Maureen Bornholdt
Program Manager, Offshore Alternative Energy Programs
Department of the Interior, Minerals Management Service,
Attention: Regulations and Standards Branch
(RSB), 381 Elden Street, MS–4024,
Herndon, Virginia 20170–4817.

Re: Alternative Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 1010– AD30, 73 Fed. Reg. 39,376-39,504 (July 9, 2008).

Submitted via website and U.S. mail on September 8, 2008.

Dear Ms. Bornholdt:

This memorandum, signed by four attorneys from Food & Water Watch, Natural Resources Defense Council, and The Center For Food Safety, examines Section 388 of the 2005 Energy Policy Act, Pub. L. No. 109-58 (August 8, 2005), which amended the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C § 1337 (2000).

It evaluates the Minerals Management Service's (MMS) legal interpretation of this section, as made apparent in the agency's recently proposed rules for Alternative Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf,[1] as well as subsequent explanations of the proposal by MMS staff.

In the preamble to the proposed rule, MMS indicates that it has the authority to grant Rights of Use and Easements (RUEs) for marine-related uses of energy facilities. According to the preamble, one such marine-related use is aquaculture.

After examining the history and legislative language of Section 388, the authors of this memo conclude that the agency does not have authority to grant RUEs for marine-related uses of energy facilities in federal waters until Congress acts positively to authorize such activities. Because Congress has not yet authorized aquaculture in federal waters, MMS may not issue RUEs for this activity. We urge MMS to revisit its current interpretation of its statutory authority under the 2005 Energy Policy Act because it is contrary to the plain language and legislative history of statute.

History of the Energy Policy Act of 2005

The language of Section 388 of the 2005 Energy Policy Act has its genesis in a very similar stand-alone bill, H.R. 5156, introduced in the U.S. House of Representatives by Representative Barbara Cubin (R-WY) in July 2002. The bill was introduced shortly after the comment period had closed for the U.S. Army Corps of Engineers' (USACOE) proposal to issue a Rivers and Harbors Act Section (10 RHA § 10) permit for a data tower for the "Cape Wind" wind-energy project.[2] A conservation organization, the Alliance for Nantucket Sound (the Alliance), had argued that USACOE did not have authority to issue a RHA § 10 permit for activities unrelated to gas, oil, and mineral extraction, and that the agency should

[1] 1010– AD30, 73 Fed. Reg. 39,376-39,504 (July 9, 2008).
[2] *See* Carolyn Kaplan, *Congress, the Courts, and the Army Corps: Siting the First Offshore Wind Farm in the United States*, 31 B.C. Envtl. Aff. L. Rev. 177 (2004); *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dept. of the Army*, 288 F. Supp. 2d 64, 68 (D. Mass. 2003).

deny the permit application under its regulations because Cape Wind did not have the requisite property interest in the Outer Continental Shelf (OCS) for wind energy development.[3]

According to its sponsor, H.R. 5156 was developed after working with various agencies and was "needed because no authority currently exists to permit alternative energy projects and ancillary projects to support oil and gas development on the OCS."[4] Among other purposes, the bill also set out "to authorize alternate uses of existing structures and facilities previously permitted under the Outer Continental Shelf Lands."[5]

H.R. 5156 amended the OCSLA to give the Secretary of the Department of the Interior – presumably to be delegated to MMS – the authority to grant property interests, by way of easements or rights-of-way, for the specified activities that:

> (A) support exploration, development, production, transportation, or storage of oil, natural gas, or other minerals;
> (B) produce or support production, transportation, or transmission of energy from sources other than oil and gas; or
> (C) use facilities currently or previously used for activities authorized under this Act.[6]

The bill carved out from the MMS's jurisdiction those activities "otherwise authorized" by other statutes, including the OCSLA, the Deepwater Port Act of 1974, and the Ocean Thermal Energy Conversion Act of 1980.[7]

The reach of this legislation was controversial. At the bill's legislative hearing, Representative Edward Markey (D-MA) remarked:

> Just asserting the jurisdiction of the federal government, without a sound policy to guide the use of federal lands and a commitment to a clear process by which innovative individual proposals will be judged will not solve our current problems. That clear policy is lacking in H.R. 5156. . . . I would like to hear from other industries about their current and future proposals for new ways of using the outer continental shelf. What plans does the aquaculture industry have? Or the liquefied natural gas industry? We will hear from a portion of the renewable industry today[,] but I believe we need to be better informed about possible types of projects in order to develop a sound policy about how to deal with their use of federal waters.[8]

The Alliance supported H.R. 5156's creation of property interests for activities on the OCS, but, among other recommendations, suggested that the new program ". . . not be vested exclusively in the Department of the Interior. These projects will dramatically affect marine resources, and joint authority should be shared with the Department of Commerce through [the National Oceanic and Atmospheric Administration (NOAA)]."[9]

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[3] Subcommittee on Energy and Mineral Resources of the Committee on Resources, U.S. House of Representatives, *Legislative Hearing on H.R. 5156, to Amend the Outer Continental Shelf Lands Act to Protect the Economic and Land Use Interests of the Federal Government*, 107th Cong. at 28 (July 25, 2002) (hereinafter *Legislative Hearing on H.R. 5156*).
[4] *Id.* at 3.
[5] H.R. 5156, 107th Cong. § 1 (a)(5) (2002).
[6] *Id.* at § 1 (b).
[7] *Id.*
[8] *Legislative Hearing on H.R. 5156*, supra n. 3, at 13.
[9] *Id.* at 30.

That bill did not pass out of committee. On February 13, 2003, Representative Cubin introduced H.R. 793, which was nearly identical to H.R. 5156.[10] The bill added a phrase to clarify that it was not just activities otherwise authorized by the enumerated statutes that were excluded from the Department of Interior's jurisdiction, but, additionally, that those activities otherwise authorized under "other applicable law" were excluded.

At its legislative hearing, many of the same complaints were raised about H.R. 793 as were about its predecessor bill, including by Representative William Delahunt (D-MA), who echoed the Alliance's concerns about whether the Department of the Interior was the proper agency to run the program. He expressed concerns about possible environmental impacts, and argued that that the oversight of offshore renewable energy projects in the oceans should include a leading role for federal agencies with a direct marine regulatory and habitat mission, such as NOAA and the National Marine Fisheries Service. He touted competing legislation that he had sponsored, saying it ". . . foresees a new licensing program that calls on the expertise of the [NOAA] Administration and their coastal zone managers."[11]

While this legislation was making its way through Congress, the U.S. District Court for the District of Massachusetts issued a decision in 2003 on the Alliance's lawsuit against USACOE for the permit that the agency had issued Cape Wind. The Court found that USACOE had the authority to issue an RHA § 10 permit for the wind power project. It found that USACOE's regulations did not require an applicant to have property rights as a prerequisite for a permit. Rather, the court found that the regulations are designed to keep the agency out of property disputes, and "require only that a permit application *affirm* that applicant possesses or will possess the requisite property interest to undertake its proposed activity."[12]

The court's decision left alone the question of whether Cape Wind actually had the requisite property interests under federal law to undertake the proposed activity. The District Court's decision was affirmed by the First Circuit Court of Appeals on February 16, 2005.[13]

The decision did not affect the bills winding their ways through Congress. Language substantially similar to Representative Cubin's H.R. 793 made its way into several energy bills considered by Congress in 2003, 2004, and 2005. H.R. 6, the Energy Policy Act of 2003, had similar language to H.R. 793 in its section 30214.[14] The Senate version of the bill did not contain any such language.[15] Section 321 in the Conference Report for these bills was similar to H.R. 793's Section 30214, but dropped a listing of the bill's purposes. It also gave the Department of Interior the authority to approve leases, in addition to the language that already gave the agency the authority to issue rights-of-way and easements for the specified activities. Also, in terms of activities for which the Department of Interior could grant such property interests, this section specified that the agency could not simply grant permissions for activities that "use facilities currently or previously used for activities authorized under this Act," but that the activities must have "energy-related or marine-related purposes."[16]

