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STATUS CHECK:

ASSESSING INTERIOR'S IMPLEMENTATION OF THE ENERGY POLICY ACT OF 2005

by Peter J. Schaumberg and William N. Sinclair*

INTRODUCTION

On August 8, 2005, President George W. Bush signed into law the Energy Policy Act of 2005 (the "Act"), the first major piece of energy legislation in over a decade. Congress enacted this law to encourage energy efficiency and conservation, to promote alternative and renewable energy sources, to reduce dependence on foreign sources of energy, and to increase domestic production of oil and natural gas. While the purpose of the Act—"to ensure jobs for our future with secure, affordable, and reliable energy"¹—is simple, the Act's scope and range are far-reaching and its implementation requires several federal agencies to work together, as well as separately, to achieve the goals outlined above.

The Department of the Interior ("DOI" or "Interior") and, in particular, the Bureau of Land Management ("BLM") and the Minerals Management Service ("MMS"), play critical roles in implementing the Act and developing many of its initiatives and programs with respect to energy resources on public lands onshore and on the outer continental shelf ("OCS"). No fewer than 86 Sections of the Act require DOI action, and many of these Sections prescribe time deadlines to complete rulemaking or other activities. It is not surprising that so many Sections of the Act are directed at DOI because Interior-managed onshore and offshore resources are responsible for 30 percent of the domestic production of oil and natural gas, 50 percent of geothermal resources, and five percent of wind energy.²

In less than two years following enactment, DOI has timely met, or is on schedule to meet, most of the deadlines prescribed by the Act. In the few instances where significant deadlines were not met or likely will not be met based on the current status of the implementation process, DOI's delay often is understandable. For example, in certain cases the prescribed deadlines were somewhat unrealistic from the outset (such as the requirement under Section 344 to issue a final rule on deep gas royalty relief, an extremely complicated rule, within 180 days of enactment). In other situations, the statutory direction Congress provided was either incomplete or unclear, requiring Interior to speculate as to Congress' purpose. Also, some of DOI's requirements under the Act involve inter-agency coordination which often requires additional time. Compounding the implementation issues, particularly where Congress' intent is unclear, is the lack of legislative history explaining how Congress intended the Act to be implemented. The Conference Report accompanying the Act consists of approximately 1,700 pages of statutory provisions and only one paragraph of text.³

This article examines DOI's progress, and in particular BLM's and MMS' efforts, in implementing selected Sections of

the Act that relate to oil and gas, geothermal energy, and alternative energy. The article highlights some of the statutory interpretation and other legal issues that Interior encountered during the implementation of some of these Sections, which in some instances has caused DOI to miss deadlines. While there is still more work to be done, a review demonstrates that, less than two years after enactment, BLM and MMS had substantially met Congress' challenge and completed or initiated an enormous number of tasks.

IMPLEMENTING THE ACT: REVIEW OF INTERIOR'S RECORD TWO YEARS LATER

Set forth below is a discussion regarding principal Sections of the Act related to three resources produced on public lands onshore and on the OCS: oil and gas, geothermal energy, and alternative energy. Sections relating to each resource are organized by the implementation deadlines the Act imposes from earliest to latest.

OIL AND GAS

Actions Effective on the Date of Enactment of the Act

Naval Petroleum Reserve Numbered 2, Sections 331 and 332: These Sections provide that administrative jurisdiction and control over all public domain lands⁴ included within Naval Petroleum Reserve Numbered 2 ("NPR-2"), located in Kern County, California, are to be transferred from the Department of Energy ("DOE") to DOI.⁵ The Act also provides that certain revenues from existing leases and new leases will be deposited into a U.S. Treasury account, and the amounts in that account are available to DOI, without further appropriation, for environmental remediation and transition costs related to the transfer and leasing of NPR-2 lands.⁶ On March 6, 2006, BLM issued a final Environmental Assessment and proposed land use plan amendment for further oil and gas leasing.⁷ BLM held its first lease sale in NPR-2 on September 13, 2006 and leased five parcels totaling 2,533 acres (the balance of the unleased acreage) for \$1.6 million. The transfer from DOE to BLM was effective on the date of enactment. BLM has far more experience than DOE in managing oil and gas production. BLM's management of NPR-2 should result in enhanced production from existing

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leases, increased efforts to lease the remaining portions of NPR-2, and improved environmental monitoring.

