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On the Line: Reforming OCSLA as a Mechanism for Fisheries Compensation in the Offshore Wind Era

Madeleine Fenderson*

INTRODUCTION

What happens when there are too many big fish in a small pond? With offshore wind power emerging as a dominant domestic energy source in the United States, existing ocean users, including the commercial fishing industry, must adapt to the industrial changes in the marine landscape. Ocean space that has been devoid of energy development for generations is becoming a garden of hundreds of offshore wind turbines, each over two-football fields in diameter.¹ The sudden and drastic increase in users sharing the same ocean space creates an increased risk of conflict between the commercial fishing industry and the construction and operation of offshore wind farms. Actors are instituting some impact minimization efforts in an attempt to mitigate potential conflicts. One such measure includes compensating the fishing industry for damage to gear and loss of historical fishing grounds.² However, the current protocol for compensating fisheries is inefficient and inadequate due to a lack of standardization across various

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1. Marc Eglon, *GE's New 12 MW Haliade-X Wind Turbine Is Truly Enormous*, TAYLOR HOPKINSON (July 24, 2019), <https://www.taylorhopkinson.com/worlds-largest-wind-turbine-ge-haliade-x/#:~:text=With%20a%20107m%20blade%20length,clean%20power%20for%2016%2C000%20households> [https://perma.cc/DAP3-VYXF].

2. RESPONSIBLE OFFSHORE DEV. ALL., IMPACT FEES FOR COMMERCIAL FISHING FROM OFFSHORE WIND DEVELOPMENT: CONSIDERATIONS FOR A NATIONAL FRAMEWORK 18 (2021), https://rodafisheries.org/wp-content/uploads/2021/12/RODA-Impact-Fees-Report_Dec21.pdf [https://perma.cc/9F3T-KJ8U].

projects and states. As such, coastal states have requested a new approach that is more unified, transparent, and efficient.³

Concurrently, the federal statute that governs offshore wind development, the Outer Continental Shelf Lands Act (OCSLA), is antiquated, being written before offshore wind farms existed in the United States. To avoid the tragedy of the salt-water commons, OCSLA must be amended to reflect the realities of the 21st century. In Part 1, this Comment will discuss the background of the American fishing industry and the legal landscape of offshore wind development. In Part II, this Comment will explain why the revenue-sharing provisions in OCSLA must be amended to account for offshore wind development and benefit coastal states, including a discussion of how the legislative history of OCSLA is rooted in oil and gas development in a pre-offshore wind federal energy program. In Part III, this Comment considers why the current governance of fisheries compensation is a source of conflict in American offshore wind development, and Part IV discusses the positive impacts that widening OCSLA profit-sharing criteria will have on this source of conflict, including a discussion of standardizing compensation across all offshore wind projects and developers. Finally, Part V of this Comment will address the legal, financial, and procedural challenges to amending a federal statute and how state-administered compensation will impact developers and fishermen.

Amending OCSLA provides an opportunity to address one of the largest setbacks in American offshore wind development: stakeholder perception and compensation. An amendment to the profit-sharing procedure laid forth in OCSLA would streamline the fisheries compensation and mitigation process by establishing and funding state-administered offshore wind compensation programs and bypassing the need for direct compensation from developers.

3. SPECIAL INITIATIVE ON OFFSHORE WIND, NINE ATLANTIC COAST STATES SCOPING DOCUMENT: FRAMEWORK FOR ESTABLISHING A REGIONAL FISHERIES COMPENSATION FUND ADMINISTRATOR FOR POTENTIAL IMPACTS TO THE FISHING COMMUNITY FROM OFFSHORE WIND ENERGY DEVELOPMENT 7 (2022), https://offshorewindpower.org/wp-content/uploads/2023/04/RFA_RevisedScopingDoc_FINAL.pdf [<https://perma.cc/HF5M-G3SR>].

I. BACKGROUND

A. *Offshore Wind and OCSLA*

Offshore wind is a renewable energy source projected to expand rapidly in the United States.⁴ The federal government aims to produce thirty gigawatts of offshore wind power by 2030⁵ and produce net zero emissions by 2050.⁶ To achieve this goal, there are over forty proposed offshore wind projects, lease areas, and call areas off the east and west coasts.⁷ The Bureau of Ocean Energy Management (BOEM), through the Secretary of the Interior, has the jurisdiction to lease submerged lands on the Outer Continental Shelf to developers for offshore wind development.⁸ The Outer Continental Shelf includes submerged lands within the Exclusive Economic Zone (EEZ).⁹ Developers have offered to pay upwards of one billion dollars to lease areas to procure offshore wind energy.¹⁰ Since offshore wind will be developed

4. See generally Coral Davenport, *Biden Administration Plans Wind Farms Along Nearly the Entire U.S. Coastline*, N.Y. TIMES, <https://www.nytimes.com/2021/10/13/climate/biden-offshore-wind-farms.html> [<https://perma.cc/KXA6-UG32>] (Oct. 15, 2021).

5. *FACT SHEET: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs*, WHITE HOUSE (Mar. 29, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-biden-administration-jumpstarts-offshore-wind-energy-projects-to-create-jobs/> [<https://perma.cc/FZ6R-CSUF>].

