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**The Potential of
Memorandums of Understanding (MOUs) within the
Offshore Renewable Energy Industry**

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August 26, 2009

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I. Introduction

Since the beginning of their tenure, the Obama administration and Secretary of the Interior Ken Salazar have made renewable energy, particularly offshore, a top priority.¹ Even though former President Bush issued an Executive Order to assist in the development of energy-related projects back in 2001, little focus and almost no progress have been made in the field of offshore renewable energy.² This lack of progress was due primarily to a jurisdictional dispute between the Department of Interior's Minerals Management Service (MMS) and the Federal Energy Regulatory Commission (FERC). The dispute held up the publication of the final rule for siting renewable energy facilities on the Outer Continental Shelf (OCS), which was only recently decided.³ To date, the utility of these projects has been recognized, noting the benefit to the environment by providing clean production, increased national security by reducing the need for foreign oil, economy revenue by providing more jobs, and providing the foundation for a future of sustainable energy production.⁴ The goal has shifted from a developing interest to actually developing the projects.

Therein lays the problem. Development of new industries requires enormous financial backing, and investors do not favor uncertainty or inefficiency. Before construction can begin, projects must obtain the necessary permits, leases, licenses, and rights-of-way. In this current climate, the regulatory process is uncertain and delayed. The proponents of the Cape Wind Energy Project began the application process in 2001 for a lease off of Cape Cod, Massachusetts to build a wind farm; the permitting process is close to completion but is still not finalized.⁵ In stark contrast, a license to build a deepwater port for crude oil or liquid natural gas (LNG) can be obtained within two years of the notice of application.⁶

The contrast in application timetables for the respective offshore projects is the result of many factors; but, the factor that this paper will primarily address is the overlapping regulatory jurisdiction exercised by different competing governmental agencies for the development of energy projects. While agencies overseeing established industries, such as LNG and crude oil, have long since realized the necessity to cooperate by signing Memorandums of Understanding (MOU), the nascent renewable energy industry, has resulted in redundant reviews and processes that greatly increase application

¹ Secretary of the Interior Salazar Order no 3285 Sec. 2. March 11, 2009.

² Executive Order 13212 May 18, 2001.

³ See 74 FR 19638 (April 29, 2009) for Notice of Availability of the MMS Final Rule.

⁴ Secretary of the Interior Salazar Order no 3285 Sec. 2. In this order Secretary Salazar addresses the omissions/ambiguities of EO 13212 by gearing this order to renewable energy, creating a task force that is not overly large and with clearly identified tasks, and by specifically identifying duties under the order for certain Department of the Interior employees.

⁵ 74 FR 3635-3636 (Jan. 21, 2009). Notice of Availability of the Final EIS for the Cape Wind Energy Project.

⁶ 74 FR 984-985 (Jan. 9, 2009). Notice of application for an offshore port system crude oil deepwater port license application. This particular application was approved and the license was issued on April 29, 2005, a mere fifteen months later. See 74 FR 31479.

time. This unnecessary increase in application time is a hindrance for both investors and developers looking to build an offshore renewable project.⁷

Offshore projects are regulated by a combination of governmental agencies. An applicant wanting to build a wind farm beyond the state's 3-nm limit must obtain a lease from MMS, and meet all the pertinent environmental requirements. The applicant must also gain a right-of-way for transmission lines from the Federal Energy Regulatory Commission (FERC) and from the governing state agencies that hold jurisdiction from the 3-nm to the shoreline. Other interested agencies range from the United States Fish and Wildlife Service (USFWS) to the United States Coast Guard (USCG). In short, there is ample opportunity for an agency to deny or severely delay a project application (which is the fiscal equivalent of killing it) particularly in the absence of well-established data that would allow these projects to satisfy the environmental regulations. By comparison, an offshore oilrig may satisfy the environmental regulatory process faster than a project like a wind farm. As California Governor Schwarzenegger states, "...environmental regulations are holding up environmental progress in some cases."⁸

This paper will examine existing MOUs used to streamline the regulatory processes for energy facilities. Research conducted on numerous MOUs provide examples of the more pertinent agreements which could be utilized for the purposes of drafting MOUs to streamline the regulatory procedures for offshore renewable energy projects. The MOU between FERC and MMS for hydrokinetic facilities on the OCS is a prime example of a successful joint process. This paper will not include the specifics of the regulatory process, but will instead focus on the use of the MOU for coordination and cooperation. Whether an MOU may create a joint application process; whether an MOU may establish a schedule and bind parties to it; and finally, whether there are any legal cases regarding enforcement of MOUs will be addressed.

II. Terms of a Memorandum of Understanding

A Memorandum of Understanding (MOU) is an agreement between parties to satisfy certain requirements to the best of each party's ability for mutual benefit. While a contract presents legal remedies should a party fail to perform, an MOU does not. MOUs are not as binding as contracts, a characteristic likely to be of concern to lawyers and investors, both of whom crave certainty. However, this arguable weakness in binding power may be considered the strength of the MOU. All parties want to retain their own authority and freedom of movement, and governmental agencies are often statutorily bound to retain their authority and freedom of movement.⁹

There are times when certainty of action, while desirable, comes second to other obligations. For this reason, a non-legally binding MOU may be preferable to

⁷ MMS final Rule Page 19. The MMS Final Rule acknowledges that the uncertainty involved in ROW and RUE granting and overseeing requirements is a hindrance to an applicant's attainment of financial backing.

⁸ "Governor Schwarzenegger Advances State's Renewable Energy Development" online press release available at <http://gov.ca.gov/press-release/11073/> accessed 6/16/2009 at 10:37 am.

⁹ Phone Interview with Adam Bless of the Oregon Energy Facility Siting Council on Aug. 3 2009.

individuals, parties, companies, and governmental agencies over a legally binding contract, which may be preferable to investors and lawyers. MOUs present an alternative to contracts that may be more attractive in certain situations.

MOUs have the potential to help streamline the regulatory process for offshore renewable energy projects. For example MOUs are often used to establish multi-party cooperation without resorting to legal force, and this cooperation would likely result in a streamlined regulatory process. A well-written MOU may provide an unrestrained system with terms that will likely result in repetitive cooperative acts, thus putting the parties in a good position to overcome competitive tendencies and establish instead a cooperative relationship. MOUs may therefore serve as the foundation for an ongoing cooperative relationship between parties that provides the mutual benefits the parties seek.

The format and wording of a MOU are flexible, but there are standard sections to be included. A typical MOU usually includes, the title, Preamble, Agreement, Boilerplate, and signatures, followed by any Attachments.¹⁰ Excluding the title and signatures, these sections are usually divided into subsections. For example, the Preamble typically includes an introduction or Background; a Purpose that outlines the general or specific goal of the MOU; and the Acknowledgments, where the parties make preliminary declarations of understanding or concession. For MOUs between governmental agencies, the Acknowledgments section usually has paragraphs or subsections that identify exactly what duties each agency is statutorily obligated to fulfill. The Agreements section follows and is often divided into numbered, lettered, titled, or undesignated paragraphs or terms, addressing specific points of the agreement for each party. These terms can be as short as a sentence or two or can be a lengthy paragraph. They may be organized into clusters of terms specific to each party, or between parties. The Boilerplate, or miscellaneous terms, is a section of general terms regarding the implementation and limits of the MOU. While MOUs often follow this pattern of Preamble, Agreements, and boilerplate followed by the signatures and any attachments the format is flexible. The parties may construct a format and structure preferable to specific needs while tailoring the terms, Acknowledgments, and Boilerplate to best satisfy the Purpose of the MOU.

III. The Use of MOUs in Court

Within the Boilerplate section of an MOU, it is noted that the terms present no legal cause of action, and research suggests that MOUs are not legally enforced. Yet, American jurisprudence does not completely ignore MOUs. A number of cases exists involving disputes in which a MOU was presented as evidence.¹¹ Chao v. Mallard Bay Drilling, Inc. is a typical case illustrating a court's use of an MOU.¹² In that case the

¹⁰ See Appendix A.

¹¹ Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 129 S.Ct. 2458, 2475 (2009); National Ass'n of Home Builders v. Defender of Wildlife, 551 US 644 (2007); Dept. of the Interior and Bureau of Indian Affairs v. Klamth Water Users Protective Association, 532 U.S. 1, 5 (2001).

¹² Chao v. Mallard Bay Drilling, Inc., 534 U.S. 235 (2001).

