



Michelle Morin
Chief, Environment Branch for Renewable
Energy
Bureau of Ocean Energy Management
45600 Woodland Rd,
Sterling, VA 20166

January 7, 2022

Re: Commercial Wind Lease Issuance and Site Assessment Activities on the Atlantic Outer Continental Shelf Offshore North Carolina, Draft Supplemental Environmental Assessment, BOEM-2021-0084

Submitted via regulations.gov

The American Clean Power Association (ACP) welcomes the opportunity to provide comments on the U.S. Bureau of Ocean Energy Management’s (BOEM) Draft Supplemental Environmental Assessment for Commercial Wind Lease Issuance and Site Assessment Activities on the Atlantic Outer Continental Shelf Offshore North Carolina (Draft SEA). While we acknowledge that there is likely insufficient time to expand the scope of leasing in the Carolina Long Bay prior to the onset of the July 1, 2022, moratorium, as ACP had previously suggested in its September 13, 2021, comment,¹ we offer the following additional comments on the Draft SEA.

A. ACP agrees with BOEM’s Preferred Alternative A.

ACP supports BOEM’s finding that Alternative A is the preferred alternative.² In the EA, BOEM notes that although BOEM identified new information and changed circumstances regarding potential impacts and issues that were not available at the time the 2015 EA was

¹ See ACP comments on Notice to Publish a North Carolina Draft Supplemental Environmental Assessment for Commercial Wind Lease and Site Assessment Activities on the Atlantic Outer Continental Shelf Offshore North Carolina, available at https://downloads.regulations.gov/BOEM-2021-0055-0025/attachment_1.pdf. We note that the moratorium that takes effect on July 1, 2022 remains in place.

² Although Alternative A assumes up to three leases in the Wilmington East area, we note that ACP in its comments on that North Carolina PSN (January 3, 2022) remained silent and did not recommend whether Wilmington East should be split up. We note that BOEM found in the SEA that “the issuance of one to three leases versus only one lease in the Wilmington East WEA is expected to result in substantially the same impacts.”

published on September 17, 2015, the impacts resulting from the Proposed Action being analyzed here are not substantially different from those analyzed in the 2015 EA. Furthermore, although Alternative C included additional restrictions on prohibiting high-resolution geological and geophysical (G&G) surveys from November 1 through April 30 during the North Atlantic right whale (NARW) migratory period, BOEM correctly found that Alternative C had the same impacts as Alternative A.

B. Updated References

ACP notes several references that require updating between the 2015 EA³ and the current SEA. The 2015 EA considered the environmental impacts of issuing leases and approving site assessment plans (SAPs) within the entirety of the three WEAs offshore of North Carolina. However, this SEA only addresses the Wilmington East WEA. In addition, on November 1, 2021, BOEM published a Proposed Sale Notice (PSN) for the Wilmington East WEA, which removed the lease blocks overlapping NARW critical habitat and areas used for training identified by the Department of Defense from leasing consideration. However, there are BMPs included in the SEA that are not relevant to the geographical area and should be removed or updated, including:

- BMP 2.1, References sturgeon restrictions in Hudson and Delaware Rivers;
- BMP 4.8, Addresses seasonal restricted surveys in Cape Cod Bay due to NARW; and
- BMP 4.11, Addresses minimizing impact to loggerhead sea turtle critical habitat - Wilmington East WEA is not within the loggerhead critical habitat, as BOEM notes in the SEA and is reflected in the 2015 EA, Figure 4-10.

In addition, the 2015 EA assumed that there will be up to one cable for each individual lease, each with a 984-foot-wide (300-meter-wide) survey corridor to shore and a maximum of 83.6 nm of cable route to be surveyed for three cables. The impacts resulting from the revised scenario are not expected to be different from those anticipated in the conservative scenario analyzed in the 2015 EA, since the 984-foot-wide (300-meter-wide) survey corridor analyzed in the 2015 EA is more than the area contemplated in BOEM's regulations to accommodate three

³ 80 FR 56494.

cables (i.e., 200 ft project easement, 30 CFR 585.628(g)(2)). However, ACP notes that survey corridors can be wider than 300 meters, and the FEA should be revised to reflect this.

C. Impact Determinations

ACP concurs with the impact determinations made by BOEM in the Draft SEA with respect to benthic resources; finfish and Essential Fish Habitat; recreational and commercial fisheries; birds and bats; air quality; water quality; demographics and economics; recreation and tourism; navigation and vessel traffic; cultural, historical, and archaeological resources; and visual resources. These all indicate no substantive differences, and in some cases, reductions in effects from those determined in the 2015 EA that there would be no effect on land use, coastal infrastructure, and environmental justice. We also agree with BOEM's determination that the shift from one meteorological tower in the 2015 EA to only meteorological buoys in the SEA reduces the potential impacts on threatened and endangered species and marine mammals to negligible to minor.

D. Mitigation Measures.

ACP provides the following comments on the Draft SEA's mitigation measures within the potential lease areas.

