

**BEFORE THE UNITED STATES
DEPARTMENT OF INTERIOR
MINERAL MANAGEMENT SERVICE**

**Alternative Energy and Alternative
Uses of Existing Facilities on the OCS) RIN-1010-AD30**

**COMMENTS OF THE OCEAN RENEWABLE ENERGY COALITION
(OREC) ON MINERAL MANAGEMENT SERVICE'S NOTICE OF
PROPOSED RULEMAKING (NOPR) ON ALTERNATIVE ENERGY
AND ALTERNATE USES OF EXISTING FACILITIES ON THE OUTER
CONTINENTAL SHELF**

I. OVERVIEW

The Ocean Renewable Energy Coalition (OREC), the national trade association for the marine energy renewables industry, including wave, tidal, current, hydrokinetic, ocean thermal and offshore wind, submits these comments on the Mineral Management Service' Notice of Proposed Rulemaking (NOPR) on Alternative Energy and Alternative Uses of Existing Facilities on the Outer Continental Shelf, *73 Fed. Reg.* 39457 (July 9, 2008). The proposed rules, which would establish a program to grant leases and other proprietary interests for alternative energy projects on the OCS, represents the culmination of a lengthy, two and a half year process that included an Advance Notice of Proposed Rulemaking, several

stakeholder and outreach conferences, release of a comprehensive programmatic EIS and implementation of an interim leasing programs for testing sites and short term lease.

A. The Marine Renewables Industry Is Gaining Momentum

In the two and a half years since MMS issued its Advanced Notice of Proposed Rulemaking, the marine renewable industry has made great strides. Companies are moving forward with the first generation of small commercial projects, and investors are showing signs of interest in this industry.¹ In 2008, the Department of Energy received \$10 million appropriations for a marine energy program and in fact, within the next

¹ A few representative developments in the wave energy industry (wave energy is the technology most likely to be sited on the OCS in the near term) include: (1) In December 2007, Canadian-based Finavera (formerly AquaEnergy) received a license for a one megawatt wave energy project located in the Olympic Coast National Marine Sanctuary off the coast of Washington State (2) Earlier this year, the Pelamis Wave Company of Scotland deployed a 2.25 MW in Portugal making it the first commercial wave energy project in the world; (3) the state of Oregon funded the Oregon Wave Energy Trust which is dedicated to advancing wave energy in Oregon and funding critical research that will help the industry move forward ; (4) Pacific Gas and Electric, a major electric utility is exploring several wave energy projects in California; (5) the Ocean Power Technology Company has devoted considerable resources to, and is moving ahead with licensing a wave energy project off the coast of Reedsport, Oregon and (6) large corporations such as Voith Seimens and General Electric are investing in wave energy technologies. We have focused on wave energy developments in this section as these are the most likely projects to be sited on the OCS.

day or two, is expected to announce the results of an RFP that would provide funding to several commercial wave and tidal projects. In fact, OREC itself has witnessed the wave energy industry's growing momentum first hand: with just a handful of members back in early 2006, OREC now stands more than forty members strong, with a constituency that includes wave, tidal, OTEC and offshore wind developers located both in the United States and other countries, law firms, environmental consulting firms, government contractors, investment banks investor owned utilities, public power districts and coastal communities.

We offer this brief snapshot of the industry to put our comments in context. Specifically, the marine renewables industry, while still nascent, is gaining momentum OREC's interest in this proceeding is to protect the progress already made and ensure that our industry continues to move forward and does not stagnate or worse, lose ground.

B. Summary Analysis of Problems in Rules

OREC commends MMS and its staff for their considerable efforts and sincere commitment to getting the OCS leasing program right rather than simply getting it done. Nevertheless, notwithstanding MMS' admirable intentions and OREC's submission of hundreds of pages of

comments in the earlier proceedings,² OREC and its member companies are concerned that the proposed rule will stifle development of alternative energy projects on the OCS and create numerous barriers to the development of clean sustainable energy resources so necessary to supporting our nation's energy goals. We believe that the proposed rule, with its (1) multiple levels of environmental review that do not synch with any of the state or federal permitting processes that have evolved for marine renewables (or that have been established for any other types of power projects); (2) competitive process that favors money over merits thereby inviting speculators and driving bona fide developers with promising, but not fully proven commercial technology overseas; (3) and added cost items such as bonus bids, rental payments, operating fees, NEPA studies and analysis, surety bonds and certified verification agents comparable to or even *steeper* than those imposed on oil and gas companies, mining interests; (4) lack of meaningful measures to safeguard

