



August 22, 2022

VIA ELECTRONIC SUBMISSION

The Honorable Deb Haaland
Secretary
U.S. Department of the Interior
Fish and Wildlife Service
1849 C St. NW
Washington, D.C. 20240

Re: Guidelines for Mitigating Impacts to Commercial and Recreational Fisheries on the Outer Continental Shelf Pursuant to 30 CFR Part 585 (June 23, 2022).

Dear Secretary Haaland:

On June 7, 2022, the U.S. Department of the Interior's Bureau of Ocean Energy Management (BOEM) published a proposed guidance for mitigating the impacts of offshore wind energy on fisheries.¹ The Office of Advocacy of the U.S. Small Business Administration (Advocacy) respectfully submits the following comments on the proposal. While Advocacy appreciates BOEM's attempts to ensure that offshore wind developers are mitigating the impacts of their actions on small businesses, the guidance is lacking in specificity and adequate data regarding the actual impacts of these activities. BOEM must conduct a Regulatory Flexibility Act (RFA) analysis of its proposals to adequately understand the impacts of offshore wind development activities on small businesses. Advocacy also requests that BOEM commit to reviewing and updating its guidance on a regular basis as additional data becomes available.

I. Background

A. The Office of Advocacy

¹ U.S. Dep't of the Interior, Bureau of Ocean Energy Mgmt., *Guidelines for Mitigating Impacts to Commercial and Recreational Fisheries on the Outer Continental Shelf Pursuant to 30 CFR Part 585* (June 23, 2022), https://www.boem.gov/sites/default/files/documents/renewable-energy/DRAFT%20Fisheries%20Mitigation%20Guidance%2006232022_0.pdf.

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.⁵

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁶

B. The Proposed Rule

The Outer Continental Shelf Lands Act (OCSLA)⁷ sets forth procedures to produce energy resources on the Outer Continental Shelf (OCS). OCSLA permits the Secretary of the Interior, in consultation with other relevant federal agencies, to grant leases, easements, and rights-of-way on the OCS for activities that support production, transportation, or transmission of energy.⁸ Under OCSLA, management of such activities should consider economic, social, and environmental values of renewable and non-renewable resources contained within the OCS.⁹ Proper consideration must also be given to other uses of the seabed including fisheries navigation and marine productivity.¹⁰

In administering lease sales, BOEM must also comply with requirements of the National Environmental Policy Act (NEPA).¹¹ Under NEPA, BOEM is required to publish a draft environmental impact statement for notice and comment. The statement must include, among other things, the environmental impact of the proposal, adverse environmental effects that cannot

² 5 U.S.C. §601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

⁴ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁵ *Id.*

⁶ *Id.*

⁷ 43 U.S.C. § 1331 et seq.

⁸ 43 U.S.C. § 1337 (p).

⁹ 43 U.S.C. § 1344 (a) (1).

¹⁰ *Id.* at (a) (2).

¹¹ 42 U.S.C. § 4331 et. seq.

be avoided, and alternatives to the proposed action.¹² In conducting this analysis, BOEM considers other uses of the areas being evaluated for leasing, including commercial fishing.

In July 2014, BOEM issued a report on best practices and mitigation measures for wind energy lessees and fisheries in the Atlantic. This report outlined five best management practices including communication and outreach; project siting, design, navigation, and access; safety; environmental monitoring; and financial compensation.¹³ BOEM issued guidelines on communications and outreach to fisheries on October 20, 2015.¹⁴ This document provided guidelines for complying with agency coordination and survey methodologies. BOEM updated and reissued these guidelines on May 27, 2020.¹⁵ This update did not address the other best management practices. On November 22, 2021, BOEM published a request for information to inform the development of additional guidance to address the remaining best management practices outlined in its mitigation measures report.¹⁶

On January 7, 2022, Advocacy filed a public comment letter on BOEM's request for information.¹⁷ On May 16, 2022, Advocacy also commented on BOEM's draft environmental assessment for the Morro Bay Wind Energy Area.¹⁸ In these letters, Advocacy requested that BOEM commit to ongoing outreach to the small business communities impacted by offshore wind development, and outline plans for regular updates to its guidance. Advocacy also requested that BOEM publish small business impact analyses within its draft environmental

¹² 42 U.S.C. § 4332 (C).