United States Supreme Court cited the terms of agreement in a MOU between the USCG and the Occupational Safety and Health Administration (OSHA) to define the jurisdictional division between them regarding worker safety on inspected and uninspected vessels.¹³ While MOUs do not appear to be legally enforceable, often times the terms themselves provide evidentiary support.

If a party to an MOU were to ignore the terms, the court would most likely not grant specific performance. For example, if FERC failed to include the license requirement that an applicant must comply with all terms and conditions of an MMS issued lease, it would be in violation of Term F within the April 9, 2009 MOU between FERC and MMS which requires FERC to include this requirement in its licenses; furthermore, a court would not be able to order FERC to do so due to Section IV which states that the MOU does not create “any private right or cause of action for or by any person or entity”.¹⁴ Resolution of such a dilemma would result from the respective parties discussion of the omission, but if an agreement to either comply or amend the MOU proved impossible between them, the dispute would lead to further discussion between the Secretary of the Interior and Chairman of FERC. If there was still no consensus, higher authorities might intervene or the MOU might even be terminated. While the court system does not appear to enforce MOUs, there are typically terms within a MOU to resolve disputes and keep the parties focused on their mutual goal rather than becoming embroiled in litigations.

IV. MOUs Clarifying Jurisdiction for Renewable Energy Projects

A. FERC and MMS

As stated earlier, the parties to a MOU often acknowledge their respective responsibilities in the Preamble, particularly if the purpose of the MOU is to settle disputes over responsibilities and jurisdiction. A clarifying statement where the parties agree to the acknowledgment of respective responsibilities between the two agencies with overlapping jurisdiction can be the first cooperative act in a history of cooperation that establishes a strong relationship between them.

For example, the new administration called for the MOU of April 2009 between MMS and FERC due to the jurisdictional conflict created by the Energy Policy Act of 2005, particularly for offshore renewable licensing.¹⁵ While ambiguously worded and general in scope, the April 2009 MOU takes the first big step towards interagency cooperation between MMS and FERC.¹⁶ By acknowledging that both MMS and FERC have licensing responsibilities on the Outer Continental Shelf and by clarifying the difference between their roles, each agency agreed to a defined partition of jurisdiction.

¹³ *Id.* at 243.

¹⁴ Memorandum of Understanding between the U.S. Department of the Interior and Federal Energy Regulatory Commission at 2-3. (April 9, 2009).

¹⁵ Secretary of the Interior Salazar Order no 3285 Sec. 2. March 11, 2009. By putting a high priority level on renewable energy this order was among other things a call for MMS to cease its feud with FERC.

¹⁶ Memorandum of Understanding Between the Dept. of Interior and Fed. Energy Regulatory Comm’n. April 9, 2009.

Thus the main problem of, “Who does what?” was solved. The MOU even went even further by adding terms calling for communication and cooperation.¹⁷ Because the MOU essentially came at the bequest of higher authorities, there is even more likelihood of compliance with this MOU. Eventually, as the parties have time to further sort out their differences following this initial understanding, a relationship will develop and their initial agreement can be refined.¹⁸

Despite MMS’ new authority for offshore projects, FERC continues to be involved in hydrokinetic offshore renewable energy projects. Luckily, FERC has many MOUs regarding various types of overlapping authority with regard to energy project regulation.¹⁹ This history is good evidence of a willingness to cooperate to the mutual benefit of involved agencies that will probably surface once tensions have had a chance to subside. FERC’s MOU history also provides some good examples of how MOUs can shape cooperative policies without legal force.

B. FERC and the state of Oregon

In March of 2008, FERC signed an MOU with several agencies of the State of Oregon to coordinate review procedures and schedules for proposed wave energy projects in the adjacent territorial waters.²⁰ Pursuant to the Federal Power Act (FPA), FERC has authority to grant licenses for hydrokinetic projects, whether in the territorial sea or on the OCS.²¹ Likewise, Oregon has authority to regulate projects within its state waters pursuant to the Coastal Zone Management Act (CZMA), Clean Water Act, National Historic Preservation Act, and the FPA.²²

Both Oregon and FERC had a mutual interest in promoting renewable energy projects; an MOU was signed in order to coordinate their respective reviews. The MOU asserts Oregon’s recognition of FERC’s authority and its pilot-licensing program; it then specifies procedures for notification of the other party regarding potential applicants, in order to commence a coordinated review process.²³ The MOU incorporates agreed upon milestones into the review process of each applicant, to which both shall strive to adhere.²⁴ The MOU requires Oregon to “complete any actions required of it within the timeframes established in the schedule” except when doing so proves impossible, as well

¹⁷ *Id.*

¹⁸ An in person interview with Mr. Timothy Redding of the MMS revealed that FERC and MMS view this initial MOU almost like the breaking of the ice between them, and do intend to eventually enter a much more specific MOU to properly streamline their joint regulatory authority.

¹⁹ Links to these MOUs in pdf format may be found on FERC’s website at <http://www.ferc.gov/legal/maj-ord-reg/mou.asp>.

²⁰ “Memorandum of Understanding Between The Federal Energy Regulatory Commission and the State of Oregon By and Through Its Departments of Fish & Wildlife, Land Conservation & Development, Environmental Quality, State Lands, Water Resources, Parks & Recreation, and Energy” March 26, 2008.

²¹ 16 U.S.C. §§791(a) et. seq. (read this)

²² 16 U.S.C. §§1451 et. Seq. (CZMA); 33 U.S.C. §§1251-1387 (CWA); 16 U.S.C. §§470 et. Seq. (NHPA); 16 U.S.C. §§791a et. Seq. (FPA) (read these). The states also have authority to regulate what goes into their respective territorial seas following the ...

²³ MOU between FERC and Oregon page 2.

²⁴ *Id.*

as requiring Oregon to comply with legally established deadlines.²⁵ This language is stricter than that what is contained in other MOUs, which typically only require a good faith effort by the parties. It does require a best effort at getting other agencies to comply with the agreed upon timeframe.²⁶

Coordination between the two parties is evident in Paragraph four of the MOU where the state's environmental reviews will be conducted in conjunction with FERC's standards satisfying the federal National Environmental Policy Act (NEPA) requirements by FERC and the CZMA requirements undertaken by the state.²⁷ The terms are not specific; neither stipulates a deadline for completion, nor methods for this coordination.

FERC recognizes that Oregon is drafting a comprehensive plan, while gathering sufficient data, that will identify certain areas appropriate for wave projects; FERC has agreed to consider the plan pursuant to the FPA.²⁸ Both parties acknowledge that any pilot projects must include terms and conditions appropriate to protect natural resources.²⁹ The MOU concludes with four paragraphs of "boilerplate", where the parties agree to the following: nothing in it prevents them from seeking redress at law; nothing requires either party to do anything contrary to applicable law; the MOU does not deal with fund transfers; the MOU takes affect when all parties have signed; it may be modified anytime by mutual written agreement; and any party may terminate it upon thirty days written notice during which time the parties will make a good faith effort to resolve any disagreements.³⁰ Overall, this MOU appears to be primarily an official decree that the parties wish to coordinate.

How the terms will be carried out under this MOU remain to be seen, for it is still relatively new. However, there has been a development that bares some comment. From FERC's reports on hydrokinetic power, it would appear that four preliminary permits have been issued for projects in Oregon and none are pending as of August 6, 2009.³¹ Oregon has taken a research-oriented approach to wave energy at the time the MOU was written and FERC was aware of this intent.³² Letters from the governor prior to the

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at page 3.

²⁸ *Id.* See also 10(a)(2)(A)(ii) of the FPA and 18 CFR 2.19. In addition to agreeing to consider a projects compliance with Oregon's Comprehensive Plan, FERC acknowledges that Oregon may submit it to NOAA as an amendment to Oregon's Coastal Management Plan. As the number of suitable locations in a comprehensive plan must be limited, the MOU allows Oregon to identify more locations in subsequent phases of its comprehensive plan.

²⁹ *Id.*

³⁰ *Id.* at 4-5.

³¹ Issued Hydrokinetic Permits (Excel Spreadsheet); Pending Hydrokinetic Permits (Excel Spreadsheet). Spreadsheet updated as of 8/06/2009, available at <http://www.ferc.gov/industries/hydropower/industry/hydrokinetics.asp>.

