September 8, 2008

Department of Interior
Minerals Management Service
Regulations and Standards Branch
381 Elden Street, MS-4024
Herndon, VA 20170-4817

Re: Alternative Energy and Alternate Use of Existing Facilities on the Outer Continental Shelf, 1010-AD30

The Conservation Law Foundation (CLF) is pleased to submit the following comments on the U.S. Department of Interior, Minerals Management Service's (MMS) proposed regulations for Alternative Energy-Related Uses on the Outer Continental Shelf (AERU) published in the Federal Register on July 9, 2008. CLF is pleased that MMS has finally issued draft rules that are intended to promote responsibly sited alternative energy projects in the Outer Continental Shelf (OCS). The development of such projects on the OCS could prove to be a critical component of efforts to halt and reverse the impending catastrophe of climate change and to achieve energy independence. Those goals, however, must not come at the expense of the productivity of the marine habitats or the health of the species of the OCS.

As a general matter, the proposed rules have struck an appropriate protective and precautionary level. In addition, with one notable exception, the proposed rules recognize the need to treat the use of the OCS by AERU as materially different from traditional use by the oil and gas industry, particularly with respect to treatment of the environmental impacts of extracting oil and gas and the ultimate use of those fossil fuels.

In passing the Energy Policy Act of 2005, the Congress explicitly recognized both the severity of the climate change threat and the urgent need for increased sources of clean renewable energy by setting a 270 day period for this rulemaking. This rulemaking long ago exceeded that deadline and the severity of the threat and the urgency of the need have grown exponentially since 2005. These proposed regulations must be finalized with all deliberate speed, true to the purpose of encouraging the responsible development of renewable sources of energy on the OCS.

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Background and Introduction:

CLF is a public interest environmental advocacy organization that is actively involved in a range of public policy issues concerning natural resources in New England. For 40 years, CLF has been the regional leader in advocating for new, cleaner sources of energy and for the protection of New England's natural resources. Over the past decade, CLF has worked to reform and reshape New England's energy system, emphasizing the need not only for development of renewable energy but also the need to decrease energy demand through energy efficiency measures, to reduce vehicle miles travelled and to implement innovative demand and delivery systems. CLF has been the leading environmental advocate for appropriately sited alternative energy projects, particularly wind power, on both land and offshore.

With respect to marine resources, CLF has long been a champion of responsible use of the Gulf of Maine and the OCS. Thirty years ago, working with commercial fishermen and their communities, CLF filed the landmark lawsuit that prevented high risk oil and gas drilling on Georges Bank, New England's premier fishing grounds. CLF remains committed to ensuring that the moratorium on oil and gas drilling on the OCS that resulted from that litigation remains in place, a moratorium entirely consistent with Congress' direction in 2005 to facilitate development of alternative energy sources on the OCS and not oil and gas. CLF's work to end chronic overfishing and force the rebuilding of New England's fish population has spanned the same time frame and continues today. CLF has also been engaged in the mapping of marine habitats and wildlife to guide the design of marine protected areas as well as endangered species protection throughout the Gulf of Maine. Additionally, CLF has been involved in permitting proceedings related to submarine pipeline and cable proposals and in various commercial development projects proposed for location on the OCS, including two offshore liquefied natural gas terminals off the coast of Massachusetts.

The proposed AERU program is under consideration at a time when there is unprecedented attention being paid to national energy policy, in light of growing awareness of climate change and the need for energy independence. After the release of the Intergovernmental Panel on Climate Change (IPCC) Working Group reports in February, April, and May of 2007, there is no longer a basis for policy-makers to ignore the impending catastrophe of climate change or the associated overarching environmental, public health, energy, legal, social, and economic considerations.[1] Development of renewable energy on the OCS, while unavoidably causing some impacts, will provide an important opportunity to meet the country's urgent need for sustainable energy. CLF made this observation during the preliminary process for the AERU program in 2005, based upon the science available at that time, and reiterates it even more emphatically now.

