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Re: Comments on the Draft Guidance for Mitigating Impact to Commercial and Recreational Fisheries from Offshore Wind Energy Development

Submitted via regulations.gov, Docket ID BOEM-2022-0033

The American Clean Power Association ("ACP") welcomes the opportunity to comment in response to the Bureau of Ocean Energy Management's ("BOEM") Draft Fisheries Mitigation Guidance Reducing or Avoiding Impacts of Offshore Wind Energy on Fisheries ("Guidance"). ACP is a national renewable energy trade association that unites the power of offshore wind, onshore wind, solar, storage, and transmission companies[1]. ACP has established a Fisheries Working Group ("FWG"), comprised of developers and leaseholders, to coordinate consensus and share best practices on the offshore wind industry's interaction with the environment, fishermen, fishing communities, and the fishing industry.

The ACP FWG continues to explore ways for the fishing and offshore wind industries to productively coexist and appreciates BOEM's efforts to create guidance that recognizes issues of common interest to both groups. ACP and its members in the offshore wind industry support the spirit of and process by which this draft mitigation was developed. It is clear that, in addition to the public meetings and comment periods for this process, BOEM has incorporated experiences and resources from other efforts which included extensive input by stakeholders, including the fishing and offshore wind industries. Similarly, the ACP FWG supports the recent efforts of the Special Initiative for Offshore Wind (SIOW) to coordinate with a group of nine Atlantic states (and growing) to explore a regional compensatory mitigation approach that provides consistency and transparency for the fishing industry, offshore wind developers, federal agencies, and the states themselves.

The ACP FWG appreciates BOEM's efforts to document common mitigation measures across East coast projects that can serve as industry standards for offshore wind development in other regions of the Outer Continental Shelf. The ACP FWG also appreciates BOEM's effort to incorporate evidence-based solutions to mitigating the effects of offshore wind on fisheries and fishing. To both points, while BOEM's efforts do provide transparency and predictability for developers and ocean users, ACP FWG recommends that BOEM consider which mitigation measures and standard continued to be applied on a project-by-project basis. Specific to compensation, the ACP FWG appreciates BOEM considering levels of compensation appropriate to phases of offshore wind development and BOEM's assessment of its legal authority to administer funds.

As BOEM finalizes its guidance, we urge the agency to bear in mind other key principles:

- Every offshore wind project is different, with location- and developer-specific design needs and commercial considerations, as well as a unique set of potentially affected fisheries. Unless dictated by bid conditions or lease stipulations, final decisions on mitigation measures should be made on a project-by-project basis in close consultation with agencies and developers.
- The final guidance must acknowledge the importance of balancing fisheries concerns against project economics and the needs of other ocean users. The ACP FWG urges BOEM to avoid using absolute words like "maximize" or "minimize" in its final guidance, and instead recommend "using commercially and technically feasible measures" to achieve its objectives.

The ACP FWG supports BOEM's recommendation that lessees engage with the commercial and recreational fishing industries, tribal communities, and others most impacted by their offshore wind development activities, prior to the onset of any project work. ACP and its members have echoed these sentiments and recommended this engagement to improve communication between ocean users and developers, to promote transparency, to inform the public, and to increase industry accountability. Developers routinely utilize such early engagement to help inform the public and receive valuable input from the WEA designation process to lease sales to early lease activities to the preparation of Construction and Operation Plans ("COPs") that must include proposed project-specific mitigations and resource monitoring plans. This kind of effective, transparent communication is vital to ensures the success of these projects, and more broadly the offshore wind industry.

The ACP FWG supports BOEM's own continued, direct engagement of the commercial and recreational fishing industries and communities at the earliest stages of the process. BOEM's engagement with these ocean users, as well partner federal and state agencies, to collect information and data to inform the initial designation of WEAs and eventually lease areas assists developers in understanding and mitigating impacts to fishing. We also look forward to continued

engagement with BOEM as the agency considers the input of the Atlantic states, collaborating federal agencies, and the industry as the agency moves toward finalizing this Guidance.

