American Wind Energy Association (AWEA)
Comments to the Minerals Management Service
Request for Information and Nominations of Areas for Leases Authorizing Alternative Energy Resource Assessment and Technology Testing Activities
January 7, 2008

The American Wind Energy Association (AWEA), the national trade organization of the U.S. wind energy industry, appreciates this opportunity to comment on the Minerals Management Service's (MMS's) proposal to adopt an interim policy governing authorizations of alternative energy assessment and technology testing on the Outer Continental Shelf (OCS). AWEA is an association of individuals and corporations interested in bringing clean, renewable wind energy projects online as efficiently as possible, including in the emerging offshore wind energy market. These comments represent a consensus document produced by AWEA's Offshore Wind Working Group, a body within AWEA comprised of more than 140 individuals representing over 80 companies and organizations. This document does not present the particular views of any company, organization, or individual who contributed. Companies that worked on the analysis of the interim policy and production of AWEA's comments include: AWS TrueWind, Alston Bird, Bluewater Wind, Borderland Wind, Cape Wind Associates, Clipper Windpower, Energetics Inc., FPL Energy, Fulbright & Jaworski, Garrad Hassan America, Inc., Hill & Kehne, Kleinschmidt, Nixon Peabody LLP, Southern Company, Strategic Energy Institute at the Georgia Institute of Technology, and Tetra Tech EC, Inc.

AWEA's comments focus on the implications of MMS's proposal for the development of OCS-based wind resources. More specifically, these comments address steps that MMS will need to take in implementing its interim policy if it is to reduce delay in the development of offshore wind by speeding the installation of the Meteorological Data Collection Facilities (MDCF)[1] that are needed for the collection of detailed data on wind resources. AWEA requests a meeting, at the appropriate time, with MMS representatives to discuss the proposals and issues introduced within these comments.

AWEA welcomes the MMS proposal as a significant effort to minimize regulatory delays in the development of offshore wind resources. The need for an interim policy to allow prompt initiation of wind resource testing on the OCS is clear. Offshore wind is a rapidly growing source of emissions-free electricity overseas. It also represents, as the U.S. Commission on Ocean Policy has recognized, a promising untapped source of clean, renewable power for this country. Federal policy makers have recognized the importance of prompt action in this area. Section 388 of the Energy Policy Act of 2005 set May 6, 2006, as the deadline for promulgation of the Alternate Energy and Alternate Use (AEAU) regulations governing alternative energy

[1] These facilities may also collect marine (*e.g.*, wave, current, and tidal) data for the development of offshore wind.

activities on the OCS. At present, however, parties interested in developing offshore wind resources cannot even apply for the authorization that MMS has found to be required for the installation of MDCFs. As a general matter, aspiring wind park developers need at least one year of MDCF data before they can make a decision to proceed in order to verify the viability of a site and finalize wind park design and financing.

The interim policy that MMS outlined in its November 6, 2007 notice requesting information and nominations pertaining to AEAU resource assessment and technology testing, 72 Fed. Reg. 62,673 (Notice), and elaborated in its December 14, 2007, Draft Lease, 72 Fed. Reg. 71,152 (Draft Lease) represents an important step toward alleviating the effects of administrative delay. Prompt MMS authorizations for the installation of MDCFs, granted on a case-by-case basis with priority given to the most time-sensitive requests, could cut a year or more from the time that otherwise would be required to construct the nation's first OCS-based wind parks. However, the interim policy will be effective in reducing regulatory delay only if it is implemented in a manner that streamlines the process of allocating assessment leasing areas, provides robust environmental review that is consistent with the potential impact of the proposed activity, promotes coordination between MMS and other government agencies, and assures a commercially practical transition from exploration to development. In particular, AWEA believes that the interim policy will achieve its purposes only if it is crafted according to the following principles:

- MMS must establish a streamlined process for allocating lease areas for resource assessment and technology testing. For the interim policy to serve its intended purpose, it must make resource assessment and technology testing leases available quickly. Conflicts raised by overlapping nominations for resource assessment and technology testing leases could significantly delay the issuance of these leases. AWEA believes that a properly structured process for nominating and allocating leases under the interim policy, based in part on MMS's determination that the size of the leases should be "designed to accommodate the activities proposed" and MMS's suggestion that the interim policy invite collaboration among prospective lessees, can provide the needed streamlining of the nomination and allocation process.

- MMS review must be coordinated with review by other agencies to eliminate duplication and promote, to the maximum possible extent, coordinated, contemporaneous regulatory action. Because Section 388 expressly preserves pre-existing authorities of other agencies while expanding MMS's jurisdiction, accelerating MMS authorization for the installation of MDCFs will not be sufficient, in itself, to accelerate the collection of data that prospective sponsors of offshore wind projects need to move forward. Section 388 requires MMS "coordination with relevant Federal agencies" in the implementation of its AEAU program. MMS should implement this directive by pressing for concurrent review of all applicable permit applications and requests for authorization within 90 days.

