Deval L. Patrick
Governor
Timothy P. Murray
Lieutenant Governor

Commonwealth of Massachusetts
Department of Fish and Game
251 Causeway Street, Suite 400
Boston, Massachusetts 02114
(617) 626-1500
fax (617) 626-1505

Ian A. Bowles
Secretary
Mary B. Griffin
Commissioner

ATTN: Regulations and Standards Branch
Regulation Identifier Number: 1010-AD30

September 5, 2008

Maureen Bornholdt
Program Manager
Offshore Alternative Energy Programs
Minerals Management Service
381 Elden Street, MS-4024
Herndon, VA 20170-4817

Dear Ms. Bornholdt:

The Massachusetts Department of Fish and Game ("DFG") submits the following comments on the Minerals Management Service's ("MMS") Proposed Rule for Alternative Energy and Alternative Uses of Existing Facilities on the Outer Continental Shelf ("OCS"). This regulation arises out section 388(a) of the Energy Policy Act of 2005 ("EPAct"), which amended section 8 of the Outer Continental Shelf Lands Act ("OCSLA") and authorized the Secretary of the Department of the Interior, acting through the MMS, to grant leases, easements or rights-of-way on the OCS for alternative energy uses. The Secretary is required to coordinate and consult with the Governor of any State or the executive of any local government that may be affected by any alternative energy lease, easement or right-of-way granted by the Secretary pursuant to this federal law.

By way of background, DFG has authority, pursuant to M.G.L. c. 21A, s.8, to manage and protect Massachusetts' wildlife and their habitats. The Division of Marine Fisheries ("DMF") in DFG has responsibility under M.G.L. c. 130, s.17 to regulate both commercial and recreational fishing within the coastal waters of Massachusetts. The Division of Fisheries and Wildlife ("DFW") in DFG has responsibility under M.G.L. c. 131 for the oversight and protection of wildlife, including freshwater and diadromous fish, in Massachusetts. A key component of DFW's responsibility is the protection of endangered, threatened, and special concern animal and plant species pursuant to M.G.L. c. 131A, the Massachusetts Endangered Species Act ("MESA"). These include marine mammals (e.g., right and humpback whales) and waterbirds (roseate, least and common

terns) that travel between federal and state waters and are protected under both the federal Endangered Species Act ("ESA") and MESA.

As noted below and discussed in the comment letter from the Massachusetts Office of Coastal Zone Mangement ("CZM"), DFG and its divisions and CZM are participating in a comprehensive ocean planning effort for state coastal waters, which will include identifying appropriate locations for alternative energy uses. Consequently, Massachusetts has a particular interest in ensuring that the MMS' alternative energy regulatory scheme for adjacent federal waters provides for meaningful state involvement, an equitable distribution of revenues to affected States, and the protection of marine and other wildlife resources in State waters.

Specific Comments on the Proposed Rule

Subpart B: Issuance of OCS Alternative Energy Leases

1. Consultation with the State on Area Identification and Lease Determinations

The Proposed Rule at 30 CFR s.285.102(e) states that the MMS' responsibilities include coordinating and consulting with the Governor of any State or the executive of any local government that may be affected by a lease, easement or right-of-way granted by the MMS. It also allows, but does not require, the MMS to invite any affected State Governor and affected local government executive "to join in establishing a task force or other joint planning or coordination agreement" in carrying out its responsibilities under the Rule. Consistent with the above responsibility, 30 CFR s.285.203 states that for competitive and noncompetitive leases, the MMS will coordinate and consult with the Governor of each affected State as directed by the relevant federal statutes. Similarly, under 30 CFR s.285.211(3)(b), the MMS is required to identify areas for environmental analysis and consideration for leasing "in consultation with appropriate Federal agencies, States, local governments, and other interested parties."

While the Rule provides for consultation with the States, it should be more clear, consistent and detailed about the breadth, substance and timing of the MMS' consultation with the State in making these critical leasing decisions. This is particularly important given that the Rule is more in the form of a road map for the decision-making rather than a comprehensive set of siting and operational standards for alternative energy facilities on the OCS. In short, the Rule should give States a meaningful consultative role throughout the alternative energy regulatory and decision-making process, beyond their existing opportunities to provide comments under other federal statutes such as NEPA. In that regard, DFG concurs with the recommendation in CZM's comment letter that the Rule expressly require the MMS to extend a formal offer to affected States to participate in a task force and/or to enter into a written joint planning or coordination agreement when carrying out its responsibilities under the Rule.

