NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

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Ms. Maureen Bornholdt
Program Manager, Offshore Alternative Energy Programs
U.S. Department of the Interior
Minerals Management Service
Regulations and Standards Branch
381 Elden Street, MS-4024
Herndon, Virginia 20170

Mr. James F. Bennett
Chief, Branch of Environmental Assessment
U.S. Department of the Interior
Minerals Management Service
Mail Stop 4042
381 Elden Street
Herndon, Virginia 20170

Re: Comments on the Alternative Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 1010-AD30: Proposed Rule and Alternative Energy Program Rulemaking Draft Environmental Assessment

Dear Ms. Bornholdt and Mr. Bennett:

On behalf of the Natural Resources Defense Council ("NRDC") and our more than 1.2 million members and online activists, we respectfully submit these comments on the Alternative Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf ("OCS") Proposed Rule ("Proposed Rule" or "Rule")[1] and Draft Environmental Assessment ("EA").[2] NRDC is a nonprofit environmental advocacy organization dedicated to the protection of public health and the environment. Combating global warming and protecting the marine environment are two of NRDC's top environmental priorities; the deployment of appropriately sited and environmentally sustainable renewable energy technologies in the United States is important to achieving both of these goals.

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[1] U.S. Department of the Interior, Minerals Management Service, Alternative Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf; Proposed Rule, 73 Fed. Reg. 39376 (to be codified at 30 C.F.R. Parts 250, 285, and 290) (July 9, 2008), [hereinafter 73 Fed. Reg. 39376].

[2] U.S. Department of the Interior, Minerals Management Service, Environmental Division, Alternative Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf: Proposed Rule, Draft Environmental Assessment, OCS EIS/EA MMS 2008-032, [hereinafter Draft Environmental Assessment].

Developing environmentally sound alternative energy resources is an essential step towards reducing greenhouse gas emissions and local, regional, and global air pollution. NRDC strongly supports renewable energy projects, particularly wind energy, and the environmental and public health benefits that offshore renewable energy projects can bring. We are pleased to see the Minerals Management Service's ("MMS") active interest in encouraging development of such technology.

However, offshore renewable energy projects will utilize areas of the ocean that are held in common trust by citizens of the United States; these projects, if improperly sited and designed, could pose significant risks to the health of ocean ecosystems. Renewable energy projects must not, and need not, undermine protection of coastal and ocean habitats and living marine resources.

In Part I of these comments, we address several substantive concerns that we have identified with the Proposed Rule and EA. It is important that these issues be addressed prior to finalization of the Rule and EA. In Part II, we address some specific sections and questions posed in the Rule.

PART I. NRDC'S COMMENTS ON THE PROPOSED RULE AND EA

The Proposed Rule regulates a vast array of complex activities, covering a huge geographic area, yet MMS has failed to include the environmental management tools that will enable it to meet the standard of environmental protection required by the Energy Policy Act of 2005 ("EPAct"). In particular, the activities authorized by that act are to be carried out in a manner that provides for "protection of the environment" and "conservation of the natural resources of the outer Continental Shelf".[3] As described in Sections 1 through 6, below, to meet this standard NRDC believes that MMS should:

- Prepare a revised Programmatic Environmental Impact Statement ("PEIS") to rectify the inadequacies of the current PEIS;
- Apply, as part of actions necessary to cure the deficiencies of the existing PEIS, an ecosystem-based marine spatial planning ("MSP") approach that focuses development in areas with maximum potential for alternative energy that are also not highly valuable from an ocean ecosystem perspective;[4]
- Prepare an Environmental Impact Statement ("EIS") prior to the lease sale and acceptance of bids for that area;
- Clarify that all applicable projects and grants will receive a project-specific National Environmental Policy Act ("NEPA") review;[5] and

[3] Energy Policy Act of 2005, Pub. L. No. 109-58, § 388, 119 Stat. 594, 744-47 (2005); 43 U.S.C. 1337, [hereinafter EPAct].

[4] Marine spatial planning is "The process of analyzing and allocating parts of three-dimensional marine spaces to specific uses, to achieve ecological, economic, and social objectives that are usually specified through political process." (Ehler, Charles, and Fanny Douvere. Visions for a Sea Change. Report of the First International Workshop on Marine Spatial Planning. Intergovernmental Oceanographic Commission and Man and the Biosphere Programme. IOC Manual and Guides, 46: ICAM Dossier, 3. Paris: UNESCO, 2007.)

[5] National Environmental Policy Act of 1969, §§ 2 *et seq*., 102 (2)(c), 42 U.S.C.A. §§ 4321 *et seq*., [hereinafter NEPA].

- Ensure a fair return to the United States for all leases, easements, and grants by using a multi-factor bidding process that accounts for the full range of costs and benefits associated with these activities.

Section 7 of Part I discusses NRDC's concerns with MMS's Proposed Rule, Subpart J, allowing for rights-of-use and easement ("RUEs") for energy and marine-related activities using existing OCS facilities. MMS exceeds the authority granted by Section 388 of the EPAct by attempting to regulate activities, such as offshore aquaculture, that have not been authorized, as required by that act. There is no national aquaculture policy and the activity is beyond the scope of MMS's regulatory expertise. Furthermore, the breadth of activities envisioned in the comments to Subpart J, particularly liquefied natural gas ("LNG") facilities, which were not addressed in the PEIS, underscores the inadequacy of the PEIS prepared for the Rule. NRDC also believes that MMS's use of Subpart J may be impermissibly overriding decommissioning standards for the oil and gas industry.

1. MMS must ensure that adequate NEPA analysis is conducted at all stages of the Rule's regulated activities.

A PEIS is intended to assess the broad environmental consequences of a wide-ranging federal program, including cumulative impacts.[6] It is permissible for the PEIS to be less detailed than an EIS for specific projects or actions, but a tiering process must then be used whereby more specific environmental reviews follow the PEIS. Given the number of highly technical activities covered in the Proposed Rule, their extreme complexity, and the vast geographic diversity in the OCS, the existing PEIS does not provide "sufficient detail to foster informed decision-making."[7]

As described in NRDC's PEIS comments, the analysis in the PEIS did not satisfy NEPA requirements because:

- The discussion of impacts of proposed projects was too general and high level;
- There was insufficient cumulative impacts analysis;[8] and
- The analysis relied on problematic assumptions that could not be verified (*e.g.*, the PEIS improperly assumed environmental impacts would be minimal without substantiating these assumptions).[9]

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[6] *National Wildlife Fed'n v. Appalachian Reg'l Comm'n*, 677 F.2d 883, 888 (D.C. Cir. 1981).

[7] *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1094, C.A.9 (Hawai'i), 2006, citing *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800 (9th Cir.2003) (quoting *N. Alaska Envtl. Ctr. v. Lujan*, 961 F.2d 886, 890-91 (9th Cir.1992).

[8] "Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 CFR § 1508.7.

[9] *See*, NRDC Comments on the Draft Outer Continental Shelf Alternative Energy Programmatic Environmental Impacts Statement, submitted to Maureen Bornholdt, Program Manager, Minerals Management Service, May 21, 2007. The PEIS suffers from the fact that it was conducted prior to the drafting of the Proposed Rule or the collection of significant information about the impacts of the various activities contemplated by the Rule and contains only "generic impacts from potential activities occurring in the environment." (PEIS p. 1-4).

The Proposed Rule's EA was "prepared to aid in the determination of whether or not a new or supplemental EIS is necessary for the support of the rulemaking."[10] The EA itself contains almost no new analysis or additional detail to provide sufficient information to satisfy the tiering approach: of the document's 35 pages, 19 summarize the Proposed Rule and 8 summarize the impacts found in the PEIS.[11] The few remaining pages contain only highly general analysis and conclusions. Therefore, NRDC believes that it is necessary for MMS to prepare a new PEIS.

2. To help remedy the legal inadequacies of the PEIS, Proposed Rule, and the EA, MMS should engage in a form of marine spatial planning to identify "high impact" and "low impact" OCS development areas, incorporating this approach into the agency's bidding process.

NRDC recommends that MMS undertake a form of MSP whereby "high impact" and "low impact" areas are identified by the agency, with assistance from affected stakeholders, including coastal states. This approach would help address the legal inadequacies of the PEIS, the Rule, and the EA, as well as provide a framework for protecting the most vulnerable and important ecological areas while promoting alternative energy development. Furthermore, this approach would achieve the following important benefits:

- Allow for effective consideration of cumulative impacts within a geographic area;
- Protect environmentally sensitive areas, including state-designated marine protected areas, that are not explicitly protected in the Proposed Rule;
- Encourage the development of alternative energy in OCS areas that contain both the greatest likelihood of producing large amounts of energy and that do not interfere with ecologically important processes and areas;
- Use spatial management concepts to more effectively and proactively manage potential conflicts among uses; and
- Create a method for meaningful and sustained interaction between state and local governments, and additional stakeholders.

A. MSP approaches are increasingly used to proactively address the multiple competing uses of marine areas.

Spatial planning is increasingly recognized by states as an effective approach for managing potentially competing interests in ocean space. For example, the Rhode Island Coastal Resources Management Council, with technical support from the University of Rhode Island, has proposed to develop within two years the Ocean/Offshore Renewable Energy Special Area Management Plan ("SAMP") in order to guide the state's exploration and development of offshore energy resources.[12] It is considered likely that federal agencies, such as MMS, will hold off on federal

[10] Draft Environmental Assessment, at 1.

