

Towards the Ideal Offshore Renewable Energy M.O.U.

Background

Leading into the new millennium, the Obama administration and Secretary of the Interior Ken Salazar have made renewable energy, particularly offshore renewables, a top priority.¹ Even though former President Bush issued an executive order to assist in the development of energy related projects back in 2001, little focus and almost no progress has been made in the field of offshore renewables.² Much credit for this lack of progress goes to a jurisdictional dispute between the Minerals Management Service (MMS) and the Federal Energy Regulatory Commission (FERC), which held up the publishing of the final rules for citing renewable energy facilities on the Outer Continental Shelf (OCS) and which was only recently decided. To date, nearly everyone has recognized the utility of these projects, noting that they are better for the environment by providing clean production, better for national security by reducing the need for foreign oil, better for the economy by providing more jobs, and they lay the foundation for a future of sustainable energy production.³ The goal is no longer developing interest but actually developing the projects.

Therein lies a problem. Development of new industries requires enormous financial backing, and investors do not like uncertainty or inefficiency. Before construction can begin, projects must obtain the necessary permits, leases, licenses, and rights of way; and in this government regulated process is uncertainty and delay.⁴ Cape Wind began the application process for a lease off of Cape Cod to build a wind farm in 2001; to date it is close to completion but is still not there.⁵ In stark contrast, a license to build a deep water port for crude oil or liquid natural gas (LNG) can be obtained within

¹ Secretary of the Interior Salazar Order no 3285 Sec. 2. March 11, 2009.

² Executive Order 13212 May 18, 2001. Former President George W. Bush issued this executive order to emphasize the need for speed in the licensing process of energy projects as well as the need for environmental protection. However, apart from establishing a joint task force comprised of representatives from essentially every department and agency in the executive branch with the vaguely written goal of monitoring and assisting in the expedited reviews; the order includes no detail as to how the process shall be streamlined, instead calling for what I will loosely describe as the “best efforts” of the licensing agencies. Also notable is that this order makes no specific mention of renewable energy, instead clumping it together with the already established oil, coal, and natural gas.

³ Secretary of the Interior Salazar Order no 3285 Sec. 2. In this order Secretary Salazar addresses the omissions/ambiguities of EO 13212 by gearing this order to renewable energy, creating a task force that is not overly large and with clearly identified tasks, and by specifically identifying duties under the order for certain Department of the Interior employees.

⁴ It is important to note that the government regulates different areas to different extents. For example, this paper will explore an MOU between the BLM and Oregon state agencies to facilitate the leasing of wind power on federal lands in Oregon. At the time, no wind power facilities existed on federal land in Oregon, but there were numerous operational wind farms on private lands in Oregon.

⁵ 74 FR 3635-3636 (Jan. 21, 2009). Notice of Availability of the Final EIS for the Cape Wind Energy Project. Cape Wind originally filed its permit application in November of 2001 with the U.S. Army Corps of Engineers as required at the time. During the application process the rules changed when the EPA was amended in 2004, causing an unusual delay in the application process for Cape Wind. However, they did not need to completely start over as the MMS analyzed the draft EIS prepared by USACE, and then made its own draft EIS. Though the final EIS has been published, no record of decision has yet been issued by the MMS.

two years of the notice of application.⁶ The huge difference in application times is the result of many factors, but the factor this paper addresses is the overlapping regulatory jurisdictions exercised by different government agencies, all of whom tend to compete with one another. In the case of established industries such as LNG and crude oil, these agencies have long since realized the necessity to cooperate by signing Memorandums of Understanding, while in the case of renewable energy facilities which are just now wrestling their way into the market, the tendency to compete still exists, resulting in redundant reviews and processes that greatly increase application time. The difference in the application time is poison for investors and an overwhelming hindrance to building an offshore renewable industry.⁷

Unlike the land based industry, when applicants run into regulatory walls they cannot simply look for a private owner to lease from, because everything offshore is regulated by some combination of government agencies. An applicant wanting to build a wind farm beyond the three mile limit must get a lease from MMS, and in so doing meet all the environmental requirements that MMS must comply with, the applicant must also gain a right of way for transmission lines from the Federal Energy Regulatory Commission and from the governing state agencies that hold jurisdiction from the three mile line to the shoreline, and the list of other interested agencies ranges from the United States Fish and Wildlife Service (USFWS) to the United States Coast Guard (USCG) and so on. In short, there is a wide range for any agency to either kill or severely delay a project application (which is the fiscal equivalent of killing it) particularly in the absence of well established data that would allow these projects to get past the environmental regulation. It is an irony that a relatively environmentally unsound project like an offshore oilrig gets through the environmental regulations much faster than a relatively “green” project like a wind farm. In the words of California Governor Schwarzenegger, “...environmental regulations are holding up environmental progress in some cases”.⁸

The Basics

A Memorandum of Understanding (MOU) is essentially an agreement between parties to do certain things to the best of their abilities for mutual benefit. Notice that this definition sounds suspiciously like that of a contract. However, a contract presents legal remedies should a party fail to perform, while an MOU does not, and therein lies the difference. As far as binding quality, MOUs fall short of contracts, a characteristic that will likely repulse both lawyers and investors, both of whom crave certainty. However, this arguable weakness in binding power is actually the strength of the MOU. To put it bluntly, all parties want to retain their own authority and freedom of movement, and in the case of government agencies, they are often statutorily bound to retain their authority

⁶ 74 FR 984-985 (Jan. 9, 2009). Notice of application for an offshore port system crude oil deepwater port license application. This particular port is proposed at thirty miles from land in 120 feet of water and involves piping 1,700,000 barrels of oil per day. Should the MMS issue a license, the applicant plans to be operational by November of 2010, a time span of 22 months from notice of application to operation. 69 FR 3165 (Jan. 22, 2004) Notice of Application for a deepwater port for LNG. This particular application was approved and the license was issued on April 29, 2005, a mere fifteen months later. See 74 FR 31479.

⁷ MMS final Rule Page 19. The MMS Final Rule acknowledges that the uncertainty involved in ROW and RUE granting and overseeing requirements is a hindrance to an applicant’s attainment of financial backing.

⁸ “Governor Schwarzenegger Advances State’s Renewable Energy Development” online press release available at <http://gov.ca.gov/press-release/11073/> accessed 6/16/2009 at 10:37 am.

and freedom of movement.⁹ There are times when certainty of action, while desirable, is superceded by other obligations. For this reason, a legally binding contract can be as repulsive to individuals, parties, companies, and government agencies as a legally impotent memorandum of understanding is to investors and lawyers that crave absolute certainty of action. Therefore, were contracts the only option of agreement open to two or more government agencies that want to cooperate but must maintain their separate authority, we would likely see nothing but a mulish resistance to a contract's binding nature thus destroying any real chance of cooperative profit. MOUs provide an alternative to contracts that can be more attractive in certain situations.

There is a second great strength of MOUs, a strength rooted in fundamental social psychology. As this paper progresses, it should become apparent that MOUs are often used to establish multiparty cooperation without resorting to legal force. To streamline the offshore renewable energy regulatory process this type of multiparty cooperation between government agencies is precisely what is needed and precisely what MOUs can contribute. Social psychologists have noted that Americans are some of the most competitive people in the world.¹⁰ It is an aspect that is deeply ingrained in the culture and has the unfortunate side effect of creating resistance where there should be cooperation.¹¹ The tried and proven method for overcoming this natural tendency to compete is communication and repetition of successfully cooperative acts.¹² MOUs provide both of these factors. This paper will show how a common element in MOUs are provisions for continuing communication between the parties, and often specific points of contact for each party. Another common theme in the MOUs are specific acts for each party to perform, the accomplishment of which lays the groundwork for the trust that is necessary to establish continual cooperation. MOUs essentially serve as the foundation for an ongoing cooperative relationship between parties, which, once established, will grow beyond the original MOU providing the mutual benefits the parties seek.¹³

⁹ Phone Interview with Adam Bless of the Oregon Energy Facility Siting Council on Aug. 3 2009.

¹⁰ Taylor, Shelley; Peplau, Letitia; Sears, David. Social Psychology 10th Edition. Prentice Hall. Upper Saddle River, NJ 2000. p 313 citing to the Kagan & Madsen experiments of the 1970s.

¹¹ Experiments have shown that even where two parties do not need to compete, but their paths just happen to cross they are likely to throw obstacles in the other's way. This is analogous to the regulatory process where motivations as simple as "They are not on my team" may be enough to spurn a harmful competition between government agencies that delays permitting and destroys investor backing. (Note that the research for this paper revealed no such practices, but this is a valid possibility, childish though it may be).

¹² There is the classic game of prisoners dilemma, in which a pair of robbers are separated and each is told that if neither rats out the other they will both get five years, if both rat out the other they will get seven years, but if only one rats out the other, the rat will get three years and the other will get nine. Studies show that players originally tend to rat each other out to their mutual destruction. However, allowing communication between the players greatly increases the likelihood of cooperation to their mutual benefit. Typically, after a few successful cooperative tries a trust is established and cooperation is essentially guaranteed from there on out. In translating this towards a streamlined regulatory process, communication is necessary between the parties, and an easy set up towards a few early cooperative successes is a major boost.

