

Response to Comments

BOEM received 401 comment submissions during the *Proposed Sale Notice for Commercial Leasing for Wind Power on the Outer Continental Shelf (OCS) Offshore New York (PSN)* comment period that closed August 5, 2016. The submissions addressed many aspects of this lease sale, and this document was prepared in response to several of the key comments and questions. BOEM's responses to the comments are organized into six categories: (1) Support for Offshore Wind, (2) Auction Procedures, (3) Fiscal Terms, (4) Navigational Impacts, (5) Marine Planning and Fisheries Concerns, and (6) Protection of Marine Species.

1. Comments Supporting Offshore Wind

***Comment:* BOEM received over 375 individual letters from stakeholders showing their support for offshore wind energy off New York. Commenters requested a quick and efficient approval process for potential projects, citing the potential for carbon reduction, new jobs and support for the local economy.**

BOEM appreciates the public's participation in our process and the fact that individual stakeholders took the time to express their opinions regarding decisions about the shared Federal resource. BOEM recognizes the important role that offshore wind can play in the effort to decrease carbon pollution and understands the need for efficient yet thorough vetting of these projects.

2. Comments Related to Auction Procedure

***Comment:* BOEM should accord preference to government entities participating in the bidding process for offshore leases.**

In recognition of comments requesting a non-monetary bid credit for government entities, BOEM will recognize the potential benefits presented by public entities by offering a 10% non-monetary credit to qualified bidders who can satisfactorily meet the definition of a "Government Authority" set forth in the FSN.

BOEM's regulations state that it may offer a non-monetary credit for factors that include "technical merit, timeliness, financing and economics, environmental considerations, public benefits, [and] compatibility with State and local needs..." (30 CFR § 585.220). In its comments, the City of New York cited the following ways that governmental entities as lessees add value to projects:

- They have a clear role in serving the public interest;
- They are not driven by the same profit motives, which means they would not necessarily require a return on investment;
- They can look at investments over a much longer time horizon and finance such projects at lower costs; and
- They cannot participate in speculative investments motivated by profits.

Early and substantial involvement by public agencies promises to lower the likelihood of later conflicts. It ensures that the agency will be engaged, and may lead the agency to view the project favorably in the future. This is particularly true where the agency directly or indirectly will have a regulatory or financial role in the project whether or not it bids for the lease.

We recognize that a government authority that wins the lease is not legally obligated to deliver announced benefits in developing the lease area, and some of the benefits promised may be given whether it wins the lease or not. However, for a credit to be in the public interest, we need not demonstrate that all possible benefits are certain to accrue. It is enough to have identified benefits of employing a non-monetary credit that we believe are more likely if a government authority does win the lease. In particular, plans such as the ones announced by NYSERDA appear to BOEM (and to many developers and other stakeholders) to hold promise for encouraging the successful development of a project.

BOEM also believes there are other arguments supporting the credit that are not related to the probability of project success. For example, governmental entities are often governed by a host of laws from which private entities are exempt. Examples include transparency and sunshine laws; preferences for local, minority and/or veteran-owned businesses, and/or union labor; protections against discrimination; differing levels of environmental review; and protection of the public interest. Such laws serve a wide array of policy and social functions.

In establishing eligibility for the bidding credit, BOEM substituted the term “government authority” for “governmental entity” to emphasize that the benefits of the bidding credit are best captured by those entities that exercise governmental power (rather than simply having a governmental affiliation).

Regarding the amount of the credit offered, BOEM has accepted the City of New York’s suggestion of 10% as appropriate in this instance. BOEM has used 25% as the maximum credit it would award in any lease sale, an amount which it has offered in the past for possession of a long-term power purchase agreement for the power generated by the project. BOEM believes the development advantage of governmental entities is somewhat less than the development advantages of a power purchase agreement, so a lower amount is appropriate in this case.

Comment: BOEM should consider non-anonymous bidding, or allowing conditional bids, which would allow a developer to opt-out of submitting a live bid if the only remaining bidder is NYSERDA.

Several potential bidders have expressed to BOEM the uniqueness of bidding in an auction in which a government authority may also be bidding—and where such government authority is proposing to conduct site assessment and characterization activities and then assign the lease for development through its own competitive process. Commenters have indicated to BOEM that potential bidders who are private developers may have different strategies against other private developers than they would against a government authority whom they may wish to win the lease. BOEM employs “anonymous bidding” in its auctions, meaning that bidders can know how many bidders they are bidding against, but not specifically who they are bidding against.

