to prevent bad faith bidders. MMS states in the preamble to the final rules that it will try to hold auctions "that will tend to award leases to bidders who value the tracts the most."⁸⁵ However, the rules provide no specific mechanisms for ensuring this outcome.

4. The Proposed Rules Lack Timelines and Deadlines for MMS Actions

The proposed rules imposed many deadlines by which the lessee must complete its responsibilities, but very few provisions required MMS to complete its respective duties by a certain date. Despite comments noting this issue, MMS did not include specific timeframes in the final rules because section 8(p) of the OCS Lands Act does not require them. MMS will likely process applications and other required submittals reasonably and in a timely manner. However, as much of the lease process timeline is out of the applicants' control, it is nearly impossible for an applicant to provide timing estimates to investors, consultants, and other necessary parties. To avoid this uncertainty, MMS could have included corresponding timelines, where possible, for certain activities or processes that trigger other requirements or actions or for certain activities that require very limited and predictable review by MMS. Imposing strict deadlines on NEPA review, which can have many unanticipated variables, is less feasible. Perhaps recognizing that certain activities are well suited to strict deadlines, MMS indicated in the preamble to the final rules that it will issue guidance setting target deadlines for MMS processes.⁸⁶

B. Potential Delays Due to FERC and MMS Joint Jurisdiction

While MMS' exclusive authority to approve OCS oil and gas development and production plans is clear under the OCSLA, the

85. *Preamble to the Final Rules*, 74 Fed. Reg. 19667.

86. *Preamble to the Final Rules*, 74 Fed. Reg. 19694.

Federal Energy Regulatory Commission ("FERC") did not agree that MMS had the same scope of authority for renewable energy projects. The 2005 amendments to the OCSLA, made by the EPAct, provided that "[n]othing in this subsection displaces, supersedes, limits, or modifies the jurisdiction, responsibility, or authority of any Federal or state agency under any other Federal law."⁸⁷ In comments⁸⁸ filed in response to the ANPR for the proposed rules, FERC contended that this section of the EPAct does not divest FERC of its authority to license hydropower facilities on navigable waters of the United States under the FPA, including the OCS.⁸⁹ FERC asserted the same arguments as in its previous comments in response to the July 7, 2008 proposed rules, and recommended that MMS remove wave and ocean current energy projects from the proposed rules because hydroelectric projects on navigable waters of the United States, including oceans up to at least twelve nautical miles offshore, were subject to FERC's jurisdiction under the FPA.⁹⁰

FERC's position was based on the following analysis. The FPA authorizes FERC to issue licenses⁹¹ for the construction, operation, and maintenance of dams, water conduits, reservoirs, power houses, transmission lines, and other physical structures of a hydropower project "in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of

87. 43 U.S.C. § 1337(p)(9) (2006).

88. FEDERAL REGULATION AND OVERSIGHT OF ENERGY, RIN 1010-AD30, COMMENTS ON THE ADVANCED NOTICE OF PROPOSED RULEMAKING ON ALTERNATE ENERGY-RELATED USES ON THE OUTER CONTINENTAL SHELF (PUBLISHED BY THE MINERALS MANAGEMENT SERVICE OF THE DEPARTMENT OF INTERIOR) (2006).

89. See FPA, *supra* note 15; see also 16 U.S.C. § 817(1) (2006).

90. MINERALS MANAGEMENT SERVICE, U.S. DEP'T OF THE INTERIOR, RIN 1010-AD30, COMMENTS OF THE FEDERAL ENERGY REGULATORY COMMISSION STAFF ON THE ALTERNATIVE ENERGY AND ALTERNATE USES ON THE OUTER CONTINENTAL SHELF: PROPOSED RULE, at 3 (Aug. 28, 2008).

91. 16 U.S.C. § 798 (2006); 18 C.F.R. §§4.80–4.84 (2008) (An applicant may also apply for a preliminary permit that maintains priority of an application for a license while the permittee studies the site and prepares to apply for a license. The preliminary permit does not authorize construction, and it is not necessary to obtain a permit in order to apply for or receive a license).

the United States.”⁹² Furthermore, the FPA provides that “[i]t shall be unlawful . . . to construct, operate, or maintain any . . . powerhouse, or other works incidental thereto across, along, or in any of the *navigable waters* of the United States or upon any part of the *public lands or reservations* of the United States . . . except under and in accordance with the terms of . . . a license granted pursuant to this chapter.”⁹³ FERC claims that projects located on the OCS are located in “navigable waters”⁹⁴ and that the OCS fits within the FPA definition of a “reservation.”⁹⁵ Because the EAct contains the general savings clause which states that the Act did not supersede the jurisdiction of any Federal agency under any other Federal law, FERC argued that the EAct did not replace its authority to regulate hydrokinetic projects on the OCS.⁹⁶

Since EAct’s enactment, FERC and MMS engaged in discussions aimed at drafting a MOU to resolve the jurisdictional conflict.⁹⁷ MMS and FERC finalized this MOU on April 9, 2009. Under the MOU, MMS has exclusive jurisdiction to regulate all aspects (leasing, production, etc.) of non-hydrokinetic renewable energy projects on the OCS (e.g., wind and solar projects). However, for OCS hydrokinetic projects like wave and current projects, MMS and FERC have agreed that MMS will have authority to issue leases, easements, and rights-of-way, and that FERC will have exclusive jurisdiction to issue licenses and exemptions for hydrokinetic projects on the OCS. Although the MOU clears up the uncertainty caused by the jurisdictional dispute, this dual leasing/licensing process may cause delays in approving hydrokinetic projects on the OCS. The joint agency process will certainly increase the cost and complexity of obtaining approvals for development which will be potentially difficult for the smaller, less sophisticated developers of these new

92. 16 U.S.C. § 797 (2006).