³² See Letter From Oregon Governor Theodore R. Kulongoski To The Ocean Policy Advisory Council on March 26, 2008. See Also Letter From Oregon Governor Theodore R. Kulongoski To Federal Energy Regulatory Commission and Ocean Power Technologies, Inc. on March 26, 2008. These two letters make reference to the MOU between Oregon and FERC as if the MOU is now the policy, however the letter emphasize that Oregon's interest is to develop the industry by researching impacts first, and only then building large scale facilities.

issuance of the most recent preliminary permit signify Oregon's intent to focus on research until completion and implementation of a comprehensive plan as mentioned in the MOU.³³ In February of 2009, FERC issued a preliminary permit to a wave energy developer to the chagrin of much of the public who considered this action a violation of the terms of the MOU.³⁴ The impression of Oregon is that the MOU forbids FERC to issue anything other than pilot project licenses until their comprehensive plan was complete and FERC seems to have thought that they were free to do as they wish with applications pending at the time of the MOU. A strict reading of the MOU reveals nothing to clarify this dispute, leading to the conclusion that a term clearly identifying that this MOU applied only to future filings or clearly specifying Oregon's desire that no preliminary permits or licenses would be issued until their comprehensive plan was complete might have prevented this problem. When drafting MOUs, it is important to include an amendment, dispute resolution procedure to prevent any unforeseen circumstances, and a clarifying scope.

C. FERC and the State of Maine

FERC and Maine signed a MOU on August 18, 2009.³⁵ This agreement includes deadlines for, "...action on an application for a state permit and a request for water quality certification."³⁶ Maine also agreed to a deadline for issuing a state submerged lands lease and schedules set by FERC for pilot project licenses "to the extent feasible."³⁷ The FERC/Maine MOU does not specify the effect of the MOU on any pending applications, nor does it seem to apply to anything but tidal energy. It extends its application to state lands and any federal lands that will have an impact on Maine's coastal areas, and it also addresses the problem with site banking by having FERC acknowledge the importance of considering potential for wind energy in any areas under review for a tidal project application. This is in contrast to the somewhat unspecific language of the MOU between FERC and Oregon, this inclusion of timetables and efforts to abide by them appears promising.

³³ See Letter From Oregon Governor Theodore R. Kulongoski To The Ocean Policy Advisory Council on March 26, 2008. See Also Letter From Oregon Governor Theodore R. Kulongoski To Federal Energy Regulatory Commission and Ocean Power Technologies, Inc. on March 26, 2008.

³⁴ Susan Chambers, "Surprising Oregon Wave Energy FERC Permit Issued" The World, Feb. 3, 2009. Available at <http://mendocoastcurrent.wordpress.com/2009/02/04/surprising-oregon-wave-energy-ferc-permit-issued/>. The source is disputable because FERC's spreadsheets list the permit in question as issued on March 9, 2007, before the MOU was written. This paper briefly treats it as correct to flush out a flaw in the MOU drafting. On a positive note, the article seems to place a sacrosanct status on the MOU detectable through the outrage that FERC may have ignored one of its provisions, which evidences a public and stakeholder reliance on the wording of MOUs making them a powerful tool in non-binding agreements.

³⁵ Memorandum of Understanding between the Federal Energy Regulatory Commission and the State of Maine by and through its Governor and Departments of Conservation, Environmental Protection, Inland Fisheries and Wildlife, and Marine Resources, State Planning Office, and Governor's Office of Energy Independence and Security. (Aug. 18, 2009).

³⁶ *Id.* at 4.

³⁷ *Id.* at 3-4.

V. FERC and Liquid Natural Gas

FERC has MOUs relating to its “exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an [Liquid Natural Gas] terminal.”³⁸ The following section will focus on a few to illustrate cooperative relationships between FERC and other agencies. The first MOU was signed with The Department of Transportation (DOT) in 1985.³⁹

A. 1985 MOU between FERC and DOT

The DOT has authority pursuant to the Natural Gas Pipeline Safety Act of 1968 and the Hazardous Materials Transportation Act for its Research and Special Programs Administration. It exercises this authority to set and enforce safety regulations and standards for Liquid Natural Gas (LNG) transportation in or affecting interstate commerce. The United States Coast Guard also exercises authority over LNG facilities that affect port safety and navigable waterways pursuant to EO 10173, the Magnuson Act, and the Ports and Waterways Safety Act of 1972. The aforementioned agencies signed an MOU specifying their particular authority relating to LNG.⁴⁰

FERC has authority, with respect to interstate LNG transportation, to accept or deny applications, or to accept with terms and conditions, and to conduct reviews of the cryogenics during the siting process and biennially after certification. DOT has authority to set and enforce regulations extending “to the design, installation, construction...operation, and maintenance of facilities...”⁴¹ There is noticeably some similarity and overlap in what both parties are required to do, the elimination of which would probably save time and resources to both parties and the industry. This MOU states that its purpose is to provide guidance and policy regarding “the fixed siting, design, construction, operation, and maintenance of fixed LNG facilities” to the agencies respective staffs and to the industry.⁴²

The agreements section is divided into subsections, the first two specify the actions to be taken by FERC and DOT respectively.⁴³ The drafters of the MOU inserted language allowing a party to avoid compliance if necessary. Rather than stating, “The [FERC/DOT] shall *to the extent possible*,” or “The [FERC/DOT] should *when practicable*,” where the terms of agreement would appear far less forceful and certain than they do when the italicized words are omitted. This MOU is a good example of strong term writing, which almost appears to be binding, and which enumerates the few

³⁸ 15 U.S.C. §717(b)(e)(1). This authority was originally granted via the Section 7 of the Natural Gas Act.

³⁹ Memorandum of Understanding Between the Dep’t of Transp. and the Fed. Energy Regulatory Comm’n Regarding Liquefied Natural Gas Transportation Facilities. (Apr. 16, 1985).

⁴⁰ *Id.* at 1.

⁴¹ *Id.* at 1-2. DOT exercises authority over both interstate, intrastate, and foreign commerce, even though it leaves enforcement to the states for intrastate commerce; FERC exercises authority over interstate and foreign commerce. This MOU limits the agreement to interstate and foreign LNG transportation.

⁴² *Id.* at 2.

⁴³ *Id.* at 2-3.

exceptions to action, leaving the parties with a clear understanding of what each will do and when.

An example of a broad term contained in this agreement appears in section 1(e): “When such voluntary agreements are reached, the FERC staff will *promptly* notify DOT of the agreements and provide *appropriate* background material.”⁴⁴ While the word “promptly” is not specifically defined by a term of days or hours, it is still a somewhat strict qualifier, and taken in light of the exception’s purpose, a stricter time limit for notification is probably unnecessary.⁴⁵ The word “appropriate” would be quite vague were it not for the section 1(d) in which the background material that the FERC is normally required to provide the DOT is defined; giving the parties a proper standard of appropriateness before using it as a qualifier.⁴⁶

Other examples of broad language found in DOT’s section include Section 2(b), which states, “[The DOT shall:] Take *whatever* action [it] *considers appropriate* in the discharge of its responsibilities in the matter referred by FERC.”⁴⁷ The term then goes on to enumerate some of the most likely actions the DOT will take.⁴⁸ Even though this term seems to leave a wide array of possible actions open, thus creating uncertainty, the listing of possible actions as well as the specification that the action is taken in the discharge of [DOT’s] responsibilities provides some expectation that whatever DOT chooses to do will be a direct result of its own regulations and standards.⁴⁹ In the Purpose section of the MOU, the parties acknowledge that DOT has “exclusive authority to promulgate Federal safety standards” and that FERC has authority to impose stricter requirements in “special circumstances.”⁵⁰ While an applicant or operating facility under FERC’s jurisdiction must comply with FERC’s requirements, it may already be in compliance with DOT’s requirements. Hence, when FERC finds a problem it may or may not be a DOT problem; therefore, FERC puts DOT on notice, as well as the applicant or operator. The applicant or operator then has thirty days to send comments to DOT, and at the end of sixty days DOT must have a decision of its own action on notice, as well as a deadline for the applicant or operator to comply if compliance is necessary.⁵¹ Essentially, DOT is the

⁴⁴ *Id.* at 3. (emphasis added). Section 1(e) is itself an exception term; it lays out an exception to section 1(b) which requires the FERC to refer to DOT for its review and its comments whenever the FERC proposes a corrective action for safety reasons, and the FERC’s safety standard differs from the DOT’s. The exception encapsulated in section 1(e) allows the FERC to omit referring to the DOT’s review and asking for comment only when the applicant or facility owner voluntarily agrees to take the proposed actions. This exception has the affect of eliminating redundant oversight, while still informing DOT of the concern and action, so that if it happens that the DOT has further safety concerns they too may be raised.