Certain private developers have expressed concern that without knowing who they are bidding against, bidders may end up bidding against their own interests. Several stakeholders recommended eliminating anonymous bidding. Others submitted comments that recommended that BOEM instead implement a form of “conditional bidding” that allowed an auction winner to revoke its provisionally winning bid if it learned that it had been bidding against a government authority.

BOEM evaluated the merits of changing its anonymous bidding policy for the New York lease sale. BOEM determined that anonymous bidding remains a “best practice” worth preserving. However, in response to commenters’ concerns, BOEM will implement a form of “conditional bidding” for this lease sale that we are characterizing as a Limited Opportunity to Revoke (LOR) a provisionally winning bid. Bidders will be given an opportunity to reserve a LOR before the start of the auction, stating that they reserve the right to revoke a provisionally winning bid should the runner-up be a government authority. The LOR can only be exercised during a one-hour period after the auction is over and the bidding has concluded. A full description of how the LOR will be implemented is included in the Final Sale Notice.

Comment: BOEM should offer a non-monetary credit for bidders who have negotiated a power purchase agreement (PPA) term sheet.

BOEM received comments in response to the PSN that both supported and opposed implementation of a non-monetary credit for a PPA term sheet. BOEM has decided not to offer a non-monetary credit for bidders who can demonstrate that they have executed a PPA term sheet for the sale of the power.

A PPA term sheet is not typically a legally binding contract for the sale of power, but rather an outline for a potential future deal. The lack of enforceability means that procuring a qualifying term sheet does not represent a sufficient developmental advantage to merit a financial credit in the auction. Moreover, commenters argued that negotiating term sheets can be a time and resource-intensive process, and that there is too much market uncertainty at this time to effectively negotiate a term sheet.

Comment: A letter of commitment should be allowed in lieu of a bid deposit for government entities participating in the leasing process.

BOEM has decided not to accept a “letter of commitment” from governmental entities in place of a bid deposit.

BOEM acknowledges the procurement challenges presented to a government entity which often have complex rules and regulations governing the disbursement of public money for public projects. However, bid deposits are an important tool to ensure a successful lease sale and resulting lease execution. Because of the complex state rules and regulations, BOEM cannot be sure that a letter of commitment backed by a governmental entity would provide adequate protection against the risks that bid deposits are designed to alleviate.

3. Comments Related to Fiscal Terms

***Comment:* BOEM should reduce the operating fee rate to below 2%.**

Pursuant to OCSLA, BOEM must ensure that the United States receives a fair return for leases and grants issued on the OCS. BOEM has determined that a 2% operating fee rate throughout the term of the lease allows the United States to collect a fair return and is in accordance with the default operating fee specified in 30 CFR 585.506. Pursuant to 30 CFR 585.510, if requested, the BOEM Director may reduce the operating fee, or waive the operating fee for up to six years, if BOEM determines that continued activities would be uneconomic without the requested reduction or waiver or that the reduction or waiver would be necessary to encourage additional activities.

***Comment:* As BOEM proposed, NYC Zone J (NYISO) should be used as a default for calculating operating fees. However, lessee should be allowed to demonstrate the actual blended wholesale value of energy based on actual offtake agreements or kilowatt-hour production.**

Commenters suggested that the offtake pathways for offshore wind in New York are still uncertain, and therefore leaseholders should maintain the flexibility to demonstrate the actual blended wholesale value of energy based on offtake agreements or energy production. Alternatively, it was suggested that Zone J, in particular is the appropriate zone to use.

In recognition of the fact that the location where a project's cable will come ashore and interconnect with the grid is uncertain until a COP is approved, BOEM has decided to build flexibility into the lease. Instead of specifying a wholesale power price index in the lease, BOEM will specify a power price index in the COP approval that includes the location where the cable comes ashore.

4. Comments Regarding Navigational Impacts

***Comment:* BOEM should implement the recommendations of the Atlantic Coast Port Access Route Study (ACPARS) by establishing a 2 nautical mile buffer zone from all Traffic Separation Schemes (TSS) and a 5 nautical mile buffer between TSS entry and exit points, and create a pass-through lane for smaller vessels.**

BOEM has actively coordinated with the United States Coast Guard (USCG) since the beginning of the New York area delineation process. BOEM will continue these engagement efforts as BOEM moves forward with leasing and specific plan reviews.