Deepwater Royalty Relief, Section 345: This Section requires DOI to provide a royalty relief incentive for Outer Continental Shelf Lands Act (“OCSLA”)⁸ leases in water depths greater than four hundred meters in the Western and Central Planning Area of the Gulf of Mexico during the five-year period following enactment of the Act. It also prescribes royalty suspension volumes (i.e. volumes of production for which no royalty would be owed) for each lease in four specified water depth ranges. The Act authorizes royalty suspension volumes of up to sixteen million barrels of oil equivalent for each lease in water depths greater than two thousand meters.⁹

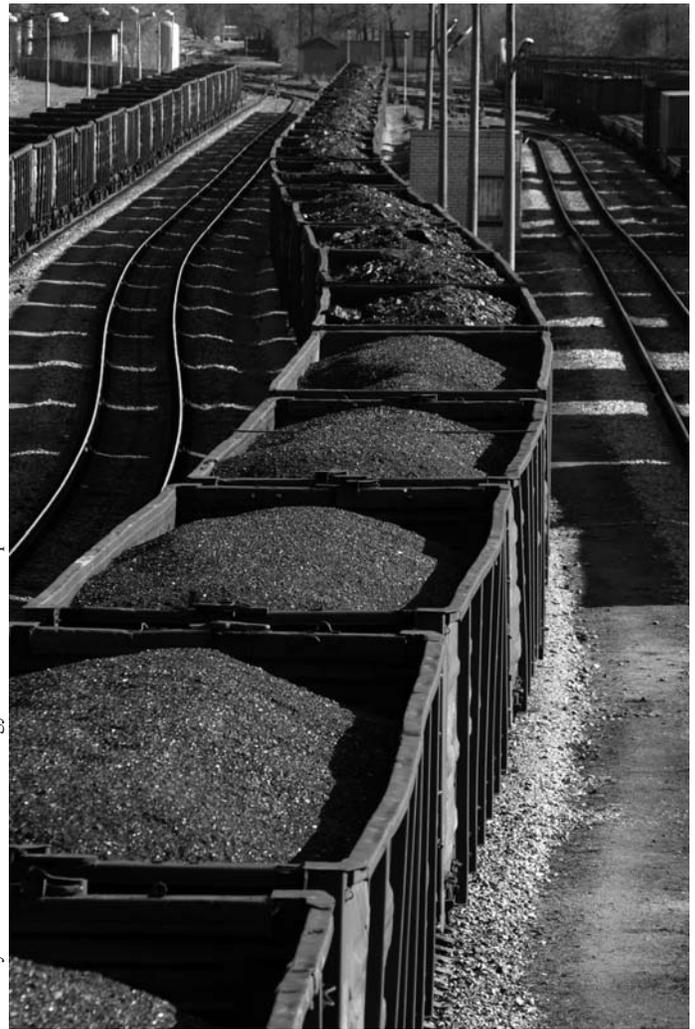
The action prescribed by Section 345 was effective upon enactment. The relief provisions have been included in all leases issued since that date. Whether the prospect of increased royalty relief will result in heightened interest in these OCS areas and higher bonus bids for leases will depend on industry projections as to whether prices for oil and gas will remain above the price thresholds that operate to suspend the royalty relief. In January 2007, the House of Representatives passed H.R.6,¹⁰ which among other things would eliminate the royalty relief provided by this Section. H.R. 6 is currently under consideration by the Senate.

Actions Required Within 45 Days After Enactment of the Act

Oil and Gas Leasing In Tar Sands Areas, Section 350: Section 350 provides DOI with the authority to issue separate leases in tar sands areas on federal lands for the exploration and development of oil and gas and for the exploration and development of tar sands, as opposed to the previous practice of issuing a combined lease for the exploration and development of oil, gas, and tar sands. Section 350 prescribes a time limit of 45 days after the date of the enactment of the Act for DOI to issue a final rule implementing this Section.¹¹ On May 18, 2006, BLM issued a final rule implementing this Section.¹² However, BLM already had implemented this new authority in an interim final rule on October 7, 2005, 60 days after enactment.¹³ This action has been completed. The ability to obtain access to the conventional oil and gas resources without the tar sands issues should increase industry interest in the area.