For example, we recommend that the Rule require the MMS to consult with the State even prior to issuing a Call for Information and Nominations regarding potential areas for leasing. In Massachusetts' case, the Executive Office of Energy and Environmental Affairs ("EEA") and its state resource agencies such as CZM and DFG and its divisions are engaged in a comprehensive ocean management planning process for

state coastal waters, as mandated St. 2008, c. 114. This ongoing ocean planning effort underscores the role of our State as a repository of detailed information and expertise on fisheries and other aquatic uses and habitats, as well as on state-listed species protected under the MA Endangered Species Act ("MESA"). A prime example of the latter are federally and state-listed colonial waterbirds such as Roseate, Least, and Common Terns, as well as on other major migratory bird concentration areas (e.g. Sea Ducks) that travel between state and federal waters that are protected under the federal Endangered Species Act ("ESA") and the federal Migratory Bird Act.

The State, as an established regulator and issuer of permits for activities in coastal waters, can also provide specific input on the nature and scope of environmental analyses needed to determine whether, or the extent to which, an area is appropriate for leasing, and on the more specific siting criteria to be applied by the MMS in identifying a leasing area. The Rule needs to more clearly affirm and provide for substantive consultation with the State throughout the regulatory process in recognition of the State's direct interest and its value as a resource for relevant information and expertise.

2. Lease Terms

30 CFR s.285.235 sets forth the basic terms to be included in commercial and limited leases awarded by the MMS. For commercial leases, these include the submittal of a Site Assessment Plan ("SAP"), which describes the assessment and survey activities needed to characterize the site for a commercial lease, and a Construction and Operations Plan ("COP"), which describes all activities and facilities to be installed to generate and transmit energy pursuant to the lease. For limited leases, the terms include the submittal of a General Activities Plan ("GAP"), which describes all activities and operations related to technology testing. While the Rule directs the MMS to conduct the required federal environmental compliance reviews (e.g., under NEPA) on the above lease actions, it does not appear to require the MMS to consult with the State apart from that process.

Consistent with our above comments, we request that the Rule expressly provide the State a separate opportunity to comment on the terms of any proposed lease. Beyond the Rule, the MMS' more specific policies and standard operating procedures should require early, pro-active and substantive consultation with the appropriate State agencies. In addition, the Rule should acknowledge that other foreseeable lease terms will include conditions related to environmental protection, including, as needed, mitigation for any unavoidable impacts (e.g, compensatory funding to the State for impacts to fisheries or to birds and other wildlife that use both state and federal waters for foraging, breeding, and migration.)

Subpart E: Payments and Financial Assurance Requirements

3. Methods for sharing revenues generated by the program with nearby States

The amended section 8 of the OCSLA mandates that 27% of the revenues received by the federal government pursuant to allowing alternative energy uses on the OCS shall be distributed to the affected States. More specifically, the statute states that such payments shall be based on a formula established in regulation that provides for

"equitable" distribution based on proximity to the project, among States that have a coastline that is located within "15 miles of the geographic center of the project."

The Proposed Rule at 30 CFR s.285.540 – 541, in turn, describes how the MMS will distribute lease revenues to the States, and how a project's location may affect an eligible State's share of the revenues. Consistent with the statute, the Rule provides that 27% of the generated revenue would be shared with States that are located wholly or partially within the area extending 3 nautical miles seaward State submerged lands. See also p. 39388. The formula proposed to determine distribution of these funds to these eligible States is "an inverse distance formula, which apportions shares according to the relative proximity of the nearest point on the coastline of each eligible State to the geographic center of the project." 30 CFR s.285.540(c). The Federal Register Notice at p. 39391 explains more specifically that revenues are broadly defined "to include bonuses, rents, license fees, operating fees, other fees, and any similar payments paid in connection with a qualified project or qualified project areas."