At this time, BOEM is retaining a 1 nautical mile (nm) setback from the edge of the TSS lanes. Although parts of the lease area are closer to the TSS, all area closer than 1 nm from the edge of the adjacent TSS will not be available for the placement of structures. Further, BOEM has decided against creating a pass-through lane for smaller vessels at this time.

In the future, if BOEM issues a lease and receives a COP, BOEM expects to receive as a component of that COP a Navigational Safety Risk Assessment drafted in conformance with

Navigational and Vessel Inspection Circular No. 02-07. This information will help BOEM determine whether additional setbacks and/or specific mitigation measures are warranted. USCG has stated that its Marine Planning Guidelines, included as Enclosure 2 of the Atlantic Coast Port Access Route Study, are a starting point and have acknowledged the possibility that risks can be mitigated, pending more detailed analysis from a project-specific Navigational Safety Risk Assessment.¹

5. Comments Related to Marine Planning and Fisheries Concerns

***Comment:* Commenters asserted that BOEM has not fulfilled its obligations under the Outer Continental Shelf Lands Act with regards to navigation and fishing activities.**

BOEM has followed all legal and procedural requirements set forth by law in the Outer Continental Shelf Lands Act (OCSLA) and implementing regulations. BOEM is authorized to issue leases, easements and rights of way to provide access to the outer continental shelf (OCS) for the purpose of developing renewable energy resources. OCSLA requires that BOEM consider fishing and navigation impacts, among others. However, neither OCSLA nor any other source of law requires the agency to avoid all fisheries and navigation impacts in its leasing program. While absolute avoidance of all impacts is unlikely, BOEM does evaluate and attempt to minimize these potential impacts when balancing the potential for offshore wind development with potential impacts to other uses of the area.

BOEM has and will continue to seek opportunities to mitigate impacts of authorized activities on other ocean uses, including fishing and navigation.

***Comment:* The New York WEA is located off of New York, but is utilized by many stakeholders from surrounding states – a joint Renewable Energy Intergovernmental Task Force should have been created for this project. In addition, commenters suggested that BOEM utilize the Northeast Ocean Plan and data in the Northeast Ocean Data Portal in its decision making processes.**

In accordance with 30 CFR § 585.102(e), BOEM establishes Intergovernmental Renewable Energy Task Forces (Task Force) to provide coordination and consultation with any Federal, state, local governments and Indian Tribes that may be affected by a lease, easement or right-of-way. The Task Forces are typically established on a state-by-state basis, but BOEM welcomes the opportunity to establish joint Task Forces where they may be beneficial. It is important to note that BOEM's public process to inform its decision-making for the New York lease area has had a wider scope than just the State of New York, including meetings held in areas in Massachusetts, Rhode Island, and New Jersey. However, as BOEM moves forward with overseeing potential development in the lease area, we will keep this recommendation in mind and may consider establishing a joint Task Force if we believe that it would facilitate better coordination with interested and affected parties.

¹ Letter to Bureau of Ocean Energy Management, attention Dr. Krueger, from Captain B.L. Black, U.S. Coast Guard, Chief, Prevention Division. September 28. <http://www.boem.gov/USCG-NY-Area-ID-recommendation>.

With regard to the Northeast Ocean Plan, BOEM represents DOI on both the [Northeast](#) and [Mid-Atlantic](#) Regional Planning Bodies (RPBs) and is the Federal co-lead for the Mid-Atlantic RPB, and both RPBs are finalizing their Ocean Plans in Fall 2016 for certification by the National Ocean Council, after which Plan implementation will begin. The RPBs include representation from federal agencies, the coastal states from Virginia to Maine (including Pennsylvania), federally-recognized tribes, and Fishery Management Councils. BOEM encourages participation from all user groups and stakeholders throughout the process. The RPB leverages existing efforts underway by states and regional entities, and engages stakeholders and technical experts at each key step.

BOEM is committed to the regional ocean planning process as described in the Northeast and Mid-Atlantic Ocean Plans, including the use and maintenance of Ocean Plan data and information.

