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June 12, 2009

The Honorable Jeff Bingaman
Chairman
The Honorable Lisa Murkowski
Ranking Minority Member
Committee on Energy and Natural Resources
United States Senate

The Honorable Nick J. Rahall II
Chairman
The Honorable Doc Hastings
Ranking Minority Member
Committee on Natural Resources
House of Representatives

Subject: *Department of the Interior, Mineral Management Service: "Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf"*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of the Interior, Mineral Management Service (MMS), entitled "Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf" (RIN: 1010-AD30). It was published in the *Federal Register* as a final rule on April 29, 2009. 74 Fed. Reg. 19,638. It was effectively received as a major rule on May 28, 2009.

The final rule establishes a program to grant leases, easements and rights-of-way (ROW) for renewable energy project activities on the Outer Continental Shelf (OCS), as well as certain previously unauthorized activities that involve the alternative use of existing facilities located on the OCS. The final rule establishes the methods for sharing revenues generated by this program with nearby coastal States. Finally, this rule is intended to ensure the orderly, safe, and environmentally responsible development of renewable energy sources on the OCS.

The final rule has an announced effective date of June 29, 2009. The Congressional Review Act requires 60 days between the effective date of a major rule and the later of the date of publication of the rule in the *Federal Register* or receipt by Congress of a report containing a copy of the final rule, a concise general statement, including

whether or not the rule is a major rule, and the proposed effective date of the rule. 5 U.S.C. § 801(a)(3)(A). GAO received a copy of the rule on April 27, 2009, along with a report indicating that the rule was not a major rule. This final rule was published on April 29, 2009. However, on May 28, 2009, MMS notified GAO that the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) had determined that the final rule was likely to result in an annual effect on the economy of \$100 million or more, and therefore, the final rule is a “major rule” under the Congressional Review Act. 5 USC § 804(2). Consequently, we determined that MMS’s major rule was effectively received on May 28, 2009, for purposes of our reporting requirements under 5 U.S.C. § 801(a)(2)(A). Neither we nor Congress, however, have received a corrected report, nor has a corrected rule been published in the *Federal Register*. Therefore, this final rule does not have the required 60-day period prior to its effective date.

Enclosed is our assessment of the MMS’s compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review indicates that MMS, with the exception of the 60 day period prior to the effective date, complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: C. Stephen Allred
Assistant Secretary
Land and Minerals Management
Department of the Interior

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF THE INTERIOR,
MINERAL MANAGEMENT SERVICE
ENTITLED
"RENEWABLE ENERGY AND ALTERNATE USES OF EXISTING
FACILITIES ON THE OUTER CONTINENTAL SHELF"
(RIN: 1010-AD30)

(i) Cost-benefit analysis

MMS had a cost-benefit analysis report (Report) prepared by Industrial Economics to support this rulemaking. The final rule contains a short summary of this analysis, and the full analysis is available at the Regulations.gov website, Docket MMS-2008-OMM-0012.

The Report looks at the net federal revenues over 20 years in 4 cases. The present value of cumulative net federal revenues over the 20-year period of the analysis ranges from approximately--\$9.3 million and--\$57.3 million in the Baseline and Low cases, respectively, to approximately \$357 million and \$538 million in the Intermediate and High payment cases, respectively. The Report notes that the significant difference in net revenues is attributable to the inclusion of operating fee payments to MMS in the Intermediate and High payment cases, as operating fees are relatively larger in comparison to the other fees paid to MMS in all three cases.

MMS determined that the benefits of the rule, when weighed against the potential payment that may exceed \$100 million, justify the final rule because the final rule will establish a new regulatory program intended to encourage safe, efficient, and environmentally sound development of the renewable energy sources on the OCS.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

MMS concluded that the final rule will impact a substantial number of small entities; however, the rule would not have a significant economic impact on these small entities when compared to the economic impact it will have on large entities. MMS further concluded that due to the newness of the offshore renewable energy industry, it is difficult to determine an accurate count of the number of entities that will or may be subject to the final rule; however, for the purposes of the Regulatory Flexibility Analysis, MMS assumes that most of the relevant entities will be small. MMS determined that company size would not play a role in the economic impact of the rule, because the costs associated with the final rule, such as rentals and operating fees, will be determined by the project size, which is determined by the applicant.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

MMS determined that the final rule will not impose an unfunded mandate on state, local or tribal governments, or the private sector of more than \$100 million per year, and that the final rule will not have a significant or unique effect on state, local, or tribal governments or the private sector.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

On December 30, 2005, MMS issued an Advanced Notice of Proposed Rulemaking, which requested comments on the program requirements. 70 Fed. Reg. 77,345. A Notice of Proposed Rulemaking (NPR) was published on July 9, 2008, which included a summary of those comments. 73 Fed. Reg. 39376. MMS received 280 comment letters in response to the NPR, from non-governmental organizations, state and local governments, industry and the general public. MMS responded to those comments in the final rule published on April 29, 2009. 74 Fed. Reg. 19,638.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The final rule contains information collection requirements that were submitted to OMB, as required by the Act. OMB approved the information collection and assigned OMB Control Number 1010-0176, which will expire April 30, 2012. The respondents primarily will be an estimated 15-25 federal OCS companies that submit unsolicited proposals, lessees and designated operators, and ROW or RUE grant holders. There is also the potential that companies or state and local governments will submit information or comments relative to renewable energy-related uses of the OCS, Certified Verification Agents, and surety or third-party guarantors will respond. MMS estimates a total of 396 responses, resulting in 31,124 burden hours and \$3,816,000 non-hour cost burdens.

Statutory authorization for the rule

The final rule is authorized by the Energy Policy Act of 2005, Public Law 109-58, 119 Stat. 594, July 29, 2005.

Executive Order No. 12,866 (Regulatory Planning and Review)

OMB determined that the final rule is a significant rule and made the assessments required under the Executive Order. MMS states that the final rule will not have an annual effect on the economy of \$100 million or more for the first 15 years. However, OMB and MMS determined that the appropriate analysis of the rule focuses on the financial impact of the rule over a 20-year period, during which the

annual effect on the economy would be over \$100 million. MMS finds that the benefits of the rule, when weighed against the potential payment that may exceed \$100 million, justify the final rule because the final rule will establish a new regulatory program intended to encourage safe, efficient, and environmentally sound development of the renewable energy sources on the OCS.

MMS determined that the final rule will not create a serious inconsistency or otherwise interfere with the actions taken or planned by another agency. Both MMS and the Federal Energy Regulatory Commission (FERC) have some authority in relation to wave and current energy development on the OCS. MMS and FERC finalized a Memorandum of Understanding on April 9, 2009, which set forth a plan for MMS and FERC to work together and eliminates dual regulatory processes.

MMS determined that the final rule will not alter the budgetary effects of entitlements, grants, user fees or loan programs, or the rights or obligations of their recipients. Finally, MMS determined that the final rule raises novel legal or policy issues, because it establishes a new regulatory program for the development of renewable energy on the OCS and to allow for alternate uses of existing OCS facilities.

Executive Order No. 13,132 (Federalism)

MMS determined that this final rule will not substantially and directly affect the relationship between the federal and state governments and that a federalism assessment is not required. However, to the extent that state and local governments have a role in outer continental shelf activities, this rule will affect that role.