- Environmental reviews of meteorological towers must be efficient as well as thorough. MMS already has carefully evaluated the program-wide effects of meteorological towers in its Programmatic Environmental Impact Statement (EIS). The U.S. Army Corps of Engineers (Corps) has prepared a detailed site-specific assessment of the Cape Wind meteorological tower (*available at* http://www.nae.usace.army.mil/projects/ma/ccwf/windfarm.htm). Moreover, MMS and the Corps have had extensive experience with the evaluation of similar structures on the OCS, most notably in connection with structures used for oil and gas exploration and development. Environmental reviews must be complete and accurate, but should be conducted with an awareness that delay in taking environmentally beneficial action carries its own environmental costs.

- MMS must provide a workable transition from data collection leasing under the interim policy to development and production leasing under the forthcoming regulations, while preventing unwarranted disclosure of proprietary information. For the interim policy to accelerate the collection of data on offshore wind data, parties who are considering an investment in the collection of such data must see a commercially practical route from data collection to wind park construction and operation. To offer such a path, the interim policy will need to incorporate safeguards against the misuse of data collection leasing by parties seeking to block or delay wind project development, or obtain speculative profits from banking potential wind park locations. Lessons from the Bureau of Land Management's experience with exploratory leasing of public lands in the on-shore wind context may help MMS to combat possible misuse of the interim leasing for the collection of offshore wind data.

In the discussion that follows, AWEA (1) elaborates on these general principles; (2) sets out some related observations pertaining to competitive state bidding processes, decommissioning requirements, military and radar impact issues, wind turbine testing under the interim policy, and characterization of offshore conditions; and (3) responds to the questions posed at the end of the Notice based on the principles and observations that we have discussed.

AWEA's response to the interim policy and nominations Notice, as noted above, is informed in part by preliminary review of the Draft Lease that MMS published on December 14, 2007. However, full analysis of the Draft Lease will require additional time and effort. The present comments are not intended to communicate AWEA's position as to the specific terms that resource assessment and technology testing leases should incorporate. AWEA expects to submit such comments, which may include additional suggestions concerning the interim policy proposal, by the February 12, 2008 deadline for comments on the Draft Lease.

I. EFFECTIVE IMPLEMENTATION OF THE INTERIM POLICY

The Notice states that MMS's interim policy is intended to expedite the collection of "resource data" by potential sponsors of alternative energy projects. 72 Fed. Reg. at 62,674 (c.1). The interim policy will succeed in expediting alternative energy resource assessment and technology testing on the OCS only if MMS takes affirmative steps on several levels to streamline

administrative review and preserve incentives for private investment in activities covered by the policy.

A. MMS Should Streamline the Process for Setting the Boundaries of Resource Assessment and Technology Testing Lease Areas

The success of the interim policy depends on the timely execution of resource assessment and technology testing leases. AWEA is particularly concerned that the execution of leases under the interim policy, particularly leases that its members need to install and operate MDCFs, will be delayed by complications arising from nominations whose geographic areas overlap. MMS should adopt three measures to address this problem.

First, MMS should minimize the potential for overlapping nominations by establishing reasonable limits on the size of resource assessment and technology testing leases. The Notice establishes a sensible framework, stating that "[t]he size of each lease issued would be designed to accommodate the activities proposed." 72 Fed. Reg. at 62,674 (c.2). MMS should implement this approach by establishing appropriate, activity-by-activity limits on the size of leases that it will grant under the interim policy. AWEA believes that the installation and operation of an MDCF ordinarily should not require a lease area larger than a circle one nautical mile across. (The rationale for this limit is set out below in AWEA's response to question 5 from the Notice.) Other resource assessment and technology testing leases may require smaller or larger areas. As a guiding principle, however, MMS should limit resource assessment and technology testing leases to the minimum size that is reasonably required to accomplish the intended purpose.

Second, MMS should provide for the prompt resolution of conflicts that arise when lease applicants nominate overlapping, or even identical sites. Auctioning rights to areas sought by more than one lease applicant is impractical in this setting. Designing and implementing an auction process would require many months of work by MMS officials. (Timelines from inception to completion for MMS auctions of rights to explore for and produce oil and gas on the OCS can extend for several years.) This would divert administrative resources from other tasks that are essential to the progress of the AEAU program. Moreover, the task of designing and implementing an auction of rights to conduct resource assessment and technology testing activities probably could not be completed during the expected lifespan of the interim policy. MMS has stated that the interim policy will remain in effect only until it publishes the section 388 regulations,[2] which are expected to come out by the end of 2008.[3] If MMS adheres to this timetable, the final rule implementing section 388 would almost certainly appear before the agency could complete an auction of rights to conduct resource assessment and technology testing on the OCS.