⁴⁵ *Id.* The term involves an exception to terms 1(b) through 1(d) in which FERC must notify DOT if it has proposed an action to an applicant or operator that is different than DOT’s procedures. When this happens FERC notifies DOT and then must wait for DOT’s response. Under the exception in 1(e) the applicant or operator voluntarily agrees to comply and FERC no longer needs to wait for a DOT response to the recommendation, instead they simply let DOT know what is happening.

⁴⁶ *Id.* at 2-3.

⁴⁷ *Id.* at 3. (emphasis added).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 2.

⁵¹ *Id.* at 2-3.

lead agency, in that an applicant or operator can rest assured that if DOT standards are not met, then neither are FERC's.

The MOU sets up a communication system whereby both parties keep each other and the applicant or operator informed of their actions and requirements. FERC agrees to invite DOT to its inspections and conferences with operators, and DOT agrees to give FERC notice of any inspections it plans on conducting on a facility under FERC's jurisdiction, and to provide FERC with DOT's findings.⁵² DOT also agreed to apply its enforcement authority to any actions that FERC recommends and to which DOT agrees if the facility fails to comply with them.⁵³ This is a particularly interesting agreement, as it adds immediate support to FERC's demands in one of the special circumstances in which FERC could impose stricter requirements.⁵⁴

The Boilerplate section follows the two "agreements" sections. Section 3 of the Boilerplate specifies that both parties will designate representatives and will arrange to work jointly to properly execute the MOU. Section 4 specifies that the MOU takes effect on the date of the last signing and will apply to applications filed and all facilities operating on and after that date. Section 5 declares that the MOU makes no restrictions to the agencies' statutory authorities. Section 6 allows for the modification, suspension, or termination of the MOU by either party following thirty days of written notice to the other party.⁵⁵ The Termination Clause has a qualifier, permitting a party to modify, suspend, or terminate only if the statutory authority identified in the preamble is altered or abolished.⁵⁶

Overall, this MOU seems well written in that it clearly identifies what is to be done and when; and it avoids ambiguous terms or broad language. When there are exceptions to action, or broad language, it does not seem to adversely affect the purpose of the MOU, which is to establish a system whereby FERC and the DOT work together to accomplish their respective, statutorily mandated tasks. As this paper will explain below, this MOU resulted in a cooperative relationship between the parties, and it spawned further MOUs that refined that relationship.

B. 1993 MOU between FERC and DOT

In 1993, FERC and DOT signed a second MOU, the Preamble of which appears much like that of the 1985 MOU.⁵⁷ However, the Background information omits the

⁵² *Id.* at 2,4.

⁵³ *Id.* at 4.

⁵⁴ This providing of support by one party to another may be another method of building a strong cooperative relationship through trust, support, and even dependence. MOU terms providing for parties to support one another's actions under appropriate conditions may yield stronger relationships between the parties.

⁵⁵ *Id.* at 4.

⁵⁶ *Id.* This condition requisite for a termination are modification will probably create more certainty of action between the parties because parties are not completely free to opt out of the MOU.

⁵⁷ Memorandum of Understanding Between the Dep't of Transp. And the Fed.Energy Regulatory Comm'n Regarding Natural Gas Transportation Facilities. (Jan. 15, 1993).

DOT's use of the USCG. The Acknowledgments section states FERC's "authority over the siting of interstate natural gas transmission facilities" and its ability to mitigate expected environmental damage by imposing conditions prior to construction of a facility, while again affirming DOT's "exclusive authority to promulgate Federal safety standards" for natural gas transportation facilities.⁵⁸

In reading the Agreements section, it appears that DOT and FERC took a step back from the rather specific language of the 1985 MOU. For example, Term 1(c) requiring DOT to "[e]stablish a means to notify the [FERC] of significant enforcement actions involving pipeline facilities..." fails to set a time by which this must be done.⁵⁹ With the exception of the qualifying term, "promptly," there appears to be no deadlines for compliance with any of the terms in this MOU. However, there is a term that may help clarify this lack of deadlines. It follows the Agreements section and resembles the Boilerplate term this paper generally refers to as the Points of Contact Term, only this term, in addition to requiring both parties to designate staff representatives, also requires the parties to establish "joint working arrangements from time to time to administer this MOU."⁶⁰ While the term itself still seems vague, because it does not specify how the parties will establish arrangements or designate staff, it fits in with the overall character of this MOU, which is a refining of inter-party communication over an indefinite period.⁶¹

While specificity of language in MOUs seems to help build a cooperative relationship, MOUs may accomplish this goal without such specificity. This MOU, even though it lacks timetables and many details, still establishes the main points of agreement. Both parties recognize overlapping jurisdiction and, despite the 1985 MOU, communication problems remain.⁶² The Agreements section lists some of the parties' grievances over communication.⁶³ The two parties had already been operating under an MOU for eight years without specificity, and flexibility may have become more appealing because a level of trust between the two had probably already been established, thus eliminating a desire for more specific terms.⁶⁴

Another term to note in the Boilerplate is the Addendum Term--, a term specifying that this MOU does not supercede the 1985 MOU.⁶⁵ Instead, this new MOU seems to be more of a refinement of or addendum to the old MOU, which is still in effect.

⁵⁸ *Id.* at 1-2.

⁵⁹ *Id.* at 2.

⁶⁰ *Id.* at 3.

⁶¹ This MOU, like the 2009 MOU between FERC and DOI functions primarily as an official announcement; in the case of the 2009 MOU it was the announcement of jurisdictional line, in this case it is a goal announcement that the parties want to communicate better.

⁶² *Id.* at 2.

⁶³ *Id.* at 2-3. The specifics of the terms are not listed here for brevity. To sum up, communication problems remained and both sides agreed to establish means of notifying the other in some situations, to promptly notify the other party in other situations, and to refer to the other or review the others considerations regarding safety conditions.

⁶⁴ *Id.* at 3. Note that the MOU got the date of the prior MOU incorrect though they cited to the Federal Register correctly.

⁶⁵ *Id.*

The purpose of Amendment provisions, typically found in the Termination Clause, is to eliminate unworkable or poorly conceived terms of agreement over time. It appears that MOUs between parties may evolve with the parties' relationship.

C. Interagency Agreement among FERC, U.S. Coast Guard, and Research and Special Programs Administration

On February 11, 2004, FERC signed an interagency agreement with the USCG and the Research and Special Programs Administration (RSPA), another department within the Department of Transportation, regarding safety and security reviews of LNG facilities.⁶⁶ This agreement is written with various degrees of strong and broad language depending on the terms, but where it is broad it is ultimately flexible as well.⁶⁷ It provides for on the spot creation of schedules by FERC in conjunction with the other parties during and LNG application review.⁶⁸ It also establishes FERC as the lead agency in the NEPA review and decision, and identifies the USCG and RSPA as cooperating agencies that will assist with identifying data needs and gathering information.⁶⁹ It also includes terms requiring the parties to designate representatives to participate in inspections and conferences as well as a specification that all communications should be informal so that they occur as soon as possible.⁷⁰ The Boilerplate contains the usual Addendum Clause, Termination Clause, and No Action Term.⁷¹ Interestingly though, in one of the No Action Terms, it says, "This IA is not intended to direct or bind any person outside the Participating Agencies," thus insinuating that even though the IA presents no legal cause of action, it does direct and bind persons within FERC, USCG, and RSPA.⁷²

This document is an example of a second refinement to an already existing MOU. It shows that the relationship originally established by the 1985 MOU continues to exist and grow. Not only does it reference the 1985 MOU in its Addendum Clause as the 1993 MOU did, but FERC's press release refers to the existing relationship by saying, "[This] agreement reinforces the agencies' longstanding working relations in coordinating the seamless review of safety and security issues..."⁷³ This press release seems to evidence a cooperative relationship between the parties that has been evolving for some time.

⁶⁶ Interagency Agreement Among the Federal Energy Regulatory Commission, United States Coast Guard, and Research and Special Programs Administration For the Safety and Security Review of Waterfront Import/Export Liquefied Natural Gas Facilities. February 11, 2004. The term Interagency Agreement is synonymous with an MOU in this context. There may be state or federal agencies that consider an Interagency Agreement to be a different type of document in their own working environment, but it is generally, and in FERC's case, just another wording for Memorandum of Understanding.

⁶⁷ *Id.* at 3.