¹³ U.S. Dep't of the Interior, Bureau of Ocean Energy Mgmt., *Development of Mitigation Measures to Address Potential Use Conflicts between Commercial Wind Energy Lessees/Grantees and Commercial Fishermen on the Atlantic Outer Continental Shelf* (July 2014), <https://www.boem.gov/sites/default/files/renewable-energy-program/Fishing-BMP-Final-Report-July-2014.pdf>.

¹⁴ U.S. Dep't of the Interior, Bureau of Ocean Energy Mgmt., *Guidelines for Providing Information on Fisheries for Renewable Energy Development on the Atlantic Outer Continental Shelf Pursuant to 30 CFR Part 585* (June 2019), <https://www.boem.gov/sites/default/files/renewable-energy-program/Regulatory-Information/BOEM-Fishery-Guidelines.pdf>.

¹⁵ U.S. Dep't of the Interior, Bureau of Ocean Energy Mgmt., *Guidelines for Providing Information on Fisheries for Renewable Energy Development on the Atlantic Outer Continental Shelf Pursuant to 30 CFR Part 585* (May 27, 2020), <https://www.boem.gov/sites/default/files/documents/aboutboem/Social%20%26amp%3B%20Econ%20Fi shing%20Guidelines.pdf>.

¹⁶ U.S. Dep't of the Interior, Bureau of Ocean Energy Mgmt., *Request for Information Guidance for Mitigating Impacts to Commercial and Recreational Fisheries from Offshore Wind Energy Development* (November 22, 2021), <https://www.boem.gov/sites/default/files/documents/renewable-energy/BOEM-2021-0083-0001.pdf>.

¹⁷ See Comments from the SBA Office of Advocacy, Re: Request for Information, Guidance for Mitigating Impacts to Commercial and Recreational Fisheries from Offshore Wind Energy Development (January 7, 2022), <https://advocacy.sba.gov/2022/01/12/advocacy-comments-on-boems-rfi-for-reducing-or-avoiding-impacts-of-offshore-wind-energy-on-fisheries/>.

¹⁸ See Comments from the SBA Office of Advocacy, Re: Draft Environmental Assessment, Commercial Wind Lease and Grant Issuance and Site Assessment Activities on the Pacific Outer Continental Shelf, Morro Bay Wind Energy Area, California (May 16, 2022), <https://advocacy.sba.gov/2022/05/17/advocacy-comments-on-boems-environmental-assessment-for-the-morro-bay-offshore-wind-energy-area/>.

impact statements. Advocacy once again renews these comments and offers additional comments on the proposed guidance below.

II. Advocacy's Small Business Concerns

On August 4, 2022, Advocacy held a small business roundtable to discuss BOEM's proposed guidance documents.¹⁹ During the roundtable, Advocacy heard from small commercial fishermen, port operators, marine equipment retailers, onshore processors, fish markets, and other fishing industry representatives. Small businesses renewed their concerns regarding their inability to adequately comment on mitigation measures without knowing the impacts that offshore wind development activities will have. There are simply too many unknowns for the current guidance to be effective. BOEM should therefore consider modifications to the guidance to address these unknowns. BOEM should gather data and information from existing projects, and other activities with analogous impacts that may help better inform the agency.

A. BOEM must conduct an RFA analysis in its draft Environmental Assessments and Environmental Impact Statements. This will ensure that the agency and developers are properly considering the impacts of offshore wind development projects on small businesses.

1. BOEM should look to NOAA and other sources to gather data on the potential impacts of offshore wind development projects.

Advocacy and small businesses are concerned that there is not enough data to understand the impacts of offshore wind development projects. Without knowing what the effects are, mitigation attempts could be futile. BOEM should look at existing wind energy projects as a model for determining impacts, while understanding that there are additional variables such as the uniqueness of different marine ecological systems, and the type of turbine (floating versus stationary) that may also impact the analyses. Advocacy again encourages BOEM to work with the National Oceanic and Atmospheric Administration (NOAA) to understand and utilize its fisheries data, and its spatial modeling technology to better understand the ecology of a proposed wind energy area. NOAA has looked at the impacts of marine monument designations on fisheries. While not entirely similar, NOAA's experience may offer at least some insight into potential impacts that BOEM could use as a baseline to discuss mitigation measures.

2. Small businesses are significantly impacted by offshore wind development projects. These impacts must be thoroughly analyzed.

Table 1 below describes the makeup of the U.S. fishing industry based on firm size. The right three columns indicate the share of a firm's annual revenue that would be represented by various levels of new costs. For example, a \$10,000 increase in costs for large fishing firms from a new offshore wind project would represent less than 0.1 percent of annual receipts for large firms.