93. 16 U.S.C. § 817(1) (2006) (emphasis added).

94. See 16 U.S.C. § 796(8) (2006).

95. See 16 U.S.C. § 796(2) (2006).

96. MINERALS MANAGEMENT SERVICE, U.S. DEPARTMENT OF THE INTERIOR, RIN 1010-AD30, COMMENTS OF THE FEDERAL ENERGY REGULATORY COMMISSION STAFF ON THE ADVANCE NOTICE OF PROPOSED RULEMAKING ON ALTERNATIVE ENERGY AND ALTERNATE USES ON THE OUTER CONTINENTAL SHELF: PROPOSED RULE, at 2 (Feb. 28, 2006).

97. See MOU, *supra* note 2.

hydrokinetic technologies.

FEDERAL STATUTORY REQUIREMENTS RELATED TO OCS RENEWABLE ENERGY DEVELOPMENT

Although MMS is implementing a new regulatory framework to site renewable energy projects on the OCS, numerous existing environmental, land use, and energy-related statutes are also implicated in siting such projects. In addition to the consultation and responses to findings required by the Endangered Species Act and the Magnuson-Stevens Fishery Conservation and Management Act, MMS will coordinate and consult with relevant Federal agencies, the Governor of any affected state, executive of any affected local government, and affected Indian tribes.⁹⁸ The following is a description of the statutes most relevant in siting renewable energy projects on the OCS.

A. National Environmental Policy Act ("NEPA")

NEPA requires Federal agencies to evaluate the potential impacts of any "proposed major Federal actions significantly affecting the quality of the human environment," and to consider alternatives to such proposed actions.⁹⁹ MMS is the lead federal agency for NEPA compliance for renewable energy and alternate use activities on the OCS.¹⁰⁰ "Federal actions" include rulemaking under the Administrative Procedure Act, adoption of agency policies or programs, and required project approvals of private and state or local activities.¹⁰¹ If the proposed action is likely to have a "significant impact," the acting agency must prepare an EIS.¹⁰² If it is uncertain whether the action may cause a significant impact, the agency can first prepare a more concise EA.¹⁰³ MMS anticipates that, at least initially, competitive lease sales will require an EIS.¹⁰⁴

Under the final rules, the issuance or sale of any type of lease or the approval of any submitted plan would qualify as a "major

98. 30 C.F.R. § 285.203 (2009).

99. 42 U.S.C. § 4332(2)(C) (2006).

100. *Preamble to the Final Rules*, 74 Fed. Reg. 19651.

101. 40 C.F.R. § 1508.18(a) (2008).

102. 40 C.F.R. § 1501.4 (2008).

103. 40 C.F.R. §§ 1501.3, 1508.9, 1508.13 (2008).

104. *See Preamble to the Final Rules*, 74 Fed. Reg. 19659.

Federal action" under NEPA and require a review of the environmental impacts of such actions. For noncompetitive and competitive commercial leases, the rules require two separate environmental reviews for: (1) the lease issuance/sale and SAP approval; and (2) COP approval.¹⁰⁵ Two environmental reviews are also required for competitive limited leases and competitive ROW/RUE grants. For noncompetitive limited leases and ROW/RUE grants, the rules require only one environmental review.¹⁰⁶ Applicants for competitive commercial leases may submit the SAP and the COP simultaneously for a combined NEPA analyses.¹⁰⁷ Further NEPA review may be required if revisions to the facility design, fabrication, installations, or decommissioning result in a significant change in the impacts previously identified to and evaluated by MMS, require any additional authorizations, or propose new or additional activities that were not previously identified or evaluated.¹⁰⁸

The final rules require that the applicant provide most of the information needed for MMS to develop the appropriate NEPA documents. This information includes a description of the resources, conditions, and activities that could be affected by the applicant's proposed site assessment, construction, and decommissioning activities.¹⁰⁹ The EIS prepared by MMS must include a discussion of alternatives to the proposed action, a disclosure of environmental impacts, and a discussion of the "environmental consequences" of the proposed alternatives.¹¹⁰ The alternatives analysis requires the acting agency to describe "all reasonable alternatives" to the proposed action, including a no-action alternative.¹¹¹ This discussion must be in sufficient depth that "reviewers may evaluate their comparative merits."¹¹²

105. Table 2, *Preamble to the Final Rules*, 74 Fed. Reg. 19691.

106. *Id.*

107. *Preamble to the Final Rules*, 74 Fed. Reg. 19691; 30 C.F.R. § 285.601(d) (2009).