¹³ This paper will give some examples of MOUs establishing these relationships, which in turn spurn further MOUs that are considered addendums to the original. This illustrates the ability of the MOU to establish growing relationships. The key is the communication, which allows the parties to recognize when they have established a pattern of cooperation and to then address further issues between them with the subsequent MOU to further improve cooperation and coordination.

The format and wording of an MOU is flexible, much like contracts, but as far as the structure goes there are some basic sections that almost always appear. A reader will find in an MOU, from top to bottom, the title, Preamble, Agreement, Boilerplate, and signatures, followed by any Attachments.¹⁴ Excluding the title and signatures, these sections are further divided into subsections. For example, the Preamble is typically subdivided into: an introduction typically called the Background; a Purpose that outlines the general or specific goal of the MOU; and the Acknowledgments, in which the parties make preliminary concessions. For government agencies, the Acknowledgments section is typically subdivided further into paragraphs or subsections that identify exactly what duties each agency is statutorily obligated to fulfill.¹⁵ The Agreements section is typically divided into numbered, lettered, titled, or undesignated paragraphs, called terms, addressing specific points of the agreement for each party. These terms can be a short as a sentence or two or can be a lengthy paragraph. They may be divided into a cluster of terms for each party to comply with, or they may bounce back and forth between parties.¹⁶ The Boilerplate is a section of general terms regarding the implementation and limits of the MOU itself.¹⁷ Ultimately, the format is flexible and may be tailored like the terms, Acknowledgments, and Boilerplate to best satisfy the Purpose of the MOU.

This paper shall examine the potential use of the MOU in streamlining the regulatory processes for offshore renewable energy facilities. The research for this paper involved reading dozens of MOUs, and the paper will begin by explaining some lessons from a few of the pertinent examples. The paper will then explain how these lessons may be compiled to create MOUs for the streamlining of offshore renewable energy facility regulations. Following a brief conclusion will be a simple example of an MOU attempting to streamline the joint FERC and MMS authority over hydrokinetic facilities on the OCS. This paper will not dwell on the specific authorities to regulate facilities, but will instead address the proper use of the MOU in building coordination and cooperation. Some key questions are: whether an MOU may create a joint application process; whether an MOU may establish a schedule and bind parties to it; and finally whether there are any legal cases regarding enforcement of MOUs.

At the cost of sacrificing suspense for clarity, this paper shall reveal the following answers to these key questions: MOUs are able to establish joint application processes, MOUs may establish timelines but do not legally bind agencies to them, and there are no legal cases revealed in the research for this paper regarding MOU enforcement. This paper will stress again and again that MOUs are not legally binding. They are instead a non-binding vehicle towards establishing a cooperative relationship between parties that

¹⁴ This paper defines terms and acronyms in an attachment at the end.

¹⁵ Government agencies typically cite the specific statutes or legislative acts from which they derive their authority in the acknowledgments section. While this may seem unimportant, it is necessary to consider that a legally impotent memorandum derives its strength from other sources. Therefore the subtleties may make the difference. An acknowledgments section may mean more than the agreements section, particularly where there has been a longstanding disagreement over what a particular statute, act, or amendment means.

¹⁶ Remember that ultimately the format is flexible. The sections described in this paper are simply those that usually appear. Parties should feel free to stray from the mainstream if that is important to them. The defining characteristic of an MOU is that it is a non-binding agreement.

¹⁷ The general terms are referred to as boilerplate merely because the terms within are reminiscent of boilerplate terms found in typical contracts and are found in various forms and wording in most MOUs.

share common goals. In the context of offshore renewable energy, in which multiple agencies may exercise overlapping authority, an MOU will function best by acknowledging the overlapping authority, declaring the parties' mutual goals such as reducing delay and redundancy, establishing specific actions and schedules for each party to follow in exercising its relevant authority in a cooperative manner, establishing a workable method of dispute resolution and an MOU amendment process, and finally by establishing points of contact and/or methods of frequent communication between the parties. Coupled with an executive order or legislative act requiring cooperation, MOUs may be considered nearly as binding as a legally enforceable contract.¹⁸ However, absent such a directive, MOUs may function equally as well so long as: inter-party communication is stressed, the terms of agreement are specific enough that progress is easily visible, and the MOU is given time to establish a cooperative relationship between the parties, so that inter-party coordination becomes the ingrained norm in each parties' procedures.

MOUs in Court

This paper emphasizes again and again that MOUs are not legally enforceable. Yet, American jurisprudence does not simply ignore an MOUs existence. A number of cases exist involving disputes in which a MOU may be called on as evidence. Most notably, the United States Supreme Court cited the agreements in a MOU between the USCG and the Occupational Safety and Health Administration (OSHA) to define the jurisdictional division between them regarding worker safety on inspected and uninspected vessels.¹⁹

In essence, while MOUs are not legally enforceable, they do present evidence of understanding before the court. For example, the MOU signed between the MMS and FERC on April 9, 2009 clearly identified the division of jurisdiction on the OCS.²⁰ While the MOU states that it creates no obligations or causes of action, were a dispute to arise between two private parties over their respective leases and licenses on the OCS, a court, in deciding whose lease or license was valid, would use the MOU as evidence of where FERC's jurisdiction ends and MMS's begins.²¹ A formal writing of agreement between the two agencies before their commander in chief and the entire population of the United States is difficult to refute by any party. An MOU serves in the court as evidence of understanding without creating binding obligations on its parties.

¹⁸ With an executive order everyone in the agencies knows that if they do not follow the terms of an MOU that was written to comply with the executive order, they may be found in noncompliance and risk losing their jobs or their funding.

¹⁹ *Chao v. Mallard Bay Drilling, Inc.* 534 U.S. 235 at 243 (2001). The court noted that the MOU gave USCG preemption over OSHA on inspected vessels; however, the context by which the MOU separated the jurisdictional authorities implied that OSHA maintained jurisdiction for the type of worker safety at issue in the case for uninspected vessels, even though the MOU contained no specific agreement on the particular issue. The MOU itself states in the Preamble that it does not pertain to uninspected vessels.

²⁰ 74 FR 19639 (April 29, 2009). Prior to this MOU, there was a dispute over authority between FERC and MMS that stood as a giant roadblock in the way of MMS publicizing its final rule on alternative energy on the OCS. See Carolyn Elefant, "FERC and MMS Finalize MOU, Open the Door for MMS Rule" (May 11, 2009) available at <http://www.carolynelefant1.typepad.com/renewablesoffshore/2009/05/ferc-and-mms-finalize-mou-open-the-door-for-mms-rule.html> .

²¹ Obviously, the statutes and prior court cases did not sufficiently clarify the division of jurisdiction sufficiently to be workable, otherwise the MOU would never have been signed.

If a party to an MOU were to ignore the terms, the court system would not have any authority to grant specific performance. For example, in the April 9, 2009 MOU between FERC and MMS, if FERC failed to include a requirement in its license to an applicant that the applicant comply with all terms and conditions of an MMS issued lease, in violation of Paragraph F of the Agreements Section, a court would not be able to order FERC to do so. Instead, the typical resolution of such a dilemma would be for the points of contact to meet to discuss the omission, and if an agreement to either comply or amend the MOU proved impossible, the dispute would probably move up the chain of command until it reaches the Secretary of the Interior and Chairman of FERC. If there were still no consensus, the MOU would probably be terminated and the executive branch would probably order resolution or find new leaders for the DOI and FERC. While the court system cannot enforce MOUs, there are always alternate methods to ensure either compliance or at least ensure an adaptable system that ultimately furthers the primary goal of cooperation.

MOUs and FERC

A common theme is evident in most of the MOUs that this paper will examine. The parties to the MOU will acknowledge their respective responsibilities. While this may seem a simply stated term that on its face is so trivial as to be readily dismissed, it is actually a crucial accomplishment; for often the agencies are being forced to sign an MOU by their superiors specifically to settle disputes over responsibilities and jurisdiction. A clarifying statement in which the parties agree as to who shall do what is the all important first cooperative move in a theoretical game that social psychologists call “Prisoners’ Dilemma” in which competing parties begin cooperating with each other to reap mutual rewards, but only after the first successful cooperative turn. This acknowledgment of responsibilities, commonly found in MOUs is the first successful cooperative turn which statistics shows leads to increasing cooperation between former rivals until they become allies. To put it another way, the acknowledgment of respective responsibilities between two agencies with overlapping jurisdiction is essentially the tearing down of the “Berlin Wall” between them.

For example, the new administration called for the MOU of April 2009 between MMS and FERC because there was a problem with offshore renewable licensing and the administration wants the process streamlined.²² While ambiguously worded and general in scope, the April 2009 MOU takes the first big step towards interagency cooperation between MMS and FERC.²³ By acknowledging that both MMS and FERC have licensing responsibilities on the OCS, by clarifying the difference between their roles, and by signing the document each agency agreed to a defined partition of jurisdiction. Thus the problem of who does what was solved. The MOU even went further by adding terms calling for communication and cooperation.²⁴ Though these terms were broadly worded, a style of term writing that typically fails to achieve results, this still sets the agencies in a position to build a relationship. Because the MOU essentially came at the

²² Secretary of the Interior Salazar Order no 3285 Sec. 2. March 11, 2009. By putting a high priority level on renewable energy this order was among other things a call for MMS to cease its feud with FERC.