Actions Required Within 90 Days After Enactment of the Act

BLM Pilot Project Offices, Section 365: Section 365 directs DOI to enter into a memorandum of understanding (“MOU”) within 90 days after enactment of the Act with the Department of Agriculture (“Agriculture”), the Environmental Protection Agency, and the Army Corps of Engineers. The purpose of the MOU is to develop a pilot project to streamline the federal permitting process for oil or gas development, especially with regard to processing an Application for Permit to Drill (“APD”) which the lessee must obtain before beginning oil and gas drilling operations on federal oil and gas leases. Employees from each of the above-mentioned agencies will be assigned to seven



Courtesy of Indiana Office of Energy & Defense Development

Coal is a traditional, yet antiquated, source of energy in the United States.

BLM field offices in Colorado, Montana, New Mexico, Utah, and Wyoming, the states with the highest potential for the development and production of onshore domestic energy, to implement the pilot project.¹⁴ The purpose of this Section is to locate in one office the expertise to complete reviews and issue permits, including consultations and the preparation of biological opinions under Section 7 of the Endangered Species Act;¹⁵ permits under Section 404 of the Federal Water Pollution Control Act;¹⁶ regulatory matters under the Clean Air Act;¹⁷ planning under the National Forest Management Act of 1976;¹⁸ and the preparation of analyses under the National Environmental Policy Act (“NEPA”).¹⁹ The MOU was signed on October 24, 2005²⁰ within the 90-day deadline prescribed by Section 365 and all seven pilot offices are staffed and functioning. This action has been completed.

Actions Required Within 180 Days After Enactment of the Act

OCS Deep Gas Royalty Relief, Section 344: Section 344 is a royalty relief provision providing that, within 180 days after enactment, DOI must issue a regulation granting royalty relief for the production of natural gas from ultra deep wells on leases issued in water depths less than four hundred meters in the Gulf

of Mexico. Ultra deep wells are defined under this Section as “a well drilled with a perforated interval, the top of which is at least 20,000 true vertical depth below the datum at mean sea level.” Under Section 344(c), DOI may establish price thresholds limiting the royalty reduction granted under this Section. This new authority supplements MMS’ existing regulatory program for deep gas royalty relief. MMS is still drafting a proposed rule. This Section is not self-executing, and MMS has not met the 180 day deadline to issue a final rule. Further, as explained above regarding Section 345, H.R. 6 would repeal this section. MMS is faced with several interpretational issues here which could have a significant effect on the scope of royalty relief offered. Because the amount of potential royalty relief in issue is so large, the impact could be millions of dollars per eligible well. MMS will publish proposed regulations in May 2007.

Actions Required Within One Year After Enactment of the Act

Royalty Relief For Gas Hydrates/CO₂ Injection, Sections 353 and 354: Section 353 provides that DOI may grant royalty relief as an incentive to produce natural gas from gas hydrate resources²¹ on the OCS or on federal leases in Alaska. DOI must conduct a rulemaking to establish a royalty relief program if the Secretary determines that royalty relief would encourage the production of natural gas from gas hydrates.²² Similarly, Section 354 provides that if the Secretary determines that it is in the public interest to provide royalty incentives for enhanced recovery techniques for oil and gas using the injection of carbon dioxide, DOI must conduct a rulemaking to provide for those royalty incentives for an eligible onshore federal or OCS lease.²³ DOI is required to publish advanced notices of proposed rulemaking for both sections within 180 days after the date of enactment of the Act and final rulemaking for both Sections must be completed within 365 days after the enactment of the Act unless the agency decides not to proceed with a rule. On March 8, 2006, BLM and MMS jointly issued advanced notices of rulemaking for public comment for both sections.²⁴ These actions have been completed.