1. ESA Section 7 Programmatic Consultation Concerns

As an initial matter, ACP would like to take this opportunity to incorporate by reference its November 9, 2021, letter to BOEM and National Marine Fisheries Service (NMFS) (Nov. 9 ACP Letter, Attachment A) expressing concerns regarding prohibitive conditions imposed on offshore wind data collection activities off the U.S. Atlantic Coast.⁴ These conditions were imposed through Project Design Criteria (PDC) by the agencies without consultation with the affected offshore wind industry members through a programmatic Endangered Species Act (ESA) section 7 consultation completed by NMFS on June 29, 2021, in a letter of concurrence (LOC).⁵ As discussed further in our letter, the PDCs contain Best Management Practices (BMPs) that are unnecessary to protect ESA-listed species and are inconsistent with requirements for similar surveys in other contexts, or are unrelated to species protection. This LOC has been

⁴ See ACP Letter to BOEM/NMFS (November 9, 2021), attached hereto as Exhibit A.

⁵ NMFS Concurrence Letter (June 29, 2021) (concurring with BOEM's "not likely to adversely affect" determination for offshore wind activities off the U.S. Atlantic Coast), available at: https://www.boem.gov/sites/default/files/documents/renewable-energy/Final-NLAA-OSW-Programmatic_0.pdf.

incorporated into the Draft SEA, and we ask that BOEM account for ACP’s concerns expressed in our letter —and any subsequent discussions thereon with BOEM and NMFS—in the final EA in this proceeding and the provisions of the Wilmington East lease(s).

2. BOEM Mitigation Measures.

ACP agrees with BOEM’s finding that based on new information, the 200-m exclusion zone for high resolution geophysical sound sources is no longer needed and should not be required. However, BOEM did not take ACP’s recommendation from our September 13, 2021, comments regarding shutdowns related to HRG surveys (i.e., prohibitive and does not align with agency determinations in other offshore survey scenarios) fully into account in Appendix A of the Draft SEA. While BOEM states that it is not requiring shutdown, pre-start clearance, or ramp-up for equipment other than boomers, sparkers, or bubble guns, it nevertheless continues to include mitigation for activities that include other HRG survey equipment and those that do not require an MMPA permit. It also continues to conflate requirements under the LOC (applicable to only ESA-listed species) for requirements that should be applied to all “protected” species under the MMPA, meaning all marine mammals, even if not listed.

Below are further specific comments on the mitigation measures in the draft SEA:

- **PDC 4:** BOEM calls PDC 4 “Minimize Interactions with Protected Species During Geophysical Surveys,” but this is parallel to the LOC section PDC 4 “Minimize Interactions with Listed Species during Geophysical Survey Operations.” We request that BOEM change the title of PDC 4 to match the LOC, and change the language in PDC 4 to “listed species” where it currently says “protected species.” The LOC does not cover non-listed marine mammals, and decisions regarding mitigation associated with activities for non-listed protected marine mammals under MMPA should be made on a project-by-project basis via NMFS’ technical advice and permitting. It is inappropriate for BOEM to apply the requirements of ESA-listed species to all marine mammals if they are listed.
- **BMP 4.1.3:** Revise to reflect the current technology for autonomous surface vessel use. The requirement to use a mother vessel with Protected Species Observers (PSOs) in conjunction with autonomous surface vessels (ASVs) negates one of the key benefits of this developing technology. ASVs represent an

advancement in survey equipment that facilitates monitoring while reducing risks to health, safety, and the environment that are normally associated with a crewed vessel. The requirement to have a chase or mother vessel with cameras and PSOs negates the benefits of using ASVs for those purposes and increases the risk of marine mammal strikes when compared to ASVs alone. Each of these monitoring measures is impracticable and counter to the best available science. Therefore, they should be eliminated from offshore wind survey requirements.

- **BMP 4.2:** The requirement for a 500-m shutdown for NARW should be removed in its entirety. This requirement is unnecessary given the small acoustic footprint of HRG surveys and is not supported by science. For example, the 500-m exclusion area for NARW is roughly three times the distance that NMFS established to avoid Level B harassment of marine mammals, including NARW, in its 2020 Incidental Harassment Authorization for Ørsted’s offshore wind survey activities in coastal waters from New York to Massachusetts.⁶ Moreover, NMFS has established that clearance, exclusion and shut-down zones should be based on peak pressure injury criteria, and that defining exclusion zones based on other acoustic thresholds for behavioral response or injury using an accumulation of energy, “has questionable relevance as a standard protocol for mobile sources, given the relative motion of the source and the animals.”⁷ In fact, the LOC itself suggests that exclusion and shut-down areas are unnecessary here, noting that even at peak noise levels (i.e., using sparkers), “[a]nimals in the survey area during the HRG survey are unlikely to incur any hearing impairment due to the characteristics of the sound sources....”⁸
- **BMP 4.3:** While conditions are not contained in the LOC letter, BOEM nevertheless imposes restrictions: e.g., 200-m shutdown for non-ESA listed

⁶ See NMFS, Incidental Harassment Authorization issued to Ørsted Wind Power North America, LLC (“Ørsted”) (Sept. 25, 2020), at 2 (sections 4(d)(i), (ii)) (providing 141-meter marine mammal harassment zone for impulsive sources such as boomers and sparkers, and a 54-meter harassment zone for non-impulsive, non-parametric sub-bottom profilers). NMFS also exempted Ørsted’s non-impulsive source HRG surveys from shut-down requirements. Id. at 4 (section 4(g)(ix)).