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[10] H.R. 793, 108th Cong. (2003).
[11] Subcommittee on Energy and Mineral Resources of the Committee on Resources, U.S. House of Representatives, *Legislative Hearing on H.R. 793 and H.R. 794*, 108th Cong. at 20 (March 6, 2003) (hereinafter *Legislative Hearing on H.R. 793*).
[12] *Alliance to Protect Nantucket Sound Inc. v. U.S. Dept. of the Army*, 288 F. Supp. 2d at 77 (D. Mass. 2003).
[13] *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dept. of the Army*, 398 F.3d 105 (1st Cir. 2005).
[14] H.R. 6 at Section 30214, 108th Cong. (2003).
[15] H.R. 6, Energy Policy Act of 2003 (Engrossed Amendment as Agreed to by Senate), 108th Cong (2003).
[16] H.R. 6, Conference Report 108-375, 108th Cong. (2003).

This Conference Report was never approved by the Senate, but the language of Section 321 made its way into Section 2010 of H.R. 6, the Energy Policy Act of 2005, which passed the House on April 25, 2005.[17]

The version of the Energy Policy Act of 2005 that passed the Senate was different, however. It specified that the Department of Interior could not simply grant leases, easements, and rights-of-way for activities that "use, for energy-related or marine-related purposes, facilities currently or previously used for activities authorized under this Act," as Section 321 of the House version had, but that such activities had to have "*authorized* marine-related purposes." (emphasis added).[18]

This language was agreed to in Section 388 of the Conference Report,[19] which passed both the House and the Senate on July 28, 2005 and July 29, 2005, respectively, and was signed by the President, becoming law on August 8, 2005.[20]

Analysis

A. Under Section 388, MMS can only grant leases, easements, or rights-of-way for marine-related activities that are "authorized" by some other act of Congress.

The starting point in statutory interpretation is the language of the statute itself.[21] Section 388 has two primary parts that are at issue. The first is a general introductory section in the newly amended Section (p)(1) of the OCSLA, which states that leases, easements, and rights of ways are the types of property interests that the agency may convey. It also generally states that MMS does not have the authority to grant property interests when that authority is already provided by other statutes:

> IN GENERAL. The Secretary . . . may grant a lease, easement, or right of way on the Outer Continental Shelf for activities not otherwise authorized in this Act, the Deepwater Port Act . . . , the Ocean Thermal Energy Conversion Act of 1980 . . . , or other applicable law. . .

The second part of the statute that is relevant for this analysis is newly amended Section (p)(1)(A)-(D) of the OCSLA, which narrows the general authority Section (p)(1) by specifying the types of activities for which the agency may convey such property interests. Those activities are those that:

> (A) Support exploration, development, production, or storage of oil or natural gas;
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> (B) Support transportation of oil or natural gas, excluding shipping activities;
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> (C) Produce or support production, transportation, or transmission of energy from sources other than oil and gas; or
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> (D) Use facilities currently or previously used for oil and gas drilling for energy-related purposes or other authorized marine-related purposes.

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[17] H.R. 6, Energy Policy Act of 2005 (Engrossed as Agreed to or Passed by House), 109th Cong (2005).
[18] H.R. 6, Energy Policy Act of 2005 (Engrossed Amendment as Agreed to the Senate), § 321, 109th Cong. (2005).
[19] H.R. 6, House Report 109-190, § 388.
[20] Pub. L. No. 109-58
[21] *United States v. James*, 478 U.S. 597, 604 (1986) (internal quotation omitted).

While both the introductory portion of Section (p)(1) and, below it, subsections (A)-(D), touch upon the MMS's authority under the Act, the latter controls in determining the types of activities for which MMS can grant property interests because it is more specific.[22]

Looking, then, to the controlling part of the statute to determine the activities for which MMS can convey property interests, MMS may grant such property interests for activities that support exploration, development, production, or storage of oil or natural gas; support transportation of oil or natural gas, excluding shipping activities; and produce or support production, transportation, or transmission of energy from sources other than oil and gas. The agency's power to grant property interests for these activities are rather straightforward.

