



January 7, 2022

Amanda Lefton
Director
Bureau of Ocean Energy Management
1849 C Street, N.W.
Washington DC 20240

RE: Request for Information – *Guidance for Mitigating Impacts to Fishers from Offshore Wind*

The New York Offshore Wind Alliance (NYOWA) respectfully submits these comments in response to the Bureau of Ocean Energy Management's (BOEM) November 22, 2021 Request for Information (RFI) on issues related to mitigation of impacts to recreational and commercial fishing associated with the development and operation of offshore wind farms in the U.S. Outer Continental Shelf (OCS).

NYOWA is a diverse coalition of organizations with a shared interest in promoting the responsible development of offshore wind power for New York. NYOWA is a project of the Alliance for Clean Energy New York (ACE NY). NYOWA's specific goal is to secure policies and programs that will achieve the State's standard of 9,000 MW of offshore wind power by 2035. www.nyowa.org

NYOWA strongly supports BOEM's stated intention to initiate a process leading to the establishment and administration of a more coordinated, transparent and equitable system for compensating unmitigated impacts to recreational and commercial fisheries. Creating a federal fisheries compensation fund, using lease acquisition and operating revenue, helps achieve national and state renewable energy goals and benefits all stakeholders: fishing communities, states, the federal government, and offshore wind developers. The current arrangement for estimating and compensating for the financial impacts of offshore wind development is deeply flawed, fails to serve the interests of stakeholders, and represents a major impediment to the timely, efficient, and cost-effective development of offshore wind projects in the U.S. The status quo suffers from the following major deficiencies:

- **Current process creates divergent outcomes.** OCS fisheries constitute regional resources that transcend state boundaries. Commercial fleets may fish waters that are a considerable distance from their home port. Under the current state-by-process, agencies overseeing compensatory mitigation may not have jurisdiction over the fishery in question, resulting in certain affected parties falling outside the reach of these remedial schemes.
- **Heterogenous nature of compensatory mitigation mechanisms across the states.** In the absence of a comprehensive federal scheme, some (but not all) individual states have established processes for mitigating impacts and fixing monetary relief as part of their

coastal zone management responsibilities. The result is an onerous quilt of mitigation processes that vary quite significantly from state to state.

- **Lack of commitment to consistent, data-driven standards for impact estimation.** All stakeholders need to have confidence that the estimation of financial impacts associated with offshore wind development is grounded in science and analytical rigor. Unfortunately, these attributes are not evident in the processes administered to date, eroding public confidence that the result is equitable and fair to all affected parties.
- **Uncapped liability of current process exacerbates regulatory risk.** Offshore wind project development is predicated on long-term revenue streams obtained through competitive state solicitations. The contract price is typically fixed (or escalates based on a fixed schedule) and must be sufficient to provide a competitive return on the invested capital. These fixed price contracts do not typically allow for the pass-through of unpredictable and costly compensation payments which, at an extreme, can undermine a project's fundamental economics. This, in turn, puts at risk state and federal OSW deployment goals and the economic, environmental and social benefits they generate.
- **Highly litigious nature of current processes.** The absence of universally accepted and government-sanctioned baseline data sources and standardized impact estimation methodologies incentivizes parties to take an adversarial, litigious posture. The level of contentiousness, inefficient use of scarce administrative resources, diversion of party resources, and inconsistent outcomes marking these proceedings serve no one's interests and inspire little public confidence in the process outcomes.

In responding to this urgent policy void, BOEM proposes the articulation of federal guidance around: the mitigation of impacts through project design; procedures for prosecuting claimed losses; and determining and enforcing the set-aside of adequate funds.¹ For the reasons stated above, NYOWA strongly supports a more proactive role for BOEM and other federal agencies in addressing compensation for unmitigated commercial losses in the outlined areas.

The areas identified as within BOEM's remit are a necessary, but insufficient federal response to the fisheries compensation challenge. The RFI explicitly rejects a role for BOEM in creating, holding or administering funds for mitigation, citing lack of legal authority.² NYOWA believes this is an overly constrained interpretation of BOEM's authority. BOEM should actively consider creative approaches to a comprehensive compensation scheme, such as that put forward by the American Clean Power Association in its comments, that utilizes the federal permitting apparatus but does not require BOEM to hold and administer funding. Other approaches that rest on third party administration of compensation funds are certainly conceivable. BOEM should solicit and refine these approaches during the guidance development and comment periods.

BOEM's guidance should reflect the following key design elements:

¹ BOEM 2021-0083-0001 at 3.

² *Id.* at 4.

- BOEM guidance should reflect and support achievement of NEPA's hierarchy of actions that could be taken by project developers in addressing potential environmental, economic and social impacts. That is, efforts should be made to avoid, minimize or mitigate impacts in the first instance. Direct payments should be used as part of a suite of mitigation options and defaulted to as a last resort to redress unavoidable impacts.
- Financial compensation should be designed to compensate fishing communities for impacts they can demonstrate were caused by the presence of offshore wind farms. As such, the compensation scheme should recognize project design modifications (e.g., turbine design and spacing) and ecosystem enhancements that mitigate or offset potential losses. The compensation scheme should also consider other environmental and human factors bearing on fish stocks including but not limited to the effects of climate change.
- Direct payment for uncompensated losses is one, but not the only, form of available redress. BOEM's guidance should include as eligible expenditures such categories as compensation to address bona fide claims for gear loss; aide for vessel navigational safety equipment and training; opportunities for fishers to support wind farm development and operation and maintenance; and community benefit funds among other potential benefit streams.

Lastly, NYOWA wishes to underscore that a truly comprehensive, effective and efficient compensation scheme stood up through this process must ultimately supplant the current patchwork approach. Otherwise, developers will be subject to "double jeopardy" and the benefits to remaining stakeholders of a singular, transparent, adequately funded, evidence-based system will be limited at best.

Thank you for the opportunity to comment. NYOWA and its members stand ready to support BOEM and to work constructively with all stakeholders as this guidance is developed.

Sincerely,

A handwritten signature in black ink, appearing to read "Fred Zalcman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Fred Zalcman
Director, NYOWA

Fred Zalcman
Director
New York Offshore Wind Alliance
119 Washington Avenue, Suite 103
Albany, New York 12210
(518) 432-1405
fzalcman@aceny.org