[11] "Tiering" refers to the coverage of general matters in broader EISs, such as national program or policy statements, with subsequent narrower statements or environmental analyses incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. 40 C.F.R. § 1508.28, as discussed in *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1094, C.A.9 (Hawai'i), (2006).

[12] The Rhode Island Coastal Resources Management Council (CRMC) and The University of Rhode Island (URI) under The Center of Excellence for Research on Offshore Renewable Energy. The Ocean/Offshore Renewable

review permit processes until the SAMP has been formally adopted. By laying out a formal review process for well-planned allocation of offshore renewable energy projects, Rhode Island hopes to streamline federal and state permitting processes, thus encouraging business development, while simultaneously considering the protection of its ocean resources.

MMS should also note that MSP has been adopted internationally as an effective approach for managing multiple uses of marine areas, including the siting of alternative energy projects, such as offshore wind. Marine spatial planning efforts are currently underway in Australia, New Zealand, China, Canada, and throughout Europe.[13]

B. MMS should incorporate MSP into this Proposed Rule by developing a set of "green" and "red" zones to guide energy siting decisions.

NRDC recommends that MMS develop, within the next five years, an initial set of "green" and "red" zones. Green zones would be characterized by a high potential for energy production and a low potential for adverse environmental/ecological impacts. Red zones would be zones with potential for energy production, but an unacceptably high potential for adverse environmental and ecological impacts.

Developers applying in a green zone would have their projects moved to the top of the list for quicker, not lighter, review, whereas those projects proposed for red zones would start off at the bottom of the list and may receive additional scrutiny. This expedited review would help foster faster development in those areas best suited to alternative energy projects that do not harm the ocean environment. Zones should be reviewed periodically (on a 5 to 10 year basis) in order to keep current with the evolving understanding of ocean ecosystems, new technologies, and stakeholders' changing needs.

This spatial planning approach will need to be accompanied by the preparation of an EIS. This NEPA analysis would evaluate the cumulative impacts of various uses allowed in the proposed green and red zones, as well as alternative zone designations.[14] MMS should use data inputs and modeling best practices supplied by both state and federal agencies that have expertise in managing ecological impacts of marine resource management decisions. In particular, NRDC suggests that MMS work in close coordination with the National Oceanic and Atmospheric Administration ("NOAA") and the U.S. Fish and Wildlife Service ("FWS"), as well as coordinate with the Federal Energy Regulatory Commission ("FERC").

MMS considered a form of spatial planning in Alternative 3.1 of the EA, but rejected this approach, reportedly because it might cause delays in alternative energy development, while the agency performs the spatial assessment.[15] NRDC shares MMS's interest in developing

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Energy Special Area Management Plan (SAMP). Proposed PDF at http://www.crmc.state.ri.us/samp/ocean.html. Updated 2 Sept. 2008.

[13] UNESCO's Ecosystem-based Marine Spatial Management Initiative has compiled numerous MSP approaches and guidelines online at http://www.unesco-ioc-marinesp.be/.

[14] *See supra* notes 3, 5.

[15] Alternative 3.1 proposed a regulatory program where the agency itself – as opposed to industry – would identify a

alternative energy in the OCS without unnecessary delay. However, we believe that no significant delay of alternative energy development will occur with this spatial planning approach because MMS can continue to grant limited leases for projects under its existing interim lease policy concurrent with zone development.[16]

3. The Proposed Rule should require the preparation of an EIS before a lease or grant is made.

Under the Proposed Rule, MMS will issue leases on a competitive basis, accepting bids and awarding leases and grants to the highest bidder *prior* to the submission of an EIS or any other NEPA documentation.[17] NRDC believes that MMS should instead require the preparation of an EIS prior to the award of a lease or grant.

Preparation of NEPA documentation *after* the lease or grant has been awarded precludes the development of a meaningful "alternatives analysis" in the NEPA documentation. The Council on Environmental Quality ("CEQ") regulations implementing NEPA identify the alternatives analysis as "the heart of the environmental impact statement."[18] To that end, they require agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated."[19] If MMS awards a lease or grant before conducting NEPA review on

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limited swath of the OCS for a three-year planning cycle that it will then accept competitive leases for. MMS would conduct initial NEPA analysis to remove portions of the defined strategic area from consideration, though subsequent project-specific NEPA documentation would also be required. The EA states: "[Alternative 3.1] differs from the proposed action in that the MMS would identify areas for leasing rather than allowing industry to identify areas. Initial NEPA analyses would be used to identify environmentally sensitive subareas within the proposed lease area that could be removed as an area for leasing. The same types of alternative energy projects would be proposed under this alternative as for the proposed action. The areas where these activities are expected to occur in the foreseeable future are off the Atlantic, Pacific and Gulf of Mexico coasts. The process differs in that areas that are environmentally sensitive would not be offered for lease, thus apparently increasing the level of environmental protection. However, both the proposed action and this alternative would require subsequent site-specific NEPA documentation that would essentially result in the same level of protection through the identification of areas that should be avoided. The primary differences are in the timing of when the areas are identified and the burden of identifying the areas; i.e., in the proposed action, the developer is responsible for proposing the areas for lease with the risk that the area may later be determined to be environmentally sensitive and therefore development would not be allowed. This alternative, however, may result in delays in development while the Federal Government goes through the process of identifying the areas for development. The cumulative impacts are the same or similar as the proposed action and would be analyzed in detail as part of the NEPA analysis conducted for each site-specific proposal." EA at 33.

[16] *See*, Department of the Interior, Minerals Management Service, Notice of Nominations Received and Proposed Limited Alternative Energy Leases on the Outer Continental Shelf (OCS) and Initiation of Coordination and Consultation 73 Fed. Reg. 21152-02 (Friday April 18, 2008), *available at* http://www.mms.gov/federalregister/2008.htm.

[17] *See*, 73 Fed. Reg. 39376, 39466-70, Subpart B.

[18] S*ee*, 40 C.F.R. §§ 1500-1508, 1502.14.

[19] *Id.*; *see also, e.g.*, 42 U.S.C. § 4332(2)(C)(iii) (requiring a "detailed statement" on alternatives to a proposed action) and 33 C.F.R. § 325, App. B(9)(5)(c) (requiring changes in location to be considered). In addition, an agency "shall state how alternatives . . . will or will not achieve the requirements of section 101 and 102(1) of the Act" – which requires agencies to "use all practicable means" to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings" and to "preserve important historic, cultural,

the project's location, the alternatives analysis will likely only consider those alternatives directly comparable to the lessee/grantee's proposed action. In order to perform a sufficient alternatives analysis, MMS should review all the reasonable alternatives that exist prior to an award, not the more limited scope of reasonable alternatives available after the award. The inadequacy of the existing PEIS underscores the necessity of preparation of an EIS *prior* to the award of a lease or grant, particularly until MMS prepares a revised PEIS, as recommended above in Section 1 of Part I of these comments.

MMS also states that it will consider issuing leases for standard block sizes or legal subdivisions. The standard OCS lease block is nine square miles.[20] It is also conceivable that multiple blocks would be leased at once. The possibility that entire blocks or multiple blocks, covering huge areas, will be offered for lease further necessitates the performance of a full EIS prior to the lease sale. In order to account for the likely significant cumulative impacts of leasing blocks or multiple blocks, an EIS must be performed for all the blocks that are part of the sale.[21]

MMS should apply its own existing practice of conducting a full NEPA review prior to the sale of leases on the OCS. The lease sale is the last step in MMS's complicated ten-step pre-lease process, which begins at least 28-34 months earlier with a call for information and nominations and a Notice of Intent to prepare a lease sale EIS.[22] The Proposed Rule is inconsistent with MMS's own current practices – MMS should rectify this inconsistency by requiring that the EIS precede the sale of leases or grants of easements or rights-of-way.

Perhaps of greatest concern, if MMS waits until the winning bids have been awarded, it is likely that the agency will have so committed itself to its decision and the chosen developers invested significant funding, that the environmental analysis will simply be a post hoc rationalization for the lease, lacking a sufficient environmental review. This process runs counter to the requirement that an impact statement be on a "proposal" for a federal action, rather than on an action that has been already taken.[23] Further, as described above, it is necessary to perform the NEPA analysis prior to the award of a bid in order achieve a meaningful review of reasonable alternatives.

4. The Proposed Rule should clarify the need for project-specific EISs.

Particularly in light of the PEIS's inadequacy, it is crucial that a full NEPA review be exercised for projects and grants on the OCS. As the impacts of every project will be based on a new and unique set of variables – *e.g.*, rapidly changing new technology, cumulative impacts, and specific geographic characteristics – every new project is likely to meet the threshold test for preparation of a full EIS. MMS should also clarify that the EIS must address the project's easement area.[24]

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and natural aspects of natural heritage" – as well as how alternatives "will or will not achieve the requirements of ... other environmental laws and policies." 40 C.F.R. § 1502.2(d).

[20] 73 Fed. Reg. 39376, 39395.

