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Department of the Interior  
Minerals Management Service  
Program for Renewable Energy and Alternate Use of Existing Structures on the Outer Continental Shelf  
Notice of Intent (NOI) to prepare a programmatic environmental impact statement (EIS)  
Federal Register Vol. 71, No. 87, Friday, May 5, 2006, pgs. 26559-265460

The MMS, through this Notice of Intent (NOI) announced its intent to prepare a programmatic EIS for the National Offshore Alternate Energy-Related Use (AERU) Program and Rule as authorized by the Energy Policy Act of 2005. The NOI also served to announce the scoping process for this programmatic EIS. According to the NOI, the programmatic EIS analysis will focus on the potential environmental effects of implementing the AERU program, and associated rulemaking. Federal, State, tribal, local government agencies, and other interested parties are requested to provide comments on the scope of the programmatic EIS, significant issues that should be addressed, and alternatives that should be considered.

## Introduction

[Long View Associates](#), Inc. (Long View) appreciates the opportunity to provide comments to MMS regarding the AERU programmatic EIS. Long View is a consulting firm with unique expertise in the area of hydropower licensing, relicensing, and compliance. Long View has relevant national, regional and state experience in the strategic planning, process design and consultation aspects of hydropower licensing, which is transferable to other renewable energy venues. In addition, Long View actively participates in industry efforts to help shape the future of hydropower licensing regulations. We also have prior experience with experimental oil shale technology development and federal coal leasing and permitting programs. We offer our comments on the MMS's development of a programmatic EIS for AERU activities on the OCS based on our experience in these other regulatory arenas involving energy and water resource development on lands and waters subject to federal jurisdiction.

As we understand the proposed scope of this EIS, the MMS is proposing to address the impacts of the AERU Program and Rule on a programmatic level and will not be addressing any site specific issues of concerns nor any impacts related to specific technologies. Therefore we are focusing our comments on broad program alternatives and related potential impacts of AERU development that MMS should consider in the programmatic EIS.



Section 388(a) of the Energy Policy Act of 2005 amended section 8 of the Outer Continental Shelf Lands Act (OCSLA) to authorize the Department of the Interior to grant leases, easements or rights-of-way on the U.S. Outer Continental Shelf (OCS) for the development and support of energy resources from sources other than oil and gas and to allow for alternate uses of existing facilities on the OCS. In its Advanced Notice of Proposed Rulemaking (ANOPR) to implement these new provisions of the Energy Policy Act of 2005 (FR Vo. 70, No. 250, Friday, December 30, 2005), MMS indicated that it anticipates proposals for various types of energy development projects on the OCS from sources other than oil or natural gas, as well as other alternative use proposals, with the majority of proposals being for development of renewable energy. The MMS indicated that possible sources of renewable energy might include wind, wave, current and solar energy.

### **General Comments**

For this programmatic EIS to be effective it must address the AERU Program and Rule in a broad and logical fashion. In this regard the EIS should clearly identify the proposed federal action that is being analyzed and reasonable alternatives to that action. For example, the EIS should clearly articulate the preferred regulatory and administrative framework that is being proposed to manage development of the OCS for alternative energy uses, and the criteria for evaluating site specific impacts of proposals. The EIS should also identify possible alternative approaches, and be clear as to the type and level of analysis that is being conducted in this EIS; both in terms of what is being included in the analysis, but as importantly, what is not.

At the time of its scoping notice, MMS did not make information available to the public with regard to the proposed action or action alternatives that it planned to evaluate, nor did it identify a preliminary list of potential effects of implementing the proposed action. Therefore Long View will lay out a description of what it believes could be a preferred proposed action, along with potential alternatives to that action, that reflect both a variety of regulatory approaches and a range of potential development activity under those alternatives.

One of the most important considerations for the MMS as it develops this programmatic EIS is that it conducts its analysis in a fashion that doesn't inadvertently constrain the potential scope of the AERU program due to an unnecessarily limited evaluation of alternatives and potential impacts. Given significant uncertainties at this time as to the regulatory structure that might best work for this program, the types of technologies that might ultimately seek approval within the program and the potential effects that different development proposals may have, it is essential that this programmatic EIS articulate what is currently known about the potential impacts from these programs, as well as the uncertainties regarding development under this program that could only be addressed during subsequent project specific NEPA analyses.



## Specific Comments

In order to enhance the effectiveness of this programmatic EIS, Long View recommends that key components and considerations of the programmatic analysis should include:

- Identification of those types of AERU developments that might be expected to occur on the OCS. In this regard the EIS should be comprehensive, although by necessity general, in nature so that the analysis will provide a strong legal and technical foundation for site specific NEPA analyses which will follow for project specific proposals.

The EIS should identify all currently known AERU uses and technologies that could potentially locate on the OCS. The EIS should utilize existing information about these known uses to define broader categories of uses with similar characteristics that can be evaluated programmatically.