⁷ NMFS, Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico, 86 Fed. Reg. 5322, 5414 (Jan. 19, 2021).

⁸ LOC at 16 (noting sound source levels of 176 to 205 dB re 1 µPa-m and the “generally very short pulses and duration of the sound.”).

species (BMP 4.3.4) is inconsistent with 100-m shutdown for listed ESA species other than NARW. This incongruity is discussed in section B of the attached Nov. 9 ACP Letter (Attachment A).

- **BMP 4.3.5/4.3.6:** NMFS generally does not require PSOs to determine whether small delphinids are “approaching” a vessel or towed acoustic sources (BMP 4.3.5) and allows for alternative monitoring plans for night and low-visibility (BMP 4.3.6). However, BMP 4.4 is in contradiction to those subsections in that it suggests that the ITA under the MMPA would require a 200-m zone for non-listed marine mammals and be monitored for 30 minutes of pre-clearance. This also is in contradiction to BOEM’s statement that such actions are not required for some HRG sources (see page A-4). Mitigation associated with non-ESA-listed marine mammals should be fully determined through MMPA technical advice and the ITA permitting processes. As noted above, we suggest that BOEM change the title of PDC 4 to “listed species” from “protected species” and remove references to non-ESA-listed marine mammals. If BOEM wants to discuss PDCs and BMPs for non-ESA-listed marine mammals, it should make a statement that PDCs and BMPs for non-listed marine mammals will be considered by NMFS through issuance of ITAs, if necessary, under the MMPA. There is no reason to enumerate the mitigation measures in the SEA, as BOEM cannot know what NMFS will or will not require for individual MMPA permits.
- **BMP 4.4:** Remove the language: “...and 200 meters for non-ESA-listed marine mammals.” Change language: "Before any noise-producing survey-equipment is deployed..." to the language from the LOC: "Before any noise-producing survey equipment (operating at <180 kHz) is deployed..."
- **BMP 4.4.1:** Change language: "If any protected species..." to "If any ESA-listed species...." for the same reasons discussed above.
- **BMP 4.9:** Addresses reducing operating frequencies of boomer, sparker, or bubble gun sound sources used within the NARW Critical Habitat. Operation of this equipment has no effect on the criteria that make the habitat designated Critical NARW Habitat (warmer water, lower wind speeds, less frequent storms, lower wave height). Additionally, the WEA is outside critical habitat, although

surveys for cables could be within critical habitat. Seasonal restrictions on surveys are not practical for offshore wind development and in this case are not relevant as critical habitat is not impacted by survey equipment. HRG surveys including the specified sources are regularly conducted year-round and at times when NARW are known to be present. Sufficient monitoring and mitigation measures are implemented to avoid acoustic impacts to NARWs. In addition, revise language: "Boomer, sparker, or bubble gun sound sources..." to match the LOC language "Sound sources..."

- **BMP 4.10:** Addresses separation distance between vessels to ensure sound sources don't overlap. However, the condition is not related to species protection. There is no scientific basis for any such separation distance requirement, and it is worth noting that oil and gas HRG surveys in the Gulf of Mexico and Atlantic OCS are not subject to similar separation requirements. As such, a separation distance requirement is not appropriately imposed as part of the LOC. In addition, revise language: "boomer, sparker, or bubble gun" to "sound sources" to match LOC.

3. Protected Species Observer Requirements

In addition, there are several inconsistencies between the LOC and the BMPs listed in the SEA with regard to PSO requirements. In order to align with NMFS recommendations, ACP recommends that BOEM make the following revisions:

- **PDC 8 (Reporting Requirements):** In the SEA, BOEM added the requirement that lessees ensure that PSOs submit monthly reporting of survey activities to BOEM, a requirement that was not included in the LOC. BOEM should remove this requirement, not only because it is inconsistent with the LOC, but also because this requirement is not typical in the industry and would create a new administrative burden for both the lessee and BOEM.
- **BMP 8.1 (Report Data):** In the SEA, BOEM added the requirement that lessees include detections with PAM in the report of survey activities to BOEM, a requirement that was not included in the LOC and is not mentioned elsewhere in the BMPs. BOEM should remove this requirement.

- **BMP 8.2:** In the SEA, BOEM added the requirement that lessees include “factors that may be contributing to impaired observations during active surveys, such as environmental conditions or detections” in the final monitoring report on yearly survey activities, a requirement that was not included in the LOC. While the LOC recommended that such factors be recorded, there was no requirement to include the specific factors in the summary of records to BOEM. BOEM should remove this requirement.

II. Conclusion

We urge BOEM to consider the foregoing comments on the Draft SEA as it finalizes its environmental analysis in advance of the Wilmington East lease sale.

