



DESAUTEL LAW

May 9, 2023

Via Email and Certified Mail

Secretary Haaland
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240
Debra.Haaland@doi.gov

James Bennett, Program Manager
Bureau of Ocean Energy Management
45600 Woodland Road
Sterling, Virginia 20166
james.bennett@boem.gov

Amanda Lefton, Director
Bureau of Ocean Energy Management
1849 C Street, NW
Washington, D.C. 20240
amanda.lefton@boem.gov

Robin Main, Esquire, as counsel to
Ørsted Offshore North America
399 Boylston Street, 12th Floor
Boston, MA 02116
rmain@hinckleyallen.com

Director, Jeff Willis
Chairman, Raymond Coia
Rhode Island Coastal Management Council
Stedman Government Center, Suite 3
4808 Tower Hill Rd.
Wakefield, RI 02879
Jwillis@crmc.ri.gov
rcoia@crmc.ri.gov
council@crmc.ri.gov

RE: Review and Revision of COP and Lease Grant for South Fork Wind Farm and South Fork Export Cable Project

Dear Secretary Haaland, Director Lefton, Renewable Energy Program Manager Bennett, Attorney Main, Director Willis and Chair Coia:

Pursuant to 43 U.S.C. § 1349(a)(2)(A), this letter serves as the Fisherman Advisory Board's ("FAB"), and the individual fishers whom it represents, official notice of intent to sue the Secretary of the Interior and the Bureau of Ocean Energy Management (collectively, "BOEM"), Ørsted Offshore North America ("Ørsted"), and the Rhode Island Coastal Management Council for violations of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331, et seq., related

to the approval, enforcement, and violations of the BOEM's Conditions of Construction and Operations Plan Approval (Construction and Operations Plan or "COP").

South Fork Wind Farm (SFWF or Project), is located in Bureau of Ocean Energy Management (BOEM) Lease Area OCS A-0517, which is within the Rhode Island – Massachusetts Wind Energy Area (RI-MA WEA). SFWF includes up to 15 wind turbine generators (WTGs or turbines) with a nameplate capacity of 6 to 12 MW per turbine, submarine cables between the WTGs (Inter-array Cables), and an offshore substation (OSS), all of which will be located approximately 19 miles (30.6 kilometers [km], 16.6 nautical miles [nm]) southeast of Block Island, Rhode Island.

Prior to the CRMC's issuance of a conditional consistency on July 1, 2021, the SFWF team communicated multiple times with the CRMC and the FAB to discuss the economic impact of the SFWF on the Rhode Island Fisheries, both commercial and recreational. During the analysis necessary to issue the conditional consistency determination, SFWF submitted a mitigation proposal and the CRMC relied upon a report titled Economic Impact of South Fork Wind on Rhode Island Commercial Fisheries created by the Marine Policy Center in the Woods Hole Oceanographic Institution on September 28, 2020. Using these details provided by the Woods Hole analysis which was also informed by the COP, the CRMC was able to condition the concurrence upon recommending and agreeing on a measure of mitigation that they determined would be sufficient to compensate for the major impacts the project would have, and to meet the CRMC's mitigation enforceable policies §§ 11.10.1(C), (G) and (H).

Despite consistently emphasizing that the measures contemplated did not take into account many elements of needed mitigation, and that the agreed mitigation measures were insufficient to mitigate for impacts to Rhode Island based fishermen, the CRMC agreed to an amount based upon the data relied upon and presented by Orsted, and issued a conditional concurrence. The FAB reiterated with supporting documentation that Orsted's mitigation offer do not meet the enforceable policies under the laws and Ocean SAMP. Orsted's emphasis on the need for the necessary mitigation being "data driven" or "based on scientific evidence" served to assign a zero value to certain harms Orsted found difficult to quantify.

The FAB also detailed significant inconsistencies of the data used, including the COP, for the determination of the extent of the impact the project would have upon the evaluation of mitigations strategies required pursuant to law and regulations such that the project would conform to said law and regulations.

This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of OCSLA to the extent such notice is deemed necessary by a court. See 43 U.S.C. § 1349(a)(2)(A). If BOEM, Orsted, and/or CRMC does not take action to remedy the violations detailed in this letter, the FAB hereby provides notice of its intent to seek a judicial remedy.

LEGAL BACKGROUND

OCSLA prescribes a framework under which the BOEM is authorized to issue leases, easements, or rights-of-way for offshore renewable energy projects. 43 U.S.C. § 1337(p)(1). Specifically, the BOEM must consult with the U.S. Coast Guard and other relevant federal agencies, and must consider several factors, including safety, protection of the environment, conservation of natural resources, and prevention of interference with reasonable uses of the area, including for fishing or navigation. 43 U.S.C. § 1337(p)(1)(C), (4)(A)-(L). Pursuant to regulations, the leaseholder, Orsted, timely proposed a Construction and Operations Plan ("COP"). 30 C.F.R. § 585.601(b). The COP includes all data and information to support the plan for the wind facility, as well as proposals for minimizing environmental impacts. 30 C.F.R. § 585.626(b). Following the COP proposal, BOEM is required to conduct a NEPA analysis, such as an Environmental Impact Statement ("EIS"), to determine whether to approve the COP, reject it, or approve it with modifications. 30 C.F.R. § 585.628(b).