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[2] Notice, 72 Fed. Reg. at 62,674 (c.1) ("The interim policy would be in effect only until the MMS promulgates final rules for the AEAU program, at which time all AEAU program activities will be regulated under those rules.")

[3] During the November 5, 2007 teleconference that MMS convened to announce publication of the interim policy Notice, agency officials described their intention to publish proposed regulations governing the AEAU program in the spring of 2008 and final regulations by the end of that year. An earlier MMS timeline dated April 2, 2007 had projected a proposed rule by the summer 2007 and a final rule by the fall of 2008.

In view of the impracticality of any attempt to auction leasing rights under the interim policy, MMS should work to resolve conflicts raised by overlapping lease applications by encouraging negotiations and voluntary relocations. When two or more nominations seek rights to the same area, even after proposed project footprints have been reduced to sizes reasonably required for the activities at issue, MMS should encourage nominating parties to negotiate collaborative undertakings or revised lease boundaries that eliminate overlaps, and, in the absence of negotiated agreements, allow any party to substitute a nearby, unclaimed area for its original overlapping nomination.

A third measure that MMS should adopt to minimize delay associated with overlapping nominations pertains to the timing of nominations. The Notice states that MMS "will consider nominations and other information received in response to this Notice to evaluate competitive interest…" 72 Fed. Reg. at 62,674 (c.2). AWEA believes each round of nominations, the first of which will be submitted by January 7, 2008 as required by the Notice, should be sufficient to determine competitive interest among nominations each round. Where only one lease applicant nominates an area, there is no competitive interest. Where more than one lease applicant expresses interest, MMS should encourage negotiation or unilateral relocation to resolve the conflict.

If, contrary to AWEA's recommendation, MMS decides to provide additional notice to determine competitive interest by posting the initial round of nominated areas and inviting further response, that process should be completed promptly. To minimize delay, MMS should post initial nominations by January 21 and require any responsive filings by February 11. Any conflicts generated by the responsive filings should be resolved by negotiation and voluntary relocation, as discussed above.

Finally, MMS should clarify that it will accept and consider any additional requests for leases under the interim policy at specified intervals rather than on a rolling basis. The Notice indicates that MMS will accept additional requests after January 7, 2008.[4] MMS should clarify that additional nominations will be accepted and considered at specific times. If MMS were to accept and consider additional nominations on a rolling basis, later nominations could delay execution of the first resource assessment and technology testing leases – potentially indefinitely – by creating new overlaps with earlier nominations that would require resolution before MMS could proceed. To avoid this dead end, MMS should establish discrete rounds of nominations at predictable intervals. (AWEA suggests that MMS select an interval such as every six months to allow proper consideration of the prior round of nominations before it turns to the next round.) In addition, MMS should bar nominations submitted in a later round from staking claims to areas covered by valid nominations or lease applications submitted in earlier rounds. By structuring the nominating and application process in this manner, MMS can provide for the orderly resolution of overlaps in requested leasing areas and the timely execution of resource assessment and technology testing leases.

[4] 72 Fed. Reg. at 62,674 (c.1) ("Parties wishing to receive authorization for data collection activities and technology testing may continue to submit requests under the interim policy until the final rules are in place.").

Reliance on these measures to avoid and resolve overlapping claims is fully consistent with section 388's instructions that MMS secure "a fair return to the United States" and issue leases on a competitive basis unless it finds that no competitive interest exists. Outer Continental Shelf Lands Act (OCSLA) §§ 8(p)(3), 8(p)(4)(H). Both the Notice and Draft Lease emphasize that resource assessment and technology testing leases under the interim policy will not confer priority rights for development. From an economic perspective, the competition that matters most is the competition for development rights. Accelerating the process of resource assessment and technology testing, in preparation for the allocation of development rights, should increase competition for and federal revenues from development rights. Indeed, the Notice's suggestion that MMS promote collaboration and joint ventures among prospective holders of resource assessment and technology testing leases, 72 Fed. Reg. at 62,675 (c.1) (MMS question 2), implicitly recognizes that the fair return and competition clauses do not require a self-defeating effort to maximize revenues from the exploratory rights.

B. MMS Should Coordinate its Evaluation of Lease Applications under the Interim Policy with Parallel Efforts of Other Responsible Agencies

In enacting section 388, Congress expressly provided that the existing regulatory jurisdiction of other agencies would not be affected. OCSLA § 8(p)(9). Thus, for example, resource assessment and technology testing activities that involve installation of fixed structures on the OCS require authorization from the Corps.[5] In addition, many activities authorized by a resource assessment or technology testing lease could require compliance with consultation requirements imposed by the Endangered Species Act, the Marine Mammal Protection Act, the National Historic Preservation Act, the Magnuson-Stevens Fishery Conservation and Management Act, the Coastal Zone Management Act, the Abandoned Shipwrecks Act, and other federal and state laws. Prompt MMS action to make resource assessment and technology testing leases available will not be sufficient, in itself, to achieve the goals of the interim policy if the execution of a resource assessment or technology testing lease merely starts the process of duplicative administrative review before other agencies.