ACP and its members also support BOEM's use of the Council of Environmental Quality's (CEQ) definition of mitigation.[1] This framework is an appropriate and well-understood way to manage offshore wind project effects, particularly with respect to fisheries. The Draft BOEM Fisheries Mitigation Guidance provides robust recommendations on avoidance (1), minimization (2), and Compensation (5), but does not adequately address Rectification (3) and Reducing (4). ACP recommends that BOEM include further guidance to offshore wind developers focused on addressing Bullets 3 and 4 as it believes that this process will be most successful if all five aspects of the CEQ definition of "mitigation" are addressed given appropriate weight. The remainder of our comments are structured to comment on the specific sections of the Guidance.

Environmental Monitoring

The ACP FWG agrees that BOEM and other entities, including the Responsible Offshore Science Alliance (ROSA), have developed guidance documents that provide overarching principles to inform fisheries monitoring designs for the phases of offshore wind development. The proposed Guidance could serve to supplement these existing resources with BOEM's perspective on processes that could better inform developers of information needed in the construction phase. Specifically, it would be helpful if this Guidance could include information on timelines with respect to required studies as they relate to BOEM's definitions of phases of construction.

In addition, developers are required to conduct multiple studies that result in fish mortality.[2] The ACP FWG recommends BOEM consider adding to this guidance document language that indicates the acceptability of using regional studies for neighboring lease owners operating in similar habitat. This would significantly reduce fish mortality and environmental impact related to the studies themselves. Further, ACP FWG suggests that BOEM consider additional language regarding the use of innovative technologies (e.g., non-extractive techniques) to perform required studies.

Project Siting, Design, Navigation and Access

The ACP FWG proposes BOEM consider the following principles as it finalizes this guidance:

- Leases on the Atlantic OCS are not the same, and leaseholders may have different solutions to project siting, design, navigation, and access based on ocean users in and around specific lease areas.
- Conditions within the lease itself can vary, from ocean conditions to habitats to seafloor geology. Standard approaches may not be equally applicable across all leases. Any guidance by BOEM and consulting agencies should allow flexibility to account for

[1] 40 CFR 1508.1(s).

[2] The industry foresees potential challenges in receiving necessary federal permits to conduct these types of surveys, which is a barrier to hiring local fishermen to conduct the studies and to completing the required studies.

variability across leases and projects within leases and not unduly restrict adaptive approaches that developers will need to take in mitigating site- or activity-specific actions.

- Unless specifically mandated by a federal lease stipulation or state procurement requirement, BOEM should provide the flexibility for the lessee to work directly with the affected fishing communities to establish reasonable and practicable project siting and design solutions. Standard layouts may not be applicable across all lease areas within an OCS region.
- In several instances, BOEM uses the term maximize or minimize when referring to one industry over another. The ACP FWG recommends this guidance should include more balanced language when discussing coexistence of ocean uses.

We now turn to BOEM's specific project recommendations.

Recommended static cable design elements, pg. 5

> *All static cables should be buried to a minimum depth of 6 feet below the seabed where technically feasible. Technical feasibility constraints include seabed conditions that preclude burial, such as telecommunication cable crossings.*

The ACP FWG recommends that cable burial depths should be determined by the risk profiles of the seafloor and sediment conditions in the project footprint. The spatial extent of profiles can vary within a project footprint, lease area, and between leases across the extent of the Atlantic OCS. Profiles may also shift over time depending on oceanic conditions and other factors or uses in a particular area. For instance, anchoring risk from commercial/merchant shipping will set the required burial depth in/around entrances to ports, which may need to be different from a standard proposed depth. Further, there may be other ocean uses or users that require unique burial depths or techniques to avoid or mitigate interactions and this flexibility should be afforded to the developers to directly manage these instances with the affected stakeholders.

