United States Department of the Interior
OFFICE OF THE SOLICITOR
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M-37059

Memorandum

To: Secretary

From: Solicitor

Subject: Secretary's Duty to Prevent Interference with Reasonable Uses of the Exclusive Economic Zone, the High Seas, and the Territorial Seas in Accordance with Outer Continental Shelf Lands Act Subsection 8(p), *Alternate Energy-related Uses on the Outer Continental Shelf*

I. Introduction

In a memorandum dated September 15, 2020, attorneys in the Division of Mineral Resources of the Solicitor's Office provided advice to David MacDuffee, Chief, Projects Coordination Branch, Office of Renewable Energy Programs, Bureau of Ocean Energy Management (BOEM), on the interpretation of subsection 8(p)(4)(I) of the Outer Continental Shelf Lands Act, as amended in 2005 (OCSLA)[1] (September 2020 Memo). The initial advice was that "prevention of interference with reasonable uses of the exclusive economic zone, the high seas, and the territorial seas," meant that BOEM should prevent interference with the legal right to fish or navigate, rather than prevent physical impediments to fishing and vessel transit. The Secretary has asked me to review this initial legal advice and provide my analysis of the language of subsection 8(p)(4)(I) to determine what the statement, "The Secretary shall ensure that any activity under this subsection is carried out in a manner that provides for— . . . (I) prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas" means, particularly in relation to fishing and vessel transit.

Rather than the highly constrained interpretation of "interference" cited in the September 2020 Memo, a strict textual reading of the statute lends itself to an interpretation that requires the Secretary, when assessing whether to approve an activity on the Outer Continental Shelf (OCS)

[1] Section 8 of OCSLA was amended by section 388 of the Energy Policy Act of 2005 (EPAct) to add a new paragraph (p). That modification to OCSLA was codified at 43 U.S.C. § 1337(p).

under subsection 8(p)(1) of OCSLA,[2] to prevent any and all interference with fishing or other reasonable uses. Under such a reading, if it is not possible to prevent interference, the Secretary would be required to disapprove the activity. However, as discussed below, just as the September 2020 Memo was impermissibly narrow in its interpretation, interpreting the provision to require prevention of "any and all interference"—even the prevention of *de minimis* or reasonable interference—would be overly proscriptive when the statutory provision is read in context and in light of established canons of statutory interpretation.

Accordingly, I conclude that the meaning of the phrase "prevention of interference with reasonable uses" requires a more nuanced interpretation. Based on the analysis below, I advise the Secretary that the phrase requires the Secretary to act to prevent interference with reasonable uses in a way that errs on the side of less interference rather than more interference. This means preventing all interference, if the proposed activity would lead to unreasonable interference, but not the type of interference that would be described as *de minimis* or reasonable. Moreover, the interference that the Secretary should prevent is more than impediments only to the legal right to engage in other reasonable uses.

Additionally, in its initial regulations promulgated after subsection 8(p)(4)(I) was enacted, BOEM included a regulatory provision at 30 C.F.R. § 585.621(c) (emphasis added) that requires a lessee to demonstrate in its Construction and Operations Plan (COP) that the proposed activities will not "*unreasonably* interfere with other uses of the OCS, including those involved with National security or defense." Though this interpretation adds a modifier to "interfere" that the statute did not provide—and thus differs from the statutory language—by disallowing interference that is unreasonable, the regulation implements an avenue for preventing all interference when that interference is unreasonable, thereby implementing the plain meaning of the statute in this context. At the same time, the regulatory provision would not bar *de minimis* or reasonable interference, and this is consistent with the statutory provision when it is read in context and considering established canons of statutory interpretation, as discussed below. Under this reading, in determining whether interference is unreasonable, I advise the Secretary to consider not only the individual proposed activity but how that activity would add to the overall level of interference with a reasonable use and to consider the nature of the interference from the perspective of the other users.

II. Purpose and Relevant Text of Section 388 of the Energy Policy Act of 2005

A. Purpose

Section 388 of the Energy Policy Act of 2005 (EPAct) amended OCSLA to authorize the Secretary to:

> grant a lease, easement, or right-of-way on the outer Continental Shelf for activities not otherwise authorized in this . . . Act [OCSLA] . . . if those activities:

[2] In this memorandum, I am focusing on wind energy activities under subsection 8(p)(1)(C) of OCSLA, but its findings are equally applicable to other activities that could be authorized by subsection 8(p)(1). 43 U.S.C. § 1337(p)(1).