

Access Framework: Model Text (November 2011)

An Act to Establish a Framework for Development of Offshore Wind Power^Y

Whereas, the offshore waters of [State] are ecologically and economically vital public resources and it is in the interest of all [State residents] to preserve and protect the State's coastline, and to embrace responsible marine-based development of renewable sources of power; and,

Whereas, [State] has determined that development of renewable resources is fair and equitable, that developing such resources in public trust waters is in conformance with the same, that [State] seeks to serve as an effective steward of responsible development by preserving and protecting the public resources for the good of the public; and,

Whereas, offshore wind power provides utility-scale renewable energy at competitive costs, helps to meet the increasing energy demand in U.S. coastal areas, provides a price-stable means of energy generation, and does so without emitting greenhouse gases or conventional pollutants, which have environmental and health consequences; and

Whereas, offshore wind power, being a domestic source of energy enhances U.S. energy independence,

Whereas, there is likely to be an increased demand for the potential placement of structures in offshore waters, given the energy and job creation needs of the [State], it is in the interest of the [State] to create a comprehensive regulatory framework that reflects the scope of the economic, ecological, and social aspects of development of a utility-scale offshore wind energy facility; and,

Whereas, [State] has a renewable portfolio standard of Y% by 20XX; and

Whereas, [State] is committed to developing offshore areas in a transparent manner that involves all stakeholders, honors existing activities, values biodiversity and ecosystem health, formulates all decisions on the best available science, and establishes an adaptive management system of monitoring and evaluation;

BE IT ENACTED...

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Definitions

The following terms and phrases shall have the meaning ascribed to them in this Subchapter unless the context clearly indicates otherwise:

‘Access system framework’ or ‘Framework’ means the multiple considerations with property rights regarding operation level rights, which include but are not limited to: access (the right to enter); withdrawal (the right to extract); exclusion (the right to deny access); and alienation (the right to sell, lease or transfer).

‘Benthic organisms’ means bottom-dwelling organisms in an aquatic environment.

‘Decommissioning’ means the formal process for deactivating, removing, or otherwise removing from active service.

‘Defined Upper Limit Tract Size’ means a tract size with a set limitation as determined by [State].

‘Developer’ means the person, organization, or entity that develops or otherwise undertakes the development of a site.

‘Finding’ generally means the stated results of an agency prepared written environmental assessment (EA) or environmental impact statement (EIS) pursuant to the National Environmental Policy Act (NEPA). An agency will issue a finding after reviewing whether a federal undertaking will significantly affect the environment. An agency may issue a finding of no significant impact (FONSI) when environmental analysis and interagency review reveal that a project has no significant impacts on the quality of the environment.

‘Graduated Rent’ means a lease that offers low rents in the early months or years, and increases over time to reach market or other negotiated rates.

‘Graduated Royalty’ means an increase in the production based royalty percentage or royalty rate that would increase over time.

‘Greenhouse Gas’ means gases that trap heat in the atmosphere, and include, but are not limited to carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), and fluorinated gases.

‘Lead federal agency’ means the federal agency that is generally designated to supervise and/or coordinate preparation of the environmental analysis (EA) or environmental impact statement (EIS) under the National Environmental Policy Act (NEPA). If there are multiple federal agencies involved in an undertaking, the lead agency will serve as the primary contact for NEPA requirements. Federal agencies, together with state, tribal or local agencies, may act as joint lead agencies.

‘Long-term fixed tenure’ means a long-term lease, generally for fifteen or more years, and for a negotiated, fixed period of time.

‘Marine Life’ means marine mammals, turtles, fish, aquaculture, organism, or any other aquatic

life.

'Negotiation Tract Size' means a tract size that is negotiated between [State] and developer based on mutual considerations.

'Not-hinder-open-access Tract Size' means a tract size and/or location that will not exclude open access.

'No limit Tract Size' means a tract size without set limitation to be determined by the needs of the developer.

