

MAY 23 2013

PROGRAMMATIC AGREEMENT

Among

The U.S. Department of the Interior, Bureau of Ocean Energy Management;  
the State Historic Preservation Officers of North Carolina, South Carolina, Georgia, and Florida;  
The Catawba Indian Nation and  
The Advisory Council on Historic Preservation;

Regarding

Review of Outer Continental Shelf Renewable Energy Activities under  
Section 106 of the National Historic Preservation Act

WHEREAS, the Outer Continental Shelf Lands Act (OCSLA) grants the Secretary of the Interior the authority to issue leases, easements, or rights-of-way on the Outer Continental Shelf (OCS) for the purpose of renewable energy development, including wind energy development (*see* 43 U.S.C. § 1337(p)(1)(C)), and to promulgate regulations to carry out this authority (*see* 43 U.S.C. § (p)(8)); and

WHEREAS, the Secretary delegated this authority to the former Minerals Management Service (MMS), now the Bureau of Ocean Energy Management (BOEM), and promulgated final regulations implementing this authority at 30 CFR § 585; and

WHEREAS, under the renewable energy regulations, the issuance of leases and subsequent approval of wind energy development on the OCS is a staged decision-making process that occurs in distinct phases; and

WHEREAS, BOEM may issue commercial leases, limited leases, research leases, interim policy leases, Right-of-Way (ROW) grants, or Right-of-Use and Easement (RUE) grants on the OCS, and

WHEREAS, *Outer Continental Shelf* (OCS) means all submerged lands lying seaward and outside of the area of lands beneath navigable waters, as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301), whose subsoil and seabed appertain to the United States and are subject to its jurisdiction and control. *See* 30 CFR § 585.112; and

WHEREAS, *Commercial lease* means a lease, issued under the renewable energy regulations at 30 CFR § 585, that specifies the terms and conditions under which a person can conduct commercial activities. *See* 30 CFR § 585.112; and

WHEREAS, *Commercial activities* mean, for renewable energy leases and grants, all activities associated with the generation, storage, or transmission of electricity or other energy product from a renewable energy project on the OCS, and for which such electricity or other energy product is intended for distribution, sale, or other commercial use, except for electricity or other energy product distributed or sold pursuant to technology-testing activities on a limited lease. This term also includes activities associated with all stages of development, including initial site characterization and assessment, facility construction, and project decommissioning. *See* 30 CFR § 585.112; and

WHEREAS, *Limited lease* means a lease, issued under the renewable energy regulations at 30 CFR § 585, that specifies the terms and conditions under which a person may conduct activities on the OCS that support the production of energy, but do not result in the production of electricity or other energy product for sale, distribution, or other commercial use exceeding a limit specified in the lease. *See* 30 CFR § 585.112; and

WHEREAS, *Research lease* means an OCS lease, ROW grant, and/or RUE grant, issued under the renewable energy regulations at 30 CFR § 585.238, to a Federal agency or a state for renewable energy research activities that support the future production, transportation, or transmission of renewable energy. *See* 30 CFR § 585.112; and

WHEREAS, *Interim Policy lease* means a lease, issued under the interim policy announced in November 2007, before the issuance of the final regulations in April 2009, which allowed for limited leasing for resource data collection and technology testing activities. The Interim Policy leases have a five year term and provide no subsequent commercial rights. *See* 72 FR 62673; and

WHEREAS, *ROW grant* means an authorization, issued under the renewable energy regulations at 30 CFR § 585, to use a portion of the OCS for the construction and use of a cable or pipeline for the purpose of gathering, transmitting, distributing, or otherwise transporting electricity or other energy product generated or produced from renewable energy. An ROW grant authorizes the holder to install on the OCS cables, pipelines, and associated facilities that involve the transportation or transmission of electricity or other energy product from renewable energy projects. *See* 30 CFR § 585.112; and

WHEREAS, *RUE grant* means an easement, issued under the renewable energy regulations at 30 CFR § 585, that authorizes use of a designated portion of the OCS to support activities on a lease or other use authorization for renewable energy activities. An RUE grant authorizes the holder to construct and maintain facilities or other installations on the OCS that support the production, transportation, or transmission of electricity or other energy product from any renewable energy resource. *See* 30 CFR § 585.112; and