⁶⁸ *Id.*

⁶⁹ *Id.* at 2-3.

⁷⁰ *Id.* at 4.

⁷¹ *Id.* at 4-5.

⁷² *Id.* at 4.

⁷³ *Id.* at 4; "Commission, Coast Guard, DOT Sign Interagency Agreement to Coordinate Review of LNG Terminal Safety, Security" FERC News Release: February 11, 2004 available at <http://www.ferc.gov/news/news-releases/2004/2004-1/02-11-04-interagency.asp>.

D. Results of the LNG MOUs

In 2005, FERC's Director of Energy Projects, Mark Robinson, testified as a staff witness before the United States Senate on the siting and safety status of LNG terminals.⁷⁴ The testimony explained that FERC has developed a regulatory process that involves the coordination of many other interested government agencies as well as the stakeholders.⁷⁵ The USCG has primary responsibility for the security of LNG facilities, but the FERC shares that responsibility.⁷⁶ According to Director Robinson, FERC's practice is to coordinate its regulatory authority with those of other regulating agencies.⁷⁷ He also notes that preparation of the Draft Environmental Impact Statement is a cooperative effort between FERC and several other parties, typically including the USCG, USACE, and USFWS as well as state agencies and other federal agencies.⁷⁸ The testimony cites the dual needs of adequate assessment and expedited access as the reason for cooperation.⁷⁹ For post-construction inspections, FERC created the LNG Engineering Branch tasked not only with inspections, but also with coordination with other agencies such as DOT and USCG.⁸⁰ To date, this branch is still coordinating inspections, and while the agencies inspect for different things, they try whenever possible to go to a particular site at once so as not to overwhelm a facility's operations.⁸¹

Overall, this testimony shows that the original goals of the 1985 and 1993 MOUs have been met and have become standard operating policy for FERC and DOT. This level of cooperation is evidenced by the joint security assessments performed by FERC and USCG, as well as their agreement that future LNG applicants must submit a letter of intent and commence a security assessment at the when the pre-filing process begins.⁸² It also appears that in the twenty years of the operational relationship the inevitable disputes arising under the MOUs have all been resolved between the affected agency staff members without rising to higher levels.⁸³ These findings bode well for the ability of an MOU to build cooperation over time.

VI. The Bureau of Land Management in Oregon

On February 4, 2009 the Oregon Energy Facility Siting Council (OEFSC) signed an MOU with the Bureau of Land Management (BLM) regarding the environmental review and siting of wind energy projects on federal land located in Oregon.⁸⁴ The

⁷⁴ Testimony of J. Mark Robinson Director, Office of Energy Projects Federal Energy Regulatory Commission Before the Subcommittee on Energy Of the Committee on Energy and Natural Resources United States Senate. (Feb. 15, 2005).

⁷⁵ *Id.* at 3-4.

⁷⁶ *Id.* at 1.

⁷⁷ *Id.* at 9.

⁷⁸ *Id.* at 8.

⁷⁹ *Id.* at 9.

⁸⁰ *Id.* at 13-14.

⁸¹ Phone Interview with Richard Folley of FERC on 13 August 2009.

⁸² Testimony of J. Mark Robinson at 18-19.

⁸³ Phone Interview with Richard Folley of FERC on 13 August 2009.

⁸⁴ Memorandum of Understanding Between the U.S. Department of the Interior, Bureau of Land Management Oregon State Office, The Oregon Energy Facility Siting Council Concerning Joint

impetus of the MOU was the rapidly growing wind industry in Oregon since the turn of the century. Furthermore, although the BLM manages a great deal of land in Oregon, no wind farms existed on BLM lands because of the complicated siting process.⁸⁵ This agreement is an example of how MOUs can be used to establish a joint application process.

The Preamble of this MOU states that its purpose is to create a joint environmental review and to “facilitate a harmonious relationship...in the review of all [wind power] permit applications.”⁸⁶ The Background and Acknowledgments show that for wind power facilities on federal land in Oregon, both the OEFSC and BLM must undergo separate siting processes.⁸⁷ The BLM prepares environmental documents pursuant to NEPA, and the OEFSC prepares an independent assessment “that is consistent with and does not duplicate Federal Agency review” while considering the assessments of the Oregon Department of Energy (ODOE), the BLM, and other interested parties.⁸⁸ It appears that the OEFSC does what the BLM must do, only through different statutory authorities and requiring different levels of compliance. The Acknowledgments include not only the specific statutory authorities of both parties, but also statements clarifying that the OEFSC, ODOE, and BLM will cooperate in the preparation of the NEPA documents in a public process, thereby sharing expertise, eliminating duplicate effort, promoting interagency coordination, providing clarity to the applicant, and creating a more efficient review process.⁸⁹ The BLM is the lead agency for the NEPA compliance, but OEFSC and ODOE will participate through a complete sharing of information for all the necessary documents thus eliminating duplication of effort.⁹⁰

There are three aspects of this MOU that establish the joint application process for the agencies: first, emphasis on communication, cooperation, and sharing of information in every aspect of an individual application; second, the flowchart found in the Attachments section clearly maps out the joint OEFSC/BLM process envisioned by the parties, coupled with a term allowing for the flowchart to be amended independently of the MOU;⁹¹ finally, and most importantly, the inclusion of terms regarding the necessity of a separate MOU between the agencies and the applicant.⁹²

Environmental Review for Wind Energy Generation Projects. Feb. 4, 2009. The BLM actually signed the MOU on January 16th, the OEFSC received it on Jan. 27 and signed it, thus putting it into effect on Feb. 4.

⁸⁵ In January of 2009, all the wind farms in Oregon existed on private land. The BLM did have applications pending for rights of way and for the siting of facilities.

⁸⁶ Memorandum of Understanding Between the U.S. Department of the Interior, Bureau of Land Management Oregon State Office, The Oregon Energy Facility Siting Council Concerning Joint Environmental Review For Wind Energy Generation Projects at 1 (Feb. 4, 2009).

⁸⁷ *Id.*

⁸⁸ *Id.* at 2.

⁸⁹ *Id.*

⁹⁰ *Id.* Other documents required in the process are the Project Plan of Development, Wind Energy PEIS that BLM has established, BLM Wind Energy National Policy, Field Office Resource Management Plan, EFSC Notice of Intent, and Application for Site Certification.

⁹¹ *Id.* at 3.

⁹² *Id.*

The Agreements section begins by noting that the parties will “cooperate in their respective reviews of each project” as well as discussing and sharing information regularly.⁹³ The parties agree that a primary point of contact will be designated for each project, and this person will then manage the communications and exchange of information; the parties also put emphasis on sharing the flowchart with applicants early in the process.⁹⁴ Also early in the process, pre-application meetings will be held in which the BLM will invite all necessary federal agencies, and the ODOE will invite all necessary state agencies.⁹⁵ These meetings are held to establish criteria for the necessary document preparation and to inform the applicant of the parties’ “data and information needs.”⁹⁶ Following the pre-application meeting, the parties to this MOU and the applicant will enter the project specific MOU to ensure a coordinated review process.⁹⁷

Overall, this seems to be a well-conceived MOU that provides a curious combination of detail and flexibility. It is detailed the description of the combined process, but also remains flexible by not defining some terms and allowing parties freedom of action in many circumstances. As an example of flexibility, there is a clause allowing the parties to proceed on their own if they cannot agree that the application is complete.⁹⁸ The explanation of the joint application process and schedule may be found in the flowchart attachment, which clearly illustrates the process for the parties and the applicants.

Unfortunately, success under this MOU is difficult to determine. While the OEFSC continues to get requests for leases and rights-of-way (ROWs), none involve federal lands since the MOU went into effect.⁹⁹ Some of the projects pending at the time of the MOU signing have moved forward under BLM review, including ROWs for transmission lines and wind testing facilities.¹⁰⁰ However, the MOU did not apply retroactively, so all of these projects obtained permits through the former process of dual applications.¹⁰¹ The most likely reason for the lack of applications on federal land despite the MOU is actually unrelated to the regulatory process and pertains to other applicant siting considerations, such as ideal wind conditions and proximity to substations for transmission possibilities.¹⁰² Until applicants begin taking advantage of this new framework the two agencies will be unable to measure success under this MOU.

⁹³ *Id.* at 2.

⁹⁴ *Id.* at 3.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 4.

⁹⁹ Phone interview with Adam Bless of the OEFSC on August 3 2009.

