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Via Electronic Submission

Georgeann Smale, Renewable Energy Modernization Rule Lead
Office of Regulations
Bureau of Ocean Energy Management
Department of the Interior
45600 Woodland Road, Mailstop: DIR-BOEM
Sterling, VA 20166

**Re: Fisheries Survival Fund Comments on BOEM's Renewable Energy
Modernization Rule [Docket No. BOEM-2023-0005]**

Dear Ms. Smale:

The Fisheries Survival Fund ("FSF") respectfully submits these comments regarding the Bureau of Ocean Energy Management's renewable energy modernization rule. 88 Fed. Reg. 5968 (Jan. 30, 2023) ("Proposed Rule"). FSF represents the vast majority of Full-Time Limited Access permit holders in the Atlantic sea scallop fishery, with members home-ported up and down the East Coast from Massachusetts to North Carolina. FSF has participated actively and consistently in debate and deliberations relating to the development of wind farms offshore New England and the Mid-Atlantic.

FSF will focus on the Proposed Rule's seeking "comments on the use of bidding credits and multiple factor auctions as a method of advancing important priorities, such as promoting workforce development or supply chain enhancement, consistent with the goals of the OCS Lands Act." 88 Fed. Reg. at 5986. FSF agrees it should be "BOEM's goal to ensure that there is adequate flexibility to the leasing process to achieve public policy goals" *Id.* As we will explain, BOEM in the Final Rule should therefore formalize the use of bid credits to achieve public policy goals in general and identify the use of bid credits to support regional fishery compensation funds as a fully appropriate use of these credits in particular. To that same end, BOEM should amend its operating fee regulations to allow pre-existing lessees likewise to participate in funding these compensation programs.

As a starting point, the Final Rule should include the Proposed Rule's new definition of "multiple factor auction" as "an auction that involves the use of bidding credits to incentivize goals or actions that support public policy objectives or maximize public benefits through the competitive leasing auction process. In all multiple factor auctions, BOEM would add the monetary value of the bidding credits to

the value of the cash bid to determine the highest bidder.” 88 Fed. Reg. at 6023 (amending 30 C.F.R. § 585.112).

Significantly, the recent Proposed Sale Notice for the Gulf of Mexico (“GOM PSN”) would establish for the first time a bid credit for “establishing and contributing to a fisheries compensation mitigation fund or contributing to an existing fund to mitigate potential negative impacts to commercial and for-hire recreational fisheries caused by OCS offshore wind development in the GOM.” 88 Fed. Reg. 11939, 11942 (Feb. 24, 2023).

Helping to stand up and fund regional fishery compensation funds on a national scale via bid credits represents a public policy objective BOEM should pursue. For its part, FSF is working with fisheries participants, wind developer representatives, and the ten Eastern coastal states from Maine to Virginia to design just such a regional compensation fund for the Atlantic Seaboard. FSF strongly supports inclusion of the same sort of bid credit for impending lease sales in the Central Atlantic Bight and the Gulf of Maine as the GOM PSN contains.

The Final Rule should, moreover, identify regional fishery compensation funding as an appropriate use of such a credit. BOEM has two options in the Final Rule to accomplish this goal. First, BOEM could include regional fishery compensation program funding in the Final Rule explanatory text, along with other types of public benefits the Proposed Rule’s explanatory text did specifically reference, to wit, workforce development agreements and community benefit agreements. 88 Fed. Reg. at 5985-86.¹

Second, and perhaps more preferable, BOEM could include an illustrative list of permissible examples of “public benefits” bid credits in final Section 585.216(b)(5). That list could contain fisheries compensation, as well as the other uses of bid credits the Proposed Rule did identify. Currently, proposed Section 585.216(b)(5) provides for the use of multiple factor bid credits for a broadly-defined category of “public benefits” but does not specify what these public benefits may be. 88 Fed. Reg. at 6026. Of course, it will be important for any regulatory text (or explanatory text) to state that these identified public beneficial purposes are illustrative, not exclusive.

