American Wind Energy Association (AWEA)
Comments to the Minerals Management Service
Proposed Rule
Alternative Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf
Regulation Identifier Number (RIN) 1010–AD30
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Introduction

The American Wind Energy Association (AWEA) appreciates this opportunity to comment on the Minerals Management Service's (MMS's) Proposed Rule for Alternative Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf (the Proposed Rule). 73 Fed. Reg. 39,376 (July 9, 2008). AWEA, the national trade organization of the U.S. wind energy industry, is an association of individuals and corporations interested in bringing clean, renewable wind energy projects online as quickly and efficiently as possible, including projects produced by the emerging offshore wind energy sector.

These comments set out the views of AWEA's Offshore Wind Working Group, which comprises more than 160 individuals (representing more than 100 companies and organizations) pursuing development of offshore wind energy resources. Companies that worked actively on these comments include: Bluewater Wind, Cape Wind Associates, Fishermen's Energy, FPL Energy, Georgia Tech, Southern Company, Tetra Tech EC, and Winergy Power. AWEA members may submit their own additional comments endorsing this submission and discussing issues not covered by these comments.

AWEA's comments on the Proposed Rule begin with an overview of key concerns and recommendations. The overview sets out AWEA's view that successful development of offshore wind resources will require MMS to:

- Minimize administrative delay, both by promulgating its Final Rule promptly and by ensuring that the Final Rule establishes workable timelines for wind park leasing and plan approval;
- Incorporate within the Final Rule effective safeguards against misuse of the leasing and plan approval processes by opponents of offshore wind projects and speculators; and
- Ensure that revenue collection provisions of the Final Rule – including, most notably, provisions pertaining to operating fees, minimum payments and determinations of competitive interest – do not operate to deter development of publicly beneficial alternative energy projects.

The overview section of these comments is followed by a more detailed, subpart-by-subpart review of the Proposed Rule. For each subpart, we provide a summary of AWEA's views, a section-by-section analysis of the proposed regulatory language, and, where relevant, answers to the subpart-specific questions that MMS set out in the July 9, 2008, Federal Register notice. Many of AWEA's comments address ways in which the Proposed Rule should be changed to accomplish the objectives identified in this overview. Other comments address more technical concerns, many of which are critical to the proper operation of the Final Rule.

I. Overview of AWEA's Comments

MMS's publication of the Proposed Rule marks an important step in the United States' effort to establish a workable legal framework for wind parks and other alternative energy facilities on the Outer Continental Shelf (OCS). AWEA appreciates the challenges that MMS has faced in devising its proposed regulatory framework and applauds a number of features of the Proposed Rule. The Proposed Rule includes many constructive features, such as the priority given to commercial project development over limited leases for resource assessment and technology testing (73 Fed. Reg. at 39,395(c.3)) and the opportunity for commercial alternative energy project developers to initiate non-competitive leasing of sites where only one qualified firm is interested in a specific tract. (proposed §§ 285.230-.231).[1] These comments, however, focus primarily on ways in which MMS could modify the Proposed Rule to eliminate or lower administrative barriers to the development of offshore wind power.

In AWEA's view, it is imperative that MMS act decisively to minimize further administrative delay. First and foremost, MMS should issue its Final Rule promptly, before the end of the current Administration. In addition, MMS should ensure that its Final Rule incorporates effective measures, not present in the Proposed Rule but consistent with the general framework established there, to reduce administrative delay in the leasing and plan approval processes.

Without diminishing the priority that we place on prompt publication of the Final Rule, AWEA also recommends a series of modifications to the Proposed Rule designed to eliminate unnecessary steps in the development of alternative power resources. Most notably, AWEA recommends that MMS revise portions of its Proposed Rule that create unnecessary obstacles to the development of alternative power resources. AWEA proposes specific revisions to the Proposed Rule designed to guard against strategic and speculative misuse of the leasing program and to avoid the creation of unnecessary financial obstacles to publicly-beneficial renewable energy projects. AWEA submits that its comments on the MMS Proposed Rule, whether taken together or evaluated individually, are a logical outgrowth of the concepts included in the MMS Proposed Rule and no further administrative notice and comment proceedings would be required in order for MMS to implement the recommendations set forth by AWEA in its comments.[2]

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[1] AWEA also appreciates MMS's continued progress toward interim leases that should allow some resource assessment and technology testing to occur before the first round of leasing under the Final Rule. *See* 72 Fed. Reg. 62,673 (Nov. 2007) (notice of Interim Policy proposal and request for nominations); 73 Fed. Reg. 21,152 (April 18, 2008) (announcement of nominations and priorities); 73 Fed. Reg. 21,363 (April 21, 2008) (proposed lease for data collection and technology testing under the Interim Policy). Case-by-case leasing under MMS's Interim Policy may allow offshore wind developers to cut critical months from the time needed to conduct essential site assessment activities, provided that the Interim Policy and Final Rule are administered with an eye toward this objective.

[2] See *City of Stoughton v. EPA*, 858 F.2d 747, 753 (D.C. Cir. 1988) ("[A]n Agency may promulgate a Final Rule that differs from its Proposed Rule without allowing further comment if the relevant changes are a 'logical outgrowth' of the Proposed Rule and the notice and comments upon it. *NRDC v. Thomas*, 838 F.2d 1224, 1242 (D.C.Cir. 1988); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C.Cir. 1983). The statutory requirement of notice and the opportunity for comment on a Proposed Rule 'does not automatically generate a new opportunity for comment' every time the Agency reacts to the comments. *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C.Cir. 1973). As we have long recognized, '[a] contrary rule would lead to the absurdity that ... the agency can learn from the comment on its proposals only at the peril of starting a new

MMS must act to minimize further administrative delay in the development of offshore wind and other alternative energy resources on the OCS

Offshore wind farms provide a rapidly growing source of emissions-free electrical power to European consumers.[3] The United States' offshore wind resources, as analyzed in recent reports by MMS and the U.S. Department of Energy (DOE), can provide an even greater amount of electricity than that which is generated by offshore wind farms in Europe and can become an important source of clean, stable-priced renewable electrical power in this country.[4] Congress has recognized the need for prompt action to expedite the development of alternative energy production on the OCS. Specifically, section 388 of the Energy Policy Act of 2005 (EPAct 2005) set May 6, 2006 as the deadline for promulgation of final regulations for MMS's Alternate Energy and Alternate Use (AEAU) program. Today, more than two years after the statutory deadline, firms who are prepared to develop this country's offshore wind resources still cannot even apply for MMS authorization to begin the process of planning, constructing and operating a wind park on the OCS.

The most important step that MMS can take to minimize further delay is promulgation of a workable Final Rule before the end of this Administration. Postponement threatens the viability of a number of planned first-generation offshore wind projects, whose sponsors and supporters have relied upon MMS to finish, at least by the end of this year, the rulemaking directed in EPAct 2005. In reliance on MMS's promulgation of the Final Rule, project sponsors have expended millions of dollars and have signed contracts to deliver power to customers. In addition, a number of States with limited access to land-based renewable energy resources have sought to exercise leadership in combating climate change by establishing ambitious renewable energy requirements and timelines. States that fit this profile, including Delaware, Maryland, Massachusetts, New Jersey, New York, and Rhode Island, will face unnecessary hardship if MMS fails to clear the way for timely construction and operation of offshore wind parks.

In addition to publishing its Final Rule promptly, MMS can reduce administrative delay by revising the leasing and plan approval provisions set out in its July 9 proposal. In particular, MMS should:

- *Establish meaningful deadlines for MMS actions*. A number of required administrative actions, including reviewing requests for non-competitive leases to determine whether

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procedural round of commentary.' *Id.* at 632 n. 51. If it were not possible for an agency to reexamine and even modify the Proposed Rule, there would be little point in the comment procedures.").

[3] *See, e.g.*, U.S. Department of Energy, *20% Wind Energy by 2030 Increasing Wind Energy's Contribution to U.S. Electricity Supply* 48 (May 2008) ("*DOE Report*") (available at http://www1.eere.energy.gov/windandhydro/pdfs/41869.pdf) ("Twenty-six offshore wind projects with an installed capacity of roughly 1,143 MW now operate in Europe.").

[4] A 2006 MMS study estimated that the country could have up to 70 GW of offshore generating capacity by 2030. MMS, *Technology White Paper on Wind Energy Potential on the U.S. OCS* 8 (May 2006) (available at http://ocsenergy.anl.gov). The May 2008 DOE Report projects that the U.S. could have 54 GW of installed offshore capacity by 2030, enough to meet about 3 percent of total projected U.S. electrical demand. *DOE Report* at 10 (describing "20% wind power scenario" under which the U.S. would add 54 GW of offshore wind generating capacity by 2030).

competitive interest exists, deciding whether to accept or reject high bids at lease auctions, and reviewing proposed Site Assessment Plans (SAPs) and Construction and Operation Plans (COPs), should be subject to firm regulatory deadlines. Meaningful deadlines for routine administrative action will reduce scheduling uncertainty for wind power developers and for public officials, working at the regional, state and local levels, who are responsible for ensuring that adequate generating capacity is developed to meet future demand.

- *Revise the SAP and COP provisions to streamline the environmental review process*. Under MMS's Proposed Rule and the accompanying statements of anticipated policies, developers of the first commercial wind parks on competitively awarded leases will not obtain authorization to start construction until MMS (and its NEPA contractors) have completed *three* EISs.[5] Under this scenario, NEPA review alone could be expected to account for four or more years in the timeline for development of offshore alternative energy projects. Delay of this magnitude would severely disadvantage offshore wind projects in competitions with conventional power projects for support from investors and frustrate the will of public officials responsible for planning to meet future demand and legal requirements for renewable energy. AWEA has proposed a number of changes to the environmental review provisions of the Proposed Rule to reduce this delay while fully complying with NEPA.

<u>MMS should revise the Proposed Rule to reduce opportunities for misuse</u>

Offshore wind power development under the framework outlined in the Proposed Rule would be vulnerable to disruption by project opponents, speculators and unqualified bidders. The Proposed Rule lacks adequate protections against strategically motivated participation in the leasing process by parties who do not intend to develop alternative energy resources but instead seek to block or delay others from pursuing such development or to turn a quick speculative profit. The Proposed Rule also lacks effective safeguards against leasing by parties that purport to be able to develop alternative energy resources, but lack the financial and technical resources to achieve their objectives.

AWEA's subpart-by-subpart comments in Sections II.A to II.J detail a series of suggested revisions to the Proposed Rule designed to combat these potential misuses. Key recommendations include:

- *Strengthening bidder qualifications standards* (subpart A, §§ 285.106-.107) to exclude bidders that have no real intention of developing alternative energy resources or that lack the financial or technical wherewithal to do so.
- *Shifting the payment balance away from operating fees* (subpart E, §§ 285.505) in competitive auctions. Under the Proposed Rule, operating fee payments would be deferred until approval of the lessee's COP -- a milestone that a delay-minded lessee could likely put off for five years or more. Rental and cash bonus payments, in contrast, would be paid from the outset of the lease period. As a result of this difference in timing, auctions structured to emphasize operating fee payments, as opposed to rental and cash bonus payments, would

[5] 73 Fed. Reg. at 39,419(c.2) (projecting that "initially, all commercial development projects will require an EIS for each phase of the project").

encourage sham bidders, speculators, and unqualified firms. Misuse of the auctioning process would be fostered by the ability to control a valuable, competitively auctioned right for extended periods of time based largely on a contingent, fully revocable promise to make operating fee payments at some time in the future. Accordingly, AWEA recommends that MMS reduce the maximum operating fee to 1% and rely more heavily on rental and cash bonus payments to collect federal revenues.

- *Increasing cash deposits in competitive auctions* (proposed § 285.501(a)) to discourage sham and speculative bidding. MMS has proposed requiring winning bidders in sealed-bid, cash bonus auctions to post a deposit equal to 20% of their winning bids. The deposit preserves the winning bidder's place until the bid is accepted by MMS, at which point the remainder becomes due. The decision to accept or reject the high bid is expected to be reached within 90 days (proposed § 285.222(a)(2)), although MMS envisions extending that period "if necessary" (*id.*). To some sham bidders and speculators, even a 90-day period of control over a valuable, competitively assigned lease may be worth forfeiture of a 20% deposit -- particularly if the cash bonus bid is relatively modest. AWEA recommends increasing the deposit. In competitive auctions for leases burdened with a 1% operating fee structured to collect the vast majority of federal revenues as cash bonus bids, as recommended above, AWEA recommends 40% of the cash bonus bid as a sound starting point for the cash deposit in a competitive auction
- *Requiring meaningful commitments from parties that express interest in sites proposed for non-competitive leasing* (subpart B, §§ 285.230-.231) in order to deter sham expressions of interest. Opponents of offshore renewable energy projects can be expected to pursue multiple strategies to block or delay development. In addition to filing sham bids, they may submit sham expressions of competitive interest to trigger time-consuming competitive bidding procedures. AWEA suggests revisions to the unsolicited request provisions (proposed §§ 285.230-.231) designed to guard against this potential abuse.

<u>MMS should revise its approach to the collection of federal revenues from alternative energy leasing in order to avoid discouraging publicly beneficial projects</u>

In addition to not establishing financial obstacles to misuse of the auction process, the Proposed Rule's revenue provisions come up short in two other broad respects. First, MMS's commitment to minimum charges is misguided. The Proposed Rule contemplates imposing significant minimum charges for both competitive and non-competitive commercial leases.[6] These minimum charges are not grounded in the fair return or competitive bidding provisions of section 388 of the Energy Policy Act of 2005. In fact, minimum charges would operate to *prevent* leasing at fair market rates, determined in competitive bidding, if the high bid fell short of the minimum that MMS had determined. The contemplated minimum charges would prevent non-competitive leasing to a single interested developer, and the public benefits that renewable energy development could produce, wherever the MMS-determined minimum exceeded the interested developer's ability to pay.

[6] *See* 73 Fed. Reg. at 39,412(c.1) (illustrative calculation of yielding minimum annual operating payment of $333,000 (first two years) then $666,000 (operating period) for a 200 megawatt offshore wind park).

The preamble to the Proposed Rule asserts that the contemplated minimum charges, consisting principally of operating fee charges in the amount of 1% of imputed gross revenues for two years and 2% of imputed gross revenues thereafter, will not discourage otherwise viable alternative energy projects. (73 Fed. Reg. at 39,407-08). However, MMS bases this assertion on flawed comparisons to operating fees paid by land-based wind parks, which have lower costs and risks, and by offshore wind parks in the United Kingdom, which enjoy significant financial advantages under British law.[7] Furthermore, because of the high price of electricity in the Northeast where offshore wind projects are currently planned, the value of the renewable energy Production Tax Credit (PTC) is significantly eroded by the operating fees contemplated under the Proposed Rule, and these fees represent a higher percentage than the percentages estimated by Industrial Economics in 2007, as referenced in the preamble.

A second set of shortcomings in MMS's proposed approach to revenue collection concerns the manner in which operating fees would be computed. Under MMS's preferred approach to determining operating fees, as set out in proposed § 285.505(c)(1):

- *Operating fees would become due before power revenues began to accrue*, creating significant financial hardship for project developers. AWEA suggests that the Proposed Rule be revised to delay the collection of annual operating fees until the power sales begin.
- *Imputed gross revenues would be estimated using statewide average retail power prices.* Under MMS's formula for computing operating fees (proposed § 285.505), a wind park's operating fee liability would be pegged to statewide average retail prices in the state where power is fed into the grid, rather than to the wholesale prices lessees will actually obtain for the power. This disconnect between imputed prices and revenues (used to compute operating fee liability under the Proposed Rule) and actual prices and revenues (realized by the lessee from power sales) raises significant hurdles for project financing. AWEA suggests a number of changes to proposed § 285.505 designed to eliminate this problem.

<u>MMS should revise the financial assurance provisions of the Proposed Rule to allow the development of more cost-effective safeguards against defaults on decommissioning obligations</u>

MMS and the offshore wind industry have a common interest in the establishment of financial assurance requirements for the AEAU program that will protect the public against lessee or operator defaults without imposing unnecessary costs that would impede the development of offshore wind power. The most significant financial assurance issues pertain to safeguards against defaults on decommissioning obligations. Because projected wind farm decommissioning costs vastly exceed the other regulatory liabilities for which MMS proposes to require financial assurance coverage, AWEA's financial assurance comments focus on cost-effective financial assurance for decommissioning obligations.

To improve the cost-effectiveness of the financial assurance rules in proposed subpart E, MMS should first separate financial assurance coverage for decommissioning obligations from

[7] In addition to the Renewables Obligation, a renewable energy target and credit trading program, and the Climate Change Levy, both of which favor renewable electricity generation in the U.K., £118 million was allocated for capital grants to help start the offshore wind industry's first round of projects.

coverage for other regulatory liabilities. Wind farm decommissioning costs and default risks cannot yet be fully analyzed. (There are, for example, significant unresolved questions as to the decommissioning standards that will apply, such as depth of foundation removal below mudline or whether it will be an option to leave part of the foundation above mudline as reef.) AWEA believes, however, that further analysis will show these costs and risks to be reasonably bounded and insurable. Rules providing for separate financial assurance coverage of decommissioning obligations should rationalize financial assurance costs without weakening the public's protection against default. Additional revisions to the proposed financial assurance provisions, designed to clarify that MMS retains the flexibility to approve a wide range of effective coverage mechanisms – including, for example, combinations of decommissioning trusts, parent company guarantees, liabilities, such as gradually funded trust accounts (designed to accrue resources needed for decommissioning before decommissioning occurs), combined with insurance coverage against low probability risks of earlier than expected decommissioning.

MMS should consider separating the Alternative Energy portion of the rule from the Alternate Use portion

The Alternative Energy portion of the Proposed Rule is complex, and the inclusion of the Alternate Use segment complicates it further. AWEA is concerned that combining both in the Final Rule will create significant delay.

II: Subpart-by-Subpart Comments

SUBPART A - GENERAL PROVISIONS: 73 Fed. Reg. 39,389-92 (section-by-section analysis) & 73 Fed. Reg. 39,460-66 (proposed text §§ 285.100-.118)

A.1: General Observations

Subpart A of the Proposed Rule sets out the general purpose, procedures, and party obligations under the rule. While AWEA agrees with the general themes outlined here, AWEA recommends that MMS further clarify and strengthen the rule's statement of purpose, the qualification and due diligence standards for lease holders and the confidentiality protections. Domestically generated renewable energy is an important part of America's energy solution and AWEA recommends that MMS revise its proposed statement of regulatory purpose to affirm the importance of encouraging timely development of alternative energy sources. In addition, the lease and grant holder qualification and due diligence requirements should be strengthened to assist MMS in its efforts to "avoid situations where leases are acquired for strategic or purely speculative purposes." 73 Fed. Reg. at 33,394(c.3). Finally, given the limits on MMS's ability to protect against the release of competitively sensitive information, and the importance of confidentiality to an emerging industry, MMS should carefully limit its information requests.

A.2: Section-by-Section Discussions and Recommendations

Existing Text: § 285.101 What is the purpose of this part?

> (a) Establish procedures for issuance and administration of leases, right-of-way (ROW) grants, and right-of-use and easement (RUE) grants for alternative energy production on the Outer Continental Shelf (OCS) and RUEs for the alternate use of OCS facilities for energy or marine-related purposes;
>
> (b) Inform you and third parties of your obligations when you undertake activities authorized in this part; and
>
> (c) Ensure that alternative energy activities on the OCS and activities involving the alternate use of OCS facilities for energy or marine-related purposes are conducted in a safe and environmentally sound manner, in conformance with the requirements of subsection 8(p) of the OCS Lands Act, other applicable laws and regulations, and the terms of your lease, ROW grant, RUE grant, or Alternate Use RUE grant.
>
> (d) This part is not intended to convey access rights for oil, gas, or other minerals.

Discussion: Proposed section 285.101 refers to alternative energy development on the OCS in neutral terms. The asserted purpose of Part 285 is to "[e]stablish procedures" and guard against the hazards and environmental damage. This is inconsistent with the preamble's recognition that alternative energy development can make an important contribution to the nation's energy security and economic well-being. *See* 73 Fed. Reg. at 39,376(c.3) ("Increasing the Nation's supply of renewable energy produced from domestic sources will be a key part of any strategy to meet this goal" of "narrow[ing] the gap between the amount of energy used and the amount domestically produced. … . "[T]he Energy Policy Act of 2005 (EPAct) encourages the development of renewable energy resources as part of an overall strategy to develop a diverse portfolio of domestic energy supplies for the future.").

It is also inconsistent with generally held views, that substituting power from offshore alternative energy sources – primarily offshore wind at the current state of technology – for power generated using the current mix of technologies can yield significant environmental benefits, as documented in Delaware PSC offshore wind docket 06-241, 2006-2008. Indeed, the research shows that two of the leading statutory objectives, protection of the environment and prevention of waste (OCSLA § 8(p)(4)(B)-(C), 43 U.S.C. § 1337(p)(4)(B)-(C)), strongly support a strong, affirmative stance toward the development of renewables on MMS's part. Proposed § 285.101 should be revised to articulate this purpose.

AWEA recommendation: Proposed 285.101 should be modified to read as follows:

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(d) Promote timely development of commercially viable alternative energy projects on the OCS.

(e) This part is not intended to convey access rights for oil, gas, or other minerals.

Existing Text of §§ 285.106-.107 (considered together):

§ 285.106 Who can hold a lease or grant under this part?

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(b) You may not become a lessee, ROW grant holder, RUE grant holder, Alternate Use RUE grant holder or acquire an interest in a lease or grant under this part if:

(1) You or your principals are excluded or disqualified from participating in transactions covered by the Federal non-procurement debarment and suspension system (2 CFR part 1400), unless MMS explicitly has approved an exception for this transaction;

(2) The MMS determines or has previously determined after notice and opportunity for a hearing that you or your principals have failed to meet or exercise due diligence under any OCS lease or grant;

(3) The MMS determines or has previously determined after notice and opportunity for a hearing that you:

(i) Remained in violation of the terms and conditions of any lease or grant issued under the OCS Lands Act for a period extending longer than 30 calendar days (or such other period MMS allowed for compliance) after MMS directed you to comply; and

(ii) You took no action to correct the noncompliance within that time period; or

(4) After notice and hearing, MMS finds that you are not meeting the diligence requirements on any other OCS lease issued under this subchapter.

§ 285.107 How do I show that I am qualified to be a lessee or grant holder?

(a) An individual must submit a written statement of citizenship status attesting to U.S. citizenship. It need not be notarized nor give the age of individual. A resident alien may submit a photocopy of the Immigration and Naturalization Service form evidencing legal status of the resident alien.

(b) A corporation or association must submit evidence, as specified in the table in paragraph (c) of this section, acceptable to MMS that:

(1) It is qualified to hold leases or grants under this part,

(2) It is authorized to conduct business under the laws of its State;

(3) It is authorized to hold leases or grants on the OCS under the operating rules of its business; and

(4) The persons holding the titles listed are authorized to bind the corporation or association when conducting business with us.

(c) Acceptable evidence under paragraph (b) of this section includes, but is not limited to: [*table, not reproduced here, setting forth documentation required to establish compliance with corporate formalities for different types of organizations*]

Discussion: As noted in our introduction to these comments, AWEA believes that the Proposed Rule lacks adequate safeguards against (1) strategic leasing by parties seeking only to block or delay the development of offshore wind resources; (2) leasing by speculators seeking to profit from possible increases in the value of offshore wind resources; and (3) leasing by unqualified firms that purport to be able to develop offshore wind parks but lack the necessary financial resources and technical expertise. Failure to provide such safeguards will frustrate the purposes of the AEAU program by delaying bona fide development efforts and increasing the costs of such efforts.

In its narrative overview of subpart B, MMS recites its determination to "avoid situations where leases are acquired for strategic or purely speculative purposes." 73 Fed. Reg. 33,394(c.3). However, the disincentives to strategic and speculative auction participation upon which MMS relies, the provisions of proposed subparts E and F that would "require lessees to make payments and meet lease development requirements" (*id.*), appear to be inadequate to the task. Initial payments under subpart E may be quite small, particularly if a lease is awarded noncompetitively or competitively on the basis of operating fee bids rather than cash bonus bids. The "lease development requirements" contained in subpart F also appear to provide inadequate checks on "strategic or purely speculative" participation in the leasing program. Under proposed subpart F, a commercial leaseholder with an approved COP would be required only to begin construction by the date given in its approved construction schedule (unless MMS granted a deviation). *See* Proposed § 285.631. Activities under an approved SAP would not be subject to a comparable milestone requirement. As a result, a leaseholder acting from strategic or speculative motives would apparently be able to hold a commercial lease for the entire five-year term of a SAP (longer if an extension were obtained) without taking any appreciable action at the lease site.

MMS can supply part of the needed protection of the leasing process by revising proposed §§ 285.106-.107 to establish meaningful qualifications standards and clarify due diligence requirements.

Strengthening the qualifications standards. In AWEA's view, meaningful qualifications standards for prospective lessees represent the most effective safeguard against these forms of potential misuse of the leasing process. Due diligence requirements that apply once a lease has been awarded (discussed below) can also help, but disqualifications of unqualified lessees for failure to meet due diligence requirements are likely to occur only after a potentially valuable OCS site has been tied up

for years. In setting the regulatory framework for land-based wind energy leasing on lands within its jurisdiction, the Bureau of Land Management (BLM) has sought to discourage speculation by requiring lease applicants to submit a statement of "financial and technical capability to construct, operate, maintain, and terminate the project." 43 C.F.R. § 2802.12(a)(5); *see id.* § 2804.26(a)(5) (BLM authority to deny a lease application for failure to "demonstrate the technical or financial capability to construct the project or operate facilities").[8] Therefore MMS should do likewise for offshore renewable energy technologies.

MMS evidently has found that minimal qualifications standards are adequate for purposes of its programs relating to OCS leases for oil, gas and mineral development. *See* 30 C.F.R. § 256.35 (setting forth minimal qualifications for oil and gas lessees). There are, however, important differences between these existing leasing programs and the alternative energy program at issue here. First, electrical power, unlike oil, is sold in distinct local markets. Under current conditions, the generation of electricity from alternative energy resources on the OCS is only commercially practical in close proximity to electrical grids that need additional power. Moreover, wind and water conditions impose additional geographic constraints. (Commercial development of an offshore wind park, for example, requires steady winds above relatively shallow waters as well as access to a grid in need of additional power and the ability to transmit it.) These geographic constraints on alternative energy development allow project opponents and speculators to target key alternative energy sites more easily than they could oil and gas or mineral sites.

A second important difference between alternative energy leasing and MMS's existing leasing programs – particularly the oil and gas leasing program that accounts for most existing OCS leasing activity – concerns project finances. The current economics of alternative energy production cannot support the high cash bonus bids that MMS collects in auctions of oil and gas leases and at the same time deter obstructionists, speculators and would be resource developers lacking adequate financial and technical resources. AWEA believes that where MMS holds AEAU auctions to allocate tracts in which there is competitive interest, specified operating fees should ordinarily be capped at 1% in order to avoid creation of a back-loaded, highly contingent package of payment obligations that would encourage bidding by obstructionists, speculators and firms that cannot marshal the financial and technical resources required to develop a project.