6. *FACT SHEET: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies*, WHITE HOUSE (Apr. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/> [<https://perma.cc/RR7T-GVPT>].

7. See Teresa R. Christopher et al., *The Road to 30 Gigawatts: Key Actions to Scale an Offshore Wind Industry in the United States*, CTR. FOR AM. PROGRESS (Mar. 14, 2022), <https://www.americanprogress.org/article/the-road-to-30-gigawatts-key-actions-to-scale-an-offshore-wind-industry-in-the-united-states/>; WALTER MUSIAL ET AL., OFFSHORE WIND MARKET REPORT: 2022 EDITION 11 (2022), <https://www.energy.gov/sites/default/files/2022-09/offshore-wind-market-report-2022-v2.pdf> [<https://perma.cc/8A54-ZPT3>].

8. See 43 U.S.C. § 1334(a); see also *BOEM Governing Statutes*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/about-boem/regulations-guidance/boem-governing-statutes> [<https://perma.cc/KK7W-UV57>] (last visited Dec. 29, 2022 6:00 PM).

9. See 43 U.S.C. § 1331(a); see also *BOEM Governing Statutes*, *supra* note 8.

10. See, e.g., *BOEM Lease Sale ATLW-8: New York Bight (February 23-25, 2022)*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Results%20Round%20by%20Round%20v2.pdf> [<https://perma.cc/88WX-H4VZ>] (last visited Sept. 16, 2023).

off of nearly every coastal state in the United States and will be an extremely lucrative industry for the country, the government must facilitate this industry's coexistence with existing industries sharing the same ocean space.¹¹ As the United States moves forward, fisheries should not be left behind.

The OCSLA governs the framework for sharing profits gained from federal leases issued by the federal government to the coastal states. The OCSLA does so by governing the federal government's leasing of offshore energy resources, including oil, gas, and, more recently, offshore wind development.¹² The Act adopted the federal profit-sharing framework for leases on the Outer Continental Shelf through the Energy Policy Act of 2005.¹³ The statute specifically states that "[p]ayments shall be made based on a formula . . . that provides for equitable distribution, based on proximity to the project, among coastal states that have a coastline that is located within [fifteen] miles of the geographic center of the project."¹⁴ Therefore, if the state is more than fifteen miles from the geographic center of a project, not inclusive of the outer bounds or cable network of a project, it will not be eligible for profit sharing.¹⁵ As this Comment will discuss, this is very problematic as it virtually excludes the offshore wind industry from this provision.

If a state is eligible for profit sharing, they receive twenty-seven percent of the total lease sale.¹⁶ BOEM is the federal agency that then administers these funds to states.¹⁷ If there is more than one state within fifteen miles of the geographic center of the project, BOEM uses the inverse distance formula to calculate funds for each of the states relative to how close or far the states are from the geographic center.¹⁸ Unlike most other federal spending programs, the federal government

11. See Christopher et al., *supra* note 7; MUSIAL ET AL., *supra* note 7.

12. *BOEM Governing Statutes*, *supra* note 8.

13. Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 388, § 8, 119 Stat. 594, 745.

14. 43 U.S.C. § 1337(p)(2)(B).

15. Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. 19638, 19678 (Apr. 29, 2009) (to be codified at 30 C.F.R. pts. 250, 285, 290).

16. Under OCSLA, the federal government must "provide for the payment of [twenty-seven] percent of the revenues received by the Federal Government as a result of" lease sales for projects "that have a coastline that is located within [fifteen] miles of the geographic center of the project." 43 U.S.C. § 1337(p)(2)(B).

17. Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. at 19638; 30 CFR § 585.540 (2022).

18. 30 C.F.R. § 585.540(c) (2022).

puts no conditions on spending when they profit share lease sales with qualifying states.¹⁹

Despite the potential benefits profit sharing may have on states through the administration of OCSLA, coastal states shoreside of offshore wind projects in federal waters will be ineligible for profit sharing due to the strict location criteria in the statute.²⁰ The final rule-making for OCSLA's revenue sharing criteria specifically states that even if part of the project infrastructure is within state waters (three nautical miles), the state is not eligible for funds if the coastline is more than fifteen miles from the geographic center of the project.²¹ This rule particularly impacts offshore wind development because the geographic center of offshore wind farms is typically located in excess of fifteen miles from the coastal states, yet export cables run from the offshore substation to state shorelines carrying energy.²² Furthermore, offshore wind farms have a large amount of onshore infrastructure. This infrastructure includes drilling operations at the landing spot (typically on a beach), a transition joint bay where landing cable meets the cable leading energy to the onshore substation, and underground cables leading to an onshore substation (which may be miles from shore).²³ Under the current framework of OCSLA revenue sharing, even if a coastal state has project infrastructure (such as export cables) running through their state waters or onshore infrastructure within the state land, the state will still not be eligible for the twenty-seven percent of the federal revenue shares.²⁴

B. *Fisheries of the United States*

As the prospect of offshore wind development becomes a reality in the United States, commercial fishermen and the communities that rely on them are left with uncertainty. Furthermore, ensuring commercial fishing remains a viable source of income and food source is important to the American economy. Commercial fishing is a very

19. See generally 43 U.S.C. § 1337.

20. See 43 U.S.C. § 1337(p)(2)(B); Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. at 19684; 30 C.F.R. § 585.542 (2022).

21. Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. at 19678.

22. *Bringing Wind Power Ashore*, ORSTED, <https://us.orsted.com/renewable-energy-solutions/offshore-wind/what-is-offshore-wind-power/bringing-wind-power-ashore> [<https://perma.cc/J9KN-R4S5>] (last visited Jan. 20, 2023).

23. See *id.*

24. Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. at 19678.

lucrative industry with high economic and cultural value across the American coastline. In 2020, commercial fishermen landed 8.4 billion tons of fish valued at \$4.8 billion in American ports.²⁵ In 2019, the seafood industry—inclusive of the commercial fishing sector, seafood processors, seafood dealers, seafood wholesalers, seafood distributors, seafood importers, and seafood retailers²⁶—generated 1,233,915 American jobs resulting in \$43.3 billion in gross income.²⁷ The commercial fishing industry has had a large effect on the American economy, providing many jobs across various sectors, including in tourism and hospitality.²⁸ Since the fishing industry has such important economic and historical ties to our coasts, the government must act to address and mitigate potential conflicts between the fishing industry and the growing offshore wind industry as they share the same geographic space.

C. *Conflict between the Fishing Industry and the Offshore Wind Industry*

Conflicts between the commercial fishing industry and the offshore wind industry are inevitable since the two industries share the same ocean space, and litigation between the two has already ensued.²⁹ In 2021, a fishing group filed a Petition for Review in the United States Court of Appeals for the First Circuit to review BOEM's approval of the Vineyard Wind Project on grounds that the project failed to adequately try to minimize the impacts the project may have on commercial fishing and navigation.³⁰ This legal action is indicative of the severity of conflicts between the commercial fishing and offshore

25. RICHARD CODY ET AL., 2020 FISHERIES OF THE UNITED STATES 6 (Micahel Liddel & Melissa Yencho eds., 2022), <https://media.fisheries.noaa.gov/2022-05/Fisheries-of-the-United-States-2020-Report-FINAL.pdf> [<https://perma.cc/8LNZ-8HG2>].

26. RITA CURTIS ET AL., FISHERIES ECONOMICS OF THE UNITED STATES 2019, at 8 (Shelley Arenas & Alex Richardson eds., 2022) https://media.fisheries.noaa.gov/2022-07/FEUS-2019-final-v3_0.pdf [<https://perma.cc/247K-TVZG>].

27. *See id.* at 20.

28. Sean Pasco et al., *The Indirect Economic Contribution of Fisheries to Coastal Communities Through Tourism*, 8 FISHERIES 138, 138 (2023).

29. Margaret Badding, *Offshore Wind and the Fishing Industry: The Path to Co-Existence*, KLEINMAN CTR. FOR ENERGY POL'Y (June 21, 2022), <https://kleinmanenergy.upenn.edu/news-insights/offshore-wind-and-the-fishing-industry-the-path-to-co-existence/> [<https://perma.cc/U4FP-UQBR>].

30. Miriam Wasser, *Fishermen Challenge Federal Approval of First Large-Scale Offshore Wind Project*, WBUR (Sept. 13, 2021), <https://www.wbur.org/news/2021/09/13/roda-fishermen-lawsuit-vineyard-wind-boem> [<https://perma.cc/LA5Q-D5NW>].

wind industry and the urgency to facilitate minimization and mitigation measures between the two industries.

The size of each lease area designated for wind farms is substantial and has the potential to impact existing commercial fishing activity. For example, off the coast of New York and New Jersey, the New York Bight lease areas (six lease areas in total) encompass 488,000 acres (762 square miles).³¹ Since each project takes up so much of the ocean space, commercial fishermen who historically have used the area to fish may choose to fish elsewhere due to navigational concerns.³² If they instead choose to continue fishing within the wind farms, they risk entangling their gear in offshore wind structures, such as the wind turbine and substation foundations, or export cable components.³³ Entanglements between gear and offshore wind infrastructure are a particular concern for fishermen that utilize mobile fishing gear (such as trawls and dredges), and they will likely need to change their daily operations to minimize damage to their vessels and equipment.³⁴ Because of these potential conflicts, mitigating and compensating for conflicts between both industries is essential to their coexistence. These efforts may most easily be achieved by amending OCSLA to allow for coastal state compensation administration.

II. REVISITING OCSLA TO INCLUDE OFFSHORE WIND DEVELOPMENT

If amended, the revenue-sharing provisions in OCSLA should include provisions that account for offshore wind development. But, since OCSLA was designed for an antiquated federal energy regime favoring oil and gas development, the current revenue-sharing criteria do not consider the technical nuances of offshore wind farms.

A. *OCSLA Represents an Antiquated Federal Energy Program*

The OCSLA should represent our federal goal of a transition to renewable energy, but the current, antiquated model does not truly support that purpose. The revenue-sharing criteria in dispute were created by a 2005 amendment to OCSLA adopted by the Energy Policy

31. Notice of Intent to Prepare a Programmatic Environmental Impact Statement for Future Wind Energy Development in the New York Bight, 87 Fed. Reg. 42495 (July 15, 2022).