²³ Memorandum of Understanding Between the Dept. of Interior and Fed. Energy Regulatory Comm’n. April 9, 2009.

²⁴ Id.

bequest of higher authorities, there is even more likelihood that this MOU will be complied with to a certain extent, at the threat of executive anger early on, but eventually a relationship will develop creating the opportunity to further refine the cooperative agreement.²⁵

FERC will inevitably be involved in hydrokinetic offshore renewable energy projects. While tension probably remains between FERC and MMS over the 2005 Amendment to the Environmental Protection Act, FERC has many MOUs regarding various types of overlapping authority with regard to energy project regulation.²⁶ This history evidences a deeply rooted willingness to cooperate to the mutual benefit of involved agencies that shall probably surface once tensions have a chance to subside. FERC's MOU history also provides some good examples of how MOUs can shape cooperative policies without the aid of legal binding power.

FERC and Liquid Natural Gas

FERC has a few memorandums of understanding relating to its “exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an [Liquid Natural Gas] terminal.”²⁷ The following section shall focus on a few of them to illustrate how FERC implemented the MOU in different situations. The first such MOU was signed with The Department of Transportation (DOT) in 1985.²⁸ As this is the first MOU specifically referenced in this paper it shall be discussed in detail.

1985 MOU Between FERC and DOT

In this document, the parties begin by specifying their particular authority relating to Liquid Natural Gas (LNG).²⁹ To summarize, FERC has authority, with respect to interstate LNG transportation, to accept or deny applications, or to accept with terms and conditions, and to conduct reviews of the cryogenics during the siting process and biennially after certification; DOT has authority to set and enforce regulations extending “to the design, installation, construction...operation, and maintenance of facilities...”³⁰ There is noticeably some similarity and overlap in what both parties are required to do, the elimination of which would save time and resources to the parties and the industry. This MOU states that its purpose is to provide guidance and policy regarding “the fixed

²⁵ An in person interview with Mr. Timothy Redding of the MMS revealed that FERC and MMS view this initial MOU almost like the breaking of the ice between them, and do intend to eventually enter a much more specific MOU to properly streamline their joint regulatory authority.

²⁶ Links to these MOUs in pdf format may be found on FERC's website at <http://www.ferc.gov/legal/maj-ord-reg/mou.asp>.

²⁷ 15 U.S.C. §717(b)(e)(1) This authority was originally granted via the Section 7 of the Natural Gas Act.

²⁸ Memorandum of Understanding Between the Dep't of Transp. And the Fed. Energy Regulatory Comm'n Regarding Liquefied Natural Gas Transportation Facilities. (Apr. 16, 1985) (on file at FERC website <http://www.ferc.gov/legal/maj-ord-reg/mou/mou-4.pdf>).

²⁹ Id. at 1. DOT has authority pursuant to the Natural Gas Pipeline Safety Act of 1968 and the Hazardous Materials Transportation Act for its Research and Special Programs Administration. It exercises this authority to set and enforce safety regulations and standards for LNG transportation in or affecting interstate commerce. The United States Coast Guard also exercises authority over LNG facilities that affect port safety and navigable waterways pursuant to EO 10173, the Magnuson Act, and the Ports and Waterways Safety Act of 1972.

³⁰ Id. at 1-2. DOT exercises authority over both interstate, intrastate, and foreign commerce, even though it leaves enforcement to the states for intrastate commerce; FERC exercises authority over interstate and foreign commerce. This MOU limits the agreement to interstate and foreign LNG transportation.

siting, design, construction, operation, and maintenance of fixed LNG facilities” to the agencies respective staffs and to the industry.³¹

In reading this MOU, one notices that the agreements section is divided into subsections, and that the first two specify the actions to be taken by FERC and by DOT respectively.³² These two subsections begin simply with, “The [FERC/DOT] shall:” and then go on to enumerate each action that is to be taken and what exceptions if any there are to these specified actions.³³ These enumerations are nearly bereft of “broad language”, whereby the drafters include words that allow a party to avoid compliance when they see fit. For example, had the two subsections begun with, “The [FERC/DOT] shall to the extent possible:” or “The [FERC/DOT] should when practicable:” the terms of agreement would have far less force and certainty than they do when the qualifying words are omitted. As it is written, this MOU is a good example of strong term writing, creating what almost appears to be binding language, and enumerating the few exceptions to action, leaving the parties with a clear understanding of what each will do and when.

One example of a broad term in this agreement appears in section 1(e), in which it states, “When such voluntary agreements are reached, the FERC staff will *promptly* notify DOT of the agreements and provide *appropriate* background material.”³⁴ While the word “promptly” is not specifically defined by a term of days or hours, it is still a somewhat strict qualifier, and taken in light of the exception’s purpose, a stricter time limit for notification is unnecessary.³⁵ The word “appropriate” would be quite vague were it not for the section 1(d) in which the background material that the FERC is normally required to provide the DOT is defined; giving the parties a proper standard of appropriateness before using it as a qualifier.³⁶

There are other examples of broad language found in DOT’s section. Specifically, Section 2(b) states, “[The DOT shall:] Take *whatever* action [it] *considers appropriate* in the discharge of its responsibilities in the matter referred by FERC,” the term then goes on to enumerate some of the most likely actions the DOT will take.³⁷ Even though this term seems to leave a wide array of possible actions open, thus creating uncertainty, the enumeration of possible actions as well as the specification that this action be taken in the discharge of [DOT’s] responsibilities provides some expectation that whatever DOT chooses to do will be a direct result of its own regulations and standards.³⁸ Noticeably, in the Purpose Section of the MOU, the parties acknowledge that DOT has “exclusive authority to promulgate Federal safety standards” and that

³¹ Id. at 2.

³² Id. at 2-3.

³³ Id.

³⁴ Id. at 3. (emphasis added) Section 1(e) is itself an exception term; it lays out an exception to section 1(b) which requires the FERC to refer to DOT for its review and its comments whenever the FERC proposes a corrective action for safety reasons, and the FERC’s safety standard differs from the DOT’s. The exception encapsulated in section 1(e) allows the FERC to omit referring to the DOT’s review and asking for comment only when the applicant or facility owner voluntarily agrees to take the proposed actions. This exception has the affect of eliminating redundant oversight, while still informing DOT of the concern and action, so that if it happens that the DOT has further safety concerns they too may be raised.

³⁵ Id.

³⁶ Id. at 2-3.

³⁷ Id. at 3. (emphasis added)

³⁸ Id.

FERC has authority to impose stricter requirements in “special circumstances”.³⁹ This essentially makes DOT the bottom line. While an applicant or operating facility under FERC’s jurisdiction must comply with FERC’s requirements, it may already be in compliance with DOT’s requirements. Hence, when FERC finds a problem it may or may not be a DOT problem, therefore FERC puts DOT on notice, as well as the applicant or operator; the applicant or operator has thirty days to send comments to DOT, and at the end of sixty days DOT must have a decision of its own action on notice, as well as a deadline for the applicant or operator to comply if compliance is necessary.⁴⁰ Essentially, DOT is the lead agency, in that an applicant or operator can rest assured that if DOT standards are not met, than neither are FERC’s.

Aside from the language aspect, the MOU sets up a system whereby both parties keep each other and the target facility informed of their own actions and requirements. FERC agrees in its section to invite DOT to its inspections and conferences with operators, and DOT agrees in its section to give FERC notice of any inspections it plans on a facility under FERC’s jurisdiction, and to provide FERC with DOT’s findings.⁴¹ DOT also agreed to apply its enforcement authority to any actions that FERC recommends and to which DOT agrees if the facility fails to comply with them.⁴² This is a particularly interesting agreement, as it adds immediate support to FERC’s demands in one of the special circumstances in which FERC could impose stricter requirements.

Following the two “agreements” sections comes the boilerplate. Subsection 3 specifies that both parties will designate representatives and will arrange to work jointly every so often to properly execute the MOU; subsection 4 specifies that the MOU takes affect on the date of the last signing and that it will apply to all applications filed after and all facilities operating on and after that date; subsection 5 declares that the MOU makes no restrictions to the agencies’ statutory authorities; and subsection 6 allows for the modification, suspension, or termination of the MOU by either party following thirty days of written notice to the other party.⁴³ Interestingly, this Termination Clause has a qualifier, permitting a party to modify, suspend, or terminate only if the statutory authority identified in the preamble is altered or abolished.⁴⁴

Overall, this MOU is well written in that it clearly identifies what is to be done and when; and it avoids ambiguous terms or “qualifying” language. When there are exceptions to action, or “qualifying” words, it does not adversely affect the overall purpose of the MOU, which is to establish a system whereby FERC and the DOT work together to accomplish their respective, statutorily mandated tasks. As this paper will reveal below, this MOU did result in a cooperative relationship between the parties that spawned further MOUs to refine that relationship.

1993 MOU Between FERC and DOT

In 1993, FERC and DOT signed a second MOU, the Preamble of which is much like that of the 1985 MOU.⁴⁵ The Background information omits the DOT’s use of the

³⁹ Id. at 2.