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[8] In 2006, BLM published a guidance memorandum elaborating on the financial and technical qualifications required to lease land-based wind sites. BLM stated that

> [T]echnical capability can be demonstrated by international or domestic experience with wind energy projects or other types of electric energy related projects on either Federal or non-Federal lands. The applicant should provide information on the availability of sufficient capitalization to carry out development, including the preliminary study phase of the project, as well as the site testing and monitoring activities. Actual development or ownership of similar sized wind energy facilities or other types of electric energy related facilities within the last five years by the applicant would generally constitute evidence of financial capability.

U.S. Bureau of Land Management, *Wind Energy Development Policy*, Instruction Mem. No. 2006-216 (Aug. 24, 2006) (*available at* http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2006/2006-216__.html).

(See the discussion of proposed § 285.505 in part E.2 below.) In a competitive situation, the additional value beyond fixed operating fees and rental payments will be reflected in higher up-front bids. At the same time, although lowering operating fee charges for auctioned tracts would help to deter misuse of the bidding process, it would not provide a complete solution. Meaningful qualifications standards for bidders in alternative energy lease auctions are also needed.

Qualifications standards need not be identical for all forms of alternative energy development. Firms seeking commercial leases to produce power from ocean currents or waves cannot yet be expected to document extensive experience with these newly emerging technologies. Moreover, firms in these industries may need to collect resource data and test new equipment under a lease in order to establish their access to the capital required for full development. To encourage the development of new technologies, it may be appropriate for MMS to apply different technical and financial qualifications standards in these areas.

Clarifying due diligence standards for lease holders. Due diligence standards for lessees can provide a backstop to strengthened qualifications standards. The best way to reduce the programmatic costs of awarding alternative energy leases to sham bidders, speculators and bidders that lack needed financial resources and technical expertise is to set qualifications standards that prevent them from participating. Where this first line of defense fails, due diligence requirements can allow MMS to reclaim promising renewable energy sites from lessees that have not moved to develop them. For this reason, AWEA strongly supports due diligence requirements that help to deter sham and speculative bidding.[9]

MMS has indicated that it intends to rely on a requirement of due diligence, linked to payment and planning obligations established under subparts E and F, to discourage and correct for strategic and speculative bidding for alternative energy leases.[10] AWEA supports this undertaking and suggests a minor clarification to proposed § 285.106 to improve it. Proposed § 285.106(b) should be revised to eliminate subsection (b)(4), which appears to be subsumed within subsection (b)(2) and to serve only as a source of potential confusion.

AWEA Recommendation: To strengthen § 285.106 as a check against misuse of the leasing process, and eliminate the confusion created by the overlap between proposed §§ 285.106(b)(2) and (b)(4), MMS should revise §§ 285.106(b)(2)-(4) to read as follows:

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[9] *See* 73 Fed. Reg. at 39,378(c.2) (reporting that comments received in response to the Advance Notice of Proposed Rulemaking "were consistent about MMS requiring due diligence from any developer").

[10] In the preamble to subpart B of the Proposed Rule, MMS states that

> We want to encourage competition for OCS leases from entities that will diligently develop alternative energy resources and avoid situations where leases are acquired for strategic or purely speculative purposes. Diligence requirements under subparts E and F of this part would require lessees to make payments and meet lease development requirements that ensure efficient and expeditious activities on the lease.

73 Fed. Reg. at 39,393(c.3); *see also id.* at 39,405(c.2) ("MMS is purposely proposing to retain discretion relating to lease terms and renewals as a tool to promote diligence").

(b) You may not become a lessee, ROW grant holder, RUE grant holder, Alternate Use RUE grant holder or acquire an interest in a lease or grant under this part if:

* * *

(2) The MMS determines or has previously determined after notice and opportunity for a hearing that you or your principals have failed to meet or exercise due diligence under any OCS lease or grant;

(3) The MMS determines or has previously determined after notice and opportunity for a hearing that you:

(i) Remained in violation of the terms and conditions of any lease or grant issued under the OCS Lands Act for a period extending longer than 30 calendar days (or such other period MMS allowed for compliance) after MMS directed you to comply; and

(ii) You took no action to correct the noncompliance within that time period; or

(4) You fail to submit an adequate statement of financial and technical capability to construct, operate, maintain, and terminate the project.

To bring § 285.107 into conformity with the heightened qualifications standard set out in revised § 285.106, MMS should add the following subsections to proposed § 285.107, which are patterned on BLM's rules and guidance governing qualifications to hold a land-based wind energy lease:

(d) An individual, corporation or organization must submit a written statement demonstrating financial and technical capability and intention to construct, operate, maintain, and terminate the project.

(e) Support for an acceptable statement under paragraph (d) of this section can include, but is not limited to

(1) documented descriptions of international or domestic experience with wind energy projects or other types of electric energy related projects; and

(2) information establishing access to sufficient capital to carry out development (which may include information on the development or ownership of comparably sized wind energy facilities or other types of electric energy related facilities within the last five years).

(f) MMS may require you to submit additional information at any time considering your bid or request for a non-competitive lease.

Existing Text: § 285.113 How will data and information obtained by MMS under this part be disclosed to the public?

(a) The MMS will make data and information available in accordance with the requirements and subject to the limitations of the Freedom of Information Act (5 U.S.C. 552), the regulations contained in 43 CFR part 2 (Records and Testimony), and the requirements of the Act.

(b) If MMS determines that any data or information is exempt from disclosure under the Freedom of Information Act (5 U.S.C.552(b)(4)), MMS will not disclose the data and

Discussion: AWEA believes the protections outlined in proposed § 285.113 are insufficient to shield highly sensitive commercial data such as business and trade secrets. Any data that MMS obtains under § 285 will be subject to release under the Freedom of Information Act (FOIA), notwithstanding the objections of the party that provided the information, if a court determines that the data does not fall within one of the exemptions to disclosure under that Act. *See, e.g.,* 30 C.F.R. 252.6 (MMS Director "shall make data and information available in accordance with the requirements and subject to the limitations of [FOIA]" and specified regulations). For this reason, MMS should carefully limit its requests for commercially sensitive information. For example, MMS should avoid collecting competitively sensitive disaggregated or raw wind resource data, if less sensitive aggregated or summary data will meet its needs.

AWEA Recommendation: MMS should clarify that it will scrutinize proposed information requests with an eye toward minimizing the collection of commercially sensitive information, including business and trade secrets.

Existing Text: § 285.116 Requests for information on the state of the offshore alternative energy industry.

> (a) The Director may, from time to time and at his discretion, solicit information from industry and other relevant stakeholders (including State and local agencies) as necessary to evaluate the state of the offshore alternative energy industry, including the identification of potential challenges or obstacles to its continued development. Such requests for information could relate to the identification of environmental, technical or economic matters that promote or detract from continued development of alternative energy technologies on the OCS. You must respond to such at request in a timely manner, as established in the request. * * *

Discussion: This provision evidently seeks to describe MMS's authority to request information on a voluntary basis. There are repeated references to MMS's ability to "request" or "solicit" information under this provision. However, there is also a statement that entities addressed in these requests or solicitations "must respond to such a[ ] request in a timely manner." It seems highly unlikely that MMS intends to assert blanket authority to *compel* timely responses to information demands imposed on "industry and other relevant stakeholders (including State and local agencies)." Indeed, as applied to the States, such an assertion of federal authority to impose such a unilateral demand for information would raise significant constitutional concerns under the Tenth Amendment. Accordingly, AWEA recommends that the language suggesting authority to compel responses to general requests for information on the state of the offshore energy industry be dropped.

AWEA Recommendation: Delete the sentence "You must respond to such a[ ] request in a timely manner, as established in the request."

A.3: Responses to MMS Questions Relating to Subpart A

1. Is this subpart informative?

Subpart A is informative and provides necessary information.

2. Is it easy to locate needed information?
The information included in this subpart is easy to locate.

3. Is it easy to read and follow?
Subpart A is easy to read and understand.

4. Does it include the appropriate topics?
Subpart A generally covers the appropriate topics. However, as set out in the section-by-section discussions and recommendations above, AWEA believes that MMS should

- revise the statement of purposes in proposed § 285.101 to convey stronger support for the development of renewable energy resources on the OCS;
- protect the leasing process from potential misuse by revising proposed §§ 285.106-.107 to establish meaningful qualifications standards and clarify due diligence requirements; and
- clarify that it will carefully limit information requests in light of the limits on its ability to protect against the release of competitively sensitive information (proposed § 285.113).

SUBPART B - ISSUANCE OF OCS ALTERNATIVE ENERGY LEASES: 73 Fed. Reg. 39,394-403 (section-by-section analysis) & 73 Fed Reg. 39,466-70 (proposed text, §§ 285.200-.238)

B.1: General Observations

Priority for commercial leases (proposed § 285.201).
In its section-by-section discussion, MMS appropriately proposes to give applications for commercial leases priority over applications for limited leases for resource assessment and technology testing. MMS notes, in particular, that it contemplates allowing commercial leasing of an area to proceed noncompetitively even where "interest in limited leasing in the same area is expressed." (73 Fed. Reg. 33,395 (c.3)). The proposed commercial leasing priority comports with policies expressed by the Congress in § 388 of the Energy Policy Act and by the President in Executive Orders pertaining to energy development. A commercial leasing priority, if properly designed and administered, can help to combat strategic misuse of the leasing process to delay or block alternative energy development on the OCS, although other measures will also be needed.

Determinations of competitive interest (proposed § 285.201).
MMS's implementation of the competitive bidding requirement in situations where developers' express interest in project areas that partially overlap could have important implications for the offshore wind industry. (Implications for project viability will be particularly high if MMS sets high minimum operating rate or cash bonus payments, as it seems to be contemplating.) In its discussion of this issue (73 Fed. Reg. 33,394), MMS describes six very different potential approaches to identifying and resolving overlapping expressions of interest.

The absence of meaningful deadlines for MMS action creates a significant risk of project-killing delay.

The leasing process that is described in the Proposed Rule sets numerous deadlines for bid applicants, but no meaningful deadlines for MMS action.

B.2: Section-by-Section Discussions and Recommendations

Existing Text: § 285.201 How will MMS issue leases?

> The MMS will issue leases on a competitive basis as provided under §§ 285.210 through 285.225. However, if we determine after public notice of a proposed lease that there is no competitive interest, we will issue leases noncompetitively as provided under §§ 285.230 through 285.231. We will issue leases on forms approved by MMS, and will include terms, conditions and stipulations identified and developed through the process set forth in §§ 285.211 and 285.231.

Discussion: The reference to noncompetitive leasing procedures set out in "§§ 285.230 through 285.231" is confusing because those provisions describe the entire proposed procedure for

securing a lease through an unsolicited request. The provisions pertaining to the issuance of noncompetitive leases are found in proposed § 285.231(d)-(f).

AWEA Recommendation: Revise § 285.201 to read "…we will issue leases noncompetitively as provided under § 285.231(d)-(f)."

Existing Text: § 285.203 With whom will MMS consult before issuance of a lease?

> For leases issued under this part, by either the competitive or noncompetitive process, MMS will coordinate and consult with relevant Federal agencies, with the Governor of any affected State, and the executive of any affected local government, as directed by subsections 8(p)(4) and (7) of the OCS Lands Act and by other relevant Federal statutory requirements (e.g. Endangered Species Act (ESA), and the Magnuson-Stevens Fishery Conservation and Management Act (MSA)).

Discussion: This language could be misread to suggest that MMS's obligations under OCSLA to "coordinate with other Federal agencies" (43 U.S.C. § 1337(p)(4)(E)) and to undertake "coordination and consultation with the Governor of any State or the executive of any local government that may be affected by a lease, easement, or right-of-way" (*id.* § 1337(p)(7)) are comparable to its obligation under § 7 of the Endangered Species Act (16 U.S.C. § 1536) to consult with federal wildlife officials. But § 7 of the ESA, unlike the OCSLA provisions cited here, imposes significant substantive limits on MMS's authority. The language of this provision should be revised to avoid this confusion, which project opponents could use to challenge MMS compliance with its own coordination and consultation requirements.

AWEA Recommendation: Revise proposed § 285.203 to read as follows:

> For leases issued under this part, by either the competitive or noncompetitive process, MMS will coordinate and consult with relevant Federal agencies, with the Governor of any affected State, and the executive of any affected local government, as directed by subsections 8(p)(4) and (7) of the OCS Lands Act. In addition, MMS will adhere to other Federal statutory requirements that require them to consult with or respond to findings by other Federal agencies.

Existing Text: § 285.206 What is the lease size?

* * *

> (b) The lease size includes the minimum area that will allow the lessee sufficient space to develop the project and manage activities in a manner that is consistent with the provisions of this part. The lease may include whole lease blocks or portions of a lease block.

Discussion: The phrase "[t]he lease size includes the minimum area …" is ambiguous, suggesting that the selected area may be larger than the described minimum.

AWEA Recommendation: Replace subsection (b) with the following:

The lease size will correspond to MMS's determination of the minimum area that will allow the lessee sufficient space to develop the project and manage activities in a manner that is consistent with the provisions of this part. The minimum area will include, where appropriate, space needed for adjustment to the locations of proposed structures based on detailed site characterization work and sufficient space between project areas.

Existing Text: § 285.212 What must I submit in response to a Request for Interest or a Call for Information and Nominations?

If you are a potential lessee, when you respond to a Request for Interest or a Call, your response must include all of the items listed in paragraphs (a) through (g) of this section.

(a) The area of interest for a possible lease.

(b) A general description of your objectives and the facilities that you would use to achieve those objectives.

(c) A general schedule of proposed activities, including those leading to commercial operations.

(d) Available and pertinent data and information concerning alternative energy and environmental conditions in the area of interest, including energy and resource data and information used to evaluate the area of interest. The MMS will protect these data and information from public disclosure to the extent allowed by law.

(e) If available from the appropriate State or local government authority, certification that the proposed activity conforms with State and local energy planning requirements, initiatives or guidance.

(f) Documentation showing that you are qualified to hold a lease, as specified in § 285.107.

(g) Any other information requested by MMS in Request for Interest or Call for Information and Nominations.

Discussion:

Ambiguity as to whether responses to requests and calls are mandatory. The opening sentence of proposed § 285.212 could be read to suggest that potential lessees – that is, parties who might be interested in bidding – must respond to a Request for Interest or Call for Information and Nominations and provide all the information that MMS has requested in order to be eligible to bid. This is evidently not the case. Bidder qualifications set out in proposed § 285.107 do not include the filing of a full (or partial) response to an MMS request or call. Current regulations governing MMS's collection of information for its oil and gas leasing program also contain no such requirement. *See* §§ 30 C.F.R. 256.16-.25. Moreover, such a requirement would be unworkable, since it is hard to imagine that MMS would disqualify from bidding an entity that came into existence during the period between a request or call and the related auction.

Overly burdensome information demands. Proposed § 285.212 would make it expensive and risky for any potential lessee to respond to an MMS request or call. Setting aside subsection (g)'s opened-ended demand for "[a]ny other information requested by MMS" in its notice, compiling just the information identified in the Proposed Rule would require a significant commitment of resources. Consider, for example, the difficulty that a prospective bidder could face in meeting the subsection (d) demand for "*available and pertinent data and information*

concerning alternative energy and environmental conditions in the area of interest, *including energy and resource data and information used to evaluate the area of interest"* (emphasis supplied), even assuming that the notice provided much needed clarification.

Moreover, much of the requested information, such as the information described in subsection (d), is highly proprietary. As AWEA has explained in its comments on proposed § 285.113, MMS's FOIA-based protections for proprietary information it collects are inadequate. As a result, proposed § 285.113, in its current form, would discourage prospective bidders from providing <u>any</u> response to a request or call. Indeed, only a concern that no one would nominate areas in which they were interested would provide any incentive for developers to volunteer to share proprietary information as contemplated in proposed § 285.212.[11]

<u>AWEA Recommendation</u>: MMS should change the first sentence of proposed § 285.212 to read:

> Potential lessees who respond to a Request for Information or a Call are encouraged to provide the information identified to paragraphs (a) through (g) of this section.

<u>Existing Text</u>: § 285.214 What areas will MMS offer in a lease sale?

> The MMS will offer areas for leasing as identified in § 285.211(b) of this part.
> We will not accept nominations after the Call for Information and Nominations closes.

<u>Discussion</u>: Proposed § 285.214 should be revised to clarify that MMS may, over time, issue multiple Calls for Information and Nominations covering any particular region of the OCS. MMS should make clear that areas within the scope of an initial Call but not nominated in any of the responses will remain eligible for nomination in the course of a subsequent nomination process, whether initiated by the MMS (proposed § 285.210) or by a potential leaseholder under the unsolicited request procedure (proposed § 285.230).

<u>AWEA Recommendation</u>: Proposed § 285.214 should be revised to clarify that MMS may, over time, issue multiple Calls for Information and Nominations covering any particular region of the OCS.

> The MMS will offer areas for leasing as identified in § 285.211(b) of this part.
> We will not accept nominations <u>under a Call for Information and Nominations after the stated deadline for responses has passed. We may, however, accept such nominations under a later Call for Information and Nominations that covers the same areas.</u>

<u>Existing Text</u>: § 285.215 What information will MMS publish in the Proposed Sale Notice and Final Sale Notice?

* * *

> The Proposed Sale Notice and Final Sale Notice will include, or describe the availability of, information pertaining to:

[11] We note that proposed § 285.212(f) contains a reference to bidder qualification standards set out in proposed § 285.107. Part II.A above sets out AWEA criticism of those proposed qualification standards and suggestions for improving them.

(c) Auction details, including

* * *

(2) Minimum bid;

* * *

(e) Criteria MMS will use to evaluate competing bids or applications and how the criteria will be used in decision-making for awarding a lease.

Discussion:

Minimum bids. AWEA disputes MMS's assumption that auctions should have minimum bids. Our reasoning is summarized in Part I above, and detailed in our discussions of (a) the proper understanding of the competitive bidding and fair return provisions of OCSLA 8(p), *see* Part II.E; (b) the public interest in encouraging renewable energy development, *see* Part I. In short, AWEA believes that MMS should avoid second-guessing market valuations of alternative energy leases on the OCS. Alternative administrative determinations of fair value, whether framed as pre-auction minimum bids or post-auction standards of bid adequacy, should not be invoked to block alternative energy leasing of OCS tracts.

Lack of guidance as to possible bid evaluation criteria. The Proposed Rule provides no indication of the sorts of non-monetary criteria MMS might apply to evaluate bids. Moreover, the proposal to use random selection by lot in the event that multiple bidders submit the same bid amount (proposed § 285.223) suggests that MMS may not have any other meaningful criteria in mind. In keeping with our view that the AEAU rule should protect against sham and speculative bidding (see, for example, Parts I and II.A.2 above (see especially our discussion of proposed §§ 285.106-.107), AWEA believes that MMS should undertake an objective review of bidders' technical and financial competence to develop the projects they propose in determining who should be eligible to bid. In choosing the winner from among qualified bidders, however, AWEA believes that MMS should look only to the highest qualified bid.

AWEA Recommendation: MMS should delete the regulatory reference to minimum bids and provide additional guidance as to the bid evaluation criteria it might announce and apply.

Existing Text: § 285.221 What auction format may MMS use in a lease sale?

(a) Except as provided in § 285.231, we will hold competitive auctions to award alternative energy leases and will use one of the following auction formats, as determined through the lease sale process and specified in the Proposed Sale Notice and in the Final Sale Notice:

[discussion, not reproduced here, describing alternative auction protocols that use cash bonus bidding, operating fee bidding, and a combination of the two.]

Discussion: AWEA opposes the use of any auction format for competitive allocations of alternative energy leases that would unduly emphasize back-loaded operating fee payments. High operating fee charges, in excess of 1% of actual power revenues, can allow publicly important renewable energy opportunities to be tied up by sham and speculative bidders and firms that lack the financial resources to proceed with development. These concerns are

summarized above in Part I and discussed at greater length below in Part II.E.2 (analysis of proposed §§ 285.500-.501).[12]

AWEA Recommendation: MMS should revise proposed § 285.221(a) to conclude with the statement that "In deciding among these auction formats and specifying auction details in the Proposed Sale Notice and Final Sale Notice, we will guard against auction procedures that invite sham and speculative bidding by placing undue weight on contingent promises of future payment."

Existing Text: § 285.222 What does MMS do with my bid?

(a) If sealed bidding is used:

* * *

(2) We reserve the right to reject any and all high bids, regardless of the amount offered or bidding system used. We intend to accept or reject all high bids within 90 calendar days, but we may extend that time if necessary.

* * *

(b) If we use ascending bidding, we may designate the winning bid solely based on its being the highest bid submitted by a qualified bidder (qualified to be an OCS lessee under § 285.107).

Discussion:

Failure to commit to a reasonable timetable for bid acceptance. Prolonged delay in providing administrative authorizations that firms need to investigate and develop alternative energy resources on the OCS has been one of the most serious shortcomings to date of the AEAU program. The Final Rule, as we have argued elsewhere in these comments (*see* II.D.1 and II.F.1), should be crafted to eliminate opportunities for unwarranted administrative delay. It is unclear why, after completing a lengthy pre-auction process – including information gathering, area identification, and posting of proposed and final lease notices – MMS should need 90 days (with the option of an indefinite, self-granted extension) to accept or reject the high bid.

Presumption that bids will be evaluated solely on monetary criteria. As stated in our comments on proposed §§ 285.106-.107 and 285.215(e) above, AWEA believes that bidding procedures should include an objective assessment of whether bidders have the technical and financial resources to undertake the alternative energy projects for which they purport to seek authorization. AWEA would prefer that unqualified bidders be excluded through the application of meaningful, objective bidder qualification standards. However, if MMS declines to exclude unqualified bidders from the outset, it should review the qualifications of high bidders before awarding leases.

Review of bid adequacy. To the extent that proposed § 285.222(a)(2) is intended to reserve MMS authority to nullify an auction because the competitively determined value of a lease falls short of a minimum value that MMS has placed on it, AWEA believes that this provision is

[12] The specific formula that MMS has proposed for the calculation of operating fees is also deeply flawed, for reasons discussed below in Section II.E.2 (analysis of proposed § 285.505).,

misguided. (See the discussion of the minimum bid provision of proposed § 285.215(c)(2) above.)

AWEA Recommendation: Proposed § 285.222(a) should be revised to set a 30-day deadline for acceptance or rejection of the high bid. In addition, if MMS declines to revise proposed § 285.107 to establish meaningful bidder competence requirements, proposed § 285.222(b) should be changed to provide for review of high bidders' qualifications to make productive use of alternative energy leases before the lease is awarded.

Existing Text: § 285.223 What does MMS do if there is a tie for the highest bid?

(a) Unless otherwise specified in the Final Sale Notice, except in the first stage of a two-stage bidding auction, if more than one bidder on a lease submits the same high bid amount, the winning bidder will be determined by random selection by lot.

(b) The winning bidder will be subject to final confirmation following determination of bid adequacy.

Discussion:

Resolution of ties by drawing lots. AWEA objects to the unnecessary resort to random selection in the event of a tie in a sealed bid auction. A lease should be awarded to the qualified bidder that values it most. Accordingly, in the event of a tie in a sealed bid auction, the rules should provide for a follow-on round of ascending bidding or second round of sealed bidding to break the tie.

Disregard for non-monetary criteria. This provision presumes that non-monetary bid evaluation criteria will not provide a basis for distinguishing among bidders. As noted in the preceding comment, AWEA believes that MMS should assess bidders' technical and financial competence, preferably through the application of meaningful bidder qualifications standards but, failing that, through pre-award assessment of the high bidder.

Review of bid adequacy. AWEA objects to MMS review of auction results for "bid adequacy," as provided in proposed § 285.223(b), for reasons set out in our discussion of proposed § 285.215(c)(2) above.

AWEA Recommendation: Proposed § 285.223 should be revised to eliminate references to (i) selection by lots to break ties; and (ii) MMS reviews of "bid adequacy." In addition, if MMS declines to revise proposed § 285.107 to establish meaningful bidder competence requirements, proposed § 285.222(b) should be changed to provide for review of high bidders' qualifications to make productive use of alternative energy leases before the lease is awarded.

Existing Text: § 285.224 What happens if MMS accepts my bid?

If we accept your bid, we will send you a notice with three copies of the lease form.

(a) Within 10 business days after you receive the lease copies, you must:

(1) Execute the lease;

(2) Pay the first 6 months' rental as required in § 285.503;

(3) Pay the balance of the bonus bid as specified in the lease sale notice or in the lease agreement as required in § 285.500;
(4) File financial assurance as required under §§ 285.515 through 285.537.

* * *

(c) You will forfeit your deposit if you do not execute and return the lease within 10 business days of receipt, or otherwise fail to comply with applicable regulations or stipulations in the Final Sale Notice.
(d) We may extend the 10 business day time period for executing and returning the lease if we determine the delay to be caused by events beyond your control.

* * *

(g) MMS will only accept the highest bid. We will refund the deposit on all other bids.

Discussion: The 10-business-day deadline for successful bidders to submit 80 percent of its winning cash bonus bid plus six months rental and the cost of initial financial assurance measures is unreasonably tight.

AWEA Recommendation: Revise proposed § 285.224(a) to read:

(a) Within 30 business days after you receive the lease copies, you must:

Existing Text: § 285.231 How will MMS process my unsolicited request for a noncompetitive lease?

(a) The MMS will consider unsolicited requests for a lease on a case-by-case basis and may issue a lease noncompetitively in accordance with this part. We will not consider an unsolicited request for a lease under this part that is proposed in an area of the OCS that is scheduled for a lease sale under this part.

* * *

(c) If MMS determines that competitive interest exists in the lease area:
(1) The MMS will proceed with the competitive process set forth in §§ 285.210 through 285.225; and
(2) If you submit a bid for the lease area in a competitive lease sale, your acquisition fee will be applied to the deposit for your bonus bid.
(3) If you do not submit a bid for the lease area in a competitive lease sale, MMS will not refund your acquisition fee
(d) If MMS determines that there is no competitive interest in a lease:
(1) We will publish a notice, in the Federal Register, of such determination; and
(2) You must submit within 60 days of the date of the notice to MMS:
(i) For a commercial lease, a Site Assessment Plan (SAP), as described in §§ 285.605 through 285.612; or
(ii) For a limited lease, a General Activities Plan (GAP), as described in § 285.640 through 285.647.
(e) If we approve or approve with conditions your SAP or GAP, we may offer you a noncompetitive lease.

Discussion: The reference in proposed **§** 285.231(a) to review unsolicited requests for noncompetitive leases on a "case-by-case basis" could be read as reserving an option for MMS

to defer leasing even where competitive interest is found. This would be inconsistent with proposed §§ 285.231(c) and 285.502(c), which provide that MMS will proceed with competitive leasing if the competitive interest is found.

In addition, this provision, read together with proposed § 285.502(b), appears to create an unwarranted distinction between tracts identified in requests for noncompetitive leases where competitive interest is in fact found and tracts identified in such requests where no competitive interest is found. Where only one firm is interested in pursuing alternative energy development at the referenced tract, proposed §§ 285.231(e) and 285.502(b) provide that MMS *may* make the tract available for noncompetitive leasing – *after* reviewing a SAP that the applicant has prepared at considerable additional expense.

AWEA accepts that MMS may reasonably decline to make a tract available for noncompetitive leasing for reasons that would also support a decision not to lease on a competitive basis. *See, e.g.*, Proposed 285.210(b) (describing consultations with other federal agencies and state and local authorities and MMS's evaluation of potential negative effects on the human and marine environment). AWEA does not believe, however, that the Final Rule should reserve to MMS unconstrained discretion to decide whether particular tracts should be leased on a noncompetitive basis.