32. See *Offshore Wind Energy: Fishing Community Impacts*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/topic/offshore-wind-energy/fishing-community-impacts> [<https://perma.cc/TF7C-S7JP>] (last visited Apr. 19, 2023).

33. See RESPONSIBLE OFFSHORE DEV. ALL., *supra* note 2, at 5.

34. See *Offshore Wind Energy: Fishing Community Impacts*, *supra* note 32.

Act.³⁵ The Energy Policy Act, that was put into place by George W. Bush, is often criticized for failing to adopt any proposals addressing climate change and climate change technology.³⁶ One of the primary goals of the Energy Policy Act was to “promote and expedite oil and natural gas development” and facilitate the permitting and approval process for oil and gas exploration and development.³⁷ But renewable energy development, including offshore wind development, was not a large consideration or priority in adopting this policy. The Act was passed ten years before the construction of America’s first offshore wind farm in 2016.³⁸ Since the Energy Policy Act was passed before a single offshore wind project was even in the pre-development phase in the United States, the law simply did not consider offshore wind power a prolific and reliable federal energy source. Despite this policy’s roots in an outdated federal energy program, the United States still relies on this policy to control many of our renewable energy programs, including lease sale revenue sharing with coastal states.³⁹

B. OCSLA’s Geographical Criteria Fails to Consider Technical Nuances of Offshore Windfarms

The current and arbitrary OCSLA fifteen-mile from the geographical-center requirement excludes the lease sales from the entire offshore wind entire industry from being shared with coastal states—despite the potentially disruptive effect the projects will have on state coastlines and industries—and does not consider the technical nuances of offshore wind farms. The OSCLA final rulemaking currently includes provisions that restrict states from profit sharing despite project infrastructure being present in their state waters:

We have re-examined the statutory language in [S]ubsection 388 of the [Energy Policy Act] and have concluded that allowing a State to be eligible for revenue sharing when its nearest coastal point is farther than [fifteen] miles from the

35. See Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 388, § 8, 119 Stat. 594, 745.

36. *Committee Report: Legislation Committee*, 27 ENERGY L.J. 349, 349, 359 (2006).

37. Impacts to Onshore Jobs, Revenue and Energy: *Review and Status of Section 390 Categorical Exclusions of the Energy Policy Act of 2005: Hearing Before the H. Nat. Res. Subcomm. on Energy and Min. Res.*, 112th Cong. 2 (2011) (statement of Mike Pool, Director, Bureau of Land Mgmt.).

38. *Block Island Wind Farm*, ORSTED, <https://us.orsted.com/renewable-energy-solutions/offshore-wind/block-island-wind-farm> [https://perma.cc/6HX7-XR8L] (last visited Apr. 19, 2023).

39. *BOEM Governing Statutes*, *supra* note 8.

geographic center of the project area *would not be consistent* with the statutory language. Accordingly, we have revised the final rule to reflect a more literal reading of the statute. Therefore, revenues from a project will not be shared with a State if the nearest point on its coastline is not within [fifteen] miles of the geographic center of a qualified project area, *even if a portion of the qualified project area is located within [three] nautical miles of that State's seaward boundary*.⁴⁰

But the vast majority of offshore wind farms in the United States are located in excess of fifteen miles from land.⁴¹ Despite this, coastal states and their citizens still feel the impacts of offshore wind project construction and operation because each offshore wind project has multiple onshore components.⁴² Most, if not all, coastal states that manage these large-scale offshore wind projects will have offshore wind infrastructure cross their state waters and offshore wind export cables land on their shorelines.⁴³ Arguably, a project's distance—whether it is more or less than fifteen miles from the coastal states—makes no difference in the total impacts the coastal states and stakeholders face. Even if the wind farm is located far offshore, project infrastructure, such as export cables, will still run through state coastal waters and land on their shores.⁴⁴ However, due to these current arbitrary requirements for profit sharing in OCSLA, essentially no states will be eligible for profit sharing with federal offshore wind lease sales because the geographic centers of the proposed projects simply are too far offshore.⁴⁵

40. Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. 19638, 19678 (Apr. 29, 2009) (to be codified at 30 C.F.R. pts. 250, 285, 290) (emphasis added).

41. See, e.g., *Transforming New Jersey with Ocean Wind 1*, ORSTED, <https://oceanwindone.com/about-the-project> [<https://perma.cc/3JVZ-7ZTC>] (last visited Aug. 21, 2023).

42. See *generally Bringing Wind Power Ashore*, ORSTED, <https://us.orsted.com/renewable-energy-solutions/offshore-wind/what-is-offshore-wind-power/bringing-wind-power-ashore> [<https://perma.cc/7ETC-F28A>] (last visited Jan. 20, 2023).