¹⁰⁰ *Id.*

¹⁰¹ Memorandum of Understanding Between the U.S. Department of the Interior, Bureau of Land Management Oregon State Office, The Oregon Energy Facility Siting Council Concerning Joint Environmental Review For Wind Energy Generation Projects at 1 (Feb. 4, 2009). The very first paragraph specifies that the MOU applies only to future wind energy projects on federal land in Oregon.

¹⁰² Phone interview with Adam Bless of the OEFSC on 3 August 2009 at 1310. Mr. Adam Bless considers the wind potential to be an applicant’s first concern, the transmission possibilities the second concern, and the issue of who owns the land to be third. He also notes that there are no large substations on federal land at present, further hindering its attractiveness to wind project applicants.

VII. The California Example

Governor Schwarzenegger of California issued Executive Order S-14-2008 (EO) in November of 2008, declaring an increase in California's use of renewable energy by requiring all retail sellers of electricity to obtain at least 33% from renewable sources by the year 2020 and onward.¹⁰³ To eliminate some of the resistance towards achievement of this ambitious undertaking, the executive order also required the Renewable Energy Transmission Initiative (RETI) to begin identifying zones that could be developed into renewable energy projects with little or no environmental impact, and it required the California Energy Commission (CEC) and the California Department of Fish and Game (CDFG) to collaborate in streamlining the review, permitting, and licensing process for all proposed renewable energy projects in order to cut application times in half within areas that a Renewable Energy Action Team (comprised of both agencies) identifies as ideal for renewable energy projects.¹⁰⁴ The executive order specifically references two MOUs signed the same day by the CEC, CDFG, BLM, and the United States Fish and Wildlife Service (USFWS) in three of its specific orders.¹⁰⁵ In doing so, Governor Schwarzenegger has effectively made compliance with the MOUs' terms more probable, because the inference now is that he as Governor of California may enforce them both.¹⁰⁶

A. CEC/CDFG MOU

The MOU between the CEC and CDFG on November 17, 2008 formally establishes the Renewable Energy Action Team (REAT) and defines its purpose as “[providing] for a streamlined permitting process for renewable energy projects [by reducing processing time and providing guidance to applicants].”¹⁰⁷ It contains a Preamble that cites the EO in a one-paragraph background followed by a one-paragraph purpose.¹⁰⁸ It then follows with the Agreement section, which sets dates and uses strong,

¹⁰³ Executive Order S-14-08 by the Governor of the State of California. Arnold Schwarzenegger. (Nov. 17, 2008). At 3 of 5.

¹⁰⁴ *Id.* at 3-4 of 5.

¹⁰⁵ *Id.* at 3 of 5. Orders 4-6. Order 4 references the CEC/CDFG MOU and begins by saying “Pursuant to the MOU...” and then goes on to declare specific goals for the Renewable Energy Action Team (REAT), which that MOU formally creates. These same goals, listed in orders 5-12 of the executive order, are found in the CEC/CDFG MOU under terms 1, 2, 5, 6, 7, 8, 9, 10, and 11. For many of the terms the executive order mirrors the words of the MOU perfectly, and in the other terms the executive order strays in its words from those of the MOU only slightly, usually creating slightly more detail. For example, term 10 of the MOU sets the completion date for the draft DRECP and initiation of the environmental review process as Dec. 2010, while order 11 of the executive order sets the exact same goal at a completion date of Dec. 31, 2010.

¹⁰⁶ Email of July 8, 2009 from Ashley Conrad-Saydah to Alastair Deans; “Renewable Energy in California: Implementing the Governors Renewable Energy Executive Order.” Powerpoint Presentation by Kevin Hunting of California Biodiversity Council on March 19, 2009 at EL Centro, CA. Both the email and this presentation at a stakeholder meeting reference both the MOUs and the Executive Order as directives.

¹⁰⁷ Memorandum of Understanding Between the California Energy Commission and the California Department of Fish and Game Regarding the Establishment of the Renewable Energy Action Team. Nov. 17, 2008. at 1.

¹⁰⁸ *Id.*

specific, almost binding language.¹⁰⁹ The Boilerplate consists of only an Amendment Term.¹¹⁰ Absent is declaration that this MOU does not create a cause of action, a termination clause, or any other typical terms found in the Boilerplate. This MOU appears more binding than any other researched thus far. It is possible, albeit unlikely, that if taken to a court of law it might be interpreted as a contract. Practically speaking, though, the most likely relief would be specific performance or possibly damages for delays and both of these could easily be obtained through a formal complaint to the executive branch, which could order compliance or reallocate funding to compensate one agency's reliance faster than any court.

Progress under this MOU is promising. It has the support of the Governor, but it is also clearly written, and contains deadlines for completion of the terms. It appears that to date the parties are completing the terms pursuant to the schedule.¹¹¹

VIII. Conclusion

Memorandums of Understanding appear to be vehicles toward interagency cooperation, and particularly useful in the areas of overlapping authority for offshore renewable energy regulation. They function to formalize agreements and understandings between parties without creating a legal cause of action should one party fail to follow through with the agreement. Two or more parties sharing a mutual interest typically enter MOUs voluntarily.¹¹² While the terms are not legally binding, often the members of the parties who actually carry out the terms of the MOUs view them as directives from their managers.¹¹³ With the authority of an executive order from a higher authority backing a MOU, the acknowledgments and agreements seem to be viewed as having even more weight for those parties or people tasked with their fulfillment.¹¹⁴ In either the case of an MOU voluntarily entered into or one ordered by executive or legislative authority

¹⁰⁹ *Id.* The only term that seems to be unspecific is term 2, saying, "The REAT shall work closely with the [BLM] and [USFWS]..." without defining how close is closely. However, this term did not need to be specific as there was a separate MOU signed the same day between all four parties. The EO references it, and this MOU references the MOU. All the other terms use the beginning phrase, "The REAT shall..." or some equivalent except for term 1 which merely declares the creation of the REAT.

¹¹⁰ *Id.* at 2. It allows amendments at any time so long as both parties sign a written document.

¹¹¹ July 8 2009 Email from Ms. Ashley Conrad-Saydah of the BLM to Mr. Alastair Deans. Though the BLM was not a party to the MOU, the MOU requires the parties' REAT to work closely with it. Ms. Conrad-Saydah is assigned to the REAT and says that they base their actions around the directives of the MOU and the Executive Order. Though it has taken a great amount of work they appear to have gotten through the public scoping meetings as required on time. In a subsequent email dated July 31, 2009, Ms. Conrad-Saydah said that the parties had begun working together prior to the Executive Order, evidencing a prior acknowledgment of the mutual interest in cooperation. The level of writing specificity in this MOU and the level of compliance may be the twin children of a genuine mutual desire to cooperate and an executive order directing cooperation.

¹¹² Phone Interview with Richard Folley of FERC on 13 August 2009.

¹¹³ July 31 2009 Email from Ms. Ashley Conrad-Saydah of the BLM to Mr. Alastair Deans.

¹¹⁴ *Id.*

there is a motivation to comply with the terms of agreement, despite the lack legal binding power.¹¹⁵

Communication, mutual interests, and investments of time and labor in cooperative efforts serve to bind individuals and groups together.¹¹⁶ This bind can be just as strong as or stronger than a legal bind, which a party may violate without remorse absent any other binding so long as the rewards outweigh the legal penalties.¹¹⁷ MOUs seem to develop cooperation and coordination by recognizing mutual interests, promoting communication, and establishing clear cooperative actions. These three aspects of an MOU can lay the foundation for a cooperative relationship among parties. As the parties successfully and repetitively complete the cooperative acts specified in the MOU, a trust seems to develop, which further strengthens the relationship, over time turning it into a key component of the parties' respective procedures. This is the case with the FERC/DOT MOUs regarding LNG facilities.

Evidence of MOU success may be difficult to find, especially when the MOU is new. Outlying factors surrounding the regulatory process cloud any calculation of MOU streamlining success based on time or cost reduction in applications.¹¹⁸ However, research indicates that parties to MOUs view the terms of an MOU as controlling, even if they recognize that they are not legally binding.¹¹⁹ For this reason, MOUs may be more viable in some situations than contracts. With wording properly tailored to the parties' needs, an MOU can achieve the desired results. They may be used to establish joint applications and schedules, as evidenced by the BLM's MOU with Oregon. Parties recognize their mutual interests, establish methods for frequent communications, and provide clear terms so that success is easily observable. Given time and a mutual desire among governmental agencies to reap the rewards of cooperation and coordination in the exercise of offshore renewable energy regulatory authority, MOUs have the potential to establish schedules and joint applications that parties voluntarily comply with absent legal enforcement; thus, having the potential to build strong cooperative relationships.