For the designed cable route, a burial assessment study is required. The burial assessment will need to detail the following: risks along the cable route suitable (lay and) burial method(s) and resulting trench profiles based upon the sediment conditions, and additional protection that may be required.[3] Rather than encouraging a standard depth, BOEM should encourage lessees to base cable burial depths on the outcomes provide in project-specific cable burial risk assessments, which consider all factors, conditions and other uses of the ocean that could impact the burial depths of offshore wind transmission cables. Specific to fishing activity, BOEM should allow developers flexibility to design cable protections respective of the type of fishing activity that may happen in and around their projects based on consultations with agencies and fishing community.

[3] Cable Burial Risk Assessment Methodology Guidance for the Preparation of Cable Burial Depth of Lowering Specification CTC835, February 2015, available at ttps://www.carbontrust.com/resources/cable-burial-risk-assessment-cbra-guidance-and-application-guid

Lessees should avoid installation techniques that raise the profile of the seabed, such as the ejection of large, previously buried rocks or boulders onto the surface. The ejection of this material may damage fishing gear.

Cable route survey activities help to identify areas of potential seabed obstructions that may interfere with the installations of cables. It is the intent of developers to route cables around obstructions, sensitive habitats, archaeological areas of significance etc., to the maximum possible extent. In the event that this is not possible, the Route Clearance/Pre-Lay Grapnel Run (an installation technique) (RC/PLGR) may dislodge debris in the seabed as this is the intent of this activity – to initially prepare the seabed for the burial of cables. It is possible that there could be disturbances associated with this activity, specifically the creation of a 'furrow' where the seabed is raised on either side. The ACP FWG recommend that BOEM consider which activities may result in disturbances that are unavoidable and not considered to be obstructions and exclude such in the final Guidance.

If needed, cable protection measures should reflect the pre-existing conditions at the site. This mitigation measure chiefly ensures that seafloor cable protection does not introduce new obstructions for mobile fishing gear. Thus, the cable protection measures should be trawl-friendly with tapered or sloped edges. If cable protection is necessary in "non-trawlable" habitat, such as rocky habitat, then the lessee should consider using materials that mirror the benthic environment.

The ACP FWG recommends that BOEM consider instances where there would be no additional need for protection (e.g., if an area is not trawl-friendly and/or no mobile fishing gear is used in the area).

Recommended Dynamic Cable Design Elements, pg. 5

Dynamic cables should be suspended at a depth that minimizes, to the extent practicable, the potential for interactions with fishing operations.

Where feasible, cables should share corridors and minimize the total cable footprint.

The ACP FWG encourages BOEM to recognize that the total cable footprint in a project – whether developed independently or in collaboration with another leaseholder(s) – will be the same where the cables are installed in a shared corridor or independent corridors. Project design and the dynamic cable corridor depth should consider the regional recreational and commercial fisheries activities (e.g., epipelagic and mesopelagic) to best mitigate impacts. The ACP FWG recommends that BOEM not mandate how a developer(s) install cables or how cable corridors should be designed. BOEM should consider the risks to mandating common corridors, such as the susceptibility of a single catastrophic event (i.e., a merchant vessel transitioning with an anchor deployed), impacting all infrastructure in the corridor itself.

Recommended Dynamic Cable Design Elements, pg. 5 - 6

The facility design should maximize access to fisheries, including by consideration of:

As noted above, project design must balance various technical, commercial, and ocean user considerations. The proposed language elevates one ocean user at the expense of other critical factors, including project viability. The ACP FWG recommends BOEM adopt the following wording:

The facility design should <u>enable continued</u> access to fisheries, including by consideration of:

The intent and purpose of several recommendations in this section is unclear. In some instances, it is difficult to determine which components or installation techniques BOEM is recommending (e.g., common cable corridors, regional transmission backbones, etc.). In other instances, BOEM's early siting work has already identified space-use conflicts and it is not clear what additional conflicts might remain. For some items, a clear definition of the objective or agency expectation of the developers would be helpful. The ACP FWG recommends BOEM further elaborate on these items:

Consolidation of infrastructure, where practicable, to reduce space-use conflicts.

