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VIA E-Rulemaking Portal (www.regulations.gov)

Dr. Jill Lewandowski
Chief, Division of Environmental Assessment
Office of Environmental Programs
Bureau of Ocean Energy Management
45600 Woodland Road, VAM–OEP
Sterling, VA 20166

Re: Comments on Draft Programmatic Environmental Impact Statement for Expected Wind Energy Development in the New York Bight

Dear Dr. Lewandowski:

American Clean Power¹ (“ACP”), National Ocean Industries Association² (“NOIA”), the Offshore Operators Committee³ (“OOC”), and the New Jersey Offshore Wind Alliance (“NJOWA”) (collectively referred to herein as the “OSW industry”) appreciate the opportunity to provide comments on the Bureau of Ocean Energy Management’s (“BOEM”) *Draft Programmatic Environmental Impact Statement for Expected Wind Energy Development in the New York Bight* (the “Draft PEIS”).⁴ Each of the co-signatories include as members the New York Bight (“NY Bight”) leaseholders that will be directly impacted by the PEIS as well as other offshore wind developers that will be impacted by any precedent BOEM sets in adopting certain avoidance, minimization, mitigation, and monitoring measures (“AMMM measures” or “AMMMs”).

¹ American Clean Power (ACP) is the leading voice of today’s multi-tech clean energy industry, representing over 800 energy storage, wind, utility-scale solar, clean hydrogen and transmission companies. ACP is committed to meeting America’s national security, economic and climate goals with fast-growing, low-cost, and reliable domestic power.

² NOIA represents the interests of all segments of the offshore energy industry, including offshore oil and gas, offshore wind, offshore minerals, offshore carbon capture, use and sequestration (CCUS), and other emerging technologies. Our membership includes energy project leaseholders and developers and the entire supply chain of companies that make up an innovative ecosystem contributing to the safe and responsible development and production of offshore energy.

³ The Offshore Operators Committee (OOC) is a non-political non-profit organization representing the majority of offshore energy leaseholders on the Federal Outer Continental Shelf (OCS). For more than 75 years, OOC member companies have collaborated together to foster prudent operations that exhibit stewardship of the environment while continuously improving worker safety on the Federal OCS.

⁴ 89 Fed. Reg. 2249 (Jan. 12, 2024).

I. Introduction

The OSW industry appreciates BOEM's intent to facilitate timely review of Construction and Operations Plans ("COPs") that are later submitted for the New York Bight lease areas. However, the OSW industry is concerned that the PEIS, if finalized as currently drafted, could hinder development of offshore wind projects in the NY Bight by prematurely adopting many of the AMMMs that are identified in Alternative C, the "Proposed Action." This outcome is a counter-productive use of BOEM's authority under the National Environmental Policy Act ("NEPA") and the Outer Continental Shelf Lands Act ("OCSLA"), because it would impose mitigation requirements on developers that are technically and economically infeasible, are duplicative or impracticable, will create untenable safety issues, are better addressed through COP guidance, or proposes to adopt AMMMs that are outside BOEM jurisdiction and better addressed by the jurisdictional agencies. Furthermore, BOEM's proposal to adopt all identified AMMMs at the PEIS stage would place a significant undue burden on developers to disprove the appropriateness of AMMMs at the site-specific level, thereby increasing costs and delaying the development of offshore wind projects. Finally, many of the proposed AMMMs are not true mitigation measures but rather serve to augment existing Construction and Operations Plan (COP) guidance or new regulations that are in development. The use of a regional programmatic NEPA analysis to create new AMMMs that should be addressed in guidance or regulations circumvents proper processes under the Administrative Procedures Act (APA) and risks missing input from a wider range of stakeholders outside the NY Bight region.

To address these concerns, the OSW industry urges BOEM to ensure that the final PEIS does not impose new analytical burdens or substantive requirements on lessees but instead serves as an *analytical* tool that improves the efficiency of the environmental review of COP-specific proposals within the NY Bight through tiering. To ensure this outcome:

- BOEM should reframe the PEIS as an analysis of AMMMs rather than as a vehicle for mandating AMMMs.
- The Purpose and Need of the Proposed Action should be an analysis of AMMMs that BOEM *may* consider as conditions of approval.
- BOEM should create an Alternative that analyzes a set of realistic, standard, and proven AMMMs in collaboration with the OSW industry.
- BOEM should include in Alternative C only novel AMMMs if BOEM can demonstrate that (1) existing measures are insufficient at reducing impacts, are infeasible, or are not preferred and (2) the proposed measure will effectively mitigate the listed impact.
 - If existing measures are demonstrated to be insufficient, BOEM should work with the offshore wind industry to modify existing measures or design new measures that can be demonstrated to substantially reduce or avoid impacts and are technically and economically feasible.
- BOEM should remove from consideration certain listed AMMMs, including:
 - AMMMs that are not true mitigation measures, but instead augment existing COP guidance or substitute for new regulations. If BOEM believes these measures merit further consideration, the agency should do so by seeking full public input through revisions to COP guidance or a rulemaking.

- AMMMs that are technically or economically infeasible.
- AMMMs that are outside BOEM's jurisdiction, and
- AMMMs that are voluntary.