It would be valuable to see a timeline of activities throughout the development process along with the identified lead agency and time to completion. Such a timeline would provide all stakeholders with more information about how the interim policy relates to the overall project proposal.

MMS officials have acknowledged that agencies with regulatory authority over alternative energy projects on the OCS will need to coordinate their efforts in order to minimize the potential inefficiency of the parallel permitting regimes that Congress has provided.[6] This

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[5] Section 4(e) of OCLSA extends the Corps' jurisdiction "to prevent obstructions to navigation in the navigable waters of the United States [conferred by section 10 of the Rivers and Harbors Act (RHA)] . . . to artificial islands, installations, and other devices." Section 10 of the RHA prohibits construction of any "structure[ ] in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States" without approval from the Corps. 33 U.S.C. § 403.

[6] *See, e.g., Public Scoping Meeting on OCS Renewable Energy and Alternative Use Programmatic EIS* [at 9-10 of unpaginated transcript] (June 8, 2006) (*available at* http://ocsenergy.anl.gov/documents/docs/OCS_0608TranscriptSanFran_CA.PDF) (statement of Program Manager

approach conforms to the requirements of Executive Order No. 13,212, "Actions to Expedite Energy-Related Projects," in which the President determined that "[t]he increased production and transmission of energy in a safe and environmentally sound manner is essential to the well-being of the American people," and directed "executive departments and agencies [to] take appropriate actions, to the extent consistent with applicable law, to expedite projects that will increase the production, transmission, or conservation of energy."[7] AWEA believes that this process of concurrent review, conducted in accordance with the Executive Order, should ordinarily be completed within 90 days.

AWEA believes that MMS coordination of these parallel permitting and consultation requirements relating to alternative energy resource assessment and technology testing on the OCS is essential to the success of the AEAU program. MMS should initiate these coordination efforts in its implementation of the interim policy. Most importantly, MMS should work closely with the Corps to ensure that consultations and reviews undertaken for the MMS leasing process also satisfy consultation and review requirements under the Corps' permitting regime.

C. MMS Should Ensure That NEPA Review Is Efficient as Well as Thorough

AWEA believes that MMS should serve as the lead agency for review of resource assessment and technology testing leases under the National Environmental Policy Act (NEPA). *See* 40 C.F.R. § 1501.6 (describing lead agency role in preparation of EISs). In orchestrating environmental review of MDCFs in particular, MMS should encourage reliance on the detailed analysis of meteorological towers set out in the Programmatic EIS for the AEAU, which found that the environmental effects of the site characterization phase of offshore wind energy development generally would be negligible to minor. *See, e.g.*, PEIS at 5-5, 5-9, 5-14, 5-15, and 5-33.

In formulating its approach to NEPA review of MDCFs, MMS should draw upon the substantial body of experience that it and other agencies have with meteorological ("met towers") and similar offshore structures. In 2002, the Corps prepared a detailed Environmental Assessment (EA) for Cape Wind's met tower in Horseshoe Shoals off the coast of Massachusetts and concluded that it would have no significant environmental effect.[8]

Maureen Bornholdt that section 8(p)(9) creates the potential for "layer upon layer" of inefficient review, and that MMS should "strive for" coordination among interested agencies to avoid this result).

[7] Exec. Order No. 13,212, 66 Fed. Reg. 28,357 (May 18, 2001), as amended by Exec. Order No. 13,302, Sec. 1, 68 Fed. Reg. 27,429 (May 15, 2003).

[8] U.S. Army Corps of Engineers, *Environmental Assessment and Statement of Findings, Application No. 199902477, Cape Wind Associates, LLC* (Aug. 19, 2002) *available at* http://www.nae.usace.army.mil/projects/ma/ccwf/windfarm.htm. The Corps stated that

> The single data tower itself, supported by three pilings, is of minimal impact and environmental effect. This type of construction is typical for piers along the coastline. The primary construction impact it will have is the underwater noise generated during the estimated 3 days it will take to drive the piles supporting the tower.

In addition to taking these immediate steps to streamline NEPA compliance for resource assessment and technology testing leases, MMS should also take initial steps to streamline and improve the quality of the NEPA review in the AEAU program as a whole.