43. See *id.*

44. See *id.*

45. The distance between the shore to the closest geographical point (not the geographic center, as required by OCSLA) of the current proposed offshore wind projects off the Atlantic coast range from fifteen miles to twenty-seven miles. See *Offshore Wind Power*, ORSTED, <https://us.orsted.com/renewable-energy-solutions/offshore-wind#project-list> [<https://perma.cc/T7FQ-VCKV>] (last visited Jan 13, 2023); *South Fork*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/renewable-energy/state-activities/south-fork> [<https://perma.cc/Y3X4-8SKP>] (last visited Apr. 20, 2023); *Sunrise Wind Farm*, FED. PERMITTING IMPROVEMENT

C. *Suggested Amendments*

There are two possible amendments OCSLA could adopt to resolve these issues. First, Congress and BOEM may amend OCSLA by increasing the location-based profit-sharing qualification from fifteen miles from the geographic center to thirty miles to consider the realistic location of where offshore wind farms will be cited relative to the shoreline. Since all of the current offshore wind projects in the United States are within thirty miles from shore,⁴⁶ amending the language to increase the project distance from shore requirements to thirty miles would allow states to share in the immense lease sales of projects off of their coasts.

Second, Congress and BOEM may revisit the regulatory rulemaking under OSCLA to not include project infrastructure, such as export cables and cable landing infrastructure, as a variable in determining profit-sharing eligibility. This amendment should include language that allows profit sharing if the state is within fifteen miles of any project infrastructure, *inclusive* of export cables and onshore infrastructure.⁴⁷ If BOEM reconsiders its choice to not allow states to recover if any project infrastructure is within fifteen miles from state coastlines or crosses through their state waters, many more states could participate in profit sharing for leases where the project's infrastructure crosses into their state water and land.

III. FISHERIES COMPENSATION AS A SOURCE OF CONFLICT IN AMERICAN

STEERING COUNCIL: PERMITTING DASHBOARD, <https://www.permits.performance.gov/permitting-project/fast-41-covered-projects/sunrise-wind-farm> [<https://perma.cc/4Z24-X22C>] (last visited Apr. 20, 2023); *Project Description*, SOUTHCOAST WIND, <https://southcoastwind.com/project-description/> [<https://perma.cc/33AJ-BCZZ>] (last visited Jan. 13, 2023); *Vineyard Wind 1*, VINEYARD WIND, <https://www.vineyardwind.com/vineyardwind-1> [<https://perma.cc/2H6F-UVC8>] (last visited Jan. 13, 2023); *Project Overview*, KITTY HAWK WIND, <https://www.kittyhawkoffshore.com/project-overview> (last visited Jan. 13, 2023); *Delivering Wind Power*, COASTAL VA. OFFSHORE WIND, <https://coastalvawind.com/about-offshore-wind/delivering-wind-power.aspx> [<https://perma.cc/HT3K-9L68>] (last visited Jan. 13).

46. All major proposed offshore wind projects in the United States range from being located fifteen miles to twenty-seven miles from land. See sources cited *supra* note 45.

47. Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. 19638, 19678 (Apr. 29, 2009) (to be codified at 30 C.F.R. pts. 250, 285, 290).

OFFSHORE WIND DEVELOPMENT

A. *Fisheries Compensation is Necessary for Coexistence*

Offshore wind will be a new use of ocean space that has historically been used by commercial fishermen for centuries.⁴⁸ As offshore wind expands in the United States, compensating the fishing industry for the value of their damages is necessary to address risks of gear damage resulting from entanglements with offshore wind structures, temporary or permanent loss of historical fishing grounds, and other devastating impacts generated by both industries sharing the same ocean space.⁴⁹ Additional risks to the commercial fishing industry include course rerouting if fishermen choose to transit around wind farms to get to their fishing grounds and temporary loss of transit and fishing grounds during the construction phase of offshore wind development.⁵⁰ Since each wind farm project takes up so much ocean space, commercial fishermen who historically have used the area to fish may choose to fish elsewhere entirely. Additionally, if fishermen historically traveled through current offshore wind leases to get to their fishing grounds, they may choose to divert the wind farm entirely. Mitigating these risks or at the very least providing adequate compensation so that fishing is not negatively impacted by new development is essential to their coexistence.

B. *The Current Protocol for Fisheries Compensation is Insufficient*

The current regime for fisheries compensation funding is insufficient due to a lack of standardization. There is no federal or state program in existence, and developers have taken a project-by-project approach to fund and administer fisheries compensation.⁵¹ Coastal states have already called on BOEM to establish a standardized fisheries compensation framework across all projects so the process is “consistent, equitable, and transparent” and can provide a “uniform framework, methodology, criteria, and process for calculating economic impacts.”⁵² However, as a federal agency, BOEM lacks

48. *Offshore Wind Energy: Fishing Community Impacts*, *supra* note 32.

49. *See* RESPONSIBLE OFFSHORE DEV. ALL., *supra* note 2.

50. *See id.*

51. *See* SPECIAL INITIATIVE ON OFFSHORE WIND, *supra* note 3, at 5.

