



**COMMENTS PREPARED FOR BOEM’S PROPOSED RENEWABLE
ENERGY MODERNIZATION RULE**

ON BEHALF OF

CAPE MAY COUNTY, NEW JERSEY

[Docket No. BOEM-2022-0019] and [RIN 1010-AE04]

Information Collection Clearance Officer
Office of Regulations
Bureau of Ocean Energy Management
ATTN: Anna Atkinson
45600 Woodland Road
Sterling, VA 20166

Dear Ms. Atkinson,

Thank you for the opportunity to submit comments in response to the Bureau of Ocean Energy Management’s (BOEM) proposed rule (BOEM-2022-0019) to modernize its regulations in regard to the development of offshore wind energy. Our firm represents Cape May County in New Jersey, where an immense amount of offshore wind development is planned. The County is strongly concerned about the environmental, economic, and social impacts offshore wind projects will have. These comments are in reference to proposed changes under Section C, Geophysical and Geotechnical Surveys; Section E, Renewable Energy Leasing Schedule; and Section G, Risk Management and Financial Assurance.

BACKGROUND

As a historic oceanfront community, Cape May County is at the forefront of climate change response and impacts. Thus, Cape May County is committed to supporting responsibly permitted renewable energy projects. At the same time, the County seeks to protect its historic and cultural character, its tourism economy, and its uninterrupted ocean views for generations to come. No community should be forced to bear externalities created by multi-billion-dollar corporations—including offshore wind developers—that stand to make billions of dollars in revenue at the community’s expense and without any direct or tangible benefits.

In our experience, due to the enormous pressure placed on BOEM to get offshore wind up and running following permit reviews of approximately two years, BOEM is skipping steps in its environmental review. Holding aside myriad unanswered questions about the effects of offshore wind on the natural environment, including sea mammals, birds, fish, and other wildlife, not to mention harm to local economies and environmental justice communities, BOEM's current approach has been to put the thumb on the scale in favor of developers at every single opportunity. Insofar as the proposed regulation changes reflect industry lobbying to grease the tracks for offshore wind developers to make the process even faster (and cheaper) and continue to force communities to absorb the externalities associated with their developments, we object. Responsible development must ensure that externalities are avoided, minimized, and mitigated to the greatest extent possible. BOEM's current regulations and proposed changes fall far short of this goal.

The County herein responds to various concerns regarding geophysical and geotechnical surveys, renewable energy auction regulations, and of greatest concern, financial assurances for decommissioning. BOEM's proposal to no longer require full funding of decommissioning accounts from developers is irresponsible and appears designed specifically to alleviate the industry's ongoing financial challenges while unfairly transferring decommissioning risks to consumers.

GEOPHYSICAL AND GEOTECHNICAL SURVEY "FLEXIBILITY"

As a threshold matter, BOEM should be strengthening survey requirements, not weakening them by allowing developers to defer survey work, including the survey work needed to evaluate harm to benthic resources, paleolandscapes, and historic and cultural resources, including traditional cultural properties. Detailed surveys are currently required by BOEM prior to a developer's submission of a construction and operations plan (COP) not only to inform BOEM about the suitability of a site for offshore wind energy development, but also to allow the public to understand the effects of the undertaking, too. It is critical that BOEM increase opportunities for the public to understand a development's potential to harm historic and cultural resources, as well as the natural environment, which the proposed changes fail to do. Moreover, we have serious concerns whether and to what extent the public would have any opportunity to review or challenge the result of deferred surveys or how this process would work, since BOEM's proposed revisions do not address this issue, leaving developers no responsibility to avoid, minimize, or mitigate adverse effects discovered after COP approval.

REFORMING BOEM'S RENEWABLE ENERGY AUCTION REGULATIONS

BOEM proposes to continue to implement multiple factor auctions through bidding credits, to allow the lease award process to consider policy priorities. For example, such priorities might include requiring workforce development agreements. Currently, BOEM ascribes a value, in monetary terms, to the factors or actions demonstrated by a bidder at a lease auction during the

competitive award process. A multiple factor auction may take one or more non-monetary factors into consideration, including development agreements or public benefits, among other factors.

Although the use of multiple factor auctions has merit, BOEM should consider making certain factors mandatory considering the significant adverse economic effects adjacent communities are expected to experience. For example, developers should not be allowed to move forward in a multiple factor auction—or in any aspect of BOEM’s leasing process—unless and until it has developed a meaningful community benefit agreement or mitigation fund, appropriately capitalized to offset all adverse effects that a community is expected to experience. Alternatively, BOEM could instead value these types of benefits to incentivize developers to negotiate them on the front end, rather than waiting until the end of NEPA review and the Section 106 process required by the National Historic Preservation Act, an approach currently allowed where BOEM may consider “any other factor or criteria to further development off offshore renewable energy.” BOEM should also consider awarding bidding credits measured by the degree to which a developer avoids, minimizes, or mitigates harm to historic properties and cultural resources, including heritage tourism economies. Such a determination could be made in conjunction with adjacent communities and after approval by State Historic Preservation Officers, Tribal Historic Preservation Officers, and the Advisory Council on Historic Preservation.