Throughout the planning process, stakeholders were involved in developing data products for human activities (such as shipping, fishing, recreation, energy, and aquaculture) and marine life and habitat (through review of the methods, analyses, and draft products for spatial data characterizing species and their habitat). These data products reside on the Northeast and Mid-Atlantic Ocean Data Portals. For example, the NE RPB developed its Portal, in collaboration with an associated working group, to serve as a user-friendly source of maps, data, and tools that can serve as one source of information to inform ocean planning from the Gulf of Maine to Long Island Sound. A range of government entities including BOEM, non-government organizations, and stakeholders in the Northeast and Mid-Atlantic regions are already using both Data Portals. BOEM is committed to using the Data Portals to enhance access to data, environmental reports, and proposed offshore wind development activities. The data are available to the public online at www.northeastoceanandata.org and <http://midatlanticocean.org/data-portal/>.

Comment: Commenters raise concerns about potential fisheries impacts, assert that BOEM’s estimates of fishery exposure are inaccurate, and suggest that the decision-making process should be documented and made more transparent.

In identifying a WEA offshore New York to analyze for potential leasing, BOEM considered the comments and concerns it received during more than four years of stakeholder outreach, including multiple Task Force meetings, public workshops, and comments received on numerous public notices.

BOEM balances the potential for offshore wind development against potential impacts to fishing and other existing activities on the OCS. In the case of fisheries, BOEM evaluated commercial fishing data, patterns of known fishing activity, input received from fishermen, relevant science, and concerns raised about the uncertainty regarding future fishing opportunity. The data that BOEM analyzed showed that the Atlantic squid and scallop fisheries each derived less than 1% of their total average annual revenue from the New York WEA between 2007 and 2012. BOEM nonetheless recognizes that this is still an important resource for the fishing community. BOEM also balanced these considerations against, among other things, the need to provide an area that

preserves siting flexibility and the potential for project-specific mitigation measures and reasonable adaptation to reduce fisheries impacts.

It should be noted that the issuance of a lease does not, by itself, authorize the installation of any bottom-founded structures, including site assessment devices and wind turbines. Rather, the lease grants the lessee the exclusive right to submit plans proposing the installation of such structures. Should a future lessee submit a construction and operation plan (COP), BOEM will then conduct a comprehensive review the plan and may approve, approve with modifications, or disapprove the proposed activities. To inform this determination, BOEM will conduct additional analyses on potential impacts pursuant to the National Environmental Policy Act and other relevant statutes, and will consider potential mitigation measures that could help reduce impacts to the fishing industry.

Transparency and clarity in BOEM's leasing process is important to BOEM and is encompassed in several actions included in the *2016 National Offshore Wind Strategy* (Action Areas 2.1 and 2.2).² BOEM engages with stakeholders through several mechanisms, including public meetings, opportunities to provide comment on *Federal Register* documents, the studies development process, and through documents such as this FSN. As we implement the initiatives outlined in the Strategy, BOEM may consider other avenues of stakeholder engagement in future processes.

Comment: A fisheries working group should be created for this WEA, as well as other and future WEAs.

BOEM is committed to maintaining open communication with stakeholders, as evidenced by steps outlined to better engage with commercial and recreational fishermen in the recently released *2016 National Offshore Wind Strategy* and drafts of the *Northeast Ocean Plan* and *Mid-Atlantic Ocean Action Plan*.³ Strategies include, but are not limited to, convening scoping meetings, open houses, environmental studies meetings, and forums. BOEM is willing to work with the future lessee and fisheries stakeholders to develop a communication approach that is best suited for the New York lease area and complies with all applicable Federal statutes, such as the Federal Advisory Committee Act. BOEM also has developed specific guidance to lessees regarding communication with commercial and recreational fishermen in order to better inform project development and minimize potential multiple use conflicts.

BOEM is committed to ensuring that fisheries stakeholders are engaged throughout the development of any offshore wind projects offshore New York, and recognizes that the New York lease area supports fishing activities. In recognition of this use and the importance of communicating with fishermen, BOEM has modified Addendum "C" of the lease to include a

² National Offshore Wind Strategy: Facilitating the Development of the Offshore Wind Industry in the United States, 2016. Department of Energy and Department of the Interior. Accessed September 21, 2016. <http://www.boem.gov/National-Offshore-Wind-Strategy/>

³ Draft Mid-Atlantic Regional Ocean Action Plan, <http://www.boem.gov/Ocean-Action-Plan/>

stipulation requiring the development of a publicly-available Fisheries Communication Plan (FCP) that includes the designation of a primary point of contact with fisheries stakeholders (i.e., Fisheries Liaison).