[21] 73 Fed. Reg. 39376, 39467 § 285.206(b). *See also*, 73 Fed. Reg. 39376, 39395 discussion of § 285.201, (5).

[22] Hildebrand, Stephen G., and Jonnie B. Cannon. Environmental Analysis: The NEPA Experience at 609, CRC Press, 1993.

[23] *See, Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

[24] A project easement is granted to accompany the lease, and, while this easement must be applied for as part of the lease, the Proposed Rule does not explicitly state that this easement must be included in NEPA and Coastal Zone

Further, MMS should ensure that rights-of-way grants ("ROWs") and rights-of-use and easement grants ("RUEs") receive full NEPA review.[25]

Currently, the Proposed Rule does not explicitly require an EIS or even an EA for every project, stating that one "may be" prepared. For example:

> "The PEIS provides a basic understanding of the possible impacts of various types of alternative energy and alternate use projects. However, MMS will develop additional, site specific EISs *as appropriate*."[26]

Additional examples of MMS's limited commitment to the preparation of project-specific EIS (or even EA) appear throughout the document.[27]

Given the experimental nature of all of the technologies at issue combined with the fact that each particular area of the ocean will have unique biological and environmental characteristics that will be variously impacted by activities authorized by the Proposed Rule, each individual lease may have effects on the environment that are highly uncertain. Further, as more projects are approved, the cumulative impacts will increase. With all of these issues in play, the agency should perform a full EIS on each project.[28]

Applicable case history interpreting relevant NEPA requirements demonstrates that the types of individual leases contemplated by the Proposed Rule – which rise to the level of major federal actions significantly affecting the quality of the human environment – will require the

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Management Act ("CZMA") review: "(a) A lease issued under this part grants the lessee the right, subject to obtaining the necessary approvals and complying with all provisions of this part, to occupy, and install and operate facilities on, a designated portion of the OCS for the purpose of conducting: (1) Commercial activities; or (2) Other limited activities that support, result from, or relate to the production of energy from an alternative energy source. (b) A lease issued under this part confers on the lessee the right to one or more project easements without further competition for the purpose of installing gathering, transmission, and distribution cables, pipelines, and appurtenances on the OCS as necessary for the full enjoyment of the lease. (1) You must apply for the project easement as part of your Construction and Operations Plan (COP) or General Activities Plan (GAP), as provided under subpart F of this part; and (2) The MMS will incorporate your approved project easement as an addendum to your lease." 73 Fed. Reg. 39376, 39466, § 285.200.

[25] Currently § 285.305, describing the needed information for ROW and RUE grants, only notes that requests must detail: "(a) The area you are requesting for a ROW grant or RUE grant; (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; and (d) Pertinent information concerning environmental conditions in the area of interest." 73 Fed. Reg. 39376, 39471.

[26] 73 Fed. Reg. 39376, 39379 (emphasis added).

[27] Additional examples include: "The SAP would undergo the appropriate NEPA review and *may* require either an Environmental Impact Statement (EIS) or an Environmental Assessment (EA)." 73 Fed. Reg. 39376, 38388 (emphasis added). "If more than one proposal [for alternate uses on an existing OCS facility] initially appears feasible, the MMS *may* commence and environmental review under NEPA, where each of the proposals is analyzed." 73 Fed. Reg. 39376, 39436 (emphasis added). "In the *near term* we anticipate the NEPA compliance for development will be project specific EIS." 73 Fed. Reg. 39376, 39379 (emphasis added). "Also, we anticipate that limited leases and RUE and ROW grants will require an EIS. After the impacts and related mitigation of alternative energy activities on the OCS are better understood, it is possible that projects may require an environmental assessment." 73 Fed. Reg. 39376, 39419.

[28] It is not our intention to unnecessarily burden alternative energy demonstration projects; NEPA review inherently allows for appropriate levels of scrutiny based on the varying levels of project impacts.

preparation of a full EIS.[29] The U.S. Supreme Court iterated in *Kleppe v. Sierra Club* that even where there is a national, overarching PEIS, an EIS may be required for each government grant of private leases or ROWs "significantly affecting the quality of the human environment".[30] *Sierra Club v. Peterson* reiterates that the commitment of public land for leasing requires preparation of an EIS.[31]

CEQ regulations for determining intensity and significance of a major federal action also imply that new leases will require an EIS, and courts have continually required the preparation of individual EISs for actions similar to those proposed here.[32] In *Forelaws on Board v. Johnson* the court found that a long-term contract for power delivery had significant environmental impacts and required an EIS.[33] In *Pit River Tribe v. United States Forest Service*, the court determined that the extension of a lease to produce geothermal steam was a significant impact requiring an EIS because it was more than the preservation of the status quo.[34] Leases for alternative energy projects envisioned under the Proposed Rule will certainly be more than the preservation of the status quo; thus they will require the preparation of an EIS. In *Sierra Club v. Mainella*, the court found that the agency had to prepare an EIS when it granted applications for exemptions from directional drilling regulations for a project to drill oil and gas wells.[35] Overall, in cases involving new technologies and particularly the production of energy, the courts have recognized the high probability of significant environmental impacts and have required the preparation of full EISs for each project. This is the situation here, and MMS should make explicit its commitment to fulfill its NEPA obligations through the preparation of EISs for all site-specific leases authorized under the regulation.

NRDC also recommends that the EIS be completed prior to giving the relevant state(s) the opportunity to for consultation and review, so that the state(s) can make an effective assessment of the project, based on specific projected environmental and other impacts. While the project area and the easement locations may not directly interfere with states' coastal management plans, the impacts caused by a project or grant could affect resources protected by these plans. State(s) will only have the full information to accurately assess the project's projected impacts once the EIS is complete.

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[29] NEPA § 4332 requires an impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."

[30] *Kleppe v. Sierra Club* , 427 U.S. 390, 399 (1976), citing *Scientists' Institute for Public Information, Inc. v. AEC*, 156 U.S.App.D.C. 395, 404-405, 481 F.2d 1079, 1088-1089 (1973); *Davis v. Morton*, 469 F.2d 593 (CA10 1972); (several Courts of Appeals have held that an impact statement must be included in the report or recommendation on a proposal for such action if the private activity to be permitted is one "significantly affecting the quality of the human environment" within the meaning of s 102(2)(C), *Kleppe* at 399).

[31] *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983). The court explained: "in issuing these leases the Department made an irrevocable commitment to allow *some* surface disturbing activities, including drilling and roadbuilding … the Department has not complied with NEPA [by not preparing an EIS] because it has sanctioned activities which have the potential for disturbing the environment without fully assessing the possible environmental consequences." *Id.* at 1414-15.

[32] *See*, 40 C.F.R. § 1508.27.

[33] *Forelaws on Board v. Johnson*, 743 F.2d 677 (9th Cir. 1984); *Supra*, note 33.

[34] *Pit River Tribe v. United States Forest Service*, 469 F.3d 768 (9th Cir. 2006).

[35] *Sierra Club v. Mainella*, 459 F. Supp. 2d 76 (D.D.C. 2006).

5. The Rule must include clear standards regarding the acceptable levels of environmental impacts that projects cause during construction and operation.

The Rule does not contain objective standards to avoid, minimize, or reduce a project's environmental impacts.[36] The Proposed Rule states:

> "Commenters reminded us to recognize that specific data requirements will vary by the type of project and the location. We addressed this by not including standards in these regulations. Instead we are requiring applications to submit the project design and the data and information that were the basis for the design, so we can evaluate each project on a case-by-case basis. As we gain experience with offshore alternative energy, we may set more specific project requirements."[37]

The lack of concrete standards for environmental impacts is a major flaw in the Rule. NRDC believes that it is important to protect against risks, promote environmental sustainability, ensure consistency across projects, and prevent unintended environmental impacts by developing concrete standards that:

- Ensure that projects either individually or in combination do not adversely affect key ecological processes, habitats or species;
- Call for conditions and mitigation measures to minimize projects' environmental impacts;
- Require monitoring and data collection requirements, including a description of how data is to be incorporated into adaptive management requirements; and,
- Call for an adaptive management approach that requires a spelling out in advance of the steps that will be taken if certain impacts occur.

This lack of specific standards appears throughout the regulations. For example, a Construction and Operations Plan ("COP") must demonstrate to MMS that the project "[d]oes not cause undue harm or damage to natural resources, life (including human and wildlife), property, or the marine, coastal, or human environment."[38] Standards are necessary for measuring instances of undue harm.

6. To ensure a fair return of value for all leases, grants, and easements, MMS should adopt a multiple-factor bidding process that fully accounts for environmental and economic externalities and rewards environmental best practices.