² OREC Comments on Advanced Notice of Proposed Rulemaking on Alternative Energy on the Outer Continental Shelf (February 28, 2006); OREC Testimony at MMS Stakeholder Meetings, Washington D.C. (May 20, 2006); OREC Comments on MMS Draft Programmatic EIS for Alternative Energy on the Outer Continental Shelf, (May 20, 2007), OREC Comments on Request for Information and Nominations of Area for Leases Authorizing Testing Activities on the Outer Continental Shelf (January 12, 2008); OREC Comments on Proposed Lease Terms (February 12, 2008).

proprietary information, the most valuable asset of an emerging company (5) potentially draconian penalties for non-compliance; (6) conferral of unfettered discretion to MMS to contract the size of a lease or alter or modify its terms partway through and (7) failure to definitively resolve the FERC-MMS jurisdictional dispute, creates so much regulatory uncertainty and risk that it will drive away private investors and hobble our nation's fledgling marine renewables industry at the precise point in time that our member developers have finally started to acquire their proverbial sea legs. Moreover, MMS did not thoroughly consider the adverse impact of its proposed rule on small businesses such as marine renewables,³ describe projected recordkeeping burdens, identify duplicative and conflicting regulations or propose alternatives that might remediate adverse effects on small businesses, all of which are required by the Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. § 601 *et. seq.*

³ SBA regulations classify electric companies as small if their total electric output for the preceding fiscal year did not exceed four million megawatt hours. *See* MMS NOPR, SBA analysis.

C. Future Action

We realize that MMS has long passed the statutory deadline set forth in EPAct 2005 for issuing these rules, and our industry does not favor further delays. At the same time, if left to stand unchanged, the MMS rules will significantly deter marine energy companies from embarking on projects on the OCS and will very likely drive them overseas.

Thus, at a minimum we recommend the following:

- (1) MMS should either modify the rules as we discuss in our comments, or simply exempt small marine energy developers from the rule's most onerous financial and permitting requirements, such as surety bonds, operating fees,⁴ bonus bids and multiple-tiered review for different phases of development.
- (2) MMS should coordinate with state and other federal agencies to streamline the siting process;
- (3) MMS must allow marine renewables developers a way to test projects while offering a fair opportunity to build them out without being forced to acquire a full commercial lease to accomplish this goal.
- (3) MMS must guarantee full protection for confidential and proprietary data;
- (4) MMS and FERC must resolve the jurisdictional conflicts over the Outer Continental Shelf and do so expeditiously, in a manner that avoids duplicative regulation and gives developers the regulatory certainty needed to proceed with wave energy projects on the OCS; and

⁴ Also, MMS should calculate operating fees in a manner that makes them *comparable* to those for the more profitable oil and gas industry.

(5) MMS must consider the adverse impacts of this rule on small business and modify it accordingly.

These comments are organized as follows. Part I contains our general commentary on various aspects of the proposed rule. Part II offers a section by section analysis of key provisions.

I. COMMENTS ON PROPOSED RULE

A. The MMS Competitive Process Favors Money Over Merits and Will Encourage Gamesmanship and Speculation

As a general matter, OREC favors competition. Ultimately, the marine renewables technologies that emerge as dominant will do so on their merits and their ability to produce clean, renewable power in a more cost effective, reliable and environmentally benign manner than other options. However, true competition depends on robust markets with vigorous participants and a product whose benefits can be readily measured and compared. The marine renewables market does not yet possess these features; most wave energy companies are small and underfunded. As such, the market is vulnerable to manipulation by better funded entities, which might, for example, seek to stall a more advanced technology by outbidding it for a lease, or might seek to back an affiliate with a less mature technology and box out a more advanced company from

obtaining a site. Moreover, in a less mature market, the impact of these types of shenanigans are magnified; preventing a “ready-to-deploy” company from accessing a lease can, quite frankly, put it out of business or force it overseas – ultimately diminishing the potential for competition rather than enhancing it, as is MMS’ intention.

We discuss the problem of less mature markets below, in the context of our comments on MMS’ proposed bidding system.

1. The MMS Process Is Neither Competitive Nor Consistent With the Public Interest

The concept of competition embodies some notion of merit. For example, the dictionary defines “competition” as “rivalry for supremacy” (Dictionary.com). The MMS competitive process, as outlined in the rule, does not account for merit but instead, is an auction, with sites sold to the highest bidder irrespective of technological superiority, past experience or future development plans.

No statute requires MMS to implement competition for alternative energy sites in this manner. Section 8(p) of the OCS merely directs MMS to issue leases on a “competitive basis,” unless there is no competitive interest. By contrast, the language of 43 U.S.C. § 1337 governing the

award of oil and gas leases authorizes the Secretary to grant a lease to “the highest qualified bidder,” and thus, envisions the money-centered competitive type of auction that MMS now transplants to its alternative energy program. Indeed, OREC submits that had Congress *intended* MMS to run the alternative energy program as an auction, it would have used the same language applied in Section 1337, rather than the broader directive of issuance “on a competitive basis.”