It would be helpful if BOEM provided examples of this item. Developers are primarily focused on building necessary and efficient infrastructure. We recommend either eliminating this item or rephrasing it to recommend that developers consider the potential to consolidate infrastructure when creating its project layout.

Consideration of larger turbine sizes to reduce total project footprint and meet energy production commitments.

We are concerned that this recommendation turns the project design and engineering process on its head. While developers analyze and account for the likely benefits and costs of its wind turbine options within the permitting process, selection of wind turbine generators is a complex decision that primarily involves commercial and technical considerations, The phrasing of this item implies that reduction of the project footprint should be a driver of the developer's decision. We are also concerned that this provision could conflict with BOEM's mandate to consider prevention of waste of the wind resource under 43 U.S.C. 1337(p)(4)(C) by elevating project footprint over maximization of renewable energy generation on a lease. We recommend either eliminating this item or rephrasing to recommend that developers consider the effects of project footprint in selecting its turbines.

Coordination of turbine and substation array layouts between and among neighboring lease areas to allow safe fishing operations and transit through multiple projects. In instances where layout design cannot accommodate two common lines of orientation across adjacent leases, the lessee should consider incorporating a 1 nautical mile setback,

within which no surface structures may be constructed. See Navigation and Vessel Inspection Circular 10-194 for more details.

The ACP FWG agrees that the 1-nautucal mile spacing for the southern New England lease areas for the purposes of a unified layout was appropriate for that area. This layout was situational and collaboratively designed and agreed to by those leaseholders, with substantial ocean user input and supporting technical analysis, to accommodate mariner uses in the area. However, this specific action, driven in part as response to ocean user concerns and agencies' recommendations, should not signal support for that standard in other lease areas. The 1-nautical mile separation between turbines may not be required for safe fishing operations and/or navigations for independent lease areas or adjoining projects and/or lease areas across an OCS region. If there are adjacent lease areas with different layouts, a suitably sized buffer based on a NSRA could be considered. Other markings should also be considered to inform mariners that they are leaving one lease (orientation) and entering another.

Turbine locations should be sited to avoid known sensitive benthic features, such as natural and artificial reefs.

The ACP FWG recommends that BOEM recognize developers are using the results of site assessment and characterization surveys (geological and geophysical surveys) to achieve this mitigation. We recommend that BOEM take the opportunity to further clarify what defines 'sensitive' benthic habitats and 'artificial reefs. For artificial reefs, BOEM should clarify if this applies to designated reefs for fish or fishing or whether this terminology refers to something broader. BOEM should also recognize that there are designated, i.e., state-based reefing locations - and undesignated artificial reef areas (i.e., mariner-created bottom structure), and which should be avoided.

Facility planning should consider use of nature inclusive designs, where applicable, to maximize, maintain and/or provide additional available habitat for fish.

The ACP FWG recommends that BOEM further elaborate as to which fish species are meant to benefit from nature inclusive designs. The differences in species and their habitat utilizations varies significantly across seafloor types and even in the water column. Maximizing habitat for one species could inadvertently reduce habitat for another species. The ACP FWG suggests that BOEM consider revising this mitigation to allow for site-specific species considerations and whether habitat development is necessary or should be created based on species composition in a project area.

Navigation and Safety

Regarding navigation and safety, ACP agrees with BOEM on many of the recommendations and is currently considering or actively implementing nearly all of them as appropriate per project and other site-specific circumstances. The ACP FWG recommends BOEM consider the following:

Considering installation techniques and time windows that minimize disruption to fishing activities (e.g., simultaneous lay and burial, or conducting activity during the appropriate time of year).

ACP recognizes mitigation as a core principle to successful offshore wind development and members are incentivized to minimize disruptions to fishing activities. However, ACP opposes citing time windows with regard to fishing activities as a determining factor in when installation construction activities can occur.

As worded, the recommendation is aimed at reducing business interruption rather than enhancing safety. If that is indeed the case, then it seems more appropriate to include this as a mitigation recommendation in the Project Siting, Design, Navigation, and Access category.