New Section (p)(1)(D) of the OCSLA, however, contains more qualifications. It gives MMS the authority to issue leases, easements, or rights-of-way for marine-related uses of energy facilities. But, giving effect to every word in the statute as required with statutory construction,[23] MMS may not grant every activity with a marine-related purpose such property interests. Rather, the agency may only do so when such activities have been "authorized."

Further, the "authorization" for "marine-related" activities cannot be derived from Section 388, itself. Otherwise, Section (p)(1)(D)'s use of the term would be redundant. This is especially true given that the other activities for which MMS may grant property interests, under Section (p)(1)(A) – (C), do not similarly have the "authorized" qualifying language. The authorization must come from either a separate act of Congress or from an administrative agency acting pursuant to separate statutory authority.

Therefore, under a plain language reading of Section 388, MMS is given the general power to grant leases, easements, and rights of way for a number of specific types of activities in the OCS. MMS may not grant such property interest for marine-related uses of energy facilities, however, until they are separately "authorized" by Congress.

Given the straightforward statutory command that marine-related uses must be "authorized," there is no reason to resort to legislative history.[24] However, the legislative history of Section 388 also supports a reading of the statute that requires marine-related uses of energy facilities to be separately authorized by Congress before MMS may grant property interests to them. As detailed above, the House-passed version did not include the requirement that activities with marine-related purposes be authorized. The Senate-passed version did. Before the House-Senate conference committee marked up the bill's conference report, the committee specifically rejected the House version, thus indicating that this language was a purposeful addition to the statute.

This makes ample sense given the controversy surrounding the legislation's grant of authority to MMS. At two hearings, Representatives Delahunt, Markey, and Kind complained that the Department of

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[22] 73 Am. Jur. 2d Statutes § 170 ("Where there in the same statute a specific provision and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision.")

[23] An interpretation of the statute that would not require an activity with a marine-related purpose to be "authorized" before it is granted a lease, right-of-way, or easement by the Department of Interior would be an interpretation that negates the word "authorized." This would violate the rule of statutory construction that every word should be given effect. *See Rake v. Wade*, 508 U.S. 464, 471 (1993) ("We generally avoid construing one provision in a statute so as to suspend or supersede another provision. To avoid denying effect to a part of a statute, we accord significance and effect to every word.") (Internal quotation omitted). It would also violate the rule that, in statutory construction, no word should be presumed to be redundant. See *United States v. Alaska*, 21 U.S. 1, 59 (1997).

[24] *See United States v. Gonzales*, 520 U.S. 1, 6 (1997).

Interior was given too much authority under the stand-alone bills that were the predecessors of Section 388. Mr. Delahunt advocated that NOAA be the lead agency. While most of this controversy was surrounding renewable energy-related uses of the OCS, the heart of their concerns was that an agency with expertise in protecting marine resources be deemed the lead agency for regulating activities on the OCS. The final version of the bill follows suit and limits MMS's authority to regulate those marine-related activities on energy facilities only after Congress has first separately approved such activities. Thus, Congress ensured that such marine-related activities on the OCS are regulated by the agency with the appropriate expertise before MMS could regulate them on energy facilities.[25]

B. Aquaculture is not an authorized marine-related purpose.

Congress has not authorized offshore aquaculture in federal waters. Congress has considered a number of bills that have provided this authority, but none have passed out of committee. [26]

Other statutes, such as the National Aquaculture Act of 1980 (NAA), 16 U.S.C. §§ 2801-2810 (2006), are aimed at promoting aquaculture, but they do not provide property interests for the operation of aquaculture operations in federal waters. As discussed in Section C, *infra*, the statute's use of the term "authorized" in Section (p)(1)(D) cannot mean something different than it does in the more general introductory portion of Section (p)(1). Therefore, simply because the NAA promotes aquaculture, it cannot be said to be an "authorized," purpose, as is required in Section 388.