AWEA Recommendation: Revise proposed §§ 285.231(a) and (e) to read as follows:

> (a) The MMS will consider unsolicited requests for a lease on a case-by-case basis, but will not process an unsolicited request for a lease under this part that is proposed in an area of the OCS that is scheduled for a lease sale under this part.
>
> * * *
>
> (e) If we approve or approve with conditions your SAP or GAP, we will offer you a noncompetitive lease unless we conclude that the requested area is not suitable for leasing for reasons that would be equally applicable to leasing on a competitive basis.

Existing Text: § 285.235 If I have a commercial lease, how long will my lease remain in effect?

> (a) For commercial leases the lease terms are as shown in the following table:
>
> * * *
>
> (4) A commercial lease will have an operations term of 25 years, unless a longer term is negotiated by applicable parties.
>
> A request for lease renewal must be submitted 2 years before the end of the operations term.
>
> The operations term begins on the date that we approve your COP. The lease renewal request must meet the requirements of §§ 285.425 through 428.
>
> * * *

Discussion: AWEA strongly believes that the 25-year operations term should be triggered by submission of the final, CVA-certified Fabrication and Installation Report required by proposed § 285.708(a)(5), after construction is completed. The 25-year operations terms should commence with actual commercial operation. This will avoid undue hardship that could otherwise result for lessees that encounter unavoidable delay in obtaining COP approval and

completing a Final Facility Design Report. It will also align the standard operations term under MMS leases with the electricity delivery requirements of a typical 25-year power purchase agreement.

AWEA Recommendation: Subsection (a)(4) should be revised to

> (4) A commercial lease will have an operations term of 25 years, unless a longer term is negotiated by applicable parties.
> A request for lease renewal must be submitted 2 years before the end of the operations term.
> The operations term begins on the date when the CVA submits a certified final Fabrication and Installation Report as required by § 285.708(a)(5). * * * *

B.3: Responses to MMS Questions Relating to Subpart B

General questions:

1. Proposed types of leases. Do these lease types (commercial, limited) adequately address the possible uses allowed under these regulations?

The types of leases proposed are well-suited to the activities envisioned under the AEAU program.

2. Proposed leasing process, including the proposed acquisition fee and procedures for paying for associated NEPA analysis.

AWEA does not object to the proposed $.25/acre acquisition fee, or to the proposed provisions setting out the circumstances under which that fee would be refunded, credited against lease payments, or forfeited.

AWEA's broad views concerning NEPA analysis under the Proposed Rule are set out in Part II.F**.** AWEA construes the question quoted above more narrowly. Based on the context in which it first appears (73 Fed. Reg. at 38,393(c.2)), AWEA understands this question to be concerned with MMS's proposal to adapt MMS procedures for NEPA analysis of noncompetitive sand and gravel leases to the AEAU program. Those procedures, as MMS describes later in the preamble to the Proposed Rule, involve (1) early "notice to the requestor of the type of environmental analysis required" and "an estimated schedule for completing the analysis and making the decision whether or not to issue a lease"; and, possibly, (2) a requirement that the requestor "fund the NEPA analysis." 73 Fed. Reg. at 39,400(c.3).

AWEA does not object to MMS's proposal to require parties seeking noncompetitive leases to pay for NEPA analysis of those leases and related plans. However, as we note in Parts II.F.1 and II.F.2 below, if MMS intends to charge private applicants for NEPA analysis, it should allow those applicants an opportunity to limit project delay associated with that analysis. MMS, like other federal agencies, should allow applicants that pay for the services of NEPA contractors to participate in the selection of those contractors and prepare draft NEPA analyses for their use.

3. Proposed process for obtaining public input on unsolicited applications and the considerations for determining whether competitive interest exists.

AWEA believes, for the reasons set out in Part I and its comments on proposed § 285.231 above, that rigorous effort to defeat sham expressions of competitive interest, designed solely to delay offshore alternative energy development, are essential. In determining whether bona fide competitive interest exists, MMS should consult with key shoreline government agencies, including PSCs and authorities responsible for coastal zone planning, and with representatives of relevant consumer and public advocacy groups.

4. All aspects of the proposed sale process, including the proposed criteria for determining competition, proceeding with competitive auctions, and awarding leases.
AWEA's comments on various aspects of the proposed sale process appear throughout Part II.B of these comments.

- Lease sizes should correspond to MMS's determination of the minimum area that will allow the lessee sufficient space to develop the project (including the space that must be reserved as a buffer zone around each wind tower for navigational safety and air turbulence reasons) and manage activities in a manner that is consistent with the provisions of Part 285. (See comments on proposed § 285.206.)
- MMS should avoid competitive leasing auction formats that invite sham and speculative bidding by placing undue weight on contingent promises of future payment. (See comments on proposed § 285.221(a).)
- The Final Rule should limit MMS's discretion, after finding that there is no competitive interest in a particular tract, that a noncompetitive leasing should nevertheless be denied. (See comments on proposed § 285.231.)

5. Whether the length and structure of the proposed terms would inhibit legitimate efforts to develop alternative energy projects on the OCS and on alternatives that might be better.
AWEA believes that the length and structure of the proposed lease terms would unnecessarily inhibit legitimate efforts to develop alternative energy projects on the OCS in the following respects:

- The 25-year operations term for commercial leases should not begin until a lessee submits its proposed 285.702. (See comments on proposed § 285.235.)
- The Final Rule should incorporate a presumption of lease renewal for lessees that operate successfully within the terms of the initial leases. (See comments on proposed §§ 285.425-.427.)

<u>Section-specific questions:</u>
Section 285.200 Proposed project easement provision.
MMS should provide some flexibility in choosing easements and right-of-way routes for transmission lines and cabling associated with the lease activity. Proposed §§ 285.506-.507 (easement and right-of-way payments, respectively) refer to ROW corridors 200 feet in width. If, as indicated in proposed § 285.200(b), ROW routes are specified in initial COP submissions, a corridor 200 feet wide may be insufficient to accommodate adjustments to transmission line and cable routes made necessary by obstacles, such as reefs and wrecks, that lessees cannot fully anticipate until the installation process begins. (We are concerned here about the sorts of difficulties that delayed the completion of the New Haven-to-Shoreham cross-Sound cable project.)

Section 285.201 Considerations other than geographic overlap of multiple proposals to determine whether or not there is a need to conduct a competitive lease sale in an area. We invite comments on any of the proposed approaches. In particular, what do you think is the capability of package bidding to ensure a fair return and to induce an efficient allocation of leases?

AWEA acknowledges that situations may arise in which different developers seek rights to overlapping project areas or to areas for projects of such different scales that one developer's preferred site falls wholly within another's larger preferred site. However, AWEA does not believe that package bidding offers a practical response to this possibility, at least in the early stages of the AEAU auction program. Package bidding protocols and rules would dramatically increase the complexity of the alternative energy leasing process. (The experience of the Federal Communications Commission (FCC), which has spent years analyzing the issues associated with package bidding in auctions of telecommunications spectrum, where there are compelling economic reasons for packaging, based on the value of multi-regional networks, should be instructive.[13] The economic rationale for packaging here, based on possible differences in the scale and location of desired project sites, appears to be far less compelling. AWEA believes that MMS should continue to evaluate the costs and benefits of package bidding, and should consider the results of the first rounds of leasing in that continuing evaluation. Those first rounds of leasing, however, should be conducted in a more conventional format, based on MMS's informed judgments concerning the appropriate size of leases offered to all bidders. The costs of the delay that would result from an effort to work out package bidding rules in the abstract, without information from initial auctions, would almost certainly outweigh any benefit of the package bidding refinements**.**

The proposed approach, as well other possible approaches such as intertract competitive auctions, to address this issue.

AWEA opposes intertract competition. To determine which tracts should be regarded as in competition with other tracts, MMS would need to assume the role of electrical supply planner, a role that state and regional grid planners are far better positioned to fulfill. Moreover, the complexity of an intertract bidding system would undoubtedly add significantly to the time and expense required to execute the leases that must be in place before alternative energy development on the OCS can begin. Finally, adoption of an intertract bidding system would likely complicate MMS competitive interest determinations. This could undermine the noncompetitive leasing provisions as a means of streamlining the leasing process.

We invite comments on the proposed priority of commercial leases over limited leases.

MMS has rightly prioritized commercial over limited leases. AWEA's support for this approach is discussed in section B.1.

The proposed approach for developing appropriate lease documents.

[13] *See, e.g.*, Jacob K. Goeree, Charles A. Holt, and John O. Ledyard, *An Experimental Comparison of Flexible and Tiered Package Bidding* (May 25, 2007) (technical paper commissioned by the FCC to resolve some of the issues posed by package bidding) (available at http://wireless.fcc.gov/auctions/data/papersAndStudies/fcc_report_052507_final.pdf).

The proposed lease documents are appropriate, however, MMS must establish timelines and criteria in order to effectively manage the review and approval processes.

Section 285.203 Issues relevant to coordination and consultation with Federal agencies and State and local governments.
AWEA recommends clarifying this section in the comments above. Consultation is appropriate under federal statutes and should, of course, occur. However, it is not necessary to enumerate these statutes as it could inappropriately imply MMS authority where another agency is in the lead.

Section 285.204 The proposed process for choosing areas to make available for leasing and the proposed means for mapping and describing those areas.
AWEA does not have an opinion regarding this section.

Section 285.206 The proposed provisions governing lease size.
It is AWEA's opinion that this section should be revised to allow for some adjustment if detailed site characterization identifies such need.

Section 285.211 The most useful way to describe areas we decide to make available for alternative energy leasing.
AWEA believes that the areas MMS decides to make available for leasing should be described by blocks.

Section 285.212 Information that we should request to identify alternative energy interest in general or specific OCS areas.
As described in comments on § 285.212, AWEA contends that the information requested is too comprehensive. And, given the limits of MMS's ability to protect this highly sensitive information, requiring this information from interested parties would likely deter potential lessees from responding to a Request for Interest of Call for Information and Nominations. (*See* comments on proposed § 285.212.)

The handling of data and information.
AWEA's position that MMS limit the information collected and released due to this concern. (*See* comments on proposed § 285.113.)

Section 285.213 How the CZMA process for competitive leasing could be expedited.
AWEA's views concerning the streamlining of CZMA review are set forth in Part II.F.1 below.

Section 285.215 Whether this process provides sufficient information and notice to encourage competition for prospective alternative energy sites.
AWEA does not have an opinion regarding whether the proposed process provides sufficient information and notice.

Section 285.220 The relative merits of proposed alternative auction formats for leasing OCS acreage for alternative energy projects and on alternatives that might be more effective. Whether allowing bidders to define a set of tracts on which they wish to submit a package bid would

increase interest in a sale, generate higher aggregate bonus bids, and help ensure that bidders acquire their primary tracts of interest.
AWEA does not have a preference between sealed and ascending bidding, although it recommends a second, ascending bidding stage for sealed bid auctions that produce ties.

Section 285.221 Which of the proposed bidding systems is most appropriate for alternative energy leases and why.
AWEA, for reasons set out in Part I and Part II.B.1 above, believes that competitive leasing should be conducted using cash bonus bidding with a reduced baseline operating fee requirement, set at 1% of actual power generation revenues.

Section 285.222 The appropriate bid acceptance considerations and the potential use of intertract competition.
As described in more detailed comments above on this section, it is AWEA's opinion that MMS should also consider a bidder's qualifications and the intention to develop a lease area in order to discourage sham bids.

Section 285.223 The likelihood of receiving tied bids and on the proposed provisions for selecting a winner in that case.
AWEA does not have a view on the likelihood of tied bids. AWEA recommends that any ties in sealed bid auctions should be resolved through additional rounds of bidding rather than by lot. (See comments to proposed § 285.223 above.)

Section 285.224 Any difficulties the procedures for formally issuing a lease might cause potential lessees. Would holding an additional round of bidding be more appropriate than resolving a tie by lot or, perhaps, by offering a joint lease?
AWEA believes that the proposed 10-business-day deadline for successful bidders to submit the balance of their cash bonus bids, initial rent payments and initial financial assurances is unreasonably tight and should be extended to 30 business days. (*See* comments to proposed § 285.224 above.)

AWEA recommends that any ties in sealed bid auctions should be resolved through additional rounds of bidding rather than by lot. (See comments to proposed § 285.223 above.)

Section 285.225 The fairness of the proposed bid appeal process.
AWEA does not have an opinion regarding the proposed appeal process.

Section 285.230 Whether and how any requested information may inhibit requests and on whether this fee will serve its intended purpose.
AWEA believes, as set forth in its comments regarding proposed § 285.113, that FOIA provides inadequate protection for sensitive commercial data. "Available and pertinent data and information" is too broad. Requiring its submission will discourage qualified bidders from coming forward.

Section 285.231 Whether our proposal not to return your acquisition fee if you choose not to bid is appropriate. The proposed SAP or GAP deadlines and the proposed NEPA and CZMA compliance procedures.

AWEA does not object to MMS's proposal to retain acquisition fees of applicants for noncompetitive leases who decline to bid in auctions triggered by their requests. AWEA believes that deadlines for SAPs and GAPs associated with noncompetitive leases are appropriate, provided that MMS exercises appropriate flexibility in unusual circumstances. AWEA's view concerning NEPA and CZMA compliance for noncompetitive leases, which reflect its general view concerning the need to reduce administrative delay in the leasing process, are set forth in Part II.F.2.

Section 285.238 This concept for making areas of the OCS available for alternative energy research.

AWEA does not have an opinion regarding this section.

SUBPART C - ROW GRANTS AND RUE AND EASEMENT GRANTS FOR ALTERNATIVE ENERGY ACTIVITIES: 73 Fed. Reg. 39,404-405 (section-by-section analysis) & 73 Fed Reg. 39,471-72 (proposed text, §§ 285.300-.316)

C.1: General Observations

The important issues in this subpart concern how MMS will regulate facilities, as defined under this subpart, that are only partially used by alternative energy projects (AEPs). Included is the issue of how AEPs will be charged rent on facilities, such as electric cables, that are jointly used by non-AEPs. AWEA believes that AEPs designed to use any portion of a facility under this subpart should be eligible for a ROW grant or RUE grant. AWEA also believes that MMS should establish criteria for evaluating ROW and RUE grant requests that do not have a competitive interest and should set deadlines for taking actions such as issuing public notice, evaluating comments from notice, determining level of competitive interest, and issuing noncompetitive grants.

C.2: Section-by-Section Discussion and Recommendations

Existing Text: § 285.300 What types of activities are authorized by ROW grants and RUE grants under this part?

Discussion: Because the facilities, particularly electric transmission cables, can be used by alternative energy projects (AEPs) as well as non-AEPs, it will be important to know whether the Rule applies only to facilities *exclusively* used by AEPs. An example would be a cable whose capacity is reserved by an AEP and non-AEP (such as a natural gas power plant) going from one state, crossing the OCS, and terminating in another state. Would the Rule apply to this cable? And if mixed use (AEP plus non-AEP) is allowed, what is the threshold and what is the methodology for determining the portion of the facility used by an AEP? Additionally, what would happen if this proportion changes over time and falls below the established threshold?

AWEA Recommendation: MMS should clarify whether a facility partially used by an AEP and partially by a non-AEP would be regulated under this subpart and, if so, how. It is AWEA's belief, though, that ROW and RUE grants should be available to AEPs designed to only partially use facilities under this subpart.

Existing Text: § 285.305 How do I request a ROW grant or RUE grant?

Discussion: The requirements are not stringent enough to ensure that only applicants capable of building facilities specified under this subpart, and with the intention of doing so, are allowed to request a ROW or RUE grant.

AWEA Recommendation: This subpart should require applicants to demonstrate that they are technically and financially qualified to undertake these activities, as stated in AWEA's comments on § 285.107.

Existing Text: § 285.306 What action will MMS take on my request?

(b) (3) Evaluate your request for a noncompetitive grant and GAP simultaneously

Discussion/AWEA Recommendation: MMS should establish criteria for evaluating ROW and RUE grant requests that do not have a competitive interest.

Existing Text: § 285.307 How will MMS determine whether competitive interest exists for ROW grants and RUE grants?

Discussion/ AWEA Recommendation: No timelines for issuing public notice, evaluating comments from notice, or determining level of competitive interest are stated here. The timing for these steps in determining competitive interest should be specified.

Existing Text: § 285.309 When will MMS issue a noncompetitive ROW grant or RUE grant?

Discussion: First, the question of "when" is not fully addressed in this section. Specific timing requirements are not established. Second, the terms and conditions of the grant are considered non-negotiable. This has the potential of rendering projects unfinanceable.

AWEA Recommendation: The section should accomplish what it sets out to do and set up a timeline for issuing a noncompetitive ROW or RUE grant. Some flexibility should be built in concerning the grant terms and conditions to ensure they are financeable and, ultimately, that the facilities serving the alternative energy project can be constructed.

Existing Text: § 285.316 What payments are required for ROW grants or RUE grants?

Discussion: If facilities under this subpart can jointly be used by AEPs and non-AEPs (see above discussion on § 285.300), then payments should be adjusted to reflect the percentage used by an AEP. This section does not specify payments beyond the first year though they can be found in §§ 285.507 – 285.509.

Recommendation: If joint (AEP plus non-AEP) usage is allowed, a methodology for determining the proportion of facilities used by an AEP and adjusting payments accordingly should be established. To establish payment levels for the life of the project, reference to §§ 285.507 – 285.509 should be added.

SUBPART D - LEASE AND GRANT ADMINISTRATION: 73 Fed. Reg. 39,405-407 (section-by-section analysis) & 73 Fed Reg. 39,472-75 (proposed text, §§ 285.400-437)

D.1. General Observations

Subpart D of the Proposed Rule addresses certain aspects of OCS lease and grant administration, including: (1) noncompliance and cessation orders; (2) operator designations; and (3) lease or grant assignment, suspension, renewal, termination, relinquishment, contractor and cancellation. AWEA supports many of the concepts proposed by MMS in the Proposed Rule to facilitate administration of leases and grants once issued. Many of AWEA's comments on Subpart D seek to strengthen these provisions through further clarifications to the scope, timing and process of certain of the mechanisms for lease and grant administration. Of paramount concern to AWEA and its members, however, is the need to revise the lease or grant provision to authorize automatic assignment (without the requirement to obtain advance approval from MMS) of a lease to a third-party lender solely for project finance purposes, provided that the lease or grant holder submit certain mandatory information to MMS within 10 days of the effective date of such an assignment. The basis for this request is discussed in further detail in comments on proposed §§ 285.408-.411.

D.2. Section-by-Section Discussion and Recommendations

Existing Text: § 285.402 What is the effect of a cessation order?

> (a) Upon receiving a cessation order, you must cease all activities on your lease or grant as specified in the order. The MMS may authorize certain activities during the period of the cessation order.
>
> (b) A cessation order will last for the period specified in the order or as otherwise specified by MMS. If MMS determines that the circumstances giving rise to the cessation order cannot be resolved within a reasonable time period, the Secretary may initiate cancellation of your lease or grant as provided in § 285.437.

Discussion:

Scope of a cessation order. To the extent feasible, a cessation order should require discontinuation of *only* those specific lease or grant activities that form the basis of the noncompliance addressed in the cessation order. An event of noncompliance may be based on a violation of MMS regulations, including any term of a lease, grant, plan or other MMS approval, or an order of the Director, or any other applicable federal law or regulation. *See* § 285.400(a) and (b). It is possible that a violation of a certain federal law or regulation, *e.g.,* U.S. Coast Guard vessel registration requirements applicable to a vessel transporting equipment or other materials on an OCS lease or grant, may need to be addressed through issuance of an MMS cessation order. However, a cessation order, such as in the foregoing example, may not warrant discontinuation of all lease or grant activities, and certain lease or grant activities may be able to proceed without interfering with or otherwise affecting the ability to resolve the noncompliant activities.

Process for Lifting a Cessation Order. AWEA is concerned that this section does not identify the process for terminating or lifting the order where the lessee, grantee or operator timely satisfies all requirements of the order, particularly those circumstances where all such requirements are satisfied before the deadline established in the order.

AWEA Recommendations:

Scope of a cessation order. AWEA requests that MMS revise § 285.402(a) of the Final Rule to state that a cessation order should require discontinuation of only those activities that form the basis of the noncompliance addressed in the cessation order, unless the specific circumstances warrant cessation of all lease or grant activities. AWEA proposes the following revisions to § 285.402(a):

> "(a) Upon receiving a cessation order, you must cease those activities on your lease or grant that are specified in the order. The cessation order shall identify those lease or grant activities that form the basis of the noncompliance addressed in the order. All other lease or grant activities not identified in the cessation order may continue during the period of the cessation order."

Process for Lifting a Cessation Order. AWEA requests that MMS revise § 285.402(b) either (1) to specify the process for termination or lifting of a cessation order where the lessee, grantee or operator has satisfied all requirements of the order, or (2) to state that a cessation order must include the requirements and process for terminating or lifting the order on or before the end of the period specified in the order.

Existing Text: § 285.405 How do I designate an operator?

> (e) If there is a change in the designated operator, you must immediately provide written notice to MMS and identify the new designated operator. The lessee(s) or grant holders is the operator and responsible for compliance until MMS approves designation of the new operator.

Discussion:

Time Period for Submitting a New Operator Notice. Proposed §§ 285.405 and 285.406 address the requirements for designating an operator other than the lease or grant holder. In § 285.405(e), MMS states that a lease or grant holder must provide MMS with written notice of a change in its designated operator "immediately" following the occurrence of such a change. AWEA is concerned that "immediate" notice, which may be construed as contemporaneous or instantaneous, may not be feasible under the circumstances, despite the good faith efforts of the lease or grant holder to provide such notice in an expeditious manner.

AWEA Recommendations:

Time Period for Submitting a New Operator Notice. Instead of requiring "immediate" notice, AWEA requests that MMS revise § 285.405(e) to specify the time period following the occurrence of a change in the designated operator within which written notice of the change must be provided to MMS, *e.g.*, within 72 hours following the assumption by the new operator of its responsibilities under the lease or grant. AWEA proposes the following revised language for § 285.405(e): "(e) If there is a change in the designated operator, you must provide written notice

of the change to MMS and identify the new designated operator *within 72 hours after the change in the designated operator has occurred.*"

Notice Requirements for a New Operator Designation and Time Period for MMS Action on the Notice. In order to avoid unnecessary delays in the review and approval of a new operator notice, AWEA requests that MMS identify in § 285.405 the information that the lease or grant holder must include in a written notice of change of a designated operator. AWEA also requests that MMS specify in § 285.405(e) a time period within which MMS must issue written notice of its approval or denial of the new operator designation, *e.g.*, within 30 days after receipt of written notice of a new operator designation.

Existing Text: §§ 285.408 through 285.411 (considered together)

§ 285.408 May I assign my lease or grant interest?

(a) You may assign all or part of your lease or grant interest, including record title, subject to MMS approval under this subpart. Each instrument that creates or transfers an interest must describe the entire tract or describe by officially designated subdivisions the interest you propose to create or transfer.

* * *

§ 285.409 How do I request approval of a lease or grant assignment?

(a) You must request approval of each assignment on a form approved by MMS and submit originals of each instrument that creates or transfers ownership of record title or certified copies thereof within 90 calendar days after the last party executes the transfer agreement.

(b) Any assignee will be subject to all the terms and conditions of your original lease or grant, including the requirement to furnish financial assurance in the amount required in §§ 285.515 through 285.536.

(c) The assignee must submit proof of eligibility and other qualifications specified in § 285.107.

(d) An authorized official, on behalf of the holder of a lease or grant or portion thereof, must furnish evidence of authority to execute the assignment.

§ 285.410 How does an assignment affect the assignor's liability?

As assignor, you are liable for all obligations, monetary and non-monetary, that accrued under your lease or grant before MMS approves your assignment. Our approval of the assignment does not relieve you of these accrued obligations. MMS may require you to bring the lease or grant into compliance to the extent the obligation accrued before the effective date of your assignment if your assignee, or subsequent assignees, fails to perform any obligation under the lease or grant.

§ 285.411 How does an assignment affect the assignee's liability?

(a) As assignee, you and any subsequent assignees are liable for all lease or grant obligations that accrue after MMS approves the assignment. As assignee, you must comply with all the terms and conditions of the lease or grant and all applicable

regulations, remedy all existing environmental and operational problems on the lease or grant and reclaim the site as required under subpart I of this part.
(b) Assignees are bound to comply with each term or condition of the lease or grant and the regulations in this subchapter. You are jointly and severally liable for the performance of all obligations under the lease or grant and under the regulations in this part with each prior lessee who held an interest at the time the obligation accrued, unless this part provides otherwise.

Discussion:
Authorization by Rule for Assignments for Project Finance Purposes. AWEA strongly supports the ability to assign a lease or grant, or a portion thereof, under the OCS alternative energy/alternate uses program and generally concurs with MMS that the oil and gas lease assignment provision (*See* 30 C.F.R. § 256.62) could be applied to the alternative energy/alternate uses program. AWEA is concerned, however, that the obligation to obtain advance approval from MMS of a lease assignment would impose an unnecessary burden if applied to assignments undertaken strictly for project finance purposes.

The development of offshore wind energy projects, and likely other projects under the OCS alternative energy/alternate uses program, will require financing from a third-party finance or lending institution. A standard project finance agreement would require the OCS lease or grant holder to grant the lender, as security for the loan, a security interest in the rights of the holder under the OCS lease. The lease or grant holder also is required to make a limited assignment of the lease or grant to the project lender that authorizes the project lender, at its election upon the occurrence of an event of default under the financing agreements (*i.e.*, a default on the loan obligation) or otherwise, to take over the rights and obligations of the original holder under the lease or grant. The project lender, however, would not exercise such rights or actively assume such obligations unless and until an event of default were to occur. Instead, the original lease or grant holder would remain directly responsible to MMS for all obligations under the lease or grant and would continue to provide the financial assurance required for the lease or grant.

Time period for action on an assignment application. AWEA believes that such a time period is essential for avoiding delays in processing and taking action on assignment applications and to minimize commercial uncertainty where an assignment application is pending.

AWEA Recommendations:
Authorization by Rule for Assignments for Project Finance Purposes. AWEA requests that MMS revise the lease assignment provisions in the Proposed Rule to allow for the assignment of a lease interest to a lender in connection with the grant of a security interest in the holders rights under the lease (necessary to secure project financing). Specifically, AWEA requests MMS to revise the Final Rule to authorize an assignment of a lease interest to a lender in connection with the grant of a security interest in the holder's rights under the OCS lease without the requirement to obtain advance approval from MMS, provided the original lease holder submit to MMS within 10 days after the effective date of the assignment all information specified in proposed section 285.408(B), with the following clarifications:

(1) For purposes of subsection (B)(6), the statement of the assignee (lender) agreeing to comply with and be bound by the terms and conditions of the

lease or grant would be conditioned upon the exercise of the lender of its "step in" rights under the financing agreements, *i.e.* upon the occurrence of an event of default and an election by the lender to take over the lease. In the interim, the original lease holder would continue to bear all obligations under the lease; and

(2) For purposes of subsection (B)(8), the assignee (lender) would be required to provide a statement regarding how the assignee will comply with the financial assurance requirements under the lease upon the assignee's election of its "step in" rights under the financing agreements and its assumption of all lease obligations. In the interim, the original lease holder would continue to provide the financial assurance required for the lease.