II. BOEM should not adopt AMMMs through NEPA.

NEPA requires federal agencies to assess the environmental effects of their proposed actions prior to making decisions.⁵ Importantly, NEPA is merely a procedural statute- it authorizes the use of substantive authorities for improved environmental outcomes but imposes no substantive requirements.⁶ NEPA only requires a “reasonably complete discussion of possible mitigation measures” to allow for a fair evaluation of avoidable and unavoidable environmental consequences.⁷ The Supreme Court has warned that there is no requirement under NEPA “that a complete mitigation plan be actually formulated and adopted.”⁸ Indeed, the Court has held that it would be “inconsistent” with NEPA’s procedural focus “to demand the presence of a fully developed plan that will mitigate environmental harm.”⁹ In short, NEPA requires agencies to take a “hard look” at the environmental impacts of actions being proposed under substantive statutes over which they have authority, such as OCSLA. NEPA itself does not provide authority to impose requirements or limit actions.¹⁰

In the introduction BOEM states that it is developing this Draft PEIS “to (1) identify, analyze, and *adopt* programmatic AMMM measures that could be applied to the six NY Bight lease areas.”¹¹ It appears that BOEM is proposing to use NEPA to impose substantive requirements on lessees without identifying the authority for each of the AMMMs. As stated, BOEM cannot use NEPA as the statutory mechanism to adopt these AMMM measures, it can only rely on NEPA to analyze the impacts of adopting or not adopting said measures under other statutes. As discussed in detail below, adopting AMMMs at the PEIS stage, prior to COP review, is contrary to BOEM’s implementing regulations under OCSLA. The final PEIS and Record of Decision (ROD) should clarify that BOEM is *considering* rather than *adopting* the proposed AMMMs. In this way, the PEIS does not inappropriately impose substantive requirements on projects, but instead provides an analysis of these AMMMs, which can help inform and provide a more efficient path to project specific environmental reviews and approval. As discussed below,

⁵ 42 U.S.C. § 4331.

⁶ NEPA Sec. 101(b), 42 USC 4331(b), and Sec. 105, 42 U.S.C. 4335 (“The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.”); 40 CFR 1508.1(s) (“While NEPA requires consideration of mitigation, it does not mandate the form or adoption of any mitigation.”); *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (“[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.”).

⁷ *See id.* at 352.

⁸ *Id.*

⁹ *Id.* at 353; *see also Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 205-06 (D.C. Cir.) (agency not required to finish mitigation studies or execute mitigation plans before project begins), *cert. denied*, 502 U.S. 994 (1991); *Communities, Inc. v. Busey*, 956 F.2d 619, 625-26 (6th Cir.) (EIS lacking complete remediation plan adequate where sufficient investigation was conducted to identify mitigation alternatives and make reasonable estimate of cost), *cert. denied*, 506 U.S. 953 (1992).

¹⁰ *Ibid.*, at 351. (“other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed, rather than unwise, agency action.”)

¹¹ Draft PEIS, at ES-1.

however, this efficiency is only possible if the preferred alternative selected in the ROD considers only those AMMMs that are reasonable and economically and technically feasible.

a. The Purpose and Need of the Proposed Action inappropriately shifts burden to developers.

The Proposed Action proposes to “[adopt] ...measures...*unless* future COP-specific NEPA analysis shows that implementation of measures is not warranted or effective”¹² Separate from the issue of adopting substantive measures discussed above, the proposal to wait for site specific analysis to show that a measure is not warranted inappropriately shifts the burden to developers to prove that specific AMMMs should not be imposed at the COP approval stage. This will significantly increase the costs to developers to study, analyze, and disprove the appropriateness of certain measures. This is a burden found in neither NEPA nor BOEM regulations nor other reviewing statutes.

The final PEIS should not require site-specific analysis to disprove the need for prematurely adopted AMMMs. Rather, the PEIS should help inform the site-specific NEPA review but ultimately the analysis in the site-specific NEPA document should determine which AMMMs are reasonable and necessary for the project under review.

b. The Purpose and Need of the Proposed Action, The Adoption of AMMMs, is contrary to BOEM’s authority under OCSLA and NEPA.

BOEM states that the Proposed Action for the Draft PEIS is “the adoption of programmatic AMMM measures that BOEM would require as conditions of approval for activities proposed by lessees in COPs submitted for the NY Bight lease areas, unless future COP-specific NEPA analysis shows that implementation of measures is not warranted or effective.”¹³ Stating that BOEM “would require” the AMMMs as conditions of approval is contrary to BOEM’s authority under OCSLA’s implementing regulations.

First, under BOEM’s implementing regulations, the agency cannot use a PEIS to “pre-approve” COP terms and conditions. Doing so prematurely imposes a substantive burden on lessees and inappropriately preempts the COP approval process. BOEM regulations outlining the COP approval process state that BOEM conducts an environmental review once the lessee has submitted a COP and that “*upon completion* of our technical and environmental reviews and other reviews required by Federal Law... BOEM may approve, disapprove, or approve with modifications your COP. If we approve your COP, we will specify terms and conditions to be incorporated into your COP.”¹⁴ Importantly, BOEM approves a COP, including mitigation measures, *upon completion* of the environmental review.

In short, as required by regulation, a lessee submits a COP, which includes proposed measures to reduce impacts from the proposed activities within the COP to BOEM. BOEM subsequently reviews the COP for completeness and sufficiency and conducts an environmental review on the

¹² Draft PEIS, ES-3.

¹³ Draft PEIS, ES-3.

¹⁴ 30 C.F.R. § 585.628(f).

