



National Headquarters

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March 18, 2011

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

**Re: RIN 1010-AD71; Proposed Rule, Acquire a Lease Noncompetitively,
BOEMRE Docket Identification 2010-0045; Vol .76, Number 32, Fed. Reg.
8962 (published February 16, 2011).**

To Whom It May Concern:

On behalf of our over one million members and activists nationwide, Defenders of Wildlife hereby submits this letter in response to the Bureau of Ocean Energy Management, Regulation and Enforcement's (BOEMRE's) request for comments on its "Acquire a Lease Noncompetitively" rule identified as RIN 1010-AD71; BOEMRE Docket Identification 2010-0045; as requested in Vol .76, Number 32, Fed. Reg. 8962 (published February 16, 2011).

Defenders supports the development of renewable energy resources to mitigate the increasing threat of climate change, meet our Nation's growing energy needs, and build a strong economy. Defenders also recognizes that development of these resources will put greater pressure on our Nation's non-energy resources, including our Nation's marine wildlife and habitats. Therefore, Defenders supports public policies and management decisions on the siting and operation of renewable facilities that seek to achieve a no net loss to wildlife and their habitats and, in the case of threatened, endangered, or other sensitive species, a net conservation benefit, by avoiding, minimizing, restoring and compensating for adverse impacts to such wildlife.

Inherent in this metric is a "Smart from the Start" approach that focuses on:

- Project location – high energy potential and low conflict, including near existing or planned transmission;
- Thorough environmental review at the project and landscape level, including cumulative effects;
- Effective mitigation of unavoidable impacts on a site-specific and regional basis; and
- Early and ongoing input and coordination with all affected stakeholders.

Although the notice for this BOEMRE rulemaking purports to only go so far as to remedy "inconsistencies" in proposed practices for permitting of offshore wind energy facilities and marine hydrokinetic (MHK) installations, the rulemaking raises several other issues not addressed to date by BOEMRE.

Defenders offers the following detailed comments in an effort to help the agency achieve these objectives in its decision-making process:

1. **Level of lessee interest should not be the primary determining factor in a streamlining of the offshore siting and planning process.** In proposing to arbitrarily set a new criteria for an expedited accelerated permitting process solely on the basis of the number of applicants for a lease at a particular location, BOEMRE appears to ignore in this rulemaking any and all other parameters that make a particular location unique, including sensitivity of marine biota, migratory pathways, seafloor topography, geologic instabilities, and potential space-use conflicts associated with vessel traffic or military uses. BOEMRE should note that each anticipated offshore wind or MHK energy lease site in the marine environment will possess unique characteristics, and the general level of interest in a particular location by potential lessees has little relationship to these site-specific issues.
2. **Full compliance with NEPA and other environmental laws is required.** As the agency is well aware, offshore wind energy involves relatively new technology for the U.S. and there are considerable uncertainties regarding short and long-term potential impacts on marine species and habitats. The initial wind energy leasing area will set a precedent for expansion of similar technology across the Atlantic coast, and the early MHK leases will likely set similar precedents for the Pacific Coast and other regions. In addition, the extensive area and long life of these proposed facilities potentially may result in significant cumulative impacts to the environment.

The National Environmental Policy Act (“NEPA”) “is our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1. It requires that a “detailed statement,” known as an “Environmental Impact Statement (“EIS”), be prepared for every “major Federal action[] significantly affecting the quality of the human environment,” and that the detailed statement include: the environmental impact of the proposed action, any adverse environmental effects that can’t be avoided, alternatives to the proposed action, the relationship between local short term uses of the environment and “the maintenance and enhancement of long-term productivity,” and any “irreversible and irretrievable commitments of resources” that would be involved in the proposed action. 42 U.S.C. § 4322(2) (C). “The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” *Id.* § 1500.1(c). Programmatic analyses are important and appropriate for assessing larger scale effects of connected actions or broad policy initiatives. The Council on Environmental Quality’s (“CEQ’s”) 40 Most Asked Questions states specifically that an “overview or area-wide EIS would serve as a valuable and necessary analysis of the affected environment and the potential cumulative impacts of the reasonably foreseeable actions under that program or within that geographical area.” Answer to Question 24a, 46 Fed. Reg. 18026 (1981). While site-specific impacts do not need to be fully evaluated until a decision has been made to act on site development, a programmatic EIS “must provide ‘sufficient detail to foster informed decision-making.’” *Citizens II*, 481 F. Supp. 2d at 1086 (quoting *Friends of Yosemite*, 348 F.3d at 800). Notably, the programmatic EIS must still provide a “reasonably thorough discussion of the significant aspects of the probable environmental consequences.” *Lujan*, 961 F.2d at 890

(quoting *California v. Block*, 690 F.2d at 761).

We encourage BOEMRE not to apply Categorical Exclusions (CEs) at any point in the planning or decision-making process for the activities in question. Under CEQ regulations, CEs are strictly limited to classes of actions that “do not individually or cumulatively have a significant effect on the human environment” and therefore “neither an environmental assessment nor an environmental impact statement is required.” 40 C.F.R. § 1508.4. We understand and appreciate the role of CEs in the NEPA process, and we understand that, properly established and applied, CEs can hypothetically promote efficiency by allowing federal agencies to forgo a comprehensive NEPA analysis of projects that, individually or cumulatively, do not have a significant effect on the environment. When *improperly* established and applied, however, CEs can subvert the goals of NEPA by circumventing substantial environmental review, preventing public participation in agency decisions, and by failing to inform decision makers of the true environmental impacts of a decision. BOEMRE is currently revising its CE policies precisely because of previous problems with their implementation in the context of offshore oil and gas drilling and we encourage the agency to continue that process in a thoughtful manner for activities that appropriately qualify for exemption from NEPA.