108. *Preamble to the Final Rules*, 74 Fed. Reg. 19690. See 30 C.F.R. § 285.617(d) (2009) (for example, proposed revisions to the SAP may require additional NEPA review).

109. *Preamble to the Final Rules*, 74 Fed. Reg. 19689; 30 C.F.R. §§ 285.611(a), 285.627(a), 285.646(a) (2009).

110. 40 C.F.R. §§ 1502.14(a), 1502.16 (2008).

111. *Id.* at §§ 1502.14(a), (d).

112. *Id.* at § 1502.14(b).

As part of the NEPA process, MMS must publish a notice of intent during the scoping of the environmental review¹¹³ and request comments from affected state agencies, Indian tribes, the applicant, and the public upon the release of a draft EIS.¹¹⁴ For projects that require an EIS, MMS will file the draft EIS with EPA and hold at least one public hearing to receive comments on the draft EIS in the vicinity of the proposed lease area.¹¹⁵ MMS anticipates that under typical circumstances, the final EIS will be completed three-to-five months after the public hearing.¹¹⁶ After the EIS has been completed and is made available to the public,¹¹⁷ MMS and the applicant may proceed with the proposed actions.¹¹⁸

B. Coastal Zone Management Act ("CZMA")

The CZMA specifies that coastal states may protect coastal resources and manage coastal development.¹¹⁹ In certain circumstances, a state with a coastal management program can deny or restrict development off its coast if the reasonably foreseeable effects¹²⁰ of such development would be "inconsistent" with the state's coastal management program.¹²¹ Under the final rules, there are two phases of CZMA review for all competitive and noncompetitive commercial leases, competitive limited leases, and competitive ROW/RUE grants: (1) one combined CZMA review for the lease sale or ROW/RUE grant and SAP approval; and (2) one CZMA review for the COP/GAP approval.¹²² For

113. *Id.* at § 1501.7 (2008).

114. *Id.* at § 1503.1 (2008); *Preamble to the Final Rules*, 74 Fed. Reg. 19659.

115. *Preamble to the Final Rules*, 74 Fed. Reg. 19659.

116. *Id.*

117. 40 C.F.R. § 1502.19 (2008).

118. Once the acting Federal agency has complied with NEPA's procedural requirements, NEPA requires no more action from the acting Federal agency. See *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980).

119. See 16 U.S.C. § 1451 (2006); 15 C.F.R. § 930.34 (2008).

120. 15 C.F.R. § 930.53 (2009). See also *Preamble to the Final Rules*, 74 Fed. Reg. 19651.

121. For example, if a state agency objects to the consistency certification from the applicant, MMS is prohibited from issuing a noncompetitive lease or grant to the applicant. 15 C.F.R. §§ 930.63-64 (2008).

122. See Table 2, *Preamble to the Final Rules*, 74 Fed. Reg. 19691; 30 C.F.R. § 285.612 (2009).

noncompetitive limited leases and ROW/RUE grants, there is one combined CZMA review for the lease sale or ROW/RUE grant and GAP approval.¹²³ The review process, timeline, and options to appeal a state agency's objection to the consistency determination depend on whether the action is considered a Federal agency activity or a Federal approval of a license or permit.¹²⁴ Generally, issuance of a lease or grant is a Federal agency activity.¹²⁵ In contrast, MMS' approval of a SAP, GAP, or COP is an approval of a Federal license or permit under the CZMA.¹²⁶ However, as explained below, MMS has merged some of these reviews and selected one CZMA process in circumstances where MMS is simultaneously approving the issuance of a noncompetitive lease or grant and a SAP or GAP.¹²⁷

Competitive Lease or Grant Sales. When MMS conducts a competitive sale for a lease or a ROW/RUE grant, it will first determine if the lease or grant is "reasonably likely to affect any land or water use or the natural resources of a [s]tate's coastal zone".¹²⁸ In the event such effects are reasonably foreseeable, the MMS is required to submit a "consistency determination" to the affected state at least ninety days prior to the lease or grant sale.¹²⁹ MMS will prepare a consistency determination, based on the information received from the potential lessee or grantee, that

123. Table 2, *Preamble to the Final Rules*, 74 Fed. Reg. 19691.

124. *See generally* 15 C.F.R. §§ 930.30–46, 930.50–66 (2008). "Federal agency activity" is defined as "any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities [which] includes a range of activities where a Federal agency makes a proposal for action initiating an activity or series of activities when coastal effects are reasonably foreseeable, e.g., a Federal agency's proposal to physically alter coastal resources, a plan that is used to direct future agency actions, a proposed rulemaking that alters uses of the coastal zone." 15 C.F.R. § 930.31(a) (2008).

125. *See* Table 1 and Table 2, *Preamble to the Final Rules*, 74 Fed. Reg. 19652, 19691.

126. *See id.*

127. Under the final rules, the issuance of competitive leases and grants is subject to 15 C.F.R. pt. 903, subpart C as a Federal agency activity, and the issuance of noncompetitive leases and grants and approval of the SAP, GAP, and COP are subject to 15 C.F.R. pt. 903, subpart D as a Federal license or permit. 30 C.F.R. §§ 285.612, 285.627, 285.647 (2009). *See also* Table 1, *Preamble to the Final Rules*, 74 Fed. Reg. 19652.