COP. It is at this stage that BOEM determines which AMMMs should be included in the environmental review for analysis and which AMMMs should be selected for adoption as terms and conditions of plan approval. In contradiction to these regulations, BOEM is proposing to rely on this PEIS to prematurely adopt AMMMs prior to COP review and approval. While BOEM can certainly rely on a PEIS to *analyze* the impacts of *appropriate* AMMMs (as discussed in more detail below) it should not use the PEIS as authority to impose a substantive burden on a lessee prior to the COP review and approval.¹⁵

Premature adoption of AMMMs may also inadvertently overlook consultation processes such as under the Endangered Species Act (ESA), which begins with review of a fully developed site-specific action in sufficient detail to assess the effects of the action on listed species and critical habitat.¹⁶ If the activity is allowed by an incidental take statement, any reasonable and prudent measures imposed as a result of the ESA process “cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.”¹⁷ Similarly, the Marine Mammal Protection Act (“MMPA”) authorization process begins with a developer’s application to conduct site-specific activities, and any conditions imposed must be “practicable” and may not unduly interfere with the activity’s implementation.¹⁸ Other environmental review statutes, including the Clean Air Act and the Clean Water Act contain similar requirements to review site-specific plans and limit agencies’ conditioning authority over proposed activities.¹⁹ As such, any AMMMs that would potentially be required under the ESA, MMPA or other environmental statutes should not be adopted prior to the completion of the consultation process.

In the final PEIS, BOEM should clarify that the Proposed Action is an analysis of AMMMs that BOEM *may* consider as conditions of approval. As such, future site-specific analysis would determine whether an AMMM considered in the draft PEIS is warranted, rather than determining whether such measure is *not warranted*. Under this scenario, BOEM would still rely on the PEIS to provide an environmental analysis of impacts and to tier site-specific reviews, but it would not prematurely require the adoption of specific AMMMs. The final PEIS would include an analysis of all reasonable AMMMs that BOEM may require as terms and conditions of COP approval. BOEM would not be required to re-analyze each AMMM included in the final PEIS when

¹⁵ As noted in the section below, it is no defense that a lessee may theoretically rebut the adoption of an AMMM at the COP stage by demonstrating that it is not “warranted or effective.” This new burden is not found in BOEM’s regulations.

¹⁶ 50 C.F.R. § 402.14(c)(1)(i) (requiring detailed description of proposed action to initiate ESA consultation).

¹⁷ *Id.* § 402.14(i)(2).

¹⁸ 16 U.S.C. § 1371(a)(5)(A)(i)(II)(aa) (“practicable” requirement for conditions in incidental take regulations provision); *id.* § 1371(a)(5)(D)(ii)(I) (“practicable” requirement for conditions in incidental harassment authorizations); *see Nat. Res. Def. Council, Inc. v. Pritzker*, 828 F.3d 1125, 1134-35 (9th Cir. 2016) (interpreting “least practicable adverse impact” requirement under 16 U.S.C. § 1371(a)(5)(A)(i)(II)(aa)); *id.* at 1135 n.9. (eliminating 99% of oceans from sonar activity would be more protective of marine mammals “[b]ut it would not be practicable because it would so restrict military options for readiness training, that it would render such training ineffective”).

¹⁹ 40 C.F.R. 1502.24 (To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrent and integrated with environmental impact analyses and related surveys and studies required by all other Federal environmental review laws and Executive orders applicable to the proposed action, including the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (54 U.S.C. 300101 *et seq.*), and the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

reviewing and approving a COP. As such, the final PEIS would allow for consistency, standardization, and a more efficient environmental review process at the site-specific level.

III. The PEIS should be an analytical tool for the purposes of tiering subsequent environmental reviews.

A PEIS should evaluate the effects of planning level decisions, including, in this case, the effects of implementing certain AMMMs. A PEIS is an important NEPA tool for improving efficiencies and reducing agency burden by allowing for site-specific reviews to tier from the PEIS. Indeed, CEQ's recently proposed NEPA regulations²⁰ recognize the value of a PEIS for the purposes of tiering.²¹ The proposed regulations note that "agencies generally *should* tier their environmental impact statements and environmental assessments when it would eliminate repetitive discussions of the same issues, focus on the actual issues ripe for decision, and exclude from consideration issues already decided."²² Drafted correctly, the NY Bight PEIS could play the role described above and help reduce the time it takes to finalize COP review. Unfortunately, the current version does not achieve this objective. Instead, it appears to rely on the PEIS process to adopt wholesale all AMMMs that are identified through the PEIS process. In doing so, BOEM is not only making decisions which are not appropriate this early in the process, but it is also placing the burden on the lessee to show that certain AMMMs are not warranted.

Indeed, BOEM admits that it lacks sufficient project- and site-specific information at this PEIS stage to determine which AMMMs may be appropriate, stating that it "may require additional or different measures based on future, site-specific NEPA analysis or the parameters of specific COPs."²³ In fact, as identified in Appendix C, almost all impact assessments are deferred to the individual project NEPA process. BOEM's proposal to adopt all AMMMs identified in this process at the PEIS stage *and then evaluate them again* at the site-specific stage to determine which AMMMs are appropriate (including AMMMs that were not adopted in the PEIS)²⁴ exposes that the adoption of AMMMs is not ripe at this PEIS stage. The premature adoption of these AMMMs undermines tiering's efficiency goals and will lead to duplication of effort and an *increase* in the data and analysis that will be necessary to prove that certain adopted AMMMs are inapplicable at the site-specific level. This is the very duplication of effort that NEPA's implementing regulations attempt to avoid. The Offshore industry provides detailed comments on the AMMMs, and these issues in Attachment A.

The PEIS should be an analysis of appropriate programmatic AMMMs that BOEM *may* consider as a condition of approval. BOEM should be able to rely on the analysis of the AMMMs to tier subsequent site-specific reviews. Finally, to ensure the promises of efficiency under a PEIS, the

²⁰ While not finalized, NEPA Phase II regulations will likely be finalized, prior to the finalization of the PEIS. Moreover, the NPRM notes that "An agency may apply the regulations in this subchapter to ongoing activities and environmental documents begun before" the effective date of the final rule. *See* 88 Fed. Reg. 49924 (July 31, 2023).