Time period for action on an assignment application. AWEA requests that MMS include in the assignment provisions a time period within which the agency must make a determination whether an assignment application is administratively complete (*e.g.,* 15 days after the date on which the application is submitted) and take action on the application (*e.g.,* an additional 30 days after the date on which an application is found to be administratively complete).

Existing Text: § 285.417 When may MMS order a suspension?

* * *

(b) If MMS orders a suspension under paragraph (a)(2) of this section, and if you wish to resume activities, we may require you to conduct a site-specific study that evaluates the cause of the harm, the potential damage, and the available mitigation measures.

(1) You may be required to pay for the study.

(2) You must furnish one paper copy and one electronic copy of the study and results to us.

(3) We will make the results available to other interested parties and to the public.

(4) We will use the results of the study and any other information that becomes available:

(i) To decide if the suspension order can be lifted; and

(ii) To determine any actions that you must take to mitigate or avoid any damage to natural resources, life (including human and wildlife), property, or the marine, coastal, or human environment; or to sites, structures, or objects of historical or archaeological significance.

Discussion: This provision requires further clarification concerning the scope and process for development and review of a site-specific study. Specifically, it is unclear whether MMS would require that this study follow NEPA guidelines for preparing an Environmental Assessment or Environmental Impact Study, or for studies related to sites, structures or objects of historical or archaeological significance, the requirements under Section 106 of the National Historic Preservation Act (NHPA). AWEA understands that the nature of such a study would need to be determined on a site- and fact-specific basis relative to the factors that required issuance of the suspension order. However, AWEA is concerned that proposed § 285.417 will be interpreted to

require automatic preparation of a NEPA or NHPA analysis to support the lifting of a suspension order regardless of whether such an analysis otherwise is warranted by the proposed action.

In addition, the process for MMS review of the study is not clear, *i.e.* whether a draft study would be subject to public notice and comment requirements or whether MMS would issue the final study together with its decision to lift, modify or sustain the suspension order to which the study pertains.

AWEA Recommendation: Section 285.417(b) should be revised to clarify that the site-specific study shall not automatically be required to comply with NEPA and/or the NHPA unless the proposed lifting of the suspension order independently warrants such an analysis. In addition the Final Rule should specify the process for review of a site-specific study.

Existing Text: § 285.418 How will MMS issue a suspension?

(a) The MMS will issue a suspension order orally or in writing.

(b) A suspension order issued orally will be followed by a written explanation by MMS as soon as practicable.

(c) The written explanation will describe the effect of the suspension order on your lease or grant and any associated activities. The MMS may authorize certain activities during the period of the suspension, as set forth in the suspension order.

Discussion: A lease or grant holder seeking a voluntary suspension likely will require a fairly expeditious determination from MMS in order to implement any necessary changes to the applicable project development schedule, in terms of testing, equipment ordering, installation or other lease or grant activities. Because many critical aspects of offshore project development have a relatively long lead time, a lease or grant holder will need sufficient advance time, where circumstances warrant a suspension, to reschedule certain lease or grant activities.

AWEA Recommendation: AWEA requests that MMS revise § 285.418 of the Final Rule to provide a time period within which MMS must issue a decision (either oral or written) on a suspension request under § 285.416, *e.g.*, 30 days after the date on which the request for suspension is submitted to MMS. AWEA proposes the following revisions to Section 285.418(a):

"(a) The MMS will issue a suspension order orally or in writing within 30 days after the day on which the request for suspension is submitted to MMS."

Existing Text: § 285.420 What effect does a suspension order have on my payments?

(b) If MMS approves your request for a suspension as provided in § 285.416, we may suspend your payment obligation, as appropriate for the term that is suspended, depending on the reasons for the requested suspension.

Discussion/AWEA Recommendation: Section 285.420(b) does not clarify the circumstances under which a suspension of the payment obligation may be warranted where MMS has approved a request for a suspension order submitted pursuant to § 285.416. AWEA requests that MMS provide for an automatic waiver of the payment obligation where MMS has approved a

suspension request submitted by a lease or grant holder. This approach would be consistent with the automatic waiver of the payment obligation provided under § 285.420(c) where MMS has issued a suspension request. Alternatively, AWEA requests that MMS clarify in § 285.420(b) the criteria it will consider in determining whether to waive the payment obligation for an approved lease or grant suspension under § 285.416.

Existing Text: § 285.421 How long will a suspension be in effect?

> (a) Except as provided below, a suspension will be in effect for the period specified by MMS.
>
> (b) The MMS will not approve a suspension request pursuant to § 285.416 for a period longer than 2 years.
>
> (c) If MMS determines that the circumstances giving rise to a suspension ordered under § 285.417 cannot be resolved within 5 years, the Secretary may initiate cancellation of the lease or grant as provided in § 285.437.

Discussion: Under proposed § 285.416, a lease or grant holder may request MMS to suspend the term of a lease or grant by up to a two-year period, where warranted by the circumstances. *See* proposed §§ 285.416 and 285.421. A suspension granted under § 285.416 tolls the lease or grant term by the total term of the suspension (as also is the case for a suspension order issued at MMS's behest under proposed Section 285.417). *See* proposed § 285.415(b).

AWEA believes that circumstances may arise under which a lease or grant holder will require a suspension of its lease or grant term for longer than a two-year period. For example, it is possible that third party legal challenges related to the issuance or terms and conditions of an OCS lease or grant may result in direct or indirect delays in project development that extend beyond two years or that several years may be needed to obtain certain data before site plans can be refined.

AWEA Recommendation: AWEA requests that MMS revise § 285.421(b) of the Proposed Rule to allow for up to a five-year suspension where justified by the particular circumstances. A maximum suspension period of up to five years would be consistent with the maximum term of a suspension that may be obtained under the MMS OCS oil, gas and mineral interest leasing rules. *See*, *e.g.*, 30 C.F.R. § 250.170(a) (allowing up to a five-year suspension period where supported by the circumstances).

Existing Text: § 285.425 May I obtain a renewal of my lease or grant before it terminates?

> You may request renewal of the operations term of your lease or the original authorized term of your grant. The MMS, at its discretion, may approve a renewal request to conduct substantially similar activities as were originally authorized under the lease or grant. The MMS will not approve a renewal request that involves development of alternative energy not originally authorized in the lease or grant. The MMS may revise or adjust payment terms of the original lease, as a condition of lease renewal.

Discussion: Given the likelihood of technological developments during the term of an OCS lease, AWEA anticipates that there may be circumstances where a lease holder would seek to upgrade or replace the wind turbine structures (excluding the marine foundations) at an OCS wind turbine generation facility at or near the end of the original lease term and continue to operate the OCS wind turbine generation facility under a renewal lease.

AWEA Recommendation: AWEA requests MMS to clarify in the Final Rule that the intention of the lease holder to upgrade or replace wind turbine equipment before the end of the lease term would not require the lease holder to file a new application for an OCS lease for the site. (It is conceivable that technological improvements in turbine design could make replacement advantageous, if lease renewal were available, as early as 15 years into the operating term.) Instead, the original lease holder under such circumstances will be allowed to apply for a lease renewal under the lease or grant renewal provisions.

Existing Text: § 285.426 When must I submit my request for renewal?

(a) You must request a renewal from MMS:

(1) No later than 180 calendar days before the termination date of your limited lease or grant.

(2) No later than 2 years before the termination date of the operations term of your commercial lease.

(b) You must submit to MMS all information it requests pertaining to your lease or grant and your renewal request.

Discussion: The proposed lease and grant renewal regulations require a lease or grant holder to submit to MMS a request for renewal of the lease or grant term no later than 180 calendar days before the termination date of a limited lease or grant, or two years before the termination date of the operation term of a commercial lease. However, the proposed regulations do not include a time period within which MMS must take action on a request for renewal.

The Proposed Rule also states that timely submission of a renewal request allows a lease or grant holder to continue activities under the original lease or grant terms. It is unclear whether the lease or grant holder may continue approved activities where the original lease or grant term has terminated, but a timely renewal request is pending before MMS. *See* Proposed Rule at § 285.427(a) (including preamble discussion, 73 Fed. Reg. at 39,406).

AWEA Recommendation: AWEA requests that MMS include in § 285.426 the time period within which the agency must take action on a renewal request, whether to grant, grant with conditions, or deny the request.

AWEA also requests MMS to clarify § 285.427(a) to state that the timely filing of a renewal request allows the lease or grant holder to continue activities under the original lease or grant terms until MMS takes action on the renewal request, regardless of whether the original lease or grant term has expired.

Existing Text: § 285.427 How long is a renewal?

> The MMS will set the term of a renewal on a case-by-case basis not to exceed the original term of the lease or grant.

Discussion/AWEA Recommendation: AWEA requests that MMS specify in proposed § 285.427 the principal factors the agency will consider to set the renewal term for an OCS lease or grant. In addition, AWEA requests that MMS consider granting a renewal term that exceeds the original term if warranted by particular circumstances.

Further, MMS has invited interested parties to comment whether the regulations should provide for open-ended lease terms, thereby obviating the need for any renewal period, and automatic renewal of existing leases or grants. *See* Proposed Rule preamble at p. 246. Rather than an open-ended lease, AWEA would support the issuance of a lease or grant for an initial term that is subject to automatic renewal for one or more consecutive terms provided that the lease holder continue to satisfy certain conditions, such as that the lease holder continue to have a good operating record and provide any required financial assurance.

Existing Text: § 285.432 When does my lease or grant terminate?

> Your lease or grant terminates on whichever of the following dates occurs first:
>
> > (a) The expiration of the applicable term of your lease or grant, unless your term is automatically extended under §§ 285.235 or 285.236, or your lease or grant is suspended or renewed as provided in this subpart;
> >
> > (b) A cancellation, as set forth in § 285.437; or
> >
> > (c) Relinquishment, as set forth in § 285.435.

Discussion: AWEA recommends that MMS revise subsection (a) of this section to allow for circumstances where a lease or grant renewal request is pending before MMS as of the termination date for the original lease or grant.

AWEA Recommendation: AWEA proposes that Section 285.432 be revised as follows:

> Your lease or grant terminates on whichever of the following dates occurs first:
>
> > (a) The expiration of the applicable term of your lease or grant, unless your term is automatically extended under §§ 285.235 or 285.236, your lease or grant is suspended or renewed as provided in this subpart, or a renewal request timely submitted pursuant to § 285.426 is pending before MMS as of the termination date of the original lease or grant; …

Existing Text: § 285.436 Can MMS require lease or grant contraction?

> At an interval no more frequent than every 5 years, the MMS may review your lease or grant area to determine whether the lease or grant area is larger than needed to develop the project and manage activities in a manner that is consistent with the provisions of this part. MMS will notify you of our proposal to contract the lease or grant area.

(a) MMS will give you the opportunity to present orally or in writing information demonstrating that you need the area in question to manage lease activities consistent with these regulations.
(b) Prior to taking action to contract the lease or grant area, MMS will issue a decision addressing your contentions that the area is needed.
(c) You may appeal this decision under § 285.118 of this part.

Discussion: AWEA recognizes that there may be circumstances where the development and operation of a project does not require use of the entire lease or grant area issued to the holder. Where MMS proposes contraction of a lease or grant, AWEA supports the opportunity for a lease or grant holder to submit information to justify the need for the entire or some portion of the lease or grant area, in an effort to refute the proposed contraction. Nonetheless, the authority of MMS to seek contraction of a lease or grant area has significant potential consequences for the offshore wind power generation industry, and AWEA is concerned that § 285.436 does not clarify the scope of the information that MMS will consider in making an initial decision to notify a lease or grant holder of a proposed lease or grant contraction.

AWEA Recommendation: AWEA requests that MMS specify in proposed § 285.436 the information that MMS would be required to consider as part of such an area "review" before making a decision to notify a lease or grant holder of a proposed contraction, *i.e.* at a minimum, by taking into consideration all information submitted by the lease or grant holder in its application for an OCS lease or grant, as well as all other information and plans submitted by the holder following issuance of the lease or grant.

D.3: Responses to MMS Questions Relating to Subpart D

1. Noncompliance.
AWEA requests MMS to make certain revisions to the noncompliance and cessation order provisions of the draft rule to clarify the scope of activities that may be prohibited under a cessation order and the process for lifting a cessation order, particularly where all requirements of the order have been satisfied by the holder in advance of the period specified in the order.

2. Assignments.
AWEA strongly urges MMS to revise the lease/grant assignment provisions to allow for assignments to third-party lenders for project finance purposes without the obligation to obtain advance written approval from MMS, provided that the lease or grant holder submits certain information to MMS within 10 days after the effective date of the assignment.

3. Alternatives such as open-ended lease terms and automatic renewals.
AWEA supports the issuance of leases or grants that specify an initial term that is subject to automatic renewal for one or more consecutive terms, provided that the lease or grant holder continue to satisfy certain minimum conditions, such as continued compliance with the lease or grant terms, maintenance of a good operating record and maintenance of the required financial assurance for the lease or grant.

4. Criteria for consideration in lease renew decisions.

MMS has invited comment on the criteria that should be applied to evaluate a request for renewal of an existing OCS lease or grant, including the following: (1) design life of existing technology; (2) availability and feasibility of new technology; (3) environmental and safety record of the lessee; (4) operational and financial compliance record of the lessee; and (5) competitive interest and fair return considerations. AWEA supports the use of these criteria to evaluate a lease or grant renewal request. With regard to the criterion concerning competitive interest and fair return, AWEA requests that MMS undertake this evaluation consistent with AWEA's comments on Subpart B of the Proposed Rule. Further, AWEA recommends that MMS consider, where applicable, the relative significance in terms of generation capacity and reliability of the OCS electric power generation facility within the regional transmission system that receives the electric power output from the facility.

SUBPART E - PAYMENTS AND FINANCIAL ASSURANCE REQUIREMENTS: 73 Fed. Reg. 39,407-416 (section-by-section analysis) & 73 Fed Reg. 39,475-82 (proposed text of §§ 285.500-.541)

E.1: General Observations

AWEA's comments on subpart E focus on the operating fee and financial assurance provisions.

MMS Should Reduce Required Operating Fee Payments and Revise the Manner in Which They are Computed

Under the Proposed Rule, operating fee payments would be deferred until approval of the lessee's COP -- a milestone that a delay-minded lessee could likely put off for five years or more. Rental and cash bonus payments, in contrast, would be paid from the outset of the lease period. As a result of this difference in timing, auctions structured to emphasize operating fee payments, as opposed to rental and cash bonus payments, would encourage sham bidders, speculators, and unqualified firms. Misuse of the auctioning process would be fostered by the ability to control a valuable, competitively auctioned right for extended *periods* of time based largely on a contingent, fully revocable promise to make operating fee payments at some time in the future. AWEA recommends that MMS reduce the maximum operating fee to 1%. In keeping with this analysis, MMS should not hold auctions with fixed cash bonuses and variable operating fee rates.

In addition to reducing operating fees, MMS can discourage sham and speculative bides by increasing bid deposits. MMS has proposed to require winning bidders in sealed-bid, cash bonus auctions to post a deposit equal to 20% of their winning bids. The deposit preserves the winning bidder's place until the bid is accepted by MMS, at which point the remainder becomes due. The decision to accept or reject the high bid is expected to be reached within 90 days (proposed § 285.222(a)(2)), although MMS envisions extending that period "if necessary" (*id.*). To some sham bidders and speculators, however, even a 90-day period of control over a valuable, competitively assigned lease may be worth forfeiture of a 20 % deposit -- particularly if the cash bonus bid is relatively modest. AWEA recommends increasing the deposit. In competitive auctions for leases burdened with a 1% operating fee structured to collect the vast majority of federal revenues as cash bonus bids, as recommended above, AWEA recommends 40% of the cash bonus bid as a sound starting point.

Apart from its concern that auctions weighted toward backloaded, operating fee payments tend to encourage sham and speculative bidding, AWEA believes that MMS's proposed method of computing operating fees is flawed. First, MMS's commitment to minimum charges is misguided. The Proposed Rule contemplates imposing significant minimum charges for both competitive and non-competitive commercial leases.[14] These minimum charges are not

[14] *See* 73 Fed. Reg. at 39,412(c.1) (illustrative calculation of yielding minimum annual operating payment of $333,000 (first two years) then $666,000 (operating period) for a 200 megawatt offshore wind park).

grounded in the fair return or competitive bidding provisions of section 388 of the Energy Policy Act of 2005. In fact, minimum charges would operate to *prevent* leasing at fair market rates, determined in competitive bidding, if the high bid fell short of the minimum that MMS had determined. In addition, the contemplated minimum charges also would prevent non-competitive leasing to a single interested developer, and the public benefits that renewable energy development could produce, wherever the MMS-determined minimum exceeded the interested developer's ability to pay.

MMS has stated that the minimum charges it has proposed, including operating fees set at 1% of imputed gross revenues for two years and 2% thereafter, will not discourage otherwise viable alternative energy projects. 73 Fed. Reg. at 39,407-08. However, MMS bases this assertion on flawed comparisons to operating fees paid by land-based wind parks, which have lower costs and risks, and by offshore wind parks in the United Kingdom, which enjoy significant financial advantages under British law. Furthermore, because of the high price of electricity in the Northeast where offshore wind projects are currently planned, the value of the renewable energy Production Tax Credit (PTC) is significantly eroded by the operating fees contemplated under the Proposed Rule, and the percentage these fees represent is higher than those estimated by Industrial Economics in 2007, as referenced in the preamble.

AWEA also objects to the manner in which operating fees would be computed under the Proposed Rule. Under MMS's preferred approach to determining operating fees, as set out in proposed § 285.505(c)(1), wind farm operators would be required to pay operating fees before they begin collecting power revenues. These early operating fee payments would come too late in the development process to discourage sham bidders and speculators, but too early to be financed out of operating revenues. To avoid the hardship that the significant burden that this could place on some legitimate project developers, AWEA has suggested that the Proposed Rule be revised to delay the collection of annual operating fees until the power sales begin.

Under MMS's formula for computing operating fees (proposed § 285.505), a wind park's operating fee liability would be pegged to statewide average retail prices in the state where power is fed into the grid, rather than to the wholesale prices lessees will actually obtain for the power. This disconnect between imputed prices and revenues (used to compute operating fee liability under the Proposed Rule) and actual prices and revenues (realized by the lessee from power sales) raises significant hurdles for project financing. AWEA has suggested a number of changes to proposed § 285.505 designed to eliminate this problem.

MMS Should Revise the Financial Assurances Provisions to Provide More Cost Effective Protection Against Defaults on Decommissioning Obligations

AWEA's comments concerning MMS's proposed financial assurances provisions focus on the potential costs of providing effective safeguards against private default on decommissioning obligations. The exact magnitude of these potential costs is not known. Decommissioning costs will depend on the final terms of subpart I and how those provisions are administered. (See Part II.I below for AWEA's comments on MMS's proposed decommissioning provisions.) Annual charges for the maintenance of surety bonds, the preferred form of financial assurance in the Proposed Rule, are also uncertain since no market for wind farm decommissioning surety bonds

currently exists. (Current rates in the construction surety bond market suggest likely annual charges in the vicinity of 2.5-3% of face value.) Although precise estimates of decommissioning costs and corresponding surety rates are not currently available, it is clear that the cost-effectiveness of the MMS's financial assurance rules for decommissioning costs will have important financial implications for potential wind farm projects. The currently proposed surety approach would unreasonably burden project economics.

It is impossible, at this early stage of the development of (a) the U.S. offshore wind industry and (b) MMS's decommissioning standards for offshore wind farms, to specify the most cost-effective form of financial assurance coverage for decommissioning costs. However, AWEA believes that the best solutions will emphasize timely coverage using a wide range of financial tools. As to timing, it is essential that financial assurance obligations at each stage of a project correspond to the default risks at that stage. Thus, the Final Rule should make clear that no decommissioning coverage will be required until construction actually begins. As the operating term proceeds, the level and type of financial assurance that is required should be linked to actual default risks.

In AWEA's view, the risk of default on decommissioning obligations is likely to increase (modestly and from a very low level) as the scheduled date of decommissioning approaches. Moreover, the increase may be greater if normal operating margins are depressed by unexpected difficulties, such as systematic component failures or abnormal weather patterns, for which a lessee or operator has failed to obtain adequate insurance.[15] Under an efficient financial assurance scheme, the level of protection against such a default should increase in step with the level of risk. A decommissioning trust fund, financed with periodic payments beginning after some part of the operating period has passed would fit this pattern. There is some residual risk of decommissioning early in the operating period, before a decommissioning trust fund would be adequately funded. Although insolvency of the original lessee is unlikely to result in premature decommissioning,[16] it is possible that dramatic legal changes or technological failures could. In AWEA's view, to the extent that these minor residual risks require coverage, that coverage could

[15] A 2006 study of wind farm decommissioning, prepared for the UK Department for Trade and Industry, includes the following findings:

- "The Government's risk adjusted exposure to default during construction is relatively low because installations are unlikely to be abandoned at such an early stage and the probability of default of the liable entities over the liabilities is also low, given the financial profiles of the companies that have been awarded Crown estate leases and the short period of time over which their financial profiles could erode."
- "[I]f offshore wind is successfully financed, it is expected that an installation would be able to cover the cost of decommissioning at every point in the life of the plant. Even near the end of life, when the difference between the present value of future cash flows and decommissioning costs shrinks, the offshore wind operating margins would be large enough to cover decommissioning costs."

Climate Change Capital, *Offshore Renewable Energy Installation Decommissioning* (2006) § 4.1 (2006 DTI Decommissioning Report) (available at http://www.climatechangecapital.com/uploadedFiles/OffshoreRenewableEnergyInstallationDecSt_14_04_06_1.pdf)

[16] Once wind towers and turbines are in place, prospective operating revenues should exceed operating costs for the duration of the operating term. As long as this is true, the owners of the wind farm will have powerful incentives to see that it remains in operation.

be provided most efficiently through supplemental financial assurances targeting these specific concerns. This supplemental financial assurance could take the form of insurance or a qualified corporate guarantee. The combination of a decommissioning trust and supplemental coverage for the very small risk of early decommissioning will be far less expensive than a surety bond and provide better protection against default than a surety bond.[17]

AWEA's review suggests three principal ways in which MMS could significantly improve the cost effectiveness of subpart E's proposed financial assurance rules, particularly as they pertain to decommissioning costs, without appreciably increasing the risk of default.

- MMS should separate financial assurance for decommissioning costs from financial assurance for other regulatory obligations. Subpart E of the Proposed Rule appears to contemplate a unified financial assurance regime, under which a single financial assurance instrument would cover all of the obligations for which financial assurances is required. *See* proposed § 285.525(a)(2) (an acceptable financial assurance instrument must "[g]uarantee compliance … with all terms and conditions of the lease or grant … and all applicable regulations").[18] By combining disparate default risks, that ought to be subject to very different minimum coverage standards, this approach would foreclose the most efficient approaches to providing decommissioning cost coverage and needlessly increase financial assurance costs while adding a potential cross-default burden to wind farm operators.

- MMS should invite alternative energy developers to draw upon a broad range of financial assurance measures in devising appropriate financial assurances for decommissioning liabilities. The Proposed Rule unjustifiably constrains choices available to lessees and operators seeking to provide needed financial assurances as efficiently as possible.
    - Although the Proposed Rule's basic statement of lessee and operator financial assurance obligations refers to "bond[s] or other financial assurance[s]" (proposed § 285.516(b)), it also states that "financial instruments other than surety bonds would be accepted only "if MMS determine[d] that such security protects MMS to the same extent as the surety bond" (proposed § 285.526(a)).
    - Although the Proposed Rule holds out the prospect of lease specific decommissioning accounts (proposed § 285.527), it provides no assurance that lessees or operators will be permitted to build the decommissioning account gradually as the scheduled decommissioning date approaches, and makes no provision for other forms of assurance, such as insurance, letters of credit, or financial commitments from well-capitalized entities, that might help to support such gradual accruals.

[17] Surety bonds can only provide protection for a 25-year operating term if they are consistently renewed. A lessee or operator that was unwilling or unable to renew a surety bond during the closing years of its operating term would leave MMS with no guaranteed funding for decommissioning costs. If a lessee or operator stopped paying into a decommissioning trust fund, MMS would have the contents of the fund (plus access to any supplemental financial assurance that had been required to meet any shortfall).

[18] Although proposed § 285.527 states that MMS may accept lease-specific or grant-specific decommissioning accounts, it indicates that such an account would operate "[i]n lieu of a surety bond" rather than in conjunction with a surety bond or other assurance.

- Although the proposed financial assurance generally track existing financial assurance rules for oil and gas or sulfur leases (30 C.F.R. §§ 256.52-.59), the Proposed Rule conspicuously omits authorization for alternative energy developers to use the third-party guarantees that developers of oil and gas and sulfur deposits can provide in place of bonds (30 C.F.R. § 256.57.)

In considering which additional financial assurance options should be made available to wind farm lessees and operators, MMS should review its rules governing financial assurances for supplemental oil spill liability. Those rules allow oil and gas lessees to guarantee payment using insurance, self-insurance (with an appropriate showing of adequate assets), and "alternative method[s]" approved by the Director. 30 C.F.R. § 253.20. Similar flexibility as to permissible forms of financial assurance is evident in (1) EPA rules governing financial assurances for the closure of hazardous waste facilities (40 C.F.R. § 264.143), which allow the use of trust funds, insurance, financial tests and corporate guarantees, as well as surety bonds and letters of credit; and (2) NRC rules governing financial assurances for the decommissioning of nuclear facilities (*e.g.*, 10 C.F.R. 50.1), which allow NRC license holders to provide assurances against default on decommissioning liability through a variety of means, including periodic deposits in dedicated decommissioning funds, insurance and guarantees from financially qualified parent or affiliate corporations. If these alternative forms of performance security can be applied to liabilities that are unknown, they surely should be acceptable for wind farm decommissioning costs which are bounded.

- Commit to careful, regularly updated estimates of net decommissioning costs. Decommissioning cost estimates should account for the substantial residual value of wind towers and turbines. To the extent possible, MMS estimates of decommissioning costs should take advantage of developers' own cost estimates prepared and audited in compliance with standard accounting rules. (See, for example, the Financial Accounting Standards Board's 2002 standards governing "Accounting for Obligations Associated with the Retirement of Long-Lived Assets.") In addition, MMS should update decommissioning cost estimates periodically to account for developments such as site specific authorizations to allow portions of decommissioned structures to remain in place as reefs, and growth and technological progress of the marine services industry that may lead to important cost reductions. MMS should track these changes and revise decommissioning cost estimates at regular intervals.

Companies that seek to help develop the U.S. offshore wind industry are likely to have different preferences with respect to financial assurance for decommissioning. None, however, is likely to choose to post a surety bond for a 25-year operating term or to commit equivalent sums of cash for that period. MMS should make certain that the Final Rule preserves its flexibility to work with lessees to accept alternative assurances and avoid imposing unnecessary costs on offshore wind development.

E.2: Section-by-Section Discussions and Recommendations

Existing Text: § 285.501 What deposits will MMS collect for a competitively issued lease, ROW grant, or RUE grant?

> (a) For a competitive lease or grant we offer through sealed bidding, you must submit a deposit of 20 percent of the total bid amount unless some other amount is specified in the Final Sale Notice.
>
> (b) For a competitive lease we offer through ascending bidding, you must submit a deposit as established in the Final Sale Notice.
>
> (c) You must pay any balances on accepted high bids in accordance with the Final Sale Notice, these regulations and your lease or grant instrument.
>
> (d) The deposit will be forfeited for any successful bidder who fails to execute the lease within the prescribed time or otherwise does not comply with the applicable regulations or stipulations in the Final Sale Notice.