128. *Preamble to the Final Rules*, 74 Fed. Reg. 19651.

129. *Id.*

will include the proposed activity, its expected coastal effects, and an evaluation of how the proposed lease or grant is consistent with the state coastal management program.¹³⁰ After MMS submits its consistency determination to the state agency, the state agency will determine whether the supplied information is adequate for its review, may request additional information to supplement the initial submission, and give public notice of the proposed actions.¹³¹ When the state agency has adequate information, it will begin its consistency review and either concur with or object to the consistency determination within sixty days.¹³² If the state agency response is not received after sixty days from the commencement of the review, concurrence is presumed.¹³³ If the state agency agrees with MMS's determination, MMS may proceed with the lease or grant sale.¹³⁴

If the state agency objects to the determination, MMS can still proceed with the competitive lease or grant sale if it has concluded that the sale is fully consistent with the affected state coastal management program and it has notified the state agency of its decision to proceed.¹³⁵ If MMS proceeds with the lease or grant sale over the state agency's objection, the state agency's only recourse is to request mediation or seek judicial review.¹³⁶

Noncompetitive Lease or Grant Applications. For a noncompetitive lease, two CZMA reviews are required – one simultaneous review for the issuance of the lease and SAP approval and another review for the COP.¹³⁷ For a noncompetitive limited lease or ROW/RUE grant, one simultaneous review is required for the issuance of the limited lease/grant and GAP approval.¹³⁸ Although the issuance of a noncompetitive lease or grant is a Federal agency activity and the approval of a SAP, GAP, or COP is a non-Federal activity that

130. *Id.*

131. 15 C.F.R. §§ 930.41(a), 930.42(b) (2008).

132. *Id.* at § 930.41(a).

133. *Id.*

134. *Preamble to the Final Rules*, 74 Fed. Reg. 19651.

135. 15 C.F.R. §§ 930.43(d), (e) (2008). MMS will follow the procedure in 15 C.F.R. part 930, subpart C. *Preamble to the Final Rules*, 74 Fed. Reg. 19651.

136. 15 C.F.R. §§ 930.44, 930.116 (2008).

137. See Table 2, *Preamble to the Final Rules*, 74 Fed. Reg. 19691.

138. See *id.*

requires a Federal license or permit, MMS has chosen to subject the simultaneous noncompetitive lease/grant issuance review and SAP/GAP review to the CZMA procedure for a Federal permit or license.¹³⁹ The CZMA review for a noncompetitive lease or ROW/RUE grant follows the review process used for all SAP, GAP, and COP approvals.¹⁴⁰

SAP, GAP, and COP Approvals. Under the final rules, the competitive lessee or grant holder or the noncompetitive lease or grant applicant will be required to prepare a consistency certification to submit to MMS with its SAP, GAP, and COP.¹⁴¹ For all three types of plans, the consistency certification must include: (1) one copy of the consistency certification stating that the proposed activities described in detail in the applicant's plans comply with the state's approved coastal management program and will be conducted in a manner that is consistent with such program;¹⁴² (2) data and information identified as required submissions by the state's program; and (3) an evaluation of how the proposed activity is consistent with the state's program.¹⁴³ For all competitive leases, limited leases and ROW/RUE grants, MMS will then submit one copy of the SAP/GAP/COP, supporting information, and consistency certification to the affected state CZMA agency.¹⁴⁴ For all noncompetitive leases, limited leases, and ROW/RUE grants, it is the applicant's responsibility to furnish a copy of the SAP/GAP, supporting information, and consistency certification to the affected state CZMA agency and MMS at the same time.¹⁴⁵

Concurrence by the state agency is conclusively presumed if the state agency response is not received after six months from the commencement of the review.¹⁴⁶ MMS will not proceed with the

139. See Table 1, *Preamble to the Final Rules*, 74 Fed. Reg. 19652.

140. See *id.*

141. 30 C.F.R. §§ 285.611(b), 285.627(b), 285.646(i) (2009).

142. *Id.*

143. *Id.*; 15 C.F.R. §§ 930.58(a)(2), (a)(3) (2008). Applicants must also submit "information" as required by 15 C.F.R. § 930.76(a).

144. 15 C.F.R. § 930.76(b); 30 C.F.R. §§ 285.612(a), 285.628(c), 285.647(a).

145. 30 C.F.R. §§ 285.612(b), 285.647(b) (2009).