'Offshore waters' mean oceanic and estuarine waters off the coast of the State, including bays, sounds and intra-coastal waterways. [For Great Lakes States, 'offshore waters' may include, as appropriate, the Great Lakes and any connecting waters].

'Power Purchase Agreement' or PPA means a financial arrangement between parties, where one party sells energy and/or other attributes, and one party agrees to purchase the same.

'Property rights' means the social institutions that define or limit the range of privileges in accordance with local land use laws and zoning regulations. Property rights traditionally include: the right to use of the property; the right to any benefit from the property; the right to transfer or sell the property; and the right to exclude others from the property.

'Renewable' means a non-polluting and non-CO₂ emitting source of energy that comes from natural resources (such as wind, sunlight, waves, currents, tides, ocean thermal gradients, and geothermal sources), and that are naturally replenished.

'Single-window permitting' means a single location and/or entity for submission of regulatory documents with the purpose of increasing efficiency in obtaining the relevant permit(s).

'Sound propagation' means the movement of sound through water that is perceived by a receiver as direct or reverberant sound.

'Spatial Inventory' means a database that includes an inventory of pertinent characteristics, including, but not limited to maps of existing uses, lists of measurements, and research data.

Section 1. Purpose

In furtherance of the goals of energy independence, job creation, reduced emissions of conventional pollutants and greenhouse gases and increased [State] requirements for electricity from renewable sources, it is in the public interest to develop [State's] offshore wind power resources and to provide a Framework to facilitate the orderly development, management and oversight of such resources.

It is the intent of the [Legislative Body], in full recognition that the development of renewable energy sources is required pursuant to [RPS standard], that [State] offshore areas should be developed in a comprehensive manner, wherein renewable energy production is maximized and the necessary economies of scale are realized. It is the intent of the [Legislative Body] that a

comprehensive and responsible marine renewable development program shall be accomplished by implementation of the goals proscribed herein, and as such, liberal interpretation in favor of accomplishing the stated goals and objectives shall be exercised.

Section 2. Framework

The goal of this Act is to establish a Framework for accessing the offshore waters of the [State] for the purpose of developing sources of renewable energy. The Act shall be implemented in furtherance of the goals declared in Section 1 and following objectives:

- (a) development of offshore wind resources in [State] waters;
- (b) creating property rights for [State] waters;
- (c) minimizing conflicts with existing uses and users;
- (d) minimizing any negative project-specific environmental effects; and
- (e) fair compensation for the use of such waters and resources in conformance with the public interest.

Section 3. Offshore Wind Resource Development

In furtherance of the goals and objectives of this Act, [State] shall implement the following methodologies when creating a comprehensive Framework:

- (a) centralized one-stop management;
- (b) lease systems;
- (c) notice and opportunity for public involvement and comment;
- (d) long-term leasing;
- (e) fixed-tract size;
- (f) financial assurance and transfer subject to approval;
- (g) graduated rent and royalty formulas; and
- (h) exclusion zones.

Section 4. Identification of Areas to Offer for Lease and Lease and Permitting Systems

- (a) The [State Agency] may, consistent with the goals and objectives of this Act, identify tracts for offshore wind power development through pre-leasing studies or offshore spatial planning efforts.

- (b) [State Agency] shall create a spatial inventory of existing offshore water uses. [State] may utilize this information to map exclusion zones and identify preferred tracts for offshore wind power development in accordance with subsection (a) of this Section. The inventory should include, but is not limited to, identifying and mapping ammunition dumps, waste dumps, designated shipping lanes, sand borrow areas, archeological sites, and designated habitat areas. [Agency] shall also consider other potential user conflicts such as those with commercial fishers, recreational boaters, and commercial vessels as well as conflicts with marine life, including, birds, bat and marine mammals. The [Agency] shall include a written report accompanying such designations describing the rationale for mapping. The [Agency] shall seek to include the designation system in the [State] coastal zone management plan] to enhance consistency with the implementation of State policy, including the goals and objectives of this Act.