Discussion:

Subsections (a) & (b) amount of the deposit: Bid deposits can help to discourage strategic and speculative participation in auctions – an objective that MMS has said it shares with legitimate wind power developers. *See* 73 Fed. Reg. at 33,394(c.3). AWEA's concerns about strategic and speculative misuse of the auction process and related concerns about the Proposed Rule's bidder qualification and auction design provisions are discussed in Parts I, II.A.2 (proposed § 285.107) and II.B.2 (proposed § 285.212) above. In addition to the reforms recommended in our discussions of those provisions, AWEA also believes that a substantial increase in bid deposits could help to discourage participation in auctions by parties seeking to block alternative energy development or secure rights to offshore wind sites for speculative purposes. It is true that the deposit would only allow a strategic or speculative bidder to tie up a potential development site for a relatively short period of time. (The Proposed Rule indicates that decisions to accept or reject high bids are expected to be reached within 90 days of the auction (proposed § 285.222(a)(2)).) However, to some sham bidders and speculators even a 90-day period of control might be worth the risk of forfeiting a 20 % deposit --particularly if the high bid is relatively small. AWEA therefore recommends increasing the deposit. In a competitive auction for a lease subject to a 1% operating fee requirement (as recommended above), AWEA recommends that the high bidder be required to post a 40% deposit.

Subsection (d) discretion to waive insubstantial deviations from technical: The Rule should clarify that MMS has discretion to excuse, for good cause, late execution of a lease or technical violations of regulations or stipulations bearing on lease execution.

AWEA Recommendation: To strengthen the bid deposit as a deterrent to misuse of the auction process and clarify the existence of a good-cause exception to bid forfeiture for failure to comply with requirements set out in the Final Sale Notice, § 285.501 should be revised to read as follows:

> § 285.501 What deposits will MMS collect for a competitively issued lease, ROW grant, or RUE grant?
>
> > (a) For a competitive lease or grant we offer through sealed bidding, you must submit a deposit of 40 percent of the total bid amount unless some other amount is specified in the Final Sale Notice.

(b) For a competitive lease we offer through ascending bidding, you must submit a deposit as established in the Final Sale Notice.
(c) You must pay any balances on accepted high bids in accordance with the Final Sale Notice, these regulations and your lease or grant instrument.
(d) Bid deposits will be subject to forfeiture if the successful bidder fails to execute the lease within the prescribed time or to comply with other material requirements established by applicable regulations or stipulations in the Final Sale Notice.

Existing Text: § 285.502 What initial payments will MMS require to obtain a noncompetitive lease, ROW grant, or RUE grant?

* * *

(b) If we determine that there is no competitive interest we will then:
(1) Retain your acquisition fee if we issue you a lease.
(2) Refund your acquisition fee, without interest, if we do not issue your requested lease.

* * *

Discussion: For reasons described above in our discussion of § 285.231, proposed subsections 285.231(e) and 285.502(b) create an unwarranted distinction between tracts identified in requests for noncompetitive leases where competitive interest is in fact found and tracts identified in such requests where no competitive interest is found. Where only one firm is interested in pursuing alternative energy development at the requested site, these provisions state that MMS *may* make the tract available for noncompetitive leasing after it reviews a GAP or SAP that the applicant has prepared at considerable expense. AWEA for reasons set out above, does not believe that the Final Rule should reserve to MMS unconstrained discretion to decide whether particular tracts should be leased on a noncompetitive basis.

AWEA Recommendation: Proposed § 285.502(b) should be revised to read as follows.

(b) If we determine that there is no competitive interest we will then:
(1) Retain your acquisition fee if we issue you a lease.
(2) Refund your acquisition fee, without interest, if we decline, as provided in § 285.231(e) to issue your requested lease.

Existing Text: § 285.504 What rentals will MMS collect on a limited lease?

(a) The rental for a limited lease is $3.00 per acre per year, unless otherwise established in the Final Sale Notice and your lease instrument.
(b) You must pay the first 6 months' rental when MMS issues your limited lease as provided in § 285.500.
(c) You must pay rentals at the beginning of each subsequent one year period on the entire lease area for the duration of your operations term in accordance with the regulations at § 218.51 of this chapter.

Discussion: MMS has indicated, appropriately in AWEA's view, that commercial leasing will take precedence over limited leasing for research purposes, and that a limited lease will not confer any preferential rights respecting development. 73 Fed. Reg. at 33,395(c.3) (discussion of proposed § 285.201). Limited leases will neither confer rights to conduct commercial activities nor displace commercial undertakings. Moreover, for limited leases with appreciable market value, MMS should obtain that value through its auction procedures. Accordingly, AWEA believes that baseline rental rates for limited leases should be set lower, at no higher than $1.50 per acre per year. This change should help to ensure that rental charges do not suppress the level of valuable research conducted under limited leases.

AWEA Recommendation: Reduce the rental charges specified in proposed § 285.504(a) for limited leases from $3.00 per acre per year to $1.50 per acre per year.

Existing Text: § 285.505 What operating fees will MMS collect from a commercial lease?

Unless we substitute a rental payment obligation, you must pay operating fees on your commercial lease during the operations term, as described in this section.

(a) We will determine the annual operating fee for activities relating to the generation of electricity conducted during the operations term of your lease based on the following formula, F = M * H * c * P * r where:

(1) F is the dollar amount of the annual operating fee;

(2) M is facility installed capacity expressed in megawatts;

(3) H is the number of hours in a year, equal to 8760, used to calculate an annual payment;

(4) c is a ``capacity factor'' representing the anticipated efficiency of the facility's operation expressed as a decimal between zero and one;

(5) P is a measure of the retail electric power price expressed in dollars per megawatt hour, as provided in paragraph (c)(2) of this section; and

(6) r is the operating fee rate and expressed as a decimal between zero and one.

(b) The annual operating fee formula relating to the value of annual electricity generation is restated below:

[F (annual operating fee) = M (installed capacity) * H (hours per year) * c (capacity factor) * P (power price) * r (operating fee rate)]

Example: The operating fee for a 150 megawatt facility with an anticipated capacity factor of 0.35 operating in a region with a typical power price of $65 per megawatt hour and a fee rate of 0.02 would be just under $0.6 million per year (150 megawatts times 8,760 hours per year times 0.35 times $65 per megawatt hour times 0.02).

(c) We will specify operating fee parameters for commercial leases issued competitively in the Final Sale Notice and in the lease instrument for those issued noncompetitively.

(1) Unless we specify otherwise, we intend to set the operating fee rate (r) at 0.01 for the first two years of the operations term, and at 0.02 in the third and remaining years of the operations term. We may apply a different fee rate for new projects (i.e. a new generation based on new technology) after considering factors such as program objectives, state of the industry, project type, and project

potential. Also, we may agree to reduce or waive the fee rate under § 285.509 for a given project.

(2) The power price (P) will be determined based on the prior year's average retail power price in the State in which a project's transmission cables make landfall, as published by the Department of Energy, Energy Information Administration. If, at the time the annual operating fee payment is due, the prior year's average retail power price in unavailable, the lessee shall calculate the operating fee based on the most recent average annual retail power price published by the Department of Energy, Energy Information Administration.

(3) We will select the capacity factor (C) based upon applicable analogs drawn from present and future domestic and foreign projects that operate in comparable conditions and on comparable scales. Upon the completion of the first year of commercial operations on the lease, MMS may adjust the capacity factor as necessary (to accurately represent a comparison of actual production over a given period of time with the amount of power a facility would have produced if it had run at full capacity). Thereafter, MMS may adjust the capacity factor (to accurately represent a comparison of actual production over a given period of time with the amount of power a facility would have produced if it had run at full capacity) no earlier than the completion of the sixth year of operation, or any five year period thereafter. The operator or lessee may request review and adjustment of the capacity factor under § 285.509 of this part.

(4) We will use the installed capacity (M) of the equipment you actually install.

(d) You must submit all operating fee payments to MMS in accordance with the regulations at § 218.51 of this chapter.

(e) We will establish the operating fee in the final sale notice or in the lease instrument on a case-by-case basis for activities conducted during the operations term that do not relate to the generation of electricity (e.g. hydrogen).

Discussion: AWEA's objections to MMS's decision to establish a high operating fee rate – presumptively set at 2% for most of the operating term of commercial leases, regardless of whether they are awarded competitively or noncompetitively – are set out above in Parts I and II.E.1 above. In those discussions, we argue that a much lower operating fee payments, presumptively no higher than 1% of power revenues, would better serve the purposes of the AEAU program. Here, we set these general objections to one side and focus on specific flaws in the mechanism that MMS has proposed for collecting operating fees.

Premature commencement of operating fee charges. There is, in the first instance, a problem with timing. MMS proposes to begin collecting operating fees (at a reduced 1% rate) from the beginning of the operations term, which starts when the lessee's COP is approved. 73 Fed. Reg. at 39,401(c.2), 39,412(c.1). The proposal to begin collecting operating fees long before the leaseholder can start selling power is justified on the ground that COP approval clears the way for "permanent disturbance of the OCS." 73 Fed. Reg. at 39,380 (c.1). However, there is no logical connection between operating fee payments and authorization for "permanent disturbance of the seabed floor." The proposed decommissioning and financial assurance provisions already ensure that no disturbance occurs until a reliable mechanism for restoring the seabed has been put in place. Operating fee payments should not be due until a project begins generating power

and the associated power revenues. Rental payments under proposed § 285.503 should continue until that time.

Flawed mechanism for estimating gross revenues. Other flaws in the proposed operating fee provisions pertain to the mechanism that MMS has proposed for computing the gross revenue estimates to which the operating fee rate will be applied. We are concerned in particular with the power price that MMS proposes to use to compute estimated gross revenues for an offshore alternative energy project. Under proposed **§** 285.504(c)(2), the power price used in this computation – the term "P" in the operating fee equation – would be the prior year's statewide average *retail price for electricity* in the State where the project's transmission cables make landfall. There are two serious problems with this definition of "P."

First, the proposal to estimate revenues using *retail* power prices is perplexing. The published retail power rates that are cited in the Proposed Rule include transmission and distribution charges as well as payments to power generators. (Although the cited Department of Energy (DOE) publication does not provide a full description of the basis for the retail price figures it recites, comparison to more detailed data sets for electrical power prices in certain States confirms that the DOE retail prices include transmission and distribution charges.[19]) Thus, the use of retail prices to estimate gross revenues to power generators increases the effective operating fee rate, considered as a percentage of actual revenues, and decouples offshore wind projects' liabilities to MMS from their actual financial performance. Moreover, there is widespread recognition that the nation's transmission system requires significant investment and federal policy supports such upgrades. Thus, current trends involving transmission infrastructure are likely to increase transmission charges as a proportion of total retail price.

A second problem with the proposed definition of "P" involves the use of statewide average retail prices. The DOE statewide averages referred to in the Proposed Rule are computed across all end-use sectors—residential, commercial, industrial and transportation.[20] In a number of States, the easing of regulation in the electricity market has freed power generators to negotiate with consumers on a sector-by-sector basis, and prices vary significantly across sectors. Thus, if a wind park developer negotiates a contract to supply power for just one sector, use of the multi-sector average price will distort the revenue estimate.[21]

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[19] DOE's figures for statewide average retail electricity prices are available at http://www.eia.doe.gov/cneaf/electricity/epm/table5_6_b.html (table captioned "Average Retail Price of Electricity to Ultimate Customers by End-Use Sector, by State").

Even the use of average wholesale prices as a benchmark would be problematic, since wholesale prices include charges for ancillary services such as reactive support and voltage control. A retail price standard, which is inflated by additional transmission and distribution charges that are not reflected in project revenues, exacerbates the distortion.

[20] *See* http://www.eia.doe.gov/cneaf/electricity/epm/table5_6_b.html (Table listing average retail electricity prices by end-use sector and state).

[21] For Delaware, to take one example, sectoral averages for 2007 ranged from 8.46¢/kWh for the industrial sector to 12.22¢/kWh for the residential sector. The overall average was 10.89¢/kWh. *See* http://depsc.delaware.gov/sos.shtm006C and http://www.delmarva.com/_res/documents/DEMasterTariff.pdf).

Moreover, statewide average electricity prices have become vastly more volatile in recent years due to sharp increases in fossil fuel prices and significant legal change. Both fossil fuel markets and legal developments (particularly legal changes resulting from state, federal and international efforts to address the electrical power sector's contributions to climate change) can be expected to generate continued volatility in statewide average power prices in the decades ahead. [22]

The Proposed Rule's formula for estimating gross revenues may also be construed to limit needed adjustments to the capacity factor, "C." Under proposed § 285.505(c)(3), MMS initially selects a capacity factor based on prior industry experience and reserves the right to adjust that figure to reflect actual performance more accurately after the first year of operation and at five-year intervals thereafter. Although this provision specifically reserves the right of the operator or lessee to "request review and adjustment of the capacity factor under § 285.509 of this part," it is not clear whether such reviews and adjustments are limited to the restrictive timetable established for MMS-initiated adjustments. Proposed § 285.505(c)(3) should be revised to clarify that lessee-initiated adjustments to the capacity factor are not restricted in this manner.

One critical advantage of offshore wind power, from the perspective of state and local governments, regulated utilities, and other large purchasers of electrical power, is its long-term price stability. Indeed, to compete effectively against fossil fuel based power under current conditions, offshore wind developers must offer long-term price stability. An operating fee liability that is based not on revenues actually realized by the owners and operators of offshore wind parks (typically under long-term power purchase agreements that guarantee a significant measure of price stability), but on imputed revenues based on statewide average prices that track uncontrolled fossil fuel prices, creates an unmanageable potential liability that could make it impossible to obtain project financing.

AWEA Recommendation: MMS should modify its method for computing estimated gross revenues. For wind park developers to obtain financing, long-term operating fee liabilities to MMS must be based on their own revenues, obtained (predominantly) in wholesale transactions, not on indexes based on other entities' revenues. To minimize project financing difficulties created by operating fee charges, MMS should base any such charges on lessees' actual revenues. Alternatively, MMS could provide some relief by (1) using DOE's published wholesale power prices (rather than retail prices) to estimate gross revenues; (2) revising the final sentence of subsection 285.505(c)(3) to clarify that "[t]he operator or lessee may request review and adjustment of the capacity factor at any time under § 285.509 of this part; and (3) providing assured relief, in the form of a substitute operating fee computation based on actual revenues, for lessees who are able to show that imputed gross revenues under the regulatory formula significantly overstate actual revenues. (Language to provide this assured relief is set forth in AWEA's comments to proposed § 285.509 below.)

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[22] It is also significant that average retail prices vary sharply from one region of the country to another. For example, 2007 DOE EIA data show average prices of electricity of $140/MWh in RI, $155/MWh in MA, and $153/MWh in NY (with substantially higher prices in New York City and Long Island). http://www.eia.doe.gov/fuelelectric.html. All of these figures are *more than twice* the $65/MWh assumption used in MMS's illustrative calculation.

Existing Text: § 285.509 May MMS reduce or waive lease or grant payments?

(a) The MMS Director may reduce or waive the rental or operating fee, including components of the operating fee such as the fee rate or capacity factor, when the Director determines that it is necessary to encourage continued or additional activities.

(b) When requesting a reduction or waiver, you must submit an application to us that includes all of the following:

(1) The number of the lease, ROW grant, or RUE grant involved;

(2) Name of each lessee or grant holder of record;

(3) Name of each operator;

(4) A demonstration that:

(i) Continued activities would be uneconomic without the requested reduction or waiver or

(ii) A reduction or waiver is necessary to encourage additional activities; and

(5) Any other information required by the Director.

(c) No more than six years of your operations term will be subject to a full waiver of the operating fee.

Discussion: Discretionary authority to reduce or waive operating fees is helpful, particularly if it is exercised liberally "to encourage continued or additional activities" (73 Fed. Reg. at 39,414(c.1)). However, the reservation of such purely discretionary authority will not adequately address the serious threat that MMS's proposed operating fee formula poses to project finances. (See the discussion of proposed § 285.505 above.) Prospective investors in offshore wind projects will not accept the possibility of partial discretionary administrative relief as an answer to the risks posed by operating fee liabilities that are both unbounded and decoupled from actual project revenues. AWEA has argued that MMS should reduce the operating fee rate for competitive auctions to 1% and assess these fees against actual rather than imputed power revenues. If MMS rejects both these recommendations, it should, at a minimum, provide assured as opposed to discretionary relief for lessees whose actual revenues are sharply lower than the revenues imputed to them under the operating fee regulations.

AWEA Recommendation: In the event that the Final Rule retains significant operating fees charges based on imputed rather than actual revenues, proposed § 285.509 should be revised to include the following:

* * *

(c) No holder of a lease or grant will obtain full waivers of operating fees covering more than six years of the relevant operations term under subsection (a) of this section.

(d) The MMS Director shall reduce the operating fee for a commercial lessee under this subpart if the lessee demonstrates that estimated revenues for its operations (that is, the product of the M, H, c and P factors defined in section 505(a) of this part) exceed actual revenues by 20% or more. A lessee that qualifies for relief under this section shall pay operating fees on revenues equal to 120% of actual revenues.

(e) When requesting a reduction or waiver under subsection (d) of this section, you must submit an application to us that includes all of the following:

(1) The number of the lease involved;

(2) Name of each lessee of record;

(3) Name of each operator;

(4) Documentation of actual power sale revenues derived from operations under the lease.

(5) Any other information required by the Director.

Existing Text: § 285.516 What are the financial assurance requirements for each stage of my commercial lease?

(a) The basic financial assurance requirements for each stage of your commercial lease are as follows:

Before MMS will…. -- You must provide . . .

(1) Issue a commercial lease or approve an assignment of an existing commercial lease

-- A $100,000 minimum lease-specific financial assurance.

(2) Approve your Site Assessment Plan (SAP)

-- A SAP bond or other financial assurance, in an amount determined by MMS, if upon reviewing your SAP, MMS determines that a SAP bond is required in addition to your minimum lease specific bond, due to the complexity, number, and location of any facilities involved in your site assessment activities.

(3) Approve your Construction and Operations Plan (COP)

-- A COP bond or other financial assurance, in an amount determined by MMS based on the complexity, number, and location of all facilities involved in your planned activities, including commercial operation, and your anticipated decommissioning costs. The COP financial assurance requirement will be in addition to your lease-specific bond and, if applicable, SAP bond.

(b) Each bond or other financial assurance must guarantee compliance with all terms and conditions of the lease. You may provide a new bond or increase the amount of your existing bond, to satisfy any additional financial assurance requirements.

Discussion: For the reasons set out in Part II.E.1 above, AWEA objects to the requirement that the bond or alternative financial assurance provided at the COP stage of a project the project "guarantee compliance with all terms and conditions of the lease." The level of financial assurance required to safeguard against defaults on decommissioning obligations is far higher than any amount reasonably required to assure compliance with other lease terms, particularly in light of MMS's power to cancel leases for uncorrected violations under proposed § 285.437. Moreover, in putting a decommissioning bond, fund or insurance policy at risk for violations of any lease term or condition would effectively preclude efficient underwriting of decommissioning risks. To establish a cost-effective financial assurance regime, MMS should

revise § 285.516 to permit lessees to provide financial assurances for decommissioning obligations in separate, stand alone instruments.

AWEA Recommendation: Revise subsections (a)(3) and (b) to read as follows:

(3) Approve your Construction and Operations Plan (COP)

-- COP financial assurance, meeting coverage requirements determined by MMS based on the complexity, number, and location of all facilities involved in your planned activities, including commercial operation, and your anticipated decommissioning costs. At the election of the leaseholder, COP financial assurance may provide separate coverage for decommissioning obligations and for other obligations arising out of activities under the COP. The COP financial assurance requirement will be in addition to your lease-specific bond and, if applicable, SAP bond.

(b) Each bond or other financial assurance, except for a bond or other financial assurance dedicated exclusively to decommissioning obligations as provided in subsection (a)(3) of this section, must guarantee compliance with all terms and conditions of the lease. You may provide a new bond or increase the amount of your existing bond, to satisfy any additional financial assurance requirements.

Existing Text: § 285.517 How will MMS determine the amounts of the SAP and COP financial assurance requirements associated with commercial leases?

* * *

(b) We determine the amount of the SAP and COP financial assurance requirements on a case-by-case basis. The amount of the financial assurance must be no less than the amount required to meet all lease obligations, including:

(i) The projected amount of rentals and other payments due the Government over the next 12 months;

(ii) Any past due rentals and other payments;

(iii) Other monetary obligations; and

(iv) The estimated costs of lease decommissioning, as required by subpart I of this part.

*** * ***

(d) If your cumulative potential obligations and liabilities increase or decrease, we may adjust the amount of COP bond or, if applicable, SAP bond.

(1) If we propose adjusting your financial assurance amount, we will notify you of the proposed adjustment and give you an opportunity to comment.

(2) We may approve a reduced financial assurance amount if you request it and if the reduced amount that you request continues to be greater than the sum of:

(i) The projected amount of rentals and other payments due the Government over the next 12 months;

(ii) Any past due rentals and other payments;

(iii) Other monetary obligations; and

(iv) The estimated costs of lease decommissioning, as required by subpart I of this part.

Discussion: The references in proposed § 285.517(b) to MMS setting the "amount of the financial assurance," and in proposed § 285.517(d) to financial assurance covering the sum of leaseholder financial obligations are inconsistent with AWEA's notion that lessees should be given the option of providing entirely separate coverage for decommissioning obligations.

AWEA Recommendation: Revise the opening passages of §§ 285.517(b) and .517(d)(2) to read as follows:

> (b) We determine the amount of the SAP and COP financial assurance requirements on a case-by-case basis. Financial assurance measures, taken as a whole, must be adequate to meet all lease obligations, including:
>
> * * *
>
> (2) We may approve a request for a reduction in financial assurance coverage if you request it and if the reduced coverage that you request continues to provide adequate assurance for:
>
> * * *

Existing Text: § 285.525 What general requirements must a financial assurance instrument meet?

> (a) Any bond or other acceptable financial assurance instrument that you provide must:
>
> (1) Be payable to MMS upon demand; and
>
> (2) Guarantee compliance of all lessees, operators and grant holders with all terms and conditions of the lease or grant, any subsequent approvals and authorizations, and all applicable regulations.

Discussion: The proposed requirement for payment to MMS on demand may impede the use of some advantageous forms of financial assurance (such as insurance against early decommissioning as a supplement to a decommissioning trust fund). The proposed requirement that all financial assurance instruments operate as guarantees of compliance with all regulations and lease conditions would prevent the beneficial separation of financial assurance for decommissioning and for other obligations. Neither requirement serves any useful purpose that MMS cannot achieve through case-by-case review.

AWEA Recommendation: Delete proposed subsection 285.525(a).

Existing Text: § 285.526 What instruments other than a surety bond may I use to meet the financial assurance requirement?

> (a) You may use other types of security instruments, if MMS determines that such security protects MMS to the same extent as the surety bond. MMS will accept pledges of the following:
>
> * * *

Discussion: Subsection (a) unduly restricts financial assurance options by requiring that security instruments be equivalent to surety bonds and implying that only the enumerated cash equivalents will be accepted.

AWEA Recommendation: Revise proposed § 285.526(a) to read as follows:

> (a) You may use other types of security instruments, if MMS determines that they provide (or form part of a package of financial assurance measures that provides) security comparable to that would be provided by a surety bond. Among the financial assurances that may be accepted are pledges of the following:

Existing Text: § 285.527 Can I use a lease or grant specific decommissioning account to meet the financial assurance requirements?

> (a) In lieu of a surety bond, MMS may authorize you to establish a lease, ROW grant, or RUE grant-specific decommissioning account in a federally insured institution. The funds may not be withdrawn from the account without our written approval.
>
> * * *
>
> (2) You must fully fund the account within the time MMS prescribes to cover all costs of decommissioning including site clearance. The MMS will estimate the cost of decommissioning, including site clearance.

Discussion: This provision should be revised to clarify that MMS, in appropriate circumstances, will allow lessees (i) to defer the date of full funding until well into the operating period; and (ii) to combine decommissioning accounts with other supplemental financial assurance measures.

AWEA Recommendation: Revise proposed § 285.527(a)(2) to read as follows:

> (a) In lieu of a surety bond, MMS may authorize you to establish a lease, ROW grant, or RUE grant-specific decommissioning account in a federally insured institution. The funds may not be withdrawn from the account without our written approval.
>
> * * *
>
> (2) You must fund the account in accordance with the schedule that MMS prescribes to provide timely coverage of the costs of decommissioning including site clearance. The MMS will estimate the cost of decommissioning, including site clearance. The MMS may require you to maintain another form of financial assurance to supplement the decommissioning account in the event of early decommissioning.

Existing Text: § 285.528-.529 [reserved]

Discussions: For unexplained reasons, the Proposed Rule omits authorization for alternative energy developers to use the third-party guarantees that developers of oil and gas and sulfur deposits can provide in place of surety bonds (30 C.F.R. § 256.57). It also omits express authority that the oil spill funding regulations extend to oil and gas producers to guarantee oil payments using insurance, self-insurance (with an appropriate showing of adequate assets), and "alternative method[s]" approved by the Director. 30 C.F.R. § 253.20.

AWEA Recommendation: The reserved sections should be filled in with provisions tracking the cited oil and gas financial assurance provisions to broaden the range of financial assurance options available to alternative energy producers.

E.3: Responses to MMS Questions Relating to Subpart E

General questions:

1. Whether or not information from other sources supports the conclusion that proposed rates in this rule are in line with fixed terms used elsewhere and would constitute a small fraction of expected offshore alternative energy project costs. If not, please provide such alternative information.
AWEA's significant concerns regarding the operating fees are described above in response to § 285.505.

2. Payments to the landowners.
The rental rates proposed for commercial leases are reasonable, although in comments on § 285.504 AWEA argues the rental fee for limited leases should be reduced.

3. We conclude that the proposed size of our payments would not adversely affect the rate of offshore alternative energy development. We request comments on whether the results of this analysis accurately characterize the basic economics of anticipated OCS alternative energy projects.
AWEA strongly disagrees with MMS's assessment that the minimum charges described in the Proposed Rule will not discourage otherwise viable alternative energy projects. As discussed in Part I, the US offshore wind industry confronts costs and risks in excess of those confronting land-based wind farms in the US or offshore wind farms overseas. Moreover, the contemplated minimum charges would apply to a wide array of potential projects. In AWEA's view, every prospective offshore wind project has the potential to yield important public benefits in terms of improved energy security and environmental quality. It is a logical certainty, that MMS's proposed minimum charges will make some of these potential projects uneconomical, and the attrition in AWEA's view, could well be substantial.

4. Issues related to implementation of revenue sharing.
AWEA does not have an opinion regarding the implementation of revenue sharing proposed.

Section-specific questions:

Section 285.500 Suggestions concerning how the payment procedures should be structured and what the content of alternative energy payment procedures should include.
AWEA does not have an opinion regarding the implementation of revenue sharing proposed.

Section 285.501 Setting the deposit amount and deposit forfeiture requirements, including the extent to which these amounts and requirements should be related to the type of auction format employed.