146. 15 C.F.R. § 930.62(a) (2008). If the review is not completed after three months of its commencement, the state agency must provide written notification to MMS of the status of the review and its basis for further delay in issuing a final decision. *Id.* at § 930.62(b).

noncompetitive lease or grant issuance, or SAP, GAP, or COP approval if: "(1) [c]onsistency has not been conclusively presumed; or (2) the [s]tate objects to the applicant's consistency certification" and, on appeal, the Secretary of Commerce does not find that "the permitted activities are consistent with the objectives of the CZMA or are otherwise necessary in the interest of national security."¹⁴⁷

Option to Amend the SAP, GAP, or COP. If the state agency objects to the consistency certification, the applicant has the option to submit an amended plan to MMS with the necessary data or information to support the amended consistency certification that describes modifications made to the original plan; and how the modifications will ensure that all proposed activities will be consistent with the state's coastal management program.¹⁴⁸ MMS will then submit the modified plan, the consistency certification, and all applicable information and data that was required in the initial submission to the state agency.¹⁴⁹ The state agency has three months to complete its review of the modified plan (instead of six months), after which concurrence will be conclusively presumed.¹⁵⁰

Subsequent consistency reviews for revisions to the SAP, COP, or GAP are "not required unless MMS determines that the revisions (1) [r]esult in a significant change in the impacts previously identified and evaluated; (2) require any additional Federal authorizations; or (3) involve activities not previously identified and evaluated."¹⁵¹

C. Rivers and Harbors Appropriations Act

Construction of renewable energy structures on the OCS such as the installation of wind turbines, electrical service platforms, submarine cable systems, and cable landfall transition structures will require a Section 10 permit under the Rivers and Harbors Appropriations Act of 1899 ("RHA").¹⁵² The Corps has the

147. *Preamble to the Final Rules*, 74 Fed. Reg. 19690.

148. *See* 15 C.F.R. §§ 930.77–78, 930.82 (2008).

149. *Id.* at § 930.83.

150. *Id.*

151. *Preamble to the Final Rules*, 74 Fed. Reg. 19690.

152. *See* Cape Wind Draft Environmental Impact Statement, U.S. Dept. of Interior, Mineral Management Services (Jan. 2008) at 1-3, *available at*

authority to review and regulate certain structures and activities that are located in or that affect navigable waters of the United States.¹⁵³ A Section 10 permit from the Corps is required for the "construction of artificial islands, installations, and other devices on the seabed, to the seaward limit of the outer continental shelf."¹⁵⁴ The Corps' decision to issue a Section 10 permit for construction on lands which are under lease from the DOI is limited to an evaluation of the impact of the proposed work on navigation and national security.¹⁵⁵ All other construction and installation projects located on the seabed that are not under a lease from the DOI are subject to more comprehensive permitting procedures required by the Corps.¹⁵⁶ A Section 10 permit under the RHA is subject to NEPA review.¹⁵⁷

Section 10 permits are also required for power transmission lines from renewable energy projects crossing navigable waters of the United States unless those lines are part of a hydrokinetic project subject to regulation by FERC under the FPA.¹⁵⁸ FERC, not the Corps, will review permit applications for power transmission lines that are a part of a water power project.¹⁵⁹

<http://www.mms.gov/offshore/alternativeenergy/CapeWindDEIS.htm>
[hereinafter Cape Wind DEIS].

153. See 33 U.S.C. § 403 (2006).

154. See 43 U.S.C. § 1333 (2006); 33 C.F.R. § 322.3(b) (2008).

155. See 33 C.F.R. § 322.5(f) (2008).

156. *Id.* Also, the *Ocean Thermal Energy Conversion Act of 1980*, 42 U.S.C. § 9101, requires a license for the ownership, construction, location, and operation of ocean thermal energy conversion (OTEC) facilities and plantships. An application for an OTEC license filed with the National Oceanic and Atmospheric Administration constitutes an application for all Federal authorizations required for ownership, construction, location, and operation of an OTEC facility or plantship, including applications for Section 10 of the RHA, Section 404 of the Clean Water Act, Section 103 of the Marine Protection, Research and Sanctuaries Act, and other Corps authorizations which may be required by the Corps. 33 C.F.R. § 320.3(m).

157. 33 C.F.R. § 320.3(d).

158. *Id.* at § 322.5(i)(1).

159. *Id.* at § 322.5(h)(3).

D. Other Statutes Potentially Governing the Siting of OCS Renewable Energy Development

1. Potential Impacts on the Marine Environment, Endangered Species, and Migratory Birds

Renewable energy development projects on the OCS are subject to additional Federal statutes because of their potential impact on protected endangered marine species, habitats, resources, and sanctuaries.¹⁶⁰ In the case of wind farms, impacts on migratory birds also need to be considered.

The *Endangered Species Act of 1973* ("ESA")¹⁶¹ requires Federal agencies to consult with the DOI's U.S. Fish and Wildlife Service ("FWS") and the Commerce Department's National Marine Fisheries Service ("NMFS") to ensure that proposed Federal "agency actions" are not likely to jeopardize the continued existence of any species listed as endangered or threatened, or result in the destruction or adverse modification of critical habitat designated for such species.¹⁶² Plans submitted pursuant to the final rules must contain sufficient information to ensure that the proposed activities will be conducted in a manner consistent with provisions of the ESA.¹⁶³ Applicants must notify MMS if endangered or threatened species may be present in the vicinity of the lease or grant or if designated critical habitat of a threatened or endangered species may be affected by the direct or indirect effects of MMS-approved activities.¹⁶⁴ MMS will then consult with state and Federal fish and wildlife agencies and identify whether, and under what conditions, the activity may proceed.¹⁶⁵

The *Marine Mammal Protection Act* ("MMPA") prohibits the

160. See Jeremy Firestone et al., *Regulating Offshore Wind Power and Aquaculture: Messages from Land and Sea*, 14 CORNELL J.L. & PUB. POL'Y 71, 78-85 (2004).