The FCP is intended to be a conceptual, informational document designed to ensure that an operator has planned to communicate with fisheries stakeholders, and to provide BOEM and the general public with an overview of the lessee's approach to fisheries outreach. It is also anticipated that an operator would already develop much of this requested information as a part of its internal planning for COP submission.

6. Comments Related to Protection of Marine Species

***Comment:* Several commenters recommended that BOEM adopt additional stipulations for the protection of North Atlantic right whales similar to those contained in a voluntary agreement for the Mid-Atlantic WEAs.**

Based on currently available science, BOEM believes that its current suite of mitigation measures are protective of endangered species, including the North Atlantic right whale, in the lease area during site characterization activities. These conditions were developed in consultation with the National Marine Fisheries Service (NMFS) to provide appropriate measures to reduce potential impacts from site characterization activities. BOEM supports coordination and cooperation between environmental organizations and offshore wind energy developers. BOEM remains committed to using the best science and scientific methodologies currently available to support effective mitigations to protect the North Atlantic right whale and will continue to evaluate new information as it becomes available, to determine whether additional protective measures are appropriate.

The lease does not include environmental stipulations pertaining to site assessment activities or construction activities. Requirements covering those types of activities, such as pile driving, will be considered in the future incident to BOEM receiving, reviewing and approving a project-specific plan such as a Site Assessment Plan or a Construction and Operations Plan.

For more information on the potential impacts of this lease sale on the North Atlantic right whale and other marine mammals, as well as mitigation measures required by BOEM, see Sections 4.4.2.5 and 5.1.3.4 and Appendix B of the Environmental Assessment, available at <http://www.boem.gov/New-York/>.

***Comment:* Additional vessel speed restrictions should be put in place, including (1) a 10-knot speed limit restriction during the period of November 1 – April 30 on all vessels of any length, associated with site assessment surveys and site characterization activities. This would include survey vessels as well as support vessels operating in and transiting to and from the Wind Energy Area.**

Section 4.2 of Addendum C of commercial lease OCS-A 0512 contains Vessel Strike Avoidance Measures aimed at reducing impacts to sensitive species. Measures include maintaining a

vigilant watch for protected species, species-specific separation distances and speed restrictions of less than 10 knots (18.5 km/hr) or less for vessels 19.8 meters (65 ft) in length or greater, operating from November 1 through April 30. These restrictions are a requirement of NOAA's 2013 Biological Opinion issued to BOEM by NOAA for Commercial Wind Lease Issuance and Site Assessment Activities on the Atlantic Outer Continental Shelf in Massachusetts, Rhode Island, New York and New Jersey Wind Energy Areas⁴. NOAA determines timeframes for speed restrictions based on when higher densities of right whales are likely to pass through or reside in the area (73 FR 60173).

The restrictions will be implemented in order to reduce the potential of vessel collisions with protected species during activities conducted in support of the submission of a plan (i.e., SAP and/or COP) and apply throughout the survey area, not only while the lessee is operating in Seasonal Management Areas (SMAs). BOEM believes that these standard operating conditions (Section 4.0 of Addendum C) will provide the necessary protections to sensitive species, including the North Atlantic right whale, in the lease area offshore New York.

Comment: Stakeholders suggested that from March 22 to April 30 and from November 1 to November 22, the best commercially available noise attenuation and source level reduction technology should be required to reduce sound during pile driving (unless technology is prohibitively expensive).

The lease does not include environmental stipulations for site assessment activities or construction activities. Stipulations covering those types of activities, such as pile driving, will be considered in the future in the event BOEM reviews a Site Assessment Plan or a Construction and Operations Plan.