Employing liaisons from the commercial fishing industry to provide safety and communication services during construction.

Developers are currently contracting commercial and recreational fishermen as fisheries liaisons upon survey and project vessels,and contracting their vessels as scout and safety vessels during survey and construction stages of projects. Representatives from the fishing industry are also contracted to provide further project updates, communications and aid in safety efforts.

Monitoring cable burial in real-time and report all potential hazard events to the USCG as soon as possible.

Developers conduct regular cable surveys, which are included in a project's Construction and Operation Plan (COP). Regular cable surveys are frequently conducted during early stages of the project (i.e., during the construction period), and become needed less frequently over time as the project is established.

There are several foreseeable situations that could be classified as hazardous which may occur over the lifecycle of a project. To set reasonable boundaries on reporting, ACP encourages BOEM to clarify 'potential hazard events' as related to cable burial.

Using digital information technology platforms (e.g., smartphone applications) to bring together survey and construction schedules and locations in addition to standard local notices to mariners via the USCG.

There is not one maritime software platform (app) that has been agreed upon by the entire industry, but efforts can be made to provide standard information across whichever mediums are used. For example, currently multiple developers in the Rhode Island and Massachusetts wind energy areas are supporting a software platform that will provide project locations, survey and construction vessels, and other project news on an app that will house multiple projects and developers. This

same software may or may not be used by other developers, and BOEM should not require the use of a specific software, but instead focus on what information is shared and the frequency.

> *Providing training opportunities for the commercial fishing industry to simulate safe navigation through a wind facility in various weather conditions and at various speeds.*

Currently, multiple developers are providing simulated experiences to commercial and recreational fishing interests. These efforts will continue as the offshore wind industry continues to develop because they have proven to be beneficial to demonstration attendees. These should not be continued if the intended audience and communities do not find them beneficial, likely by the time offshore wind projects are installed and commonly found in U.S. waters. In addition to these on-going activities, ACP encourages BOEM to work with the U.S. Coast Guard to develop a standard certification process verifying a mariner's completion of a navigation safety course.

In response to the guidance that lighting, marking, and AIS utilization should be as standardized as possible:

Developers of the Rhode Island and Massachusetts lease areas have established and have been working via a Joint Developer Marine Affairs Working group to discuss and coordinate efforts which include lighting and marking, uniform labeling, aids to navigation, NAV safety, etc. Prior to adopting these standards across all projects, a review amongst all maritime user groups should take place to reach standards for all WEAs.

Compensatory Mitigation

Climate change driven by carbon emissions is negatively impacting the health of commercial and recreational fisheries around the world. While offshore wind energy developed at scale can help reduce future carbon emissions, and thus lessen future stresses from climate change, we acknowledge that the development of offshore wind will result in small to moderate effects on other ocean users. Where efforts to avoid, minimize, and mitigate impacts to commercial and recreational fishing are not wholly successful, we support efforts to create a coast-wide fisheries compensation process for offshore wind development that provides predictability, certainty, and resolution of fishermen's' compensation claims. While we agree that BOEM does not have authority to establish or manage a federal compensatory mitigation program, we believe BOEM's final guidance can go much further in endorsing and incentivizing the creation of an independently administered third party fund that can effectively manage a compensation fund.

The BOEM Guidance goes a long way towards trying to provide greater predictability through a transparent, data driven process, though we provide several recommendations below based on member experience. While the offshore wind and commercial fishing industries agree on many

foundational concepts, like the use of third-party fund managers, there remains a difference of opinion regarding how to estimate revenue exposure during wind farm operations. We provide suggestions below on how to add greater rigor to those estimates, but the inherent uncertainty of how to calculate losses and how individual commercial fishers will respond and adjust fishing patterns in the future highlights why such mitigation funds should be credited against discounts on auction bids and current operations fee payments.

We also encourage BOEM to support the work the Special Initiative on Offshore Wind (SIOW) has been doing to bring Northeast and Mid-Atlantic states together with the commercial fishing and offshore wind industries to create a regional third-party fisheries compensation fund. As noted above, the ACP FWG has been coordinating with SIOW and believes its efforts are the right process to create a compensation mechanism that works for everyone.