As discussed in its comment on proposed § 285.501 above, AWEA believes that a 20% deposit may be inadequate to deter some sham bidders and speculators, to whom even a 90-day period of control over a valuable, competitively assigned lease may have a high perceived value. (For example, a sham bidder seeking to delay development of a proposed wind farm could view forfeiture of a bid deposit as the price of restarting the competitive bidding process.) For that reason, AWEA recommends increasing the proposed bid deposit.

Section 285.502 For a noncompetitive lease, whether to require an additional payment equal to the difference between the minimum bid we would have set for a competitive sale offering in the same area and the acquisition fee, as an alternative approach. Whether the size and treatment of acquisition fees proposed in this section is appropriate and whether or not it would discourage expression of any legitimate interest in a possible alternative energy lease.
As described in Part I and comments on § 285.215, AWEA opposes setting a minimum bid. The acquisition fee in § 285.500 is sufficient.

Section 285.503 Whether the baseline rental fee proposed in this section would be appropriate for lessees and fair to the public.
The proposed rental fee is fair and appropriate.

Section 285.504 Whether there is any valid reason to charge a different rental for limited leases than for commercial leases.
AWEA believes the rental fee for limited leases should be reduced below the commercial lease rate for reasons described in comments on § 285.504.

Section 285.505
1. Whether there are operating fee procedures that are as efficient and fair as the one specified here for alternative energy activities. Please include detailed examples and explanations for any alternatives suggested.
AWEA's comments on the proposed operating fee are laid out above in response to this subsection.

2. The frequency of the review and adjustment of the capacity factor.
AWEA does not have an opinion regarding the capacity factor review and adjustment.

Section 285.506 Whether this is the most appropriate way to set rentals for easements and whether the size of the rental is appropriate.
AWEA supports the proposed rental payments.

Section 285.507 Whether this is the most appropriate way to set rentals for easements, and whether the size of the rental is appropriate.
AWEA supports the proposed rental payments.

SUBPART F - PLANS AND INFORMATION REQUIREMENTS: 73 Fed. Reg. 39,420-426 (section-by-section analysis) & 73 Fed Reg. 39,482-93 (proposed text of §§ 285.600-658)

F.1: General Observations

AWEA's principal concerns with subpart F pertain to the effect of MMS's contemplated environmental review processes on wind park development schedules. Under the Proposed Rule, the path to development of a wind farm on a competitively issued commercial lease is expected to involve "three NEPA and three CZMA reviews—one each for the Lease Sale action, the SAP, and the COP." 73 Fed. Reg. at 39,420(c.2 & Table 2). Even the comparatively streamlined process for development on a non-competitively issued lease is expected to trigger two rounds of NEPA and CZMA review—one for the Lease and SAP considered together and one for the COP. *Id.* The potential for unwarranted delay in the development of the first generation of offshore wind farms is particularly troubling in view of MMS's expectation that "initially, all commercial development projects will require an EIS for each phase of the project." 73 Fed. Reg. at 39,419(c.2). Under MMS's Proposed Rule and the accompanying statements of anticipated policies, developers of the first commercial wind parks on competitively awarded leases will not obtain authorization to start construction until MMS (and its NEPA contractors) have completed *three* EISs.[23]

Under the Proposed Rule's provisions governing environmental review of leases, SAPs and COPs, NEPA review alone could be expected to add four years or more to the timelines for development of the first generation of offshore wind parks. This would put offshore wind (and other OCS alternative energy projects) at a severe disadvantage in efforts to attract investment. It would also impede state efforts to meet renewable energy standards established to promote energy security and improve the environment.

The effects of excessive procedural delay are highlighted in two attached Figures pertaining to the process for developing a wind farm on a non-competitive commercial lease. **Figure 1** sets out the lease and plan approval process that an offshore wind developer would need to follow under the Proposed Rule. Step-by-step estimates of the time required provide the basis for our assessment that this is likely to be a *four-year* process. **Figure 2** sets out a revised timeline incorporating a number of AWEA's suggestions for streamlining the process. Step-by-step time estimates on that Figure show why we think that reasonable streamlining of the process could cut years from the development time.

AWEA and its members understand that development of offshore wind parks will require thorough environmental review. It has proposed a number of changes to subpart F, summarized here and detailed in part II.E.2, that can reduce delay while fully meeting the requirements of NEPA and the CZMA.

[23] 73 Fed. Reg. at 39,419(c.2) (projecting that "initially, all commercial development projects will require an EIS for each phase of the project").

Review of Survey Protocols

MMS rules should allow offshore wind developers to initiate subsea surveys before they have an approved SAP by MMS. Current MMS regulations authorize oil and gas companies to conduct geological and geophysical (G&G) surveys on the OCS before they bid on a lease. 30 C.F.R. § 251.3(a). NEPA review of the required G&G permits ordinarily takes the form of a Categorical Exclusion Review (CER), confirming that the proposed activity is covered by MMS's categorical conclusion that such activity ordinarily has no significant effect on the environment.[24] There is no indication that G&G work needed for the siting and design of met tower and wind turbine foundations should have any greater environmental impact.[25] MMS should revise the Proposed Rule to give offshore wind power companies access to the streamlined G&G permit procedure that is already available to oil and gas companies. Completion of G&G surveys under pre-lease permits will expedite the completion and approval of SAPs and expedite the development of alternative energy projects on the OCS.

NEPA Review of SAP

The Proposed Rule states that MMS will prepare "appropriate NEPA analysis" of a SAP, but the overview discussion states: "We anticipate that initially, all commercial development projects will require an EIS for each phase of the project (i.e., one EIS for the SAP and one EIS for the COP)." (73 Fed. Reg. at 39,419(c.2).) Another discussion of the Proposed Rule in the section titled "Development Process" states: "The SAP would undergo NEPA reviews and may require either an Environmental Impact Statement (EIS) or an Environmental Assessment (EA)." (73 Fed. Reg. at 39,388(c.1)). However, MMS already has conducted a comprehensive review of the potential subsea surveys and installation of meteorological towers in its PEIS and found negligible impacts (PEIS §§ 3.5.2, 5.2.1.2), so a Categorical Exclusion Review similar to MMS review of mineral explorations should be sufficient to satisfy NEPA requirements under most circumstances. Therefore, AWEA requests that MMS issue a Notice of a Proposed CER for public comment in order to finalize a new CER rule by early 2009 shortly after promulgation of this Final Rule.

State Review of Survey Proposals under the Coastal Zone Management Act (CZMA)

CZMA review of federal planning and permitting decisions is governed by the terms of approved state plans. Some plans require state concurrence before MMS issues a permit for G&G activities on the OCS (a routine administrative action under MMS rules governing exploration for oil, gas and sulfur). *See* 30 C.F.R. § 251.6-2(c)(1). We note that the Gulf Coast States have chosen *not* to require CZMA review for specific G&G permit applications, except for very deep borings into the OCS. Whether CZMA review of proposed G&G activity relating to offshore wind development (including seabed surveys and core sampling for met tower and wind tower construction, engineering) is necessary should be determined by the affected states after consultation. MMS should not presume that such review will be required.

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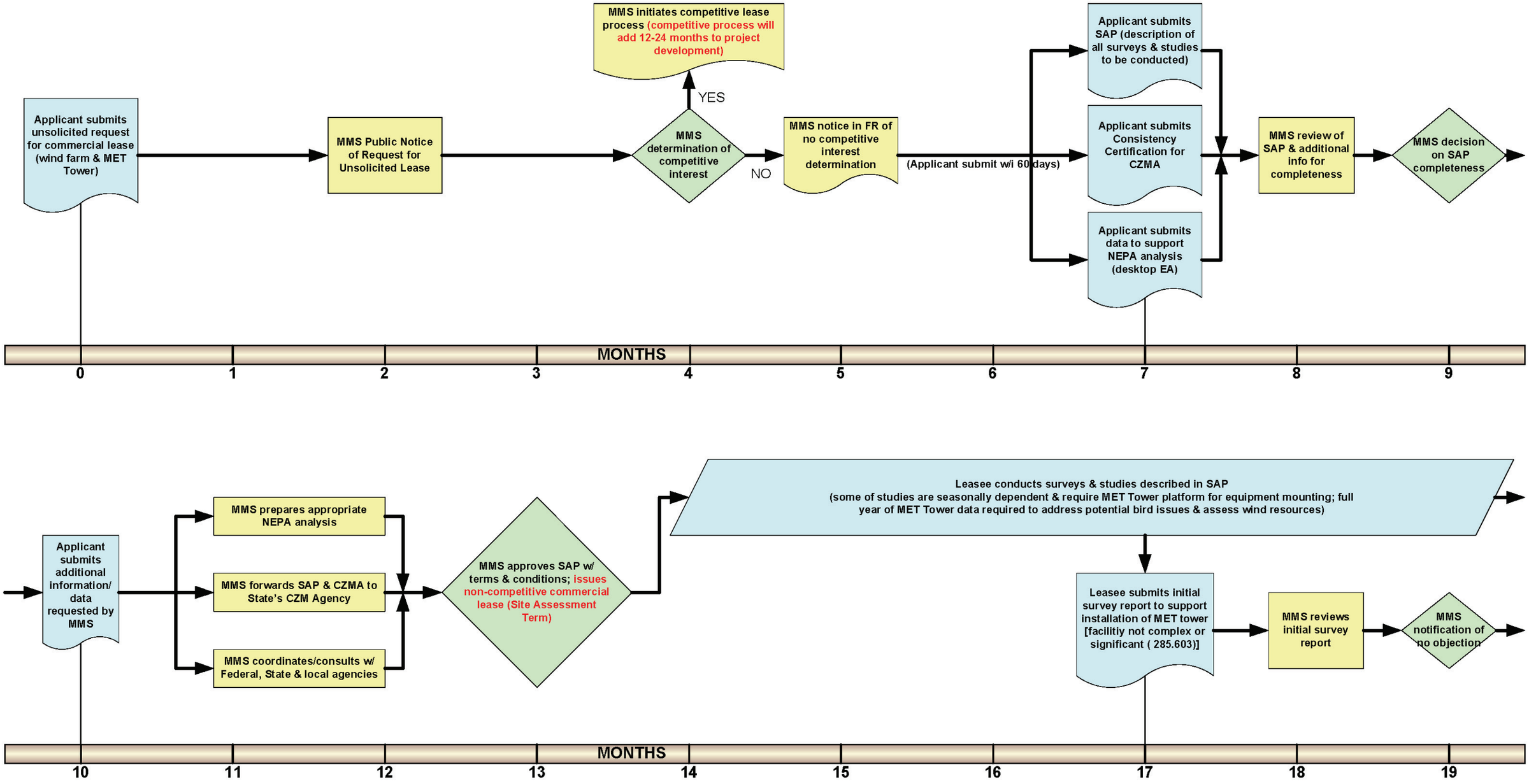
[24] *See* Department of the Interior, *Departmental Manual* at 516 DM 15.4.

[25] *See* Minerals Management Service, U.S. Department of the Interior, *Final Programmatic Environmental Impact Statement for the Outer Continental Shelf Alternative Energy and Alternate Use Program*, § 5.2.1.2 (2007) (PEIS) (mineral surveys have "negligible impacts").

Earlier Review of Facility Design Report, and Fabrication and Installation Report
AWEA understands the need for a detailed environmental review process before construction of any proposed offshore wind farm, and as illustrated in **Figures 1 and 2**, any proposed development will have to follow the process proposed by MMS. The industry, however, sees no reason why preparation and MMS review and approval of the Facility Design Report and Fabrication and Installation Report, cannot proceed in parallel with MMS's preparation of the EIS and review of the COP. As illustrated in Figure 2, proceeding in parallel can reduce the overall project development timeline by four to six months.

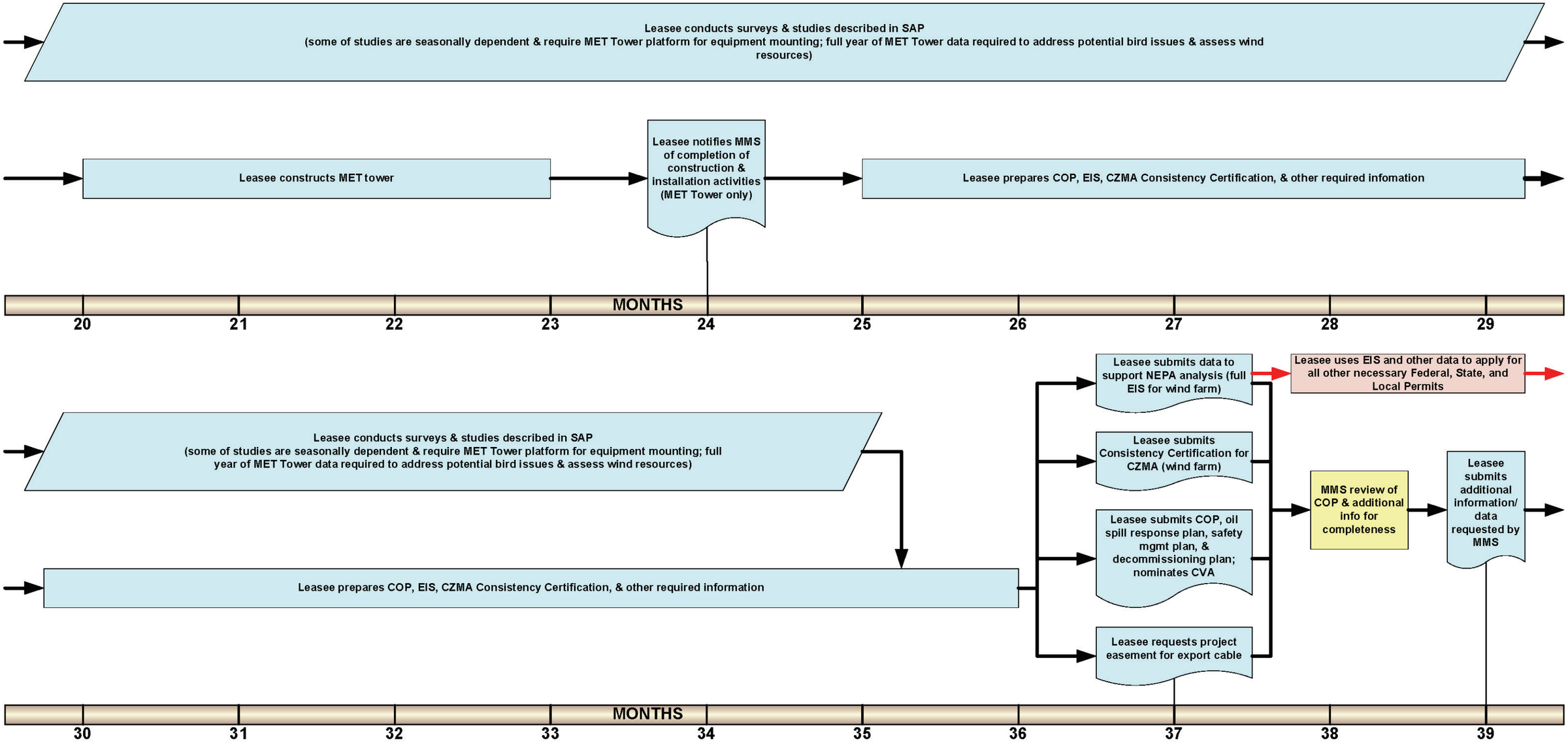
Best Available and Safest Technology
The Proposed Rule requires use of "best available and safest technology" for MDCFs and for wind turbine facilities, yet the use of the "best available and safest" will be difficult to ascertain at this time. AWEA believes that such a requirement is premature for a new industry where many different practical technologies may be installed before it will be possible to reach an informed judgment as to which technology is "best available" or "safest." These terms are used for emission control equipment where incremental differences in control may have a significant impact on long term public health, but are not appropriate for technologies that measure scientific conditions in remote locations with no possible impact on public health. Proposed §§ 285.606(a)(2) and 285.621(b) already require that the proposed activities be "safe." There is no need for a second safety requirement unless and until application of new alternative energy technologies demonstrate a need for a tighter safety standard.

Figure 1. BASECASE - Postulated Application of MMS Proposed Process for Non-Competitive Commercial Lease to Offshore Wind Farm (including meteorological tower)



KAS\MMS process-BASECASE\8/27/2008

Figure 1. BASECASE - Postulated Application of MMS Proposed Process for Non-Competitive Commercial Lease to Offshore Wind Farm (cont.)



KAS\MMS process-BASECASE\8/27/2008

Figure 1. BASECASE - Postulated Application of MMS Proposed Process for Non-Competitive Commercial Lease to Offshore Wind Farm (cont.)

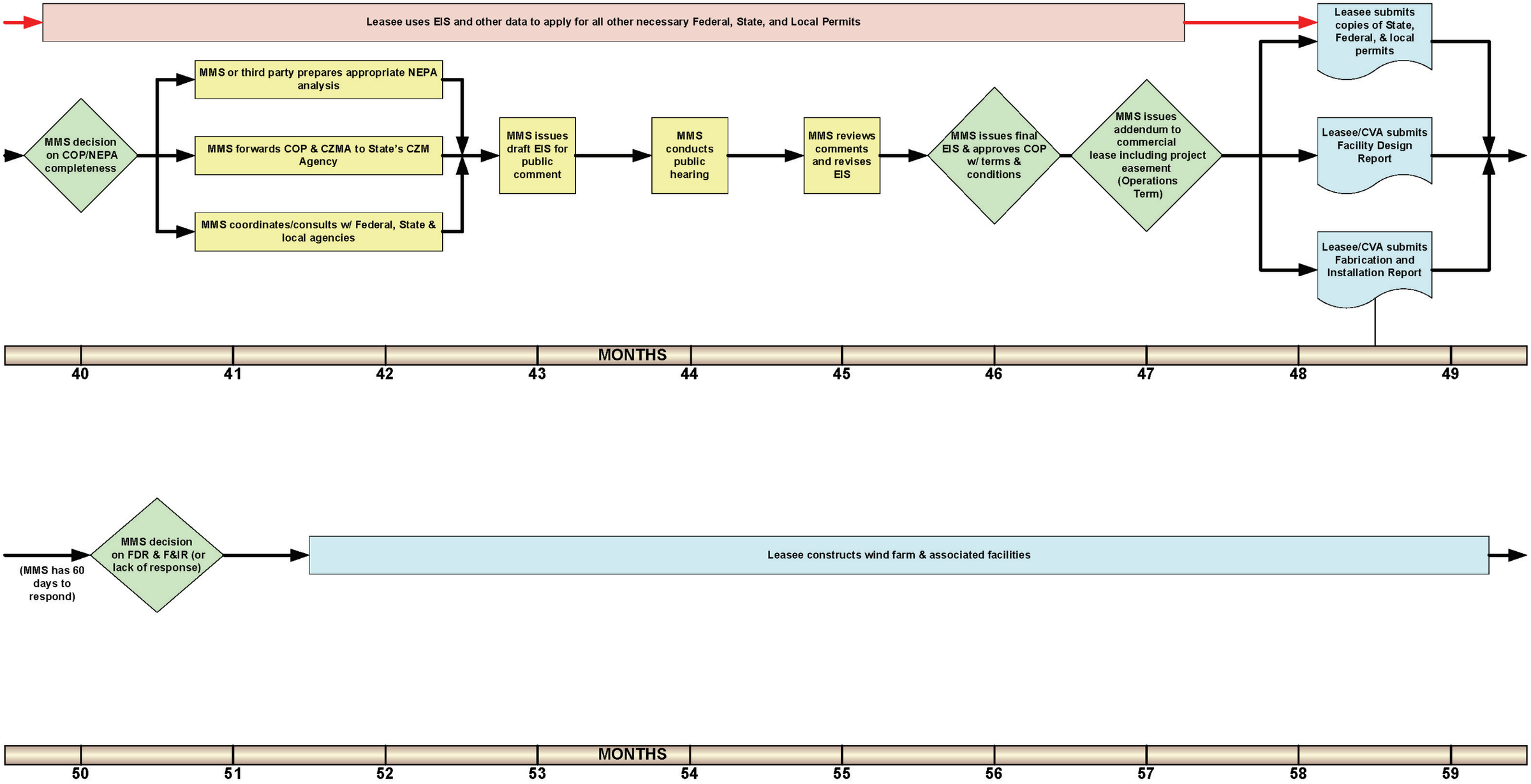


Figure 1. BASECASE - Postulated Application of MMS Proposed Process for Non-Competitive Commercial Lease to Offshore Wind Farm (cont.)

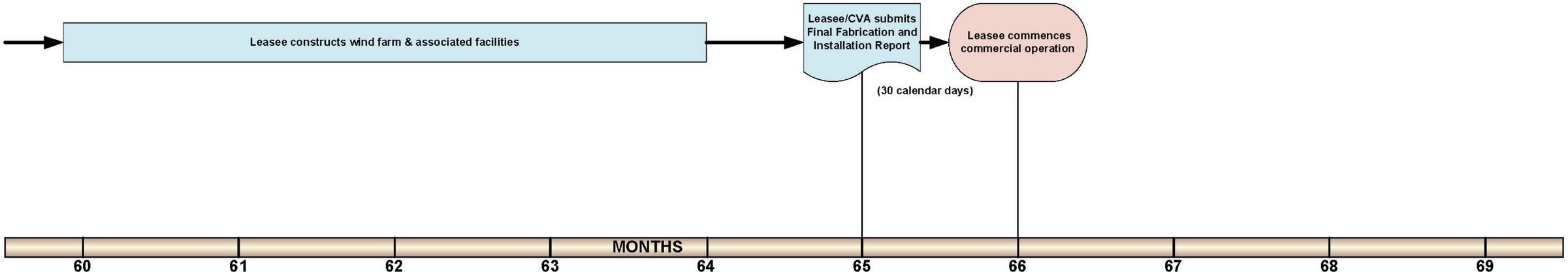
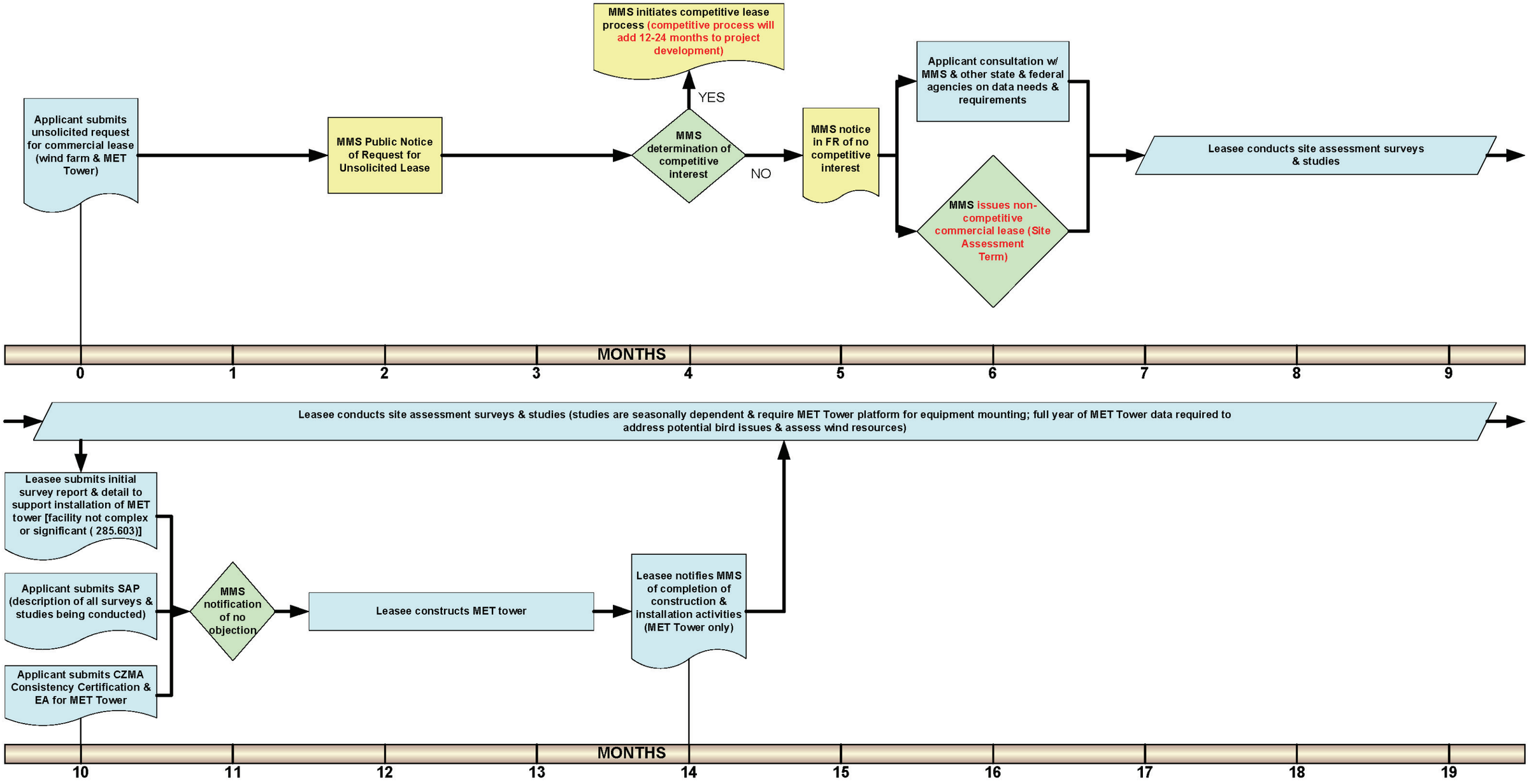


Figure 2. **ALTERNATIVE CASE - Postulated Application of Suggested Revisions to MMS Proposed Process for Non-Competitive Commercial Lease to Offshore Wind Farm (including meteorological tower)**



KAS\MMS process-ALTERNATIVE\8/28/2008

Figure 2. **ALTERNATIVE CASE - Postulated Application of Suggested Revisions to MMS Proposed Process for Non-Competitive Commercial Lease to Offshore Wind Farm (cont.)**