161. See 16 U.S.C. §§ 1531-1544 (2006); 50 C.F.R. pt. 402 (2008).

162. 16 U.S.C. § 1536(a)(2) (2006); 50 C.F.R. § 402.1(b) (2008). See also 30 C.F.R. § 285.203 (2009).

163. 30 C.F.R. §§ 285.611(b)(4), 285.627(a)(4), 285.646(d) (2009).

164. 30 C.F.R. §§ 285.801(c), 285.801(d) (2009).

165. 30 C.F.R. §§ 285.801(c)(2), 285.801(d)(2) (2009).

taking of marine mammals in U.S. waters and by U.S. citizens on the high seas.¹⁶⁶ Under the final rules, SAPs, COPs, and GAPs must contain sufficient information to ensure that the proposed activities will be conducted in a manner consistent with the provisions of the MMPA.¹⁶⁷ If there is reason to believe that marine mammals may be incidentally taken as a result of the proposed activities, the lessee or grant holder: (1) must secure an authorization from the Commerce Department's National Oceanic and Atmospheric Administration ("NOAA") or the FWS for incidental taking, including taking by harassment, that may result from the applicant's proposed actions; and (2) must comply with all measures required by NOAA or FWS, including measures to effect the least practicable impact on such species and its habitat and to ensure no unmitigable adverse impact on availability of the species for subsistence use.¹⁶⁸

The *Magnuson-Stevens Fishery Conservation and Management Act* requires Federal agencies to consult with NMFS on proposed Federal actions that may adversely affect Essential Fish Habitats ("EFH") that are necessary for spawning, breeding, feeding, or growth to maturity of Federally-managed fisheries.¹⁶⁹ Under the final rules, any conservation recommendations adopted by MMS to avoid or minimize adverse affects on EFH will be incorporated as terms and conditions in the lease or grant and must be adhered to by the lessee or grantee.¹⁷⁰ The MMS may require additional surveys to define boundaries and avoidance distances. If required, MMS will specify the survey methods and instrumentations for conducting the biological survey and specify the contents of the biological report.¹⁷¹

The *Fish and Wildlife Coordination Act of 1958* ("FWCA") requires Federal agencies to consult with Federal and state fish and wildlife agencies prior to issuing a permit for an activity where any stream or other body of water is proposed to be impounded, diverted, the channel deepened, or otherwise

166. See 16 U.S.C. §§ 1361–1407 (2006).

167. 30 C.F.R. § 285.801(b) (2009).

168. 30 C.F.R. § 285.801(3) (2009).

169. See 16 U.S.C. § 1802(10) (2006); 50 C.F.R. § 600.920(a)(1) (2008); see also 30 C.F.R. § 285.203 (2009).

170. 30 C.F.R. § 285.803(b) (2009).

171. 30 C.F.R. § 285.803(c) (2009).

controlled or modified.¹⁷² The consultation must consider conservation of wildlife resources to prevent loss of and damage to such resources during project planning, construction, and operation.¹⁷³ Any reports and recommendations of the wildlife agencies must be included in authorization documents for construction or for modification of projects.¹⁷⁴ For hydropower projects, FERC has independent consultation requirements under Section 10(j) of the FPA.¹⁷⁵ The *Estuary Protection Act*, which requires Federal agencies to assess the impacts of commercial and industrial developments on estuaries, is complementary to the provisions of the FWCA for projects in estuarine areas.¹⁷⁶

The *National Marine Sanctuaries Act* ("NMSA") prohibits the destruction, loss of, or injury to any sanctuary resource managed under the law or by permit, and requires Federal agencies to consult with NOAA on actions that are likely to destroy, injure, or cause the loss of any sanctuary resource.¹⁷⁷ If an applicant plans to conduct activities prohibited under the NMSA but authorized under a valid Federal or state lease, permit, license, approval, or authorization, the applicant must obtain a permit from NOAA for the activities and comply with terms and conditions to protect marine sanctuaries.¹⁷⁸

The *Migratory Bird Treaty Act of 1918* requires that Federal agencies taking actions likely to negatively affect migratory bird populations enter into a MOU with the FWS to ensure that environmental reviews mandated by NEPA evaluate the effects of the agency actions on migratory birds, with emphasis on species of concern.¹⁷⁹ For example, the type and extent of impacts to migratory birds from offshore wind projects may include some level of bird-strike impacts and mortality associated with the turbine structures.¹⁸⁰

172. See 16 U.S.C. §§ 661–666c (2006).

173. *Id.* at §§ 662(a), (b).

174. *Id.* at § 662(b).

175. See 18 C.F.R. § 5.26 (2008).

176. See 16 U.S.C. §§ 1221–1226 (2006).

177. See *id.* at §§ 1431–1445; 15 C.F.R. pt. 922 (2008).

178. See 15 C.F.R. §§ 922.48–49 (2008).

179. See 16 U.S.C. §§ 703–712 (2006); see also U.S. FISH AND WILDLIFE SERVICE, SERVICE RESPONSIBILITIES TO PROTECT MIGRATORY BIRDS (2004), available at <http://www.fws.gov/policy/720fw2.html>.