Gear Loss

The ACP FWG believes that gear loss claims after the start of construction should be managed through its proposed regional, third party-managed compensatory mitigation program. ACP supports the recommendation in the draft guidance to follow minimum standards set forth in NOAA's Fisheries Contingency Fund ("FCF"). Though developers cannot model it entirely, as it is a legislatively created entity, the process has proved a workable solution to gear claims.

ACP requests that BOEM remove the following guidance language: "[a] lessee may elect to reimburse damage to fishing gear from marked and charted obstructions in order to limit interactions with lessee property." Reimbursements for interactions with known obstructions encourages unnecessary risks and goes against the first point raised in the "Safety Measures." It does not make sense for developers to reimburse gear loss related to interactions with known obstructions as doing so could invite unwanted risk. This language is also inconsistent with the administration of the FCF, which limits claimant recovery if the claimant is also at fault or was negligent (50 CFR 296.4(c)).

While we are not opposed in principle to recoverability of reasonable fees, a cap for such fees should be defined. We think fees under a gear loss program should not exceed 25%, as this will ensure most funds go to those with the claim. In addition, we suggest BOEM add language to the recommendation that allows for reasonable fees paid to an attorney, certified public accountant, or other consultant contingent to an award. As the draft guidance is currently written, it can be construed that developers should reimburse fees regardless of a claim's merits. The FCF does not consider damages and fees separately, as the FCF regulations state, "An award may also include compensation for reasonable fees paid by the claimant to an attorney, CPA, or other consultant for the preparation or prosecution of a claim." 50 CFR 296.8(d). We believe reimbursement of fees contingent to an award reflects the intent of the FCF and should be mirrored in the final guidance.

For gear loss claims made prior to the start of construction—e.g., during survey activities—ACP believes that it would be easier to maintain the status quo and have developers manage such claims individually. Most developers already have systems in place for these claims and can therefore continue to be responsive to fishermen's gear loss claims in a timely way.

Compensation for Lost Income

We generally agree that for the purposes of determining voluntary compensation during construction, such compensation, when appropriate, should be derived from the proportion of the project area that is rendered unavailable to fishing during active construction. Based on time of year restrictions for certain activities as well as construction logistics, it is unlikely that an exclusion zone would encompass the entire lease area for the full construction period, but rather would be located in proximity to the vessels conducting work. We agree with BOEM's draft guidance to the extent it is based on NOAA data. BOEM has also (presumably with input from NMFS) provided thoughtful methodologies to calculate exposure specific to distinct fisheries that may have data gaps.

For determining voluntary compensation reserve funds for commercial fishing during operations, BOEM's proposed percentage exposure estimates—which BOEM rightfully acknowledges are overestimates—should be grounded in more rigorous methodology. For example, BOEM provides no basis for why 100 percent revenue exposure is a reasonable basis for the first year after construction is completed. Similarly, more detail is needed to justify the recommended values for year 2 and beyond.

Instead of the proposed percentages in operations, ACP urges BOEM to look at economic impact analyses that can be used to inform the process and serve as examples, such as those conducted by the Woods Hole Oceanographic Institution on impacts to commercial landings during construction, operations, and decommissioning. While this analysis was prepared for one project, the methodology is useful for other projects and can serve as a more appropriate starting point. Based on that export report, operational impacts were estimated to be much lower than BOEM proposed. The analysis also provides some lease area specific factors, such as potential stock effects on bivalves may be smaller spatially than finfish but of slightly longer duration.