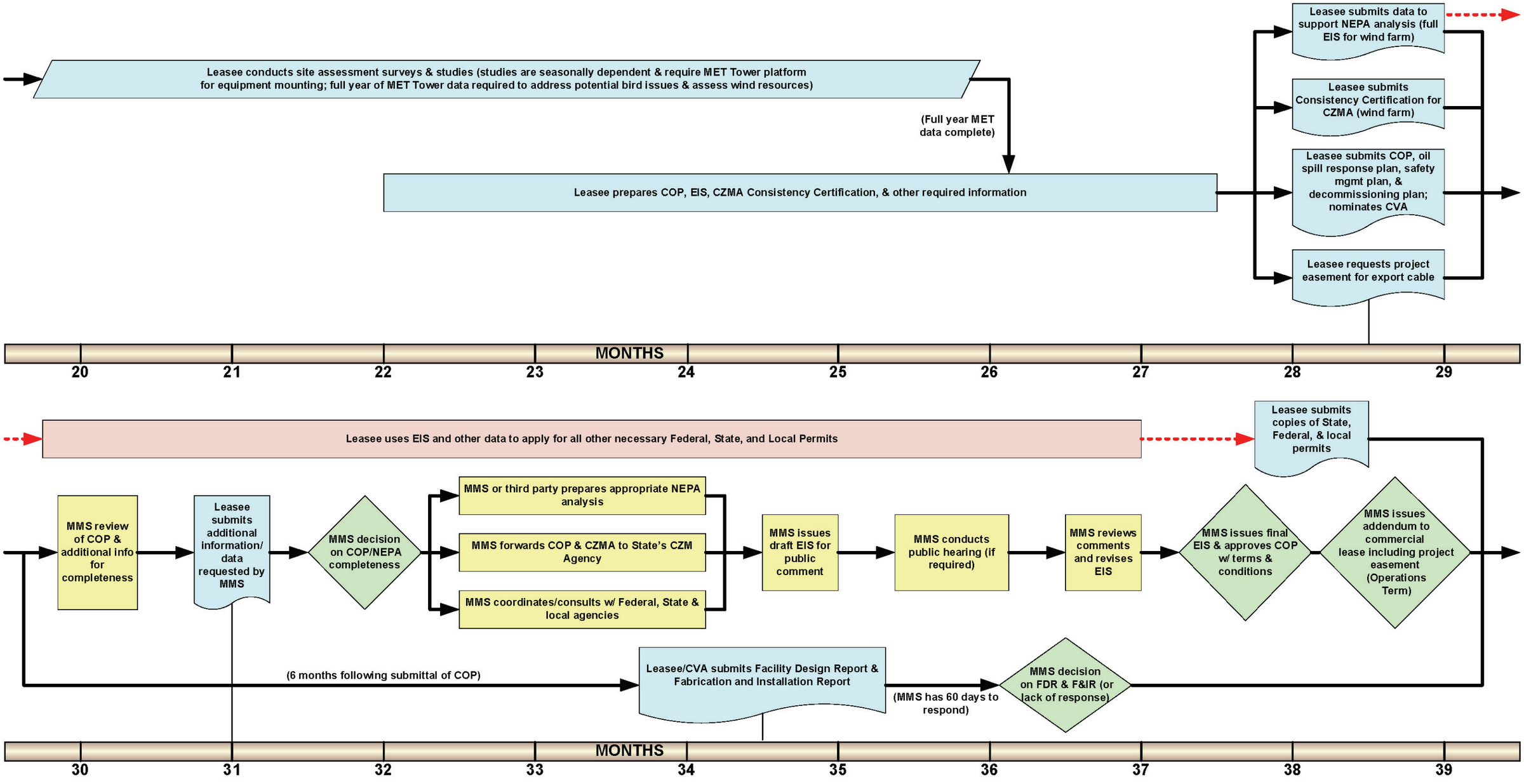
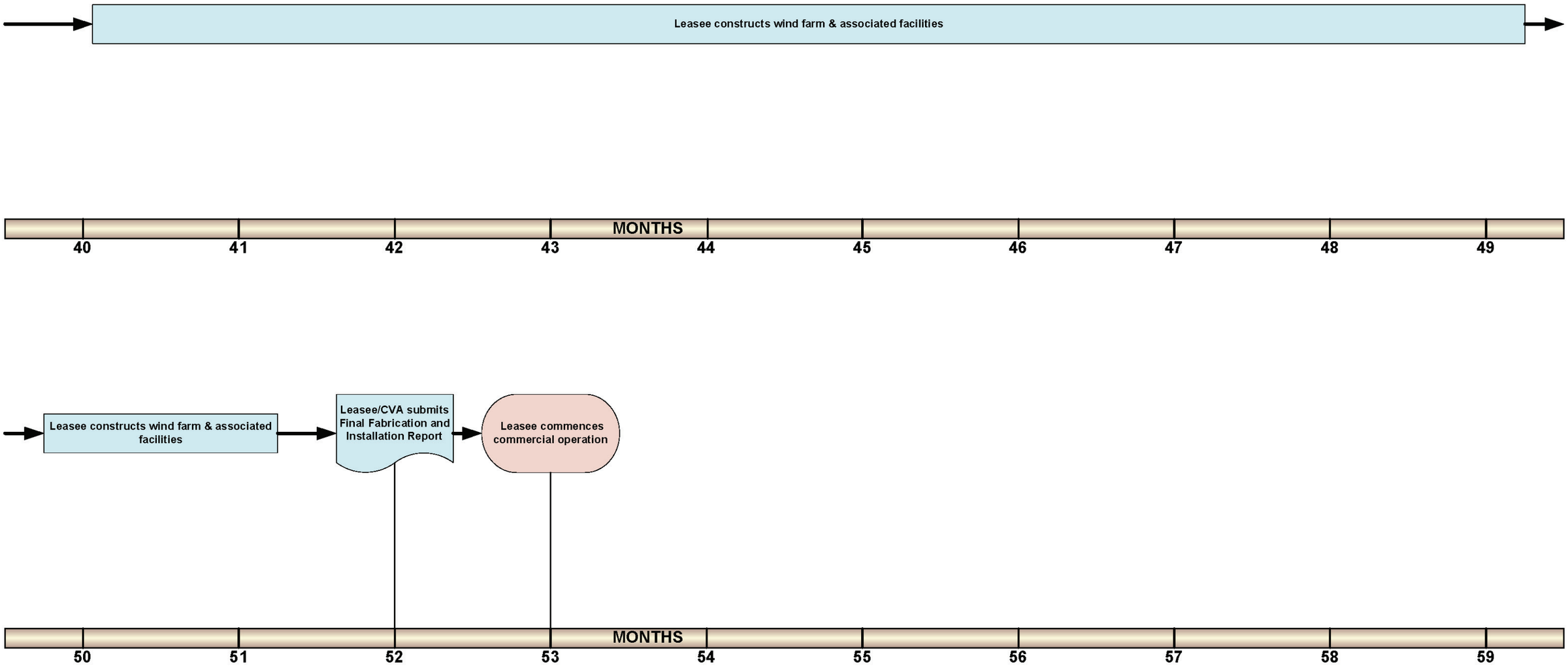


Figure 2. **ALTERNATIVE CASE - Postulated Application of Suggested Revisions to MMS Proposed Process for Non-Competitive Commercial Lease to Offshore Wind Farm (cont.)**



F.2: Section-by-Section Discussions and Recommendations

Existing Text of §§ 285.600, .605 and .613 (provisions relevant to seabed surveys considered together):

§ 285.600 What plans and information must I submit to MMS before I conduct activities on my lease or grant?

You must submit a SAP, COP, or GAP and receive MMS approval as set forth below:

* * *

(a) [Before you:] Conduct any site assessment activities on your commercial lease [, you must:] Submit and obtain approval for your Site Assessment Plan (SAP) according to §§ 285.605 through 285.612.

* * *

§ 285.605 What is a Site Assessment Plan (SAP)?

(a) A SAP describes the surveys you plan to perform and other activities you propose to conduct for the characterization of your commercial lease, including your project easement. At a minimum, your SAP must describe how you will conduct the following surveys on your lease. (1) Physical characterization surveys (e.g., geological and geophysical surveys or hazards surveys); (2) Resource assessment surveys (e.g., meteorological and oceanographic data collection); and (3) Baseline environmental surveys (e.g., biological, archaeological, or socioeconomic surveys).

(b) You must receive MMS approval of your SAP before you can begin any activities on your lease as provided in § 285.613.

* * *

§ 285.613 When may I begin conducting activities under my approved SAP?

After MMS approves the SAP, the applicant may begin to conduct any approved activities that do not involve the construction of facilities or any other seabed disturbing activities on the OCS.

Discussion: One critical source of unwarranted delay in the planning and review procedures set out in subpart F pertains to the proposed requirement for extensive and time-consuming NEPA analysis before wind park developers can conduct seabed surveys. Routine seabed survey activities are well-understood and known to be environmentally benign. Timely authorization to perform these surveys is critical to project development schedules, because survey results are a prerequisite to effective planning for cable routes and the locations and designs of met towers and wind towers. The Proposed Rule nevertheless contemplates delaying seabed survey activities until MMS completes an EIS for a lessees SAP. Under proposed § 285.600(a), a developer cannot conduct "any site assessment activities [for a] commercial lease" until MMS approves its SAP. Moreover, SAP approval requires NEPA review (proposed § 285.601(d)), which for the first generation of offshore wind projects is expected to entail preparation of an EIS. 73 Fed. Reg. at 39,388(c.1).

AWEA respectfully submits that neither SAP approval nor project-specific NEPA analysis should be required as a prerequisite to initiation of subsea surveys. Subsea survey activities, including subbottom profiling, magnetometry, and the collection of shallow core samples and

grab samples, have been thoroughly studied and found to have negligible environmental impacts. In fact, current MMS regulations allow oil and gas developers to conduct geological and geophysical (G&G) surveys under pre-lease exploration permits (30 C.F.R. §251.3(a)), which are typically issued without project-specific analysis of environmental effects under a longstanding categorical exclusion.[26] The environmental effects of G&G surveys for offshore wind farms are no different from the effects of G&G surveys for oil and gas or mineral development projects. Indeed, the PEIS for the AEAU Program confirmed that subsea surveys would have "negligible impacts."[27]

MMS should revise its Proposed Rule to enable developers of offshore wind resources to engage in pre-lease G&G activities on the same terms as developers of oil, gas and mineral resources. The Final Rule for the AEAU Program should include G&G permit provisions patterned on the existing permitting provisions for oil and gas and sulfur exploration. Pre-lease permits, issued under MMS's section 388 authority to grant easements and rights of way for alternative energy uses of the OCS,[28] would streamline the planning process by facilitating early acquisition of key information on seabed conditions. Additionally, MMS should confirm that its existing categorical exclusion for G&G permits applies to G&G permits for alternative energy development.[29]

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[26] MMS regulatory and permitting actions that are categorically excluded from case-specific review in an EA or EIS include:

> approval of offshore geological and geophysical mineral exploration activities, except when the proposed activity includes the drilling of deep stratigraphic test holes or uses solid or liquid explosives.

Department of the Interior, *Departmental Manual* at 516 DM 15.4 (available at http://elips.doi.gov/app_dm/act_getfiles.cfm?relnum=3625).

[27] MMS's programmatic review of the environmental effects of the AEAU Program included the finding that:

> Impacts to geologic features and processes associated with these activities are expected to be negligible since they mainly involve remote studies that would be of short duration and would not disturb the seafloor. Bottom sampling, Vibracore sampling, and deep boring would result in some disturbance to the seafloor. However, once the activity is completed, recovery would occur at a rate proportional to the rate of sedimentation in the area of interest.

PEIS § 5.2.1.2.

[28] The competitive allocation and fair return provisions of section 388, 43 U.S.C. § 1337(p)(2)(C), (p)(4)(h), do not preclude the issuance of G&G permits to alternative energy developers. Nothing in section 388 prevents MMS from reaching a finding that there is no competitive interest in non-exclusive authorizations to conduct G&G activity. Moreover, pre-leasing G&G permits would clearly provide a fair return to the federal government by expediting the leasing process and improving the information available to potential bidders.

[29] In AWEA's view, G&G surveys for an alternative energy project are "geological and geophysical mineral exploration activities" within the meaning of 516 DM 15.4 (quoted more fully in the preceding footnote) because determining the mineral composition of the seabed is the focus of this work. If MMS concludes that the existing categorical exclusion cannot be interpreted to cover G&G surveys for alternative energy projects, it should act as quickly as possible to revise the existing categorical exclusion to encompass identical G&G work undertaken in connection with alternative energy projects.

Authorization to conduct initial subsea surveys prior to SAP approval could significantly speed the development of offshore wind farms. First, early G&G results would accelerate met tower planning and installation. By the time its SAP was approved, an offshore wind developer would already have the information on seabed conditions needed to begin met tower construction. Moreover, a wind farm developer with early authorization by permit to collect G&G data will also be able to prepare its SAP and secure MMS approval more quickly. Knowledge of seabed conditions will simplify the issues pertaining to met tower design and location that a SAP must address. Indeed, the review scheme contemplated by the Proposed Rule, under which wind farm developers must propose both survey protocols (including G&G work) and met tower plans in a single SAP submission, builds in a need for revisions and administrative delay as survey results prompt modifications in met tower plans. Pre-lease G&G permits would allow wind farm developers to steer clear of this cul-de-sac.

Finally, pre-lease permit authorization to conduct G&G surveys would also allow wind farm developers to shorten development timetables by combining SAP and COP submissions under proposed § 285.601. To combine SAP and COP submissions under this provision, a developer would be required to "provide sufficient data and information with [its] COP for MMS to complete the needed reviews and NEPA analysis." Moreover, a developer would be required to revise its COP and wait while MMS conducted additional reviews "if new information [became] available" after site assessment activities were complete. Early completion of site survey work (including, most importantly G&G work) under the permitting provisions recommended here would significantly improve prospects of wind farm developers' successfully invoking this provision. Absent an opportunity to conduct early (pre-SAP) G&G surveys, any effort to secure simultaneous approval for a SAP and COP would almost certainly result in post-submission COP revisions and additional delay.

AWEA Recommendations: MMS should revise the Proposed Rule to enable developers of offshore wind resources to engage in pre-lease G&G activities on the same terms as developers of oil, gas and mineral resources. In addition, MMS should clarify that its existing categorical exclusion for G&G permits applies to permits for G&G work in support of alternative energy projects.

Existing text of §§ 285.605(c) and .614(b) (provisions relating to additional SAP requirements for multiple and complex facilities):

§ 285.605 What is a Site Assessment Plan (SAP)?

* * *

> (c) If you propose to install facilities on the OCS (e.g., single-monopile meteorological towers), you must submit the information required in § 285.610(b), as part of your SAP. If you propose to construct multiple facilities or a facility which MMS determines to be complex or significant, we will require you to submit the additional reports and information required in § 285.614(b) and to nominate a Certified Verification Agent (CVA) as required in § 285.706.

§ 285.614 When may I construct OCS facilities proposed under my SAP?

* * *

(b) If you are constructing multiple facilities or a facility deemed by MMS to be complex or significant as provided in § 285.605(c), you must complete the activities described in § 285.610(b) and submit an initial survey report of the results of those activities to MMS. You also must submit the following before construction may begin:

(1) Facility Design Report described in § 285.701;

(2) Facility Fabrication and Installation Report described in§ 285.702; and

(3) Your Safety Management System described in § 285.810.

Discussion: Proposed § 285.605(c) indicates that SAPs involving proposals to construct "multiple facilities or a facility which MMS determines to be complex or significant" will require additional information, beyond that required for single-facility SAPs, as described in Section 285.614(b). In addition, SAPs describing construction of multiple or complex facilities require nomination of a Certified Verification Agent.

Proposed § 285.605(c) could be interpreted to require a wind farm developer proposing to construct two or three met towers, which may be required at larger wind farm sites, to meet the additional requirements of proposed § 285.614(b). AWEA does not believe the construction of two or three identical (or nearly identical) met towers should trigger these additional requirements, which will add significantly to the time and expense of SAP submission.

Recommendation: Proposed § 285.605(c) should be revised to read as follows:

(c) If you propose to install a simple facility or combination of facilities on the OCS (e.g., three or fewer meteorological towers of conventional design), you must submit the information required in § 285.610(b), as part of your SAP. If you propose to construct a facility or combination of facilities that MMS determines to be complex or significant, we will require you to submit the additional reports and information required in § 285.614(b) and to nominate a Certified Verification Agent (CVA) as required in § 285.706.

Existing text: § 285.606 What must I demonstrate in my SAP?

(a) Your SAP must demonstrate that you have planned and are prepared to conduct the proposed site assessment activities in a manner that conforms to your responsibilities listed in § 285.105(a) and:

(1) Conforms to all applicable laws, implementing regulations, lease provisions and stipulations or conditions of your commercial lease;

(2) Is safe;

(3) Does not unreasonably interfere with other uses of the OCS, including those involved with national security or defense;

(4) Does not cause undue harm or damage to natural resources, life (including human and wildlife), property, or the marine, coastal, or human environment; or to sites, structures, or objects of historical or archaeological significance;
(5) Uses best available and safest technology;
(6) Uses best management practices; and
(7) Uses properly trained personnel.

* * *

Discussion: Proposed § 285.606(a)(5) requires use of "best available and safest technology." Use of a "best available and safest technology" requirement is premature for new industry where many different practical technologies must be installed before development of any track record as a basis for determining which technology is "best available" or "safest." How is "best available and safest technology" determined for measurement studies? Who will determine whether meteorological tower monopile foundations are safer than tripod foundations or jack-up barges with meteorological towers on the barge? These terms are used for emission control equipment where incremental differences in control may have a significant impact on long term public health, but are not appropriate for technologies that measure scientific conditions in remote locations with no conceivable adverse impact on public health.

AWEA Recommendation: Proposed § 285.606(a)(2) already requires that proposed activities be "safe." AWEA submits that that is sufficient to address safety concerns and that subsection (a)(5) be omitted until and unless a sufficient record of scientific measurement studies demonstrates a need for a tighter safety standard.

Existing Text: § 285.610 What must I include in my SAP?

Your SAP must include the following information, as applicable. We will keep this information confidential to the extent allowed by law.

* * *

[a] (4) Commercial lease stipulations and compliance[, including a] description of the measures you took, or will take, to satisfy the conditions of any lease stipulations related to your proposed activities.

Discussion: This section is ambiguous and could be read to require an applicant to anticipate and agree to comply with conditions that *might* be stipulated by MMS in the future in the lease document.

AWEA Recommendation: Section 285.610(a)(4) should be modified to read as follows:
Your SAP must include the following information, as applicable. We will keep this information confidential to the extent allowed by law.

* * *

[a] (4) Commercial lease stipulations and compliance[, including a] description of the measures you took, or will take, to mitigate the impacts of proposed activities plus a commitment to comply with the conditions of any final lease stipulations related to your proposed activities."

Existing Text: § 285.612 How will MMS process my SAP?

(a) The MMS will review your submitted SAP, and additional information provided pursuant to § 285.611, to determine if it contains the information necessary to conduct our technical and environmental reviews. We will notify you if your submitted SAP lacks any necessary information.

(b) The MMS will prepare appropriate NEPA analysis.

(c) The MMS will forward one copy of your SAP, consistency certification, and associated data and information under the CZMA to the State's CZM Agency after all information requirements for the SAP are met.

(d) As appropriate, we will coordinate and consult with relevant Federal, State, and local agencies and provide to other Federal, State, and local agencies relevant nonproprietary data and information pertaining to your proposed activities.

Discussion: In elaborating on the requirement that MMS prepare an "appropriate NEPA analysis" of a SAP, the preamble states: "We anticipate that initially, all commercial development projects will require an EIS for each phase of the project (*i.e.*, one EIS for the SAP and one EIS for the COP)." 73 Fed. Reg. at 39,419(c.2); *see also id.* at 39,388(c.1) ("The SAP would undergo the appropriate NEPA reviews and may require either an Environmental Impact Statement (EIS) or an Environmental Assessment (EA).").

AWEA believes that in the absence of extraordinary circumstances that give rise to real concerns of uncharacteristically significant environmental effects, preparation of an EIS for a wind farm SAP is wholly unjustified. The only actions covered by a typical wind farm SAP with any discernible environmental effects are G&G surveys and met tower construction. MMS has already established a categorical exclusion for ordinary G&G activities. (See the discussion of proposed §§ 285.600, .605 and .613 above.) In addition, MMS has carefully reviewed subsea surveying and met tower installation in its PEIS for the AEAU Program, which concluded that subsea surveys are likely to have "negligible" environmental impacts and that installation of a typical meteorological tower is unlikely to cause a significant environmental impact. PEIS §§ 3.5.2, 5.2.1.2.

In light of these existing analyses, there should be a strong presumption that approval of a SAP will *not* require preparation of an EIS. Indeed, most wind farm SAPs should not even require an EA. As we have noted, the survey activity falls within an existing categorical exclusion. Construction of a conventional met tower should also be covered by a categorical exclusion, which MMS should establish as quickly as possible. An EA or EIS should only be required for a wind farm SAP if the applicant seeks authorization to conduct unusually intrusive G&G testing or to install a met tower in a particularly sensitive location. AWEA acknowledges that a rulemaking proceeding may be required to establish a categorical exclusion for conventional met tower construction, AWEA recommends that the Proposed Rule be revised to accommodate the promulgation of any CER by MMS in the future.

AWEA Recommendation: Proposed § 285.612 should be revised to read as follows:

(a) The MMS will review your submitted SAP, and additional information provided pursuant to § 285.611, to determine if it contains the information necessary to conduct

our technical and environmental reviews. We will notify you if your submitted SAP lacks any necessary information.
(b) The MMS will prepare a NEPA analysis. MMS will consult with affected federal and state agencies to determine whether a CER, EA or EIS is appropriate.

The overview discussion of the NEPA review of the SAP should mirror the statement in the Development Process: "The SAP would undergo the appropriate NEPA reviews and may require an Environmental Impact Statement (EIS), an Environmental Assessment (EA) or a Categorical Exclusion Review (CER)."

Existing Text: § 285.621 What must I demonstrate in my COP?

Your COP must demonstrate that you have planned and are prepared to conduct the proposed activities in a manner that conforms to your responsibilities listed in § 285.105(a) and:

* * *

(e) Uses best available and safest technology;

Discussion: Section 285.621(e) requires use of "best available and safest technology" for wind park technology. This requirement is premature in the context of a new industry where many different practical technologies must be installed and tested before experience provides a reasonable basis for identifying one approach as the "best available" or "safest." MMS has not indicated how such a determination would be made, or by whom. Who will designate the "best available and safest technology" for wind turbines and blades? Who will determine which manufacturer makes the safest turbines or blades? How will MMS define "best" for turbines? Again, these terms are commonly applied to emission control equipment where incremental differences in control may have a significant impact on long term public health, but are not appropriate for technologies that generate wind energy miles offshore in remote locations with no adverse impact on public health.

AWEA Recommendation: Section 285.621(b) already requires that the proposed activities be "safe". That is sufficient to address the safety concern and AWEA respectfully recommends that subsection (e) be stricken in its entirety.

SUBPART G - FACILITY DESIGN, FABRICATION, AND INSTALLATION: 73 Fed. Reg. 39,427-429 (section-by-section analysis) & 73 Fed Reg. 39,493-97 (proposed text of §§ 285.700-714)

G.1: General Observations

Since MMS chose not to incorporate design standards into the proposed MMS Rule, offshore wind developers will not have a design target, yet must still satisfy MMS that "accepted" engineering and industry practices and standards are being followed. The result is a subjective process that raises significant budgeting and scheduling concerns for projects under development.

MMS is in the process of conducting a series of reviews of international standards and guidance documents, and while this is a thoughtful approach to understanding differences among these standards, completing this analysis may well take more time than MMS's rulemaking timetable and the project development timetables for the first generation of US offshore wind farms will allow. If nothing else, early projects need to know the standards immediately, and have those standards apply for the duration of the project, in order not to further delay projects and make them uneconomic.

AWEA believes that a phased approach may therefore be warranted. By using the valuable information and knowledge embedded in existing standards, such as those used in Europe, with which the Certified Verification Agents (CVAs) will already be familiar, this phased approach can advance MMS's policies, including safety and reliability goals, without impeding the growth of the industry. A number of companies have the capacity to effectively take on the role of the CVA and in fact have considerable experience in such a role. While many of them were formed or are based overseas, most if not all have operations in the US and are interested in participating in the US offshore alternative energy industry.

Furthermore, offshore wind is now and will likely continue to be an internationally oriented industry. This is to the benefit of the US, as US projects will benefit from global best-practices, and US manufacturers will be able to develop and market products that meet the requirements of a world-wide market. In order to facilitate the US participation in this global industry, the US must adopt internationally accepted standards whenever possible.

With respect to the CVA's responsibility to "verify, witness, survey, or check" most if not all of a wind farm installation: Given that construction consists of the repeated installation of numerous, nearly identical units, and given that a great deal of information is available to the CVA both before and after installation (e.g., geotechnical data or the ability to test bolt tensions), requiring the CVA to observe the work to this extent is beyond what is necessary to ensure safe and proper installation; such a requirement could cause costly delay, however.

The draft regulations contain numerous instances where a developer might lose their position in the process simply because the regulations do not accommodate the inevitable changes and delays that arise from projects of this complexity, nor accommodate the need for developers to

secure necessary permits before all project information is available (e.g. data on vessels). Strict regulations that do not accommodate change or delay, or do not accommodate contingency planning, do not necessarily serve a public purpose, and in fact could result in squandering agency resources by compelling developers to re-start an application process simply because of a delay or change that could otherwise be easily accommodated. The regulations should better allow for detailed specifications further into the development process, and for an efficient review of changes and delays, with tests to ensure that the change or delay was not the result of poor execution, and that the change or delay does not undermine the purpose of the regulations.

We note that wind turbines present essentially no environmental risk in the event of failure, and that personnel are in the turbine structures for a small fraction of time, and even then only in good weather conditions. Safety and failure tolerances should reflect the inherently safe and environmentally benign nature of wind turbines, as to do otherwise would work against the economics of this important, inherent feature of wind energy.

G.2: Section-by-Section Discussions and Recommendations

Existing Text §§ 285.701, 702, 705, 707 and 711 (considered together):

§ 285.701 What must I include in my Facility Design Report?

> Your Facility Design Report provides specific details of the design of any facilities, including cables and pipelines, that are outlined in your approved SAP, COP, or GAP . . . You must include the following items in your Facility Design Report . . .
>
> > (k) Certification statement and location of records as required in § 285.714(c). The following statement [must specifically be made]: 'The design of this structure has been certified by a MMS approved Certified Verification Agency to be in accordance with *accepted engineering practices* and the approved SAP, GAP, or COP as appropriate [emphasis added].'

§ 285.702 What must I include in my Fabrication and Installation Report?

> Your Fabrication and Installation Report must describe how your facilities will be fabricated and installed in accordance with the design criteria identified in the Facility Design Report, your approved SAP, COP, or GAP, and *generally accepted industry standards and practices* [emphasis added].

§ 285.705 What is the function of a Certified Verification Agent (CVA)?

> (a) You must use a Certified Verification Agent (CVA) to:
>
> > (1) Ensure that your facilities are designed, fabricated, and installed in conformance with *accepted engineering practices* and the Facility Design Report and Fabrication and Installation Report; and
> >
> > (2) Ensure that repairs and major modifications are completed in conformance with *accepted engineering practices* [emphasis added].

§ 285.707 What are the CVA's primary duties for facility design review?

> (a) The CVA must use good engineering judgment and practices in conducting an independent assessment of the design of the facility. The CVA must certify in the

Facility Design Report to Mms that the facility is designed to *withstand the environmental and functional load conditions appropriate for the intended service life at the proposed location* [emphasis added].

§ 285.711 What reports must the CVA submit for project modifications and repairs?

(a) The CVA must verify and, in a report to us, certify that major repairs and major modifications to the project conform with *accepted engineering practices* [emphasis added].

Discussion: The preamble to the Proposed Rule indicates that "MMS considered incorporating design standards in these regulations" and "may elect to incorporate into the regulations those standards that are expected to have widespread applicability to Alternative Energy projects."[30] 73 Fed. Reg. at 39,427. However, MMS's initial approach, as reflected in the language of the Proposed Rule, is to provide simple and general guidance, reflected in the language above.

Beginning with its first project, completed in 1991, the offshore wind industry in Europe has developed criteria for certifying offshore wind farms and has successfully implemented approval strategies using standards developed by entities referenced by MMS, including the International Electrotechnical Commission (IEC), Det Norske Veritas (DNV) and Germanischer Lloyds (GL). The offshore wind industry in Europe has nearly two decades of experience building and operating offshore wind farms (which now number more than two dozen) without major incident relating to structural or safety issues.