180. Cape Wind DEIS, *supra* note 152, at 6-13.

2. Water Discharges and Air Emissions

Multiple sections of the *Clean Water Act* (“CWA”) are applicable to renewable energy development projects. Section 402 of the CWA requires a National Pollutant Discharge Elimination System (“NPDES”) permit from the Environmental Protection Agency (“EPA”) (or an authorized state) before discharging any pollutant into territorial waters, the contiguous zone, or the ocean from an industrial point source.¹⁸¹ For example, the installation of onshore transmission lines and associated components would require a NPDES General Stormwater Construction permit.¹⁸²

Section 404 of the CWA requires a permit from the Corps before discharging dredge or fill material into waters of the United States, including wetlands.¹⁸³ Also, Section 401 of the CWA requires applicants for Federal licenses to obtain a water quality certificate when intending to conduct any activity which may result in a discharge into navigable waters.¹⁸⁴ If the discharge is within three miles of shore, the applicant must meet state water quality standards. Section 311 of the CWA prohibits discharges of oil or hazardous substances into the navigable waters of the United States, adjoining shorelines, into or upon the waters of the contiguous zone, in connection with activities under the OCSLA, or which may affect natural resources belonging to the United States.¹⁸⁵

In addition to the CWA, two other Federal statutes regulate materials that are generated or disposed of into ocean waters: the *Marine Protection, Research, and Sanctuaries Act of 1972* (“MPRSA”)¹⁸⁶ and *Resource Conservation and Recovery Act* (“RCRA”).¹⁸⁷ “Construction, operation, and decommissioning of renewable energy projects involve the transportation, handling, and disposal of material considered to be hazardous to the environment and humans should they be handled, released, or

181. See 33 U.S.C. § 1342 (2006); 40 C.F.R. pt. 122 (2008).

182. Cape Wind DEIS, *supra* note 152, at 1-4.

183. See 33 U.S.C. § 1344 (2006); 33 C.F.R. § 323.3 (2008).

184. 33 U.S.C. § 1341(a)(1) (2006).

185. *Id.* at § 1321(b)(1); 40 C.F.R. § 112.1 (2008); 30 C.F.R. pt. 254 (2008).

186. 33 U.S.C. §§ 1401–1445 (2006).

187. 42 U.S.C. §§ 6921–6939e (2006).

[improperly disposed of]" into the marine environment.¹⁸⁸ Specifically, wind turbines and electric service platforms use lubricating oil, cooling liquids, and grease that would require proper disposal and leak prevention.¹⁸⁹

The MPRSA prohibits the dumping or transportation for dumping of materials, including dredged material, solid waste, garbage, sewage, sewage sludge, chemicals, biological and laboratory waste, wrecked or discarded equipment, rock, sand, excavation debris, and other waste into ocean waters without a permit from the EPA or the Corps.¹⁹⁰ The standard for permit issuance is whether the dumping will "unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities."¹⁹¹ For hazardous materials, RCRA requires waste generators to determine whether they generate hazardous waste, and if so, to determine how much hazardous waste they generate and notify the responsible regulatory agency.¹⁹²

The *Clean Air Act* ("CAA") prohibits Federal agencies from providing financial assistance for, or issuing a license or other approval to, any activity that does not conform to an approved implementation plan for achieving and maintaining the National Ambient Air Quality Standards in the applicable area of the activity.¹⁹³ Under the final rules, if the project is located in the western Gulf of Mexico, the applicant must provide to MMS any information required to make the appropriate air quality determinations for the project.¹⁹⁴ CAA requirements differ for OCS air pollution sources within twenty-five miles of a state's seaward boundary¹⁹⁵ and those located beyond twenty-five miles of a state's boundary.¹⁹⁶ Furthermore, an applicant for a

188. Cape Wind DEIS, *supra* note 152, at 2-24.

189. *Id.* at 2-24-2-25.

190. See 33 U.S.C. §§ 1402(c), 1411 (2006); 40 C.F.R. pts. 224-225 (2008). In the case of ocean dumping of dredged material, the Army Corps has permitting authority. 33 U.S.C. § 1413(a) (2006).

191. 33 U.S.C. § 1412(a) (2006).

192. See 42 U.S.C. §§ 6921-6939 (2006); 40 C.F.R. pts. 261-262 (2008).

193. See 42 U.S.C. §§ 7401-7671(q) (2006).

194. 30 C.F.R. § 285.659. All other projects must comply with CAA regulations. 40 C.F.R. § 55.3 (2008).