On August 4, 2006 DOI determined not to proceed with rulemaking under either section. DOI concluded that the Act’s royalty relief provisions would not result in additional natural gas production from methane hydrates because of the operational, economic, and environmental uncertainties involved with this emerging technology. DOI also concluded that the royalty incentives would not lead to increased oil production on the OCS, primarily due to unfavorable economics associated with the high cost of installing appropriate equipment and the lack of affordable nearby sources of carbon dioxide. For federal leases

onshore, DOI determined that current high oil prices made the use of this technology affordable without additional financial incentives.²⁵

Actions Required Within 18 Months After Enactment of the Act

Oil Shale/Tar Sands Leasing, Section 369: The United States is blessed with enormous oil shale resources on the public lands. To encourage the development of this resource, the Act provides, among other things, that: (a) within 180 days, DOI must make available for leasing under the Mineral Leasing Act (“MLA”)²⁶ land within Colorado, Utah, and Wyoming that DOI considers to be necessary to conduct research and development activities with respect to technologies for the recovery of

liquid fuels from oil shale and tar sands resources on public lands; (b) within 18 months, DOI must develop a programmatic environmental impact statement (“EIS”) for a commercial leasing program; and (c) within six months after completing the EIS, DOI must issue regulations for a commercial leasing program for oil shale and tar sands. Within 180 days after the final rule establishing the commercial leasing program, the DOI is directed to consult with the States, Indian tribes, and other interested persons, and the

Oil and gas, and geothermal production from leases managed by BLM and MMS contribute significantly to meeting the energy needs of our Nation today.

DOI may conduct a lease sale only if there is sufficient support to proceed. To expedite oil shale and tar sand project permit review, subsection (k) directs the DOI to act as lead agency in coordinating environmental and other reviews with states, local governments, and Indian tribes. Regulations implementing this requirement are due six months after enactment. The DOI is required to submit a report to Congress within 90 days of enactment describing its program in developing regulations and conducting the final lease sales. In addition, Section 369 amends the MLA to increase the acreage limitation from 5,120 acres to 5,760 acres for oil shale and tar sands.²⁷ On March 4, 2006, BLM selected six oil shale Research, Development, and Demonstration (“RD&D”) lease nominations in Colorado and Utah for further review and analysis under NEPA and submitted a report to Congress on December 6, 2006 on the status of implementation actions to promulgate regulations. In addition, on December 13, 2005, BLM initiated a programmatic EIS to evaluate oil shale and tar sands development in Colorado, Utah, and Wyoming²⁸ and on August 25, 2006, BLM published an advance notice of proposed rulemaking for oil shale regulations.²⁹ On December 15, 2006, BLM issued five RD&D leases to Chevron, Shell, and EGL Resources. BLM has made progress in meeting the various deadlines set forth in Section 369. Now that the RD&D leases have been issued, there is increased interest in the upcoming regulations for full-scale oil shale development.

Actions Required Within Three Years After Enactment of the Act

Royalty-In-Kind, Section 342: This Section provides permanent authority to DOI to more effectively and efficiently operate its royalty-in-kind (“RIK”) program. The MLA³⁰ and the OCSLA³¹ provide that DOI may allow federal oil and gas lessees to satisfy their royalty payment obligations through RIK arrangements under which the lessees provide physical volumes of oil or gas in lieu of money. When DOI takes RIK, it then either sells the oil or gas or transfers it to another federal agency, such as the DOE, which stores oil in the Strategic Petroleum Reserve.

In recent years, MMS has taken increasingly large proportions of its royalties in-kind, particularly from OCS leases, and marketed that production in an effort to enhance revenues for the United States. Annual appropriations acts provided MMS the authority necessary to spend money for transportation, processing, or other activities involved in marketing oil and gas. Section 342(b)(4) makes that authority permanent. The statute provides that MMS may take and market RIK only if the benefits to the United States are greater than or equal to taking royalties in value. On September 29, 2006, MMS delivered its Royalty in Kind report to Congress highlighting business processes, systems, and plans to support RIK capabilities.³² Many of the provisions in Section 342 reaffirm existing RIK provisions in the MLA and OCSLA, and most of the new provisions are self-executing. In Fiscal Year 2006, MMS expects to take almost 80 percent of its Gulf Of Mexico OCS lease oil royalties in-kind (a value approaching four billion dollars) and 30 percent of its gas (valued at over \$2 billion).³³ Having permanent authority will enable MMS to develop additional marketing tools to enhance the benefits of the RIK program to the United States.