The electric power industry offers numerous examples of competitive processes that MMS could have applied, which would foster competition, introduce new players and result in selection of projects that would serve the public interest and promote our nation’s goals of energy independence and production of clean renewable energy. For over eight decades, FERC has issued permits and licenses on a competitive basis under the Federal Power Act, selecting the project that is “better adapted” to make best use of a waterway consistent with the public interest. Likewise, state commissions and utilities frequently run competitive procurements, choosing projects which best meet certain pre-determined criteria, such as lowest cost, ability to generate renewable energy, size and a variety of other factors.

Where new and emerging technologies are usually subsidized, and not treated as mature industries, a money-centered auction process is particularly damaging to such a nascent industry and skews the intent of subsidies as these resources end up moving from one government agency to another rather than supporting much needed R&D efforts. In the oil and gas industry, setting optimal bonus bids is a complex endeavor that relies on years of data on production, risk assessment and a host of other economic factors. The offshore wind industry has only operated in Europe for a decade and has benefited from subsidies, while the marine renewables industry is even less mature. Without any information about these projects potential productivity or even success, MMS or bidding companies would essentially pull the amount of bonus bids out of a hat.

In addition – and particularly with the uncertainty surrounding calculation of bonus bids – the system invites speculators to come in and drop large bids on the table. Indeed, some companies might submit hefty bonus bids to do mischief – to beat out or stall a smaller but more technologically advanced competitor. A company could file a FOIA request for information that a competitor files in response for a Call for

Nominations and use that information to put together a competing bid and figure out how much of a bonus bid to place.⁵ A group of well financed NIMBY agitators could even put together a sham project and bid up a site to keep any development from moving forward.

These scenarios may seem far-fetched, however, the marine renewables industry has already witnessed efforts by developers to bank multiple sites through the FERC permitting process. FERC eventually took remedial action through implementation of its strict scrutiny permit policy to curb abusive activity⁶. A bonus bid system, particularly in a nascent industry, is prone to potential abuse, and for that reason, we ask MMS to consider some of the alternatives proposed below.

2. Alternatives to the Bonus Bid

OREC urges MMS to reconsider the bonus bid system and to replace it with a system that rewards merit and sweat-equity rather than cash.

Among the options available, MMS can (1) devise a system similar to FERC's existing competitive system; (2) defer to the results of a competitive

⁵ For that reason, it is imperative that MMS guarantee protection of proprietary data submitted in response to calls for nomination as discussed *infra*.

⁶ Most of FERC's hydrokinetic policies and orders are set forth here – www.ferc.gov/industries/hydropower/indus-act/hydrokinetics.asp.

state commission or utility RFP for a power project or (3) give at least marginal preference to companies that identify a potential site in response to a call for nominations, rather than allowing multiple companies to bid on the site.

OREC recognizes that adapting the bonus bid system to meet the needs of a new industry is a challenge. MMS is not alone in unsuccessfully attempting to adapt a regulatory process intended for large, mature industries to a small emerging industry. In the case of Verdant Power's Roosevelt Island Tidal Energy (RITE) project, FERC eventually devised an exemption process to allow the company to test the project (though obtaining the exemption is still time consuming and costly). With energy issues so vital to supporting our economy, can we afford to regulate innovation to the point that we stall, or even stop such positive developments?

B. MMS' Failure to Unequivocally Offer Safeguards to Proprietary Information Deprives Marine Renewables of Their Most Significant Asset and Increases Opportunities to Game the System

The problems with the bonus bid system, discussed above, are exacerbated further by the lack of protection of data for companies that

submit information in response to the Call for Nominations. The MMS proposed regulations require companies to turn over detailed information to support interest in a particular site – ranging from the site location to resource assessment data to the particular facilities to be deployed.

However, once the Call for Nominations process is closed (or even while it is ongoing), a competitor could file a FOIA request and potentially obtain that information and then use it to submit a competing bid during the auction process. Moreover, once the competitor submits the information, it loses control the ability to protect it. Though a competitor can claim that the information is proprietary, under FOIA, it is MMS that ultimately makes the decision regarding disclosure, and not the owner of the information.

To be sure, other regulatory processes require developers to submit confidential information for a variety of reasons. But in many of these cases, at least the information owner receives a benefit from taking the risk of disclosure. For example, in the FERC process, developers must submit information regarding a proposed project in a preliminary permit or license application. But there, developers who come forward with this information first are accorded first filed preference – meaning that if a

second company takes the information and tries to use it to prepare a competing application, the first filer will still prevail. By contrast, the MMS process offers no first filed protection – winners of the auction are selected based on the size of their bonus bid. As a result, companies can “stalk” the Calls for Nomination process, obtain the information they want through FOIA and use that information to buy up a site during the auction process.