Recent analysis of the actual effects of the Cape Wind met tower, which has been in place since December 2002, confirm the projections of the Corps' EA.[9] Extensive experience with other pile-mounted offshore structures and with "jack-up barges" (unpowered, flat-bottomed vessels outfitted with telescoping legs that can extend to the seabed and provide a stable work platform) reinforces the Corps' analysis. Based on this experience, MMS should establish a presumption that an EA will satisfy the requirements of NEPA for MDCF leases under the interim policy. Over the longer term, MMS should consider establishing a categorical exclusion for MDCFs as the final rules are developed. The final Programmatic EIS for the AEAU program found negligible to minor impacts of MDCFs in most cases, so MMS should expect these temporary structures to have a de minimus environmental impact. MMS allows for categorical exclusions for similar facilities in unexceptional areas of the OCS.[10]

D. MMS Should Protect Prospective Lessees Against Strategic Misuse of Leasing under the Interim Policy and Unwarranted Disclosures of Proprietary Information

The interim policy, if properly implemented, will accelerate the development of alternative energy resources on the OCS by allowing aspiring project sponsors to evaluate potential project sites and technologies while they await issuance of the final AEAU regulations. AWEA believes that effective implementation of the interim policy will require careful attention to two related concerns. First, MMS must act to prevent foreseeable misuses of resource assessment and technology testing leasing that could substantially delay actual development of alternative energy resources. Second, MMS must provide a practical route from the exploratory activities authorized under the interim policy to the actual development of alternative energy projects. Firms will not invest in resource assessment or technology testing without some reasonable prospect that such investment will lead to commercial development opportunities. To encourage investment in resource assessment and technology testing, MMS will need to protect investors not only from strategic misuse of the leasing process, but also from other avoidable delay of development leasing and from the misappropriation of hard-won proprietary information.

Id. at 8. It further noted that it the Cape Wind met tower resembled "numerous pile-supported piers along the shoreline" and a "data tower" that Woods Hole Oceanographic Institute had been permitted to install south of Martha's Vineyard. *Id.* at 2.

[9] *See, e.g.*, Ocean and Coastal Consultants, Inc., *Revised Field Report for the Seabed Scour Control Systems (SSCS) Installation* (May 2006) (*link available at* http://www.mms.gov/offshore/RenewableEnergy/ReportsforCapeWind.htm); *see also* U.S. Army Corps of Engineers, *Cape Wind Fact Sheet* (Oct. 2005) (summarizing permitting and construction of Cape Wind met tower) (available at http://www.nae.usace.army.mil/projects/ma/ccwf/farmfact.pdf).

[10] *Compare, e.g.*, 30 C.F.R. § 280.30(e) (categorical exclusion in MMS's regulations for mineral prospecting on the OCS for "[m]eteorological observations and measurements, including the setting of instruments").

The purposes of the interim policy could be frustrated by two forms of potential misuse. The first involves leasing by parties who have no real interest in exploring or developing alternative energy resources, but seek instead to block proposed projects or profit from the power to do so. There is a significant risk that strategically motivated parties will seek leases under the interim policy not to assess alternative energy resources or test new technology, but to stop alternative energy projects or exact payments from their sponsors. A second form of potential misuse involves undue delay of development leasing by parties that have some interest in exploring or alternative energy resources and technologies, but on a slower timetable than their potential competitors. The Notice and Draft Lease envision data collection leases with five-year terms. Notice, 72 Fed. Reg. at 62,674-75; Draft Lease, 72 Fed. Reg. at 71,154 (section 4). Leasing under the interim policy should not empower lessees to slow the pace of alternative energy development by locking up prime alternative energy sites that others are prepared to develop.

Apart from these possible forms of misuse, the interim policy could also be undermined by a failure to build in sufficient incentives to invest in resource assessment and technology testing. In this regard, AWEA believes that it is particularly important that MMS commit to vigorously protect proprietary information that lessees would invest to create.

MMS can create favorable conditions for investment in resource assessment and technology testing by incorporating the following features into leasing under the interim policy:

- Technical and financial qualifications. MMS should require prospective lessees to demonstrate that they are technically and financially qualified to undertake the activities for which they seek authorization. The required showings should not be complex or onerous. To obtain authorization to install and operate an MDCF, for example, a prospective lessee should demonstrate (1) past experience with the installation and operation of MDCFs or a contractual relationship with an entity possessing such experience; and (2) financing for the $2-3 million cost of a typical MDCF project.[11] This is broadly consistent with the approach the Bureau of Land Management (BLM) has taken to land-based wind energy leasing. BLM has sought to discourage speculation by requiring lease applicants to meet qualification and due diligence requirements.[12]
- Milestones. MMS can also combat undue development delay by requiring lessees to meet milestones calibrated to assure reasonable progress toward the lessee's stated objectives. *Compare, e.g.*, 30 C.F.R. § 256.37(a)(3) (requiring holders of eight-year oil and gas leases to begin exploratory drilling within five years). For example, leases authorizing installation and operation of a conventional MDCF might require the lessee to apply for all required permits and authorizations within one year and to complete construction within three years. MMS should retain the discretion to waive milestone requirements, and even to extend the lease term, for good cause. Lessees should not be

[11] MMS might also consider requiring that applicants for alternative energy resource assessment and technology testing leases, issued on a case-by-case basis under the interim policy, to satisfy the regulatory requirements that have been established for sulphur and oil and gas leases. *See* 30 C.F.R. § 256.35.