Other statutes, such as the River and Harbors Act (RHA) and Clean Water Act, 33 U.S.C. §§ 1251-1387 (2000) (CWA), regulate activities on the Outer Continental Shelf. But, as recognized by the First Circuit in *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dept. of the Army*, 398 F.3d 105 (1st Cir. 2005), RHA § 10 permits do not convey property interests for any activities in the OCS.

Further, while it is true that some aquaculture facilities would need to get CWA discharge permits before they operate in the OCS, CWA discharge permits authorize discharges, they do not authorize marine aquaculture activities. In any event, this more general permission to discharge would be required for other activities for which the Secretary can grant leases, easements, or rights-of-way on the OCS under Section (p)(1)(A)-(C) of Section 388. But this section only requires that "marine-related" activities allowed under Section (p)(1)(D) be specifically "authorized." Therefore, the statute's use of "authorized" in Section (p)(1)(D) cannot mean permissions derived from these other, more general statutory authorities.

In sum, both the plain language and the history of Section 388 clearly indicate that MMS does not have such authority to grant RUEs for marine-related uses of energy facilities in federal waters until Congress acts positively to authorize such activities. Congress has not yet authorized aquaculture in federal waters under any existing statutes. Therefore, MMS may not issue RUEs for this activity.

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[25] Indeed, it was only in June of that year that Congress first introduced legislation giving NOAA the lead permitting authority over one such supposed marine-related activity, offshore aquaculture, while still giving concurrent authority over such activities on or within 1 mile of OCS leases. S. 1195, the National Offshore Aquaculture Act of 2005, 109th Cong. at § 4 (a)(2).

[26] *See* H.R. 2010 and S. 1609, the National Offshore Aquaculture Act of 2007, 110th Cong. at § 2 (a)(2) ("It is the policy of the United States to. . . [e]ncourage the development of environmentally responsible offshore aquaculture by *authorizing* offshore aquaculture operations . . .") (emphasis added).

C. There is no contradiction or redundancy in the statute that should give cause for MMS to deviate from the plain meaning of the statute.

MMS staff have indicated that they may deviate from the plain language of the statute and ignore the word "authorized" in Section (p)(1)(D) because the agency reads this language as being contradictory when it comes to certain marine-related uses, such as marine aquaculture, for which there is no Congressional authorization. These staff have said that if new Section (p)(1)(D) of the OCSLA is interpreted to mean that Department of Interior does not have the authority to convey property interest for certain marine-related activities because they have not yet been authorized by Congress, this contradicts the new introductory language of section (p)(1), which gives MMS the authority to convey property interests for all activities that do not presently have such interests under federal law. In other words, Congress could not have possibly meant the word "authorized" to be a limiting word in the phrase, "authorized marine-related purposes," in Section (p)(1)(D) because it would undermine Congress's intent to give the Department of Interior comprehensive authority over all uses of oil and gas rigs not presently authorized under federal law, as stated in Section (p)(1). The agency states, by way of example,

> an individual seeks to use an existing oil and gas platform in the Gulf of Mexico to conduct certain offshore aquaculture activities. Offshore aquaculture activities on the OCS are not currently authorized by any other statutory authority.[27]

Therefore, the proposed rule's preamble states, MMS may authorize the use of an existing facility for offshore aquaculture activities.[28] As explained by MMS staff, to read that these aquaculture activities could not be allowed because they do not have "authorized marine-related" purposes, as stated in subsection (D), would be contradictory.

But, MMS's interpretation creates a contradiction where there is none and impermissibly derives the meaning of the statute not by specific language, but by innuendo.[29] Again, the starting point for interpretation of a statute is its language. The contradiction that MMS staff believe exists can only be present in the language of the statute if the introductory Section (p)(1), which excludes those activities otherwise authorized by specific statutes and other applicable law from the Department of Interior's jurisdiction, is also read to conversely give the Department of Interior the authority over all activities that have not yet been authorized by statute or other applicable law.

But this is not how the statute reads. This introductory language of Section (p)(1) does not give the agency the authority to convey property interest over specific types of activities. The specific types of activities for which MMS has the authority to grant property interests is governed by the second, more specific part of the statute. Therefore, this MMS reading of the statute violates the rule that when conflicts arise between a section of a statute that deals generally with a subject, and another that deals specifically with a certain parts of it, the specific language controls.[30]

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[27] 73 Fed. Reg. at 39,435.

