



Dear Acting Director Tetreault,

The American Clean Power Association (ACP) appreciates the opportunity to submit comments on the U.S. Committee on the Marine Transportation System's (CMTS) Proposed National Guidance for Industry on Responding to Munitions and Explosives of Concern (MEC) in U.S. Federal Waters (Proposed Guidance). ACP is the national trade association representing the renewable energy industry in the United States, including in all aspects of offshore wind energy, bringing together over 1,000 member companies, 120,000 members, 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. ACP is encouraged by this effort and fully supports the development of guidance for MECs in Federal waters.

#### **Clarity on Final Decision-Making Authority for MECs and Timelines**

ACP believes CMTS should further clarify which, if any, federal agency has, or will be granted, final decision-making authority related to MECs. The Proposed Guidance does not specify which Federal agencies (if any) holds final authority over decisions, although the guidance does highlight the Bureau of Safety and Environmental Enforcement's (BSEE) ability to issue administrative orders. A clear delineation of the roles and responsibilities of each agency and which agency makes the final call on decisions would be of great benefit to the overall process. Along these lines, ACP also recommends streamlining the confirmed MEC notification process from the current guidance to notify seven agencies to a single point of notification. This would help ensure that the decision-making process is predictable and expedient. In addition, CMTS should ensure that the final guidance has well defined timelines for all processes around MEC decision-making. For example, on page 15 of the Proposed Guidance, a. Munitions Response Plan, states "As with the MEC notification and the risk assessment, the munitions response plan should be provided to BSEE with copies sent to BOEM, USCG, FWS, EPA, USACE, and NOAA, as soon as completed and, if possible, thirty (30) days before the commencement of any munitions response work." Is it reasonable then to expect the agency review/comment period to be < 30 days? Clarity on timelines is important, as offshore wind developers often have very limited construction windows due to seasonal restrictions for protected species or weather-related challenges. In addition, limited availability of the specialized vessels that work on offshore wind projects, means that any delays to the construction schedule could result in projects no longer having access to the vessels needed to complete installation. It is essential for developers to know how long a process may take so it can be factored into the construction schedule. ACP also recommends that agency consultations and submittal of plans be allowed to occur well in advance of COP approvals so that developers can begin MEC disposition immediately upon COP approval. Finally, to ensure that any measures imposed on projects do not cause major project delays and are technically and economically feasible, the final guidance should include the flexibility to tailor mitigation on a case-by-case basis.

#### **Need for Synchronized Written Guidance Amongst Federal Regulators**

ACP believes this Proposed Guidance is a first step to clearly defining the Bureau of Ocean Energy Management (BOEM) and BSEE expectations for MEC related site clearance and 'As Low As Reasonably Practical' (ALARP) approach for offshore wind projects from the pre-Construction & Operations Plan (COP) phase through project execution. Navigating the unexploded ordnance (UXO)/MEC ALARP process with multiple federal agencies and offices is a complex and not always a clear process for offshore wind lessees. For example, the Proposed Guidance on MEC/UXO Coordination begins, according to the Phase 1 Flow Chart after 'Discovery' and does not acknowledge the interconnected nature between BOEM's guidance and the Proposed Guidance.

BOEM published (2022) guidance entitled, "Supporting National Environmental Policy Act Documentation for Offshore Wind Energy Development Related to Munitions and Explosives of Concern and Unexploded Ordnances." Within this guidance document, BOEM states that the ALARP risk mitigation process should be implemented for offshore wind projects to direct the investigation for identifying UXO. In addition, BOEM cites a 2017 study regarding how "lessees should incorporate risk management into MEC/UXO studies and mitigation" (BOEM, 2022, p. 9). This study is a publication produced by Carton et al (2017). Moreover, the BOEM guidance states "BOEM has made recommendations to include a risk assessment when evaluating and assessing sites for UXO..." and "a preliminary risk assessment framework for MEC/UXO is described in Chapter 5 [of Carton et al, 2017]" (BOEM, 2022, p. 9).

Carton et al (2017)'s Chapter 5 states that "the MEC hazard and risk assessment methods presented in this chapter require testing before being applied by BOEM" and "therefore the approach presented [here] must be considered preliminary until it is fully tested" (Carton et al., 2017, p. 83). No further documentation exists in the BOEM (2022) publication or other published guidance after that date that acknowledges that the Carton et al (2017) methodology has been fully tested by BOEM (and other agencies such as BSEE agree with the process) and has been approved for lessee use or needs to be modified.

