SAVE OUR SOUND
alliance to protect nantucket sound

March 18, 2011

**VIA EMAIL AND U.S. MAIL**

Department of the Interior
Bureau of Ocean Energy Management, Regulation and Enforcement
Attn: Regulations and Standards Branch
381 Elden Street, MS-4042
Herndon, VA 20170-4817

**Re: Comments on "Acquire a Lease Noncompetitively, 1010-AD71"**

Dear BOEMRE:

The Alliance to Protect Nantucket Sound (APNS) submits these comments in response to the Bureau of Ocean Energy, Management, Regulation and Enforcement (BOEMRE) proposed rulemaking, *Renewable Energy Alternate Uses of Existing Facilities on the Outer Continental Shelf – Acquire a Lease Noncompetitively*. 76 Fed. Reg. 8,962 (Feb. 16, 2011). The rule is part of Secretary Salazar's November 23, 2010, so-called "Smart from the Start" wind energy initiative for the Atlantic Outer Continental Shelf, and was originally set forth by BOEMRE as a direct final rule. 75 Fed. Reg. 72,679 (Nov. 26, 2010), *withdrawn* 76 Fed. Reg. 4,244 (Jan. 25, 2011).

APNS is a nonprofit environmental organization, formed in 2002, that is dedicated to the long-term preservation of Nantucket Sound. While supportive of consensus-based renewable energy development, APNS has actively opposed the proposal by Cape Wind Associates to construct a large offshore wind energy plant in Nantucket Sound. APNS supports a thoughtful approach to siting wind energy facilities that embodies the principles of marine spatial planning, consensus-based management, the Administration's stated commitment to transparency and public involvement, and the principles of fair market competition.

APNS submitted comments in response to the direct final rule, which we incorporate by reference here. *See attached*. While APNS appreciates BOEMRE's necessary decision to withdraw the direct final rule and undertake a notice and comment rulemaking process, our substantive concerns about the proposed revision to the rule remain. BOEMRE, already at fault for an improperly managed and proponent-driven review of the Cape Wind project, appears to be opting for a review process for all offshore wind that puts the desire to rush to construct renewable energy projects above a reasonable and thoughtful review of the impacts of those projects on the environment, the economy, and coastal stakeholders.

As proposed, the rule promotes a "land rush" attitude. The proposed rule would diminish the level of competition for offshore wind sites. It is unfortunate that the Obama Administration would withdraw a provision originally proposed by the Bush Administration that promotes competition and, as a result, enhances public benefits. The Salazar proposal decreases competition and creates a process where

**4 Barnstable Road, Hyannis, Massachusetts 02601**
**508-775-9767 ▫ Fax: 508-775-9725**

**www.saveoursound.org**

a 501 (c)(3) tax-exempt organization

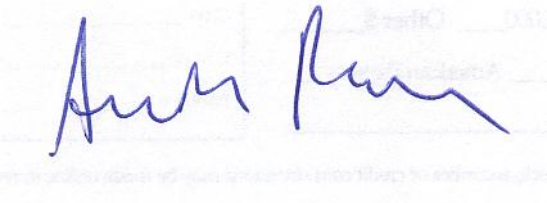
offshore wind developers will, in effect, gain the ability to lock-up valuable public trust Outer Continental Shelf lands without the need to test their proposals against competing interests.

The current requirements of 30 C.F.R. §§ 285.231 and 285.232 should be retained. The added review and competition it will promote is inherently beneficial. It will identify the areas that are truly worthy of consideration for development, provide greater financial return to the government and taxpayers, and ensure that, if such an area is selected for development, only the most qualified developer is selected. If the Secretary intends to follow a "Smart from the Start" approach, he will reject the proposed rule and leave the existing regulations at 30 C.F.R. §§ 285.231 and 285.232 in place.

Furthermore, the proposed rule, in an effort to shorten the environmental review process for developers, marginalizes the public review process that is necessary to ensure stakeholder participation and support for future projects.