¹¹⁵ The Energy Policy Act of 2005 called for FERC to enter a few MOUs, including one with the Secretary of Defense as stated under Section 311. This MOU was entered on November 21, 2007 and like the MOUs from California it references the Act in its Background.

¹¹⁶ Taylor, Shelley; Peplau, Letitia; Sears, David. Social Psychology 10th Edition. Prentice Hall. Upper Saddle River, NJ 2000. See Chapter 10: Behavior in Groups.

¹¹⁷ This observation depends on one's belief in the Efficient Breach Doctrine, whereby if the rewards of a breach outweigh the legal costs then a party will breach.

¹¹⁸ This is the case when success is measurable by a drop in application times or costs. Such outlying factors include a random desire on the part of applicants to pick an area within the MOU's jurisdiction, as was the case in measuring the BLM/OEFSC MOU. Another example would be the increased expertise and technology decreasing the costs while increasing the efficiency of LNG facility safety inspection, thus making any analysis of success under the FERC MOUs regarding safety inspections difficult.

¹¹⁹ July 31 2009 email from Ms. Ashley Conrad-Saydah to Mr. Alastair Deans. Telephone interview with Mr. John White of the OEFSC on Aug. 4 2009. See Also Susan Chambers, "Surprising Oregon Wave Energy FERC Permit Issued" The World, Feb. 3, 2009. Available at <http://mendocostcurrent.wordpress.com/2009/02/04/surprising-oregon-wave-energy-ferc-permit-issued/>. (Demonstrating via public outrage at the presumption that the MOU had been violated that the public believed the terms of the MOU were legally binding and would result in litigation; this perception though not accurate is important to note because if people believe the terms are binding, they will treat them as such).

Appendix A: Definition of Terms

Acknowledgments: A section of the MOU found in the Preamble, but characteristically a merger of the Preamble and Agreements. The parties typically cite and recognize one another's statutory authority, and typically acknowledge their mutual interests making it a subtle but powerful opening to any meeting of the minds.

Addendum Term: A boilerplate term specifying that the MOU is in addendum to and does not terminate or supercede an already existing MOU.

Agreements: The center section and the meat of the MOU, containing the terms to which the parties specifically agree to abide.

Amendment Term: A boilerplate term allowing amendment of the MOU through some specified process, but no termination or suspension of the MOU.

Attachments: Any documentation following the signatures necessary to clarify the understanding. Typical examples are a list of points of contact and a flowchart of procedures.

Background: Part of the Preamble that describes a situation or existing problem giving rise to the purpose for this MOU.

BLM: Bureau of Land Management (under the U.S. Department of the Interior)

Boilerplate: The section of a Memorandum of Understanding officially referred to as General Terms, Miscellaneous Terms, or some variant thereof and containing standard terms found in most MOU Boilerplates. Examples of these terms include the Fiscal Term, the Termination Clause, and Limitation of Statute Term.

CEC: California Energy Commission

CZMA: Coastal Zone Management Act

DFG: California Department of Fish and Game

Dispute Resolution Term: Defines the methods for resolving disputes, typically keeping resolution at the lowest level possible and pushing steadily upward to department heads when lower echelons fail to resolve a dispute. The research for this paper uncovered no such term that resorted to arbitration or the court system for dispute resolution.

DOT: Department of Transportation

EIS: Environmental Impact Statement

Effective Upon Term: Defines the date at which the MOU becomes effective, typically as the date of the last signing.

FERC: Federal Energy Regulatory Commission

FIA Term: Specifies that any exchange of information to certain (typically federal) parties is subject to the Freedom of Information Act.

Fiscal Term: The fiscal term generally specifies that the MOU is not a funds transfer document nor does it provide the authority for such a transfer, and that any attempt to transfer funds of any kind ancillary to the MOU's terms must be accompanied by a separate written agreement and must also comply with all applicable laws.

FPA: Federal Power Act

Limitation of Statute Term: This term reflects one of the primary concerns government agencies will have in entering agreements, they are unable to supercede their statutory authority. This term states that compliance with all other terms of the MOU is only required to the extent an agency is authorized to act by law.

LNG: Liquid Natural Gas

MOU: Memorandum of Understanding

MMS: Minerals Management Service

NEPA: National Environmental Policy Act

No Action Term: This term is one of the identifying terms in an MOU as opposed to a contract. It specifies that the MOU does not create any possible action at law, via any enforceable rights, benefits, trusts, etc. either substantive or procedural at law or equity.

OCS: Outer Continental Shelf

OEFS: Oregon Energy Facility Siting Council

Preamble: The first of three main sections of the MOU, containing Background or Introduction, Acknowledgments, and Purpose. It is the lead in to the Agreements.

Purpose: A Preamble section in which the parties declare their mutual interest to be satisfied by the terms of the MOU

REAT: Renewable Energy Action Team

REPT: Renewable Energy Permit Team

RETI: Renewable Energy Transmission Initiative

RSPA: Research and Special Programs Administration

Termination Clause: Defines a date, method, or other condition for termination of the agreement. Typical clauses state that the agreement is terminated after completion of all terms to the satisfaction of all parties, or that it may be terminated by the mutual written agreement of all parties, or even that one party may opt out of the MOU by a written thirty days notice to all other parties (occasionally requiring consent of the other parties).

USACE: United States Army Corps of Engineers

USCG: United States Coast Guard

USFWS: United States Fish and Wildlife Service

Appendix B:Sample/Hypothetical MOU
(This is not an existing MOU, and uses the agencies as an example only)
MEMORANDUM OF UNDERSTANDING
BETWEEN
THE U.S. DEPARTMENT OF THE INTERIOR
AND
THE FEDERAL ENERGY REGULATORY COMMISSION

Background

President _____ issued Executive Order _____ on _____, calling for more coordination between agencies involved in the siting and regulation of Offshore Renewable Energy Facilities in an effort to streamline the process and thus encourage investor confidence.

Acknowledgments

The Department of the Interior (DOI) by and through its Minerals Management Service (MMS) and the Federal Energy Regulatory Commission (FERC)(jointly as the Parties), as parties to this Memorandum of Understanding (MOU), hereby acknowledge and declare the following:

- A. MMS has exclusive jurisdiction to issue leases, easements, and rights-of-way regarding Outer Continental Shelf (OCS) lands for hydrokinetic projects pursuant to Section 8(p) of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1337(p) (2006).
- B. FERC has exclusive jurisdiction to issue licenses and exemptions for hydrokinetic projects located on the OCS pursuant to Part I of the Federal Power Act (FPA) 16 U.S.C. §§792-823a (2006) and Sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§2705, 2708 (2006).
- C. FERC will not issue preliminary permits on the OCS.
- D. FERC will not issue a license or exemption to an applicant for an OCS non-federal hydrokinetic project until the applicant has first obtained a lease, easement, or right of way from MMS for the site thereof.
- E. The Parties are required by law to conduct necessary analyses and prepare necessary environmental documents under the National Environmental Policy Act (NEPA) in the exercise of their respective jurisdictions.
- F. The Parties may both attach terms and conditions to their leases, easements, rights of way, licenses, or exemptions. The Parties may inspect authorized projects to ensure compliance with the attached terms and conditions.
- G. It is in the interest of both Parties to prepare joint environmental documents for the purposes of their NEPA analysis for individual non-federal hydrokinetic applicants. It is also in the interest of both parties to coordinate terms and conditions and subsequent inspections.
- H. The parties recognize and agree that _____ shall be the lead agency in preparation of joint environmental documents, but that this does not diminish _____'s statutory authority to regulate non-federal OCS hydrokinetic projects.

Purpose

The Purpose of this MOU is to create a means by which the Parties shall establish a joint environmental review whereby jointly prepared NEPA documents will satisfy their individual informational requirements. Ideally, a one-stop application process shall result. This shall eliminate duplication of effort thus saving time and energy to both Parties. It will also facilitate a sharing of information and staff expertise thus providing better and speedier analysis, which is in the interest of the Parties, all other federal, state, and non-governmental agencies, and all stakeholders including the applicant.

The Purpose of this MOU is also to establish cooperation and support in the attachment of terms and conditions to authorized projects as well as any subsequent inspections to ensure compliance. Cooperation will eliminate time and energy spent on duplicative efforts as well as contradictory terms and conditions.