²¹ 88 Fed. Reg 4992 (July 21, 2023) (noting programmatic reviews are re important tools to facilitate more efficient environmental reviews and project approval).

²² Proposed 40 CFR §1501.11.

²³ Draft PEIS at ES-3.

²⁴ *See, e.g., id.* at ES-1 ("The project-specific analyses ... could incorporate additional or different AMMM measures as needed").

AMMMs considered at this stage should not only be reasonable, and economically and technically feasible, but they should also be *ripe* for review.

IV. Alternatives B and C Are Unreasonable.

NEPA requires an agency provide “a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal.”²⁵

BOEM fails to provide a reasonable range of alternatives. First, both Alternative B and Alternative C propose either “adopting” or not “adopting” AMMM measures. As discussed above, while the purpose and need of the Proposed Action can be to analyze or assess the impact of implementing AMMM measures, it cannot be to adopt said measures. To address this issue BOEM should change the underlying language of the alternatives to analyze or consider rather than to adopt.

Second, Alternative B as currently constructed and in the context of the other alternatives, is not a realistic scenario.²⁶ According to the PEIS, “Alternative B considers the potential impacts of future offshore wind development for the six NY Bight lease areas without application of any AMMM measures that could avoid, minimize, mitigate, and monitor those impacts.”²⁷ While BOEM notes that “the identification and analysis would be deferred to COP specific NEPA for the NY Bight projects”²⁸ the analysis of impacts assumes a lessee would not apply any AMMMs, which does not meet the “rule of reason” standard. There is simply no scenario under which a lessee would not apply any mitigation measures to a project, as doing so would be legally infeasible, in direct contradiction to OCSLA and a multitude of other environmental laws, including MMPA. NEPA requires agencies to analyze “reasonably foreseeable” effects of the proposed agency action.²⁹ The impact analysis under Alternative B effectively assumes no environmental safeguards. These are not “reasonably foreseeable” effects because under BOEM’s implementing regulations a lessee is required to design projects and conduct all activities in a manner that ensures safety and will not cause undue harm or damage to natural resources, including their physical, atmospheric, and biological components to the extent practicable; and take measures to prevent unauthorized discharge of pollutants including marine trash and debris into the offshore environment.”³⁰ Further, in a COP, lessees are required to include “A description of the measures you will use to avoid or minimize adverse effects and any potential incidental take before you conduct activities on your lease, and how you will mitigate environmental impacts from your proposed activities including a description of the measures

²⁵ 42 U.S.C. § 4332.

²⁶ Note that the name of Alternative B, “*Defer Adoption of AMMM Measures*” is misleading and must be changed. Alternative B does not assess the deferral of AMMMs to a later stage in the NEPA process, but rather assumes that No AMMMs would be applied to the projects. If kept, the Alternative should be appropriately renamed “No Adoption of AMMM measures.”

²⁷ Proposed EIS at ES-6

²⁸ *Id.*

²⁹ 42 U.S.C. § 4332(c)(i).

³⁰ 30 C.F.R. § 585.105(a).

you will use as required by this part and [30 CFR part 285](#), subpart H.”³¹ Under Alternative B, a lessee would not be meeting this obligation.

In addition, Alternative B constitutes a “worst case scenario,” a requirement that was removed from NEPA regulations due to the potential for “distorting the decision-making process by overemphasizing highly speculative harms.”³² The inclusion of Alternative B could distort the decision-making process by radically overestimating the impacts of offshore wind development in the NY Bight and make it very difficult to determine which mitigation measures are most effective at reducing impacts. Finally, Alternative B assumes major impacts to endangered species (For example, BOEM expects impacts to be major for North Atlantic Right Whale and other ESA-listed species resulting from noise produced during unmitigated piledriving, UXO detonations, secondary entanglement in derelict gear around project structures, and vessel strikes). As intentional harassment of endangered species is considered “take” under the ESA, such mitigable impacts would be clearly inconsistent with requirements to minimize the impact of incidental take.³³ The impacts assumed under Alternative B are entirely unreasonable. At the very least, BOEM must consider a baseline level of impacts under which it is assumed lessees will be meeting statutory and regulatory obligations.

Third, and in contrast to Alternative B, under Alternative C the “Proposed Action is the adoption of AMMM measures such that potential impacts described in Alternative B may be avoided, reduced or mitigated.”³⁴ This assumes a lessee would be required to adopt all AMMMs listed in the PEIS. As discussed in detail in Section V and Attachment A, a number of the proposed AMMMs are inappropriate for inclusion as they would constitute COP guidance, are neither technically nor economically feasible, are duplicative, are outside BOEM’s jurisdiction, are voluntary, and/or impose an undue burden on the lessee, and as such should *not be considered* in BOEM’s alternative analysis.³⁵

If BOEM is to finalize the PEIS and issue a ROD, it must present a *reasonable range of alternatives*. To do so BOEM must make changes to Alternatives B and C and add a new alternative that is both reasonable and realistic. This new alternative should, at most, be limited to standard mitigation measures proposed by developers in their COPs or selected in previous RODs for offshore wind projects. This new alternative should not include any novel AMMMs. Because the alternative is “qualitatively within the spectrum of alternatives that were discussed in the draft” BOEM need not supplement the EIS in developing this new alternative.³⁶

³¹ 30 C.F.R. § 585.626(b)(15).

³² 85 Fed. Reg. 43304.

³³ 50 C.F.R. § 402.14(i)(1).