Respectfully,

Johanna Jochum
Counsel

Josh Kaplowitz
VP of Offshore Wind

American Clean Power Association
1501 M Street
Washington, D.C. 20005
202-657-7434

Enclosure: Attachment A, November 9, 2021 ACP Letter to BOEM/NMFS



November 9, 2021

James F. Bennett
Program Manager, Office of Renewable Energy Projects
U.S. Department of the Interior
Bureau of Ocean Energy Management
45600 Woodland Road, VAM-OREP
Sterling, VA 20166

Jennifer Anderson
Assistant Regional Administrator for Protected Resources,
Greater Atlantic Regional Fisheries Office
U.S. Department of Commerce
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
55 Great Republic Drive
Gloucester, MA 01930

Mr. Bennett and Ms. Anderson:

The purpose of this letter is to outline the American Clean Power Association’s (“ACP”)¹ serious concerns regarding prohibitive conditions imposed on offshore wind data collection activities off the U.S. Atlantic Coast by the Bureau of Ocean Energy Management (“BOEM”) and National Marine Fisheries Service (“NMFS”) (together, the “Agencies”). These Project Design Criteria (“PDC”) were imposed by the Agencies without consultation with affected offshore wind industry members through a programmatic Endangered Species Act (“ESA”) section 7 consultation completed by NMFS on June 29, 2021 (the “Consultation”).² The PDCs contain Best Management Practices (“BMP”) that are not supported by the best available science, are unnecessary to protect ESA-listed species, are inconsistent with requirements for similar surveys in other contexts, or are unrelated to species protection.

The Agencies’ imposition of these BMPs will frustrate the offshore wind industry’s ability to timely and economically implement high resolution geophysical (“HRG”) surveys to facilitate project development – a result that is inconsistent with the Biden Administration’s goal of deploying 30 gigawatts of offshore wind by 2030 as well as BOEM’s goal of approving at least 16

¹ ACP is the national trade association representing the renewable energy industry in the United States, bringing together hundreds of member companies and a national workforce located across all 50 states with a common interest in encouraging the deployment and expansion of renewable energy resources in the United States. By uniting the power of wind (both land-based and offshore), solar, storage, and transmission companies and their allied industries, we are enabling the transformation of the U.S. power grid to a low-cost, reliable, and renewable power system. The American Wind Energy Association (AWEA) merged into ACP on January 1, 2021. Additional information is available at <http://www.cleanpower.org>.

² 16 U.S.C. § 1536(a)(2). NMFS’s June 29, 2021, concurrence with BOEM’s “not likely to adversely affect” determination for offshore wind activities off the U.S. Atlantic Coast is available at: https://www.boem.gov/sites/default/files/documents/renewable-energy/Final-NLAA-OSW-Programmatic_0.pdf



Construction and Operation Plans (“COP”) by 2025.³ Meeting these important national goals requires close coordination with offshore wind industry members to adopt reasonable and effective PDCs, something that the Agencies failed to do in this case.

As background, BOEM authorizes Site Assessment Plans (“SAP”) and COPs as part of its management of offshore wind siting and development on the Outer Continental Shelf (“OCS”) pursuant to the Outer Continental Shelf Lands Act.⁴ In February 2021, BOEM submitted a biological assessment (“BA”)⁵ to NMFS evaluating the potential impacts to ESA-listed species from offshore wind data collection activities on the Atlantic OCS over a 10-year period (June 2021 to June 2031). The activities evaluated include shallow hazard, geological, geotechnical, biological, and archaeological surveys in the North Atlantic, Mid-Atlantic, and South Atlantic planning areas and adjacent state jurisdictional coastal waters. Subsequently, on June 10, 2021 – without consultation with the offshore wind industry – BOEM revised its BA to include the modified, problematic PDCs addressed in this letter. On June 29, 2021, NMFS issued a letter concluding the Consultation based in part on the modified PDCs provided by BOEM (“Concurrence”).

In the sections that follow, ACP outlines the procedural and substantive errors resulting from the Consultation. We respectfully request a meeting with the Agencies to discuss immediate steps to correct these errors and resolve problematic PDCs for offshore wind data collection surveys off the U.S. Atlantic Coast.

I. The Consultation failed to include necessary coordination with applicants.

The ESA consultation process does not include a public review component but does guarantee opportunities to participate for “applicants.” The definition of “applicant” includes any individual, corporation, or association “who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.”⁶ In a programmatic consultation, NMFS has said that an entity is considered an applicant when they are a “party to a discrete action.”⁷ For example, in a programmatic consultation with U.S. Forest Service on its timber management operations, a timber company is an applicant “where they are already the successful bidder on a timber sale.”⁸ Similarly here, ACP’s members include offshore wind leaseholders that have a discrete interest in BOEM’s approval of survey activities as part of SAPs and COPs.⁹ Each of these companies are therefore “applicants” for purposes of the Consultation.

³ See The White House, *Fact Sheet: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs* (Mar. 29, 2021) (available [here](#)).

⁴ 43 U.S.C. § 1337(p)(1)(C); 30 C.F.R. pt. 585.

⁵ BOEM named its document a “biological assessment” notwithstanding that the survey activities evaluated therein are not “major construction activities” requiring a BA pursuant to 50 C.F.R. § 402.12(b)(1). While this document would typically be called a “biological evaluation,” ACP uses the term BA throughout this letter for consistency with BOEM’s document name. This should not be construed to suggest that ACP believes survey activities are major construction activities.

⁶ 50 C.F.R. § 402.02 (definition of “applicant”).

⁷ NMFS & U.S. Fish and Wildlife Service, *Endangered Species Consultation Handbook*, 2-12 (Mar. 1998).