Finally, OCSLA gives the Secretary the authority to order the suspension of all development and production activities “if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life) . . . or to the marine, coastal, or human environment” among other reasons. 43 U.S.C. § 1334(a)(1); see also 30 C.F.R. § 250.172 (OCSLA regulations authorizing suspensions of operations for the same reason). Further, OCSLA provides that compliance with regulations are a condition for the continuation of leases. 43 U.S.C. § 1334(b).

Each of these statutory provisions and requirements helps to ensure Congress’s goal in OCSLA that, inter alia, “the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected. 43 U.S.C. §§ 1332(2). The Secretary of the Interior has delegated its authority under OCSLA to BOEM and the Bureau of Safety and Environmental Enforcement (“BSEE”).

FACTUAL BACKGROUND

The CRMC issued its conditional concurrence for the Project on July 1, 2021. On August 20, 2021, BOEM published the NOA of the FEIS in the Federal Register. With respect to impacts from future planned actions, including the Proposed Project, the FEIS found that the following resources could be subject to major impacts if future planned actions materialize and no further actions are taken to mitigate their impacts: (i) commercial fisheries and for-hire recreational fishing and (ii) scientific research and surveys. Bureau of Ocean Energy Management (BOEM) has approved the Construction and Operations Plan (COP) that South Fork Wind, LLC initially submitted on June 29, 2018, and last updated on May 7, 2021, for the South Fork Wind Farm Project (Project) on commercial lease OCS-A 0517 offshore Rhode Island. BOEM’s approval is subject to the terms and conditions, pursuant to 30 C.F.R. § 585.628(f)(1).

The primary affected Rhode Island coastal uses within the South Fork Wind (SFW) lease area OCS-A 0517 are the Rhode Island-based commercial fishing fleet, the recreational charter (For-Hire) fleet and the private recreational fishing fleet that fish and navigate within the lease

area. SFWF acknowledged the need for mitigation to impacted fishermen in order to meet the CRMC's mitigation enforceable policies §§ 11.10.1(C), (G) and (H). The BOEM Record of Decision for the SFWF (November 24, 2021) provides that the "Lessee must establish the compensation/mitigation funds in accordance with consistency certifications issued for the Project under the Coastal Zone Management Act."

LEGAL VIOLATIONS: BOEM MUST REVIEW AND REQUIRE REVISION OR SUPPLEMENTATION OF THE COP AND MITIGATION MEASURES

Orsted made representations in the COP and data submitted for the analysis of the economic impact of the project on the fishermen that acknowledged that the U.S. Coast Guard has sole authority to control vessel traffic on the Outer Continental Shelf, and neither SFWF nor CRMC has authority to do so; and that the U.S. Coast Guard's authority is limited to establishing limited access areas with a maximum radius of 500 meters from a center point or the outer edges of a structure. Yet, on April 20, 2023, Defendants, by and through their representatives, caused to be announced over the Channel 16 Marine Radio (Coast Guard monitored, used for emergency and distress calls) a notification that vessel traffic and fishing in the area where Defendants were laying cable was to be absolutely prohibited for a distance of 1.5 miles to either side of the cable being laid (a three-mile wide area). Information available suggests that this restriction, noticed to fishermen and other mariners, was not authorized by the United States Coast Guard. Due to the restriction in traffic and fishing caused by Orsted also caused fishermen to suffer direct damages in the loss of income from profits from fishing. This loss to the fisherman is unanticipated and questionably compensable under the current framework of the BOEM approval of the current COP.

This is merely one example which shows that the COP must be further analyzed by BOEM and CRMC to determine whether the current mitigation measures are sufficient. As described above, only selective aspects of the COP were considered in determining the ramifications of the Project to the fishermen. It is clear from the FEIS that the impacts on the fishermen will be major. Thus, it is absolutely imperative that the BOEM and CRMC re-examine the COP for compliance, and address mitigation measures for non-compliance. Further, the impacts identified as uncompensated by the FAB should be considered in light of the demonstrable damages already caused, and further foreseeable losses which remain uncompensated by the current mitigation measures.

Also, the actions of Orsted call into question whether the BOEM is selectively enforcing the terms and conditions of the BOEM approval. In much the same manner, the CRMC issued a conditional concurrence based upon very specific information regarding the COP which has not been maintained in reality. Therefore, the FAB would suggest that the non-compliance of the COP or the extension of scope of the COP, or the lack of consideration of factual evidence relevant to the CRMC's mitigation enforceable policies §§ 11.10.1(C), (G) and (H) may require all parties to treat the conditional concurrence as an objection pursuant to 15 C.F.R § 930.4 or necessitate the CRMC to require additional CZMA federal consistency review. Finally, Orsted should be responsible for their actions and the damages consequentially created under the law.

CONCLUSION

For the foregoing reasons, BOEM must review and require revision or supplementation of the COP and Mitigation Measures. Or, in the alternative, BOEM should enforce their terms and conditions and order a suspension of activity under the framework of 43 U.S.C. § 1334.

The CRMC must review and require supplementation or revision of economic impact analysis to address the areas not contemplated under the current COP and/or the economic losses that will consequentially follow from the actual practices and procedures of Orsted.

Orsted must compensate the effected fishermen and organizations that advance the fishermen's interest for their benefit in regards to the thus far uncompensated losses, and those that are reasonably foreseeable due to actions in relation with the SFWF project.

If BOEM, CRMC or Orsted fails to do so, the FAB will be forced to take judicial action to force compliance. Please contact us if you have any questions or would like to discuss this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Marisa Desautel', with a stylized flourish at the end.

Marisa Desautel, Esquire