OREC offers two solutions to this problem. First, MMS must declare in its rules that all information about a project submitted in response to call for nomination and at any other competitive part of the process is, by definition commercial and proprietary data. Commercial and proprietary data are protected through FOIA Exemption 4 and thus, would be shielded from disclosure. This solution also takes the onus off the developer to proactively monitor requests for data and assert a proprietary interest and instead, places the onus on a competitor to show why it requires access to otherwise propriety information that is exempt from release under FOIA.

To further protect against disclosure while at the same time give companies incentive to identify sites in response to a call for nomination, MMS should give companies that identify a particular site in the Call for

Nominations phase a preference in the selection process rather than breaking a tie between high bid by lot or deciding who wins a site based on high bid. To do otherwise encourages companies to act as free riders, benefiting off the labor of their competitors.

C. Still No Way to Get Projects in the Water

Marine energy developers face a quandary. As the technology moves from tank to turf, companies need a way to expeditiously site and test technology to prove to utilities and investors that it works in real world conditions. At present, however, companies do not have funds to site test projects, and must rely on private investment. And private companies are only willing to take the enormous risk of funding a test project if there is a fair opportunity for that project to eventually build out to full size if the results of early operation prove successful. As far back as our ANOPR comments, OREC has recommended a regulatory system that would allow more relaxed regulations for siting small, first generation commercial facilities that sell power to the grid and demonstrate proof of operability, with vigorous post-deployment monitoring and a fair opportunity to build the project to full scale.

The MMS process falls short. As OREC emphasized in our comments on MMS' proposed interim lease rules, the interim lease does not confer a right to build a project out or sell power to shore. And in fact, MMS itself acknowledges this deficiency, and states that it does not expect most companies to seek interim leases because of the lack of priority rights. *See* MMS Rule, Slip. Op. at 55-58. Instead, MMS suggests that developers who seek to build out simply apply for a commercial lease.

But obtaining a full blown commercial lease is no solution either. Bonus bids set for commercial leases will presumably be based on the assumption that the lease will be developed. Thus, a developer who wants to test a site but may not build it out is forced to pay for a full commercial lease – money that is wasted money is wasted if developer later gives up the lease if it does not prove viable.

For nascent technologies, MMS should revise the interim lease program to let developers connect to the grid and sell power to shore, and also confer a right of preference to build out. MMS could let others compete for the site (but give a marginal advantage to the incumbent) or decline to release the site if the test results show that the project has dangerous environmental impacts or is technologically infeasible. By giving

developers a lower cost way to test projects, MMS would help the marine renewables industry keep momentum.

D. MMS Needs to Coordinate Its Multiple Tiered System of Environmental Review To Existing Processes and Work With Other Agencies

1. Consolidate Tiers of Review

As several commenters point out, the MMS rule requires EIS and CZMA several times – for the lease decision, for the SAP and for the COP. This multi-tiered process is not compatible with existing permitting practices that have dominated the electric utility industry. In most cases, be they state siting procedures before state utility commissions or zoning boards, or the FERC hydropower process, the environmental review process is consolidated – not split up into different phases. Most states do not have the resources needed for multiple layers of review and as a result, the MMS process increases costs – not just on applicants, but participating agencies – which can lead to delays.

MMS should streamline the review process and consolidate the NEPA and CZMA procedures into one process. If necessary, MMS should make liberal use of categorical exclusions under NEPA and, for example,

categorically exclude the SAP or lease issuance from NEPA requirements where they do not involve ground disturbances.

2. Coordinate With States and Other Processes

The MMS review process is not compatible with other procedures now in place. Many wave and tidal companies that are availing themselves of the FERC process use an integrated license process where the environmental scoping process is integrated with performing studies and stakeholder outreach. The MMS process complicates this type of coordination. In addition, projects located entirely on the MMS also need to coordinate with state agencies to run the transmission line to shore.⁷

MMS's proposed procedure does not give any guidance for coordinating with states or for that matter, for coordinating with other agencies. MMS should begin to work with other agencies involved in permitting to devise a streamline, coordinated siting process and make itself available to advise developers on the most expeditious way to license a project.

⁷ As FERC notes, in the FERC process, the transmission line is included as part of the project boundary and is licensed by FERC as well.

D. MMS Must Eliminate Unnecessary Costs and Calculate Others In A Manner That Is Comparable to Other Industries

The MMS process includes many expense items that add to the cost of a project. We summarize those costs here, and they are discussed in more detail in our section by section analysis.