Actions Required With No Deadline

Streamlining APD Processing, Section 366: This Section provides that (a) no later than ten days after receiving an APD for a federal oil and gas lease, BLM will notify the applicant whether the application is complete and explain what information is missing or required for it to be complete, and, no later than 30 days after receiving a complete application, BLM will issue the permit if it is in compliance with NEPA and other applicable laws or defer the decision and provide the applicant with steps it must take and a list of actions to be taken by Interior to complete compliance. Once the applicant completes any required steps, BLM must make a decision on the permit within ten days unless compliance with NEPA or other applicable laws is not complete.³⁴ On March 7, 2007, BLM issued Onshore Oil and Gas Order Number 1 incorporating the Act’s APD processing timeframes.³⁵

NEPA Categorical Exclusions, Section 390: Pursuant to this Section, the following five actions are subject to a rebuttable presumption that a categorical exclusion under NEPA applies if the activity is conducted pursuant to the MLA for the exploration and development of oil and gas on federal leases: (1) individual surface disturbances of less than five acres so long as the total surface disturbance on the lease is not greater than 150 acres and

site-specific analysis in a document prepared pursuant to NEPA has previously been completed; (2) drilling an oil and gas well at a location or well pad site at which drilling has occurred previously within five years prior to the date of spudding the well; (3) drilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA analyzed such drilling as a reasonably foreseeable activity, so long as such plan or document was approved within five years prior to the date of spudding the well; (4) placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within five years prior to the date of placement of the pipeline; and (5) maintenance of a minor activity, other than any construction or major renovation of a building or facility.³⁶ On September 30, 2005, BLM issued policy guidance to implement these categorical exclusions.³⁷ This action has been completed.

BLM reports that as of September 2006, it has used the Section 390 categorical exclusions for more than 1300 actions. Although yet to be administratively or judicially challenged, BLM’s policy guidance interpreting Section 390 has raised legal questions regarding its efficacy. Specifically, BLM’s guidance stated that the categorical exclusions in Section 390 are not subject to the extraordinary circumstances exception set forth in the regulations promulgated by the Council on Environmental Quality (“CEQ”) implementing NEPA.³⁸ In other words, BLM interpreted Section 390 as creating statutory categorical exclusions not subject to review under the normal CEQ process for approval. This aggressive stance was lauded by members of the oil and natural gas industries as an improvement to the process for permitting oil and gas exploration and development on public lands.³⁹ Not everyone, however, agrees with BLM’s interpretation regarding the categorical exclusions. For example, in correspondence to BLM dated November 29, 2005, the Wilderness Society argued that BLM’s interpretation of Section 390 was legally deficient. BLM responded to the Wilderness Society and announced that it would address the interpretation set forth in its policy guidance in a rulemaking and would solicit comments from the public. However, when BLM published its proposed changes to Onshore Order Number 1 on March 13, 2006, no language was included addressing the implementation of Section 390. Similarly, the Final Onshore Order Number 1 did not address the Section 390 categorical exclusions. In sum, while BLM has met its charge under the Act to develop guidance related to Section 390, the continuing viability of that guidance may be unsettled.

GEOHERMAL

Action Required Within 180 Days After Enactment of the Act

Coordinating Leasing/Permitting, Section 225: This Section requires that DOI and Agriculture enter into an MOU within 180 days regarding the coordination of leasing and permitting for geothermal development of public lands and national forest lands.⁴⁰ On April 5, 2006, BLM signed an interagency MOU with the Forest Service to improve geothermal leasing and permitting

procedures.⁴¹ This action has been completed. After the new leasing provisions implementing the Act are adopted, BLM will assess the effectiveness of the streamlining efforts for leasing and permitting geothermal activities on national forest lands.

Actions Required with No Deadline

Geothermal Leasing/Royalty Value, Sections 222-224, 228-229, and 231-234: These Sections amend the Geothermal Steam Act of 1970⁴² by changing the methodology for leasing federal geothermal resources and simplifying the valuation calculations for geothermal resources used for both direct use (e.g., heating greenhouses or other buildings) and electrical generation. The Act also directs DOI to process pending lease applications under the provisions of law existing before the date of enactment. On October 7, 2005, BLM issued interim guidance for processing pending geothermal lease nominations (Section 222). On May 2, 2007, MMS⁴³ and BLM⁴⁴ issued final geothermal leasing and royalty valuation regulations. Leasing activity under the newly-amended provisions of the Geothermal Steam Act may now proceed under the new MMS and BLM regulations.