WHEREAS, *Qualified marine archaeologist* means a person who meets the Secretary of the Interior's Professional Qualification Standards for Archaeology (48 FR 44738 – 44739), and has experience analyzing marine geophysical data; and

WHEREAS, Commercial leases/limited leases and ROW and RUE grants do not grant the lessee or grantee the right to construct any facilities; rather, the lease or grant grants the lessee or grantee the right to use the leased area to develop its plans, which must be submitted to and approved by BOEM before the lessee or grantee implements its plans. *See* 30 CFR § 585.600 and 585.601; and

WHEREAS, under BOEM's renewable energy regulations at 30 CFR § 585, BOEM may review and approve, approve with modifications, or disapprove Site Assessment Plans (SAPs), Construction and Operations Plans (COPs), and General Activities Plans (GAPs), collectively "plans". *See* 30 CFR § 585.613(e), 585.628(f), 585.648(e); and

WHEREAS, under the Interim Policy, BOEM may review and object to project plans; and

WHEREAS, BOEM has determined that issuing leases and grants and approving plans constitute undertakings subject to Section 106 of the National Historic Preservation Act (NHPA; 16 U.S.C. § 470f), and its implementing regulations (36 CFR § 800); and

WHEREAS, the issuance of a commercial or limited lease, or a ROW or RUE grant has the potential to cause effects on historic properties insofar as it may lead to the lessee conducting geotechnical testing; and

WHEREAS, the issuance of a research or interim policy lease or approval of a plan has the potential to cause effects on historic properties insofar as it may lead to the lessee conducting additional geotechnical testing; constructing and operating site assessment facilities and renewable energy structures; and placing and operating a transmission cable; and

WHEREAS, BOEM may issue multiple renewable energy leases and grants and approve multiple plans associated with each lease or grant issued on the OCS offshore the Atlantic states; and

WHEREAS, BOEM has determined that the implementation of the Offshore Renewable Energy Program is complex, as the decisions on these undertakings are phased, pursuant to 36 CFR § 800.14(b); and

WHEREAS, 36 CFR § 800.4(b)(2) provides for deferral of final identification and evaluation of historic properties when provided for in an agreement executed pursuant to 36 CFR §800.14(b); and

WHEREAS, BOEM has determined that the identification and evaluation of historic properties shall be conducted through a phased approach, pursuant to 36 CFR § 800.4(b)(2), where the final identification of historic properties may occur after the issuance of a lease or grant and before the approval of a plan as a lessee conducts site characterization surveys in preparation for plan submittal (*see* 30 CFR 585); and

WHEREAS, the deferral of final identification and evaluation of historic properties could result in the discovery of unknown significant historic properties that could impact project planning, siting, and timelines; and

WHEREAS, 36 CFR § 800.14(b)(3) provides for developing programmatic agreements (agreements) for complex or multiple undertakings and § 800.14(b)(1) provides for using agreements when effects on historic properties cannot be fully determined prior to approval of an undertaking (*see* 800.14(b)(1)(ii)), and for other circumstances warranting a departure from the normal Section 106 process (*see* 800.14(b)(1)(v)); and

WHEREAS, the Section 106 consultations described in this agreement will be used to establish a process for identifying historic properties located within the undertakings' Areas of Potential Effects (APE), and to assess the potential adverse effects and to avoid, reduce, or resolve any such effects through the process set forth in this agreement; and

WHEREAS, historic property means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register (*see* 36 CFR § 800.16(l)(1)); and

WHEREAS, BOEM has identified and consulted with the State Historic Preservation Officers (SHPOs) for NC, SC, GA, and FL, (collectively, “the SHPOs”); and

WHEREAS, the Seminole Tribe of Florida and the Catawba Indian Nation are Tribes, as defined at 36 CFR § 800.16(m), have chosen to consult with BOEM and participate in development of this agreement; and

WHEREAS, BOEM shall continue to consult with these and other Tribes to identify properties of religious and cultural significance that may be eligible for listing in the National Register of Historic Places (including Traditional Cultural Properties or TCPs) and that may be affected by these undertakings; and

WHEREAS, BOEM involves the public and identifies other consulting parties through notifications, requests for comments, existing renewable energy task forces, contact with SHPOs, NEPA scoping meetings and communications for these proposed actions; and

WHEREAS, BOEM, the SHPOs, the Catawba Indian Nation, and the Advisory Council on Historic Preservation (ACHP) are signatories to this agreement.