We acknowledge that the revenue sharing percentage is mandated to be 27% under the EPAct. However, the law also requires that the regulatory formula provide for *equitable* distribution to the affected States, based on (but not solely limited to) the proximity of the project. This means that the MMS' more specific approach to ensuring an equitable distribution of the revenues should also ensure that a given State's share of the generated revenues is proportionate to the impacts of the leased facilities on that State. Our concern is that the currently proposed "inverse distance" formula may result in an inequitable distribution of funds since the character and magnitude of impacts to affected fisheries users and resources and to other wildlife and their habitats may vary among States, regardless of distance from the proposed project. Consequently, we request that the formula be amended to expressly take into account, in addition to the proximity of the project, the proportionate resource impacts of the project on the affected States. We also concur with the CZM's comment that using the center of the project area and its proximity to coastlines as the sole basis for distribution assumes that most projects will be somewhat regular in geometric shape. This could result in one State qualifying for the majority of the revenue because of its proximity to the project "center," but, because of the irregular shape of the project, less of the total project area is actually located in that State.

Additionally, as stated above, mitigation in the form of financial compensation to the State for impacts to affected fisheries and other wildlife uses and resources and habitats should be included as conditions in the lease, where appropriate, and expressly affirmed in the Rule as "revenue" for the purpose of this revenue sharing formula. Such revenue should be then distributed to eligible States, on a proportionate impact basis, to mitigate impacts to the affected uses and resources.

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

4. Use of Adaptive Management Practices to Regulate Alternative Energy Activities

In discussing the approach taken in Subpart H of the Rule, the Federal Register Notice at p. 39429 states that 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" and will "require adjustments to mitigation and monitoring activities...based on operating experiences." The MMS also noted that it considered but chose not to require the use of an Environmental Management System("EMS"), such as ISO 14001, in part because it does not want an EMS to substitute for compliance by an alternative energy facility operator with a requirement of the regulations or the lease. Similarly, in the area of safety, the MMS also considered but chose not to impose a categorical requirement that a facility operator hire a third party contractor or allow only the MMS to conduct inspections. Instead, the MMS favors a project-by-project approach.

While we recognize the value in using adaptive management practices in a range of regulatory contexts, their use for the purposes of this Rule underscores the importance of having the MMS developing a clear process for consulting with affected States on the range of appropriate adaptive management practices, particularly in connection with the applicable plans required under a lease (e.g., a SAP, COP, GAP). This effort should include the development of monitoring methodologies, the assessment of impacts to fisheries resources and other wildlife species and their habitats, and the development of corrective measures, as needed. Consistent with our above comments, an adaptive management approach to facility operation and compliance could also result in the need for additional compensation to further mitigate unavoidable impacts occurring during the term of the lease. Any such funds should be equitably distributed to the affected States based on a revenue sharing formula that takes into account proportionate impact.

5. State Consultation on a Facility's Compliance with Federal Environmental Laws

The Rule at 30 CFR s.285.801 properly provides that the MMS will consult with the appropriate State fish and wildlife agencies if there is reason to believe that a threatened or endangered species may be present while the project proponent conducts its MMS-approved activities, and when such species may be affected by the direct or indirect effects of the project proponent's actions. This regulation explains that such consultation is required under the federal ESA. The same consultation with the State occurs when any MMS-approved activity may result in an incidental taking of marine mammals, which must be authorized under the federal Marine Mammal Protection Act ("MMPA"). As to the latter, this regulatory provision also expressly notes that one condition of authorizing an incidental take may be the project proponent's agreement to perform any relevant mitigation measures. The Rule should make explicit that consultation with the State for the purposes of a project proponent's compliance with the ESA and/or the MMPA includes seeking the State's input on any required mitigation.

In comparison, 30 CFR s.285.804 describes how "essential fish habitat" ("EFH") or "habitat areas of particular concern" need to be protected. The regulation states that if the MMS finds that either of the above areas may be adversely affected by the proposed action, the MMS will consult with the National Marine Fisheries Service ("NMFS"). 30 CFR s.285.804(a). In addition, any conservation recommendations adopted by the MMS to avoid or minimize adverse effects on EFH will be incorporated as terms and conditions to the lease and must be adhered to by the applicant. 30 CFR s.285.804(b). The MMS is also authorized to require additional surveys to define boundaries and avoidance distances. Id.