[1] See Intergovernmental Panel on Climate Change, Working Group I, *Climate Change 2007: The Physical Science Basis* (February, 2007); Intergovernmental Panel on Climate Change, Working Group II, *Climate Change 2007: Adaptation, Impacts and Vulnerability* (Apr., 2007); Intergovernmental Panel on Climate Change, Working Group III, *Climate Change 2007: Mitigation Of Climate Change* (Feb., 2007), *available at* http://www.IPCC.ch (last accessed 5/18/2007).

At the same time, increasing attention is being paid to the scientific consensus regarding the declining health of the world's oceans. Both the U. S. Commission on Ocean Policy (2004) and the Pew Oceans Commissions (2003) have published well-researched reports documenting the fact that our oceans, and the resources they support, are in trouble from coast to coast and in need of decisive action to restore their health and ensure that citizens across the nation and future generations will continue to enjoy their many benefits. To address the serious issues facing our ocean ecosystems, both Commissions called for a comprehensive national policy on oceans and coasts and an overhaul of the currently fragmented management system to create a much more coordinated and effective management structure.

Perhaps nowhere is this need for change better demonstrated than in New England. The Gulf of Maine - one of the most biologically productive ecosystems in the world – is experiencing severe stress on nearly every aspect of its ecosystem. The New England Fishery Management Council has released a report documenting that 13 of 19 groundfish species, including the iconic Atlantic cod, remain overfished. Management action to rebuild these fisheries will impose even more stringent restrictions on the ability of commercial and recreational fishermen to fish. In addition to the impacts of overfishing, widespread coastal and ocean habitat degradation and loss, acidification and increased water temperatures due to the emission of greenhouse gases resulting from our dependence on fossil fuels, and pervasive point and non-point source pollution of marine waters threaten to irreversibly change the complex web of life that lives in or depends on the ocean. Scientists already believe that the innate productivity of the Gulf of Maine and Georges Bank for fish has declined from a variety of factors associated with human activities.

From our vantage point, there is no question that the continued sustainability of the Gulf of Maine is very much tied to the need to arrest and reverse the impacts of climate change. We need to dramatically alter the course of U.S. coastal and ocean management policies to not only protect this invaluable natural resource for future generations but also to harvest resources that have heretofore been untapped – the wind, tides, waves and other potential renewable sources of energy. The harvesting of these resources must be by projects that are sited responsibly and carried out with the least possible impacts on the marine environment. Development of renewable energy resources in the ocean must be considered within a comprehensive ocean management framework, where all relevant federal and state agencies work cooperatively and proactively to consider and manage the various human activities in the ocean realm. CLF has taken a leadership role in articulating the need for developing this new paradigm for ocean management[2] and developed a method for mapping the habitats of the oceans that provides an important model for developing the scientific basis for sound policy

[2] See generally, Jennifer Atkinson, Priscilla M. Brooks, Anthony C. Chatwin, Peter Shelley, Conservation Law Foundation, *The Wild Sea: Saving Our Marine Heritage* (Aug., 2000) (First chapter available at http://www.clf.org).

development to support sustainable economic activity on the continental shelf.[3] CLF is a champion of ecosystem-based ocean zoning of renewable energy facilities and other human activities. Such zoning is now being implemented in Massachusetts state ocean waters as a result of the Massachusetts Ocean Act that CLF worked to enact in 2007.