Since no standards are specified in the proposed MMS Rule, offshore wind developers will not have a design target, yet must still satisfy MMS that "accepted" engineering and industry practices and standards are being followed. The result is a subjective process that raises significant budgeting and scheduling concerns for projects under development.

As it considers whether to incorporate standards into the regulations, MMS is reviewing international standards and guidance documents for alternative energy systems; assessing the applicability of American Petroleum Institute (API) and International Standards Organization (ISO) standards; and participating in a project to compare IEC and API standards. Undertaking such a series of studies is a thoughtful approach to the numerous issues embedded in a comparison of the various standards that could be adopted.

Completion of this careful analysis, though, may well take more time than MMS's rulemaking timetable and the project development timetables for the first generation of US offshore wind farms will allow. This is especially true if one considers that the completion of these studies will not immediately result in a new set of standards specific to the US, should it be determined that such new standards are necessary. Specific design standards will need to be drafted and opened to public comment and perhaps other review before being issued. The inherently detailed and

[30] In adopting any new standards for offshore wind project certification, MMS should take into consideration that all offshore wind turbines are unmanned during normal operation and should be classified as such so that only necessary structural safety, commensurate with unmanned structures with only economic failure consequences, is mandated.

technical nature of such standards, coupled with the diverse technology to which they might apply and the importance of avoiding unnecessary conflicts with existing standards (as conflicting standards would likely increase prices or otherwise retard growth of the industry), means that the creation and finalization of these standards will require a significant amount of time.

AWEA believes that a phased approach may be warranted. A phased approach would allow the nascent offshore alternative energy industry to continue to grow and take advantage of the momentum that has been building in recent years. At the same time, by using the valuable information and knowledge embedded in existing standards, with which the CVAs will already be familiar, this phased approach can advance MMS's policies, including safety and reliability goals, without impeding the growth of the industry.

Under the two-phase approach we are proposing, MMS would (1) rely on existing standards that have been developed and successfully applied overseas to ensure safe and efficient development of the US industry, while (2) pressing ahead with its analysis of those existing standards and other work required to determine the need for and, if necessary, formulate US-specific standards. Furthermore, such a phased approach may allow for a future US standard to benefit from the experience of designing and installing facilities in the US. Early US projects will benefit from the global experience while later US projects will benefit from early US developments.

Finally, in considering the benefits of the two-phased approach proposed here, we note that existing standards are, as new standards will need to be, comprehensive in the sense of applying to the *entire* generating plant and its operations. For example, it is not advisable or even feasible for one standard to apply to the foundation and support structure of a wind turbine and another to the turbine itself. While wind turbines do receive "Type" certification, such certification is in itself not sufficient to meet the needs of the MMS in these regulations. Nor would it be practical to adopt, for example, API standards to a foundation and support structure, without also applying those same standards to the turbine itself. This point can be further illustrated by the question of design limits for wind turbines. While the sorts of structures contemplated by the API standards may have design limits determined by sea state only (for example, a 100-year wave), the design limits of a wind turbine must also account for factors such as flexibility of the blades, protection in the event of electrical grid failure, and greater susceptibility to wind-related fatigue. Design limits of wind turbines may well be determined more by the interaction of a number of variables, as opposed to the extreme state of any one variable.

AWEA Recommendation: MMS should expedite the necessary analysis of existing standards and current European practices and adopt a transparent certification plan that can be immediately implemented to serve projects that are already in the pre-construction design phase.

More specifically, we propose a two-phase approach to certification:

> Phase 1: Upon issuance of the final Rule, the CVA will be required to certify the project to one of the existing standards cited in the preamble to the Proposed Rule (73 Fed. Reg. at 39,427). The standard to which the project will be certified will be proposed by the developer when the CVA is nominated. MMS would review the proposed standard in conjunction with its review of the CVA nomination.

Phase 2: During Phase 1, MMS will complete the standards assessment project and determine whether a new US standard is warranted. Should it be determined that an existing standard or standards are sufficient, then no further action would be required other than to update the regulations to specify one of these standards. Should a new US standard be deemed necessary, that standard would be developed, proposed, finalized, and issued as projects continued to progress under Phase 1. Projects developed under leases executed after issuance of the new standard would need to comply with the new standard. Projects developed under leases executed before the new standard took effect would be considered Phase 1 projects.

Additionally, we recommend that any standards that are adopted apply:

1. Specifically to wind turbines;
2. To the entirety of the generating unit, not just portions thereof; and
3. To unmanned structures (as offshore wind turbines are).

Furthermore, we recommend that internationally accepted standards, in particular ISO, be adopted whenever possible.

Existing Text: § 285.705 What is the function of a Certified Verification Agent (CVA)?

(a) You must use a Certified Verification Agent to:

(1) Ensure that your facilities are designed, fabricated, and installed in conformance with accepted engineering practices and the Facility Design Report and Fabrication and Installation Report; and

(2) Ensure that repairs and major modifications are completed in conformance with accepted engineering practices.

(b) The CVA is directly responsible for providing to MMS immediate reports of all incidents that affect the design, fabrication, and installation of the project and its components.

Discussion: It appears the role of the CVA will be critical in whatever certification process is adopted. MMS plans to delegate substantial technical responsibility to the developer's designated CVA, including recommendations for structural design and safety, operations, and best practices. We believe such an approach is both eminently practical for MMS, and also best ensures that seasoned engineers with considerable experience in offshore wind are utilized to ensure compliance with the standards.

There is a considerable body of experience and guidance, coming out of Europe mainly, upon which the CVA could draw in carrying out its verification and certification duties. A number of companies have the capacity to effectively take on the role of the CVA and in fact have considerable experience in such a role. While many of them were formed or are based overseas, most if not all have operations in the US and are interested in participating in the US offshore alternative energy industry.

The construction of oil or gas platforms, or experimental alternative energy units, typically involves the installation of one single unit. Often, only one vessel is involved in the installation of the unit. As a result, installation can generally be planned around a single forecasted weather window of appropriate duration.

Wind farm construction, on the other hand, consists of the repeated installation of numerous, nearly identical units. Depending on the size of the projects, many tens, if not over one hundred, units may be installed in a given year. The installation process of any one unit is relatively quick (perhaps less than 48 hours), and must carried out as rapidly as possible whenever favorable weather conditions present themselves at the construction site. If multiple vessels are active on the project, each is likely to be involved in the installation of a separate wind turbine.

The proposed regulations require the CVA to "verify, witness, survey, or check" nearly every aspect of the installation process, including transporting of the turbines. We understand these actions to mean the physical presence of a CVA agent during the installation, who would visually observe the installation process. Given the repetitive nature of installing numerous, identical structures, and given the information that will be available to the CVA both before and after the installation (e.g., geotechnical data or the ability to test bolt tensions), requiring the CVA to "verify, witness, survey, or check" most if not all of the installation is beyond what is necessary to ensure correct installation. Furthermore, given the logistical challenges described above, having an agent of the CVA available at each point of the installation process, for each and every turbine, could become economically challenging to the development given the costs incurred should a schedule not be met or equipment not efficiently utilized. We further note that it is in the CVAs' interest to ensure that they have access to all the information they need, whether this requires observing an installation or not, before issuing certification. Indeed, observing the installation process may not always be a particularly effective way to determine correct installation.

The US offshore wind industry is new and no projects have yet been installed in the US, and of course these regulations will be new, and the relationship between CVA, developer, and regulator will be new to all concerned. CVAs recognized by MMS will therefore be seeking guidance from the MMS to make informed judgments for US projects. Furthermore, MMS has not yet determined what safety requirements they will impose via the certification process. This situation can be addressed through MMS training, or providing orientation to, perspective CVAs.

We also note that CVAs, by the very nature of their work, will have access to considerable detail of the project's engineering, and that this detail will often be competitive in nature. Furthermore, CVAs will work for multiple project developers, and these developers will likely be competitors with one another. Further, while we understand and appreciate that MMS will protect confidential information to the extent required and allowed by law, much of the detailed information that a CVA will have access to —and that is competitive in nature and confidential— is not actually needed by the MMS in order to perform its duties. Rather, the MMS can look to the CVA to report back on its findings based on reviewing the data. All of this allows for a means to simultaneously protect confidential data and streamline regulatory administration by implementing the following guidelines in the regulations:

a) CVAs should not be allowed to also be consultants to other competing developers (as opposed to being a CVA), nor should CVAs be allowed to be developers themselves;
b) MMS should not require confidential data needed by the CVA to be released to MMS, rather MMS should accept the findings of the CVA based on their analysis of the confidential data.

AWEA Recommendation: MMS should include and expedite a training program to educate prospective CVA organizations and offshore developers in the US and orient them to the MMS expectations so developers will not be delayed because of CVA review that is not consistent with the expectations of MMS, or that is based on differing interpretations of MMS regulations.

We also recommend replacing any strict, prospective requirements for CVAs to "verify, witness, survey, or check" numerous steps to each and every unit, if the construction of the facility involves the repeated installation of nearly identical units. Instead of such requirements, the CVA should have to follow those requirements that will be incumbent upon them in order to make certification according to the standard stipulated (see above discussion). Alternatively, these actions take by the CVA could be defined in the regulation in the sense of "giving witness to" or testifying. Such a definition would not always require the physical presence of a CVA, if the CVA were able to testify to the correct installation to standards through another means, such as records monitoring. While the CVA may determine, in many cases perhaps, that being physically present and observing an aspect of the installation is necessary to produce a certification, this should not be a requirement. Rather, the CVA should decide what is the most economic and reliable means for issuing certification.

G.3: Responses to MMS Questions Relating to Subpart G

We request comments regarding both the domestic and international availability of CVA's that will be necessary to implement the OCS alternative energy program as described in the proposed rule.

There is a considerable body of experience and guidance, coming out of Europe mainly, that CVAs can draw upon in carrying out their verification and certification duties. A number of companies are qualified to take on the role of the CVA and in fact have considerable experience in such a role. While many of them were formed or are based overseas, most if not all have operations in the US and are interested in participating in the US offshore alternative energy industry.

SUBPART H - ENVIRONMENTAL AND SAFETY MANAGEMENT, INSPECTIONS, AND FACILITY ASSESSMENTS: 73 Fed. Reg. 39,430-432 (section-by-section analysis) & 73 Fed Reg. 39,497-500 (proposed text of §§ 285.800-833)

H.1: General Observations

MMS advocates a case-by-case approach at project sites for issues related to wildlife protection, archaeological resource protection, and safety management. This allows applicants to determine the most appropriate approach at specific locations

Some of the issues covered in subpart H are covered under existing laws and regulations, such as the Endangered Species Act (ESA) and the Marine Mammal Protection Act. It is crucial that the Final Rule not create confusion or additional layers of regulations or requirements.

H.2: Section-by-Section Discussions and Recommendations

Existing Text: § 285.801 What must I do to protect marine mammals, threatened and endangered species, and designated critical habitat?

* * *

(d) If there is reason to believe that a threatened or endangered species may be present while you conduct your MMS approved activities or may be affected by the direct or indirect effects of your actions:

(1) You must notify us that endangered or threatened species may be present in the vicinity of the lease or grant or may be affected by your actions; and

(2) We will consult with appropriate State and Federal fish and wildlife agencies and, after consultation, shall identify whether, and under what conditions, you may proceed.

(e) If there is reason to believe that designated critical habitat of a threatened or endangered species may be affected by the direct or indirect effects of your MMS approved activities:

(1) You must notify us that designated critical habitat of a threatened or endangered species in the vicinity of the lease or grant may be affected by your actions; and

(2) We will consult with appropriate State and Federal fish and wildlife agencies and, after consultation, shall identify whether, and under what conditions, you may proceed.

(f) If there is reason to believe that marine mammals may be incidentally taken as a result of your proposed activities:

(1) You must agree to secure an authorization from NOAA or the U.S. Fish and Wildlife Service (FWS) for incidental taking, including taking by harassment, that may result from your actions; and

(2) You must comply with all measures required by the NOAA or FWS including measures to affect the least practicable impact on such species and its habitat and

ensure no unmitigable adverse impact on availability of the species for subsistence use.

Discussion: The Endangered Species Act and the Marine Mammal Protection Act would apply to activities covered by a lease. It is sufficient to specify the information required for inclusion in plans to be submitted. Consultation with FWS and NOAA is included in Subpart F as well as existing regulation.

In August 2008, the U.S. Department of the Interior released proposed changes in Section 7 consultation requirements under the ESA. While AWEA is not taking a position on these proposed regulations, there may be a need to retain some of the provisions in this section should MMS become the lead agency in these circumstances.

AWEA Recommendation: AWEA requests that MMS remove the consultation requirements included in § 285.801(d), (e) and (f), barring major changes to the ESA Section 7 consultation requirements.

Existing Text: § 285.802 How must I protect archaeological resources?

(a) When you prepare your SAP, COP, GAP, or decommissioning application, you must consult with MMS about archaeological resources.

(1) If an archaeological resource is known to exist or if we have reason to believe that an archaeological resource may exist in the area of a proposed lease or grant, you must include an archaeological report with your SAP, COP, GAP, or decommissioning application. If you are uncertain of the archaeological survey requirements for your proposed lease or grant, you must consult with the MMS Federal Preservation Officer.

(2) We will specify the survey methods and instrumentation for conducting the archaeological survey and specify the issues to be addressed in the archaeological report.

Discussion/AWEA Recommendation: It will be difficult for an applicant to conduct field surveys at the point in the process when a SAP is being prepared. Specify that a desktop survey is sufficient for inclusion with a SAP.

Existing Text: § 285.803 What must I do if I discover a potential archaeological resource?

(d) If we incur costs in protecting the resource, under section 110(g) of the National Historic Preservation Act, we may charge you reasonable costs for carrying out preservation responsibilities under the OCS Lands Act.

Discussion/AWEA Recommendation: It is unclear why MMS would be incurring costs and what the boundaries of "carrying out preservation responsibilities" might be. AWEA asks that MMS clarify the authority under which the applicant may be required to reimburse the costs discussed.

Existing Text: § 285.810 What must I include in my Safety Management System?

You must submit a description of the Safety Management System you will use with your COP (provided under § 285.627(d)) and, when required by this part, your SAP (as provided in § 285.614(b)(3)) or GAP (as provided in § 285.651(b)(3)). You must describe:

(a) How you will ensure the safety of personnel or anyone on or near your facilities;

(b) Remote monitoring, control, and shut down capabilities;

(c) Emergency response procedures;

(d) Fire suppression equipment, if needed;

(e) How and when you will test your Safety Management System; and

(f) How you will ensure personnel who operate your facilities are properly trained.

Discussion/ AWEA Recommendation: AWEA expects that many of these requirements will be covered by the Occupational Safety and Health Act (OSHA) regulations. The applicable OSHA requirements should be referenced here.

Existing Text: § 285.813 When do I have to report removing equipment from service?

(a) The removal of any equipment from service may result in MMS applying remedies as provided in this part, when such equipment is necessary for implementing your approved plan. Such remedies may include an order from MMS requiring you to remove such equipment or facilities from the lease.

(b) For safety equipment:

(1) You must report within 24 hours when any required safety equipment is taken out of service for more than 12 hours. If you provide an oral notification, you must submit a written confirmation of this notice within 3 business days as required by § 285.105(c).

(2) If you remove any required safety equipment from service for greater than 60 calendar days you must submit written confirmation to MMS.

(3) You must notify MMS when you return the safety equipment to service

Discussion/AWEA Recommendation: The definition of "safety equipment" is unclear. As written, it could apply to a personal flotation device, which would make these requirements onerous. AWEA requests that MMS clearly define the safety equipment covered in this section.

Existing Text: § 285.821 Will MMS conduct scheduled and unscheduled inspections?

The MMS will conduct both scheduled and unscheduled inspections.

Discussion: Unscheduled inspections of offshore wind facilities, beyond "drive-by" spot inspections, would be difficult because offshore wind turbines are unmanned, secured facilities. The 24-hour shoreside monitoring station would be more appropriate for unscheduled inspections. The monitoring station would have real-time information on the condition and operation of the facility.

AWEA Recommendation: MMS should consider clarifying what types of facilities will be subject to unscheduled inspections. AWEA suggests that unmanned offshore wind turbines and platforms will be difficult facilities on which unannounced inspections can be conducted. However, the 24-hour onshore monitoring facilities would be more appropriate for these types of inspections.

Existing Text: § 285.830 What are my incident reporting requirements?

> (b) These reporting requirements apply to incidents that occur on the area covered by your lease or grant under this part and that are related to activities resulting from the exercise of your rights under your lease or grant under this part.

Discussion: Section 285.830(b) could be interpreted to cover incidents that occur at the substation or onshore transmission line, to which OSHA would apply.

AWEA Recommendation: AWEA respectfully requests that MMS revise the language as follows:

> (b) These reporting requirements apply to incidents that occur on the area covered by your lease or grant under this part and that are related to activities, up to mean high water on the OCS, resulting from the exercise of your rights under your lease or grant under this part.

SUBPART I - DECOMMISSIONING: 73 Fed. Reg. 39,433-34 (section-by-section analysis) & 73 Fed Reg. 39,500-1 (proposed text of §§ 285.900-913)

I.1: General Observations

While this subpart permits decommissioning in place, it is treated as an exception to the requirement that all facilities be removed to a depth of 15 feet below the mudline. AWEA strongly believes that under many circumstances it may be desirable for components of offshore wind facilities – particularly cables, portions of turbine foundations and scour protection – to remain in place. If removal is required, however, it should be limited to the foundations, which should be cut off at a depth that is: 1) based on site-specific seabed conditions, 2) consistent with offshore wind standards in Europe, and 3) significantly shallower than 15 feet. MMS experience with decommissioning in the oil and gas industry, as well as the results of the Programmatic Environmental Impact Statement (EIS), on top of 17 years of offshore wind energy experience in Europe provide support for these positions.

I.2: Section-by-Section Discussions and Recommendations

Existing Text (considered together): § 285.902 What are the general requirements for decommissioning?

> (a) Except as otherwise authorized by MMS under § 285.909, within 1 year following termination of a lease or grant, you must: (1) Remove or decommission all facilities, projects, cables, pipelines, and obstructions; (2) Clear the seafloor of all obstructions created by activities on your lease, including your project easement, or grant, as required by MMS.

§ 285.909 When may MMS authorize facilities to remain in place following termination of a lease or grant?

> (a) In your decommissioning application, you may request that certain facilities authorized in your lease or grant remain in place for other activities authorized in this part, elsewhere in this subchapter, or by other applicable Federal laws. (b) The MMS may approve such requests on a case-by-case basis considering the following: (1) Potential impacts to the marine environment; (2) Competing uses of the OCS; (3) Impacts on marine safety and national defense; (4) Maintenance of adequate financial assurance; and (5) Other factors determined by the Director . . . (d) In your decommissioning application, you may request that certain facilities authorized in your lease or grant be converted to an artificial reef or otherwise toppled in place. The MMS will evaluate all such requests as provided in § 250.1730 of this subchapter.

§ 285.910 What must I do when I remove my facility?

> (a) You must remove all facilities to a depth of 15 feet below the mudline, unless otherwise authorized by MMS.

Discussion: While § 285.909 allows for decommissioning in place following a request in the decommissioning application, the default requirement is that all facilities be removed (§§ 285.902 and 285.909), to a depth of 15 feet below the mudline (§ 285.910). It is AWEA's position that under many circumstances it may be desirable for components of offshore wind facilities – particularly cables, portions of turbine foundations and scour protection – to remain in place. If removal is required, it should be limited to the foundations, which should be cut off at a depth based on seabed conditions and currents but shallower than 15 feet.

MMS Decommissioning Experience

MMS decommissioning regulations for oil and gas leases require upon relinquishment of the lease that all platforms and other facilities on the submerged land be decommissioned removed or "decommissioned" to the satisfaction of the Director of MMS (30 CFR 250.76). Pursuant to 30 CFR 250.1703(f), all decommissioning activities must be conducted "in a manner that is safe, does not unreasonably interfere with other uses of the OCS, and does not cause undue or serious harm or damage to the human, marine, or coastal environment." This and other provisions allow for decommissioning certain equipment without removal. For example, MMS regulations permit pipelines to be left in place, provided the pipeline is filled with seawater and plugged and is buried at least 3 feet below the seafloor, together with the removal of all valves or fittings that "could unduly interfere with other uses of the OCS" (30 CFR 250.1751(f),(g)).

The MMS Programmatic Environmental Impact Statement (EIS) acknowledges the possibility "that all or some of the [wind park] facilities could remain in place and be used for other purposes (e.g., artificial fishing reefs)." Likewise, restoring a site to its "original condition" is not required for oil and gas facilities on the OCS and may cause more environmental harm than having structures remain as artificial reefs or be removed just below the seafloor.

Removal of the electric cables from beneath the seafloor would create unnecessary disturbance after the accretion of 25 years or more of marine life activity along the cable route. The solid-core, insulation-wrapped cable, properly installed and buried, would not become a hazard to navigation, fishing, or the benthic environment.

The monopole foundations used in offshore wind energy are steel structures driven at least 60 feet into the seabed. Removing them entirely would create a large environmental disturbance. If the artificial reef characteristics of the foundations were considered useful to retain, as they have been in the MMS Rigs-to-Reefs program, which by 1998 had converted 128 retired oil platforms to artificial reefs in the Gulf of Mexico, parts of the foundations would be left above the mudline.[31]

European Decommissioning Experience

In a document released December 2006, the United Kingdom's Department for Business Enterprise and Regulatory Reform (BERR) issued guidance on decommissioning offshore

[31] The same principles are behind the Artificial Reef Program of the New Jersey Department of Environmental Protection, with its 15 reef sites over 25 square miles in the coastal waters of New Jersey.

renewable energy projects.[32] It "acknowledge[d] that there may be some particular circumstances . . . in which removing all of the disused installation or structure is not the best solution," and the BERR pointed to examples in which decommissioning other than by complete removal should be considered:

1. Where foundations extend for some distance below the seafloor. "Given the potential impact of removal on the marine environment, as well as the financial costs and technical challenges involved," complete removal may not be the preferred solution. Instead, the foundation should be cut off below the mudline so that the remaining foundation would be unlikely to be uncovered, but "the appropriate depth would depend upon the prevailing sea-bed conditions and currents."

2. Where cables remain buried at a safe depth below the seafloor. Again, because of the potential impact on the marine environment and financial costs of removal, complete removal is likely not the preferred solution.

3. Where scour protection materials have been used. There may be a case for leaving them in place "to preserve any marine habitat established over the life of the installation, where they do not have a detrimental impact on the environment, conservation aims, the safety of navigation, and other uses of the sea."

AWEA is aware of a decommissioning plan approved by BERR for an offshore wind energy project in the UK specifying a foundation removal depth of one meter (three feet) and requiring the cables remain *in situ*. Discussions with industry experts indicate that the common removal depth for offshore wind projects in Europe is no more than two meters (six feet).

Decommissioning, particularly the removal of the foundations, is expensive and accounts for a significant portion of total project cost. Climate Change Capital, in an April 2006 study on offshore renewable decommissioning,[33] found that:

> While there is currently very little experience of decommissioning offshore wind farms, there are expectations that the foundations will be the most difficult, and therefore most expensive, part of the offshore structures to remove. A lifting vessel, barges and tugs will all be needed. Mobilisation and demobilisation of the vessels is an expensive and variable element of the cost, since the availability of specialist vessels will change depending upon the pattern of decommissioning and even development of other offshore renewables and oil and gas structures. On the other hand, it can be expected that better technology will be available in the future and, after the first installations are decommissioned, costs will decline with learning.

[32] *Decommissioning Offshore Renewable Energy Installations under the Energy Act 2004: Guidance Notes for Industry*, United Kingdom Department for Business Enterprise and Regulatory Reform (BERR), December 2006.
[33] *Offshore Renewable Energy Installation Decommissioning Study, Final Report*, Climate Change Capital, April 4, 2006, points 124 and 128..

Because of these high costs, the decommissioning standard needs to be carefully considered as setting it too high could create financial disincentives to offshore wind energy development with no additional enhancements of other characteristics or uses of the OCS environment.

AWEA Recommendation: The same weight given to complete removal of facilities should be given to decommissioning that allows structures or parts of structures to remain in place. Final decommissioning determinations should be made on a case-by-case basis and guided by site-specific seafloor characteristics. Accordingly, § 285.910 should not use 15 feet as a guide, and if removal of turbine foundations below the seafloor is required, the depth should be the level at which the remaining structural material is expected to remain covered over time. But if an absolute standard must be referenced, MMS should base it on the removal depths common to the decommissioning plans at the more than two dozen offshore wind energy projects in Europe.

Existing text: § 285.905 When must I submit my decommissioning application?

> You must submit your decommissioning application upon the earliest of the following dates: (a) 2 years before the expiration of your lease; (b) 90 calendar days after completion of your commercial activities on a commercial lease; (c) 90 calendar days after completion of your approved activities under a limited lease on a ROW grant; or (d) *90 calendar days after cancellation, relinquishment, or other termination of your lease or grant* [emphasis added].

Discussion: Because of the extensive requirements of the decommissioning application, which shall include according to § 285.906) descriptions of removal methods and site-clearance activities, transportation and disposal plans, environmental analysis, and mitigation measures, 90 days after termination of a lease or grant is not a sufficient amount of time to develop a complete decommissioning plan

AWEA Recommendation: Change "(d) 90 calendar days" to "(d) 180 calendar days".

Existing Text: § 285.913 What happens if I fail to comply with my approved decommissioning application?

> If the lessee, grant holder, or operator fails to comply with the approved decommissioning plan or application MMS may call for the forfeiture of your bond or other financial guarantee and the lessees or grant holders remain liable for removal or disposal costs and responsible for accidents or damages that might result from such failure.

Discussion: Any penalty for failure to comply with an approved decommissioning application should be commensurate with the damages directly related to such failure. Therefore, such failure should not result in the forfeiture of the entire decommissioning bond or other financial guarantee.

AWEA Recommendation: Revise § 285.913 to state:

If the lessee, grant holder, or operator fails to comply with the approved decommissioning plan or application MMS may call for the forfeiture of your bond or other financial guarantee to the extent of any damages directly related to such failure, and the lessees or grant holders remain liable for removal or disposal costs and responsible for accidents or damages that might result from such failure.

SUBPART J - RIGHTS OF USE AND EASEMENT FOR ENERGY AND MARINE-RELATED ACTIVITIES USING EXISTING OCS FACILITIES: 73 Fed. Reg. 39,435-436 (section-by-section analysis) & 73 Fed Reg. 39,501-504 (proposed text of §§ 285.1000-.1019)

AWEA's members have a long-term interest in the development of a sound regulatory framework for alternative-use RUEs that may one day facilitate beneficial reuse of offshore wind park structures. At this time, AWEA's only suggestion concerning the development of this regulatory framework is a request that MMS clarify that future offshore wind structures will be considered "facilities currently or previously used for activities authorized" under OCSLA, within the meaning of the alternative use provision. 43 U.S.C. 1337(p)(1)(D). This could be accomplished by revising proposed section 285.1000(a) to read as follows:

> Sec. 285.1000 What activities does this subpart regulate?
>
> (a) This subpart provides the general provisions for authorizing and regulating activities that use (or propose to use) an existing OCS facility (including an alternative energy facility initially authorized under other provisions of part 285) for energy or marine-related purposes, that are not otherwise authorized under any other part of this subchapter or any other applicable Federal statute. Activities authorized under any other part of this subchapter or under any other Federal law, that use (or propose to use) an existing OCS facility are not subject to this subpart.