- (c) Taking into account the locational considerations of the project’s environmental impact assessment under Section 9 of this Act, [State Agency] may pre-approve an area or areas identified under subsection (b) of the this Section, for offshore wind resource development. Such pre-approved areas shall then be subject to a competitive bidding process under subsection (e) of this Section.
- (d) The [State Agency] is authorized to enter into long-term fixed-tenure leases for the public interest to facilitate long-term power purchase agreements and enable financing of offshore wind projects at reasonable terms. [State Agency] shall assign fixed-tenure leases for a pre-determined period of time of between 10 and 25 years. When practicable, the lease shall include an option to renew the lease. Such proposed leases and subsequent development are subject to review under the [State] environmental impact assessment (EIA) provisions of this Act.¹
- (e) Decisions on who to consider offering a lease for development of offshore wind resource development shall be determined through a competitive bidding process that considers the goals and objectives of this Act including, but not limited to: project economics; project risk (including, financial capability, experience, and technology, permitting and construction risk); and environmental and social considerations. In addition to tract development rights, if [State] intends to award a power purchase agreement, a competitive bidding process shall be conducted jointly by [State Agency] and the [State/Regional Utility Agency/Authority].
- (f) Nothing in this section shall be construed to prohibit [State] from adopting identifying lease tracts and leasing tracts to developers for offshore wind resource developments that may straddle federal waters or adjacent state waters.
- (g) The [Agency Secretary] may at any time prescribe and amend these rules and regulations as he determines necessary and proper to provide for the prevention of waste and conservation of the natural resources of the waters of [State]. In the enforcement of safety, environmental, and conservation laws and regulations, the [Agency Secretary] shall cooperate with the relevant agencies and departments of the United State and of other affected States.

Section 5. Centralized One-Stop Permitting, Leasing and Approvals, and Management

[State Agency] shall oversee applications for permits, leases and approvals for offshore wind resource development as well as construction, operation and decommissioning of each offshore wind power project. To facilitate development of offshore wind power and to provide

¹ [NOTE: The Federal Government provides for cancellation and suspension of OCS leases in 43 USC 1337. Unlike oil and gas rig drilling, offshore wind facilities do not possess the catastrophic potential for environmental damage and wildlife harm. Existing state and federal legislation (e.g. MMPA, CZMA, NEPA review, etc.) is likely to regulate any impacts caused by offshore wind, and additional state regulations may therefore be repetitive and superfluous. Further, because the return on investment is lengthier for offshore facilities, it is likely that long-term stability will be a critical investment consideration, and cancellation clauses may unnecessarily create an unfavorable degree of risk and uncertainty.

developers and the public with one primary point of contact within State government, all permits, leases and approvals required under any state law related to offshore wind power development shall be coordinated by [Office/Division] within [State Agency]. [State Agency] shall serve as the lead state agency to manage and supervise the offshore wind development process throughout the multiple pertinent agency structures. [State Agency] will serve as lead contact for streamlined single-window permitting. [State Agency] shall coordinate with federal agencies that also have jurisdiction over offshore wind resource developments and consider input from other pertinent state agencies when assessing the environmental and health impacts, shall serve as the focal coordination mechanism, and shall manage the roles of the various agencies as they relate to offshore wind development.

Section 6. Permitting Process

[State] is committed to a public permitting and leasing process. [State Agency] and/or [State/Regional Utility Agency/Authority] shall conduct public hearings to inform stakeholders and solicit their views and provide a minimum 30-day period in which the public may submit written comments about the resource, the technology, and any offshore wind development proposals or bids. To the extent practicable, this public comment period may occur at the same time as the EIA public comment period under Section 9 of this Act.

There shall be no automatic exclusion of any uses from the leased tracts for offshore wind turbines unless it is determined to be in the interest of public safety and welfare. If the Federal Government determines that an offshore wind facility qualifies for categorical exclusion from any federal requirements, [State Agency] shall have discretionary authority to grant the same to a facility within state waters. As necessary or appropriate, [State Agency] shall have the authority to require an environmental review process, the scope of which shall be determined by [State Agency] or as otherwise required by state law.