Categories of exposure	Percentage estimate
Stock effects	Lobster & crab reduced 10% for 1 year* Bivalves/mollusks reduced 10% for 4 years* 25% of finfish stocks leave area* (*annualized per year of construction)
Constrained access during operations	Landings reduced by 0-5% from baseline Calculated as present value of 5% of baseline using a 5% discount rate, which is the average of the rate usually applied in natural

	resource valuation (3%) and the rate usually applied by the US government for public investment and regulatory analyses (7%).
Inflation	<2% (based on historical average)

Source: Rhode Island Coastal Resource Management Council South Fork Wind Consistency Determination (2021, July 1) .http://www.crmc.ri.gov/windenergy/dwsouthfork/SFWF_FedConsistencyDecision_20210701.pdf, pg 204

ACP does not recommend the use of commercial growth multipliers beyond inflation. The chance of overestimation under BOEM's approach is heightened because BOEM suggests using all available data and extrapolating into the future, even though landings vary from year to year and have generally trended downward since 2008 across almost all lease areas. ACP does not think that growth factors beyond inflation are justified by the data because of the general (though not universal) downward trend in landings, which may be exacerbated by climate change.

The above critiques of the proposed percentages should not detract from the fact that ACP agrees that a universal formula could serve as a useful alternative to performing a detailed analysis for determining compensation amounts on a project-by-project basis. It would also promote consistency across the region. But because the formula would serve as the expectation for projections throughout the Northeast region, it becomes all the more important for BOEM to provide justification for these revenue exposure estimates. Again, we encourage BOEM to review and consider the WHOI analysis to refine the impact percentages. While a standardized, nationwide approach is preferred, we recognize that supplemental analyses may be warranted for other regions where BOEM is advancing offshore wind leasing, such as the Gulf of Mexico or West Coast, due to differing fishing methods, fisheries data, and technology type.

Strengthening Compensation Fund Through Use of Credits Against Auction Bids and/or Operating Fees

We concur with BOEM's assessment that it may not require lessees to make payments into a third-party compensation fund. However, we encourage BOEM to endorse what ACP believes to be the ideal solution to ensure the fund always has sufficient resources: funding the fund through lessee payments credited against auction bids and/or annual operating fee payments.

BOEM is on The Right Track With California Proposed Sale Notice

ACP believes BOEM is on the right track in seeking solutions to properly support and fund fisheries compensation. We were heartened by BOEM's proposal in the Proposed Sale Notice for California[4] that it has regulatory authority under OCSLA to implement bidding credits for contributions to mitigation funds benefiting ocean users such as the fishing industry. Whether it takes the form of what BOEM has termed a community benefits agreement, or, preferably, a transparent third-party regional mitigation fund, the proposed bidding credit is a worthwhile policy. If BOEM paired its final fishing mitigation guidance with a commitment to use its existing

[4] Proposed Sale: Pacific Wind Lease Sale 1 for Commercial Leasing for Wind Power on the Outer Continental Shelf in California, available at https://www.regulations.gov/document/BOEM-2022-0017-0001.

regulatory authority to incentivize compensatory fishing investments using bidding and operating fee credits, this would allow commercial and recreational fishermen to benefit from the promise of ocean wind to an extent that might not be possible if funding levels are solely based on projected impacts. Finally, funding through developer payments in exchange for BOEM credits would also make it easier for the third-party fund to beneficially repurpose unused funds, thereby avoiding the administrative and legal challenges involved in refunding developers if economic loss and gear loss claims fall short of BOEM's baseline estimates of revenue exposure.

Bidding Credits and Operating Fee Credits Work Well Together

As discussed further in ACP's January 7, 2022 letter and noted above, we believe BOEM has the authority today to implement mechanisms to incentives the funding of a compensatory mitigation program through both lease auction bidding credits and operating fee credits. The two funding mechanisms would work well in tandem to ensure that sufficient money is available to satisfy valid claims and provide forward-looking grants, when that money is most likely to be needed.

We assume that to the extent offshore wind development has adverse effects on fishing, such effects will not commence until the start of offshore construction. We also assume that the effects of construction of the first two commercial-scale offshore wind projects—Vineyard Wind 1 and South Fork Wind Farm—will be addressed through the funds created for those projects and not through ACP's proposed regional fund. Therefore, it is important that the regional compensatory mitigation program be in place and adequately funded by the time the next offshore wind projects commences offshore construction; this is likely to be 2024 based on current FAST-41 permitting dashboard timelines.