A representative of CLF served on the MMS policy advisory subcommittee that met while the Energy Policy Act of 2005 was being drafted and debated in Congress to consider the possibility that MMS would be given authority, by the final bill, over the uses that are the subject of the proposed rules. That subcommittee developed the broad outlines of the regulations and a preliminary tentative scope for a possible Programmatic EIS. CLF submitted written comments on the MMS' Advanced Notice of Rulemaking (February 28, 2006), the Notice of Intent to prepare a programmatic environmental impact statement (PEIS) (July 5, 2006), and the draft PEIS itself (May 21, 2007). In those comments, CLF called for regulations that would recognize that alternative energy projects will have far less of an impact on the OCS than traditional extractive energy projects such as oil and gas drilling, integrate and use the expertise of existing state and federal permitting and regulatory bodies, and expedite the siting of projects in environmentally appropriate areas. CLF called not only for the creation of a set of best management practices (BMPs) that could be applied across the board to all alternative energy projects on the OCS but also for a rigorous adaptive management protocol to address the inevitable unforeseen consequences and impacts that will be experienced as the underlying technologies for these projects develops and matures.

In short, the need to harness the alternative energy resources of the OCS is clear but the obligation to harness those resources in an environmentally responsible and sustainable manner must go hand in hand with development.

Summary of Comments:

The proposed rules create a comprehensive system for the leasing and development of the OCS for AERU. One overriding concern, however, remains in that the system could perpetuate the "first-come, first-served" approach to commercial development on the OCS if the MMS does not rigorously enforce the system of milestones and payments called for under the proposed rules. While CLF recognizes the need to both move the process forward and not to have high entry thresholds that discourage interest in developing AERU on the OCS, the system must also encourage thoughtful site selection and discourage speculative or obstructionist leases. MMS, particularly in the early stages, must rigorously review progress under certain leases and be conservative with any requests to extend deadlines for Site Assessment Plans (SAP), General Activities Plans (GAP) and Construction and Operations Plans (COP).

Another continuing concern is the apparent discrepancy of treatment for AERU with respect to the costs of conducting individual project reviews under the National

[3] Conservation Law Foundation and WWF-Canada, *Marine Ecosystem Conservation for New England and Maritime Canada: A Science-Based Approach to the Identification of Priority Areas For Conservation* (2006)

Environmental Policy Act (NEPA) as compared to traditional oil and gas projects. The costs of NEPA review are likely to be substantial and making AERU projects pay for such review places them at an economic disadvantage. To be very clear, CLF supports the requirement for individual project NEPA review and even for having project proponents responsible for some of the costs, but not in a manner that is not shared in equal by other OCS projects or that would discourage development of AERU altogether.

CLF also believes that MMS should be concurrently establishing adaptive management protocols as called for in our comments on the Draft Programmatic EIS. Even with Best Management Practices in place on a program-wide basis that require preconstruction studies and certain standard mitigation measures, there will be unknowns specific to each project during construction, operation, and decommissioning. In order to ensure the proper level of environmental consideration, MMS should establish a rigorous adaptive management protocol to address the inevitable unknown factors that will come with these new technologies.

Finally, we welcome the proposed rules provision for the Secretary to request information from stakeholders as to the environmental, technical or economic issues that will arise as AERU is developed on the OCS. CLF suggests that it may be appropriate to have standing regional advisory groups that would meet periodically to review such issues and provide recommendations to the Secretary on a regular (annual) basis. In the New England region, this is a standing role that Northeast Regional Ocean Council (NROC)(*see* http://regionaloceans.org/documents/NROC%202007%20Workplan.pdf) could play. Such use of a regional federal and state entity would have the advantage of developing both a multi-jurisdictional and comprehensive proactive framework to forward the analysis of key regional issues and a mechanism for integrating and accelerating the development of public policy decisions on OCS development issues.

In addition to these broader comments, set forth below are specific comments on the provisions of the proposed rules.

Specific Comments:

§ 285.111 – As noted above, the provision for a case-by-case determination of whether to charge for the preparation of an environmental impact statement (EIS) under NEPA could present a significant financial hurdle for AERU, a hurdle that other projects on the OCS such as oil and gas exploration and sand and gravel mining do not have to clear. If the proposed rules are to be consistent, the same rational for having lower rental and operating fees for AERU than those for oil and gas projects should apply with respect to costs associated with NEPA compliance. At a minimum, the same standards should apply to all projects on the OCS.