- Identification of the areal extent of the analysis. The EIS should be clear as to what areas of the OCS are included within the analysis and, to the extent known, what areas, if any, are being explicitly excluded from this analysis. The areal extent of the impacts analysis will require a logical set of boundaries that acknowledge the inherent problems with creating boundaries in the marine environment.
- Definition of the potential types of authorization that could be possible under the MMS's AERU program. MMS received numerous comments on the ANOPR for the AERU program recommending that it consider different types of authorization or tiered authorizations that would accommodate various aspects of technology development including research and development, demonstration and pilot projects and commercial scale projects. While it is currently unclear as to whether or not the EIS will evaluate a single detailed regulatory structure, with or without alternatives, the EIS should, at a minimum, clearly identify the range of types of authorizations that might be possible within the MMS's regulatory program.

We recommend that the EIS evaluate a regulatory program that covers the spectrum of potential types of activity, ranging from research and development (R&D), demonstration and pilot projects and commercial scale projects. Each of these types of development is likely to have varying types and degrees of impacts that should be evaluated on a programmatic basis.



- Definition of potential levels of development that might occur using each of the types of authorization possible. MMS should consider, for the purposes of this programmatic EIS, defining and evaluating low, medium and high levels of development that could potentially occur within the range of types of authorizations. Thus, the EIS would evaluate low, medium and high levels of activity for research and development (R&D) efforts, demonstration and pilot projects and commercial scale projects.
- Identification of the timeframe of the analysis being undertaken at this time. Given that the offshore AERU program is at such a formative phase, it would seem appropriate to have this programmatic EIS cover a planning horizon sufficient to allow for a significant period of initial AERU development on the OCS. A 25-year planning horizon does not appear to be unreasonable.
- Characterization of Existing Information. Utilizing existing information developed for other relevant onshore and offshore developments both in the U.S. and overseas, the EIS should describe the current state of knowledge of potentially affected resources from offshore AERU developments.
- Addressing uncertainty. The EIS should clearly acknowledge the uncertainty that will exist during the initial years of AERU activity with regard to potential environmental impacts and identify how the proposed regulatory program will help to reduce that uncertainty. In this regard the EIS should evaluate the potential for increasing knowledge of potential effects on OCS resources through the utilization of information that will be gained from early developments authorized under the program.
- Identification of project effects. The EIS should identify and evaluate direct and indirect effects that may occur in adjacent jurisdictional areas to the federally managed OCS and on adjoining land from related activities, including construction related laydown areas and energy collection and transmission facilities. Recognizing that identification of potentially relevant project related effects is likely to be difficult because of the “boundless” nature of the marine environment, some sort of “nexus” criteria should be created to help regulators prioritize information needs when existing information is inadequate for their analysis. MMS may find the study request criteria used by the Federal Energy Regulatory Commission [18 CRF 5.9(b)] to be a useful starting point for the development of such a set of criteria. Absent such criteria, informational demands of the AERU Program could become so onerous as to unnecessarily stifle interest in AERU development.



- Addressing unique challenges of the AERU Program. MMS faces the challenge of developing a program for issuing leases, easements or rights-of-way and a companion regulatory program that can accommodate a variety of technologies at varying stages of technological development. In this regard, MMS should ensure that its regulatory program will not only allow, but also support the development of new AERU technologies, as well as the investment in bringing technologies to commercial scale development. The EIS should focus on the potential effects of moving a technology through the various development phases, along with the opportunities to gain knowledge during the early developmental phases that can be brought to bear during the review and approval of commercial scale developments.
- Competing proposals. The EIS should acknowledge that competing proposals for OCS lands under MMS jurisdiction may utilize technologies that are at different degrees of development. The EIS should examine ways to balance the competing public interests in developing OCS resources efficiently with the need for developing and fostering new technologies and innovation.
- Adaptable regulatory approaches. The EIS should accommodate different levels of technological and commercial viability. Wind power is one technology that is significantly advanced and likely can be implemented on a commercial scale on the OCS immediately. Ocean, wave and tidal technologies are earlier in their development cycle and will likely require additional research and development, along with demonstration and pilot efforts prior to full commercial scale deployment. The ultimate regulatory program should be designed to manage and analyze both ends of this spectrum such that it meets the fundamental objective of promoting the development of alternative energy technologies and the commercial deployment of that technology within an environmentally, socially and financially responsible fashion.
- While there are numerous ways to divide up the various types of developments that may occur on the OCS, for the purposes of regulatory review and granting of development rights, we think there is strong logic for a basic three tier approach. The three tiers would be:
  - o research and development (R&D) and demonstration efforts
  - o pilot scale projects
  - o commercial scale projects

These three tiers should be defined so that no gaps are created among the categories.