The next East Coast lease sale, in the Central Atlantic, is anticipated between Q2 and Q4 of 2023. A fisheries compensation bidding credit in this lease sale that comes from a portion of the initial lease auction proceeds would provide "seed money" into the regional compensatory mitigation program. Depending on the percentage bidding credit that BOEM decides to use, we believe lessee payments in exchange for such a credit could be more than sufficient to satisfy claims for the effects of early offshore construction.

We estimate that lessees would begin paying operating fees for post-Vineyard/South Fork projects starting in 2025, once the first of those projects is completed and begins commercial operations. At that point, lessees could begin making payments in return for credits against their regulatorily mandated 2% annual operating fees (which could be authorized through mutually agreed-to lease amendments at the time of COP approval) into the regional compensatory mitigation program. As more projects go online, the amount of operating fees owed by lessees to BOEM would increase—and so would operating fee credit payments into the compensation program. By combining both types of credits, the compensation program would be funded early enough to matter for potential

early fisheries effects of offshore wind construction and would also become sustainably funded in the long term.

BOEM Should Work to Develop The Funding Mechanism At The Same Time The Third-Party Fund Is Being Developed

While a funding mechanism would need to be established separately from this guidance, they are not separate exercises. We urge BOEM to work with ACP and other stakeholders to develop the funding mechanism at the same time it coordinates with states, fisheries, and the offshore wind industry to ensure that the fund is appropriately structured and administered. First, a fund requires appropriate reserves to serve the need, funds that can be created through the use of a bidding credit in the Central Atlantic lease sale. Working out the details of how the funding mechanism will operate will take time and thoughtful policy. That process should start now so that the fund can be established with a funding plan already in place. Second, establishing the funding mechanism early will create fairness and predictability during the process of determining how the funds will be managed and distributed. For example, the exposure estimates during operations will be the most contentious part of both BOEM's guidance—and by extension the establishment of a compensation mechanism.

Third, the early establishment of a funding mechanism will have the added benefit of providing comfort to the fishing industry that money will always be available to satisfy valid claims. The success of the fisheries compensatory mitigation program will hinge on buy-in from all parties, and the most important aspect of that buy-in is trust in the efficacy of the process.

Finally, we believe that early attention to the funding mechanism will provide everyone with clear insight into whether the money into the fund will meet the anticipated purposes of the fund—and will allow for policy choices that grant flexibility in the event that predictions for claims and grants do not match actual usage. To that end, and as discussed further in the next section, ACP believes that to the extent the fund ends up with excess money, it should be able to be used beneficially for fishing industries through a grant program.

The Proposed Funding Mechanism Would Facilitate Grants For Adaptive Gear and Coastal Communities

A further reason to have the fisheries compensatory mitigation program funded through payments credited from winning auction bids and operating fees is that it would likely result in surplus funds that could be used in forward-looking ways that benefit fishing industries. The ACP FWG's January 7, 2022 comments recommended that a third-party compensatory mitigation program could include:

- A fund to enhance fishermen's navigational safety through grants for radar and gear upgrades; and

- A coastal community fund that could provide grants to support those not eligible for direct compensation, such as dockside seafood processors.

We believe that such grants could enhance the ability of fishermen to continue to fish within offshore wind projects, thereby creating a virtuous cycle that would decrease the need for compensation for economic loss and freeing up more funds for further grants. The fund could even provide pilot grants for the adoption of innovative gear that would, in turn, mitigate impacts on biological resources such as protected species.

Conclusion

We thank BOEM for their continued effort on this important topic. As the ACP FWG continues to advance efforts that support the coexistence of offshore wind with fisheries, it is helpful to capture best practices already underway and outline future possibilities in an accessible, common platform that is usable and helpful to both the fishing and offshore wind industries. This effort provides this opportunity. The ACP FWG looks forward to continued engagements with BOEM and fishing industries on this important effort.

Sincerely,

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