APNS strongly encourages BOEMRE to reject the proposed rule. Thank you for the opportunity to comment, and please contact me if you have any questions.

Very truly yours,



Audra Parker
President and CEO
Alliance to Protect Nantucket Sound

Cc: Senator John Kerry
Senator Scott Brown
Representative William Keating

**4 Barnstable Road, Hyannis, Massachusetts 02601**
**▫ 508-775-9767 ▫ Fax: 508-775-9725**

# Attachment

SAVE OUR SOUND
alliance to protect nantucket sound

December 22, 2010

**VIA EMAIL AND REGULAR MAIL**

Department of the Interior
Bureau of Ocean Energy Management, Regulation and Enforcement
Attn: Regulations and Standards Branch (RSB)
381 Elden Street, MS-4024
Herndon, VA 20170-4817

**Re: Comments on "Acquire a Lease Noncompetitively, 1010-AD71"**

Dear BOEMRE:

The Alliance to Protect Nantucket Sound (APNS) submits these comments in response to the Bureau of Ocean Energy, Management, Regulation and Enforcement (BOEMRE) direct final rulemaking, *Renewable Energy Alternate Uses of Existing Facilities on the Outer Continental Shelf – Acquire a Lease Noncompetitively*, published in the Federal Register on November 26, 2010. 75 Fed. Reg. 72,679 (Nov. 26, 2010). The rule is part of Secretary Salazar's November 23, 2010, "Smart from the Start" wind energy initiative for the Atlantic Outer Continental Shelf. APNS is a nonprofit environmental organization, formed in 2002, that is dedicated to the long-term preservation of Nantucket Sound. Our goal is to protect Nantucket Sound in perpetuity through conservation, environmental action, and opposition to inappropriate industrial or commercial development that would threaten or negatively alter the coastal ecosystem.

For the past decade, APNS has been involved in all aspects of the emerging offshore renewable energy program. APNS' involvement has largely been driven by the failure of the federal government to properly manage the Cape Wind project proposal in Nantucket Sound and to move it out of waters in a sensitive area with multiple adverse impacts and resulting maximum conflict, to an area – and there are numerous such sites – where the project could be developed on a consensus basis, consistent with the federal government's stated commitment to marine spatial planning.

Secretary Salazar's short-sighted, politically motivated, and illegal decision to approve the Cape Wind project has now resulted in 10 pending lawsuits at the state and federal level, with more likely to come. Had our offer to work with the Department of the Interior (DOI) and the project developer to reach a consensus solution been accepted, the project now would very likely be underway. Instead, the refusal of the agency and Cape Wind Associates to work with affected stakeholders has resulted in years of conflict which will soon culminate, we expect, in the defeat of the project.

The problems of rushed and incomplete agency consideration and an improperly limited scope of public participation that have plagued the Cape Wind project have now been compounded by the so-called "direct rule" to eliminate the requirement for publication of a request for interest prior to the issuance of a noncompetitive lease. We support retention of 30 C.F.R. §§ 285.231 and 285.232. Like the Cape

**4 Barnstable Road, Hyannis, Massachusetts 02601**
**508-775-9767 ▫ Fax: 508-775-9725**

**www.saveoursound.org**

a 501 (c)(3) tax-exempt organization

Wind decision, this rule is the result of the Secretary's rush to develop renewable energy in any place, at any time, and at any cost to other public interest values. As we have repeatedly made clear, APNS supports the expeditious development of renewable energy in the marine environment at properly-sited locations. Indeed, as the administrative record of the Cape Wind proceeding establishes, we were prepared to support the development of Cape Wind at an alternative location. Unfortunately, the Secretary rejected this course of action. The result is to create Cape Wind as the misguided and highly negative poster child for Secretary Salazar's offshore renewable energy program. This course of action threatens to bring down the entire program, as Cape Wind is likely to generate adverse legal precedent and political and public opposition to offshore renewable energy generally.

