



March 30, 2023

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: Renewable Energy Modernization Rule (88 Fed. Reg. 5968; January 30, 2023)

Dear Secretary Haaland:

On January 30, 2023, the U.S. Department of the Interior's Bureau of Ocean Energy Management (BOEM) published a proposed rule titled "Renewable Energy Modernization." The proposed rule updates provisions related to leasing and development of offshore energy activities. The Office of Advocacy of the U.S. Small Business Administration (Advocacy) respectfully submits the following comments on the proposed rule. BOEM must ensure that any update to the leasing process considers the impact to all ocean users and in particular small businesses. BOEM should consider ways to incentivize mitigation of small business impacts and ensure that small businesses are not overlooked.

I. Background

A. The Office of Advocacy

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),¹ as amended by the Small Business Regulatory Enforcement Fairness Act

¹ 5 U.S.C. §601 et seq.

(SBREFA),² 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.³ 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.⁴

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."⁵

B. The Proposed Rule

The Outer Continental Shelf Lands Act (OCSLA)⁶ as amended by the Energy Policy Act of 2005⁷ 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 2009, BOEM's predecessor, the Minerals Management Service (MMS), was charged by the Secretary with promulgating regulations for leasing and managing renewable energy activities on the OCS. In 2010, MMS was divided by Secretarial Order 3299 into three separate agencies: the Bureau of Ocean Energy Management (BOEM), the Bureau of Safety and Environmental Enforcement (BSEE) and the Office of Natural Resource Revenue (ONRR).¹¹ Under the Order, BOEM was assigned responsibility for renewable energy management functions including planning, leasing, safety, and environmental enforcement considerations.¹² BOEM's regulations

² Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

³ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁴ *Id.*

⁵ *Id.*

⁶ 43 U.S.C. § 1331 et seq.

⁷ 43 U.S.C. § 1337 (p).

⁸ *Id.*

⁹ 43 U.S.C. § 1344 (a) (1).

¹⁰ *Id.* at (a) (2).

¹¹ U.S. Dep't of the Interior, Secretarial Order 3299, (August 29, 2011) (Amended from previous version), 3299a2-establishment_of_the_bureau_of_ocean_energy_management_the_bureau_of_safety_and_environmental_enforcement_and_the_office_of_natural_resources_revenue.pdf (doi.gov)

¹² *Id.*

were codified in the Code of Federal Regulations (CFR) in 2011, and have not been updated since then.¹³

On January 30, 2023, BOEM issued a proposed rule title, “Renewable Energy Modernization.”¹⁴ The proposed rule would update the current regulations to respond to the modern offshore renewable energy climate. The rule proposes the following reforms among others:

- (1) Incremental funding of decommissioning accounts.
- (2) Flexible survey submission requirements.
- (3) Revised project verification procedures.
- (4) Reform of the auction process.
- (5) Clarity regarding safety requirements.¹⁵

II. Advocacy’s Small Business Concerns

Advocacy has engaged with stakeholders on several occasions regarding BOEM’s renewable energy development projects and related rulemakings. Advocacy has held four small entity roundtables¹⁶ and has written three public comment letters to BOEM regarding the impacts of offshore wind activities on other small business ocean users.¹⁷ Advocacy has attached its public comment letters to this letter. The letters are incorporated by reference for further context and background.

On February 28, 2023, Advocacy held a small business roundtable to discuss this proposed rule. During the roundtable, Advocacy heard from several small fishing businesses and related ocean users. Advocacy has also heard from one representative from the clean energy sector.

¹³ See 30 C.F.R. chapter V. See also 30 C.F.R part 585.

¹⁴ Renewable Energy Modernization, 88 Fed. Reg. 5968 (January 30, 2023).

¹⁵ *Id.*

¹⁶Office of Advocacy Natural Resources Roundtable, (December 14, 2021), <https://advocacy.sba.gov/2021/12/02/natural-resources-roundtable-tuesday-december-14-2021/>. Also Office of Advocacy BOEM Energy And Natural Resources Roundtable, (April 20, 2022), <https://advocacy.sba.gov/2022/04/12/boem-energy-and-natural-resources-roundtable-april-20-2022/>. Also Office of advocacy Natural Resources Roundtable, (August 4, 2022), <https://advocacy.sba.gov/2022/07/21/natural-resources-roundtable-august-4-2022/>. Also Office of Advocacy Small Entity Energy Roundtable, (February 28, 2023), <https://advocacy.sba.gov/2023/02/03/small-entity-energy-roundtable-february-28-2023/>.