MMS is instructed in Section 388 of the EPAct to "establish royalties, fees, rentals, bonuses, or other payments to ensure a fair return to the United States for any lease, easement or right-of-way granted under this subsection."[39] Determination of "fair return" is difficult because, on the one hand, the alternative energy activities are a very new and unique set of activities, and there is limited precedent to demonstrate what a "fair return" would be for projects sited on the OCS. NRDC also recognizes that it is important to not charge rates that are prohibitively high and likely to stifle alternative energy development. However, it has increasingly been demonstrated

[36] *See, e.g.*, 73 Fed. Reg. 39376, 39421, 39423.
[37] 73 Fed. Reg. 39376, 39379.
[38] 73 Fed. Reg. 39376, 39417.
[39] EPAct § 388 (p)(2).

with triple-bottom line valuation or "full-cost accounting" that consideration of elements in addition to the financial bottom-line is important in order to understand a project's true costs or benefits.[40] Thus, for projects that have the potential to dramatically impact health of the marine environment, determination of a "fair return" requires consideration of multiple factors in selecting among project applicants. There is precedent for agencies within the Department of the Interior ("DOI") relying on factors, in addition to monetary considerations, in selecting winning bids for leasing of development rights on federal property.[41]

In developing the Proposed Rule, MMS considered and rejected a multiple-factor bidding process, whereby a variety of quantitative and qualitative variables would have been evaluated in selecting the winning bid for a competitive lease. MMS determined that their program "requires a bidding system based on clear objective standards, simple to administer and transparent to the public."[42] The result, however, is that MMS is simply selling off the leases to the highest bidder.[43] This system ignores other important factors relating to a project's effects on the environment, energy supply, and consumers. MMS fails to adequately explain the rationale for this choice, or to provide substantial evidence that selecting the winning lessee based solely on the highest bid provides a "fair return" to the United States.

The costs and benefits resulting from an alternative energy or alternative use proposal's construction and operation should be clearly spelled out for stakeholders' review. MMS acknowledges the wisdom of this approach, in part, by considering the costs incurred from exclusive use of MMS-leased areas:

> "Certain alternate use activities could require that a significant portion of an OCS area be excluded from other potentially valuable uses (i.e. a large offshore aquaculture project). MMS would consider such exclusivity requirements for a potential alternate use activity in determining a fair return to the United States. The MMS would calculate the rentals or other charges for Alternate Use RUEs taking into account the areal extent of the alternate

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[40] Jay G. Martin, Ann L. MacNaughton, Sustainable Development: Impacts of Current Trends on Oil and Gas, 24 J. Land Resources & Envtl. L. 257, 267 (2004). The TBL [Triple Bottom Line] concept integrates the three principal spheres of sustainable development focus – financial performance, environmental protection, and social goals – into a company's strategic planning and corporate reporting, instead of treating each TBL component in isolation from the others. Companies that adopt a TBL focus do so because they have concluded that they will create more financial value as a direct and measurable result.

[41] In *Kerr-McGee Corp., et al. v. Watt*, 517 F. Supp. 1209 (D. D.C. 1981) the court rejected a challenge to the Secretary of Interior's system of analyzing two bids for offshore oil and gas leases offered in the OCS. The Secretary relied on a "Post Sale Matrix", prepared by the Bureau of Land Management, for each lease sale, which provided a variety of data on each tract and each high bid in order to help determine whether high bids satisfy the statutory objective of return of fair market value. Applying this matrix, the agency considered three factors. First, the Mean of the Range of Values (MROV) was the Geological Survey's estimate of the value of tract based on its analysis of geological data and a computer model simulation of production history and projections of discounted cash flow. Second, was the Discounted MROV, which calculated the effect on the value of the tract to the Government if the high bid were rejected and the tract were held to be reoffered at a future lease sale. Third was the Average Evaluation of Tract (AEOT) factor, which takes into account the actual bids received on the tract. The agency rejected bids that fell below some or all of these separate factors. While not a perfect analogy, this is an example of an agency not simply awarding a contract to the person with the highest bid.

[42] 73 Fed. Reg. 39376, 39399.

[43] *Id.*

use activity, MMS resources needed for regulating such activities, and the exclusion in that area of competing uses."[44]

NRDC believes that MMS should build on this and note all possible costs resulting from project placement – not simply those where the agency stands to lose revenue.

Additional factors relating to environmental and public protection should be added into the lease selection process. Leases for offshore renewable energy projects should be assigned with an approach which factors in the following: minimum environmental detriment, timely commencement of operation, maximum net energy impact, and lower initial installation and operations and maintenance costs to the extent that such differentials may significantly affect the ultimate cost to the consumer. MMS's proposed calculus to determine the annual operating fee – which is currently based only on production costs – should be revised to address the above factors, and used to evaluate leases, as well as renewals.

A multiple-factor bidding process should also encourage development of an array of renewables. Newer technologies may not receive the same return on investment as established ones. When the lease goes to the highest bidder, it is possible that the type of energy most profitable in the present will come to dominate certain areas of the OCS that might be better suited to other more efficient or effective technologies. In choosing between different competing projects (*i.e.*, wind versus wave technologies) for the same site, MMS should examine the energy-producing potential of each project, the differing environmental impacts, and should also keep in mind the benefit of deploying and commercializing a broad array of renewable, internationally competitive, energy technologies.

7. MMS may not use Section 388 of the EPAct to regulate activities beyond the scope of its authority or to avoid decommissioning requirements contained in Outer Continental Shelf Lands Act.[45]

Given the varying natures of the possible alternate use projects, NRDC requests that MMS promulgate a separate rule for specific types of alternate uses with enough specificity to actually be meaningful to future development and regulation. We take issue with regulation of this essentially separate program being shoehorned into these regulations and find the sections of the PEIS and EA on alternate uses to be completely insufficient.

A. The case of LNG illustrates the inadequacies of the Proposed Rule and its NEPA documentation.

The case of LNG illustrates that this Proposed Rule is not sufficiently detailed or comprehensive for the regulation of alternate uses of OCS facilities. In terms of alternative use, the PEIS only details possible environmental impacts from aquaculture, research and monitoring, and alternative energy production. The PEIS notes:

"A number of other uses have been proposed for retired oil and gas platforms. Other proposals include uses in areas such as desalination, education, hotels, recreation,

[44] *Id.* at 39438.
[45] *See*, Outer Continental Shelf Lands Act of 1953, 43 U.S.C.A. §§ 1331 *et seq.*

> military outposts, staging and supply areas for the oil and gas industry, subsea storage of natural gas or other substances, telecommunications and urgent medical care. While some of these uses may be reasonable, none is projected to occur within the next 5 to 7 years, and therefore not analyzed in this programmatic EIS."[46]

However, since the PEIS was issued, a strong interest in use of these retired platforms for LNG facilities has clearly emerged:

> "The proposed amendments to this provision are also intended to clarify that MMS may consider proposals for liquefied natural gas (LNG) facilities (regasification terminals or, potentially, liquefaction facilities) that would make use of existing OCS platforms or other facilities. MMS may not approve the construction or operation of an LNG facility – as responsibility for approval of construction and operation of marine LNG facilities rests with the U.S. Coast Guard and U.S. Maritime Administration – but may authorize the alternate use of an existing OCS facility that was originally approved under the OCS Lands Act."[47]

Given that LNG was not covered by the PEIS or EA, and the serious environmental and safety concerns with such facilities, it is inappropriate for the Proposed Rule to cover such projects. MMS should either remove the authorization to do so, or conduct a PEIS that focuses on the effects of LNG.

B. MMS is not the appropriate agency to handle offshore aquaculture and MMS may not use Section 388 of the EPAct to claim regulatory control over alternate uses that are not reasonably included within the "authorized marine-related purposes" contemplated in that section.

As stated in NRDC's comments to the PEIS, MMS is not the appropriate agency to authorize aquaculture leases. With the introduction of H.R. 2010, the Administration has made clear its intent that offshore aquaculture should be managed by the Department of Commerce. Moreover, Section 388(p)(1)(D) of the EPAct states that MMS may grant a lease for "other authorized marine-related purposes" but does not expressly authorize MMS's authority over aquaculture activities. We believe that without clear authorization from Congress, MMS does not have the authority to allow aquaculture as an alternative use for an oil and gas facility. Moreover, in the absence of a comprehensive national aquaculture policy, MMS would essentially be setting the default standards for offshore aquaculture with each permit on a case-by-case basis, without clear

[46] PEIS at 6-12.

[47] Full text states: "The proposed amendments to this provision are also intended to clarify that MMS may consider proposals for liquefied natural gas (LNG) facilities (regasification terminals or, potentially, liquefaction facilities) that would make use of existing OCS platforms or other facilities. MMS may not approve the construction or operation of an LNG facility—as responsibility for approval of construction and operation of marine LNG facilities rests with the U.S. Coast Guard and U.S. Maritime Administration—but may authorize the alternate use of an existing OCS facility that was originally approved under the OCS Lands Act. An MMS approval for alternate use or reuse of an existing facility would be required from MMS before making use of such a facility for LNG activities. Approval for an alternate use proposal involving an existing LNG facility is not subject to the proposed provisions in Part 285, subpart J, because subsection 8(p) of the OCS Lands Act does not apply to activities previously authorized under the Deepwater Port Act of 1974 (33 U.S.C. 1501 *et seq.*)." 73 Fed. Reg. 39439.

regulatory authority to manage the impacts of offshore aquaculture. Section 6.3.2 of the PEIS is also certainly not sufficient to support a regulatory framework governing offshore aquaculture.

The range of issues that must be dealt with in regulating aquaculture are far beyond the expertise of the MMS. This is evident in that the Proposed Rule contains no standards to address, for example:

- Elimination or minimization of diseases and parasites transmitted from farmed to wild finfish species;
- Pollution of the marine environment with fish wastes and excess feed;
- Harm to marine mammals and other wildlife from predator controls; and
- The decimation of populations of important forage fish, such as menhaden, herring, and anchovies used to feed carnivorous farmed species.