⁸ *Id.*

⁹ ACP members who hold leases in the Atlantic OCS are parties to the discrete activities considered in the Consultation, as evidenced by the Agencies’ own language. For example, NMFS’s Concurrence states that “[a]ll activities considered here *will comply* with a set of PDC (see Appendix B).” Concurrence at 5 (emphasis added).



As applicants, these ACP members were entitled to participate in the Consultation by submitting information and reviewing draft documents. In fact, the ESA consultation regulations provide that BOEM, as the action agency, “shall provide any applicant with the opportunity to submit information for consideration during the consultation.”¹⁰ A critical purpose of including the applicant in developing any ESA conditions is to “ensure that the measures are reasonable, that they cause only minor changes to the project, and that they are within the legal authority and jurisdiction of the agency or applicant to carry out.”¹¹ As recently as 2019, NMFS and the U.S. Fish and Wildlife Service, BOEM’s sister agency within the Department of the Interior (together, the “Services”), responded to public comments that applicants should be included in developing ESA conditions to “ensure they are implementable and do not require major alterations of the proposed action of a plan or project in terms of design, location, scope, and results.”¹² The Services responded that they “already involve Federal action agencies *and applicants* during key points of the consultation development process and will continue to do so as appropriate.”¹³

Unfortunately, ACP’s members were not provided an opportunity to participate in the Consultation despite expressing an interest in – and being directly impacted by – any HRG-related measures developed by the Agencies. Specifically, industry members were informed that HRG measures were being developed, but no context or timeline was provided, and industry members were not invited or allowed to review or provide input on those measures. Moreover, BOEM provided no public notice or opportunity for public comments,¹⁴ and therefore our members were not aware that the Agencies were proceeding with a programmatic consultation under ESA section 7. As a result, our members were not able to exercise participation rights in the Consultation.

These actions prevented ACP’s members from exercising their right to submit information during the Consultation, review draft documents, and provide comments to the Agencies during the Consultation. As described in detail below, this procedural error resulted in the Agencies’ adoption of PDCs that are inconsistent with industry standards, unrelated to species protection, or are not applicable to the proposed survey activities.

Similarly, BOEM states that it will work with current lessees to impose the PDCs on existing leases. BA at 2. In addition, the PDCs state that “[a]ny survey plan must meet the following minimum requirements specified below...” BA, App. B at 1.

¹⁰ 50 C.F.R. § 402.14(d) (emphasis added); *see also* Interagency Cooperation Under the Endangered Species Act, 51 Fed. Reg. 19,926, 19,928 (June 3, 1986) (preamble to consultation regulations) (“Nothing in section 7 authorizes or requires the Service to provide for public involvement (*other than that of the applicant*) in the ‘interagency’ consultation process.” (emphasis added)).

¹¹ NMFS & U.S. Fish and Wildlife Service, Endangered Species Consultation Handbook, 4-50 (emphasis added).

¹² Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976, 45,001 (Aug. 27, 2019).

¹³ *Id.* (emphasis added).

¹⁴ BOEM’s adoption of these PDCs without any apparent public process circumvented not only the Administrative Procedure Act’s notice-and-comment rulemaking requirements (5 U.S.C. § 553) but also BOEM’s own regulatory process for identifying necessary environmental measures under 30 C.F.R. § 585.801. The ESA does not provide independent authority to impose new requirements, except by NMFS through “reasonable and prudent measures” and associated terms and conditions in a biological opinion’s incidental take statement, which was not issued here. *See* 50 C.F.R. § 402.14(i)(1)(ii), (iv).



II. Adopted PDCs are not based on best science and are inconsistent with survey requirements in other contexts, unrelated to species protection, and impracticable.

The PDCs adopted by BOEM in its revised BA for offshore wind data collection activities include BMPs that are contrary to the best available science, do not reflect the industry standard for HRG surveys, and may even *increase* impacts to protected species. As discussed above, the imposition of such measures will frustrate the offshore wind industry’s ability to timely conduct necessary data collection in support of project development and are inconsistent with the Administration’s goal of deploying 30 gigawatts of offshore wind by 2030.¹⁵

In the following sections, ACP describes the problematic BMPs and details how each measure is not based on science, inconsistent with HRG survey requirements in other contexts, ineffective, or impracticable.

A. Protected species observer and monitoring requirements are impracticable and exceed usual requirements.

The PDCs impose several third-party protected species observer (“PSO”) and monitoring requirements that should be revised or eliminated consistent with the best available science and the Agencies’ requirements for oil and gas HRG surveys. For example, the PDCs require PSOs to be monitoring at all times in sufficient numbers to ensure 360-degree visual coverage.¹⁶ This will almost necessarily require multiple PSOs on each survey vessel to ensure the necessary visual coverage and meet PSO hours restrictions. Similarly, the PDCs impose PSO observation requirements even when survey equipment is not operating¹⁷ – a measure that is not related to minimizing impacts of survey activities on ESA-listed species but rather on general data gathering for informational purposes. These additional observation hours interfere with maximum shift lengths, necessitating additional PSOs on survey vessels. Each of these requirements is impracticable for vessels with limited berth space and will prevent surveys from being conducted in a timely manner. Such requirements are also inconsistent with the Agencies’ requirements for oil and gas HRG surveys in the Gulf of Mexico (“GOM”), where only *one independent visual PSO* is required to be on duty for HRG surveys conducted in water depths greater than 100 meters and a trained crew member may serve as the PSO in waters shallower than 100 meters where observation is only required during a pre-clearance period.¹⁸