³⁴ Draft PEIS, ES-8.

³⁵ 42 U.S.C. 4332(c)(iii); *see also* Screening Criteria for Alternatives to be Analyzed in Detail in Environmental Impact Statements

for Construction and Operations Plans (June 2022), *available at*

<https://www.boem.gov/sites/default/files/documents/renewable-energy/BOEM%20COP%20EIS%20Alternatives-2022-06-22.pdf>.

³⁶ Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, 18035 (Mar. 17, 1981); *See Friends of Marolt Park v. U.S. Dep't of Transp.*, 382 F.3d 1088, 1096–97 (10th Cir.2004).;

For Alternative B to remain in the document, the Final PEIS must make it clear that this alternative is for the purpose of analysis only and that the impacts analyzed are not a realistic reflection of any offshore wind project. Its main purpose is to assist in analyzing the effectiveness of the mitigation measures included in the new alternative.

Finally, Alternative C can become a more reasonable and useful tool for analyzing the effectiveness of novel mitigation measures if BOEM removes measures that are duplicative or impracticable, technically or economically infeasible, create untenable safety issues or undue burden on industry, are more suitably proposed as COP guidance, are outside BOEM's jurisdiction, and/or are voluntary. BOEM would further need to demonstrate avoidance of, or substantial reduction in, impacts associated with the additional measures in Alternative C above and beyond those included in the new alternative. To arrive at this alternative, BOEM should work closely with the OSW industry between now and issuance of a final PEIS to identify AMMMs that are technologically and economically feasible. BOEM worked closely with the OSW industry, particularly New York Bight lessees, to develop the representative project design envelope. BOEM should replicate this process for the development of any novel AMMMs. Finally, BOEM should fully assess the effectiveness of existing measures in the new alternative. Indeed, the Draft PEIS confirms that many of the new AMMMs were developed by BOEM without any outreach to industry members who are in the best position to provide input on the practical and economic feasibility and effectiveness of AMMMs.³⁷ Therefore, prior to developing new, and potentially overly burdensome measures to include in an alternatives analysis, BOEM should work with industry to better understand how existing measures may be made more effective- or if indeed new measures are needed. Attachment A provides the OSW industry's detailed comments on specific AMMMs.

V. BOEM should remove certain AMMMs from consideration.

Even assuming BOEM reframes the PEIS, and acknowledges that the agency is considering AMMM measures that it *may* require as conditions of approval, it should remove from consideration certain inappropriate AMMMs. Attachment A provides the OSW industry's detailed comments on specific AMMMs. As demonstrated by those comments, many of the AMMMs proposed by BOEM are inappropriate because, to varying degrees, they are outside of BOEM's statutory authority and are duplicative, are more suitably proposed as COP guidance will be technically or economically infeasible, will create untenable safety issues or undue burden on industry, and/or are voluntary.

a. BOEM should remove AMMMs that are outside their statutory authority, and duplicative.

An agency "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law."³⁸ As such, BOEM cannot implement AMMMs that

³⁷ *Id.* at 3.2-1 (AMMMs were developed from scoping, coordination with Tribes and governmental agencies, and available COPs).

³⁸ *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988)).

are outside of its authority. While a NEPA analysis can review mitigation measures that are not within an agency's authority, the agency cannot impose these measures on the lessee or adopt them in a ROD, but can only cross-reference those measures to provide for interagency coordination. In fact, "Agencies should not commit to mitigation, however, unless they have sufficient legal authorities and expect there will be necessary resources available to perform or ensure the performance of the mitigation."³⁹ Indeed, BOEM itself notes that not all "AMMM measures are within BOEM's statutory and regulatory authority; those that are not may still be adopted and imposed by other governmental agencies."⁴⁰ As such, BOEM should not develop duplicative or additive AMMM⁴¹ or impose any requirements for measures that fall outside of their statutory authority. Instead, BOEM should defer to cooperating agencies with regulatory authority to impose certain mitigation measures.⁴²

For example, AQ-1 through AQ-5 would impose air quality requirements; however, emissions in the NY Bight lease area are regulated by the Environmental Protection Agency ("EPA") under its Clean Air Act regulations at 40 C.F.R. Part 55. AQ-1 through AQ-5 are duplicative of EPA's air permit process and create the potential for conflicting requirements and confusion. Through the OCS Air Permit process, applicants will perform a Best Available Control Technology (BACT) and/or Lowest Achievable Emission Rate (LAER) analysis for each emission source and New Source Review (NSR) air pollutant that is emitted in excess of thresholds set forth in the Prevention of Significant Deterioration (PSD) regulations and/or the regulations of the Corresponding Onshore Area. For example, with respect to AMMM AQ-4, as part of the BACT/LAER analysis, applicants will assess the feasibility of, add-on pollution controls (e.g., Selective Catalytic Reduction, Selective Non-Catalytic Reduction, NO_x Adsorber/Scrubber, Lean NO_x Catalysts, SO_x Scrubber, Diesel Particulate Filter, Diesel Oxidation Catalyst, etc.) on vessels and engines on the WTGs and ESPs. EPA is responsible for reviewing and concurring with an applicant's justification for why these add-on pollution controls are technically and/or economically infeasible through the BACT/LAER process, not BOEM and BSEE. BOEM should not use its AMMMs to reinforce existing standards or legal requirements over which it has no authority itself.

Similarly, MMST-13 attempts to characterize existing vessel speed rules but may ultimately create conflict if those regulations are modified. EJ-1 would require lessees to develop an Environmental Justice Communications Plan, but an Environmental Justice Plan is already required by both the states of New York and New Jersey. AMMMs that are duplicative of (and potentially in conflict with) existing state or Federal requirements should be removed from BOEM's proposed AMMMs.