Agreements

The Parties hereby agree to the following terms:

1. Each party shall designate a member of their staffs as a point of contact prior to the signing of this MOU. An attachment to this MOU shall list each point of contact's name, business mailing address, business phone number, and email address. The points of contact shall communicate when necessary to ensure their parties' compliance with the terms of this MOU. Points of Contact may be subsequently changed by two weeks written notice to the other party.
2. All communication between points of contact shall be electronically unless paper documentation is requested.
3. The points of contact shall compile bi-annual memorandum reports, to be filed with the head of their agency on or within five days prior to the 15th of January, and on or within five days prior to the 15th of July. These reports shall outline the level of compliance with and coordination achieved between the parties. The head of each agency shall keep these reports on file for no less than three years of the date of filing, and shall provide copies to the head of the other agency or to the Cabinet at their request.
4. The Parties hereby create a Hydrokinetic Application Team (HAT) to consist of three staff representatives from each party. These staff members must be acquainted with their parties' regulatory procedures and schedules. These staff members are to be announced by emails exchanged between points of contact within five business days of the signing of this MOU. The emails shall include staff members' names, business addresses, business phone numbers, and email addresses.
5. HAT shall meet for at least eight hours per week, beginning within thirty days of the signing of this MOU. Staff members may be excused from meetings by their agency's point of contact when necessary, but an alternate staff member must attend meetings in an absentee's place.
6. HAT shall compile a Joint Hydrokinetic Application Plan (JHAP) to thoroughly integrate the Parties' schedules and procedures for the creation of, notice of, and review of environmental documents required by NEPA. JHAP shall create an environmental review process for non-federal hydrokinetic projects on the OCS that utilizes the same documents for both FERC's and MMS's needs.

7. JHAP is to be filed with the Points of Contact, Department Heads, and with the Cabinet within seven months of the signing of this MOU. Within five business days of JHAP filing, the Points of Contact will schedule a meeting for the department heads within thirty days of the date of JHAP filing; the purpose of this meeting will be to discuss the plan, and either sign an MOU implementing it or return it to HAT for amendment with a schedule for amendment not to exceed sixty days. When HAT has completed the requested amendments to JHAP, the amended JHAP shall be filed, within five business days the Points of Contact shall set a meeting to occur within thirty days of the amended filing, and at that meeting the Department Heads shall either sign an MOU implementing the amended JHAP or request further amendments or terminate this MOU.
8. HAT's first meeting shall establish a schedule necessary to complete and file the JHAP within seven months. Upon filing of the JHAP, HAT is no longer required to meet, unless called on to amend the JHAP, as specified in Term 7, at which time HAT will again be required to meet for a minimum of eight hours per week until the amended JHAP is filed.
9. The Point of Contact for MMS shall provide FERC's Point of Contact with a list of its proposed terms and conditions, if any, ten days prior to issuing a lease, easement, or right of way for a non-federal OCS hydrokinetic project. FERC's Point of Contact will assign a staff member involved with the relevant project to review MMS's terms and conditions to assure that none are or may be in conflict with FERC's own proposed terms and conditions to be attached to the FERC license or exemption for the relevant project. This review is to be complete within five days of receipt of MMS's terms and conditions.
10. If any of the parties proposed terms and conditions conflict or potentially may conflict, the Points of Contact shall communicate to establish a meeting between the parties' respective staff members for the project. The meeting shall occur no more than fifteen days after MMS provided FERC with its proposed Terms and Conditions. The respective staffs shall confer at this meeting to amend their respective terms and conditions so as to eliminate all existing or potential conflicts, or in the event that a potential conflict cannot be eliminated, to create a method of mitigation in the event that the potential conflict materializes. These amendments are to be complete by the end of the meeting. If the meeting fails to completely address the conflict, the conflict shall be resolved as specified in the this MOU's Miscellaneous Term 8.
11. The parties agree to notify each other by way of their Points of Contact within three days following the scheduling of a non-federal OCS Hydrokinetic project inspection, or two days prior to any non-scheduled inspection. Once a party notifies the other of an inspection, the other has the option of joining the inspection or waiving the right to join the inspection. This term will be considered complete, void, and superceded by Term 13 three months after the signing of this MOU.
12. The parties agree to notify the other as soon as possible in the event of an emergency inspection. In the case of an emergency inspection the other party must waive the right to join the inspection and the inspecting party must provide the other party a copy of the inspection report within a day of its filing,

accompanied with a memorandum explaining the need for the emergency inspection.

13. The Points of Contact and department heads shall hold all inspection scheduling meetings for non-federal OCS Hydrokinetic projects jointly at a time and place of the parties' mutual convenience three months after the signing of this MOU and thereafter. These scheduling meetings coordinate to the greatest extent allowed by law all inspections by FERC and MMS. In the event of an inspection involving only one party, the reason for the solo inspection shall be provided to the Points of Contact for both parties within a day of the inspection report filing. The Points of Contact will explain the solo inspection in their bi-annual report.

Miscellaneous Terms

1. Each of the Parties shall use its own appropriation to carry out its responsibilities under this MOU.
2. This MOU is not a fiscal or funds obligation instrument. Nothing in this MOU requires the Parties to obligate or expend funds in excess of available appropriations. Any transfer of funds related to the terms of this MOU must be accompanied by an appropriate funds transfer document as required by applicable law.
3. This MOU is strictly for internal management purposes. It does not confer any right or benefit, substantive or procedural, enforceable at law or equity, by any party against the United States, its agencies, its officers, or any person.
4. Nothing in this MOU will be construed to affect the responsibilities of the Parties beyond their respective statutory authorities.
5. This MOU supplements but does not amend, modify, or terminate the April 2009 MOU between the Parties. This MOU is intended to increase the level of cooperation between the parties by expanding some of the responsibilities established in the April 2009 MOU.
6. For clarity, the schedule for completion of this MOU's terms is attached.
7. Upon the signing of a second MOU implementing the JHAP, HAT shall be dissolved and Agreement Terms 4-8 of this MOU shall be considered complete and therefore no longer a part of this MOU.
8. Disputes shall be resolved by the lowest level possible. A dispute should first be resolved by the parties' respective staff members in dispute. If this proves impossible, the dispute should be resolved by the Points of Contact. If this proves impossible the dispute should be resolved by the Department Heads. If this proves impossible the MOU shall be amended. If this does not resolve the dispute the MOU shall be terminated.
9. In the event that a party lacks sufficient funding to comply with the terms of this MOU, this MOU may be suspended, amended, or terminated with thirty days written notice to the other party. In the event that an Amended JHAP is not signed by the Department Heads, the Department Heads may mutually strike Agreement Terms 4-8 from this MOU or individually strike Agreement Terms 4-8 with thirty days written notice to the other party. During the Thirty days notice the parties shall make a good faith effort to resolve the problem, including asking members of the Cabinet to act as mediators, and if successful the notice to strike

shall be canceled. In the Event that a dispute rises to the level of the Department Heads and cannot be resolved, the Department Heads may mutually agree to strike, amend, or modify the terms of the MOU causing the dispute or agree to mutually terminate the MOU; an individual party may strike, amend, or modify the terms of the MOU causing the dispute or terminate the MOU upon thirty days written notice to the other party. During the thirty days the parties shall make a good faith effort to resolve the dispute, including asking members of the Cabinet to act as mediators, and if successful the notice to shall be canceled.

10. This MOU becomes affective upon the last signatory date.

Chairman of the Federal Energy Regulatory Commission

Date

Secretary of the Interior

Date

Attachment A: Points of Contact

Federal Energy Regulatory Commission:

Minerals Management Service:

Attachment B: Schedule

Prior to Signing: Points of Contact are designated and listed on MOU

Five Days after Signing: Points of Contact have announced three staff members apiece for HAT

Thirty Days after Signing: HAT has begun meeting at least eight hours per week

Three Months After Signing: All FERC and MMS inspection scheduling meetings to ensure compliance with terms and conditions are now held jointly, and every attempt shall be made to conduct only joint inspections

Seven Months After Signing: JHAP has been filed with the Points of Contact, Department Heads, and the Cabinet

Seven Months and Five Business Days after Signing: Points of Contact have scheduled meeting for Department Heads

Seven Months and Thirty Days after Signing: Department Heads have met and either signed an MOU implementing JHAP or requested amendment

Seven Months and Ninety Days after Signing: Any Requested Amendments are complete