NOW, THEREFORE, the signatories agree that Section 106 review shall be conducted in accordance with the following stipulations.

#### STIPULATIONS

- I. For the undertakings of issuing a commercial or limited lease, or a ROW or RUE grant, the signatories agree that:
  - A. The APE will be defined as the depth and breadth of the seabed that could potentially be impacted by geotechnical testing.
  - B. A reasonable and good faith effort to carry out appropriate identification of historic properties within the APE is presented in BOEM’s [Guidelines for Providing Geological and Geophysical, Hazards, and Archaeological Information Pursuant to 30 CFR Part 585](#) (hereafter, *Guidelines*; *see* 36 CFR § 800.4(b)(1)). Should BOEM wish to alter any archaeological survey-related information included in its *Guidelines*, BOEM will first consult with the signatories.
  - C. Prior to lease or grant under this part, BOEM will identify consulting parties, pursuant to 36 CFR 800.3(f). BOEM will consult on existing, non-proprietary information regarding the proposed undertaking and the geographic extent of the APE, as defined in Stipulation I.A. BOEM also will solicit additional information on historic properties within the APE from the consulting parties and the public.

D. BOEM will require lessees and grantees to avoid adverse effects to historic properties where practicable through lease stipulations. Prior to issuing a lease or grant under this part, BOEM will record a finding of *No historic properties affected*, consistent with 36 CFR § 800.4(d). If adverse effects to historic properties cannot be avoided, BOEM will make a determination of *Historic properties affected* and follow 36 CFR § 800.4(d)(2); and resolve any adverse effect by following 36 CFR § 800.6.

II. For the undertakings of approving a plan, except as described under Stipulation IV (below), the signatories agree that:

A. The APE will be defined as the depth and breadth of the seabed that could potentially be impacted by seafloor/bottom-disturbing activities associated with the undertakings; the onshore viewshed from which renewable energy structures would be visible; and where applicable, the depth and breadth, and viewshed of onshore locations where transmission lines come ashore until they connect to existing grid structures.

B. The following constitute a reasonable and good faith effort to carry out appropriate identification of historic properties; *see* 36 CFR § 800.4(b)(1):

1. for the identification of historic properties within the seabed portion of the APE located on the OCS, historic property identification survey results generated in accordance with BOEM's *Guidelines*; and
2. for the identification of historic properties within the seabed portion of the APE located in state waters, within the viewshed portion of the APE, and within the onshore terrestrial portion of the APE, historic property identification survey(s) conducted in a manner acceptable to the affected SHPO (or affected Tribe, if on tribal lands).

C. Prior to approving a plan, BOEM will identify consulting parties, pursuant to 36 CFR 800.3(f). BOEM will consult on existing, non-proprietary information regarding the proposed undertaking and the geographic extent of the APE, as defined in Stipulation II.A. BOEM also will solicit from the consulting parties and the public additional information on historic properties within the APE.

D. Prior to approving a plan, BOEM will treat all identified potential historic properties as historic properties eligible for inclusion on the National Register unless BOEM determines that a historic property is ineligible, pursuant to 36 CFR § 800.4(c).

E. Prior to approving a plan, BOEM will avoid all identified historic properties by requiring the lessee to relocate elements of the proposed project which may affect properties, resulting in a finding of *No historic properties affected* (36 CFR § 800.4(d)(1)).

1. For the seabed portion of the APE, if a potential historic property is identified, and the lessee chooses to conduct additional investigations (e.g. diver investigation, Remotely Operated Vehicle [ROV] survey, or other methods),

and if additional investigations demonstrate that a potential historic property does not exist, then BOEM will make a determination of *No historic properties affected* and follow 36 CFR § 800.4(d)(1).