⁴⁰ Id. at 2-3.

⁴¹ Id. at 2,4.

⁴² Id. at 4.

⁴³ Id. at 4.

⁴⁴ Id.

⁴⁵ Memorandum of Understanding Between the Dep’t of Transp. And the Fed. Energy Regulatory Comm’n Regarding Natural Gas Transportation Facilities. (Jan. 15, 1993).

USCG, and the Acknowledgements section, while again affirming DOT's "exclusive authority to promulgate Federal safety standards" for natural gas transportation facilities, acknowledges that FERC has "authority over the siting of interstate natural gas transmission facilities" and may mitigate expected environmental damage by imposing conditions prior to construction of a facility.⁴⁶

In reading the Agreements section, it appears that DOT and FERC took a step back from the rather specific language of the 1985 MOU. For example, Term 1(c) requiring DOT to "[e]stablish a means to notify the [FERC] of significant enforcement actions involving pipeline facilities..." fails to set a time by which this must be done.⁴⁷ With the exception of the qualifying term, "Promptly" which is often used (and though not entirely specific is better than nothing) there appears to be no deadlines for compliance with any of the terms in this MOU. However, there is a term that helps clarify this lack of deadlines. It follows the Agreements section and resembles the Boilerplate term this paper generally refers to as the Points of Contact Term, only this term, in addition to requiring both parties to designate staff representatives, also requires the parties to establish "joint working arrangements from time to time to administer this MOU."⁴⁸ While the term itself is still vague, in that it does not specify how the parties will establish arrangements or designate staff, it fits in with the overall character of this MOU, which is a refining of inter-party communication for an indefinite period.⁴⁹

As stated earlier, many people will find the lack of detail and certainty infuriating, however, a strength of the MOU is that it can accomplish its main purpose without specificity. That purpose is the establishment of a cooperative foundation between parties. This MOU, even though it lacks timetables and many details, gets the main points of agreement across. Both parties recognize that they have overlapping jurisdictions and they both recognize that despite the 1985 MOU some problems with their communication remain.⁵⁰ The Agreements section almost looks as if the parties sat down and in a give and take session and then enumerated their top grievances over communication problems.⁵¹ Even without specificity, the two parties had already been operating cooperatively under an MOU for eight years, and there was likely already a level of trust between the two so that flexible language provided the same level of certainty as specific language, thus making flexibility more appealing.

Interestingly, in the Boilerplate section, the Termination Clause in this MOU allows either party to modify, suspend, or terminate the MOU with thirty days of written notice to the other.⁵² Unlike the 1985 MOU, there is no requirement of applicable statutory change before a party may give notice, further suggesting that certainty and

⁴⁶ Id. at 1-2.

⁴⁷ Id. at 2.

⁴⁸ Id. at 3.

⁴⁹ This MOU, like the 2009 MOU between FERC and DOI functions primarily as an official announcement; in the case of the 2009 MOU it was the announcement of jurisdictional line, in this case it is a goal announcement that the parties want to communicate better.

⁵⁰ Id. at 2.

⁵¹ Id. at 2-3. The specifics of the terms are not listed here for brevity. To sum up, communication problems remained and both sides agreed to establish means of notifying the other in some situations, to promptly notify the other party in other situations, and to refer to the other or review the others considerations regarding safety conditions.

⁵² Id. at 3.

binding power may have outweighed flexibility due to a lack of cooperative history in 1985, but now that there is an existing relationship between the parties, flexibility is more permissible.

Another term to note in the Boilerplate is the Addendum Term, that is to say a term specifying that this MOU does not supercede the 1985 MOU. Instead, this new MOU is meant more as a refinement of or addendum to the old MOU, which is still in affect. Here we see a new possibility for MOUs, they are able to consecutively build on each other as a relationship develops, and thanks to the familiar Termination Clause, they may be modified to cut out unworkable or poorly conceived terms of agreement. Thus the MOUs between parties may evolve with the parties' relationship.

Results of the LNG MOUs

In 2005, FERC's Director of Energy Projects, Mark Robinson, testified as a staff witness before the United States Senate on the siting and safety status of LNG terminals.⁵³ The testimony suggests that FERC has developed a regulatory process that involves the coordination of many other interested government agencies as well as the stakeholders.⁵⁴ With regard to the USCG, he says that it has primary responsibility for security of LNG facilities, but the FERC shares that responsibility.⁵⁵ According to him, FERC's practice is to coordinate its regulatory authority with those of other regulating agencies.⁵⁶ He also notes that preparation of the DEIS is a cooperative effort between FERC and several other parties, typically including the USCG, USACE, and USFWS as well as state agencies and other federal agencies.⁵⁷ His testimony cites the dual needs of adequate assessment and expedited access as the reason for cooperation.⁵⁸ As to post construction inspections, FERC has created the LNG Engineering Branch tasked not only with inspections but also with coordination with other agencies such as DOT and USCG.⁵⁹ This level of cooperation is evidenced by the joint security assessments performed by FERC and USCG, as well as their agreement that future LNG applicants must submit a letter of intent and commence a security assessment at the when the pre-filing process begins.⁶⁰ Overall, this testimony reveals that the original goals of the 1985 and 1993 MOUs have not only been met, but have become standard operating policy for FERC and DOT. This bodes well for the ability of an MOU to spawn cooperation given time.

FERC and Renewable Energy

In March of 2008, FERC signed an MOU with several departments of the State of Oregon to coordinate review procedures and schedules for proposed wave energy projects in the Territorial Sea of Oregon.⁶¹ Pursuant to the Federal Power Act (FPA),

⁵³ Testimony of J. Mark Robinson Director, Office of Energy Projects Federal Energy Regulatory Commission Before the Subcommittee on Energy Of the Committee on Energy and Natural Resources United States Senate. (Feb. 15, 2005).

⁵⁴ Id. at 3-4.

⁵⁵ Id. at 1.

⁵⁶ Id. at 9.

⁵⁷ Id. at 8.

⁵⁸ Id. at 9.

⁵⁹ Id. at 13-14.

⁶⁰ Id. at 18-19.

⁶¹ "Memorandum of Understanding Between The Federal Energy Regulatory Commission and the State of Oregon By and Through Its Departments of Fish & Wildlife, Land Conservation & Development, Environmental Quality, State Lands, Water Resources, Parks & Recreation, and Energy" March 3, 2008.

FERC has authority to grant licenses for non-federal wave energy projects, whether they be in the territorial sea or on the OCS.⁶² Likewise, Oregon has authority to regulate projects within its territorial sea pursuant to the Coastal Zone Management Act (CZMA), Clean Water Act, National Historic Preservation Act, and the FPA.⁶³ Suffice it to say there is overlapping authority for wave energy projects in Oregon's territorial sea and any developers interested in a wave energy project would need to apply to both Oregon and FERC.

As both Oregon and FERC had a mutual interest in promoting renewable energy projects, they signed an MOU in order to coordinate their respective reviews. The MOU begins with Oregon recognizing FERC's authority and pilot licensing program; it then specifies that whenever one party learns of a potential applicant, it will notify the other so that both parties can begin planning a coordinated review.⁶⁴ The MOU uses the idea of incorporating agreed upon milestones into the review process of each applicant, to which both shall strive to adhere.⁶⁵ The MOU requires Oregon to "complete any actions required of it within the timeframes established in the schedule" except when doing so proves impossible, as well as requiring Oregon to comply with legally established deadlines.⁶⁶ This type of language is stricter than that used of many MOUs, which typically only require a good faith effort by the parties. It does require a best effort at getting other agencies to comply with the agreed upon timeframe.⁶⁷

Particularly promising is the fact that paragraph four of the MOU states that the parties will coordinate their respective environmental reviews along FERC's standards so that the NEPA documents FERC prepares may be given to and used by Oregon to satisfy their requirements stemming from the CZMA.⁶⁸ This term reads almost as if it is establishing FERC as the lead agency, which is highly desirable accomplishment for coordination of review.⁶⁹ However, it fails slightly in the lack of specifics. For example,

⁶² 16 U.S.C. §§791(a) et. seq. (read this)

⁶³ 16 U.S.C. §§1451 et. Seq. (CZMA); 33 U.S.C. §§1251-1387 (CWA); 16 U.S.C. §§470 et. Seq. (NHPA); 16 U.S.C. §§791a et. Seq. (FPA) (read these). The states also have authority to regulate what goes into their respective territorial seas following the ...

⁶⁴ MOU between FERC and Oregon page 2.

⁶⁵ *Id.* This idea of incorporating project specific milestones that both parties shall agree upon is an oft repeated technique that makes sense. Due to the specific requirements of each project, the practice of foregoing an template schedule in favor a project specific schedule could greatly increase regulatory efficiency. However, the catch is that the ability to make so many project specific agreements is more likely to occur if the parties already have a history of cooperation. Knowledge of the other's procedures, needs, temperaments etc as well all contribute to ease of agreement. Without this experience, FERC and DOT risk arguing over petty details at the start of early projects. The balance between risk and reward in this case is an example of why it is better for the parties to design their MOU to be specific, flexible, or some combination thereof. The joint drafting of the MOU serves on its own as a cooperative endeavor to establish a history.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at page 3.

