

APPENDIX A:

SECTION 388 OF THE ENERGY POLICY ACT OF 2005, PUBLIC LAW 109-58

APPENDIX A:**SECTION 388 OF THE ENERGY POLICY ACT OF 2005, PUBLIC LAW 109-58****A.1 BACKGROUND**

In August 2005, Congress enacted the Energy Policy Act of 2005 (Public Law 109-58) (EPAct). Section 388 of the EPAct amended Section 8 of the Outer Continental Shelf Lands Act (OCSLA) (43 USC 1337) in an effort to address legal questions that had arisen earlier concerning (1) which federal agency could authorize an applicant to occupy the submerged lands of the U.S. Outer Continental Shelf (OCS) for the purpose of wind energy development and (2) what process should be followed by that federal agency in granting such authorization. Specifically, Section 388 added section 8(p) to the OCSLA authorizing the Department of the Interior (DOI) to grant, in consultation with other federal agencies, leases, easements, or rights-of-way on the OCS for certain energy-related activities. Among these activities are (1) the production, transportation, and transmission of energy from sources other than oil and gas and (2) the alternate use for energy-related or other authorized marine-related purposes of facilities previously or currently used for activities authorized under the OCSLA. The leases, easements and rights-of-way granted under the new section 8(p) must be approved on a competitive basis, unless there is no competitive interest.

Section 388 of the EPAct does not supersede existing restrictions on OCS activities, including existing deferrals by Presidential withdrawal and congressional moratoria for oil and gas production-related activities. Also, it prohibits granting of leases, easements, or rights-of-way in areas designated as marine sanctuaries, national parks, national wildlife refuges, and national monuments.

In March 2006, the DOI designated its Minerals Management Service (MMS) to implement the new OCSLA Section 8(p) provisions. Accordingly, the MMS will be proposing regulations for carrying out the responsibilities and authority granted under the EPAct section 388.

A.2 TEXT OF SECTION 388 OF THE EPAct**SEC. 388. ALTERNATE ENERGY-RELATED USES ON THE OUTER CONTINENTAL SHELF.**

(a) Amendment to Outer Continental Shelf Lands Act- Section 8 of the Outer Continental Shelf Lands Act (43 U.S.C. 1337) is amended by adding at the end the following:

(p) Leases, Easements, or Rights-of-way for Energy and Related Purposes-

(1) IN GENERAL- The Secretary, in consultation with the Secretary of the Department in which the Coast Guard is operating and other relevant departments and agencies of the

Federal Government, may grant a lease, easement, or right-of-way on the outer Continental Shelf for activities not otherwise authorized in this Act, the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.), the Ocean Thermal Energy Conversion Act of 1980 (42 U.S.C. 9101 et seq.), or other applicable law, if those activities--

(A) support exploration, development, production, or storage of oil or natural gas, except that a lease, easement, or right-of-way shall not be granted in an area in which oil and gas preleasing, leasing, and related activities are prohibited by a moratorium;

(B) support transportation of oil or natural gas, excluding shipping activities;

(C) produce or support production, transportation, or transmission of energy from sources other than oil and gas; or

(D) use, for energy-related purposes or for other authorized marine-related purposes, facilities currently or previously used for activities authorized under this Act, except that any oil and gas energy-related uses shall not be authorized in areas in which oil and gas preleasing, leasing, and related activities are prohibited by a moratorium.

(2) **PAYMENTS AND REVENUES-** (A) The Secretary shall establish royalties, fees, rentals, bonuses, or other payments to ensure a fair return to the United States for any lease, easement, or right-of-way granted under this subsection.

(B) The Secretary shall provide for the payment of 27 percent of the revenues received by the Federal Government as a result of payments under this section from projects that are located wholly or partially within the area extending three nautical miles seaward of State submerged lands. Payments shall be made based on a formula established by the Secretary by rulemaking no later than 180 days after the date of enactment of this section that provides for equitable distribution, based on proximity to the project, among coastal states that have a coastline that is located within 15 miles of the geographic center of the project.

(3) **COMPETITIVE OR NONCOMPETITIVE BASIS-** Except with respect to projects that meet the criteria established under section 388(d) of the Energy Policy Act of 2005, the Secretary shall issue a lease, easement, or right-of-way under paragraph (1) on a competitive basis unless the Secretary determines after public notice of a proposed lease, easement, or right-of-way that there is no competitive interest.