First, the MMS rules require developers to pay MMS to conduct NEPA review. Paying NEPA costs should be voluntary, as under the FERC process and where developers are required to pay, they should be able to retain an approved contractor of their choosing. On the other hand, where developers lack the financial resources to pay NEPA costs, MMS should not force them to pay but should absorb the cost as part of the program. Often, the smallest projects may have the most expensive review simply because they involve a decision of first impression - - and forcing developers to pay those costs can stymie development.

Second, the cost of a CVA is both unnecessary and possibly, infeasible. Most project investors require independent review as a condition of investment, so most of the studies that the CVA would conduct will be performed anyway. The CVA would thus represent duplicative effort. In addition, finding a qualified CVA who can definitively attest to the information that MMS seeks given the nascence of

the industry simply may not be feasible. Perhaps a CVA might be justified when projects are expansive, but for the small arrays and phased development taking place now and for the foreseeable future, a CVA adds an unnecessary and substantial expense.

Third, as OREC has argued throughout, operating fees are simply not justified in a nascent industry; marine renewables developers should not be required to pay them at all, at least until the industry matures. However, if MMS remains intent on assessing operating fees, it must follow these guidelines (discussed in more detail, *infra*, Part II.D.2:

a. Operating fees should be based on net revenues, not gross revenues, particularly because marine renewables have such high upfront capital costs. With virtually all of project income going to repayment of costs in the early years, charging operating fees adds an undue burden.

b. Operating fees should be based on wholesale rather than retail rates since the projects will sell output to other utilities on the wholesale market.

c. Operating fees should be set allowing a deduction for transportation costs (i.e., transmission costs) as in the oil and gas industry,

and MMS should liberally grant relief from operating fees to stimulate production, as permitted in the oil and gas industry. The MMS rule does not include a deduction for transmission and only provides for a waiver of up to six years, rather than unlimited operation fee relief.

d. MMS does not give any idea of how it will calculate minimum bonus bids – or whether it plans to reject bonus bids deemed to low. Lack of information about the potential amount of bonus bids injects even more uncertainty into the marine renewables industry because companies will not know how to devise bids or how much to reserve to cover these bids.

e. Rental fee costs of \$3 an acre *seem* reasonable – however, leases will be auctioned in 9 square mile blocks – which means the rental fees can amount to nearly \$18,000 annually. As discussed, *infra*, developers will rarely need more than a portion of a lease block for an entire project and may wind up overpaying unless MMS allows developers to obtain smaller lease segments.

E. MMS Must Place Limits on Its Ability to Contract the Size of A Lease or Modify Its Terms

The MMS regulations give MMS the power to limit the size of a lease. However, MMS should not be permitted to contract lease on a whim.

MMS establish a criteria delineating when it can limit a lease – and it should only allow this practice in narrow situations, to to guard against site banking. If MMS retains unfettered discretion to limit a lease, investors will never fund the project because the lease becomes too speculative a property interest.

F. MMS Must Exercise Its Enforcement and Penalty Authority Sparingly

The MMS regulations require prompt responses from companies and impose strict rules for compliance. OREC emphasizes that OREC must allow flexibility for this nascent industry. In a new regulatory environment, companies will make mistakes – and MMS should reflect developers attempting compliance in good faith. Moreover, because these companies are smaller, they may not have the same level of resources available for the degree of responsiveness demanded of large companies.

Finally, we note that the Small Business Regulatory Enforcement Flexibility Act requires agencies to implement regulations that facilitate compliance by small companies, such as handbooks, and procedures for waiver of penalties. OREC expects that MMS will comply with the directives of the SBREFA.

On the matter of decommissioning, as discussed in more detail in the section-by-section analysis, MMS cannot expect sites to be decommissioned within a year and must modify its rule to include a more reasonable time frame.

G. MMS Must Resolve the Jurisdictional Dispute With FERC

OREC is frustrated that FERC and MMS have been unable to resolve their jurisdictional differences over which entity has ultimate authority over projects on the OCS. The agencies' failure to resolve this problem has already lead several companies to forego siting projects on the OCS or to cut back on the size of projects in state waters near the three mile limit. If the uncertainty persists, companies may decide that the risk of duplicative regulation or a lengthy court battle to resolve the impasse are simply not worth the cost and may opt to site early stage projects elsewhere.

While OREC stands willing to offer our member companies' insights on the dispute as necessary, at this time, we again urge MMS and FERC to resolve their conflict and do so in a manner that affords regulatory certainty to developers and does not subject them to costly and duplicative regulation by two agencies.

H. Small Business Regulatory Fairness Act

The SBREFA defines electric power companies that generated less than 4 MW in previous year are deemed “small business.” (SBREFA has other revenue tests for small business that most of OREC’s marine renewawbles companies would likely meet

MMS’ rule does not account for the adverse impacts on renewables developers, such as potentially duplicative regulation between MMS and FERC, excessive costs and the bonus bid based competitive system. Nor does the rule provide a process for waiver of the regulations as they apply to small developers of new technologies. Finally, OREC reminds MMS that it must promulgate a separate penalty and enforcement system for small companies to comply with SBREFA.