2. If a historic property may be affected, BOEM will evaluate the historic significance of the property, in accordance with 800.4(c); make a determination of *Historic properties affected* and follow 36 CFR § 800.4(d)(2); and resolve any adverse effects by following 36 CFR § 800.6.

III. For the undertakings of issuing a research or interim policy lease, except as described under Stipulation IV (below), the signatories agree that:

- A. The APE will be defined as the depth and breadth of the seabed that could potentially be impacted by seafloor/bottom-disturbing activities associated with the undertakings; the onshore viewshed from which renewable energy structures would be visible; and where applicable, the depth and breadth, and viewshed of onshore locations where transmission lines come ashore until they connect to existing grid structures.
- B. The following constitute a reasonable and good faith effort to carry out appropriate identification of historic properties; *see* 36 CFR § 800.4(b)(1):
  1. for the identification of historic properties within the seabed portion of the APE located on the OCS, historic property identification survey results generated in accordance with BOEM's *Guidelines*; and
  2. for the identification of historic properties within the seabed portion of the APE located in state waters, within the viewshed portion of the APE, and within the onshore terrestrial portion of the APE, historic property identification survey(s) conducted in a manner acceptable to the affected SHPO (or affected Tribe, if on tribal lands).
- C. Prior to issuing a research or interim policy lease under this part, BOEM will identify consulting parties, pursuant to 36 CFR 800.3(f). BOEM will consult on existing, non-proprietary information regarding the proposed undertaking and the geographic extent of the APE, as defined in Stipulation III.A. BOEM also will solicit from the consulting parties and the public additional information on historic properties within the APE.
- D. Prior to issuing a research or interim policy lease under this part, BOEM will require lessees and grantees to avoid adverse effects to historic properties where practicable through lease stipulations. Prior to issuing a lease or grant under this part, BOEM will record a finding of *No historic properties affected*, consistent with 36 CFR § 800.4(d). If adverse effects to historic properties cannot be avoided, BOEM will make a determination of *Historic properties affected* and follow 36 CFR § 800.4(d)(2); and resolve any adverse effect by following 36 CFR § 800.6.

#### IV. Exempted Categories

Pursuant to 36 CFR § 800.14(c), the signatories agree to exempt from Section 106 review the following categories of activities:

- A. Archaeological Sampling: Vibracores or other direct samples collected, by or under the supervision of a Qualified Marine Archaeologist, for the purposes – at least in part – of historic property identification or National Register eligibility testing and evaluation.
  - B. Meteorological Towers and/or Buoys: Proposed construction and operation of meteorological towers and/or installation of meteorological buoys when the results of geophysical data collected meet the standards established in BOEM’s *Guidelines* and either: 1) resulted in the identification of no archaeological site within the seabed portion of the APE for the tower and/or buoy, or 2) if the project APE can be relocated to an area that does not contain an archaeological site, if any such sites are identified during geophysical survey. The signatories agree that offshore meteorological towers and/or buoys have no effect on onshore historic properties since they are temporary in nature and indistinguishable from lighted vessel traffic.
- V. Tribal Consultation. BOEM shall continue to consult with the Tribes throughout the implementation of this agreement in a government-to-government manner consistent with Executive Order 13175, Presidential memoranda, and any Department of the Interior policies, on subjects related to the undertakings.
- VI. Public Participation
- A. Because BOEM and the signatories recognize the importance of public participation in the Section 106 process, BOEM shall continue to provide opportunities for public participation in Section 106-related activities, and shall consult with the signatories on possible approaches for keeping the public involved and informed throughout the term of the agreement.
  - B. BOEM shall keep the public informed and may produce reports on historic properties and on the Section 106 process that may be made available to the public at BOEM’s headquarters, on the BOEM website, and through other reasonable means insofar as the information shared conforms to the confidentiality clause of this agreement.
- VII. Confidentiality. Because BOEM and the signatories agree that it is important to withhold from disclosure sensitive information such as that which is protected by NHPA Section 304 (16 U.S.C. § 470w-3) (*e.g.*, the location, character and ownership of an historic resource, if disclosure would cause a significant invasion of privacy, risk harm to the historic resources, or impede the use of a traditional religious site by practitioners), BOEM shall:
- A. Request that each signatory inform the other signatories if, by law or policy, it is unable to withhold sensitive data from public release.