Section 7. Financial Assurance and Transfer Subject to Approval

As part of lease issuance, developers shall establish a decommissioning/liability trust fund or otherwise provide appropriate financial assurance to address the costs of abandonment, decommissioning and closure.² Each [State] lease shall include provisions to address transfer of project ownership and/ or control after lease issuance, and the potential liability implications of:

- (i) abandonment prior to operation;
- (ii) liability during project operation; and
- (iii) decommissioning.

Lease transfers are subject to approval by the [Agency Secretary], and lease transfer applications must include the following:

² **[NOTE: States may choose to initially require insurance or bonding, and can decrease these commitments commensurate with the annual transfer or deposit of funds into a decommissioning trust fund. States also can require that developers mitigate the impacts on future ratepayers by requiring that the developer divert a portion of existing ratepayer payments into the decommissioning fund. These rates can be calculated based on the PPA or the expected life of the project, as appropriate.]**

- (i) Assignor and assignee name;
- (ii) percentage of interest conveyed and received;
- (iii) demonstration by assignor of financial responsibility
 - a) operators applying for a new permit should submit evidence of financial responsibility which is effective at the time of permit application but in all cases prior to permit issuance.
 - b) financial assurance must be made by one of the following mechanisms: surety bond, funded trusts, or irrevocable letter of credit; and
 - c) any documentation, financial assurance, or any other information that the [Agency Secretary] deems necessary and proper.

All leases shall be subject to [State Agency] approval and original leaseholders shall be responsible for financial assurance guarantees. [State Agency] shall have the discretion to hold the original or responsible lessee secondarily liable for decommissioning and/or require that full funds for decommissioning be dedicated to a trust fund upon transfer. If [State Agency] is satisfied that the subsequent assignee has provided sufficient financial assurance, Agency shall have the discretion to release the original or responsible lessee.

The assignee shall be subject to the applicable terms and conditions of the pertinent laws and regulations which include, but are not limited to, an obligation to conduct all operations on the leasehold in accordance with the terms and conditions of the lease, to condition all sites for proper abandonment, to restore the leased lands upon completion of any operations as described in the lease, and to furnish and maintain bond(s) pursuant to regulations.

The Assignee(s) is subject to, and shall fully comply with, all applicable regulations now or to be issued under this Act. Notwithstanding any agreement between the Assignor(s) and Assignee(s), the parties are under purview of [State Agency] and shall comply with all laws and regulations.

Section 8. Graduated Rent and Royalty Formulas

In leases, [State Agency] shall charge reasonable rent for occupation of public offshore waters. Rent shall be charged each year beginning with the issuance of the lease through decommissioning, and the rent charge shall be based on the developer's occupation of public offshore waters. [State Agency] may charge rent based on a per-turbine basis, per-acreage basis, or on the basis of a combination thereof. [State Agency] may contemplate other necessary and appropriate considerations when determining rent.³

For purposes of this subsection, production is deemed to have commenced upon final approval of pertinent state and federal permits.

- (a) [State Agency] shall formulate royalties based on actual power delivered. Such royalties shall not commence until the facility has begun production.

³ **[NOTE: It is recommended that states consider charging high rents with lower royalty payments. This system of payments is more likely to stimulate qualified bids from developers who are motivated to begin production as early as possible. A low rent, high royalty scheme may disincentivize actual production and will encourage sham bidding.]**

- (b) The wind project operator shall pay State a X% royalty on each MWh delivered during the first year of production, a YY% royalty during years __ to __, and a 2% royalty payment during every year thereafter. Royalties shall be based on the value of the products produced (energy, capacity and environmental attributes, including renewable energy credits), which typically will be embodied in a PPA, less the market price for RECs.⁴ In consideration of the goals and objectives of this Act, [State agency] may defer or waive rent and/or royalties for such a period of time as is necessary and/or practicable.