Given the criticality of this first step to the discovery process of UXO, and the significant expense involved in conducting UXO surveys for lessees, this leaves an uncertain gap at the initial phase of the BSEE and Proposed Guidance regarding how the UXO identification process transitions from the UXO/MEC desktop and survey process (identified as "Discovery" in the draft CMTS guidance) to the BSEE and CMTS' Phase 1 approach. In addition, there are no clear timelines in which BOEM (and other agencies) will review the UXO desktop studies' findings and UXO survey results. This situation exacerbates the need for efficient and quick response times for regulatory MEC/UXO coordination during marine operations. Moreover, it impresses the need for clarity on defining the specific process from the desktop study phase to the survey(s) phase, and how these phases interconnect to the implementation phases where 'lift and shift' or detonation may be needed.

Given these complexities and nuances of the approach taken by different federal agencies involved throughout the MEC/UXO ALARP process for offshore wind developers, and the costly nature of UXO related works, it would be beneficial for all agencies to synchronize their guidance and produce one document that outlines all MEC/UXO ALARP guidance from project inception through the COP process and into construction, inclusive of seabed disturbing activities and post-construction surveys. As a part of the development of such a synchronized and holistic approach, it is suggested that BOEM, BSEE, and CMTS consider instances where 'batches' of UXO/MEC could be found, rather than single instances of

UXO/MEC targets and how these two detection scenarios may warrant different reporting criteria and workflow processes to allow for expedited resolution. This is especially important because it cannot always be assumed that the detection and identification of a MEC/UXO will occur in isolation or even a small number. Large numbers of MEC/UXO could also be found in clusters along a proposed cable route, requiring a 'batch' based examination.

### **Areas of the Proposed Guidance Where More Clarity is Needed**

The Proposed Guidance describes how BSEE may issue administrative orders which could include, but are not limited to, a suspension order or an order to microsite around MEC. The Proposed Guidance should provide more clarity on the nature of these administrative orders and what they entail. This should include an associated timeline for BSEE's response once a developer has demonstrated how they will abate the threat to health, safety, or the environment. A well-defined process is essential to providing the certainty industry needs when planning and executing offshore wind projects. In addition, the MEC/UXO Coordination Flow Chart found on page 29 of the Proposed Guidance, includes "BSEE issue admin order" twice. The chart should be revised so that the word "may" is inserted in front of "issue admin order". This would be consistent with how administrative orders are referenced in other parts of the Proposed Guidance. Overall, the use of flow charts is very helpful and will likely be incorporated into documentation with contractors along with other health, safety, and environmental information.

ACP appreciates the coordinated, interagency approach of the Maritime Operational Threat Response (MOTR) process. The final Proposed Guidance should include clarity on where the decision-making authority lies within the MOTR. In addition, the MOTR process is intended to be an immediate response to threats against the United States and its interests in the marine domain, however, the MOTR process described in the Proposed Guidance exceeds 24 hours for incidents occurring during "seabed disturbing activities". ACP encourages CMTS to revise the MOTR process for MECs so that it aligns with the intended MOTR concept of quick and decisive decision-making, especially considering that prior to any unexpected MEC discovery each offshore wind developer will have completed extensive survey work to locate and identify MEC, mitigated known MEC (lifting and shifting), and retained MEC disposition and removal companies to respond during "seabed disturbing activities". It is essential to have a well-defined and responsive review and decision-making process in place to process MEC notifications, risk assessments, and Munition Response Plans to ensure appropriate responses to confirmed MEC and avoid critical delays to project schedules. In addition, we recommend that the Proposed Guidance introduce the Emergency Situation section (found on page 26) earlier in the document. The Proposed Guidance also needs to provide more clarity in Phase I to distinguish "what to do in an urgent situation" vs. "what to do if you suspect a potential MEC but it poses no immediate threat".