The Proposed Rule also fails to develop a precautionary and transparent permitting and regulatory program, provide an adequate role for states and Fishery Management Councils, or protect essential fish habitat and other sensitive ocean sites.[48]

C. Alternate Use RUEs must not be used to undermine decommissioning requirements for oil and gas facilities.

NRDC is seriously concerned that, with a few highly generalized pages related to alternate uses of existing facilities in the Rule, MMS will open the door to allow a wide range of activities that avoid the safe and environmentally sound decommissioning of oil and gas facilities on the OCS. In addition to our concerns about particular alternate uses discussed above, NRDC is troubled by the lack of clarity about the interplay between the allowance of these alternate uses and proper decommissioning of oil and gas facilities in the OCS. The decommissioning standards for oil and gas facilities in the OCS are extensive and complex.[49] NRDC is concerned that the decommissioning requirements for alternate uses are "to be determined by MMS on a case-by-case basis" and there is no assurance they will be as comprehensive or environmentally protective as the current decommissioning requirements.[50] The regulations should provide that the decommissioning requirements that apply to the original lessee and those that apply to the holder of any RUE, taken together, include those currently applicable to oil and gas facilities on

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[48] Some of these issues have been addressed in legislation enacted in California in 2006, the Sustainable Oceans Act, 2006 Cal. Stat. ch. 36, enacting SB 201, and in the recommendations of the Woods Hole Oceanographic Institution's Marine Aquaculture Task Force in 2007 Sustainable Marine Aquaculture: Fulfilling the Promise; Managing the Risks, January 2007, *available at* www.pewtrusts.org/.../Reports/Protecting_ocean_life/Sustainable_Marine_Aquaculture_final_1_07.pdf.

[49] *See*, 30 C.F.R. 250, Subpart Q—Decommissioning Activities; 43 U.S.C. 1331 *et seq.*; 67 Fed. Reg. 35406, May 17, 2002, unless otherwise noted. The general decommissioning requirements require that for facilities that are no longer useful, operators must: (a) Get approval from the appropriate District Manager before decommissioning wells and from the Regional Supervisor before decommissioning platforms and pipelines or other facilities; (b) Permanently plug all wells; (c) Remove all platforms and other facilities; (d) Decommission all pipelines; (e) Clear the seafloor of all obstructions created by the lease and pipeline right-of-way operations; and (f) Conduct all decommissioning activities 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. 30 C.F.R. 250.1703. *See also*, complex decommissioning requirements for the Pacific Region: http://www.mms.gov/omm/Pacific/lease/2004_final_decommissioning_cost_report_rev_1.pdf

[50] 73 Fed. Reg. 39376, 39303, §§ 285.1018, 285.1019

the OCS, plus any additional decommissioning requirements that may be needed to address the alternate uses.

PART II. SPECIFIC COMMENTS ON THE PROPOSED RULE

NRDC respectfully submits the following comments on specific sections of the Proposed Rule that are most relevant to the concerns of our organization and our stakeholders, and on which we have the most expertise. As requested in the Rule, we have identified our comments by subpart and section number. While we have taken the questions posed in the Rule into account, we have also chosen to comment on additional areas of the Proposed Rule not covered by MMS's questions.

Subpart A—General Provisions

§ 285.112 Definitions

Comment: NRDC is concerned with the lack of clarity in the definition of the term "right-of-use and easement grant": "means an easement issued by MMS … that authorizes use of a designated portion of the OCS to support activities on an alternative energy lease or other approval issued by a State or private party".[51] Neither the definition nor the section clarifies what counts as a support activity or what the process is for determining which activities are eligible.

MMS has also failed to include the definition of "adaptive management", an important approach that should be defined and meaningfully applied in the Proposed Rule. The DOI has provided guidance that adaptive management is to be applied by the agencies when:

(a) there are consequential decisions to be made;
(b) there is an opportunity to apply learning;
(c) the objectives of the management are clear;
(d) the value of reducing uncertainty is high;
(e) uncertainty can be expressed as a set of competing, testable models; and
(f) an experimental design and monitoring system can be put in place with a reasonable expectation of reducing uncertainty.[52]

According to these criteria, adaptive management should be applied to alternative energy projects; thus, adaptive management should be a key component of this particular program and a definition included in the Proposed Rule.

NRDC suggests that adaptive management be defined as "seeking continuous refinements in and improvements to the project's environmental management systems to respond to new

[51] The full definition states: "*Right-of-use and easement (RUE) grant* means an easement issued by MMS under this part that authorizes use of a designated portion of the OCS to support activities on an alternative energy lease or other approval issued by a State or private party. The term also means the area covered by the authorization." 73 Fed. Reg. 39376, 39464.

[52] *See*, U.S. Department of Interior Adaptive Management Technical Guide and Secretarial Order 3270 issued under the authority of 16 U.S.C. §4602(a) and Section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 1262), as amended, available at http://www.doi.gov/initiatives/AdaptiveManagement/documents.html.

information resulting from changed or unforeseen circumstances, new scientific and technical information, and new or updated modeling." This suggested definition is similar to the one found in the DOI's technical guide on adaptive management.[53]

NRDC understands that it is important that an adaptive management program include clear, predictable responsibilities to ensure the project is financially viable. MMS should develop an environmental monitoring and adaptive management program that:

- Is guided by a panel of government and academic scientists who help develop an appropriate set of protocols for data collection and adaptive responses;
- Delineates specific adaptive responses that are to be implemented to deal with environmental impacts that are judged to be reasonable possibilities;
- Requires monitoring pre-construction, during construction, post-construction, and during operation; and
- Requires that all data collected be made available to the public in electronic form and in real-time whenever possible or with minimal delay.

Every lease and grant issued under the program should contain monitoring and adaptive management conditions that are consistent with this overall environmental monitoring and adaptive management program.

Subpart B—Issuance of OCS Alternative Energy Leases

§ 285.200 What rights are granted with a lease issued under this part?[54]

[53] The DOI's definition states: "Adaptive management [is a decision process that] promotes flexible decision-making that can be adjusted in the face of uncertainties as outcomes from management actions and other events become better understood. Careful monitoring of these outcomes both advances scientific understanding and helps adjust policies or operations as part of an iterative learning process. Adaptive management also recognizes the importance of natural variability in contributing to ecological resilience and productivity. It is not a 'trial and error' process, but rather emphasizes learning while doing. Adaptive management does not represent an end in itself, but rather a means to more effective decisions and enhanced benefits. Its true measure is in how well it helps meet environmental, social, and economic goals, increases scientific knowledge, and reduces tensions among stakeholders." Williams, B. K., R. C. Szaro, and C. D. Shapiro. 2007. Adaptive Management: The U.S. Department of the Interior Technical Guide. Adaptive Management Working Group, U.S. Department of the Interior, Washington, DC. Available online at http://www.doi.gov/initiatives/AdaptiveManagement/documents.html. This definition is also similar to the definition found in the Programmatic Regulations for the Comprehensive Everglades Restoration Plan: Final Rule, 33 CFR Part 385.

[54] The full section states: "(a) A lease issued under this part grants the lessee the right, subject to obtaining the necessary approvals and complying with all provisions of this part, to occupy, and install and operate facilities on, a designated portion of the OCS for the purpose of conducting: (1) Commercial activities; or (2) Other limited activities that support, result from, or relate to the production of energy from an alternative energy source. (b) A lease issued under this part confers on the lessee the right to one or more project easements without further competition for the purpose of installing gathering, transmission, and distribution cables, pipelines, and appurtenances on the OCS as necessary for the full enjoyment of the lease. (1) You must apply for the project easement as part of your Construction and Operations Plan (COP) or General Activities Plan (GAP), as provided under subpart F of this part; and (2) The MMS will incorporate your approved project easement as an addendum to your lease. (c) A commercial lease issued under this part may be developed in phases with MMS approval as provided in § 285.629." 73 Fed. Reg. 39376, 39466-7.

Comment: This section states that issuance of a lease ensures the right to project easements without further competition (§ 285.200(b)), but it is unclear whether this is limited to land on the OCS. Does this easement include the right to pass through state waters? If so, then there needs to be some kind of explicit acknowledgment of the need for consultation with the affected state(s). Further, project easements should be evaluated in the same manner as project area and MMS should ensure that a fair return for this right is granted.[55]

§ 285.201 How will MMS issue leases?[56]

Comment: This section describes MMS's recommended plan to issue leases individually, either competitively or non-competitively, largely based upon industry interest. NRDC instead recommends (and details in Section 2, Part I) that MMS should engage in a limited scope of marine spatial planning to identify "high impact" and "low impact" OSC development areas, and incorporate this into the agency's bidding process.[57]

Further, MMS notes in the section discussion that the "approved lease form (or forms) for OCS alternative energy will be developed separately from the rulemaking and in consultation with interested and affected parties."[58] NRDC recommends that MMS specify the affected parties and lay out the mechanism to ensure consultation. We suggest that interested federal and state agencies, as well as the alternative energy business community and general public be allowed to comment on draft wording.