Section 9. State Environmental Impact Assessment

- (a) **Generally.** The development of [State] offshore resources [State] shall include the creation and evaluation of an environmental impact assessment (EIA). The goal of preparing such an environmental assessment is to provide a systematic and interdisciplinary evaluation of the potential positive and negative life-cycle effects of the proposed offshore wind project on the physical, biological, cultural and socio-economic attributes of project. Site-specific efforts shall be directed under the supervision of the [State Agency], which shall issue the EIA. To the extent feasible, [State] the state EIA shall be coordinated with the federal NEPA to the maximum extent practicable to eliminate duplicative efforts and ensure the efficiency of the environmental evaluation process. Alternatively, [Agency] may rely on the federal NEPA process for the analysis

⁴ **[NOTE: The US Department of the Interior’s current formula for royalty payments (which it terms “operating fees), 30 CFR 285.506 (2011), is based on anticipated power generation (anticipated capacity factor, but subject to future adjustment) and on the wholesale electric power price in which the project will make landfall. We do not believe this is good policy in that it ties royalties of a price-stable form of electricity generation (wind energy) to electricity rates that are primarily based on the price of volatile fossil fuel prices and nuclear power. Further, it leads to the anomalous result that royalties for a carbon-free generation technology are based in part on the price of emission of carbon dioxide, as those costs will be included in those prices to the extent that carbon market mechanisms are placed on the generator or further upstream (e.g., the coal mining company). We thus recommended that States create a formula that precisely calculates royalties based on the actual power purchase rate, either as a percentage of the yearly PPA price (which would adjust upward as the PPA price increases) for energy and capacity or based on the first year of the PPA, and then increased year over year by some percentage such as 2.5%. We do not recommend basing the royalty on the price of environmental attributes such as RECs for much the same reason we oppose royalties based on the market price of carbon. Because project owners ultimately are concerned with their total compensation (energy, capacity and environmental attributes) and they can trade-off prices among the three, we recommend that royalties be based on total price less the market price for RECs in a given year. As an example, if in 2010, offshore wind price (energy, capacity and renewable energy credits) was set in the PPA at \$160.00/MWh and the market price for RECs was \$20/MWh, then 2% of \$140/MWh would equal \$2.80 per MWh in royalty payments to be made to the state. If the energy is sold on the spot market, a state may wish to tie royalties to energy only and include the following: “For energy sold on the spot market, royalties shall be based on energy only. If the sold price per MWh in any given hour is less than 0, the royalty payment will be zero and shall not be a credit.”]**

under subsections (b) and (c) of this Section, to the extent they are considered therein. The EIA shall be sufficiently broad to inform the public and the [State Agency] on the all phases of the project: construction, operation and decommissioning and on the comparative life-cycle effects of the project.

(b) **Components.** The state EIA shall address and consider the specific impacts on the environment during construction, operation and maintenance, and decommissioning, as related to offshore wind power, including but not limited to:

- (1) Avian and bat impacts.
- (2) Impact on benthic organisms
- (3) Any impairment of water quality.
- (4) Impacts from sound propagation on marine mammals, turtles and fish.
- (5) Impacts to aquatic or tidal vegetation or other flora.
- (6) Impacts to natural surface, ground water hydrology and sediment transportation functions.
- (7) Impact on air quality, including noise.
- (8) Aesthetic impacts
- (9) Archeological Impacts; and
- (10) Effects on competing users and uses.

The considerations are not exclusive, and [State Agency] may establish other pertinent criteria as necessary. Specific sites and developments may possess unique attributes, and while all the above considerations must be evaluated, [State Agency] may prioritize and give more emphasis to those effects that are likely to pose the greatest risk to the environment.

(c) **Comparative Life-cycle Assessment.** Each assessment shall also include a comparative life-cycle analysis of the environmental impacts, including, but not limited to, effects on human health, and the comparative impact of alternative and/or traditional means of electric generation to the offshore wind facility on a per kWh basis.

(d) **Public Comment.** A draft EIA shall be made available to the public for review and comment for a period of at least 30 days. The final EIA shall record and address the concerns and comments of various stakeholders to the extent practicable.