52. Letter from Katherine S. Dykes, Comm’r, Conn. Dep’t of Energy and Env’t Prot., et al., to Amanda Lefton, Dir., Bureau of Ocean Energy Mgmt. (Nov. 12, 2021), <https://www.politico.com/f/?id=0000017f-421e-ddd1-adff-f79fabd00001> [https://perma.cc/4Z6Z-PMUX].

statutory authority to regulate, establish, or administer such a program.⁵³ Therefore, fisheries compensation is left to the states or individual developers to manage,⁵⁴ with most taking different and disjointed approaches. When developers themselves are left to address compensation, the processes for claiming damages are inconsistent across each project. Each developer has a different approach to administering and disbursing fisheries compensation, which in turn requires claimants to identify and approach developers directly.⁵⁵ This may cause confusion and frustration among fishermen needing compensation.

Secondly, the current project-by-project protocol for fisheries compensation is insufficient because, in some scenarios, fishermen cannot know which project caused their damages because many wind projects are directly adjacent. Further, if fishermen claim losses due to the increased time required to travel around the offshore wind areas, more than just one project likely impacted their fishing interests. For example, the lease areas in the New York Bight are clustered closely together, and if a fisherman is asserting a claim for increased transit time to avoid construction areas, those damages are likely attributed to several projects at the same time given their close proximity.⁵⁶ Since the existing regime for compensation directly from the developer to the aggrieved party does not consider either of these hardships, amending the profit-sharing criteria under OCSLA and using the state's payment of their portion of the lease sales to fund compensation would be a viable solution to standardize the process.

C. *Coastal State Request for a Standardized Approach*

A regionally administered fund outside of BOEM's jurisdiction is a realistic option for compensation governance that would be workable in the United States. Nine coastal states—including Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Maryland, and Virginia—have suggested establishing a “Regional Fund Administrator” to manage claims for fishery compensation mitigation to resolve the insufficiencies in the current protocol for compensation:

53. See SPECIAL INITIATIVE ON OFFSHORE WIND, *supra* note 3, at 5, 7.

54. See *id.* at 5.

55. See *id.* at 6.

56. See Image of New York Bight Areas, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/sites/default/files/images/ny-fsn.png> [<https://perma.cc/T8Q2-TEHA>] (last visited Apr. 20, 2023).

[Offshore wind] fisheries compensatory mitigation to this point has been variable by project and state due to different state jurisdictions and authorities and developers with different approaches regarding collection, administration, and disbursement of identified compensation funds. The creation of project-specific funds and administrators *means fishermen may need to seek compensation from multiple entities under different rules. These differences emphasize the need to consistently address impacts to fishing industries regardless of homeport or state regulatory authorities and to create a unified approach to administering mitigation funds.* The States are seeking ideas on how fund administration may best be done equitably and efficiently.⁵⁷

This process would allow fishermen to file claims with one regional entity to standardize compensation across all projects in a given region.⁵⁸

Besides providing a funding source for fisheries claims, this regional fund may also be used to support other activities, such as cooperative research, offshore wind infrastructure investments, and gear and vessel innovation, among others.⁵⁹ This plan is still in the pre-development stage but represents one option among many to address this issue.⁶⁰ Due to the early stage of development, the funding for this approach is still unidentified and open-ended.⁶¹ BOEM has already stipulated that they lack jurisdictional authority to “create or oversee” such a compensation program or require individual developers to directly contribute to fisheries compensation funds.⁶² A potential avenue to support this requested program would be funding these regional compensation programs using payments received by states through OCSLA’s profit-sharing provision, allowing states to recover twenty-seven percent of total lease sales. If states use the funds

57. SPECIAL INITIATIVE ON OFFSHORE WIND, *supra* note 3 at 6 (emphasis added).

58. *See id.*

59. *See id.* at 11.

60. *See id.* at 7.

61. *See id.* at 8.

62. *See id.* at 5, 7 (citing *Overview - Guidance for Mitigating Impacts to Commercial and Recreational Fisheries from Offshore Wind Energy Development*, BUREAU OCEAN ENERGY MGMT. (June 2022), https://www.boem.gov/sites/default/files/documents/renewable-energy/Overview%20Fisheries%20Mitigation%20Guidance%2006232022_0.pdf#:~:text=Safety%3A%20BOEM%20recommends%20that%20the,the%20commercial%20fishing%20industry%20as [https://perma.cc/9G29-QCQ4]).

received through OCSLA profit-sharing to fund the administration of these programs, fishermen seeking claims may go to their home-port state to seek compensation.

IV. POSITIVE IMPACTS OF WIDENING OCSLA PROFIT-SHARING CRITERIA

Amending OCSLA by widening the possibility of coastal states receiving a portion of the revenues from federal lease sales will allow states to address fisheries compensation and mitigation directly.

A. *State Funds Received through OCSLA Revenue Sharing May be Used to Establish State-Administered Offshore Wind Compensation Programs*

Coastal states eligible for profit-sharing following a revision of OCSLA may use those funds to create and administer a state-run offshore wind compensation program. As stated above, the current regime for fisheries compensation is a large setback in our country's offshore wind development, and states have been requesting a more standardized approach to compensating and mitigating offshore wind impacts.⁶³ However, the largest hurdle in creating a standardized program lies in securing funding.⁶⁴ If a portion of the price that developers pay to BOEM to lease offshore wind areas goes directly to states, that money may be used to fund compensation and provide commercial fishermen and other ocean users money for their damaged gear or lost earnings. State-administered offshore wind compensation programs would prevent fishermen from needing to seek payment from multiple developers across multiple projects, each with different rules and policies governing compensation.⁶⁵ Instead of needing to identify and coordinate directly with developers, fishermen would instead work directly with their state compensation program. Furthermore, the process would be the same no matter where they suffered damages, offering better standardization and transparency. Through this strict liability approach, as long as fishermen can prove that they were damaged by a wind farm offshore of the coastal state, they may recover without needing to go through the procedural hassle of negotiating with individual developers.