§ 285.202 What types of leases will MMS issue?[59]

Comment: MMS indicates here that they will be open to authorizing a combination of specific activities in a particular lease. Given the uncertainty of the effects of new technology, particularly the interactions between different types of technology in the same area, we suggest that such leases require a cumulative impacts analysis and full NEPA review, as described above in Part I, Section 1.

§ 285.204 What areas are available for leasing consideration?[60]

Comment: As described above, we suggest that MMS use an ecosystem-based spatial planning approach in selecting appropriate areas for leasing and granting RUEs, ROWs and Alternate Use RUEs.[61] As part of this spatial planning approach, MMS should engage in consultations with

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[55] *Supra*, Part I, Section 6.

[56] The full section states: "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." 73 Fed. Reg. 39376, 39467.

[57] *Supra*, Part I, Section 2.

[58] 73 Fed. Reg. 39376, 39395.

[59] The full section states: "The MMS may issue leases on the OCS for the assessment and production of alternative energy and may authorize a combination of specific activities. We may issue commercial leases or limited leases." 73 Fed. Reg. 39376, 39467.

[60] The full section states: "The MMS may offer any appropriately platted area of the OCS as provided in § 285.205 for an alternative energy lease, except any area within the exterior boundaries of any unit of the National Park System, National Wildlife Refuge System, National Marine Sanctuary System, or any National Monument." 73 Fed. Reg. 39376, 39467.

[61] *Supra*, Part 1, Section 2.

affected states and other federal natural resource agencies and departments and provide the maximum level of protection to areas that have been given special designation or protection by the states or other federal agencies. It is particularly important the MMS consult with states because, under the federal Submerged Lands Act, the states, not DOI, have the authority to grant easements, leases, and rights-of-way on submerged lands up to three miles from the mean high tide line.[62]

§§ 285.210 – 285.225 Competitive Lease Process/ Competitive Lease Award Process
Comment: As discussed in Part I, Section 6, NRDC urges MMS to adopt a multiple-factor bidding process for its leases that fully accounts for environmental and economic externalities and rewards environmental best practices.

The Proposed Rule states that MMS "may publish" a public notice requesting information on interest in leasing parts of the OCS; this should be mandatory.[63] NRDC is concerned that publishing such notice is optional and recommends replacing this language with a strong requirement to publish notice and garner comments from the public at all stages of the lease – including lease renewal.

The Rule's comments note that if a prospective lessee has already submitted information, MMS would not necessarily require it to be resubmitted subsequently. NRDC suggests that MMS change this requirement, as during the time period, which, given the circumstances could be lengthy, the proposal may have changed.[64]

§§ 285.235 – 285.237 Commercial and Limited Lease Terms
Comment: In the MMS's requirements that project applicants prepare necessary documentation, (Construction and Operations Plan or "COP"; Site Assessment Plan or "SAP"; and the General Activities Plan or "GAP") there are provisions allowing the lessee to request time extensions for the preliminary (and in the case of the commercial leases, site assessment) term. However, the Rule does not require any justification for failure to submit these plans in a timely fashion, nor are there any penalties associated with an extension.[65] This exception appears to make the time requirements pointless. We encourage MMS to create incentives for applicants to prepare NEPA and other planning documentations as rapidly as possible, and that time requirements be strictly enforced.

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[62] Submerged Lands Act, 43 U.S.C. § 1311 (2008).

[63] The full text for § 285.210 states: "The MMS may publish in the Federal Register a public notice of Request for Interest to assess interest in leasing all or part of the OCS for activities authorized in this part. The MMS will consider information received in response to a Request for Interest to determine whether there is competitive interest for scheduling sales and issuing leases. We may prepare and issue a national, regional, or more specific schedule of lease sales pertaining to one or more types of alternative energy." 73 Fed. Reg. 39376, 39467.

[64] The comments state: "In cases where a prospective lessee has already submitted the required information, we would not require it to be submitted subsequently. For example, if a company responded to a broad or specific Request for Interest for an area that MMS subsequently decided to offer in a lease sale, that company would not have to resubmit information in response to the Call for that sale." 73 Fed. Reg. at 39397.

[65] *See* § 285.235 (b): "If you do not timely submit a SAP or COP, as appropriate, you may request additional time to extend the preliminary or site assessment term of your commercial lease that includes a revised schedule for submission of a SAP or COP, as appropriate." Also, § 285.236 (b) "If you do not timely submit a GAP, as appropriate, you may request additional time extend the preliminary term of your limited lease that includes a revised schedule for submission of a GAP." 73 Fed. Reg. at 39470.

The regulations provide insufficient limitations or guidelines for renewal terms.[66] For example, no restrictions on the number of times a lessee may renew or any conditions requisite for renewal are provided in the Rule. It is within the bounds of reason that MMS could continue to rubber-stamp a lessee's OCS operations, bypassing the need for environmentally beneficial retrofits. Further, without any standard of performance, in order to qualify for a renewal, even the worst industrial tenants could continue operation after their term expires. This free pass relinquishes an important opportunity for MMS to continue to make sure all projects are operating in the most efficient and least environmentally detrimental way possible.

As written, the Proposed Rule allows MMS to decide on renewals, plan changes and a final decommissioning plan with no external input at all. Only MMS's approval is needed for changes made to the lease once it has been approved, including revisions and conducting activities not directly addressed in the approved lease, renewal of a lease, and approval of a decommissioning application. For example, while the proposed operator must be identified in the initial planning documents that are open to review, only MMS must be informed if the operator changes during the lease term.[67] As directed under the EPAct, MMS must consult with all relevant federal agencies for leases, easements…and related purposes.[68] MMS must also coordinate and consult

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[66] *See* § 285.235 (a)(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." and (a)(5): "A commercial lease may have additional time added to the operations term through a lease renewal, not to exceed the original term of the lease. The lease renewal term begins upon expiration of the original operations term." 73 Fed. Reg. at 39470. Detail is found at § 285.425: "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.", § 285.427 "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", and § 285.428 "If you timely request a renewal: (a) You may continue to conduct activities approved under your lease or grant under the original terms and conditions. (b) You may request a suspension of your lease or grant as provided in § 285.416 while MMS considers your request. (c) For the period MMS considers your request for renewal, you must continue to make all payments in accordance with the original terms and conditions of your lease or grant." 73 Fed. Reg. at 39474.

[67] *See* § 285.405 (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." 73 Fed. Reg. 39376, 39472.

[68] EPAct § 388(p)(1). *See*, for example: "If you want to conduct activities not directly addressed in the approved SAP, you would need to provide MMS with a written description of the proposed activities and receive approval from MMS before conducting the activities. We will determine whether the activities are within the scope of the approved SAP or if the SAP needs to be revised. If MMS determines that you must revise the SAP, then MMS must approve the revised SAP before you can conduct the activities." 73 Fed. Reg. 39376, 39418. "You must notify MMS in writing before conducting any activities not described in your approved SAP, describing in detail the type of activities you propose to conduct. We will determine whether the activities you propose are authorized by your existing SAP or require a revision to your SAP. We may request additional information from you if necessary to make this determination." 73 Fed. Reg. 39376, 39485 § 285.617 (a). "You must notify MMS in writing before conducting any activities not described in your approved COP, describing in detail the type of activities you propose to conduct. We will determine whether the activities you propose are authorized by your existing COP or require a revision to your COP. We may request additional information from you if necessary to make this determination." 73 Fed. Reg. 39376, 39489, § 285.634 (a). "You must notify MMS in writing before

with affected state and local governments when they "may be affected by a lease, easement, or right-of way" authorized in that Act.[69]

NRDC recommends that a project-specific Supplemental Environmental Impact Statement (SEIS) be conducted when their term ends to ensure that newer information regarding impact and advanced technologies with potentially fewer environmental externalities be analyzed and then taken into account in changing the renewed lease or the bid reopened so that others have the chance to apply.[70] MMS and the public would also then have the opportunity to review the current operator's environmental compliance record, and measure it against the expected environmental effects of other projects that might be vying for the lease. Further, decommissioning plans, if changed, should be publicly vetted through the Federal Register.

§ 285.238 How can I conduct alternative energy research activities on the OCS?
Comment: MMS should work with the U.S. Department of Energy ("DOE") and NOAA, FWS, and FERC to identify the best placement of alternative energy pilot sites. Also, the Rule states that a prerequisite of testing and research site determination is that no competitive interest exist; MMS provides no rationale or support for the requirement. However, poor test areas could potentially jeopardize pilot project success. NRDC recommends that areas suitable to the success

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conducting any activities not described in your approved GAP, describing in detail the type of activities you propose to conduct. We will determine whether the activities you propose are authorized by your existing GAP or require a revision to your GAP. We may request additional information from you if necessary to make this determination." 73 Fed. Reg. 39376, 39492, § 285.655 (a). Regarding renewals, *see*, for example, "The proposed rule provides that a lessee or grantee may request a renewal to conduct substantially similar activities as were originally authorized, and MMS, at its sole discretion, may approve such requests. The renewal provisions also provide timeframes and information requirements associated with renewal requests, as well as guidance on making payments and suspending activities while a renewal request is pending. The length of a renewal will be set by MMS on a case-by-case basis." 73 Fed. Reg. 39376, 39405. For decommissioning, *see* § 285.907: "(a) Based upon your inclusion of all the information required by § 285.906, MMS will compare your decommissioning application with the decommissioning general concept in your approved SAP, COP, or GAP to determine what technical and environmental reviews are needed. (b) You will likely have to revise your SAP, COP, or GAP, and MMS will begin the appropriate NEPA analysis and other regulatory reviews as required, if MMS determines that your decommissioning application would: (1) Result in a significant change in the impacts previously identified and evaluated in your SAP, COP, or GAP; (2) Require any additional Federal permits; or (3) Propose activities not previously identified and evaluated in your SAP, COP, or GAP. (c) During the review process we may request additional information, if we determine that the information provided is not sufficient to complete the review and approval process. (d) Upon completion of the technical and environmental reviews we may approve, approve with conditions, or disapprove your decommissioning application. (e) If MMS disapproves your decommissioning application, you must resubmit your application to address the concerns identified by MMS." 73 Fed. Reg. 39376, 39501.