The PDCs also include monitoring requirements that are not necessary or that increase potential marine mammal impacts. First, a requirement for PSOs to monitor the 500-meter exclusion zone at night and during low visibility conditions¹⁹ is not practicable or effective. Vessel strike avoidance measures are sufficiently protective at night and under low visibility conditions, making night-time PSO monitoring for sound sources unnecessary. Indeed, for these reasons, NMFS did not require night-time monitoring by PSOs for oil and gas HRG surveys in the GOM.²⁰ Second, the requirement to use a mother vessel with PSOs in conjunction with autonomous

¹⁵ See *supra*, note 3.

¹⁶ Concurrence, App. B, PDC 7, BMPs 3-5.

¹⁷ *Id.* PDC 4, BMP 12.

¹⁸ 50 C.F.R. § 217.184(d)(2)(ii), (iii).

¹⁹ Concurrence, App. B, PDC 4, BMP 6.

²⁰ 50 C.F.R. § 217.184(d)(2)(ii).



surface vessels (“ASVs”)²¹ will negate one of the key benefits of this developing technology. ASVs represent an advancement in survey equipment that facilitates monitoring while reducing risks to health, safety, and the environment that are normally associated with a crewed vessel. The requirement to have a chase or mother vessel with cameras and PSOs negates the benefits of using ASVs for those purposes and increases the risk of marine mammal strikes when compared to ASVs alone. Each of these monitoring measures is impracticable and counter to the best available science. They should be eliminated from offshore wind survey requirements.

Finally, in what may be an error, the text of BOEM’s BA suggests that passive acoustic monitoring (“PAM”) may be required for surveys at night.²² However, no such requirement is included in the PDCs or elsewhere in the Consultation documents, which is appropriate. If the Agencies intended to impose PAM requirements, this would be inconsistent with the requirements for oil and gas HRG surveys in the GOM, where no acoustic monitoring is required for HRG or shallow penetration surveys.²³ It would also be inconsistent with NMFS’s published statements related to the ineffectiveness of towed PAM in detecting vocalizing mysticetes. Indeed, less than a month after issuing its Concurrence, NMFS declined to impose PAM for HRG surveys after explaining that it “does not concur that PAM is an effective technique for detecting mysticetes in order to implement mitigation measures during HRG surveys...”²⁴ ACP therefore requests clarification that PAM is not necessary or appropriate for offshore wind data collection activities. In addition, ACP takes this opportunity to request that the Agencies coordinate with its members regarding the Agencies’ joint PAM recommendations for offshore wind, which were also recently developed and published without appropriate coordination with the affected offshore wind industry.²⁵

B. Exclusion and shut-down zones are not supported by the best science and are inconsistent with recent agency findings.

The PDCs impose a 500-meter monitoring, pre-start clearance, exclusion, and shut-down zone for North Atlantic right whales (“NARW”) and a 100-meter exclusion/shut-off zone for all other ESA-listed whales for vessels operating boomer, sparkers, or bubble gun equipment.²⁶ These requirements are unnecessary given the small acoustic footprint of HRG surveys and are not supported by science. For example, the 500-meter exclusion area for NARW is roughly *three times* the distance that NMFS established to avoid Level B harassment of marine mammals, including NARW, in its 2020 Incidental Harassment Authorization for Ørsted’s offshore wind

²¹ Concurrence, App. B, PDC 4, BMP 1.b; *id.* PDC 5, BMP 2.

²² See BA at 65 (“Additionally, PAM and night vision equipment is required when surveying at night. Any time a listed species is sighted within their respective exclusion zone, HRG sources will be powered to off.”).

²³ 50 C.F.R. § 217.184(c)(2)(i), (d)(2).

²⁴ NMFS, *Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys Off of Massachusetts and Rhode Island*, 86 Fed. Reg. 40,469, 40,489 (Jul, 29, 2021).

²⁵ See Sofie M. Van Parijs *et al.*, *NOAA and BOEM Minimum Recommendations for Use of Passive Acoustic Listening Systems in Offshore Wind Energy Development Monitoring and Mitigation Programs*, *Front. Mar. Sci.* 8:760840 (Oct. 27, 2021) (available at <https://www.frontiersin.org/articles/10.3389/fmars.2021.760840/full>) (last visited Oct. 30, 2021).