ALTERNATIVE ENERGY

Onshore Renewable Energy, Section 211: This Section establishes a goal, as opposed to a directive, for DOI to “seek to have approved non-hydropower renewable energy projects located on the public lands with a generation capacity of at least 10,000 megawatts of electricity” before 2015.⁴⁵ A Final Programmatic Wind Energy Development EIS was published in June of 2005 and a Record of Decision (“ROD”) to implement best management practices and land use plan amendments to provide for wind energy development on public lands was issued in December of 2005.⁴⁶ A BLM wind energy policy implementing the ROD was issued August 24, 2006.⁴⁷

Actions Required Within 270 Days After Enactment of the Act

OCS Alternative Energy Development, Section 388: This Section provides that DOI may grant leases, easements, or rights-of-way on the OCS for activities that support exploration, development, production, or storage of oil or natural gas; support transportation of oil or natural gas, excluding shipping; produce or support production, transportation, or transmission of energy from sources other than oil or natural gas; or use, for energy-related or other authorized marine-related purposes, facilities used for OCS activities. In addition, DOI is charged with establishing royalties or other payments for any lease, easement, or right-of-way granted under Section 388. Within 180 days after the enactment of the Act, Section 388 directs DOI to issue a final rule regarding the provisions for sharing revenues from these activities with coastal states. Within 270 days after the enactment of the Act, Section 388 directs DOI to issue a final rule implementing this subsection.⁴⁸ On December 30, 2005, MMS published an advanced notice of proposed rulemaking (“ANPR”) providing for public comment.⁴⁹ This ANPR addressed various rulemaking issues for alternative energy projects on the OCS other than oil or gas, such as wind, wave, or cur-

rent energy projects. It also addressed alternative uses of OCS facilities, such as using oil and gas platforms for aquaculture. In March 2007, MMS published a draft programmatic EIS examining the potential environmental consequences of implementing an alternative energy and use program on the OCS.⁵⁰ MMS estimates that proposed rules, final rules, and a final programmatic EIS will be published in 2007.

Until the final regulations are complete, MMS is unlikely to consider approving any alternative energy projects except, perhaps, the proposed wind energy project offshore Cape Cod. Several implementation issues exist with regard to this Section. Section 388 delegates to DOI the authority to grant a lease, easement, or right-of-way on the OCS for alternative energy exploration and development. DOI has managed oil and gas leasing on the OCS for over 50 years, and MMS has assumed responsibility for implementing Section 388. Alternative energy exploration and development has focused on wind, wave, and tidal resources, each of which would be used to develop electricity. Of these resources, wind energy is the most promising, and projects are proposed in federal waters off of Cape Cod and Long Island and state waters offshore of Texas.

Section 388 has created a debate as to which federal agency has the authority to regulate alternative energy projects on the OCS. In an ANPR, MMS stated that it interprets the authority granted by Section 388 to issue leases, etc., “as also providing MMS authority to regulate or permit the activities that occur on those leases, easements or rights-of-way, if those activities are energy related.”⁵¹ However, Section 388(a) provides that “[n]othing in this subsection displaces, supersedes, limits, or modifies the jurisdiction, responsibility, or authority of any Federal or State agency under any other Federal law.” In comments responding to the ANPR, the Federal Energy Regulatory Commission (“FERC”) asserts that it has jurisdiction under the Federal Power Act⁵² to license offshore energy hydropower projects.⁵³

The basis for FERC’s assertion appears to be, in part, an administrative decision from 2003, *In re Aqua Energy Group, Ltd.*, in which an administrative law judge ruled that wave energy projects are hydroelectric projects subject to FERC licensing requirements where located on a navigable waterway, on government lands, or in commerce clause waters and affecting interstate commerce.⁵⁴ This struggle between FERC and MMS, whether perceived or real, may have a significant effect on the nascent industry seeking to develop alternative energy sources on the OCS. Many companies cannot afford to go through, for example, FERC’s permitting process only to find that, in fact, they should have gone through MMS’ permitting process, or vice versa. Obtaining approvals from both agencies would also be extremely burdensome. In short, inter-agency squabbling may delay the growth of this industry and serve as a bar that would prevent potentially interested companies and investors from entering into this field. Regardless, the jostling between FERC and MMS over this issue has hindered MMS in implementing Section 388, and it appears that MMS will not issue a final rule implementing this Section until late in 2007 or 2008.