- 3. Lack of baseline data must be corrected through comprehensive peer-reviewed scientific protocols.** An evaluation of the potential effects of wind and MHK energy development on marine mammals and their habitats depends on the availability of comprehensive baseline information for the Outer Continental Shelf. Baseline information includes information on both the physical properties and the biological components of the marine environment. Physical properties include the location of subsea faults, benthic substrate and obstructions, water depth, proximity to shore, currents, winds, exposure to storms, tides, and freshwater input. Biological components include organisms present on a year-round or seasonal basis and associated with the ocean bottom, mid and upper water column, and surface. This includes organisms that may be affected by any phase of development as well as those that may be affected by accidents. It should identify particularly sensitive populations (e.g., those listed as depleted, threatened, or endangered) as well as particularly sensitive areas (e.g., existing local, state, and federal marine protected areas, national monuments, essential fish habitats, designated critical habitats for rare, depleted, endangered, or otherwise protected species, and biological hotspots or areas of particular biological richness).

Collecting adequate baseline data is challenging because of the inherent variability of biological systems. Understanding this variability requires a long-term commitment of effort and resources to monitoring. Monitoring should begin well before siting and initial construction occurs, and should continue beyond the lifecycle of development activities. If we fail to collect such information, we will have little knowledge from which to gauge adverse effects associated with energy development and a poor basis for responsible management of marine ecosystems. As the Department of the Interior has repeatedly made clear in various contexts, there is a dearth of baseline science for the Atlantic Coast offshore planning areas.

The December 3-4, 2008, “Mid-Atlantic Information Needs” workshop held at the Williamsburg Woodlands Conference Center in Williamsburg, Virginia on the topic of the

Department's proposed 2007-2012 Five-Year Outer Continental Shelf (OCS) Leasing Program (<http://www.vims.edu/public/workshops/mmsworkshop/>) made it abundantly apparent that fundamental baseline scientific information for the Mid-Atlantic Region is lacking, and that geophysical data needed for identifying offshore oil and gas deposits and areas of seafloor geologic instability is obsolete and, in many areas, missing completely. Similar serious data gaps also exist for baseline information for the Pacific Coast and other regions. Although bipartisan congressional moratoria on offshore oil and gas activities were renewed for more than two decades in this region, no curtailment of the then-Minerals Management Service (MMS) "OCS Environmental Studies Program" resulted from these congressional protections. The necessary baseline science was not pursued by MMS or by the Agency's outside contractors, and remains undone today.

We can draw some lessons from Denmark's two decades of experience with offshore wind farms. According to the Danish Energy Agency, Denmark has conducted the most extensive before-after control-impact study in the world and concluded that none of the potential ecological disturbances appear to have long-term or large-scale impacts—although some species may be vulnerable and need special mitigation measures. What is more, the research program did not cause undue delays in getting wind farms up and running. Preliminary scoping began in 1999, environmental impact assessments were approved in 2001, and construction began in 2002. The first two wind farms were functioning by 2003, and by late 2009, ten offshore wind farms were in operation. Because wind project siting and design were guided by the best available science—and stakeholders, including environmental NGOs, were consulted throughout the process—there was little skepticism about the encouraging findings. Public attitudes are strongly positive, wind turbines have become part of the landscape, and wind farms on- and offshore now provide nearly 20% of Denmark's electricity.

- 4. The cumulative impacts of proposed projects should be analyzed in the pre-leasing process.** The cumulative impacts associated with proposed future project elements likely to impact offshore waters, particularly canyons, submerged banks, and sensitive coastal features such as estuaries and embayments should be subject to a full evaluation in the pre-leasing process. The leasing process must consider the potential impacts, particularly the cumulative impacts, of these risks on all National Wildlife Refuges and other protected federal lands within the project's potential impact area, including projected impacts on wildlife during various seasons.

The site evaluation process must also fully consider the impacts of the proposed action to imperiled marine species protected under the Marine Mammal Protection Act and Endangered Species Act ("ESA"). For example, the coast of Virginia is an important migratory path for the highly endangered North Atlantic right whale, for which the National Marine Fisheries Service ("NMFS") has found that the loss of even one animal could doom the species to extinction. Sound, peer-reviewed science focused on potentially impacted marine, avian, and terrestrial species and regional oceanographic and meteorological conditions should be an integral part of any planning process. It should be noted that generating renewable energy from wind or wave arrays represents the tapping of a diffuse energy resource, often requiring a large number of wind turbines or wave energy devices, often in multiple arrays extending over large geographic areas. For these reasons, a comprehensive cumulative impact analysis will be critical.

5. **Site-specific considerations should be fully delineated early in the planning process.** BOEMRE must consider in an EIS all information relevant to a reasoned choice among alternatives. If such information is not currently available, it must obtain such information for the EIS if the cost is not exorbitant. We urge BOEMRE to move expeditiously to undertake this analysis of what information is missing and what information is necessary and begin undertaking the analysis required by 40 C.F.R. § 1502.22. Future studies will also be needed to address and identify particular site-specific characteristics as the agency moves through its planning and siting process. These include seafloor mapping, types of substrate, relevant benthic habitats, subsea canyons and other topographical features, and locations of cold-water corals, as well as ocean current patterns and fish aggregation areas. BOEMRE may not entirely defer this analysis, however, and must gather sufficient information for the programmatic stage at this time.

Thank you for considering these comments. If you have any questions, please contact Jim Lyons, Senior Director, Renewable Energy at 202-682-9400 or jlyons@defenders.org.

Sincerely,

A handwritten signature in black ink, appearing to read "J Lyons", with a long horizontal flourish extending to the right.

Jim Lyons
Senior Director, Renewable Energy