30 CFR s.285.804 should be revised to expressly state that in addition to NMFS, the MMS will consult with the appropriate State fish and wildlife agencies regarding actions taken by the MMS pursuant to this regulation. Per our comment on 30 CFR s.285.801, this regulation should also make explicit that consultation with the State for the purposes of an applicant's protection of EFH and habitat areas of particular concern includes seeking the State's input on any required mitigation.

6. State Consultation regarding Facility Damage, Equipment Failures and Adverse Environmental Effects

The Proposed Rule at 30 CFR s.285.815 describes the facility operator's responsibilities in the event of facility damage or an equipment failure, including notification to the MMS. The regulation provides that in response to such notice, the MMS may require the operator to analyze the cause of any facility failures or damage, which necessitates the submittal of a comprehensive written report to the MMS as soon as available. Both the Rule and the lease should expressly require the facility operator to notify the appropriate State fish and wildlife agencies at the same time that notice is given to the MMS, as well as require the MMS to consult with such State agencies in determining the adequacy of the facility operator's report and any appropriate corrective measures. In addition, the above regulation should be revised to require the facility operator to submit a comprehensive written report to the MMS "within the timeframe specified by the MMS," rather than use the more open-ended phrase "as soon as available."

30 CFR s.285.816 describes what actions the facility operator must take if "environmental or other conditions adversely affect a cable, pipeline or facility so as to endanger the safety or the environment." Essentially, the regulation requires the facility operator to submit a plan of corrective action to the MMS within 30 calendar days of the "adverse effect" and to thereafter submit a follow-up report to the MMS within 30 calendar days of completion of the remedial actions called for in the plan.

Per our above comment on 30 CFR s.285.815, this regulation and the underlying lease should also expressly require the facility operator to notify the appropriate State fish and wildlife agencies at the same time that notice is given to the MMS, and require the MMS to consult with such State agencies in determining the adequacy of the corrective action plan and the follow-up report, including seeking input on any required mitigation. Finally, we recommend that the regulation be amended to state in 30 CFR s.285.816(a) and (b) that the respective plan and follow-up report be submitted within 30 calendar days "or sooner, as directed by the MMS."

Subpart I: Decommissioning

7. State Consultation regarding the Decomissioning of Facilities

Subpart I, 30 CFR s.285.900 – 9.13, sets forth the obligations and requirements associated with the decommissioning of facilities. 30 CFR s.285.906 describes the information that must be included in the decommissioning application, including a description of those resources, conditions, and activities that could be affected by the

decommissioning [subsection (g)]; and the results of any recent biological surveys conducted in the vicinity of the structure and recent observations of turtles or marine mammals at the structure site [subsection (h)]. 30 CFR s.285.908 outlines the information that must be included in the decommissioning notice to the MMS; this regulation does not, however, require that such notice be sent to the State. 30 CFR s.285.912 describes that timing and content of the decommissioning report that must be sent to the MMS after the removal of the facility. Among the information required is a description of any mitigation measures taken in connection with the decommissioning activity.

Decommissioning of facilities by the MMS is another activity that clearly warrants consultation with the State. As evidenced by the type of information relevant to a decommissioning action – recent biological surveys and observations of turtles and marine mammals; any mitigation measures taken – the State has both a direct interest in and relevant expertise regarding the fisheries and other wildlife implications and impacts associated with decommissioning. Consistent with our other comments on this theme, the Rule should expressly require that any decommissioning notice to the MMS be sent to the appropriate State fish and wildlife agencies at the same time, that the State also be provided the decommissioning application and the after-action report concurrent with the MMS, and that the MMS consult with the State at each step in the decommissioning process, including on any mitigation.

In closing, DFG appreciates the opportunity to comment on this important alternative energy regulatory initiative, and looks forward to working cooperatively with the MMS in its implementation of the final Rule.

Sincerely,

Mary B. Griffin
Commissioner

cc: Paul Diodati, Director, DMF, DFG
Wayne MacCallum, Director, DFW, DFG
Deerin Babb-Brott, Assistant Secretary for Oceans and Coastal Zone Management, EEA
Ken Kimmell, General Counsel, EEA
Leslie-Ann McGee, Director, CZM