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COMMENTS OF THE NEW YORK OFFSHORE WIND ALLIANCE IN RESPONSE TO NINE-STATE REQUEST FOR INFORMATION

FRAMEWORK FOR ESTABLISHING A REGIONAL FISHERIES COMPENSATION FUND ADMINISTRATOR FOR POTENTIAL IMPACTS TO THE FISHING COMMUNITY FROM OFFSHORE WIND ENERGY DEVELOPMENT

JANUARY 31, 2023

The New York Offshore Wind Alliance (“NYOWA”)¹ respectfully submits the following comments in response to the December 12, 2022 Request for Information² (“RFI”) issued on behalf of the nine Eastern states seeking to establish a Regional Fund Administrator (“RFA”) for the administration of a centralized fund for compensatory mitigation of potential losses incurred by members of the for-hire recreational and commercial fishing industries as a result of offshore wind (“OSW”) farm construction and operation.

As a general matter, NYOWA strongly supports the states’ efforts to coordinate, streamline and standardize a claims-based fisheries compensation mechanism. As the RFI notes, “the United States currently lacks a standardized approach to fisheries compensatory mitigation that is consistently applied to all OSW projects.”³ The current ad hoc approach suffers from many deficiencies and serves neither the interests of the sustained and orderly development of the U.S. offshore wind industry, nor the equitable recompense to fishers for economic losses attributable to offshore wind development. Major inefficiencies and inequities associated with the current scheme include, but are not limited to the following:

- **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.

¹ NYOWA is a diverse coalition of offshore wind developers, environmental NGO’s, labor and other supporters seeking to establish the timely development of a robust and responsible offshore wind market in New York State.

² [“Framework for Establishing a Regional Fisheries Compensation Fund Administrator for Potential Impacts to the Fishing Community from Offshore Wind Development”](#), issued on December 12, 2022.

³ RFI Scoping Document at 6.

- **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. This, in turn, exacerbates the already fraught relationship between project developers and fishing interests.

The Scoping Document reflects the states' collective progress in framing out an alternative compensatory mitigation construct. The effort to stand up a RFA addresses a perceived gap in the state-federal cooperative effort to ensure that OSW development is consistent with the long-term interests of commercial and for-hire recreational fishing industries and presents a real opportunity to transition to a more equitable, predictable, consistent, and comprehensive approach for adjudicating and disbursing compensatory funding.

The remainder of the NYOWA comments are responsive to specific, select questions posed in the RFI. This response is supplemental to the more comprehensive and detailed responses proffered by American Clean Power Association (ACP), to which NYOWA is a signatory.

Do you agree with the general statements outlined in the Scoping Document...? If not, explain what you do not agree with, your concerns, and identify alternative possible formulations or solutions of that element.

NYOWA supports the basic thrust of the Scoping Document "[t]o establish a credible regional administrator for managing and distributing fisheries compensatory mitigation funds for OSW for the U.S. eastern seaboard."⁴

⁴ Scoping Document at 7.

In order to meet this overarching objective, NYOWA members believe it is imperative that the RFA serve as a “one stop shop” for compensatory mitigation claims. Several implications flow from this.

First, the RFA should strive to amass and maintain a funding corpus that allows for the payout over time of reasonably foreseeable losses that are directly attributable to OSW project construction and operation. A standard assessment formula should be established (e.g., \$/acre, \$/MW), rather than a case-by-case adjudication, assuming adherence to BOEM’s best practice standards. NYOWA recognizes and appreciates that there is going to be a degree of uncertainty over the magnitude of the aggregate impact, with the risk that the fund could over- or under-collect compared to well-documented claims. However, NYOWA believes that this uncertainty band will reduce over time through improvements to baseline data, better scientific understanding of causality, and experience garnered through the first U.S.-based utility scale wind projects.⁵

Second, and as a corollary to the first principle, the fund should not be empowered to retroactively increase assessments on OSW projects based on new or additional claims not reasonably foreseeable at the time of the original assessment. To do so would be to fundamentally undermine the certainty principle on which the RFA is predicated.

Third, states must reconcile their coastal zone management and other policy mechanisms for compensatory mitigation with the establishment of the RFA. If the goals of efficiency and equity are to be realized, the RFA should largely supplant, rather than supplement or duplicate, existing state processes.

Fourth, the fund should prioritize compensation to those directly and proximately impacted by OSW construction and operation. Guidance should be established to avoid double-counting of claimed losses (e.g., reduced economic value of catch *plus* permit devaluation; full value of loss claimed by both vessel operator and wholesaler). Downstream or other claimed socio-economic losses may be too remote and speculative and should not be eligible until more experience is gained with the fund.

Fifth, RFA funding for gear loss and other activities designed to facilitate the fishing industry’s adaptation to the co-existence of OSW in identified fishing grounds is appropriate. As noted in the Scoping Document, an important aim of the fund is to allow fishers to “keep fishing”.⁶

Sixth, NYOWA supports a proposed RFA model comprised of the nine states along the Eastern Seaboard of the Atlantic. For all the reasons stated, a singular delivery mechanism for compensatory mitigation will be a far superior alternative to the existing balkanized, state-by-

⁵ NYOWA supports the comments of the American Clean Power Association (“ACP”) arguing the merits of the development of a funding corpus generated through a lease sale credit mechanism.

⁶ Scoping Document at 11.

state structure. This can serve as a potential template for future implementation of a similar fund established for the Gulf States or West Coast as those markets develop.⁷

How might States encourage developers' participation in directing their compensatory mitigation to a regional fund?

States can leverage their procurement authority to encourage full and fair developer participation in a regional mitigation fund. States should agree on a uniform, region-wide metric to be applied in future OSW solicitations. An example of this is the eligibility requirement established in New York's recent Requests for Proposals, that mandates, upon award, a developer commitment of \$10,000 per MW of offered capacity for purposes of providing financial and technical support to regional monitoring of wildlife and fish that support economically important fisheries.⁸

States can also indirectly encourage the development of a robust and adequately funded RFA by advocating for the implementation of bidding credits based on funding commitments made pursuant to future offshore wind lease sales conducted by BOEM.

NYOWA appreciates the opportunity to offer our comments on the nine-state framework. We look forward to working with the state and federal officials, and other stakeholders to bring this framework into reality.

Respectfully submitted,



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⁷ While a preferred approach may be for the Bureau of Ocean Energy Management (BOEM) to serve as the central administrator of a fisheries compensation fund - with the ability to direct payments into the fund as part of an overall avoidance, minimization, and mitigation strategy, manage the fund corpus, and assign compensation - the agency has taken the view that it lacks the legal authority to perform these tasks. Congressman Tonko's *Offshore Energy Modernization Act* (H.R.9641) would explicitly grant BOEM this authority. NYOWA nonetheless believes that it is fruitful for the states to continue to pursue the development of a regional compensation fund on a joint and collective basis.

⁸ See [ORECRFP22-1](#), *Purchase of Offshore Renewable Energy Certificates*, at §2.2.7.