Finally, with AMMM MUL-7, BOEM attempts to meet International Maritime Organization ("IMO") standards. These standards are outside of BOEM's jurisdiction and authority, and

³⁹ Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 FR 3843, (Jan. 2011)

⁴⁰ DPEIS, Appendix G.

⁴¹ As discussed below, the AMMM implies it is within BOEM's authority to issue. Instead, BOEM should simply analyze the environmental effects of air permits that would be required by EPA.

⁴² See *Wyoming v. U.S. Dep't of the Interior*, 493 F. Supp. 3d 1046 (D. Wyo. 2020) (BLM rule referencing EPA regulations "usurps the authority to regulate air emissions Congress expressly delegated to the EPA").

BOEM may not use AMMMs developed through NEPA to enforce compliance with those standards (*see* Attachment A for additional examples).

b. BOEM should remove AMMMs that would be more appropriately proposed as COP development guidance.

Several AMMMs would in effect establish new COP development guidance. The inclusion of these measures is counter to the proposed action which states that “BOEM would require as conditions of approval for activities proposed by lessees in COPs submitted for the NY Bight lease areas, unless future COP-specific NEPA analysis shows that implementation of such measures is not warranted or effective.”⁴³ These measures dictate how a COP should be developed and therefore, by their very nature, could not be implemented through terms and conditions of COP approval as at that time, the COP is already fully developed and analyzed under NEPA and other environmental laws and consultations.

For example, MUL-23 which states that “Lessees must consider how to avoid or reduce potential impacts on important environmental resources, including sensitive habitats (e.g., Mid-Shelf Scarp, NJDEP-designated prime fishing grounds, hardbottom, SAV, ledges), by adjusting project design. Lessees must demonstrate this consideration through their initial COP submission or subsequent updated versions.” Requiring that a measure be demonstrated through initial COP submission is COP guidance and, as stated above, could not be implemented through terms and conditions of plan approval and is therefore in direct conflict with the proposed action. This measure, and all AMMMs that constitute COP guidance, should be removed and not included in the Final PEIS. Instead BOEM can include these measures in a narrative that discusses items that should be studied separately through the development of future guidance, what feedback was provided on these items, and how BOEM would seek further input on them through a formal guidance public review process.

If BOEM would like these measures to be included in the COP development process, then BOEM must go through the proper guidance development process. To do so, BOEM would need to amend the current COP guidance to include these measures and go through a public review and stakeholder outreach process. A NEPA document, that focuses on specific leases, should not be the venue for BOEM (and cooperating agencies) to receive stakeholder feedback on COP guidance. It is important that BOEM utilize the correct processes to ensure consistency with the purpose of the PEIS and give proper notice to all stakeholders, given that these proposed measures are highly likely to impact development beyond the NY Bight.

c. BOEM should remove AMMMs that are technically and economically infeasible.

As stated above, NEPA requires agencies to “study, develop, and describe technically and economically feasible alternatives”⁴⁴ A number of the newly proposed AMMMs are technically

⁴³ Draft PEIS, ES-3.

⁴⁴ 43 U.S.C. § 4331.

and economically infeasible, will create unsafe conditions, and/or impose undue burden on developers (*see* Attachment A for additional examples).

MUL-22 - Received Sound Level Limit: It is premature to implement new requirements on sound mitigation prior to a thorough and complete analysis of learnings from the construction of the South Fork Wind Farm and Vineyard Wind 1 projects, including measured sound fields, sound abatement techniques, relative effectiveness of mitigation and monitoring measures, and documented exposures above relevant thresholds. Ignoring this experience robs BOEM and the industry of the opportunity to learn and improve based on the most recent science and practical considerations. It remains unclear how and to what extent the proposed thresholds will reduce the amount of acoustic exposure, and whether these reductions meaningfully increase protection of marine wildlife. Empirical data compiled from projects in construction should be presented and discussed at the joint forums. This measure fails to account for trends in offshore wind technology, particularly the use of larger wind turbines and associated larger foundations and piles. Large turbines are essential to make efficient use of the nation's offshore wind resource and to meet President Biden's offshore wind and climate goals, myriad State goals, and individual projects' offtake agreements. Finally, mitigation measures for marine wildlife fall under NOAA's authority under the MMPA.

MUL-29 - Sound Field Verification (SFV) Process, Plan and Reporting: This process will result in significant construction delays to projects and is not economically or technically feasible. Requiring SFV at every turbine location would be unnecessary and cost prohibitive. A standardized target sub-sample of turbine locations would be more than sufficient to determine the effectiveness of sound reduction mitigation measures. Empirical data compiled from the projects currently conducting SFV could be discussed at our proposed BOEM-industry forum and would inform a broader discussion on how best to incorporate lessons learned from early projects. This measure could also unintentionally exacerbate stressors on marine mammals. For example, construction time could be extended unnecessarily to accommodate repeated attempts to reduce sound to a specific level (e.g., start-up, test, fail sound limit, shut down, add bubble curtain, start-up, fail by lesser degree, shutdown, and so on). Also, more extensive sound field verification requires additional vessels and equipment, which counterproductively adds to the ambient sound level.

AMMMs AQ-2 and AQ-3 require lessees to replace diesel fuel and marine fuel oil with alternative fuels such as natural gas, propane, or hydrogen for vessels and require the replacement of combustion engines with zero-emissions technology (fuel cell-electric or battery-electric) for vessels. Requiring developers to use alternative fuels or zero-emissions technology would severely limit project feasibility since the supply chain for vessels, both current and new builds, would be constrained to very few vessels globally. Considering the benefits of GHG reductions from deployment of offshore wind power, the burden of this mitigation measure is disproportionate given the magnitude of GHG emissions during the relatively brief construction period.