¹⁷ Comments from Office of Advocacy, *Guidelines for Mitigating the Impacts to Commercial and Recreational Fisheries on the Outer Continental Shelf Pursuant to 30 CFR Part 585* (August 22, 2022), <https://advocacy.sba.gov/2022/08/22/advocacy-comments-on-boems-guidance-for-mitigating-the-impacts-of-offshore-wind-energy-development/>. Also Comments from Office of Advocacy, *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/>. Also Comments from Office of Advocacy, *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/>.

Small fisheries and other ocean users' chief concerns related to mitigation of impacts to their businesses, and the need for BOEM to find ways to incentivize developers. Small fisheries also reiterated concerns about the uncertainty that wind energy developments will have on their small businesses in the future. Many stakeholders discussed that there are simply too many unknowns to be able to adequately comment on the proposed rule and its potential impacts. Others shared that they felt this proposed rule was premature considering BOEM has yet to finalize its agency guidance for mitigating the impacts of offshore wind development on fisheries. They stated that it is difficult to comment on this proposed rule when they do not know what BOEM's position is on mitigation measures.

Advocacy's comments on the proposed rule are outlined below.

A. BOEM must consider the impacts of the proposed rule on all ocean users and make such impact assessments available to the public.

In the proposed rule BOEM discusses that it does not believe that small fishing industries or small coastal communities are impacted by the proposed rule.¹⁸ Small business stakeholders disagree. Advocacy heard from small businesses that developers already do not adequately consult with them during the leasing process and that they are not adequately compensated for the impacts they face from development projects. Small businesses are concerned that this proposed rule will only further disincentivize developers from working with them when planning a particular development, as it will fast-track projects without proper regard for their impacts. Advocacy and small businesses are concerned that BOEM has not adequately considered the impacts of its proposed rule on all ocean users. BOEM should, therefore, produce a programmatic environmental impact statement for the proposed rule that includes a discussion of impacts to the environment as well as other ocean users. Once this assessment is complete and made available to the public for comment, BOEM will be better able to conclude whether there are environmental impacts or impacts to small businesses from the proposed rule.

B. BOEM should find ways to incorporate protections for all ocean users in the proposed rule.

1. BOEM should consider ways to incentivize early mitigation efforts.

Many small businesses spoke about BOEM's attempts to use leasing bid credits to incentivize developers to engage in mitigation efforts with small fisheries and other ocean users. They said that these credits are not sufficient to encourage developers to properly consult with them during the project development phase. Within the proposed rule BOEM discusses the use of bid credits but does not specifically discuss assigning additional weight to mitigation measures as a form of bid credit.¹⁹ Advocacy previously noted that "pay outs" from developers are a one-time lump

¹⁸ *Supra* note 14 at 6018-6019.

¹⁹ *Id.* at 5996-5998.

sum, and do not adequately account for long-term impacts.²⁰ Advocacy suggested BOEM explore the use of Community Benefit Agreements by which the conversations are driven by ocean users and not developers.²¹ Advocacy suggests that BOEM incorporate and codify mitigation requirement efforts into this proposed rulemaking, either by incentivizing them through bid credits or some other mechanism to ensure that developers are properly engaging with other ocean users, specifically small businesses.

2. BOEM should ensure that projects have adequate funds for decommissioning and equipment removal.

During Advocacy's roundtable, small businesses expressed concern that developers are not required to set aside adequate funding for unforeseen circumstances that may lead to early decommissioning. One fisherman in California discussed that on the West Coast most activities are bottom fishing activities, requiring the use of trawling and other equipment. As a result, when developers drape cables and transmission lines on the ocean floor, these fishermen cannot fish at all so long as the equipment is in the water. If developers were to simply cut these lines and leave them at the bottom of the ocean floor, this would pose a safety hazard to these fishermen. BOEM's proposed rule provides for incremental funding of decommissioning accounts,²² meaning that developers can allocate funds over time. This model may create a situation in which a developer puts equipment in the water but does not have adequate funds to decommission it in the event of an unforeseen circumstance or at the conclusion of the lease terms. Advocacy therefore recommends that BOEM revisit the incremental funding model and instead ensure that developers have adequate funds to decommission a structure when the structure is introduced into the ocean. This will give other small business ocean users certainty that the developer will have the ability to remove the structure if and when it becomes necessary to do so.

III. Conclusion

Advocacy is concerned that BOEM is overlooking small fisheries and ocean users within its proposed rule. BOEM must ensure that updates to the leasing process will not have a significant impact on small businesses. This can be accomplished by preparing a full environmental impact assessment for the proposed rule and allowing the public the opportunity to comment on this analysis. BOEM should also find ways to incentivize mitigation efforts by developers within the proposed rule, as well as ensure that projects have adequate funding for removal and decommissioning.

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.

²⁰ See Comments from Office of Advocacy, *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/>.

²¹ *Id.*

²² *Supra* note 14 at 5970.

Sincerely,

/s/

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/s/

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Enclosures (3)