B. *The Funds Provided to States via Offshore Leases Must be*

63. *See id.* at 6.

64. *See id.* at 11.

65. *See id.* at 14.

Conditional on the States Using it to Adopt a Compensation Program

BOEM should establish contingencies for state spending if coastal states receive funds from the federal government through OCSLA's revenue-sharing provision. Furthermore, implementing requirements for state spending would be beneficial whether OCSLA is amended to support offshore wind development or not. There are no current contingencies or requirements within the statute for state spending if coastal states receive funds from the federal government from lease sales via revenue-sharing.⁶⁶ Neither 43 U.S.C. § 1337(p)(2)(B) nor the regulations in 30 C.F.R. §§ 585.540–543 provide any guidance, limitations, or procedures for how states receiving funding may spend it.⁶⁷ However, it is common for the federal government to place limitations on spending, including funds received through the Clean Water Act and the Clean Air Act.⁶⁸ The OCSLA, through BOEM, may mirror these programs by making profit-sharing contingent on each state implementing and administering a fisheries compensation program.⁶⁹

Existing federal funding programs that place contingencies on spending include the Clean Water State Revolving Fund,⁷⁰ the Nonpoint Source Management Program,⁷¹ and the Particulate Matter Monitoring Program.⁷² The Clean Water State Revolving Fund, adopted through the Clean Water Act, provides states with funding contingent on the states creating and administering a water pollution control fund.⁷³ The Nonpoint Source Management Program, also adopted through the Clean Water Act, provides states with federal funds contingent on the state creating and implementing a program to control nonpoint source pollution from entering navigable waters.⁷⁴ The Particulate Matter Monitoring Program, adopted through the Clean Air Act, provides states with funds contingent on each state monitoring air quality and implementing a plan to achieve national

66. See 43 U.S.C. § 1337(p)(2)(B); Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. 19638, 19678 (Apr. 29, 2009) (to be codified at 30 C.F.R. pts. 250, 285, 290).

67. See 43 U.S.C. § 1337(p)(2)(B); 30 C.F.R. §§ 585.540–543 (2022).

68. See 33 U.S.C. §§ 1383(b), 1329(h)(1); 42 U.S.C. § 7407 note (Ozone and Particulate Matter Standards).

69. See sources cited *supra* note 68.

70. 33 U.S.C. § 1383.

71. *Id.* § 1329.

72. 42 U.S.C. § 7407 note (Ozone and Particulate Matter Standards).

73. 33 U.S.C. § 1383.

74. *Id.* § 1329.

air quality standards.⁷⁵ All of these programs require states to establish funds and monitor programs and pollution control strategies in order to receive money from the federal government.

Mirroring these programs, BOEM may both require states to create a process to compensate fishermen for their losses due to offshore wind development and require states to use the funds given to them through profit-sharing to fund the administration of the program as well as the payments of claims by commercial fishermen. Through this approach, states will have the autonomy to create and implement their own program, and they will be incentivized to do so by being offered the opportunity to share lease share profits with the federal government.

V. POTENTIAL LEGAL AND PROCEDURAL CHALLENGES

While amending OCSLA's profit-sharing provisions to include coastal states adjacent to offshore wind projects and making the availability of funds contingent on states implementing a fisheries compensation program would resolve current setbacks in American offshore wind development, attempts to do so may introduce legal, financial, and procedural challenges. First, this action would require an amendment of OCSLA in which the statute is explicitly clear on the drafter's intentions to *not* include project infrastructure as part of the qualification process. Second, if BOEM would be required to share twenty-seven percent of lease sales with coastal states due to this suggested provision, the lease prices of each wind energy area may be increased, burdening developers with higher costs. Third, there may be procedural challenges in implementing a state-based compensation approach over a regional-based compensation as each wind project is in federal waters and, thus, offshore of more than one coastal state. A discussion and potential solution to each projected setback are discussed below.

A. *Legal Hurdles of Amending the OCSLA Statute*

Amending the language and scope of OCSLA presents the biggest challenge. The statutory language specifically stipulates that “[p]ayments shall be made based on a formula . . . that provides for equitable distribution, based on proximity to the project, among coastal states that have a coastline that is located within [fifteen] miles of the *geographic* center of the project.”⁷⁶ In addition, the final rulemaking for

75. 42 U.S.C. § 7407 note (Ozone and Particulate Matter Standards).

76. 43 U.S.C. § 1337(p)(2)(B) (emphasis added).