¹⁹ See Office of Advocacy Natural Resources Roundtable (August 4, 2022), <https://advocacy.sba.gov/2022/07/21/natural-resources-roundtable-august-4-2022/>.

However, for the 434 fishing firms with less than \$100,000 in annual receipts—17.4 percent of all small fishing firms—it would represent an average of 18.8 percent of annual receipts. This would be a significant impact on these small fishing firms and would warrant greater mitigation efforts than would the effects on large fishing firms.

Table 1. U.S. Fishing Industry (NAICS Code 1141)

Firm Size (by Receipts)	Firm Count	% of Small Firms	Avg. Receipts	Cost Impacts as % of Receipts		
				\$1,000	\$10,000	\$50,000
Small Firms	2,493	100.0%	\$535,456	0.2%	1.9%	9.3%
<\$100K	434	17.4%	\$53,168	1.9%	18.8%	94.0%
\$100K - \$499K	1,320	52.9%	\$258,786	0.4%	3.9%	19.3%
\$500K - \$999K	397	15.9%	\$671,322	0.1%	1.5%	7.4%
\$1M - \$2.49M	286	11.5%	\$1,582,465	0.1%	0.6%	3.2%
\$2.5M - \$4.99M	41	1.6%	\$3,385,220	<0.1%	0.3%	1.5%
\$5M - \$7.49M	9	0.4%	\$6,416,889	<0.1%	0.2%	0.8%
\$7.5M - \$9.99M	9	0.4%	\$8,531,667	<0.1%	0.1%	0.6%
Large Firms	16	N/A	\$49,591,313	<0.1%	<0.1%	0.1%

Note: Data come from the Census Bureau’s Statistics of US Businesses (2017).

Understanding the geographical distribution of small fishing firms can also shed light on the potential effects of individual offshore wind projects. While BOEM should develop a national guidance based on commonalities among all fisheries, the agency must also consider regional differences that may affect such analyses and incorporate the nuances of that region into a mitigation strategy. BOEM should consider weather impacts, types of gear used, the species being fished, and other variables determined by consulting small businesses. In addition, different types of offshore wind energy infrastructure have different environmental impacts (for example, fixed versus floating operations), and differences in the types of fishing gear used depending on what species is being fished.

Table 2 shows the number of firms, employment levels, and total receipts for the fishing industry in all U.S. coastal states, grouped by region. Washington, Maine, and Alaska have by far the most fishing firms among the states, and the Northeast and Northwest have the most among the regions.

Table 2. Fishing Industry by Region and State

Region/State	Firms	Employment	Receipts (\$1,000)
Northeast	661	1,169	\$479,656
Connecticut	7	19	\$11,644
Maine	451	715	\$309,580
Massachusetts	170	354	\$129,806
New Hampshire	4	3	\$1,969
Rhode Island	29	78	\$26,657
Mid-Atlantic	180	683	\$207,030
Delaware	7	7	\$1,490
Maryland	23	16	\$4,488
New Jersey	55	224	\$92,177
New York	43	92	\$19,877
Virginia	52	344	\$88,998
Southeast (Atlantic Coast)	102	154	\$43,381
Florida (Atlantic Coast)	73	119	\$33,098
Georgia	8	9	\$2,591
North Carolina	16	20	\$6,104
South Carolina	5	6	\$1,588
Gulf Coast	292	635	\$178,227
Alabama	15	27	\$8,614
Florida (Gulf Coast)	112	180	\$50,293
Louisiana	65	259	\$70,762
Mississippi	7	41	\$6,620
Texas	93	128	\$41,938
Northwest	612	1,695	\$1,067,900
Oregon	155	283	\$99,753
Washington	457	1,412	\$968,147
California	139	342	\$122,944
Alaska	426	226	\$197,506
Hawaii	20	61	\$16,997

Note: Table only includes coastal states. Data comes from the Census Bureau's Statistics of U.S. Businesses (2017).

In addition to analyzing the direct impacts to commercial fisheries, BOEM must also consider the direct effects on coastal communities and onshore marine businesses that rely on the commercial fishing industry for revenue. Any decrease in landings results in a direct decrease in revenue for producers, fish markets, and marine supply, gear, repair, and fuel shops.