AMMMs AQ-2 encourages lessees to replace diesel fuel and marine fuel oil with alternative fuels. Requiring a technical and/or economic feasibility analysis for not using these vessels places an undue burden on developers because of the lack of these vessels in the market both

now and in future construction trends. While there are over 25 different types of vessels needed to construct and maintain an offshore wind project,⁴⁵ ACP did an analysis of 5 vessel types that provide a good representation of the vessel size and work scope across the industry including Crew Transfer Vessels, Heavy Lift Vessels, Rock Installation vessels, Service Operation Vessels and Survey Vessels.

ACP evaluated how many vessels with alternative fuels exist and how many global vessels are planned for construction or modification from 2024-2027, excluding China. ACP found that of the current fleet, only 2% of these five vessel types have alternative fuels. Of these five vessel types under construction between 2024-2027, 33% will be fueled by alternative fuels. And 7% of these vessels under modification will have the capacity to use alternative fuels. In total, that means only 5% of the global market (excluding China) of these five vessel types will be fueled by alternative fuels. As offshore wind ambitions grow in both Europe, the U.S., and other markets, these vessels will be in short supply. With vessel availability already a challenge for U.S. projects, pushing developers to only hire 5% of available vessels places undue burden on projects and is infeasible.

Alternate Fuel Available by Supply Type

Total Vessel Count (excluding China including Current Construction & Under Modif)

Vessel Main Purpose	Alternate Fuel Available	None	Vessel Count	Percentage
CTV	15	557	572	3%
Heavy lift	7	119	126	6%
Rock Installation	3	19	22	14%
SOV	40	91	131	31%
Survey	14	580	594	2%
	79	1366	1445	5%

AMMMs AQ-2 encourages lessees to replace combustion engines with zero-emissions technology (fuel cell-electric or battery-electric) if feasible for vessels, equipment and vehicles engaged in activities on the OCS. Similar to AQ-1, requiring a technical and/or economic feasibility analysis for not using these vessels places an undue burden on developers because of the lack of these vessels in the market both now and in future construction trends. ACP did a similar analysis for the availability of ESS and Shore Power capability of the same 5 representative vessel types in the current market and under construction and modification between 2024-2027. In the current market, 5% of vessels have ESS capability, 21% of those under construction and 10% of those under modification, excluding China. In total, looking at

⁴⁵ See <https://cleanpower.org/resources/offshore-wind-vessel-needs/>.

current supply and vessels under construction and modification, 5% of vessels will have ESS capability.

ESS

Total Vessel Count (excluding China including Current Construction & Under Modif)

Vessel Main Purpose	ESS (Y)	ESS (N)	Vessel Count	Percentage
CTV	32	540	572	6%
Heavy lift	5	121	126	4%
Rock Installation	2	20	22	9%
SOV	51	80	131	39%
Survey	9	585	594	2%
	99	1346	1445	7%

Shore power capacity is even less common. Current vessel availability with shore power is 1% of the global market. 4% of vessels under construction 2024-2027 will have shore power and 7% of vessels under modification. In total, in 2027, only 2% of these 5 representative vessels will have shore power capacity.

Shore Power

Total Vessel Count (excluding China including Current Construction & Under Modif)

Vessel Main Purpose	Shore Power (Y)	Shore Power (N)	Vessel Count	Percentage
CTV	3	569	572	1%
Heavy lift	9	117	126	7%
Rock Installation	2	20	22	9%
SOV	8	123	131	6%
Survey	1	593	594	0%
	23	1422	1445	2%

A programmatic NEPA review, focused on a specific region is not the appropriate vehicle to test out new measures and receive feedback from stakeholders on feasibility. As demonstrated above, these measures are infeasible, unreasonable, and requiring each lessee to prove their infeasibility

during the project specific COP review places an undue burden on the industry. The onus should not be on the industry to justify why a measure is infeasible, but instead the agency should demonstrate that the AMMMs result in reduced impacts. These measures should be removed prior to the publication of the Final PEIS.

d. BOEM should remove AMMMs that are voluntary.

In Appendix G, BOEM lists numerous AMMMs as “voluntary.” In addition to any other reason these measures are otherwise inappropriate (as set forth in Attachment A), BOEM should not analyze any of these measures as potential terms and conditions of plan approval. Doing so would undermine the voluntary nature of the measures.

e. Any AMMMs That End Up In the Preferred Alternative Should Be Backed By Evidence of their Effectiveness.

The final PEIS should demonstrate that each AMMM ultimately included in the preferred alternative results in avoidance or substantial reduction of impacts and is based on science. Indeed, BOEM notes in the PEIS that "There should also be evidence that each alternative would avoid or substantially lessen one or more potential, specific, and significant socioeconomic or environmental effects."⁴⁶ BOEM should demonstrate this reduction in impacts before considering an AMMM in its preferred alternative. However, as drafted, the PEIS does not appear to show an appreciable difference in impacts between Alternative B and Alternative C for many of the resource areas (Table ES-2 and Table 2-4). Moreover, for many AMMMs, BOEM fails to demonstrate that proposed mitigations would result in change in impact from the application of the AMMM, stating that impacts of Alternative C are anticipated to be the same or similar to Alternative B. In fact, the PEIS only has five resource areas that show appreciable reduction in impacts between Alternatives B and C. Even for those five areas, several only show reductions if the 6 NY Bight projects are built in the same year- a highly unlikely outcome, as discussed below. In addition, as discussed previously, Alternatives B and C are not reasonable as one drastically overestimates impacts while the other considers technically and economically infeasible mitigation measures. A true comparison among reasonable alternatives is key to determining the effectiveness and appropriateness of mitigation measures.