[12] *See* 43 C.F.R. §§ 2802.3(a)(4-5); BLM Instruction Memorandum No. 2006-216 on Wind Energy Development Policy (*available at* http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2006/2006-216__.html)

penalized if they are unable to meet milestones or complete work during the scheduled lease term due to construction difficulties that are beyond their control or to exceptional events of the sort typically covered by contractual force majeure clauses, such as strikes or natural disasters. Nor should lessees be penalized where litigation challenging their projects makes it legally or practically impossible to move forward on the intended timetable.

- Safeguards against speculative transfers and assignments. MMS should exercise its authority over transfers and assignments[13] to discourage speculative abuses of resource assessment and technology testing leases. A clear announcement that MMS will review proposed transfers and assignments to ensure that the interim policy does not reward speculation should discourage entities with no bona fide interests in alternative energy development from acquiring interests that could delay and raise the costs of resource assessment and technology testing.
- Data confidentiality. Resource assessment and technology testing data collected by interim policy lessees represent key proprietary information. Although the Notice does not specifically address data disclosure, the Draft Lease suggests that all lessee data would be disclosed to MMS, which would endeavor to withhold that information from the public for 60 months to the extent allowed by the Freedom of Information Act. Draft Lease, 72 Fed. Reg. at 71,154-55 (sections 10 and 11). To preserve incentives for the development of alternative energy data, MMS should carefully limit its demands for proprietary information. For example, MMS should require disclosure of only summary information where competitively sensitive disaggregated data is not needed to advance programmatic objectives. In the absence of such protections, it is unlikely that potential sponsors of wind energy projects will seek leases to install and operate MDCFs under the terms of the interim policy.
- Development lease priority. If MMS executes resource assessment and technology testing leases with terms as long as five years, as seems appropriate in light of the challenges that some lessees may face in initiating and completing the desired activities, there is a material risk that MMS and alternative energy developers will be prepared to move forward with development leasing in some areas before resource assessment or technology testing leases have expired. Requirements that lessees minimize the footprints of resource assessment and technology testing leases should alleviate but may not entirely eliminate this conflict. It is possible, for example, that one or more wind energy developers will complete tests performed under a resource assessment lease and be ready to initiate the development leasing process in a particular area while others with resource assessment leases in the area would prefer to postpone development leasing until all resource assessment leases in the area have expired. To ensure that resource assessment and technology testing leases do not impede actual alternative energy development, MMS should make clear that the development leasing process will be given priority. Holders of valid leases executed under the interim policy should be free to participate in the development leasing process. However, the timing of the development leasing process should not be affected by the terms remaining on resource assessment and

[13] *See* Draft Lease, 72 Fed. Reg. at 71,115 (proposal that MMS retain authority to review proposed transfers in section 16 of the Draft Lease). *Compare, e.g.*, 30 C.F.R. §§ 256.62-.67 (limitations on assignments and transfers of sulphur and oil and gas leases).

technology testing leases in the area, and the award of a development lease should terminate all conflicting rights under those preliminary leases.

AWEA does not suggest that MMS should attempt to formulate a detailed set of standards governing technical and financial qualifications, due diligence milestones, transfers and assignments, confidentiality and development leasing priority before it begins implementing the interim policy. An effort to develop such formal standards could undercut the flexibility and efficiency that the case-by-case consideration under the interim policy is intended to achieve. It is important, however, for MMS to make clear that it will take effective action, both in establishing its interim leasing framework and in administering that framework on a case-by-case basis, to guard against strategic abuses and to maintain reasonable incentives for investment in resource assessment and technology testing.

E. A Proposed Framework for Executing Leases under the Interim Policy in a Manner that Will Accelerate Resource Assessment and Technology Testing

In keeping with the principles outlined above, AWEA recommends that MMS include the following steps in implementing the interim policy:

1. Promptly identify the applications for resource assessment and technology testing lease sites that MMS will consider in the first round. To expedite execution of the first resource assessment and technology testing leases, review should be limited to nominations received by the January 7, 2008 deadline set in the Notice. If additional first-round nominations are accepted after that date, an early cutoff should be announced and enforced.

2. Eliminate overlaps among nominated areas wherever possible. To avoid the administrative delay and expense that would result from any effort to auction resource assessment and technology testing rights, MMS should:

   - Require lease applicants to scale back nomination areas larger than the areas reasonably required to undertake the desired activities (leases for MDCFs, for example, ordinarily should not cover an area larger than a circle one nautical mile across); and
   - Encourage negotiations and allow unilateral relocations in order to eliminate remaining overlaps.