Phase I has several areas where clarification is needed. These include the following:

- Phase I is broken down into i. discovery during pre-construction surveys, ii. discovery during seabed disturbing activities, and iii. discovery during post-construction operations. Pre-construction surveys are not well defined in this document. Some pre-construction surveys like geotechnical and some benthic/geotechnical sampling involve seabed disturbing activities. Do those activities fall under i or ii?
- Discovery during pre-construction surveys only refers to "discovery of confirmed MEC". Potential MEC are not referenced, whereas ii and iii only refer to "potential MEC", why is that the case?

- What are the criteria for a "potential MEC" during the activities in ii and iii? It is unlikely that the operating vessel/facility during activities in ii and iii will have the equipment (gradiometer, SSS, MBES) or MEC specialist onboard to be able to assess an object as a potential MEC, rather contractors will typically be working in locations the developer's MEC consultant has previously issued a clearance notice. According to an ALARP eight-phase process, a MEC specific geophysical survey (an activity under i) would produce a list of potential MEC and then the project would only investigate with an ROV the potential MEC the project could not microsite around. Aside from unanticipated emergency situation, only after ROV inspection would a potential MEC possibly be confirmed as a MEC.
- It would seem that in ii and iii activities, any interaction with MEC would be unanticipated and may involve the need for a more urgent response. Will there be activities under iii such as inspection geophysical surveys that allow a target to be identified as a potential MEC and pose no imminent threat?
- In ii, the reporting of a potential MEC needs to be done within 24 hours, but in i and iii it needs to be done within 48 hours. Why is there a discrepancy in the reporting timeframe?
- On page 10 of the Proposed Guidance, item xiv. uses "1000 yards". ACP would recommend that this number be stated in meters for consistency as BOEM guidance documents generally utilize the metric system.

Finally, ACP requests that the final guidance include a definition for "micro-siting." The use of this term without a definition may cause confusion as BOEM's definition in 33 CFR 585.634 is that locating anything 500 feet or less from the proposed location would not require a COP revision. It is important for offshore wind developers to know if BSEE requires micro-siting at greater distances than 500 ft. It should be clarified if this would still be considered micro-siting, and would a COP revision be required?

### **US Government Responsibility and Ownership of MECs**

Although not covered in the Proposed Guidance, the status of UXO/MECs as U.S. Government Property is an important topic that should be addressed either in this guidance or subsequent interagency discussions. ACP is aware that for onshore projects, when the Department of Defense (DOD) turns over a facility to a commercial entity, the DOD is responsible for the remediation of the property. This is facilitated through the Munitions Response Program (MRP) and was initiated after 2001 when Congress directed the DOD to identify and implement a Defense Environmental Restoration Program (DERP). In the offshore environment, we are witnessing a very different approach that is not in alignment with existing onshore DOD practices. The U.S. Government disposed of the MEC/UXO within the Outer Continental Shelf (OCS), which is submerged lands to the United States. Moreover, the U.S. Government is the inherent owner of the disposed MEC/UXO and as such should consider invoking the same methodology for remediation that the DOD uses for onshore property transfer to a commercial entity. In the current model, and as propagated in the Proposed Guidance, offshore wind lessees are being regulated on how to dispose of or move (i.e., lift and shift) U.S. Government property (i.e., MEC/UXO) that inherently is not the responsibility of the offshore wind lessees. In addition, by passing this responsibility onto offshore wind lessees, it increases project development costs and builds greater uncertainty into project timelines, disincentivizing offshore wind investment and increasing rate-payer costs in the long run.

Overall, CMTS, BSEE, and BOEM are encouraged to examine how the DOD's DERP Program could be applied to the submerged lands of the OCS. Moreover, the CMTS, BSEE and BOEM are encouraged to consider the implications for lessees in terms of project cost and schedule, additional insurance requirements, survey monitoring or other implications that may arise if there are residual responsibilities for a lessee from the "lift and shift" methodology. ACP encourages CMTS to consider these factors in the final guidelines in order to provide clear and actionable direction to lessees regarding this critical matter.

Thank you for the opportunity to submit comments on the Proposed Guidance. ACP and its members look forward to working with CMTS and relevant Federal agencies to further refine this guidance and ensure the safe and practicable development of the U.S. offshore wind industry.

Sincerely,

A handwritten signature in black ink that reads "Brian Krevor". The signature is written in a cursive, flowing style.

Brian Krevor  
Senior Director, Offshore Environmental and Permitting