OCSLA's revenue-sharing criteria specifically states that if the state is more than fifteen miles from the geographic center of the project, the state is not eligible for funds, despite project infrastructure running through the state's coastal waters and land.⁷⁷ So for a policy to fund fisheries compensation through revenue sharing to be successful, both the language of the statute *and* the language in the final rule-making must not be only amended but reversed. Amending OCSLA to be more workable toward offshore wind despite the language being clear that other infrastructure shall *not* count for profit sharing presents a legal hurdle in that it requires changing both the language and *intent* of the statute.

Although it would pose a legal challenge to amend OCSLA, such an amendment is not impossible. The statute has been substantially amended several times since its adoption in 1953. The first major amendment to OCSLA occurred in 1978.⁷⁸ The statute was amended to respond to concerns from coastal states that they were not adequately included in the outer continental shelf planning process.⁷⁹ This first amendment substantially changed the functions of OCSLA by increasing state participation in the leasing processes, changing bidding procedures, increasing competition, and adding regulations to protect the safety, the environment, and stakeholders.⁸⁰ The next substantial set of amendments occurred in 2005, when the statute was amended to grant BOEM jurisdiction over marine renewable energy projects.⁸¹ Since OCSLA has substantially changed twice since its adoption—especially in how the federal government coordinates with coastal states—further amendments to the nearly twenty-year-old revenue-sharing provision are reasonable and plausible.

B. *Financial Hurdles of Increased Lease Prices*

If BOEM were required to share twenty-seven percent of their lease revenue with coastal states onshore of the offshore wind projects, BOEM may increase the opening bidding price for each lease area to offset their lost profits. As a result, commercial offshore wind developers may bear the cost of profit sharing and, consequently,

77. Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf, 74 Fed. Reg. 19638, 19678 (Apr. 29, 2009) (to be codified at 30 C.F.R. pts. 250, 285, 290).

78. 5 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW, ch. 12, § 12.05[2][d] (2023), LexisNexis.

79. *Id.* § 12.05[3].

80. *Id.*

81. *BOEM Governing Statutes*, *supra* note 8.

adopting and administering fisheries compensation programs. Although profit-sharing may inevitably raise lease sale prices, developers would no longer be directly liable for damages because they essentially already “bought into” the program by leasing the area. Furthermore, developers may even save money despite paying larger lease sale prices.⁸² Vineyard Wind, for example, pledged over \$5.7 billion toward fisheries compensation through a Fisherman’s Viability Trust and a Direct Compensation Fund before construction of their offshore wind project commenced.⁸³ If, instead, compensation is “built into” the lease sale of the offshore wind lease, developers will no longer have to administer compensation programs and create funds after they pay for the lease. In this way, adopting a procedure for compensation such as this would increase the front-end costs for developers but reduce unexpected mitigation costs later in their project development timeline.

C. *Procedural Hurdles of Adopting a Non-Regional Approach to Compensation*

Despite greater efficiency than the current project-by-project compensation protocol currently in place, a state-implemented fisheries compensation program still falls short of the regional approach suggested by coastal states.⁸⁴ As stated above, nine coastal states have suggested that the United States adopt a regional approach to fisheries compensation and damage disbursement from offshore wind development.⁸⁵ Those coastal states stipulate that a regional approach would standardize compensation across all projects in a given region.⁸⁶ Adopting a state-managed approach to compensation would not address the goal of standardizing compensation between multiple states across entire regions, such as New England or the Mid-Atlantic. Therefore, the same groups that urge for a transition from a project-to-project compensation approach to a regional approach may critique state-administered compensation programs for being too siloed and not geographically large enough in scope.

82. *See generally* Term Sheet for Vineyard Wind Fisheries Mitigation Proposal, Vineyard Wind (Feb. 15, 2019), https://rodafisheries.org/wp-content/uploads/2020/08/Vineyard-Wind-Fisheries-Mitigation-Term-Sheet-FINAL-2_15_19.pdf [<https://perma.cc/P565-RVUW>].

83. *Id.* at 1, 3.

84. *See generally* SPECIAL INITIATIVE ON OFFSHORE WIND, *supra* note 3.

85. *See id.* at 1, 6.

86. *See id.* at 2.

However, a state-managed approach to compensation still addresses the coastal states' primary goal of avoiding fishermen needing to "seek compensation from multiple entities under different rules."⁸⁷ For instance, if a commercial fishing vessel is registered in Massachusetts, the vessel owner would file a damage claim within Massachusetts. It will not matter which project caused their damages, and they will not need to interact with developers directly. Therefore, the primary goals and concerns of the coastal states on this matter would be addressed despite the program not being administered using a region-wide approach.

CONCLUSION

Conflict between the commercial fishing industry and the offshore wind industry is expected as these two goliath industries compete for space in the same coastal waters. However, coastal states may use developer's lease payments to the federal government as a conduit for compensation and mitigation while avoiding the need for direct coordination with developers and ambiguities over differing policies across various regional projects. By amending OCSLA—an action which is long overdue in order to support our national shift toward renewable energy—to be workable for offshore wind, coastal states may receive a share of the enormous lease sales to then administer mitigation and compensation programs in-state. Amending the profit-sharing criteria in OCSLA is one possible step out of many to adjust our federal energy laws to be flexible and workable for renewable energy development in the future and aid in the United States' national goal of net zero emissions by 2050.

87. *See id.* at 6.