3. Coordinate licensing and environmental review efforts. To avoid duplicative review by relevant agencies, MMS should:

   - Work closely with the Corps to ensure MMS actions satisfy the consultation and review requirements of the Corps;
   - Press for concurrent review of all applicable permit applications and requests, and for the completion of all necessary review within 90 days; and

- Assume the lead agency role in conducting NEPA review of MDCF proposals, and draw upon existing environmental analyses of MDCFs and other similar structures on the OCS to streamline the NEPA process.

4. Prevent misuse of the interim leasing process by parties intent on speculation, obstruction or and delay by enforcing:

   - Pre-qualification standards;
   - Due diligence requirements keyed to reasonable resource assessment and technology testing milestones;
   - Vigorous protection of proprietary summary information disclosed by the lessee;
   - Restrictions on transfers and assignments to combat speculation; and
   - Lease provisions that give strict priority to development leasing.

II. ADDITIONAL CONSIDERATIONS

Review of the interim policy elicited additional issues for consideration. Below, AWEA summarizes these issues and provides recommendations regarding each item.

Competitive State Bidding Processes. Energy or energy-related (*e.g.*, renewable energy credit (REC)) competitions held by state agencies or other state-regulated entities, such as investor-owned utilities, for which offshore alternative energy is eligible should serve to satisfy the competition requirement of Section 388.

Decomissioning MDCFs. The proposed Interim Policy suggests that any met towers or testing devices be removed at the end of the lease. AWEA understands that an assessment lease is a temporary permit for a temporary activity and a met tower can be easily disassembled and removed if necessary. However, MMS should recognize that this process can cause temporary disturbances of the seabed and marine life. Decommissioning involves dismantling and removal of the instrumentation, tower and deck platform using a barge-mounted crane. Removed materials are typically transported to shore by barge. Steel foundation piles are cut off below the seabed using an internal high-pressure water jet cutting tool, in accordance with MMS regulations and established procedures for decommissioning of offshore platforms. Sand that had been forced into the hollow pile during installation into the seabed would be removed from the pilings by airlifting. The steel pile would then be lifted on to a barge and transported to shore where the steel would be recycled. Materials removed from the site would be properly disposed of in accordance with applicable regulations. AWEA believes any decommissioning standard should not require that the seabed be returned to its original state.

The process of decommissioning MDCFs implicates the issue of financial assurances. The Draft Lease includes a provision that would require lessees to maintain "a surety bond or other form of security approved by Lessor in the amount of $300,000 ('base bond')," and to "furnish such additional security ('supplemental bond') as may be required by Lessor if, at any time during the term of this lease, Lessor deems such additional security to be necessary." Draft Lease, 72 Fed. Reg. at 71,155 (proposed section 15). AWEA believes that security in the amount of $300,000 should ordinarily be sufficient to guarantee proper decommissioning of an MDCF. AWEA also

believes that, to avoid imposing unnecessary transaction costs, MMS should accept a range of alternatives to surety bonds as appropriate forms of security. Reasonable alternatives, which MMS has accepted in other contexts, include pledges of treasury securities and other financial instruments, (*See, e.g.*, 30 C.F.R. § 256.52 (options for lease-specific and area wide bonds in the sulphur and oil and gas leasing program)), and demonstrations of financial reliability based on audited financial statements.[14]

Radar and Military Issues. The final Programmatic EIS released November 6, 2007 includes a number of sections related to radar and military issues. It is important to note here a number of items on these concerns, especially as they may relate to the site characterization stage:

- Potentially affected agencies with flight path or radar concerns include the National Oceanic and Atmospheric Administration (NOAA), the National Aeronautics and Space Administration (NASA), the Drug Enforcement Agency (DEA), the Federal Aviation Administration (FAA), and the Department of Defense and its military branches.
- Any agency or stakeholder expressing concern should demonstrate some proof of the expected impact. A lessee should do a general desktop assessment of what regional facilities are within a possible sphere of influence by the proposed project and responsible for attempting to identify and engage identified stakeholders.
- The must be a transparent and agreed upon avenue for a Lessee to identify potential conflicts and effectively engage with the appropriate entities in the Department of Defense.

Wind turbine testing under the interim policy. The Notice states that "[o]ffshore wind turbine technologies will not be authorized for technology testing through this interim policy." 72 Fed. Reg. at 62,674 (c.1). AWEA understands that the resource assessment and technology testing leases under the interim policy should not be used to generate commercial wind power or other large-scale commercial energy projects. However, AWEA strongly urges MMS to consider leases for the testing of new turbine and foundation designs, under the interim policy instead of establishing another separate process to authorize turbine research and development.