BOEM must also consider the cumulative impacts of offshore development projects and encourage developers to look beyond immediate impacts when calculating financial compensation proposals. Current financial compensation proposals only cover a few years, and in some instances only the first year. These proposals do not account for revenue losses beyond the first few years of the project. Furthermore, developers cannot operate in vacuums, especially if there are multiple lease sales in the same geographic region. Many fishermen frequent multiple geographic areas. This means that they potentially interact with multiple wind energy leasing areas in the same trip. It is unreasonable for a developer to assume that in the long term a fishermen can simply find another area within which to fish. Rather, developers must be conscious of all potential impacted areas in the region. As the agency responsible for all of these simultaneous leases, BOEM must include this in its draft guidance, and encourage developers to understand the full scope of a particular fishing operation before they propose specific financial compensation plans and other measures.

Additionally, BOEM must encourage offshore wind developers to consider equity considerations under Executive Order (EO) 13985.²⁰ Under this EO, agencies must consider the impacts of their rulemakings and agency actions on underserved communities including rural and low-income communities. Many small coastal communities are rural, or lower income. If a fishery were forced to cease operations due to an offshore wind development project, this would have a direct economic impact on the entire coastal community.²¹

Finally, disruptions to domestic fishing operations impact food security within the U.S. As a domestic source of sustainable protein, if fisheries were forced to cease operations this would have an impact on the domestic seafood supply chain, which may impact pricing.

BOEM must therefore conduct a thorough RFA analysis of the impacts of each potential call area and each subsequent proposed sale. The agency must also encourage developers to conduct their own small business analysis and present this data to the agency for review and feedback. This will ensure that there is adequate data on which to base subsequent mitigation measures.

B. BOEM must commit to updating its guidance on a regular basis.

There are too many unknowns in BOEM's analysis to address the impacts of offshore development activities and to develop plans to mitigate those impacts. Some geographic regions have not had a lease sale, and do not have any development projects on which they can base their

²⁰ Exec. Order No. 13985, 86 Fed Reg. 7009 (January 25, 2021).

²¹ See "Family Fishers Fight For Their Way Of Life" (May 17, 2022) available at <https://advocacy.sba.gov/2022/05/17/family-fishers-fight-for-their-way-of-life/>.

comments. As such, BOEM must commit to ongoing and regular updates to its mitigation guidance. Advocacy suggests that BOEM commit to a timeline for review and updates to its guidance so that small businesses and others impacted by these development projects can be certain that the agency is committed to understanding and advocating for proper mitigation measures from these activities. Without a firm commitment from the agency, impacted entities are left with ambiguous agency actions that may not apply to their specific situation, and no certainty as to when they can expect updates based on new data and information.

C. BOEM must find ways to incentivize mitigation measures for developers.

In its existing regulatory language, BOEM states that developers must provide a description of social and economic conditions of commercial and recreational fisheries that could be affected by the proposed activities.²² Because BOEM's proposed guidance is "non-binding" and contains recommendations, rather than mandated practices developers must follow, BOEM must find ways to incentivize developers to adhere to the suggested practices.

One such method would be the use of bidding credits for developers who intend to engage in mitigation measures with fisheries. In its recent proposed sale notice for the California Wind Energy Area, for example, BOEM included a bidding credit for those developers that establish a community benefit agreement (CBA) with community and stakeholder groups whose use of the geographic space is impacted by the wind energy development project.²³ This proposed sale notice only offered a credit of 2.5 percent, however. To further incentive developers to engage in such mitigation measures, BOEM should increase the credit for community benefit agreements and other such activities so that developers are more likely to engage in these measures as early as possible in the process. BOEM should also consider other creative measures to incentivize those developers who participate in mitigation measures.

III. Conclusion

While Advocacy appreciates BOEM's attempts to provide mitigation measures for the impacts of offshore wind development projects, additional data and information is needed to make the guidance meaningful and effective. BOEM must commit to updating its guidance on a regular basis as additional details become available. Additionally, BOEM must conduct an RFA analysis within its environmental assessments and environmental impact statements to provide adequate information about the impacts of these development activities on small businesses.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Prianka Sharma at (202) 205-6938 or by email at prianka.sharma@sba.gov.

²² 30 CFR § 585.611(b)(7). *Also* 30 CFR 585.627(a)(7) and 30 CFR 585.646(b)(7).

²³ Pacific Wind Lease Sale 1 for Commercial Leasing for Wind Power on the Outer Continental Shelf in California, 87 Fed. Reg. 32443 (May 31, 2022).

Sincerely,

/s/

Major L. Clark, III
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/s/

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