FINANCIAL ASSURANCE AND RISK MANAGEMENT | DECOMMISSIONING

BOEM’s existing regulations require full funding of a decommissioning account for each renewable energy facility prior to its installation. While BOEM categorizes this requirement as an “upfront capital burden” to developers, Cape May County believes this requirement to developers is reasonable and prudent to ensure that the US taxpayer and the County are protected from the default of a developer on any of its obligations and a variety of other related concerns discussed below.

The offshore wind industry is currently in a fragile financial position where supply chain issues and inflation have drastically impacted the financial integrity of projects across the East Coast. Developers are currently banking on financial incentives through the form of tax credits to finance projects that would otherwise not be economically feasible under current market conditions without these incentives. With or without tax credits, offshore wind is one of the most expensive forms of utility-scale energy in the United States due to its enormous construction costs.

The costs of decommissioning offshore wind projects are also significant, with BOEM estimating the removal of a single turbine to cost roughly \$2,500,000. Currently, developers are required to provide financial assurance for decommissioning costs prior to agency approval of the proposed Construction and Operations Plan (COP). The proposed rule would undo this requirement and instead allow staged funding of decommissioning accounts throughout the operations period of a lease to satisfy financial assurance requirements for decommissioning. This is an irresponsible proposal by BOEM as the proposal presumes financial project viability and consistent ongoing revenues for a period of 35 years or more with disregard for uncertain financial, environmental, engineering, legal, and weather-related risks. Energy-utility projects are in essence traditional

public-private partnerships where technical and financial risks are transferred to the private sector in exchange for the opportunity to generate revenues and profit. Under the proposed rule, the Federal Government is instead transferring risks associated with decommissioning to the consumer rather than to the private sector.

The concern over potential default is magnified by the fact that most (if not all) developers organize themselves as Limited Liability Companies whose sole assets are the wind turbines themselves, which are their only revenue-generating assets. While BOEM believes that if a developer becomes insolvent during commercial activity that a solvent entity would assume or purchase control, the County believes this is a risky assumption as the most likely reason for default is that a constructed wind farm developer is unable to meet its contractual obligations set forth under a Power Purchase Agreement (PPA) because its energy production revenues are not in excess of its operating costs. A change of hands would not remove these circumstances or make the project profitable.

In Section G, Subsection (d), BOEM estimates that offshore renewable energy is projected to maintain consistent levels of power production over the life of the project and then uses this claim to support staged funding of decommissioning accounts. The County disagrees with this assumption. Offshore wind is notoriously unreliable and since BOEM is unable to guarantee reliable weather and wind conditions, it should recognize that developers are similarly unable to guarantee consistent revenues resulting from projected wind conditions. The County cites multiple years in which offshore wind farms in Europe faced summer wind-droughts repeatedly from 2018 to 2022 when electricity demand was often greatest.ⁱ BOEM also claims that legally binding PPAs will “ensure an ongoing revenue source over a significant time horizon and eliminate another major risk factor...commodity price volatility.” PPA’s are only a reliable source of revenue when the developer is actually able to deliver power, and when that price is sufficient to fund all necessary operation activities for the developer, including committing a portion of those revenues to decommissioning accounts. Wind is an intermittent and unreliable source of energy, further undermining a developer’s ability to promise sustained revenues.

The staggering costs of offshore wind are prohibitive and are currently reflected by the growing uncertainty that developers will not be able to deliver on their pre-existing energy contracts with states. In fact, in Virginia in 2022, the State Corporation Commission (SCC) mandated that if the Coastal Virginia Offshore Wind Project were unable to produce 42% of the energy it was capable of producing, the developer would be required to pay for replacement energy costs. The company urged the SCC to reconsider its mandate, citing “untenable costs” and its inability to guarantee even a 42% capacity factor. For the same project, commissioners wrote “The magnitude of this project is so great that it will likely be the costliest project being undertaken by any regulated utility in the United States...the electricity produced by this project will be among the most expensive sources of power ... in the entire United States.”ⁱⁱ

In Massachusetts, existing Power Purchase Agreements between developers and the State may already be priced too low, with the developer of Commonwealth Wind stating that without amendments to the current price of the PPA, the project “is no longer viable and would not be able to move forward.”ⁱⁱⁱ The developer is seeking to renegotiate its PPA, creating concerns amongst state officials that the cost of offshore wind is simply too much. The County is also strongly

concerned that the PPA's for Ocean Wind 1 are also priced unrealistically low, which casts further doubt about the developer's ability to fund a decommissioning account from ongoing revenues.