⁶⁹ By establishing one agency as the lead in the review, a major roadblock to cooperation is lifted. As this paper has stated, people and agencies in the United States are prone to compete even when they do not need to. When two or more agencies are put on an equal footing to perform the same task, often competition will erupt, resulting in what could be analogized as three construction workers fist fighting over the proper way to hit a nail. Establishing one agency has the potential to eliminate much wrangling and posturing, but at the cost that one agency may become blind to the needs of the others. Appropriate oversight, a well written Dispute Resolution Term, or even a broadly worded Termination Clause can mitigate this concern.

the term does not give a deadline for completion, nor a method for this coordinative work. Had it specified that the points of contact will communicate their informational requirements so that the NEPA documents will satisfy Oregon's requirements as well, and this end result should be achieved within thirty days of an applicants notice, the term would be much more useful.⁷⁰

In paragraph five, FERC acknowledges that Oregon is compiling a comprehensive plan that will identify certain areas in which wave projects are appropriate until more data is collected; and FERC agrees to consider it pursuant to the FPA.⁷¹ Both parties acknowledge in paragraph six that any pilot projects must include terms and conditions appropriate to protect natural resources.⁷² The MOU concludes with four paragraphs of "boilerplate", in which the parties agree that: nothing in it prevents them from seeking redress at law; nothing requires either party to do anything contrary to applicable law; the MOU does not deal with fund transfers; and the MOU takes affect when all parties have signed, it may be modified anytime by mutual written agreement, any party may terminate it upon thirty days written notice during which time the parties will make a good faith effort to resolve any disagreements.⁷³ Overall, this MOU appears to be primarily an official decree that the parties wish to coordinate.

Success under this MOU is difficult to judge at this time, for it is still young, but the outlook is not good. It would appear that Oregon has taken a research-oriented approach to wave energy at this time.⁷⁴ In February of 2009, FERC issued a preliminary permit to a wave energy developer to the chagrin of much of the public who considered this action a violation of the terms of the MOU.⁷⁵ Letters from the governor prior to the preliminary permit signify Oregon's intent to focus on research until completion and implementation of a comprehensive plan as mentioned in the MOU, the public seems to have taken this interest as part of the MOU.⁷⁶ Oregon seems to have assumed that the

⁷⁰ The benefit of term deadlines is, the parties can easily tell if the term was met on time or not. This way, everyone can see that the MOU is being followed, thus building the trust necessary for a long term cooperative relationship.

⁷¹ Id. See also 10(a)(2)(A)(ii) of the FPA and 18 CFR 2.19. In addition to agreeing to consider a projects compliance with Oregon's Comprehensive Plan, FERC acknowledges that Oregon may submit it to NOAA as an amendment to Oregon's Coastal Management Plan. As the number of suitable locations in a comprehensive plan must be limited, the MOU allows Oregon to identify more locations in subsequent phases of its comprehensive plan.

⁷² Id.

⁷³ Id. at 4-5.

⁷⁴ See Letter From Oregon Governor Theodore R. Kulongoski To The Ocean Policy Advisory Council on March 26, 2008. See Also Letter From Oregon Governor Theodore R. Kulongoski To Federal Energy Regulatory Commission and Ocean Power Technologies, Inc. on March 26, 2008. These two letters make reference to the MOU between Oregon and FERC as if the MOU is now the policy, however the letter emphasize that Oregon's interest is to develop the industry by researching impacts first, and only then building large scale facilities.

⁷⁵ Susan Chambers, "Surprising Oregon Wave Energy FERC Permit Issued" The World, Feb. 3, 2009. Available at <http://mendocostcurrent.wordpress.com/2009/02/04/surprising-oregon-wave-energy-ferc-permit-issued/>. On a positive note, this article seems to place a sacrosanct status on the MOU detectable through the outrage that FERC may have ignored it, which evidences a public and stakeholder reliance on the wording of MOUs making them a powerful tool in non-binding agreements.

⁷⁶ See Letter From Oregon Governor Theodore R. Kulongoski To The Ocean Policy Advisory Council on March 26, 2008. See Also Letter From Oregon Governor Theodore R. Kulongoski To Federal Energy Regulatory Commission and Ocean Power Technologies, Inc. on March 26, 2008.

MOU forbids FERC to issue anything other than pilot project licenses until the comprehensive plan was complete; FERC however seems to have assumed that they were free to do as they wish with applications predating the MOU. A strict reading of the MOU contradicts both assumptions, leading to the conclusion that a term clearly identifying what this MOU applied to (such as all future applicants) as well as clearly specifying Oregon's desire that no preliminary permits or licenses would be issued until their comprehensive plan was complete would have prevented this problem. It is now a possibility that this MOU will be amended or terminated due to this failure in specification which has sadly resulted in disillusionment. More likely, the parties will let it slide as it appears nothing was specifically violated, however, the relationship that the MOU seeks to build has been dealt a blow by this preliminary permit that clearly went against one party's wishes. The lesson here is that MOUs are vehicles towards success, but they do not independently guarantee success.

The BLM in Oregon

On February 4, 2009 the Oregon Energy Facility Siting Council (OEFSC) signed a memorandum of understanding with the Bureau of Land Management (BLM) regarding the environmental review and siting of wind energy projects on federal land within Oregon.⁷⁷ Motivating the creation of this MOU were the facts that the wind industry has been growing in Oregon since the turn of the century and though the BLM manages a great deal of land in Oregon, no wind farms existed on BLM lands because of the complicated siting process.⁷⁸ This agreement is a prime example of how MOUs can be used to establish a joint application process.

The Preamble of this MOU states that its purpose is to create a joint environmental review and to "facilitate a harmonious relationship...in the review of all [wind power] permit applications."⁷⁹ The Background and Acknowledgments show that for wind power facilities on federal land in Oregon, both the OEFSC and BLM must undergo separate siting processes.⁸⁰ The BLM prepares environmental documents pursuant to NEPA, and the OEFSC prepares an independent assessment "that is consistent with and does not duplicate Federal Agency review" while considering the assessments of the Oregon Department of Energy (ODOE), the BLM, and other interested parties.⁸¹ It would appear that OEFSC must do the same thing that the BLM must do, only through different statutory authorities and requiring different levels of compliance. The Acknowledgments include not only the specific statutory authorities of both parties, but also statements clarifying that the OEFSC, ODEO, and BLM will share in preparation of the NEPA documents in a public process, thereby sharing expertise,

⁷⁷ Memorandum of Understanding Between the U.S. Department of the Interior, Bureau of Land Management Oregon State Office, The Oregon Energy Facility Siting Council Concerning Joint Environmental Review for Wind Energy Generation Projects. Feb. 4, 2009. The BLM actually signed the MOU on January 16th, the OEFSC received it on Jan. 27 and signed it, thus putting it into effect on Feb. 4.

⁷⁸ In January of 2009, all the wind farms in Oregon existed on private land. The BLM did have applications pending for rights of way and for the siting of facilities.

⁷⁹ Memorandum of Understanding Between the U.S. Department of the Interior, Bureau of Land Management Oregon State Office, The Oregon Energy Facility Siting Council Concerning Joint Environmental Review For Wind Energy Generation Projects at 1 (Feb. 4, 2009).

⁸⁰ Id.

⁸¹ Id. at 2.

eliminating duplicate effort, promoting interagency coordination, providing clarity to the applicant, and creating a more efficient review process.⁸² Essentially, it appears that the BLM is the lead agency for the NEPA document, but that OEFSC and ODOE will participate through a complete sharing of information for all the necessary documents thus eliminating duplication of effort and providing uniformity and speed to the process.⁸³ It should be noted though, that the Oregon agencies can not simply hand in a NEPA document, they have their own documents. However, they can help the BLM create a NEPA document that is crafted in such a way so that when it is complete its information can be used in their own documents.

There are three key components in this MOU that establish the joint application process for the agencies. The first is the terms repeated emphasis that the parties shall communicate, cooperate, and share in virtually every aspect of an individual application. The second is the flowchart found in the Attachments section that clearly maps out the joint OEFSC/BLM process as the parties envision it, coupled with a term allowing for the flowchart to be amended independently of the MOU.⁸⁴ Finally, and probably most importantly, is the term stating that for each application a separate MOU will be entered between the agencies and the applicant, custom tailored to the particular situation at hand providing the most efficient process for each applicant.⁸⁵

The Agreements section begins by noting that the parties will “cooperate in their respective reviews of each project” as well as discussing and sharing information regularly.⁸⁶ The parties agree that a primary point of contact will be designated for each project, and this person will then manage the communications and exchange of information; the parties also put emphasis on sharing the flowchart with applicants early in the process.⁸⁷ Also early in the process, pre-application meetings will be held in which the BLM will invite all necessary federal agencies, and the ODOE will invite all necessary state agencies.⁸⁸ These meetings are held to establish criteria for the necessary document preparation and to inform the applicant of the parties’ “date and information needs.”⁸⁹ Following the pre-application meeting, the parties to this MOU and the applicant will enter the project specific MOU to ensure a coordinated review process.⁹⁰

⁸² Id.