II. SECTION BY SECTION ANALYSIS

A. Subpart A: General Provisions

1. Section 285.102 - Coordination

Section 285.102(e) of the proposed regulations provides that MMS will coordinate and consult with the Governor of any State or executive of

any local government that may be affected by lease, and invite these entities to serve on a task force or joining planning or coordination agreement. OREC strongly endorses the concept of joint planning and coordination and encourages MMS to work closely with, and enter into MOU's with states, local officials, tribes, resource agencies and federal agencies, including the FERC to pre-qualify sites for bidding, coordinate permitting, eliminate duplicative processes and ensure accountability by all public officials throughout the leasing process. We note that many agencies, such as the Corps, NOAA, FERC and state resources agencies have been actively involved in licensing marine renewables projects in waters over state-submerged lands and could share their experience and knowledge base and make recommendations for expediting the permitting process without compromising environmental concerns.

2. Section 285.107 - Citizenship Requirements

Section 285.107 requires a lease applicant to show proof of citizenship or incorporation within the United States. Item 7 in the table accompanying Section 285.107 requires corporate or individual members of an LLC to submit statements proving that they are authorized to hold an OCS lease - which means that they must either be U.S. citizens (if

individuals) or a U.S. organized corporation. OREC does not believe that individual or corporate members of a limited liability corporation should be required to show proof of citizenship. First, an LLC is a corporate entity and so long as it is duly incorporated under the laws of a state, the nationality of its individual members is not relevant. Second, since most independent marine energy developers companies are organized as LLC's, OREC anticipates that most marine renewable energy companies in other countries who seek to develop projects in the United States will likely select the LLC as the corporate form for establishing a U.S. subsidiary. The MMS citizenship requirements for LLC members effectively precludes foreign marine energy companies from setting up a limited liability company, thus creating an added obstacle to development of marine renewables on the OCS. Because the requirements are not necessary, OREC asks MMS to treat LLCs the same as traditional corporations and merely require evidence that the entity itself is a U.S. citizen, rather than the individual or corporate members.

3. Section 285.111 - Environmental Processing Fees

Section 285.111 states that MMS will, on a case by case basis, charge a processing fee for preparation of "unique" environmental documents, such

as the Environmental Impact Statement. Applicants will have an opportunity to obtain a cost estimate from MMS and comment on the proposed fees.

While OREC does not object to providing developers the *option* of paying for a third party contractor to prepare an EIS as FERC's hydropower program allows, we oppose a mandatory requirement. Marine renewables developers are already forced to perform costly studies for various resource agencies to identify potential project effects. And the cost obligations do not cease once an authorization is issued; most permits either here in the United States or in Europe require extensive and ongoing post-deployment monitoring. For example, Verdant Power, which operates a six turbine unit in the East River spends roughly \$1 million annually to monitor and oversee the project's operation on the surrounding environment. Moreover, though counter-intuitive, initially, the costs associated with environmental review of, for example, the first 10 MW marine renewables project comprised of 30 units may be far greater than the costs of review of a 140 turbine, 300 MW wind farm simply because of a lack of data and institutional experience in reviewing the newer project.

MMS should recognize that the costs of environmental review are not commensurate with project size or initial profitability and should exempt small marine renewables companies from shouldering the costs associated with environmental review. In addition, we recommend that MMS continue to perform programmatic and area-wide environmental analyses to reduce the cost burden on individual developers.

4. Section 285.116 – Solicitation of Information

Section 285.116 provides that the Director may solicit information from the industry and other relevant stakeholders as needed to evaluate the state of the offshore alternative energy industry, including potential challenges or obstacles to development. OREC commends MMS for its willingness to continually re-evaluate the status of this nascent industry and stands ready to assist MMS in any way possible.

B. Subpart B: Issuance of OCS Alternative Energy Leases

1. Section 285.206 – Lease Size

Section 285.206 explains that MMS will delineate leases by using mapped OCS blocks or aggregations thereof. The preamble elaborates that blocks are 9 square miles (3 miles by 3 miles) and that for a testing or gathering facility, a lessee might only require 1/16 of a block.

OREC asks MMS for flexibility with the size of a lease. Most wave energy projects, even early stage commercial size projects are compact. For example, Finavera's recently FERC-licensed, 1 MW Makah Bay Offshore Wave Pilot Project, comprised of five buoys will occupy 28.3 acres,⁸ while a ten MW, Ocean Power Technologies power station is expected to occupy approximately 30 acres.⁹ Even 100 to 200 MW projects will not require more than three to four square miles of acreage.