- B. Arrange for the signatories to consult as needed on how to protect such information collected or generated under this agreement.
- C. Follow, as appropriate, 36 CFR § 800.11(c) for authorization to withhold information pursuant to NHPA Section 304, and otherwise withhold sensitive information to the extent allowable by laws including the Freedom of Information Act, 5 U.S.C. § 552, through the Department of the Interior regulations at 43 CFR Part 2.
- D. Request that the signatories agree that materials generated during consultation be treated by the signatories as internal and pre-decisional until they are formally released, although the signatories understand that they may need to be released by one of the signatories if required by law.

### VIII. Administrative Stipulations

#### A. In coordinating reviews, BOEM shall follow this process:

1. Standard Review: The signatories shall have a standard review period of thirty (30) calendar days for commenting on all documents which are developed under the terms of this agreement, from the date they are received by the signatory.
2. Expedited Request for Review: The signatories recognize the time-sensitive nature of this work and shall attempt to expedite comments or concurrence when BOEM so requests. The expedited comment period shall not be less than fifteen (15) calendar days from the date such a request is received by the signatory.
3. If a signatory cannot meet BOEM's expedited review period request, it shall notify BOEM in writing within the fifteen (15) calendar day period. If a signatory fails to provide comments or respond within the time frame requested by BOEM (either standard or expedited), then BOEM may proceed as though it has received concurrence from that signatory. BOEM shall consider all comments received within the review period.
4. Unless otherwise indicated below, all signatories will send correspondence and materials for review via electronic media unless a signatory requests, in writing, that BOEM transmit the materials by an alternate method specified by that signatory. Should BOEM transmit the review materials by the alternate method, the review period will begin on the date the materials were received by the signatory, as confirmed by delivery receipt.
  - a. SC SHPO Review Specifications: All materials for formal review will be sent to SC SHPO in hard copy.
  - b. GA SHPO Review Specifications: All materials for formal review will be sent to GA SHPO in hard copy. Except in exceptional, emergency circumstances, BOEM acknowledges that GA SHPO cannot meet expedited review requests.



5. Each signatory shall designate a point of contact for carrying out this agreement and provide this contact's information to the other signatories, updating it as necessary while this agreement is in force. Updating a point of contact alone shall not necessitate an amendment to this agreement.
- B. **Dispute Resolution.** Should any signatory object in writing to BOEM regarding an action carried out in accordance with this agreement, or lack of compliance with the terms of this agreement, the Signatories shall consult to resolve the objection. Should the Signatories be unable to resolve the disagreement, BOEM shall forward its background information on the dispute as well as its proposed resolution of the dispute to the ACHP. Within 45 calendar days after receipt of all pertinent documentation, the ACHP shall either: (1) provide BOEM with written recommendations, which BOEM shall take into account in reaching a final decision regarding the dispute; or (2) notify BOEM that it shall comment pursuant to 36 CFR § 800.7(c), and proceed to comment. BOEM shall take this ACHP comment into account, in accordance with 36 CFR § 800.7(c)(4). Any ACHP recommendation or comment shall be understood to pertain only to the subject matter of the dispute; BOEM's responsibility to carry out all actions under this agreement that are not subjects of dispute shall remain unchanged.
  - C. **Amendments.** Any signatory may propose to BOEM in writing that this agreement be amended, whereupon BOEM shall consult with the signatories to consider such amendment. This agreement may then be amended when agreed to in writing by all signatories, becoming effective on the date that the amendment is executed by the ACHP as the last signatory.
  - D. **Coordination with other Federal Agencies.** In the event that another Federal agency believes it has Section 106 responsibilities related to the undertakings which are the subject of this agreement, BOEM will request to coordinate its review with those other agencies. Additionally, that agency may attempt to satisfy its Section 106 responsibilities by agreeing in writing to the terms of this agreement and notifying and consulting with the SHPOs and the ACHP. Any modifications to this agreement that may be necessary for meeting that agency's Section 106 obligations shall be considered in accordance with this agreement.
  - E. **Adding Concurring Parties.** In the event that another party wishes to assert its support of this agreement, that party may prepare a letter indicating its concurrence, which BOEM will attach to the agreement and circulate among the signatories.
  - F. **Term of Agreement.**
    1. The agreement shall remain in full force for twenty-five (25) years from the date the agreement is executed, defined as the date the last signatory signs, unless otherwise extended by amendment in accordance with this agreement. The term is related to the standard length of the operations term of commercial leases, which is given at 30 CFR § 585.235.