[28] *Id.*

[29] *See Palmer v. Massachusetts*, 308 U.S. 79, 83 (1939) ("And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself.")

[30] 73 Am. Jur. 2d Statutes § 170.

Further, even ignoring this second, more specific portion of the statute, insofar as this introductory language also implicitly gives the Department of Interior a certain general authority to issue leases, easements, and rights of way for activities, there is no evidence that Congress intended this authority to extend to every single activity that has not yet been authorized by statute, such as aquaculture. After all, this section does not give the Department of Interior the authority to grant such property interests for those activities "not authorized" by federal law. Rather, it is given the authority to issue leases, easements, and right-of-way for activities not "otherwise" authorized. The word "otherwise" is an adverb meaning done "in another way," "differently," "under different circumstances," or "in other respects."[31] The use of this language evinces a Congressional intent to *exclude* from the Department of Interior's authority those activities already authorized by the enumerated statutes in existence at the time of the Energy Policy Act's passage, rather than an intent *give* the agency the broader authority over activities for which no statute authorizes them, such as aquaculture.

Indeed, this matches the interpretation of the introductory language provided to Congress by MMS's Johnny Burton at the legislative hearing to H.R. 5156 in 2002, when she explained that the law excluded from MMS's jurisdiction activities already authorized under existing statutes:

> What we found is that, generally speaking, there currently exists no clear authority for the Federal Government to comprehensively review, permit, and provide appropriate regulatory oversight of those projects, with a few exceptions. The exceptions are minerals activity, which the Department of the Interior manages and oversees; the oil terminals, which are under the Deepwater Ports Act and are implemented by the Department of Transportation; and then the projects that would be permitted under the Ocean Thermal Energy Conversion Act under the Department of Commerce, although there are no such projects at this time.[32]

Ms. Burton's interpretation of H.R. 5156 would hold true for the Section 388 of the Energy Policy Act of 2005. Language in the subsequent Cubin bill, H.R 793 – and that exists in Section 388 today – does additionally exclude from the Department of Interior's authority those activities otherwise authorized under "other applicable law," in addition to the enumerated statutes. But the addition of this language should not be read as dramatically modifying the meaning of the statute.

Under the rule of statutory construction known as *ejustem generis,* "such terms as 'other,' 'other thing,' 'other persons,' 'others,' 'otherwise,' or 'any other,' when preceded by a specific enumeration, are commonly given a restricted meaning, limited to articles of the same nature as those previously described."[33] Therefore, the phrase "other applicable law" language, read in light of the enumerated statutes that precede it, the OCSLA, Deepwater Ports Act and the Ocean Thermal Energy Conversion Act of 1980, must not drastically alter the meaning of the statute, and enlarge MMS's authority.

This section must be interpreted as excluding from the Department of Interior's authority those activities already authorized by the enumerated statutes and other similar laws in existence at the time of the Energy Act's passage. It is impermissible to read it as additionally *providing* some broader authority over activities for which there is not yet a statute that authorizes them, such as aquaculture.[34]

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[31] The American Heritage Dictionary of the English Language, Fourth Edition (2000) (Updated in 2003).
[32] *Legislative Hearing on H.R. 5156, supra* n. 2, at p.7.
[33] 72 Am. Juris. 2d. Statutes § 135.
[34] In Ms. Burton's testimony on H.R. 793, she further bolstered this interpretation, saying that the bill "H.R. 793 would amend the Outer Continental Shelf Lands Act (OCSLA) to set up a comprehensive framework for permitting alternative energy-related uses on the OCS *not already expressly covered* by existing statutes." (Emphasis added.)[34] Again, she did not say that the statute gave authority to MMS over activities not authorized under federal law, only that it gives the agency the authority over those activities not already expressly authorized by existing statutes. This

Therefore, just because an activity, such as aquaculture, has no present statutory authorization does not mean that MMS *ipso facto* has authority over it pursuant to the first portion of Section 388. The agency's general authority to grant leases, easements, and rights of way for certain activities not otherwise authorized by statute or other applicable law does not contradict second portion that says that MMS only has this authority to convey such property rights for "authorized marine-related uses." MMS may grant property interests for marine-related uses of energy facilities; however, they may not do so until they are separately and specifically "authorized" by Congress.