⁸³ Id. Other documents required in the process are the Project Plan of Development, Wind Energy PEIS that BLM has established, BLM Wind Energy National Policy, Field Office Resource Management Plan, EFSC Notice of Intent, and Application for Site Certification.

⁸⁴ Id. at 3. This is interesting because the agreement that the flowchart may be amended says, “as the process is refined.” Because the MOU is used not as a binding document but as a vehicle towards interagency cooperation dependent on communication and successful cooperative attempts, parties should recognize that flexibility and adaptability to changing needs and knowledge learned is imperative.

⁸⁵ Id. This is much like the independent formulation of a project specific timeline, and is dependent on the parties’ ability to get along and quickly agree to subsequent agreements. As always, the more successful tries there are at this, the greater the likelihood that the next will succeed as well, because the spirit of cooperation is strengthened by history of joint endeavors and trust.

⁸⁶ Id. at 2.

⁸⁷ Id. at 3.

⁸⁸ Id.

⁸⁹ Id. Typically, the documents address site selection, environmental issues and concerns, possible alternate sites, alternate plans, or the options of no action or no license issue; it is typically on the applicants to provide the information necessary to assuage all the concerns of the necessary parties.

⁹⁰ Id.

Overall, this is a well-conceived MOU that provides a curious combination of detail and flexibility. It is detailed in the amount of description of the combined process, but at the same time flexible by not defining some terms and allowing parties freedom of action in many circumstances. Most interesting is a clause allowing the parties to proceed on their own if they cannot agree that the application is complete.⁹¹ This ties into the overall character of the MOU as establishing a high level of cooperation while permitting the parties a lot of flexibility. The coordinative aspect of the MOU, via a schedule, is primarily found in the flowchart attachment, which should be considered a highly desirable option for any MOU seeking to create a joint process between the parties that is in anyway complicated.⁹²

Unfortunately, it is too early to measure any success under this MOU. While the OEFSC continues to get requests for leases and rights of way (ROW)s, none have come through that involve federal lands since the MOU went into affect.⁹³ Some of the projects pending at the time of the MOU signing have moved forward under BLM review, including ROWs for transmission lines, wind testing facilities, and most noteworthy the Lime Wind Energy project which is expected to go into operation at the end of the year.⁹⁴ However, the MOU did not apply retroactively, so all of these projects obtained permits through the former process of dual applications.⁹⁵ The most likely reason for the lack of applications on federal land despite the MOU is actually unrelated to the regulatory process and pertains to other applicant siting considerations, such as ideal wind conditions and proximity to substations for transmission possibilities.⁹⁶ Until applicants begin taking advantage of this new framework the two agencies will be unable to put the MOUs terms into practice, thus satisfying the element of successful cooperative trials necessary for the two parties to gain trust in each other, thus increasing the certainty that will raise investor backing and lead to more successful trials.

The California Example

Governor Schwarzenegger of California issued executive order S-14-2008 in November of 2008, declaring an increase in California's use of renewable energy by requiring all retail sellers of electricity to obtain at least 33% from renewable sources by the year 2020 and onward. Luckily, he understood that the time requirements of the

⁹¹ This clause seems to be a get out of jail free card if the application stalls because the parties are butting heads. While the applicant will still need approval from both parties, once the two have split the process again it will appear to everyone that one party is proceeding and the other has dropped the ball. This may not always be precisely true, but it creates an incentive to communicate information needs early on so as not to be left behind. More importantly it allows parties an alternative if the joint process is not working for one applicant, without having to discard the entire relationship to the detriment of future applicants.

⁹² While the parties to the MOU might understand the processes thoroughly, they cannot forget that the applicants, public, and other stakeholders need to understand it as well or again the system may stall out of confusion.

⁹³ Phone interview with Adam Bless of the OEFSC on 3 August 2009 at 1310.

⁹⁴ **cites**

⁹⁵ Memorandum of Understanding between the OEFSC and BLM p 1. **blue book citation** The very first paragraph specifies that the MOU applies only to *future* wind energy projects on federal land in Oregon.

⁹⁶ Phone interview with Adam Bless of the OEFSC on 3 August 2009 at 1310. Mr. Adam Bless considers the wind potential to be an applicant's first concern, the transmission possibilities the second concern, and the issue of who owns the land to be third. He also notes that there are no large substations on federal land at present, further hindering its attractiveness to wind project applicants.

multiple regulatory systems would hinder realization of this new goal. To eliminate some of the resistance towards achievement of this ambitious undertaking, the executive order also required the Renewable Energy Transmission Initiative (RETI) to begin identifying zones that could be developed into renewable energy projects with little or no environmental impact, and it required the California Energy Commission (CEC) and the California Department of Fish and Game (CDFG) to collaborate in streamlining the review, permitting, and licensing process for all proposed renewable energy projects in order to cut application times in half within areas that a Renewable Energy Action Team (comprised of both agencies) identifies as ideal for renewable energy projects.⁹⁷ The executive order specifically references two MOUs signed the same day by the CEC, CDFG, BLM, and the United States Fish and Wildlife Service (USFWS) in three of its specific orders.⁹⁸ In doing this, Governor Schwarzenegger has effectively backed many of the MOUs' terms with the power of the executive branch of California, and one can expect the degree of cooperation in fulfilling the MOU/EO terms to reflect the superior need to comply over the desire to retain individual authority.

CEC/CDFG MOU

The MOU between the CEC and CDFG on November 17 of 2008 formally establishes the Renewable Energy Action Team (REAT) and defines its purpose as “[providing] for a streamlined permitting process for renewable energy projects [by reducing processing time and providing guidance to applicants].”⁹⁹ Interestingly, the MOU references the governor's executive order, which in turn referenced the MOU.¹⁰⁰ This is part of the Background, but is also serves as a subtle reminder that both the MOU and EO were planned in advance by the same minds, which should lend more weight to the terms of the MOU by further associating the entire document with the intentions and authority of the executive branch of California.¹⁰¹

⁹⁷ Newly Issued California Executive Order Requires Energy Retailers to Deliver 33% of Electrical Energy from Renewable Resources by 2020 and Establishes Facilitating Procedural Framework.

⁹⁸ Executive Order S-14-08 by the Governor of the State of California. Arnold Schwarzenegger. (Nov. 17, 2008). P 3 of 5 in Word Format. Orders 4-6. Order 4 references the CEC/CDFG MOU and begins by saying “Pursuant to the MOU...” and then goes on to declare specific goals for the Renewable Energy Action Team (REAT), which that MOU formally creates. These same goals, listed in orders 5-12 of the executive order, are found in the CEC/CDFG MOU under terms 1, 2, 5, 6, 7, 8, 9, 10, and 11. For many of the terms the executive order mirrors the words of the MOU perfectly, and in the other terms the executive order strays in its words from those of the MOU only slightly, usually creating slightly more detail. For example, term 10 of the MOU sets the completion date for the draft DRECP and initiation of the environmental review process as Dec. 2010, while order 11 of the executive order sets the exact same goal at a completion date of Dec. 31, 2010.

⁹⁹ Memorandum of Understanding Between the California Energy Commission and the California Department of Fish and Game Regarding the Establishment of the Renewable Energy Action Team. Nov. 17, 2008. at 1.

¹⁰⁰ Id.

¹⁰¹ While the EO specifically backs most of the MOU's terms with its own authority, there are terms in the MOU (for example the time deadline for appointing officials and employees from CEC and DFG) that do not appear in the EO. By simply referring to the EO's call for an REAT in the Preamble of this MOU, the writer has essentially reminded all the parties that they must comply with all the terms of this MOU, even those not specifically cited in the EO. An MOU could probably deliver this same level of necessity of compliance by citing to any higher authority that has called for the MOU's purpose, even without the specific backing that EO S-14-08 provides.

This MOU is written short and sweet. It contains a Preamble that cites the EO in a one-paragraph background followed by a one-paragraph purpose.¹⁰² It then follows with the Agreement that both sets dates and uses strong, specific, almost binding language.¹⁰³ The Boilerplate consists of only an Amendment Term.¹⁰⁴ Utterly absent is declaration that this MOU does not create a cause of action, a termination clause, or any other typical terms found in the Boilerplate. Though not legally enforceable, this MOU appears more binding than any other researched for this paper. It is possible, albeit unlikely, that if taken to a court of law it could be interpreted as a contract. Practically speaking, though, the most likely relief would be specific performance or possibly monetary damages for delays and both of these would be easier obtained through a formal complaint to the executive branch, which could force compliance or reallocate funding to compensate one agency's reliance far quicker than any court.

Progress under this MOU is promising. Not only does it have executive force behind it, but is also clearly written, and contains deadlines for completion of the terms. It appears that to date the parties are completing the terms on time.¹⁰⁵

Conclusions

Memorandums of Understanding are powerful vehicles towards interagency cooperation, particularly in the dense overlap of authority in offshore renewable energy regulation. They fill in the gap left by legally binding contracts when agencies are unable to commit without legislative approval, or where agencies value protection of their autonomous authority over cooperation, or where contracts are otherwise too binding to be desirable. MOUs fill this gap because they are not legally binding nor should they be. Any MOU that finds itself the cause of litigation should be considered a failure.