2. The signatories agree to meet every five years, beginning from the date the agreement is executed, to discuss the agreement and to determine whether amendment or termination is necessary.

G. Termination.

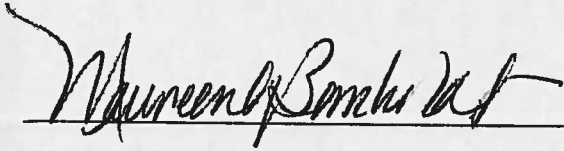
1. If any signatory determines that the terms of the agreement cannot be carried out or are not being carried out, that signatory shall notify the other signatories in writing and consult with them to seek amendment of the agreement. If within sixty (60) calendar days of such notification, an amendment cannot be made, any signatory may terminate the agreement upon written notice to the other Signatories.
  2. If termination is occasioned by BOEM's final decision on the last plan considered under the Renewable Energy Regulations at 30 CFR § 585, BOEM shall notify the signatories and the public, in writing.
- H. Anti-Deficiency Act. Pursuant to 31 U.S.C. § 1341(a)(1), nothing in this agreement shall be construed as binding the United States to expend in any one fiscal year any sum in excess of appropriations made by Congress for this purpose, or to involve the United States in any contract or obligation for the further expenditure of money in excess of such appropriations.
- I. Existing Law and Rights. Nothing in this agreement shall abrogate existing laws or the rights of any consulting party or signatory to this agreement.
- J. Compliance with Section 106. Execution and implementation of this agreement evidences that BOEM has satisfied its Section 106 responsibilities for all aspects of these proposed undertakings by taking into account the effects of these undertakings on historic properties and affording the ACHP a reasonable opportunity to comment with regard to the undertakings.

bc: Official File  
OREP Chron

BOEM: OREP: BCarrier;jl: 05/9/2013: 703-787-1623

Filename: AEAU/ERB/Environmental Compliance/2011-ATL-009NC/106-G2G/South Atlantic  
PA

Programmatic Agreement concerning Review of Renewable Energy Activities under Section 106  
of National Historic Preservation Act




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Date: May 23, 2013

Maureen A. Bornholdt  
Program Manager  
Office of Renewable Energy Programs

**Programmatic Agreement concerning Review of Renewable Energy Activities under Section 106  
of National Historic Preservation Act**



Date: 6-26-13

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**Dr. W. Eric Emerson  
South Carolina State Historic Preservation Officer**

Programmatic Agreement concerning Review of Renewable Energy Activities under Section 106  
of National Historic Preservation Act



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Dr. David Crass  
Georgia Deputy State Historic Preservation Officer,  
Director, Historic Preservation Division

Date: 3 JUNE '13

Programmatic Agreement concerning Review of Renewable Energy Activities under Section 106  
of National Historic Preservation Act

  
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Date: 6/19/13 \_\_\_\_\_

Robert F. Bendus  
Florida State Historic Preservation Officer  
Director, Division of Historical Resources

**Programmatic Agreement concerning Review of Renewable Energy Activities under Section 106  
of National Historic Preservation Act**

Winonah H. Haire Date: 6/27/13

**Dr. Winonah Haire  
Tribal Historic Preservation Officer  
Catawaba Indian Nation**

Programmatic Agreement concerning Review of Renewable Energy Activities under Section 106  
of National Historic Preservation Act

John M. Fowler

Date: 5/31/13

John M. Fowler  
Executive Director  
Advisory Council on Historic Preservation