[69] EPAct § 388 (p)(7).

[70] A SEIS is required by the CEQ regulations, 40 C.F.R. § 1502.9(c) when (1) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. An agency may also prepare a supplemental statement if it decides that it will further the purposes of the act. 40 C.F.R. 1509.9(c)(1)(iii). The leading case has endorsed the SEIS requirement: "Application of the 'rule of reason' thus turns on the value of the new information to the still pending decisionmaking process. . . . [The decision whether to prepare a supplemental impact statement is similar to the decision to prepare an impact statement initially.] If there remains 'major federal action' to occur, and if the new information is sufficient to show that the remaining action will 'affect the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental . . . [impact statement] must be prepared." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-74 (1989).

of such nascent technologies be selected in coordination with the DOE and the abovementioned agencies.

Subpart C—Rights-of-Way (ROW) Grants and Rights-of-Use and Easement (RUE) Grants for Alternative Energy Activities

§§ 285.300 – 285.316 ROW Grants and RUE Grants/ Obtaining ROW Grants and RUE Grants

Comment: The ROW and RUE grants have virtually unlimited project life spans with poorly defined environmental controls. For example, the grant request is only required to include "pertinent information concerning environmental conditions in the area of interest."[71] Given the many potential environmental impacts of activities performed under ROW and RUE grants (*i.e.*, which authorize cables, pipelines, and transportation or transmission facilities that are likely to pass through large areas of space) full NEPA analysis must be conducted for these actions.

Subpart D—Lease and Grant Administration

§ 285.437 When can my lease or grant be canceled?

Comment: Section 285.437(b)(4) sets out a three part test for cancellation, based on natural resources harm: the Secretary must determine if the continued activity under the lease would "cause serious harm or damage to natural resources; life (including human and wildlife); property; the marine, coastal, or human environment; or sites, structures, or objects of historical or archeological significance"; the possible harm or damage would not disappear or fall within "an acceptable extent within a reasonable period of time"; and that the advantages of cancellation outweigh the advantages of continuing the lease or grant.[72]

There are several problems with this section. The threat of lease or grant cancellation is the main enforcement mechanism for MMS. Yet this section, especially parts two and three, provides MMS with too much discretion because it could be interpreted so that grantees are almost never found to be in violation. The main terms are too general and need definition. For example, the

[71] *See* § 285.303: "Your ROW grant or RUE grant will remain in effect for as long as the associated activities are properly maintained and used for the purpose for which the grant was made, unless otherwise expressly stated in the grant." Regarding environmental controls, see: § 285.305 (d): "Pertinent information concerning environmental conditions in the area of interest." 73 Fed. Reg. 39376, 39471.

[72] Full text states of § 285.437(b) states: "The Secretary may cancel any lease or grant issued under this part when: (1) The Secretary determines after notice and opportunity for a hearing that with respect to the lease that would be canceled, the lessee has failed to comply with any applicable provision of the OCS Lands Act or these regulations, any order of the Director, or any term, condition or stipulation contained in the lease or grant and the failure to comply continued 30 calendar days (or other period MMS specifies) after you receive notice from MMS. The Secretary will mail a notice by registered or certified letter to the lessee or grant holder at its record post office address. (2) The Secretary determines after notice and opportunity for a hearing that you have terminated commercial operations as provided in § 285.635, or other approved activities as provided in § 285.656. (3) Required by national security or defense; or (4) The Secretary determines after notice and opportunity for a hearing that continued activity under the lease or grant: (i) Would cause serious harm or damage to natural resources; life (including human and wildlife); property; the marine, coastal, or human environment; or sites, structures, or objects of historical or archaeological significance; and (ii) That the threat of harm or damage would not disappear or decrease to an acceptable extent within a reasonable period of time; and (iii) The advantages of cancellation outweigh the advantages of continuing the lease or grant in force." 73 Fed. Reg. 39376, 39475.

regulations fail to define "serious harm or damage" or to provide examples as guidance. There is no definition of what an "acceptable" decrease in damage within a "reasonable" time might be. Finally, there is absolutely no guidance in how MMS should balance the advantages of cancellation against the advantages of continuing the lease. This section must be clarified and strengthened to protect our oceans and coastal resources.

Subpart E—Payments and Financial Assurance Requirements

§ 285.500 How do I make payments under this part?

Comment: Under the EPAct, MMS must ensure a fair return for any lease, easement, or right-of-way in the OCS. [73] To meet this requirement, NRDC encourages a multiple-factor bidding process (previously mentioned in Section 6 of Part I) as well as periodically re-evaluating the fee calculation methodology and payments actually received to ensure that all social and environmental costs are accounted for.

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

Comment: MMS requested comments on whether or not to require an additional payment equal to the difference between the minimum bid MMS would have set for a competitive sale offering in the same area and the acquisition fee.[74] We recommend that the price be set so that the Federal Government and the states receive a similar return regardless of whether or not the lease is issued competitively.

§ 285.509 May MMS reduce or waive lease or grant payments?

Comment: The threshold for the MMS Director to waive lease or grant payments set in this section seems inappropriately low. The Director may reduce or waive fees if he or she determines that it is necessary to encourage continued or additional activities.[75] This section gives the Director the ability to waive all payments with no accountability or guidance at all. This section should either be removed entirely or substantially expanded. Additional requirements should be added relating to the efficacy of operations, the value of maintaining operations, and findings that there are no other operators that could take over operations and run them effectively.

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[73] EPAct §§ 388 (p)(2), (p)(4)(I). *See e.g.,* "MMS is proposing that a rental fee be collected on the entire leased acreage with rental rates of $3 to $5 per acre for commercial leases, project easements and rights-of-way." 73 Fed. Reg. 39376, 39380.

[74] *See* under commenting procedures, "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." 73 Fed. Reg. 39376, 39441.

[75] Full text of § 285.509 states, "(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 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." 73 Fed. Reg. 39376, 39478.

Subpart F—Plans and Information Requirements

Comment: MMS should meaningfully incorporate in this section, rather than just mentioning in the comments, the requirement of adaptive management into the very structure of the leases.[76] Given the new and unknown qualities of these technologies, true adaptive management is necessary to make sure they remain as safe and efficient as possible over time and the insertion of sample provisions (as previously mentioned in our comments on § 285.112) into the regulations would be a strong step in the right direction.

Further, the Proposed Rule is unclear on when exactly a SAP and COP versus GAP is required. The comments state, "The SAP and the COP are used for commercial leases, while the GAP would be used for limited leases and grants."[77] However, § 285.640(a) notes that the GAP may be applicable to the project easement.[78] This is confusing, as a project easement would seem only to be needed for commercial operations. We request that MMS clarify this section and the applicable comments.

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

Comment: NRDC recommends the following environmental data be gathered before the operator is allowed to conduct any baseline environmental surveys under its SAP (and, by extension, its COP or GAP):[79]

- Number and diversity of species in the affected area, including indicator species and endangered, threatened, or rare species;
- Habitat use patterns by key species;
- Water quality and ocean conditions, including currents;
- Habitat composition, including benthic substrates and biogenic habitats, such as corals and sponges;
- Presence of any biologically important or unique uses of the affected area (*e.g.*, migratory routes or feeding grounds); and
- Information about traditional and local uses of the area, including fishing activity and cultural resources.

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[76] *See* the largest discussion of adaptive management in the Proposed Rule under the overview for Subpart H: "This subpart describes requirements to prevent or minimize the likelihood of harm or damage to the marine and coastal environments and to promote safe operations, including their physical, atmospheric, and biological components. The MMS intends to use adaptive management practices to regulate alternative energy activities using a system whereby the operating industries would demonstrate and validate their performance. The MMS then will require adjustments to mitigation and monitoring activities on a case-by-case basis based on operating experiences. MMS will specify terms and conditions to be incorporated into the SAP, COP, or GAP. You must certify compliance with certain of those terms and conditions." 73 Fed. Reg. 39376, 39429.

[77] 73 Fed. Reg. 39376, 39416.

[78] *See* § 285.640 (a): "A GAP describes your proposed activities for the assessment and development of your limited lease or grant including, if applicable, your project easement." 73 Fed. Reg. 39376, 39489.

[79] *See* § 285.605 (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)." 73 Fed Reg. at 39482.