MOUs serve to promote cooperation by recognizing mutual interests, promoting communications, and establishing clear cooperative actions to be carried out. By meeting these three elements an MOU lays the foundation for a cooperative relationship between the parties. As the parties successfully complete the cooperative acts the MOU specifies, the foundation is built on, and repetitions of these cooperative further strengthen the relationship, over time turning it into a key component of the parties' respective procedures.

¹⁰² Id.

¹⁰³ Id. The only term that seems to be unspecific is term 2, saying, "The REAT shall work closely with the [BLM] and [USFWS]..." However, this term did not need to be specific as there was a separate MOU signed the same day between all four parties. The EO references it, and this MOU references the MOU. All the other terms use the beginning phrase, "The REAT shall..." or some equivalent except for term 1 which merely declares the creation of the REAT.

¹⁰⁴ Id. at 2. It allows amendments at any time so long as both parties sign a written document.

¹⁰⁵ July 8 2009 Email from Ms. Ashley Conrad-Saydah of the BLM to Mr. Alastair Deans. Though not a party to the MOU, the MOU requires the parties' REAT to work closely with the BLM. Ms. Conrad-Saydah is assigned to the REAT and says that they base their actions around the directives of the MOU and the Executive Order. Though it has taken a great amount of work they appear to have gotten through the public scoping meetings as required on time. In a subsequent email dated July 31, 2009, Ms. Conrad-Saydah said that the parties had begun working together prior to the Executive Order, evidencing a prior acknowledgment of the mutual interest in cooperation. The level of writing specificity in this MOU and the level of compliance may be the twin children of a genuine desire to cooperate and an executive order directing cooperation.

Evidence of MOU success is often difficult to find, especially when the MOU is new. Outlying factors surrounding the regulatory process an example MOU seeks to streamline serve to cloud any calculation of success based on time or cost reduction in applications. However, research indicates that parties to MOUs view the terms of an MOU as controlling, even if they recognize that they are not legally binding.¹⁰⁶ Research also indicates that parties enter MOUs either due to directives from above or from a genuine desire to coordinate and cooperate; and in either case the motivation to comply with the MOU's terms exists.

Fundamentals of social psychology show that communication, mutual interests, and investments of time and labor in, success at, and repetition of cooperative efforts serve to bind individuals and groups together.¹⁰⁷ This bind can be just as strong or stronger than a legal binding, which a party may be violated without remorse absent any other bind so long as the rewards outweigh the legal penalties.¹⁰⁸ For this reason, MOUs are more viable in certain situations than contracts. With wording properly tailored to the parties' needs, an MOU can be incredibly fruitful. They may establish joint applications and schedules. The key is that parties recognize their mutual interests and then participate in a give and take to address their respective concerns specifically so that success can be observed, thus building the cooperative relationship.

¹⁰⁶ July 31 2009 email from Ms. Ashley Conrad-Saydah to Mr. Alastair Deans. Telephone interview with Mr. John White of the OEFSC on Aug. 4 2009. See Also Susan Chambers, "Surprising Oregon Wave Energy FERC Permit Issued" The World, Feb. 3, 2009. Available at <http://mendocoastcurrent.wordpress.com/2009/02/04/surprising-oregon-wave-energy-ferc-permit-issued/>. (demonstrating via public outrage at the presumption that the MOU had been violated that the public believed the terms of the MOU were legally binding and would result in litigation; this perception though not accurate is important to ability of MOUs; ie. if people believe the terms are binding, they will bind)

¹⁰⁷ Taylor, Shelley; Peplau, Letitia; Sears, David. Social Psychology 10th Edition. Prentice Hall. Upper Saddle River, NJ 2000. See Chapter 10: Behavior in Groups.

¹⁰⁸ This observation depends on one's belief in the Efficient Breach Doctrine. Examples of the validity of this assertion are visible everywhere. One such example is the simple observation that friendships founded on mutual interest and shared experiences often last forever while marriages based on a temporary attraction followed by a legally binding contract end in adultery.

Attachment A: Definition of Terms

Acknowledgments: A section of the MOU found in the Preamble, but characteristically a merger of the Preamble and Agreements. The parties typically cite and recognize one another's statutory authority, and typically acknowledge their mutual interests making it a subtle but powerful opening to any meeting of the minds.

Agreements: The center section and the meat of the MOU, containing the terms to which the parties specifically agree to abide.

Amendment Term: A boilerplate term allowing amendment of the MOU through some specified process, but no termination or suspension of the MOU.

Attachments: Any documentation following the signatures necessary to clarify the understanding. Typical examples are a list of points of contact and a flowchart of procedures.

Background: Part of the Preamble that describes a situation or existing problem giving rise to the purpose for this MOU.

BLM: Bureau of Land Management (under the U.S. Department of the Interior)

Boilerplate: The section of a Memorandum of Understanding officially referred to as General Terms, Miscellaneous Terms, or some variant thereof and containing standard terms found in most MOU Boilerplates. Examples of these terms include the Fiscal Term, the Termination Clause, and Limitation of Statute Term.

CEC: California Energy Commission

CZMA: Coastal Zone Management Act

DFG: California Department of Fish and Game

Dispute Resolution Term: Defines the methods for resolving disputes, typically keeping resolution at the lowest level possible and pushing steadily upward to department heads when lower echelons fail to resolve a dispute. The research for this paper uncovered no such term that resorted to arbitration or the court system for dispute resolution.

DOT: Department of Transportation

Effective Upon Term: Defines the date at which the MOU becomes effective, typically as the date of the last signing.

FERC: Federal Energy Regulatory Commission

FIA Term: Specifies that any exchange of information to certain (typically federal) parties is subject to the Freedom of Information Act.

Fiscal Term: The fiscal term generally specifies that the MOU is not a funds transfer document nor does it provide the authority for such a transfer, and that any attempt to transfer funds of any kind ancillary to the MOU's terms must be accompanied by a separate written agreement and must also comply with all applicable laws.

FPA: Federal Power Act

Limitation of Statute Term: This term reflects one of the primary concerns government agencies will have in entering agreements, they are unable to supercede their statutory authority. This term states that compliance with all other terms of the MOU is only required to the extent an agency is authorized to act by law.

MOU: Memorandum of Understanding

MMS: Minerals Management Service

No Action Term: This term is one of the identifying terms in an MOU as opposed to a contract. It specifies that the MOU does not create any possible action at law, via any enforceable rights, benefits, trusts, etc. either substantive or procedural at law or equity.

OCS: Outer Continental Shelf

OEFS: Oregon Energy Facility Siting Council

Preamble: The first of three main sections of the MOU, containing Background or Introduction, Acknowledgments, and Purpose. It is the lead in to the Agreements.

Purpose:

REAT: Renewable Energy Action Team

REPT: Renewable Energy Permit Team

RETI: Renewable Energy Transmission Initiative

Termination Clause: Defines a date, method, or other condition for termination of the agreement. Typical clauses state that the agreement is terminated after completion of all terms to the satisfaction of all parties, or that it may be terminated by the mutual written agreement of all parties, or even that one party may opt out of the MOU by a written thirty days notice to all other parties (occasionally requiring consent of the other parties).

USACE: United States Army Corps of Engineers

USCG: United States Coast Guard

USFWS: United States Fish and Wildlife Service

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE U.S. DEPARTMENT OF THE INTERIOR
AND
THE FEDERAL ENERGY REGULATORY COMMISSION

Background

President _____ issued Executive Order _____ on _____, calling for more coordination between agencies involved in the siting and regulation of Offshore Renewable Energy Facilities in an effort to streamline the process and thus encourage investor confidence.

Acknowledgments

The Department of the Interior (DOI) by and through its Minerals Management Service (MMS) and the Federal Energy Regulatory Commission (FERC)(jointly as the Parties), as parties to this Memorandum of Understanding (MOU), hereby acknowledge and declare the following:

- A. MMS has exclusive jurisdiction to issue leases, easements, and rights-of-way regarding Outer Continental Shelf (OCS) lands for hydrokinetic projects pursuant to Section 8(p) of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1337(p) (2006).
- B. FERC has exclusive jurisdiction to issue licenses and exemptions for hydrokinetic projects located on the OCS pursuant to Part I of the Federal Power Act (FPA) 16 U.S.C. §§792-823a (2006) and Sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§2705, 2708 (2006).
- C. FERC will not issue preliminary permits on the OCS.
- D. FERC will not issue a license or exemption to an applicant for an OCS non-federal hydrokinetic project until the applicant has first obtained a lease, easement, or right of way from MMS for the site thereof.
- E. The Parties are required by law to conduct necessary analyses and prepare necessary environmental documents under the National Environmental Policy Act (NEPA) in the exercise of their respective jurisdictions.
- F. The Parties may both attach terms and conditions to their leases, easements, rights of way, licenses, or exemptions. The Parties may inspect authorized projects to ensure compliance with the attached terms and conditions.
- G. It is in the interest of both Parties to prepare joint environmental documents for the purposes of their NEPA analysis for individual non-federal hydrokinetic applicants. It is also in the interest of both parties to coordinate terms and conditions and subsequent inspections.
- H. The parties recognize and agree that _____ shall be the lead agency in preparation of joint environmental documents, but that this does not diminish _____'s statutory authority to regulate non-federal OCS hydrokinetic projects.