²⁶ Concurrence, App. B, PDC 4, BMPs 1 (monitoring zone), 2 (exclusion zone), 2.b (shut-off requirement), 3 (pre-clearance), and 5 (post shut-down monitoring).



survey activities in coastal waters from New York to Massachusetts.²⁷ Moreover, NMFS has established that clearance, exclusion and shut-down zones should be based on peak pressure injury criteria, and that defining exclusion zones based on other acoustic thresholds for behavioral response or injury using an accumulation of energy, “has questionable relevance as a standard protocol for mobile sources, given the relative motion of the source and the animals.”²⁸ In fact, the Concurrence itself suggests that exclusion and shut-down areas are unnecessary here, noting that even at peak noise levels (*i.e.*, using sparkers), “[a]nimals in the survey area during the HRG survey are unlikely to incur any hearing impairment due to the characteristics of the sound sources...”²⁹

For these very reasons, NMFS exempted oil and gas HRG surveys from shut-down and exclusion requirements in the GOM earlier this year, concluding that a 200-meter pre-start clearance and monitoring zone was sufficient for HRG surveys.³⁰ NMFS made this decision after a review of the science and the measure’s anticipated efficacy. In particular, NMFS agreed with industry comments that the acoustic footprint of non-airgun HRG surveys is “too small” to warrant exclusion and buffer zones and that “due to the typically highly directional nature of these acoustic sources, animals observed at the surface will generally not be exposed to the signal.”³¹ NMFS noted that the proposed 200-meter restrictions had originated from BOEM’s HRG survey protocols, and that NMFS was eliminating BOEM’s proposed restrictions from its final rule after reviewing “the available scientific information regarding the typical interaction of these signals with the environment and likely lack of efficacy of typical standard operational protocols developed for omnidirectional sources.”³²

It is worth noting that even BOEM’s proposed 200-meter restrictions for HRG surveys in the GOM – which were later rejected by NMFS as not supported by science – would have been far less restrictive than the 500-meter exclusion and shut-down requirements adopted without scientific justification in BOEM’s BA as part of this Consultation. BOEM also instituted a 200-meter exclusion and shut-down zone for oil and gas HRG surveys in the Atlantic OCS for the protection of marine mammals and sea turtles.³³ BOEM has provided no rationale for the

²⁷ See NMFS, *Incidental Harassment Authorization* issued to Ørsted Wind Power North America, LLC (“Ørsted”) (Sept. 25, 2020), at 2 (sections 4(d)(i), (ii)) (providing 141-meter marine mammal harassment zone for impulsive sources such as boomers and sparkers, and a 54-meter harassment zone for non-impulsive, non-parametric sub-bottom profilers). NMFS also exempted Ørsted’s non-impulsive source HRG surveys from shut-down requirements. *Id.* at 4 (section 4(g)(ix)).

²⁸ NMFS, *Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico*, 86 Fed. Reg. 5322, 5414 (Jan. 19, 2021).

²⁹ Concurrence at 16 (noting sound source levels of 176 to 205 dB re 1 µPa-m and the “generally very short pulses and duration of the sound.”).

³⁰ NMFS, *Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico*, 86 Fed. Reg. 5322, 5376 (Jan. 19, 2021); see 50 C.F.R. § 217.184(d)(2)(i). It is worth noting that NMFS made this decision notwithstanding the presence of the endangered Bryde’s whale in the GOM which has a population of only 51 compared to an estimated 368 NARWs. See NMFS, *Draft U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments 2021*, 1, 6 (Oct. 25, 2021).

³¹ 86 Fed. Reg. at 5376 (describing industry comments and stating, “NMFS agrees with these comments”).

³² *Id.* (“NMFS ... notes that the proposed shutdown and exclusion zone requirements were offered in accordance with BOEM’s HRG survey protocols.” (citing Appendix B of BOEM’s *Programmatic Environmental Impact Statement for Gulf of Mexico OCS Proposed Geological and Geophysical Activities* (Aug. 2017) (“2017 GOM PEIS”))).

³³ See 2017 GOM PEIS at 4-169 (section 4.3.4.1.3); see also BOEM, *Record of Decision, Atlantic OCS Proposed Geological and Geophysical Activities, Mid-Atlantic and South Atlantic Planning Areas* at 4 (mitigation measure no. 3) (July 11, 2014).



departure in this Consultation from its proposed 200-meter exclusion and shut-down zone for oil and gas industry activities in the GOM and Atlantic OCS. More importantly, the Agencies have provided no explanation for why a 500-meter restriction for HRG surveys is necessary here, just months after NMFS concluded that a zone less than half that size was unnecessary for HRG surveys and not supported by science.

The PDCs already restrict certain sound sources in NARW critical habitat during calving and nursing season.³⁴ No further restrictions are necessary or appropriate. Imposition of broad exclusion zones will necessarily increase shut-downs and interfere with timely and efficient data acquisition, which in turn will frustrate industry efforts to meet BOEM regulatory requirements for specific projects. These delays will also increase the overall time that survey vessels are in the field, thus *increasing* the potential for actual marine mammal interactions. These unintended consequences underscore the importance of being guided by the best available science and, consistent with NMFS's findings elsewhere, exempting offshore wind HRG surveys from exclusion and shut-down requirements.

C. Minimum separation requirement is not related to species protection.

The PDCs require that a minimum separation distance be maintained between survey vessels "to ensure sound sources do not overlap."³⁵ The Agencies provide no scientific basis for any type of separation distance requirement, and it is worth noting that oil and gas HRG surveys in the GOM and Atlantic OCS are not subject to similar separation requirements. Rather than being a measure intended to minimize impacts to ESA-listed species (or any species), it appears that this measure may have originated from industry-proposed operational measures to avoid interference with each others' survey data. As such, a separation distance requirement is not appropriately imposed as part of this Consultation.