Characterization of U.S. Offshore Conditions. The National Oceanic and Atmospheric Administration's National Data Buoy System (NDBS) is the best publicly available measurement system that provides physical offshore meteorological ocean data of offshore conditions in the United States. However, the NDBC surface buoy measurements are inadequate for assessment of global characteristics that are important to energy production from wind turbines. There is a need for high-quality meteorological stations, funded by the Federal government, to provide regional wind, wave and current data for use by universities, government agencies (including MMS), research groups, and national laboratories for assessing the offshore wind resource and establishing a wind turbine design basis. State governments also need to

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[14] MMS, *Supplemental Bond Procedures*, NTL 2003-N06 pt. III (June 17, 2003) (describing demonstrations of financial strength and reliability that allow lessees to avoid posting supplemental bonds to cover potential lease abandonment liability).

assess their potential power resources, and prospective developers need data to make preliminary project assessments. We therefore urge MMS to advise other agencies, such as NOAA or Department of Energy (DOE), that such publicly available data is an important factor in the development of offshore wind energy resources, and that need is not diminished by private developers' collection of proprietary data.

III. AWEA RESPONSES TO QUESTIONS POSED IN THE MMS NOTICE

The Notice included specific questions for respondents. AWEA lists responses below. Additionally, some of these issues are addressed in more detail in the body of AWEA's comments.

1. *Would you be interested in acquiring an alternative energy resource assessment lease or technology testing lease as proposed under the interim policy?*

   A number of AWEA members have expressed immediate interest in proposing areas for alternative energy resource assessment leases. It is encouraging that MMS has proposed an interim policy to allow for some early stage alternative energy activities the OCS while the rulemaking is under development.

2. *Would you be willing to collaborate and enter into joint ventures with other prospective lessees who express interest in acquiring the same location for an alternative energy resource assessment or technology testing lease?*

   AWEA believes that negotiated resolutions of conflicts that arise when firms submit overlapping nominations for resource assessment and technology testing leases will be essential, since the administrative demands and delay associated with auctions make that approach impractical under the time constraints applicable to the interim policy. While companies may be willing to collaborate or enter joint ventures with other entities interested in the same location, no company should be compelled into a joint venture. As an alternative to this form of collaboration, MMS should also encourage negotiated resolution of conflicting claims to the same areas of the OCS and allow adjustments of lease area boundaries to resolve overlaps. No entity should be allowed to enter into a negotiation for a joint venture or dispute resolution for the sole purpose of delaying any leases when that entity does not have the intention or capability of building an MDCF.

3. *What would be an appropriate lease term (duration) for the authorization you are interested in acquiring?*

   MMS proposes a 5-year term for alternative energy resource assessment leases. AWEA believes that (a) lease terms could be shorter for well-understood undertakings such as installation of an MDCF and collection of one-to-two years of wind data; (b) the existence of a resource assessment lease should not affect the timing of development leasing; and (c) award of a development lease should terminate rights under any the remaining term of any resource assessment or technology testing lease in the area.

4. *Is the rental rate of $3.00 per acre appropriate?*

   AWEA views $3.00 per acre as a reasonable rental rate for alternative energy resource assessment leases for MDCFs, given the current stage of development of the offshore wind energy business. Higher rates might be feasible if assessment leases conferred an option to enter into a production lease.

5. *How much acreage should be authorized for the types of activities proposed and how should leases for such activities be appropriately spaced (i.e., inclusion of buffers)?*

   AWEA can only speak authoritatively to the areas required for the installation and proper operation of MDCFs. Under currently accepted technology, MDCFs requires the installation of a platform connected to the seabed by steel supports. The platform supports a tower on which anemometers are mounted at different heights. The proper size of the lease site for an MDCF depends principally on (a) the area needed to assure that a suitable site can be found for installation of an MDCF (*i.e.*, a location where the water is relatively shallow and the seabed contains the requisite composition); and (b) the minimum distance between MDCFs that is needed to assure accurate wind measurements. Taking into account both these factors, AWEA believes that in most circumstances a circular lease area of one nautical mile (665 acres) in diameter should be adequate. Normal and customary maritime uses should be allowed within the circular lease area.

6. *How should the MMS define technology testing activities and what specific types of activities should be authorized by technology testing leases? Should technology testing leases accommodate projects that would require a transmission cable to connect to onshore interconnection points?*

   AWEA believes that technology testing leases should be available for a broad range of activities relating to wind technology. In AWEA's view, so long as a prospective lessee proposes to engage in bona fide technology testing that satisfies all relevant legal standards (and does not require preparation of an EIS), that lessee should be able to apply for a lease under the interim policy. Thus, AWEA urges MMS to reconsider its determination that "[o]ffshore wind turbine technologies will not be authorized for technology testing through this interim policy." 72 Fed. Reg. at 62,674 (c.1).

   AWEA expresses no view as to the approach that MMS should take with respect to technology testing in other alternative energy fields, such as efforts to generate power from waves and currents.