Finally, the PEIS fails to analyze or demonstrate specific impacts of offshore wind development in the NY Bight on resources for which it proposed mitigation measures. Mitigation measures should avoid, minimize, or compensate for effects caused by a proposed action or alternatives as described in an environmental document or record of decision and that have a nexus to those effects.⁴⁷ For many AMMMs, the PEIS fails the very basics of applying mitigation measures as there is no demonstrated effect caused by the proposed action or alternatives, it is not specifically described in the document, and no clear nexus between the mitigation measure and those effects is demonstrated. Attachment A contains more detailed comments on these, and other measures, that fail to demonstrate impacts on resources and effectiveness of AMMMs.

⁴⁶ Draft EIS, 2-1.

⁴⁷ 40 CFR 1508.1(s)

VI. The PEIS is overly conservative, resulting in unrealistic assessments.

While the OSW industry strongly supports BOEM's use of a representative project design envelope, the PEIS assesses construction timelines that are unrealistic and overly conservative. For example, the PEIS unrealistically assumes that all 6 NY Bight projects will be built the same year and in the same year as other NY/NJ offshore wind projects. According to Table D-2 (Appendix D of the PEIS), the analysis assumes that all 1,125 NY Bight foundations will be constructed in 2026, with a total of 1,601 foundations in 2026 when combined with other NY/NJ projects. This approach exacerbates and overestimates air quality impacts and almost all other impacts in the "6 NY Bight Project" and "Cumulative Project" assessments. Such an analysis also overstates the benefits of mitigation measures as the benefits are greater when applied to many projects being constructed at once. BOEM should develop a reasonable buildout of the NY Bight leases based on timing for power delivery to meet state procurements and discussion with industry.

VII. It is unclear how the Draft PEIS calculates energy production when describing benefits of the projects.

The PEIS notes that "[b]ased on a conservatively estimated power ratio of 3 megawatts per square kilometer, BOEM estimates that full development of leases in this area has the potential to create up to 5.6 to 7 GW of offshore wind energy."⁴⁸ It is unclear what energy production value BOEM relies on to analyze the reductions in greenhouse gas emissions and to calculate impacts of reduced air emissions from the projects and the resulting human health benefits using USEPA's Co-Benefits Risks Assessment (COBRA).⁴⁹ It appears that BOEM uses the 280 WTG single project scenario, however, no GW value is provided. The OSW industry recommends that BOEM provide the GW value used for this analysis as well as details on how that GW number was calculated (e.g. number of WTGs multiplied by MW capacity of a WTG).

In contrast to the benefits, it is very clear how adverse impacts from the project are measured as BOEM utilizes a scenario of up to 280 WTGs for a single project and up to 1,103 WTGs for all six projects. For calculating air emissions related to construction of the projects, BOEM estimates a total of 1,680 WTGs across all six projects. Conservatively, assuming that each project uses 15 MW WTGs, this would result in over 16.5 GW (if 1,103 WTGs is used) or approximately 25 GW of energy production (if 1,680 WTGs) is used for the six lease areas. The result of this is an extreme discrepancy between the 5.6 to 7 GW assumption for energy production from the NY Bight leases and the scenario used for maximum-case adverse impacts from offshore wind development in the NY Bight. If BOEM is assuming adverse impacts from such a build out, BOEM must also calculate the benefits of generating that much clean energy. If BOEM is using the 280 WTG single project scenario and the 1,130 WTG six project scenario to calculate avoided emissions, the statement that the NY Bight leases producing 5.6 to 7 GW of offshore wind energy should be revised to reflect the actual energy production being used to calculate impacts in the analysis. Not doing so creates a discrepancy in the PEIS and could lead to confusion among stakeholders and an inaccurate characterization of adverse and beneficial

⁴⁸ Draft PEIS, at ES.

⁴⁹ Draft PEIS, 3.4.1-10.

impacts. For purposes of evaluating the projects' projected reduction in emissions, we recommend that BOEM make it clear that the NY Bight offshore wind projects are expected to result in the delivery of at least 16.5 GW of clean, renewable energy to the grid.

Furthermore, climate change benefits need to be further explained throughout the PEIS. For example, in the air section, the PEIS states that "offshore wind projects" would "represent a moderate beneficial impact in the regional context but a negligible beneficial impact in the global context."⁵⁰ These statements can be confusing and misleading, as noted by several speakers at the public hearings. Whenever global climate change impact is discussed, it should be explained in the context of the outsized contribution offshore wind will have on meeting US 30x30 goals and the importance of US reductions, as it is a major producer worldwide of greenhouse gas emissions.

VIII. Conclusion

Thank you for considering these comments as BOEM prepares its final PEIS for the NY Bight offshore wind leases. Consistent with these comments, the PEIS should focus on analyzing the effectiveness of feasible AMMMs, especially on a regional level. The PEIS must also revise the alternatives to ensure they are all realistic and technically and economically feasible per NEPA and BOEM's own guidance. This can be accomplished by revising Alternative B and C and adding a more realistic alternative that reflects projects with reasonable and practicable mitigation measures. The reasonableness of this approach would be greatly enhanced by the removal of AMMMs from the PEIS that are clearly infeasible, constitute guidance, are voluntary, outside of BOEM's jurisdiction, place an undue burden on industry, or are duplicative of existing regulations or processes.



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⁵⁰ Draft PEIS, at 112,790

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