Further, the Final Rule should allow a bidder/lessee to pursue multiple bid credits at once. Bid credits should thus be capable of stacking, 88 Fed. Reg. at 5985, as the GOM PSN provides. 88 Fed. Reg. at 11943. As the Proposed Rule explains, “Stackable credits would incentivize bidders to meet the criteria for as many of the available bidding credits as they can.” 88 Fed. Reg. at 5985. Likewise, BOEM should not artificially cap the number of different bid credits a bidder/lessee can take. *Id.* The public policy goals to which these bid credits are being devoted represent important elements in ensuring an

¹ The proposed rule does not appear to have deliberately excluded regional fisheries compensation funding as a permissible bid credit object. Rather, the GOM PSN was not released until after the Proposed Rule was issued.

overall offshore wind energy program that is as fair and equitable to U.S. communities and workers—fishing communities and fisheries workers, included—as can reasonably be accomplished. In addition, lessees may be able to include these investments as positive distinguishing factors in state wind energy procurement processes.

By the same token, “fair return” on a prospective lease should be read and understood to include investments that BOEM derivatively makes through lessees utilizing bid credits to support public policy objectives. Fair return is not simply about the value of lease payments to the Treasury. OCSLA provides BOEM with broad authority to design offshore renewable energy lease programs with the public interest in mind. We appreciate that the Biden Administration is taking advantage of this flexibility.

The Proposed Rule also asks how bidding credits or factors “might be tailored to mitigate possible adverse, project-related impacts.” 88 Fed. Reg. at 5986. The GOM PSN provides explanatory detail for one way that a fisheries compensation fund credit should be structured. More specifically, first priority claims for the fund would include gear and income loss from all phases of an offshore wind project, with funds also available for fisheries resiliency/coexistence investments. 88 Fed. Reg. at 11944-45. Fisheries resiliency should, moreover, be pursued through a range of mechanisms, and not simply directed through a bid and operating fee credit process, using whatever funds might happen to be left over after loss compensation. By the same token, the sum total of developers’ obligations to support fisheries compensatory mitigation and resiliency funding should not be solely derived from the bid and operating fee credits.

FSF further supports the GOM PSN’s prescription that, “BOEM encourages lessees to coordinate with other lessees to establish or contribute to a regional fund. A regional fund should be flexible enough to incorporate future contributions from future lease auctions and actuarially sound enough to recognize the multi-decade life of offshore wind projects in the GOM.” *Id.* at 11945. And, FSF agrees that “[t]he fisheries compensatory mitigation fund must be independently managed by a third party and designed with fiduciary governance and strong internal controls while minimizing administrative expenses.” *Id.*

BOEM’s providing for regional fishery compensation fund bid credits represents an important step, but it would only represent a half-measure on the Eastern Seaboard: BOEM issued over two dozen leases along the Atlantic Coast prior to the GOM PSN’s initiation of bid credits for contributions to regional fishery compensation funds. BOEM should therefore offer existing lessees an opportunity to contribute to these regional fishery compensation funds. Indeed, without participation by these pre-existing lessees, a regional fishery compensation fund would neither have broad enough participation nor sufficient funding to meet a compensation fund’s goals to “reorganize the multi-decade life of offshore wind projects,” particularly along the Atlantic Coast.

Accordingly, FSF supports the American Clean Power Association’s proposal to amend 30 C.F.R. § 585.506 to allow material portions of operating fee payments to be dedicated to the establishment

and on-going funding of regional fishery compensation plans. There is nothing in the Outer Continental Shelf Lands Act, nor in any other law or regulation, that would prohibit the amendment of existing leases to authorize that lessees pay portions of these required fee payments, when due, into a regional fishery compensation fund or funds.

Finally, amending Section 585.506 in this manner represents a logical outgrowth of BOEM's proposals to more formally authorize multiple factor auctions and bid credits. As explained above, bid credits have been applied only to the most recent leases, and it is reasonable that BOEM and the public would seek to advance the same types of public policy objectives for pre-existing leases in the most straight-forward manner possible, that is, through operating fee credits. Indeed, in its request for comments, BOEM explained its "goal to ensure that there is adequate flexibility to the leasing process to achieve public policy goals and any comments or suggestions as to how BOEM could best achieve this objective would be welcome." 88 Fed. Reg. at 5986. BOEM also indicated that, "Comments on alternative means to achieve public policy goals, such as through lease stipulations, are also sought." *Id.* Indeed, BOEM provided in the proposed rule for adjustment of operating fees "to encourage additional activities." 88 Fed. Reg. at 6033 (proposing to amend 30 C.F.R. § 585.510). Fisheries compensatory mitigation is just such a valid additional activity.

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Thank you very much for considering FSF's comments on the Proposed Rule. Please do not hesitate to contact us if you have any questions or require additional information.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Frulla', with a long horizontal line extending to the right.

David E. Frulla
Andrew E. Minkiewicz
Bret A. Sparks

Counsel for Fisheries Survival Fund