The need for this pre-development information assessment should be provided in the Rule as a precondition for the SAP, COP, and GAP submittal.

We fully expect that once the SAP has been reviewed and installation and seismic activities proceed to further define the area and its resources, this information be shared with both MMS and the public.

§ 285.614 When may I construct OCS facilities proposed under my SAP?
Comment: MMS proposes that if they do not respond to an applicant's SAP with objections within sixty calendar days after receiving the report, the applicant may assume MMS has no objections.[80] We are concerned sixty days may be too short a review time, and that the regulations do not appear to provide for any extension of time allowing MMS to continue to review a SAP. Further, while the activities under a SAP are less invasive than those found in a COP or GAP, there still may be impacts as a result of site assessment installation and seismic activities or concerns as to the area selected. The public should be given the opportunity to comment on the SAP, and help refine the work identified.

Subpart G—Facility Design, Fabrication, and Installation

§ 285.709 When conducting on-site fabrication inspections, what must the CVA verify?
Comment: This section requires a Certification Verification Agent (CVA) "make periodic on-site inspections while fabrication is in progress."[81] There is absolutely no guidance on the term "periodic". We suggest that MMS revise this section to either define periodic or include a "not-less than" limitation on the number of visits or time between them.

Subpart H—Environmental and Safety Management, Inspections, and Facility Assessments

Comment: The environmental compliance and enforcement requirements in the Proposed Rule are insufficient. While MMS requires a CVA for independent assessment of project design and installation, there is no similar independent inspection of environmental compliance. MMS requires only an operator-developed self-inspection program and periodic inspections from MMS. For example, the comments state, "[w]hile the proposed subpart H would not require the use of an Environmental Management System (EMS), the MMS generally endorses the EMS concept."[82] The agency does not justify its refusal to actually require an EMS. Where MMS does state an intention to actually use adaptive management practices (as noted previously in our comments on § 285.112), they intend to use a "system whereby the operating industries would demonstrate and validate their performance"; explicit adaptive management practices throughout

[80] *See* § 285.614 (a) (1): "You may begin to construct and install your facility or facilities after MMS notifies you that it has received the initial survey report and has no objections. If MMS receives the initial survey report, but does not respond with objections within 60 calendar days of receipt, MMS is deemed not to have objections to the report and you may commence construction and installation of your facility or facilities." 73 Fed. Reg. 39376, 39484-5.

[81] *See* § 285.709 (a): "To comply with § 285.708(a)(3), the CVA must make periodic on-site inspections while fabrication is in progress and must verify the following fabrication items, as appropriate…" 73 Fed. Reg. 39376, 39496.

[82] 73 Fed. Reg. 39429.

the lifetime of the project are not found and compliance and enforcement are turned over to the regulated.[83] In its role as regulator, MMS requires no set reviews of the activities taking place at a facility, for example, saying only that they will "conduct periodic reviews of the activities being conducted under an approved SAP, to ensure that they fall within the scope of the SAP."[84]

Especially given the absence of clear standards (as is previously discussed in Part 1, Section 5), it is crucial to routinely monitor and assess the projects' impacts. To ensure the future of alternative energy projects in the OCS, it is essential that the projects fully comply with environmental standards and that regular review be conducted – otherwise, the ecological benefits that these energy projects can bring will be overshadowed by their potential negative impacts. This section must include guidelines for periodic review, including setting a maximum amount of time between review periods and certain standards that will be used in such a review.

In addition, the regulation and compliance required when there is a problem in operation is also too vague and lacking in enforcement power. For example, the comments state "[o]perators would be required to notify MMS and repair any equipment failure, including pipelines and cables, as soon as practicable."[85] This does not set any concrete guidelines or timetables for repair, and does not acknowledge the environmental damage that could follow such failure nor require any mitigation if damage occurs. Similarly, once a project is in place, MMS can suspend some or all activities if they "pose an imminent threat of serious or irreparable harm or damage to natural resources, life (including human and wildlife), property, or the marine, coastal, or human environment."[86] However, suspension extends the term of lease or grant for the length of time it is in effect.[87] This is not a strong enough disincentive to prevent environmental loss.

Clear, measurable standards established for ecosystem health are essential to effective enforcement.[88] Comprehensive monitoring coordinated between MMS, applicants, and potentially third parties is essential to ensure that mitigation measures and ecological benchmarks are obtained. The regulatory system should also provide for ongoing monitoring and enforcement of developer obligations. Currently, the Proposed Rule does not meet these goals and is insufficient in this regard.

§ 285.804 How must I protect essential fish habitats identified and described under MSA?

[83] *Id.*
[84] *Id.* at 39422.
[85] 73 Fed. Reg. 39376, 39430.
[86] Full text of § 285.417 (a) states: "The MMS may order a suspension under the following circumstances: (1) When necessary to comply with judicial decrees prohibiting some or all activities under your lease; (2) When continued activities pose an imminent threat of serious or irreparable 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; or (3) When the suspension is necessary for reasons of national security or defense." 73 Fed. Reg. 39376, 39473.
[87] *See* § 285.415 (b): "A suspension extends the term of your lease or grant for the length of time the suspension is in effect." 73 Fed. Reg. 39376, 39473.
[88] *See supra*, Part I, Section 5.

Comment: NRDC believes that this section should include an analogous protection for any areas designated as essential fish habitat by a state entity.[89]

Subpart J—Rights of Use and Easement for Energy and Marine-Related Activities Using Existing OCS Facilities

Section 7 of Part I of these comments addresses NRDC's concerns with this Subpart.

§ 285.1005 How do I request an Alternate Use RUE?
Comment: It is not clear how MMS would properly evaluate environmental impacts of the project if they do not require the submission of any environmental information with the Alternate Use RUE. Because MMS will evaluate all proposals under the requirements of NEPA (§ 285.1007), the applicants should be required to submit detailed information to assist in the preparation of all relevant NEPA documentation.

§ 285.1007 What process will MMS use for competitively offering an Alternate Use RUE?
Comment: MMS abdicates responsibility and opportunity in this section by allowing the owner of an existing OCS facility a disproportionately large degree of control over the selection of an alternate use project.[90] If a platform owner is interested in exploring the possibility of hosting alternate uses in their project area, MMS – not the structure's owner – should first review the area and rank project proposals based on their impact on the health of the marine environment, instead of allowing the platform owner to eliminate options prior to MMS's review. It seems likely that the platform owner would base their consideration largely on which technology would receive for them the greatest return. By MMS reviewing the appropriateness of projects and eliminating possibly hazardous ones before the owner comments, the owner would be selecting from the remaining options. It is unclear why MMS would not take this opportunity to have a direct and significant positive impact on the environmental effects of alternate use projects. Additionally, NRDC recommends that a multi-factor bidding process, as described in Section 6 of Part I, be used to select the winning alternate use bid.

III. CONCLUSION

Finally, NRDC suggests that MMS work with FERC to provide regulatory clarity that will encourage to the development of robust alternative energy projects that have minimal impacts on marine ecosystems. MMS and FERC need to resolve their disagreements over regulatory

[89] *See* § 285.804 "(a) If MMS finds essential fish habitat or habitat areas of particular concern may be adversely affected by the proposed action, MMS must consult with NMFS. (b) Any conservation recommendations adopted by MMS to avoid or minimize adverse affects on EFH will be incorporated as terms and conditions in the lease and must be adhered to by the applicant. The MMS may require additional surveys to define boundaries and avoidance distances. (c) If required, MMS will specify the survey methods and instrumentations for conducting the biological survey and specify the contents of the biological report." 73 Fed. Reg. 39376, 39498.

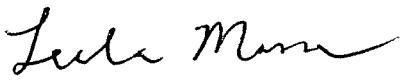
[90] *See* the comments: "Before submitting a request to the MMS for issuance of an Alternate Use RUE, the applicant must contact the owner of the existing OCS facility as well as the current lessee of the area in which the facility is located and reach preliminary agreement regarding the alternate use of the structure. Since the platform or other facility is the private property of the owner, MMS could not issue an Alternate Use RUE unless the alternate use was tentatively agreed to by the owner of the facility." 73 Fed. Reg. 39376, 39435.

authority for hydrokinetic projects, as this conflict, which appears to be pushing both agencies to rapidly advance their regulatory agendas, is likely to produce a regulatory regime that is duplicative, burdensome, and less environmentally protective. MMS should also support and contribute to the development of an integrated, national ocean policy, such as Oceans 21 to forestall conflicts in jurisdiction and ensure coordination among all the agencies working on marine resources management issues.[91]

NRDC looks forward to working with MMS to foster offshore renewable energy technologies and to safeguard our ocean and coastal resources. We sincerely hope that a revised Rule will be generated based on these comments and promulgated promptly to move us ahead the field of alternative energy projects without delay.

Respectfully submitted,

Alison Chase, Policy Analyst



Leila Monroe, Oceans Policy Analyst

[91] H.R. 21: Oceans Conservation, Education, and National Strategy for the 21st Century Act, Active Legislation, also known as Oceans 21 (Introduced January 4, 2007). A parallel bill was introduced in the Senate, S. 3314: National Oceans Protection Act of 2008 (introduced July 23, 2008). *See,* http://www.govtrack.us