Congress may in the future authorize aquaculture on the OCS, and such a grant of authority would not necessarily preclude MMS from issuing leases, easements, or rights-of-way for such uses on energy facilities. Indeed, in each of the offshore aquaculture bills that have been introduced in Congress, the sponsors carefully carved out concurrent authority for MMS on and within one mile of energy facility leases.[35]

MMS staff have countered the agency is not in fact disregarding the "authorized" language in new OCSLA Section (p)(1)(D). The agency says it is simply construing the terms differently. The staff said that agency interprets Section (p)(1)(D)'s use of the word "authorized" to mean "not prohibited," while the introductory Section (p)(1)'s use of the word means a proactive grant of authority. Thus, under this interpretation of the statute, MMS is provided the general authority to grant leases, easements, and rights-of-way for all activities with marine-related purposes, so long as no other authority prohibits them.

There are two problems with this theory. First, this violates the "normal rule of statutory construction," as the U.S. Supreme Court has called it, that "identical words used in different parts of the same act are intended to have the same meaning."[36]

Further, it does not really reconcile the agency's perceived contradiction in the statute. Section 388 was written and passed in the context of the Alliance's challenge to the Cape Wind project. The Alliance argued in its appeal brief that ". . . federal ownership of the OCS is conclusively established as a matter of federal law. There is no possibility that the Cape Wind developers can obtain the required property rights, absent an Act of Congress."[37]

The Energy Policy Act was an attempt to rectify this by providing such clear property rights. Were Congress to have intended the word "authorized" in "authorized marine-related purposes" to mean "not-prohibited," then the last-second addition of that language would, at best, still be a superfluous gesture because, without the Energy Policy Act, all marine-related activities in the OCS were prohibited, or at least subject to challenge. Therefore, giving the Department the authority to convey property interests only to activities with "non-prohibited marine-related purposes" would give the Department neither additional nor lesser authority than an act that simply gave the Department the authority to convey such property interests for activities with "marine-related purposes."

Thus, interpreting "authorized" in Section (p)(1)(D) to mean "not prohibited," is an interpretation that offers a distinction without a difference. Such an interpretation, once again, improperly renders nugatory Section (p)(1)(D)'s use of the word "authorized."

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indicates that this section of the statute's primary purpose was preserving existing authorities. It was not intended to give the agency broad new authority over activities not yet authorized by federal law.

[35] *See* H.R. 2010 and S. 1609, the National Offshore Aquaculture Act of 2007, 110th Cong. at § 4 (e).

[36] *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (quoting *Dept. of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 342 (1994)).

[37] As quoted in Carolyn Kaplan, *supra*, n. 1 at p. 211 (2004).

Conclusion

MMS might argue that under this interpretation of the statute, it is given little authority to issue leases, easements, or rights of way for marine-related activities, since Congress has not authorized any. But, it is likely that Congress foresaw that it might possibly authorize certain marine-related activities soon after the passage of Energy Policy Act of 2005.[38] Congress was simply not ready to give the authority to MMS to regulate marine-related activities, such as offshore aquaculture, simply because they would use energy facilities. Congress wanted to first approve such activities in the OCS and make sure they were regulated by the appropriate agency before MMS could regulate their use of energy facilities.

While MMS might have wanted more authority over marine-related use of energy facilities, Congress did not provide it. The agency should not contort the statute in such ways as to meet their policy preferences when it is belied by the statute's language and history.

We therefore urge MMS to revisit its current interpretation of its statutory authority and make clear in its final rule that it will not issue leases, easements, or rights-of-way for marine-related uses, such as aquaculture, until such time as Congress authorizes the activity on the OCS.

Sincerely,

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[38] *See* n. 25, *supra.*