BOEM remains committed to using the most up-to-date science currently available and – in accordance with National Marine Fisheries Service's Conservation Recommendations in BOEM's Endangered Species Act consultations – is supporting studies in areas where data is currently not available. Studies include HRG survey sound source verification (see: <http://www.boem.gov/Collaborative-Archaeological-Investigations-Sound-Source-Verifications-Final/>) and pile-driving mitigation (<http://www.bsee.gov/Research-and-Training/Technology-Assessment-and-Research/Project-634/>). In addition, BOEM has recently made available the proceedings of a meeting BOEM convened to evaluate noise-mitigating technologies, including pile-driving mitigation (see: <https://www.infinityconferences.com/InfiniBase/Templates/183779/Links.html>). In order to reduce the potential for injury to protected species, BOEM has made use of previous reports and modeled areas of ensonification from pile driving activities, in consultation with the National Marine Fisheries Service, and has adopted a very conservative shutdown requirement that would apply to all incursions into the exclusion zone during pile driving. Exclusion zone and Protected Species Observer requirements, as well as soft-start procedures, also provide supportive

⁴ NOAA. 2013. Commercial Wind Lease Issuance and Site Assessment Activities on the Atlantic Outer Continental Shelf in Massachusetts, Rhode Island, New York and New Jersey Wind Energy Areas. Biological Opinion. NER-2012-9211.

mitigations to minimize any possible impacts to protected species. With regard to vibratory hammers, use of this type of hammer is restricted to a limited range of physical environments, for example, those of certain sediment types. Further, empirical data collection on the acoustic nature of this methodology has only recently begun in Europe and at present, no data is readily available.

***Comment:* Stakeholders suggested that the lease requirements for Protected Species Observers (PSO) be increased to a minimum of 2 NMFS-approved PSOs (1 on/ 1 off) at each sub-bottom profiling site and 4 NMFS-approved PSOs (2 on/ 2 off) at each pile driving site, with additional requirements during March 22 - April 30 and November 1 - 22.**

Stipulation 4.4.2 of Addendum “C” prohibits the lessee from conducting geophysical surveys when lighting or weather conditions prevent visual monitoring of the exclusion zone, except as allowed in an alternative monitoring plan reviewed by BOEM.

Stipulation 4.4.4 of Addendum “C” requires that the exclusion zone for all sub-bottom profiling activities be monitored by one or more NMFS-approved PSOs around any operational sound source. In line with the recommendations for national standards for a protected species observer and data management program (Baker et al., 2013)⁵, in order to prevent observer fatigue and reduced effectiveness, a sufficient number of PSOs are required to be on board to facilitate effective observer rotations.

Based on consultation with NMFS, the qualifications of all PSOs are reviewed and approved by NMFS. BOEM believes that the stipulation referenced above and NMFS’s observer approval process address these recommendations and provide the necessary protections for North Atlantic right whales and other endangered species.

The comments regarding pile driving activities will be considered in the future, should BOEM receive a Site Assessment Plan or a Construction and Operations Plan.

***Comment:* BOEM should modify the New York leases to only allow sub-bottom profiling at night if site-specific risk assessment shows acceptable results regarding the potential for right whale activity during the survey period. Additionally, pile driving should be prohibited at night and right whale aerial surveys during pile driving activities should be required from March 22 to April 30.**

Stipulation 4.4.3 of Addendum “C” allows a lessee to request to be allowed to undertake night-time operations by submitting an alternative monitoring plan detailing the alternative monitoring methodology to BOEM. Upon review of the alternative monitoring plan, BOEM, in consultation with NMFS, will decide whether or not night-time operations will be allowed. Based on its experience reviewing alternative monitoring plans submitted pursuant to other commercial wind

⁵ Baker, K., D. Epperson, G. Gitschlag, H. Goldstein, J. Lewandowski, K. Skrupky, B. Smith, and T. Turk. 2013. National Standards for a Protected Species Observer and Data Management Program: A Model Using Geological and Geophysical Surveys. U.S. Department of Commerce. NOAA Technical Memorandum. NMFS-OPR-49. 73 p

leases, BOEM has modified Section 4.4.3 of Addendum C to now include the following language: “The alternative monitoring plan must demonstrate the effectiveness of the methodology proposed to the lessor’s satisfaction.” This language was added to clarify that the lessee is not only required to provide an alternative monitoring methodology, but also must demonstrate the effectiveness of the methodology proposed.

Regarding the comments provided on pile-driving, the lease does not include environmental stipulations for site assessment activities or construction activities. However, requirements covering those types of activities will be considered in the future, in the event BOEM receives a Site Assessment Plan or a Construction and Operations Plan.