195. See 40 C.F.R. §§ 55.6(b), 55.14 (2008).

196. See *id.* at §§ 55.6(d), 55.13.

renewable energy project on the OCS will need a permit from the EPA for its activities on the OCS during construction and also for the equipment and activities that would emit air pollutants or constitute an "OCS Source" during operation.¹⁹⁷

3. Potential Impacts on Navigation and Aviation

The *Ports and Waterways Safety Act* authorizes the U.S. Coast Guard to implement measures for controlling or supervising vessel traffic or for protecting navigation and the marine environment, including reporting and operating requirements, surveillance and communications systems, routing systems, and fairways.¹⁹⁸ Wind turbine generators and electric service platforms are considered fixed structures in navigable waters and would require a permit from the U.S. Coast Guard for private aids to navigation marking.¹⁹⁹

For renewable energy projects on the OCS, the *Federal Aviation Act of 1958* requires that public notice be given to the Federal Aviation Administration ("FAA") when construction, alteration, establishment, or expansion of a structure is proposed.²⁰⁰ Specifically, notice is required for the construction or alteration of structures in excess of 200 feet above ground level unless the location is shielded by existing structures of a permanent and substantial character, or natural terrain, such that it is evident beyond all reasonable doubt that the structure will not adversely affect safety in air navigation.²⁰¹ Typically, the height of an individual wind turbine generator would exceed this 200-foot threshold, and therefore would likely require FAA-approved lighting and marking.²⁰² In addition, a Department of Defense report concluded that wind farms pose potential interference with military radar.²⁰³

197. See *id.* at § 55.6; Cape Wind DEIS, *supra* note 152, at 1-4.

198. See 33 U.S.C. §§ 1221-1236 (2006); 33 C.F.R. pt. 160 (2008).

199. See 33 C.F.R. § 66.01-5 (2008); Cape Wind DEIS, *supra* note 153, at 1-5.

200. See 49 U.S.C. §§ 44701, 44718(a) (2006); 14 C.F.R. §§ 77.11-13 (2008).

201. See 14 C.F.R. §§ 77.13(a)(1), 77.15(a) (2008).

202. See Cape Wind DEIS, *supra* note 152, at 1-5.

203. See DEPARTMENT OF DEFENSE, REPORT TO THE CONGRESSIONAL DEFENSE COMMITTEES: THE EFFECT OF WINDMILL FARMS ON MILITARY READINESS 2-4 (2006), available at <http://www.defenselink.mil/pubs/pdfs/WindFarmReport.pdf>.

4. Potential Impacts on Historic Sites and Archaeological Resources

Renewable energy projects on the OCS may have adverse effects on federally protected historic areas and on archaeological resources. For example, installation of renewable onshore electric transmission cable systems beneath existing public roads, physical ground disturbance during construction/decommissioning, and operation and maintenance of OCS renewable energy projects may physically impact historic structures. Offshore wind turbines and other visible components of the proposed action may also negatively impact the open views and visible range of historic structures.²⁰⁴ Offshore archeological resources may be impacted by the footprints of the wind turbines or other structures on the sea bottom; the work area around each structure where marine sediments may be disturbed; the jet plowed trenches for installation of the inner-array cables connecting the turbines to the electric service platform; the jet plowed trenches for the transmission cable system from the electric service platform to the landfall; and associated marine work areas such as anchor drop areas.²⁰⁵

The *National Historic Preservation Act of 1966*²⁰⁶ and the *Archaeological and Historical Preservation Act of 1974*²⁰⁷ require Federal agencies to consult with the Advisory Council on Historic Preservation and the state or Tribal Historic Preservation Officer before allowing a Federally-licensed activity to proceed in an area where cultural, historic, and archaeological resources might be located.²⁰⁸ Under the final rules, the lease or grant holder must notify MMS within 72 hours if a potential archaeological resource is discovered while conducting any activity related to a project; immediately stop all seafloor-disturbing activities within the area of discovery; and keep the location of the discovery confidential until MMS evaluates and provides further instruction.²⁰⁹ Also, a developer must work with Federal agencies to effectively manage

204. Cape Wind DEIS, *supra* note 152, at 4-148.

205. *Id.* at 4-149.

206. See 16 U.S.C. §§ 470–470t (2006).

207. See *id.* at §§ 469–469c.

208. 36 C.F.R. § 800.9(c)(2).

209. 30 C.F.R. § 285.802 (2009).

any shipwrecks in offshore waters where the project is being developed.²¹⁰

CONCLUSION

The MMS final rules are an important step towards developing an offshore renewable energy industry that will provide renewable energy to populated areas in the United States, while also reducing dependence on foreign oil and protecting the environment. The final rules provide a strong framework for renewable energy development on the OCS, but additional guidance documents from MMS will be necessary in order to fully ensure that offshore projects can be developed in a timely and cost-effective manner. MMS, FERC, and the new Obama administration have demonstrated a commitment to encouraging offshore renewable energy through public statements, the MOU, and publication of the final rules. A similar and possibly greater level of commitment will be required when implementing the rules to ensure that offshore renewable energy projects are able to operate as soon as possible. Spin, Baby, Spin!

210. See 43 U.S.C. §§ 2101–2106 (2006) (providing guidance to the states and Federal agencies on how to effectively manage shipwrecks in waters under their ownership or control); NATIONAL PARK SERVICE, ABANDONED SHIPWRECK ACT GUIDELINES (1990), available at <http://www.nps.gov/archeology/submerged/intro.htm>.