To be sure, developers must initially assess a far broader area to identify the appropriate location for a project, or might want to assess a site that straddles two lease blocks. As a result, in the absence of flexibility in delineating lease size, developers may have no choice but to acquire far more acreage than necessary to site a project or even evaluate a site – and will be required to pay a bonus bid for the entire area, even with the knowledge that most of it may never be used.¹⁰

⁸ *Order on Rehearing*, 122 FERC ¶ 61,248 (March 20, 2008).

⁹ Source:
http://www.poweralternatives.com/aus/power_companies/details/company/ocean-power-technologies-inc.html

¹⁰ MMS proposes to charge \$3/acre as a rental fee which amounts to \$17,280/year (9 sq. miles or 5760 acres x \$3) annually. And if MMS sets bonus bid minimums at the \$17/acre figure used by BLM, developers will need to spend nearly \$98,000 to acquire a single lease block.

2. Call for Nominations

Sections 285.206 through 285.213 describe the information gathering process in the Call for Nominations. As OREC emphasized in our comments in Part II, we do not believe that this amount of detail is required in a call for nominations. A general expression of interest in an area should suffice. However, if MMS insists on requiring developers to include in a response to a Call for Nominations the level of detail specified in Section 285.212, MMS must guarantee proprietary treatment for the submitted information. Otherwise, companies can simply file a FOIA request for the information, use it to put together a proposal and outbid the originator of the information at the bidding phase. In the absence of full protection for this information as discussed earlier in our comments, MMS' proposed competitive system is vulnerable to gamesmanship.

3. Section 285.223 - Tie Breakers

Under 285.223, MMS will break a tie between two high bidders through random selection by lot. As OREC has already commented earlier, we favor a selection system that incorporates some element of merit or at a minimum, rewards an incumbent lessee or first mover.

C. Subpart D - Lease and Grant Administration

1. Section 285.400 – Noncompliance

Section 285.400 sets forth MMS' enforcement authority for noncompliance. Naturally, OREC expects that its members will duly comply with all MMS regulations as well as the terms and conditions of their respective leases. However, in a new industry, mistakes are expected and indeed, part of the arduous road to full commercialization. Therefore, OREC asks MMS to act flexibly in requiring corrective action of developers and imposing penalties or cessation orders.

In addition, OREC reminds MMS of the requirements of Section 223 of the Small Business Regulatory Enforcement Fairness Act, under which agencies must establish a policy or program to “provide for the reduction and under appropriate circumstances for the waiver of civil penalties for violations of a statutory or regulatory requirement by a small business entity.” Most marine renewables development companies qualify as small businesses and are entitled to the added level of protection that SBREFA provides.

2. Section 285.408 - Assignment

Section 285.408 provide of assignment of a lease, but offers little detail on the circumstances where assignment is necessary or the criterion by which MMS will approve assignments.

Because the marine renewables industry is in its nascence, many companies either merge or are acquired by larger developers. Indeed, in some instances, acquisition or merger offers the only way for a company to obtain the funding to move ahead with a project. OREC seeks clarification on whether a marine renewables company that merges or is acquired by a larger company must assign or transfer leases to the new corporate entity.

While OREC endorses a fluid, relatively simple process for assignment, we do believe that MMS must review assignments to ensure that they serve the public interest and promote fair competition. OREC is concerned that larger companies may set up sham entities to acquire sites through the bidding process only to assign them to companies of their choosing or at a higher cost, thereby circumventing the competitive process and earning profit from a public resource. MMS should review

the terms of lease assignments to ensure that companies do not use the assignment process to engage in gamesmanship.

3. Section 285.436 – Lease or Grant Contraction or Cancellation

Section 285.436 authorizes MMS to review lease or grant terms no more frequently than every five years to determine whether the area is larger than needed to develop the project. MMS' ability contract a lease area will serious jeopardize developers' ability to secure project financing, as no serious investor will tolerate a contingent property interest as the basis for an electric power project. In addition, MMS must also act flexibly in implementing its powers since some developers may seek to engage in phased lease development.

At the same time, OREC recognizes that MMS has an interest in guarding against site banking, and thus, we would not object to contraction (or even revocation) of a lease where a developer has, for example, failed to conduct any of the tasks specified in its Site Assessment Plan (SAP) and has no excuse for its inaction. However, if MMS intends to use its power to modify a lease area, it must clarify the circumstances under which it will do so to avoid creating problems for companies seeking project financing.

As for cancellation of a lease under Section 285.437, OREC contends that the Takings Clause of the Constitution requires compensation when a lease is cancelled for national security reasons. In this instance, compensation for the full and fair value of the project must be provided and should not be dependent upon availability of funds..