BOEM's commitment to ensure that "In all instances, the decommissioning account would be required to be fully funded by the time a lessee or grant holder is obligated to decommission the applicable facility" overlooks the possibility that the facility may be decommissioned sooner than expected. Under one proposed scenario by BOEM, the developer would be required in years 16-20 to provide 20% of the decommissioning costs annually until the account is fully funded. Under these circumstances, the developer would be financially unable to decommission the project in years 1-15, leaving the financial risk entirely to the consumer. Moreover, allowing BOEM to approve phased funding of decommissioning accounts on a "case-by-case basis" allows an inappropriate level of discretion to BOEM and promotes uncertainty to everyone involved.

The County acknowledges that the developers may opt to provide letters of credit and other forms of financial assurance based on the financial strength of their creditors or parent company, and that this practice is widely accepted in the industry. The County therefore encourages BOEM to be diligent in vetting the types of financial assurance each developer proposes for their project, and to check regularly that the creditors remain in a strong financial position throughout the life of the project. However, the County strongly disagrees with BOEM's proposal for developers to use staged funding accounts as it exposes consumers to unexpected risks associated with early decommissioning, such as severe weather, or impacts to the marine environment.

HURRICANES, STORMS, AND ENVIRONMENTAL CONCERNS

Every year the US East Coast experiences various types of extreme weather, including nor'easters, ice storms, blizzards, and hurricanes capable of destroying a significant number of wind farm turbines causing extraordinary environmental, economic, and social consequences. Allowing developers to construct such massive structures in the ocean with no financial assurance that they would be able to remove or replace them in the event of a catastrophe is blatantly irresponsible and dangerous to the US taxpayers whose tax dollars are largely responsible for subsidizing offshore wind projects. Taxpayers, as well as adversely affected communities—which are expected to absorb a developer's negative externalities (a windfall to developers)—have a right to expect that a developer can secure decommissioning obligations before permitting and construction can begin.

Furthermore, based on BOEM and NOAA's own reports and data included in the Ocean Wind 1 Draft Environmental Impact Statement, as well as project documentation associated with other proposed wind farms, there are significant environment and economic concerns expected during all stages of pre-construction (acoustic and seismic surveying), construction (pile driving, seafloor dredging, and cable laying), and operation (operational noise).^{iv} With the unprecedented number of whales and dolphin strandings occurring in New Jersey in just the first few months of 2023, it is highly possible that activity related to offshore wind may already be having severe and irreversible consequences for the marine environment. The County is therefore concerned that BOEM and NOAA may be subject to future lawsuits from third parties involving marine impacts,

and that one potential outcome of such lawsuits could warrant a reduction of project size or complete termination of a project, which would ultimately require decommissioning. It is therefore critical that developers continue to have access to immediate sources of capital equal to the total value necessary for full decommissioning at all times.

CONCLUSION

The proposal heeds little caution for a variety of industry risks that may impact offshore wind projects and their performance and, as a result, could have severe long-lasting consequences for Cape May County. As stated above, many of the changes that BOEM views as improvements to the development process, specifically alterations to survey requirements, renewable energy auctions, and decommissioning requirements, appear specifically tailored to benefit an industry that has already received an extensive number of generous subsidies from US taxpayers.

Given the vast array of environmental, economic, and social impacts that BOEM and NOAA expect from these projects, and the associated financial and legal risks, no project should be allowed to proceed without complete assurance that the project developer holds the necessary capital to decommission and/or remove turbines due to any seen or unforeseen circumstances that would warrant decommissioning or removal of any number of installed turbines. Cape May County does not want its coastal communities exposed to the potential consequences resulting from unnecessary risks created by the Federal Government in implementing its offshore wind program. BOEM's mission is to manage development of U.S. Outer Continental Shelf energy in an environmentally and economically responsible way. This proposal is neither environmentally responsible nor economically sound, and it should be rejected.

ⁱ UK Summer 'Wind Drought' Puts Green Revolution Into Reverse, Adam Vaughan, 2018; <https://www.theguardian.com/environment/2018/aug/27/uk-summer-wind-drought-puts-green-revolution-into-reverse>; Analysis: Weak Winds Worsened Europe's Power Crunch; Utilities Need Better Storage, Nora Buli and Stine Jacobsen, 2021; <https://www.reuters.com/markets/commodities/weak-winds-worsened-europes-power-crunch-utilities-need-better-storage-2021-12-22/>;

European Wind Turbines At A Standstill Amid An Ongoing "Wind Drought", Lizzy Rosenberg, 2022; <https://www.greenmatters.com/news/wind-drought>

ⁱⁱ Va. Regulators To Rule On Whether Offshore Wind Performance Requirement Should Stay; Charlie Paullin, Virginia Mercury; <https://www.viriniamercury.com/2022/10/03/va-regulators-to-rule-on-whether-offshore-wind-performance-requirement-should-stay/>

ⁱⁱⁱ Massachusetts Wind Power Project 'No Longer Viable' Without Contract Adjustments, Says Developer; Emma Newburger, CNBC; <https://www.cnbc.com/2022/10/31/massachusetts-wind-power-project-no-longer-viable-developer.html>

^{iv} Ocean Wind 1 Draft Environmental Impact Statement, June 22, 2023; <https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/OceanWind1-DEIS-Vol1.pdf>