As part of his so-called "Smart from the Start" initiative, BOEMRE is seeking to promulgate a rushed rule to speed projects through the leasing and permitting process at the expense of full public review, competitive process, and full environmental and public interest analysis. The 30-day length and timing of the comment period to include both the Thanksgiving and Christmas holidays further infringe on the public review afforded this significant change in the rules. We recommend that, rather than seeking to render project approvals as quickly as possible, BOEMRE follow a process based on full compliance with the law. The direct rule does not meet this test and must be withdrawn.

As an initial matter, this rule violates the Administrative Procedure Act (APA), 5 U.S.C. Part 553. The APA requires that a specific process be followed when issuing any new regulation or amending an existing regulation: the agency must issue a proposed rule and release it for public comment, respond to any comments received, issue a final rule, and refrain from finalizing the rule until a "cooling off" period has passed. *Id*. In certain situations, the rulemaking agency may make changes to a regulation using a different process, when "for good cause" it finds, and explains its reasoning, that notice and public procedure are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b). The limited purpose of a "direct final rule" is to add, change, or delete regulatory text at a specified future time. Under the APA, an agency can only promulgate a direct final rule when it believes that the rule is noncontroversial and unlikely to receive adverse comments. Should adverse comments be received, as here, the agency *must* withdraw the final rule and continue with the proposed rule under the normal notice and comment procedures prescribed by the APA.

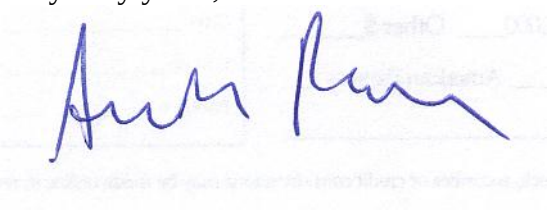
In addition, the direct rule set forth in the November 26 notice is bad public policy because it reduces public involvement, limits competition, and encourages a "land-rush attitude." It will deny the public necessary comment opportunities, be contrary to the public interest by reducing competition for the use of public trust resources, and compound the errors and harmful effects already caused by the Administration's rush to develop offshore renewable energy at any cost. This is a concern for APNS because other sites have been identified off the coast of Massachusetts for development, and we consider *full* competition to be essential at all stages.
The rule eliminates the potential for competition that could produce better proposals and projects. "First come first served" does not test the market or encourage developers to devise the best possible proposals. There is no incentive to do the best job in developing site-specific plans because developers will know they can count on approval with no pressure from others. The current regulations provide against this result by ensuring that the public has notice of any requests for interest relating to proposals to construct offshore alternative energy projects so that competitive interests have an opportunity to participate and submit alternative bids. 30 C.F.R. § 285.231(b).

Finally, the rule encourages a land rush attitude. By eliminating one of the stages of notice, BOEMRE is encouraging potential developers to lease as much area as possible without well-developed project plans in an attempt to gain a favorable position in the leasing process. As a result, project proponents with beneficial, fully-funded, and thoughtfully developed plans who would respond to the second notice may be shut out of the process entirely, leading to an overall public policy loss.

The Secretary has sought to characterize his offshore renewable energy initiative as "Smart from the Start." If jargon must be used, we believe that the correct characterization of the Secretary's initiative is "Bad from the Beginning," based on the highly flawed Cape Wind decision and now a direct final rule that undermines the very principles of open government, transparency, and public participation that this Administration has claimed as its hallmark.

Please contact me if you have any questions.

Very truly yours,



Audra Parker
President and CEO
Alliance to Protect Nantucket Sound

cc: Senator John F. Kerry
Senator Scott P. Brown
Congressman William D. Delahunt

**4 Barnstable Road, Hyannis, Massachusetts 02601**
**▫ 508-775-9767 ▫ Fax: 508-775-9725**

**www.saveoursound.org**

a 501 (c)(3) tax-exempt organization