§ 285.204 – In addition to excluding any area within the exterior boundaries of any unit of the National Park Service, National Wildlife Refuge System, National Marine Sanctuary System or any National Monument, any areas that meet the definition of a Marine Protected Area (MPA) contained in Executive Order 13158 (65 Fed. Reg. 34909

(May 26, 200)("any area of the marine environment that has been reserved by Federal, State, territorial, tribal or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein")) should also be excluded.

§ 285.211(b)(2) – The text should read "We will evaluate the potential effect of leasing on the human *and* marine environments, and develop measures to mitigate adverse impacts, including lease stipulations."

§ 285.211(c) – In addition to publishing the notice of proposed sales in the Federal Register and sending it to the governor of any affected State, notice should also be sent to the affected Fishery Management Council as established under the Magnuson-Stevens Act.

§§ 285.200 and 285.302 – The provision for project easements and Rights of Way (ROW) and Rights-of-Use and Easement (RUE) grants should take into account minimizing the footprint of cables, pipelines, and other structures necessary for the generation and distribution of energy from AERU projects. The rules should allow for and where appropriate require the creation of transmission corridors that would allow multiple projects to use the same easements or ROW/RUE grants, thereby minimizing environmental impacts.

§§ 285.212 and 285.230 – Lease applicants should be allowed to designate proprietary data and information as confidential business information (CBI) and such information should not be made publicly available unless an interested party can establish why the information is not proprietary or its designation as CBI is otherwise inappropriate. It is important to discourage "free-riders" and give confidence to applicants who invest resources to gather site specific data that others will not be able to ride on their coattails and eventually underbid them for certain lease sites.

§ 285.235 – Lease terms are appropriate if MMS rigorously monitors developments under the lease to ensure that lessees are not just hoarding sites but actively working to develop them. In the event that lessees are not actively working to develop sites, MMS must exercise its powers to rescind leases and restart the bid process.

§ 285.416 - Requests for lease or grant suspensions should be granted only for good cause, particularly if the request is due to the failure to meet timelines for the submission of a SAP, GAP or COP.

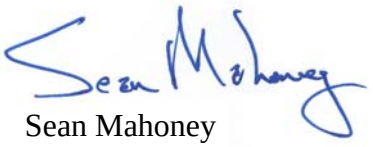
§§ 285.503 – 285.505 – CLF strongly agrees with the basis for charging lower rental and operating fees as set forth by the proposed rules at Fed. Reg. 39408-09 and 39411.

§ § 285.612(d), 285.628(d) and 285.647(d) – The proposed rules state that "As appropriate" will coordinate and consult with relevant Federal, State and local authorities when processing a SAP, GAP or COP. While the rules are clear that individual SAP, GAP and COP will be subject to a review under NEPA with MMS as the lead agency

they need to be clarified with respect to review and permitting under other applicable statutes, including but not limited to the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, the Clean Water Act, 33 U.S.C. §§ 1321 *et seq.*, and the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801 *et seq.* Under those particular statutes, MMS is not the lead agency. Depending on the statute at issue, that role is required to be fulfilled by the US Fish and Wildlife Service, the National Marine Fisheries Service, the National Oceanic and Atmospheric Agency or the Environmental Protection Agency. CLF notes that at a public presentation on the proposed rules, MMS stated that "other consultation documents (e.g., [Endangered Species Act]) are prepared by MMS." As CLF commented at the time, MMS is not authorized nor does it have the expertise to prepare the type of documents that may be required under the Endangered Species Act. Similarly, the expertise of those other agencies is necessary to comply with the requirements of NEPA.

The Conservation Law Foundation appreciates the opportunity to provide these comments and looks forward to further participation in the efforts to responsibly harvest the renewable resources found on the Outer Continental Shelf.

Very truly yours,



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