(4) **REQUIREMENTS-** The Secretary shall ensure that any activity under this subsection is carried out in a manner that provides for--

(A) safety;

(B) protection of the environment;

- (C) prevention of waste;
 - (D) conservation of the natural resources of the outer Continental Shelf;
 - (E) coordination with relevant Federal agencies;
 - (F) protection of national security interests of the United States;
 - (G) protection of correlative rights in the outer Continental Shelf;
 - (H) a fair return to the United States for any lease, easement, or right-of-way under this subsection;
 - (I) prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas;
 - (J) consideration of--
 - (i) the location of, and any schedule relating to, a lease, easement, or right-of-way for an area of the outer Continental Shelf; and
 - (ii) any other use of the sea or seabed, including use for a fishery, a sealane, a potential site of a deepwater port, or navigation;
 - (K) public notice and comment on any proposal submitted for a lease, easement, or right-of-way under this subsection; and
 - (L) oversight, inspection, research, monitoring, and enforcement relating to a lease, easement, or right-of-way under this subsection.
- (5) LEASE DURATION, SUSPENSION, AND CANCELLATION- The Secretary shall provide for the duration, issuance, transfer, renewal, suspension, and cancellation of a lease, easement, or right-of-way under this subsection.
- (6) SECURITY- The Secretary shall require the holder of a lease, easement, or right-of-way granted under this subsection to--
- (A) furnish a surety bond or other form of security, as prescribed by the Secretary;
 - (B) comply with such other requirements as the Secretary considers necessary to protect the interests of the public and the United States; and
 - (C) provide for the restoration of the lease, easement, or right-of-way.

(7) COORDINATION AND CONSULTATION WITH AFFECTED STATE AND LOCAL GOVERNMENTS- The Secretary shall provide for coordination and

consultation with the Governor of any State or the executive of any local government that may be affected by a lease, easement, or right-of-way under this subsection.

(8) REGULATIONS- Not later than 270 days after the date of enactment of the Energy Policy Act of 2005, the Secretary, in consultation with the Secretary of Defense, the Secretary of the Department in which the Coast Guard is operating, the Secretary of Commerce, heads of other relevant departments and agencies of the Federal Government, and the Governor of any affected State, shall issue any necessary regulations to carry out this subsection.

(9) EFFECT OF SUBSECTION- Nothing in this subsection displaces, supersedes, limits, or modifies the jurisdiction, responsibility, or authority of any Federal or State agency under any other Federal law.

(10) APPLICABILITY- This subsection does not apply to any area on the outer Continental Shelf within the exterior boundaries of any unit of the National Park System, National Wildlife Refuge System, or National Marine Sanctuary System, or any National Monument.

(b) Coordinated OCS Mapping Initiative-

(1) IN GENERAL- The Secretary of the Interior, in cooperation with the Secretary of Commerce, the Commandant of the Coast Guard, and the Secretary of Defense, shall establish an interagency comprehensive digital mapping initiative for the outer Continental Shelf to assist in decisionmaking relating to the siting of activities under subsection (p) of section 8 of the Outer Continental Shelf Lands Act (43 U.S.C. 1337) (as added by subsection (a)).

(2) USE OF DATA- The mapping initiative shall use, and develop procedures for accessing, data collected before the date on which the mapping initiative is established, to the maximum extent practicable.

(3) INCLUSIONS- Mapping carried out under the mapping initiative shall include an indication of the locations on the outer Continental Shelf of--

- (A) Federally-permitted activities;
- (B) obstructions to navigation;
- (C) submerged cultural resources;
- (D) undersea cables;
- (E) offshore aquaculture projects; and

(F) any area designated for the purpose of safety, national security, environmental protection, or conservation and management of living marine resources.

(c) Conforming Amendment- Section 8 of the Outer Continental Shelf Lands Act (43 U.S.C. 1337) is amended by striking the section heading and inserting the following: ‘Leases, Easements, and Rights-of-way on the Outer Continental Shelf- ’.

(d) Savings Provision- Nothing in the amendment made by subsection (a) requires the resubmittal of any document that was previously submitted or the reauthorization of any action that was previously authorized with respect to a project for which, before the date of enactment of this Act--

(1) an offshore test facility has been constructed; or

(2) a request for a proposal has been issued by a public authority.

(e) State Claims to Jurisdiction Over Submerged Lands- Nothing in this section shall be construed to alter, limit, or modify any claim of any State to any jurisdiction over, or any right, title, or interest in, any submerged lands.