CONCLUSION

Interior's substantial progress in less than two years of implementing the Energy Policy Act of 2005 demonstrates that DOI, MMS, and BLM have taken these implementation responsibilities seriously and devoted the resources necessary to substantially comply with Congress' ambitious time schedule. Moreover, while there have been some legal or policy implementation hurdles along the way, given the breadth of this new law, the agencies have handled diligently multiple, overlapping deadlines and deftly implemented sometimes vague statutory mandates.

Oil and gas, and geothermal production from leases managed by BLM and MMS contribute significantly to meeting the energy needs of our nation today. Development of alternative energy, particularly on the OCS, and development of the vast oil shale and methane hydrate resources on Interior-managed lands hold great promise for the future. The investment that BLM and MMS are making today in response to Congress' direction in the Energy Policy Act of 2005 undoubtedly will pay substantial dividends in our energy future.



Endnotes: Status Check

¹ Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 [hereinafter Energy Policy Act].

² Minerals Management Service, Energy Policy Act of 2005, available at <http://www.mms.gov/2005EnergyPolicyAct.htm> (last visited Apr. 12, 2007).

³ H.R. REP. NO. 109-190 (2005) (Conf. Rep.).

⁴ Of the approximately 10,451 acres of land in NPR-2, approximately 7,919 acres are currently under lease for oil and gas production.

⁵ Energy Policy Act, *supra* note 1, § 331.

⁶ Energy Policy Act, *supra* note 1, §§ 331(c)(2), 332(b)(1), (2).

⁷ Proposed Caliente Resource Management Plan Amendment and EA Regarding Management of Lands Recently Transferred to BLM Known as NPR-2, available at http://www.blm.gov/ca/pdfs/bakersfield_pdfs/minerals/NPR2_rmp_amendment.pdf (last visited Apr. 12, 2007).

⁸ 43 U.S.C. § 1337(a)(1)(H).

⁹ Energy Policy Act, *supra* note 1, § 345.

¹⁰ H.R. 6, 110th Cong. (2007).

¹¹ Energy Policy Act, *supra* note 1, § 350.

¹² Leasing in Special Tar Sands Areas, 71 Fed. Reg. 28,778 (May 18, 2006).

¹³ Leasing in Special Tar Sands Areas, 70 Fed. Reg. 58,610 (Oct. 7, 2005).

¹⁴ Energy Policy Act, *supra* note 1, § 365.

¹⁵ Endangered Species Act § 8, 16 U.S.C. § 1536 (1973).

¹⁶ Clean Water Act § 404, 33 U.S.C. § 1344 (1972).

¹⁷ Clean Air Act § 101, 42 U.S.C. § 7401 (1970).

¹⁸ National Forest Management Act § 14 (a), 16 U.S.C. § 472a (1976).

¹⁹ National Environmental Policy Act § 2, 42 U.S.C. § 4321 (1969).

²⁰ BLM MOU WO300-2006-06, Oct. 24, 2005, available at http://www.blm.gov/nhp/spotlight/epa2005/BLM_MOU_WO_300-2006-07.pdf (last visited Apr. 12, 2007).

²¹ Gas hydrates are crystalline substances composed of water and gas together in solid form far above the freezing point of water, in which a solid water-lattice accommodates gas molecules in a cage-like structure, or clathrate. Gas Hydrate Production Incentives, 71 Fed. Reg. 11,559, 11,560 (Mar. 8, 2006).

²² Energy Policy Act, *supra* note 1, § 353.

²³ Energy Policy Act, *supra* note 1, § 354, 119 Stat. 594, 715.

²⁴ Gas Hydrate Production Incentives, 71 Fed. Reg. 11,559 (Mar. 8, 2006); Enhanced Oil and Natural Gas Production Through Carbon Dioxide Injection, 71 Fed. Reg. 11,557 (Mar. 8, 2006).

²⁵ DOI Defers Action on Rulemakings for Gas Production from Gas Hydrates and Enhanced Oil Recovery Through Carbon Dioxide Injection, http://www.blm.gov/nhp/spotlight/epa2005/Aug06_jt_stmt.pdf (last visited Apr. 12, 2007).

²⁶ Federal Onshore Oil and Gas Leasing Reform Act, 30 U.S.C. §§ 226, 241 (1987).