Purpose

The Purpose of this MOU is to create a means by which the Parties shall establish a joint environmental review whereby jointly prepared NEPA documents will satisfy their individual informational requirements. Ideally, a one-stop application process shall result. This shall eliminate duplication of effort thus saving time and energy to both Parties. It will also facilitate a sharing of information and staff expertise thus providing better and speedier analysis, which is in the interest of the Parties, all other federal, state, and non-governmental agencies, and all stakeholders including the applicant.

The Purpose of this MOU is also to establish cooperation and support in the attachment of terms and conditions to authorized projects as well as any subsequent inspections to ensure compliance. Cooperation will eliminate time and energy spent on duplicative efforts as well as contradictory terms and conditions.

Agreements

The Parties hereby agree to the following terms:

1. Each party shall designate a member of their staffs as a point of contact prior to the signing of this MOU. An attachment to this MOU shall list each point of contact's name, business mailing address, business phone number, and email address. The points of contact shall communicate when necessary to ensure their parties' compliance with the terms of this MOU. Points of Contact may be subsequently changed by two weeks written notice to the other party.
2. All communication between points of contact shall be electronically unless paper documentation is requested.
3. The points of contact shall compile bi-annual memorandum reports, to be filed with the head of their agency on or within five days prior to the 15th of January, and on or within five days prior to the 15th of July. These reports shall outline the level of compliance with and coordination achieved between the parties. The head of each agency shall keep these reports on file for no less than three years of the date of filing, and shall provide copies to the head of the other agency or to the Cabinet at their request.
4. The Parties hereby create a Hydrokinetic Application Team (HAT) to consist of three staff representatives from each party. These staff members must be acquainted with their parties' regulatory procedures and schedules. These staff members are to be announced by emails exchanged between points of contact within five business days of the signing of this MOU. The emails shall include staff members' names, business addresses, business phone numbers, and email addresses.
5. HAT shall meet for at least eight hours per week, beginning within thirty days of the signing of this MOU. Staff members may be excused from meetings by their agency's point of contact when necessary, but an alternate staff member must attend meetings in an absentee's place.
6. HAT shall compile a Joint Hydrokinetic Application Plan (JHAP) to thoroughly integrate the Parties' schedules and procedures for the creation of, notice of, and review of environmental documents required by NEPA. JHAP shall create an environmental review process for non-federal hydrokinetic projects on the OCS that utilizes the same documents for both FERC's and MMS's needs.

7. JHAP is to be filed with the Points of Contact, Department Heads, and with the Cabinet within seven months of the signing of this MOU. Within five business days of JHAP filing, the Points of Contact will schedule a meeting for the department heads within thirty days of the date of JHAP filing; the purpose of this meeting will be to discuss the plan, and either sign an MOU implementing it or return it to HAT for amendment with a schedule for amendment not to exceed sixty days. When HAT has completed the requested amendments to JHAP, the amended JHAP shall be filed, within five business days the Points of Contact shall set a meeting to occur within thirty days of the amended filing, and at that meeting the Department Heads shall either sign an MOU implementing the amended JHAP or request further amendments or terminate this MOU.
8. HAT's first meeting shall establish a schedule necessary to complete and file the JHAP within seven months. Upon filing of the JHAP, HAT is no longer required to meet, unless called on to amend the JHAP, as specified in Term 7, at which time HAT will again be required to meet for a minimum of eight hours per week until the amended JHAP is filed.
9. The Point of Contact for MMS shall provide FERC's Point of Contact with a list of its proposed terms and conditions, if any, ten days prior to issuing a lease, easement, or right of way for a non-federal OCS hydrokinetic project. FERC's Point of Contact will assign a staff member involved with the relevant project to review MMS's terms and conditions to assure that none are or may be in conflict with FERC's own proposed terms and conditions to be attached to the FERC license or exemption for the relevant project. This review is to be complete within five days of receipt of MMS's terms and conditions.
10. If any of the parties proposed terms and conditions conflict or potentially may conflict, the Points of Contact shall communicate to establish a meeting between the parties' respective staff members for the project. The meeting shall occur no more than fifteen days after MMS provided FERC with its proposed Terms and Conditions. The respective staffs shall confer at this meeting to amend their respective terms and conditions so as to eliminate all existing or potential conflicts, or in the event that a potential conflict cannot be eliminated, to create a method of mitigation in the event that the potential conflict materializes. These amendments are to be complete by the end of the meeting. If the meeting fails to completely address the conflict, the conflict shall be resolved as specified in the this MOU's Miscellaneous Term 8.
11. The parties agree to notify each other by way of their Points of Contact within three days following the scheduling of a non-federal OCS Hydrokinetic project inspection, or two days prior to any non-scheduled inspection. Once a party notifies the other of an inspection, the other has the option of joining the inspection or waiving the right to join the inspection. This term will be considered complete, void, and superceded by Term 13 three months after the signing of this MOU.
12. The parties agree to notify the other as soon as possible in the event of an emergency inspection. In the case of an emergency inspection the other party must waive the right to join the inspection and the inspecting party must provide the other party a copy of the inspection report within a day of its filing,

accompanied with a memorandum explaining the need for the emergency inspection.

13. The Points of Contact and department heads shall hold all inspection scheduling meetings for non-federal OCS Hydrokinetic projects jointly at a time and place of the parties' mutual convenience three months after the signing of this MOU and thereafter. These scheduling meetings coordinate to the greatest extent allowed by law all inspections by FERC and MMS. In the event of an inspection involving only one party, the reason for the solo inspection shall be provided to the Points of Contact for both parties within a day of the inspection report filing. The Points of Contact will explain the solo inspection in their bi-annual report.

Miscellaneous Terms

1. Each of the Parties shall use its own appropriation to carry out its responsibilities under this MOU.
2. This MOU is not a fiscal or funds obligation instrument. Nothing in this MOU requires the Parties to obligate or expend funds in excess of available appropriations. Any transfer of funds related to the terms of this MOU must be accompanied by an appropriate funds transfer document as required by applicable law.
3. This MOU is strictly for internal management purposes. It does not confer any right or benefit, substantive or procedural, enforceable at law or equity, by any party against the United States, its agencies, its officers, or any person.
4. Nothing in this MOU will be construed to affect the responsibilities of the Parties beyond their respective statutory authorities.
5. This MOU supplements but does not amend, modify, or terminate the April 2009 MOU between the Parties. This MOU is intended to increase the level of cooperation between the parties by expanding some of the responsibilities established in the April 2009 MOU.
6. For clarity, the schedule for completion of this MOU's terms is attached.
7. Upon the signing of a second MOU implementing the JHAP, HAT shall be dissolved and Agreement Terms 4-8 of this MOU shall be considered complete and therefore no longer a part of this MOU.
8. Disputes shall be resolved by the lowest level possible. A dispute should first be resolved by the parties' respective staff members in dispute. If this proves impossible, the dispute should be resolved by the Points of Contact. If this proves impossible the dispute should be resolved by the Department Heads. If this proves impossible the MOU shall be amended. If this does not resolve the dispute the MOU shall be terminated.
9. In the event that a party lacks sufficient funding to comply with the terms of this MOU, this MOU may be suspended, amended, or terminated with thirty days written notice to the other party. In the event that an Amended JHAP is not signed by the Department Heads, the Department Heads may mutually strike Agreement Terms 4-8 from this MOU or individually strike Agreement Terms 4-8 with thirty days written notice to the other party. During the Thirty days notice the parties shall make a good faith effort to resolve the problem, including asking members of the Cabinet to act as mediators, and if successful the notice to strike

shall be canceled. In the Event that a dispute rises to the level of the Department Heads and cannot be resolved, the Department Heads may mutually agree to strike, amend, or modify the terms of the MOU causing the dispute or agree to mutually terminate the MOU; an individual party may strike, amend, or modify the terms of the MOU causing the dispute or terminate the MOU upon thirty days written notice to the other party. During the thirty days the parties shall make a good faith effort to resolve the dispute, including asking members of the Cabinet to act as mediators, and if successful the notice to shall be canceled.

10. This MOU becomes affective upon the last signatory date.

Chairman of the Federal Energy Regulatory Commission

Date

Secretary of the Interior

Date

Attachment A: Points of Contact

Federal Energy Regulatory Commission: _____

Minerals Management Service: _____

Attachment B: Schedule

Prior to Signing: Points of Contact are designated and listed on MOU

Five Days after Signing: Points of Contact have announced three staff members apiece for HAT

Thirty Days after Signing: HAT has begun meeting at least eight hours per week

Three Months After Signing: All FERC and MMS inspection scheduling meetings to ensure compliance with terms and conditions are now held jointly, and every attempt shall be made to conduct only joint inspections

Seven Months After Signing: JHAP has been filed with the Points of Contact, Department Heads, and the Cabinet

Seven Months and Five Business Days after Signing: Points of Contact have scheduled meeting for Department Heads

Seven Months and Thirty Days after Signing: Department Heads have met and either signed an MOU implementing JHAP or requested amendment

Seven Months and Ninety Days after Signing: Any Requested Amendments are complete