### *Research and Development (R&D)*

By their very nature, R&D and demonstration efforts should pose little environmental risk and thus the regulatory requirements for such efforts should be commensurately modest in their expectations. The focus of this tier should be on supporting public and/or private investment in AERU technology and the development of basic operating and environmental impact related information for use in later phases, should proposals be pursued beyond the R&D phase. Some limited time frames would apply to the authorizations for the types of efforts in this tier (e.g., 10 years, with the potential for extension upon a showing of good cause).

### *Pilot Scale Development*

The pilot scale project tier would be distinguished from R&D by the substantial increase in the level of development, and attendant investment, that bring along with it increased opportunity to gain knowledge needed to move a technology to the commercial scale and the opportunity to gain additional information regarding the potential environmental impacts of a commercial scale deployment. Time frames of authorizations for this tier would likely be similar to those of the R&D tier.

### *Commercial Scale Development*

The commercial scale project tier would be designed to accommodate the evaluation and approval of full commercial scale projects. These developments would be characterized by size and scale, and by timeframes that would be aimed at fully developing the resources made available by the development rights or regulatory approval mechanisms. Timeframes for commercial scale projects would likely be in the 25-50 year range.

The programmatic EIS should acknowledge the potential for activity to occur along a continuum such as that described above. The specific details of how to define each tier or how many tiers to have is less important than ensuring that the range of potential activities described above is covered by the analysis in the EIS.

- Taking advantage of experience in other Federal resource development programs: MMS should look for guidance as to how to approach the development of the AERU program for the OCS in other existing energy development programs affecting federal lands and/or jurisdiction. These programs have evolved to strike a balance between the need for data collection and effects analysis with risk management and limiting the exposure of investors to open ended regulatory processes. Similar principles should govern the development of the AERU program.



One of the programs the EIS should evaluate for potential applicability to the AERU program is the Federal Energy Regulatory Commission's (FERC) regulatory program for non-federal hydropower development. Over time FERC has implemented a variety of regulatory processes including the recently introduced Integrated Licensing Process (ILP) [18 CFR Part 5]. For commercial scale developments, the steps and requirements of FERC's ILP present a logical sequence of requirements from pre-application information development and agency and public consultation, to development and approval of study program elements, to execution of pre-development studies, to preparation of application materials, to the conducting of NEPA analysis and related reviews (e.g., Endangered Species Act consultation, National Historic Preservation Act Section 106 consultation). We recommend that MMS evaluate the potential for an ILP-type process to provide a regulatory framework for commercial scale AERU development on the OCS.

By its very nature however the AERU program presents a challenge to the MMS not faced by the FERC regulatory program. In the case of the AERU program there are many different types of development, as opposed to a single technology, that could conceivably occur within the context of the program. In addition, it is likely that the AERU program will need to be able to effectively process requests to locate R&D, demonstration and pilot project proposals, unlike anything that the FERC process faces on a regular basis. Long View recommends that MMS not adopt an ILP-type regulatory process for all types of AERU development that may be proposed for the OCS. Instead, MMS should evaluate in the EIS a regulatory program that includes a tiered approach that will simultaneously promote the development of new technology at the R&D and pilot scale project phases while at the same time providing for appropriate environmental protection for commercial scale development.

The EIS should evaluate how such a regulatory program could allow for the scaling up of a technology from the R&D phase to full commercial scale development. Several regulatory mechanisms are available that MMS could consider for use in its program, including a FERC type preliminary permit approval and a research and development lease similar to that recently developed by the Bureau of Land Management (BLM) for experimental oil shale technology development [70 FR 33753, June 9, 2005, Appendix A]. Again, Long View believes it is less important that the EIS attempt to evaluate the specific effects of any particular mechanism but rather that it focus on the potential effects of moving a technology through the various development phases, along with the opportunities to gain knowledge during the early developmental phases that can be brought to bear during the review and approval of commercial scale developments.



## Summary

Long View appreciates the opportunity to provide comments to the MMS on the development of a programmatic EIS for its recently authorized AERU program for the OCS. We recommend that the MMS take a holistic and flexible approach to the EIS analysis of the AERU development rights and regulatory program. The EIS should acknowledge the uncertainty that exists currently with regard to the types of development that may ultimately occur under the program and the pace at which development may occur and the intensity of that development. The EIS should also evaluate how this uncertainty can be managed in an acceptable fashion through the use of a tiered regulatory/development rights program that can effectively address proposals through the entire spectrum from R&D to commercial scale development. In this fashion the programmatic EIS will encompass a complete assessment of the activities and their potentially effects that could occur on the OCS in the foreseeable future and provide a solid foundation for project specific reviews that will follow.

We appreciate the opportunity to provide comments on the scope of the programmatic EIS for the National Offshore Alternate Energy-Related Use (AERU) Program and Rule as authorized by the Energy Policy Act of 2005. If there are any questions please don't hesitate to contact me at (360) 576-3579.

Sincerely,

Stephen D. Padula  
Principal