²⁷ Energy Policy Act, *supra* note 1, § 369.

²⁸ Notice of Intent to Prepare a Programmatic EIS and Plan Amendments for Oil Shale and Tar Sands Resources Leasing on Lands Administered by BLM in Colorado, Utah, and Wyoming, 70 Fed. Reg. 73,791 (Dec. 13, 2005).

²⁹ Commercial Oil Shale Leasing Program, 71 Fed. Reg. 50,378 (Aug. 25, 2006).

On September 26, 2006, the deadline for public comments on this advance notice of proposed rulemaking was extended until October 25, 2006. Commercial Oil Shale Leasing Program, 71 Fed. Reg. 56,085 (Sept. 26, 2006).

³⁰ Mineral Leasing Act § 36, 30 U.S.C. § 192 (1920).

³¹ Outer Continental Shelf Lands Act § 27, 43 U.S.C. § 1353 (1953).

³² Report to Congress: Minerals Management Service Royalty in Kind Operation, <http://www.mrm.mms.gov/rikweb/PDFDocs/ReportToCongress.pdf> (last visited Apr. 12, 2007).

³³ In Fiscal Year 2005, MMS actually took in-kind 75 percent of its OCS oil royalty and 30 percent of its OCS gas royalty. See MINERALS MANAGEMENT SERVICE, ROYALTY IN KIND PROGRAM FISCAL YEAR 2005 REPORT (2006), available at <http://www.mrm.mms.gov/rikweb/PDFDocs/RIKPRPFY2005.pdf> (last visited Apr. 12, 2007).

³⁴ Energy Policy Act, *supra* note 1, § 366.

³⁵ Onshore Oil and Gas Operations; Federal Oil and Gas Leases; Onshore Oil and Gas Order Number 1, Approval of Operations; Final Rule, 72 Fed. Reg. 10,308 (Mar. 7, 2007).

³⁶ Energy Policy Act, *supra* note 1, § 390.

³⁷ IM No. 2005-247, Sept. 30, 2005.

³⁸ IM No. 2005-247, Attachment 2, Sept. 30, 2005.

³⁹ See Testimony of Duane Zavadil on behalf of IPAMS before the Senate Commission on Energy and Natural Resources (June 27, 2006), available at http://energy.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=1570&Witness_ID=4445 (last visited Apr. 30, 2007).

⁴⁰ Energy Policy Act, *supra* note 1, § 225.

⁴¹ BLM MOU WO300-2006-08, Apr. 5, 2006, available at http://www.blm.gov/nhp/spotlight/epa2005/BLM_MOU_WO_300-2006-08.pdf (last visited Apr. 12, 2007).

⁴² Geothermal Stream Act, 30 U.S.C. §§ 1001 *et seq.* (1970).

⁴³ Geothermal Royalty Payments, Direct Fee Uses, and Royalty Valuation, 72 Fed. Reg. 24448 (May 2, 2007).

⁴⁴ Geothermal Resource Leasing and Geothermal Resources Unity Agreements, 72 Fed. Reg. 23458 (May 2, 2007).

⁴⁵ Energy Policy Act, *supra* note 1, § 211.

⁴⁶ Wind Energy Development Programmatic EIS, <http://windeis.anl.gov> (last visited Apr. 12, 2007).

⁴⁷ IM No. 2006-216, Aug. 24, 2006.

⁴⁸ Energy Policy Act, *supra* note 1, § 388.

⁴⁹ Alternate Energy-Related Uses on the OCS, 70 Fed. Reg. 77,345 (Dec. 30, 2005).

⁵⁰ Notice of Availability of the Draft Programmatic Environmental Impact Statement and Public Hearings, 72 Fed. Reg. 13,307 (Mar. 21, 2007).

⁵¹ Alternate Energy-Related Uses on the OCS, 70 Fed. Reg. 77,345 (Dec. 30, 2005).

⁵² Federal Power Act § 1 *et seq.*, 16 U.S.C. §§ 792 *et seq.* (1920).

⁵³ FERC Comments, <https://ocsconnect.mms.gov/pcspublic/do/ProjectDetailView?objectId=0b011f8080050473&attribute=comments#comments> (last visited Apr. 16, 2007).

⁵⁴ 102 FERC ¶ 61,242.