D. Subpart E - Payments and Financial Assurance Requirements

1. Section 285.501 - Deposits for Leases

OREC has already discussed our strong objection to a bonus-bid based competitive system in Part I of our comments. Should MMS insist on a bonus bid system for marine renewables projects, it must devise a system that will not edge out smaller developers, nor allow larger companies to game the system. MMS must also provide additional details on how bonus bids will be set so that developers can account for these added costs in their business planning.

2. Section 285.505 - Operating Fees

Again, OREC reiterates its objection to operating fees at least while marine renewables remain in their nascence. Should MMS insist on operating fees, they must be comparable to, or lower than those set for oil and gas companies and must reflect the realities of renewable energy

project development. For example, the oil and gas industry is permitted to subtract the costs of transportation prior to calculating royalties on proceeds from sales. *See* 30 C.F.R. § 206.54 and are entitled to royalty relief to promote development indefinitely and not just the 6 years allowed by Section 285.509 (c) for alternative energy developers. 30 C.F.R. § 203.1. In addition, marine renewables have extremely high upfront capital costs and as a result should be relieved from royalty repayment during the early term of operation. Finally, royalty rates should be assessed on *net* not *gross* revenues, and should reflect wholesale rather than retail power rates, as discussed at length by NHA and AWEA.

3. Financial Assurances

Sections 285.515 through 285.537 describe the financial assurances required for alternative energy projects. These include a \$100,000 minimum lease specific bond (\$300,000 for a limited lease) as well as an SAP and COP bond in an amount required by MMS. Acceptable forms of assurance include a security bond, minimum net assets of \$500,000,000 or certificates of deposit or savings. *See* Section 285.526.

Again, as discussed in our main comments, these financial requirements are extremely onerous. Because of the high risk nature of

marine renewables projects (in that they are a new and untested technology), developers will have difficulty securing surety bonds at reasonable interest rates, if at all. Moreover, MMS' rules are discriminatory as a large utility or corporation will meet the net asset requirement and thus, will not need a surety bond, while small marine renewables companies must obtain bonding. MMS should consider a lower bonding requirement or some potentially less onerous alternative to bonding such as letters of credit or some other showing of creditworthiness.

E. Subpart F: Plans and Information

1. General Commentary

As stated in our earlier comments, we believe that MMS should streamline the permitting process so that developers do not need to submit to several phases of NEPA review and CZMA analysis. Also, while the MMS regulations form a good basis for assisting developers in preparing applications and plans, OREC asks for MMS to designate specific staff who can meet with applicants for assistance in preparation of their plans, just as FERC staff engage in pre-application meetings with applicants. Access to MMS staff will help marine renewables developers put together SAPs,

COPs and GAPS efficiently and provide the information that MMS requires to evaluate them.

2. Section 285.629

Section 285.629 allows for phased development of leases, which OREC strongly supports as it dovetails with the concept of adaptive management.

3. Section 285.704 - Certified Verification Agent

As stated in our general comments, OREC believes that a CVA is an unnecessary expense not required at least for the first few generations of commercial projects. Most the information regarding design and safety will be included in the general engineer and design for the project and should be sufficient to show that the project conforms to accepted engineering practices. In addition, many investors retain their own expert engineers to conduct their own due diligence regarding project stability and a project's ability to attract investment offers added proof of the viability of the design.

When marine renewables projects approach large scale sizes, OREC would might not object to a CVA. However, a CVA should not be required at this early stage and certainly not for projects that are smaller than 20 MW or involve fewer than 20 or 30 units.

F. Subpart I Decommissioning

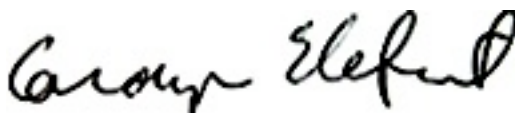
1. Facility Removal

Section 285.909 provides that developers must decommission a project within a year following termination of a lease, unless otherwise authorized by MMS. OREC asks MMS to act flexibly in requiring decommissioning – and be explicit in the rulemaking to provide developers and the finance community some comfort. Many times, projects may change the surrounding environment and attract or sustain avian or marine life, which can complicate the decommissioning projects. Developers may need time – indeed more than a year – to explore the effects of decommissioning on the environment and to undertake decommissioning in a way that does not cause further damage. In addition, MMS may want to afford several years grace period to allow project owners to determine whether another company might want to take over the project or use any pilings or other project material on the site.

IV. CONCLUSION

OREC appreciates the time, effort and resources that MMS has devoted to the process of implementing its new authority under Section 388 of the Energy Policy Act of 2005 to issue leases for alternative energy on the OCS. However, MMS must adopt the changes proposed by OREC in these comments to give the marine renewables industry a chance to succeed in U.S. waters.

Respectfully submitted,



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