D. Time/area restrictions are unnecessary and not supported by science.

The PDCs limit surveys in Cape Cod Bay from January 1 to May 15 to protect NARW.³⁶ However, this limitation is unnecessary given existing dynamic and seasonal management areas, which among other things impose a 10-knot speed limit for vessels 65 feet in length or greater in Cape Cod Bay.³⁷ Vessels have safely conducted surveys year-round in these areas without event. Moreover, other vessels are allowed to transit these waters during the referenced time period, and it is arbitrary to limit offshore wind surveys when other activities are not similarly restricted.

The PDCs also appear to refer to a "voluntary pause" in sparker operation in nearshore loggerhead sea turtle critical habitat from April 1 to September 30.³⁸ Although this measure is not mandatory, even voluntary measures should be based on sound science. In fact, even without a voluntary pause in sparker operations, NMFS concludes that impacts to any

³⁴ Concurrence, App. B, PDC 4, BMP 8 (limiting sound sources in the Southeastern U.S. calving area habitat from December through March to frequencies <7 kHz and >35 kHz at night or in low visibility conditions).

³⁵ *Id.* PDC 4, BMP 9.

³⁶ *Id.* PDC 4, BMP 7.

³⁷ 50 C.F.R. § 224.105(a)(3)(i).

³⁸ Concurrence, App. B, PDC 4, BMP 10.



loggerhead turtles in the area would be “minor” and “temporary.”³⁹ ACP is concerned that this measure, although technically voluntary, will be imposed by PSOs during survey activities or that a failure to implement this voluntary pause will be viewed negatively in post-survey reporting. For these reasons, and because the measure is not warranted or necessary, it should be removed from the PDCs.

E. The 30-day marine debris recovery requirement is impracticable and will increase vessel transits.

The PDCs require recovery of marine trash and debris “immediately, but no later than 30 days from the date in which the incident occurred.”⁴⁰ This 30-day limit, which is not imposed on oil and gas HRG surveys, will be nearly impossible to achieve operationally for any objects that must be re-located on the seafloor. Industry members will need time to contract with equipment providers if specialized equipment like magnetometers is needed and will then need to determine an appropriate area to survey and develop a recovery plan. In addition, the 30-day deadline will not provide sufficient time or flexibility for debris recovery activities to be combined with other planned activities, resulting in an overall increase in vessel transits.

Moreover, these new marine debris requirements could conflict with existing incident reporting requirements set forth in BOEM’s offshore renewable energy regulations at 30 C.F.R. Part 585.⁴¹ Pursuant to BOEM’s Memorandum of Agreement (“MOA”) with the Bureau of Safety and Environmental Enforcement (“BSEE”),⁴² these incident reporting regulations are enforced by BSEE, which has interpreted them to include responses to lost gear and equipment. Without opining on the merits of this interpretation, we urge the Agencies to avoid using the Consultation to impose new reporting and recovery requirements for marine debris when that incident reporting process is being managed by BSEE under the MOA.

III. Conclusion.

Imposing more onerous measures on offshore wind than for the oil and gas industry is arbitrary and frustrates important Biden Administration offshore wind energy goals, along with various state targets for offshore wind as well. HRG surveys and their acoustic metrics are the same regardless of their location or the industry that is undertaking them. Marine mammals and sea turtles that may be present in the Atlantic and the GOM are virtually identical with the exception of pinnipeds, which are not found in the GOM. Indeed, only four species of cetaceans generally listed as likely to be present in the Atlantic are not present in the GOM, and both marine areas contain a small, ESA-listed mysticetes population. Conclusions drawn by the Agencies for offshore wind HRG surveys in the Atlantic should therefore be consistent with the effects analysis for oil and gas HRG surveys in the GOM.

³⁹ Concurrence at 18.

⁴⁰ *Id.*, App. B, PDC 3, BMP 3.

⁴¹ See 30 C.F.R. § 585.830 (reporting obligations); *id.* § 585.831 (describing types of incidents covered by reporting requirement, including those involving property or environmental damage); *id.* § 585.832 (outlining immediate notification requirements); *id.* § 585.833 (providing 15-day written report requirement).

⁴² Memorandum of Agreement Between the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement, *Renewable Energy*, sec. IV (Dec. 22, 2020).



The measures described in this letter will create significant challenges for completing data collection activities, which are an essential first step to developing offshore wind projects. Consistent with the Administration's goal of developing 30 gigawatts of offshore wind by 2030, the PDCs described above must be revised to ensure that they are practicable and effective and reflect industry standards.

ACP requests that the Agencies meet with offshore wind industry members, including those who were improperly denied the right to participate in the Consultation as applicants, to chart a constructive path forward regarding the problematic PDCs and BMPs described above. Such a meeting should also include a discussion of necessary procedural steps to adopt more appropriate PDCs for offshore wind data collection activities.

Thank you for your timely attention to this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Josh Kaplowitz".

Josh Kaplowitz
Vice President, Offshore Wind
American Clean Power Association

cc:

David Hayes, White House Office of Domestic Climate Policy
Michele Morin, BOEM Office of Renewable Energy Projects
Julie Crocker, NMFS Office of Protected Resources
Cheri Hunter, Bureau of Safety and Environmental Enforcement
Jocelyn Brown-Saracino, U.S. Department of Energy
Christine Harada, Federal Permitting Improvement Steering Council