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POTENTIAL APPROACHES FOR IMPACT FEES TO FISHING INDUSTRY FROM OFFSHORE WIND

Per the National Environmental Policy Act (NEPA), offshore wind projects must follow a stepwise path to reducing fisheries impacts, in this order (40 CFR § 1508.20):

1. Avoid the impact altogether by not taking a certain action or parts of an action
2. Minimize impacts by limiting the degree or magnitude of the action and its implementation
3. Rectify the impact by repairing, rehabilitating, or restoring the affected environment
4. Reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action
5. Compensate for the impact by replacing or providing substitute resources or environments

Mitigation refers to siting and project design principles specifically adopted to reduce impacts to fishing. It is not satisfied through compliance with standard mandatory health and safety regulations, although these are important. Mitigation is also not synonymous with compensation. Financial reparations for fishing business losses are termed **impact fees**, not "mitigation."

Compensation frameworks and determination policies must be **transparent**, **holistic**, and **well-structured**. Because much of the fishing industry is regional in nature, impact fees must be coordinated and consistent amongst projects, include cumulative impacts, and be equitable across impacted fisheries and through the supply chain.

As data collection and analyses will take time, it is necessary to determine appropriate impact fee frameworks with affected fishermen and relevant regulatory authorities prior to lease issuance. It may be appropriate to supplement baseline regional impact fees with Community Fisheries Agreements depending on specific circumstances.

Impacts Fees must cover residual losses from:

- Direct displacement from fishing grounds (exclusion zones or de facto closures)
- Increased cost (or catch per unit effort) due to navigating to/from other fishing grounds, including increased competition in non-developed marine space
- Increased insurance or waterfront use costs
- Losses to dealers and shoreside processing facilities

Overarching Principles:

1. *Impact fees to be assessed and required only after reasonable efforts to mitigate through project siting/design.*
2. *Mitigation not to be defined as meeting health and safety or monitoring requirements.*
3. *Preferred terminology of "impact fee" over "compensatory mitigation" in order to distinguish from environmental and operational mitigation measures and to comport with standard approaches in other industries.*

4. *Any framework for impact fees must strictly incorporate the principle of self-determination – i.e., fishermen must be empowered to determine how funds are appropriately allocated.*

Fishing Industry Recommendations

To be completed pending industry survey results and included in final report.

Current and Potential Methods

There are no explicit federal requirements to compensate for impacts from OSW development to fishing businesses. To date, impact fees have only been considered or implemented through: (1) Coastal Zone Management Act review processes; and (2) ad hoc agreements. They could also be required by: (3) power procurements; (4) OSW lease sales; (5) BOEM's NEPA process; or (6) creation of a new federal contingency fund.

1. Coastal Zone Management Act (CZMA)

What: If a state has such review authority, and it has laws or policies for compensation of impacts to the fishing industry, developers will work with the state to determine impact fees. States review a project under coastal zone management policies in two circumstances:

- The state has identified Geographic Location Descriptions (GLDs) in federal waters that include OSW areas, and NOAA has approved those GLDs; or
- A developer voluntarily submits to a state's CZM review.

The only state that expressly requires compensation for fishing industry impacts is Rhode Island. There is no specific framework for determining how the impact fees will be calculated. NOAA's National Ocean Service, which oversees the federal CZM program, has asserted that states' requirements of such fees are not legally enforceable policies. This interpretation, if upheld, means that compliance with state measures is voluntary on the part of the developer.

When: during the state's preparation of its consistency determination, usually during the Final EIS review. *Example*: Rhode Island Ocean SAMP

PROS	CONS
• A state is incentivized to look after its fishing industry • The fishing industry has some legal recourse to collect impact fees • Developers appear motivated to work with states to provide fees if policies are in place	• Most states do not have the appropriate mechanisms in place: need review authority for a project *and* impact fee policies • NOAA has indicated that CZMA does not provide states the authority to require if and how much impact fees should be • A state, at most, only has authority to look after itself and its own fishing businesses. Fishermen from any state may operate in federal waters; this can lead to inconsistent impact fees coastwide • How impact fees should be calculated has not been agreed and requires significant effort to adopt policies in each state

2. Ad Hoc Agreements (Community Fisheries Agreements)

What: Developers and fishing industry members may elect to enter into private agreements where developers compensate for future lost revenue. Negotiations for these types of agreements are often between mediators or attorneys and may not follow transparent or inclusive processes.

When: Typically before lease or power contract is obtained. *Example:* Castle Wind (see page 31 summary), City of Morro Bay & Morro Bay Commercial Fisherman's Organization, Port San Luis Commercial Fishermen Association ("Fishermen's Agreement" portion is confidential)

PROS

- Can provide direct payments to impacted local fishermen
- Execution outside of regulatory bounds can promote flexibility of terms
- Could be additive to regional baseline approaches
- Can be readily specialized to local priorities
- Fishermen likely to have a more direct role in agreement terms than if brokered through a state or federal agency
- Can provide future certainty if executed early in lease process

CONS

- Not typically transparent process
- Difficult or impossible to encompass every impacted fisherman, may disrupt community
- May limit an individual's ability to pariticipate in public process through non-disclosure stipulations
- Does not address cumulative impacts
- Likely to be specific to one developer or project without transferability
- Not many examples; poorly incentivized under regulatory and leasing processes
- Opt-in model (not required)

3. Power procurements

What: When a power purchase agreement (PPA) is reached, the purchaser (usually a state) could require the developer to include fisheries impacts payments as a condition of the contract. Again, this is a state-by-state process and a framework for impact fees has not been determined.

When: during the PPA negotiations. *Example*: NYSERDA Fisheries Mitigation Plan (note "Fisheries Compensation Plan" portion is optional)

PROS

- Provides more flexibility for developers to fund impact fees as cost may be incorporated in bid for power price
- Could provide certainty for fishermen earlier in the process than if addressed much later through CZMA or NEPA

CONS

- Generally (not always) PPAs are highly competitive among developers and states based on price; adequate compensation plans may thus be disincentivized unless consistent throughout a region
- The impact fees for fishermen may be directly passed on to the ratepayer
- State power regulatory bodies are typically not well suited to understand fishery needs
- No state has required this approach to date
- Does not address cumulative impacts

4. Payments Deriving from Lease Sales

What: Certain parties have expressed interest in allocating a portion of a lease area's auction price to fisheries impact fees. Past efforts have focused on mechanisms to distribute this funding to states, which would determine priorities of which fisheries impact fees are only one possibility.

When: At new lease auction. *Example*: RISEE Act (for coastal restoration; not impact fees)

PROS	CONS
• Could constitute significant resources given extremely high lease prices • Cost not passed to ratepayer through power contract • Provides certainty of funds relatively early in lease process	• Requires legislation • Competes with other coastal interests of states, such as the revenue sharing program for coastal restoration under the Gulf of Mexico Energy Security Act • Funding amount dependent on additional future leases occurring • Likely difficult to require of existing leases • Allocation mechanisms could be complex and uneven across states

5. BOEM's NEPA Process and Record of Decision

What: NEPA allows a federal agency to require impact fees as part of a Record of Decision to mitigate the environmental (including socioeconomic) impacts of an action. BOEM could incorporate procedures for assessing and paying impact fees into its guidance or Best Management Practices.

When: During last step of permitting process. *Example*: BOEM's requirement of $3 million for impact fees to states other than MA & RI in Vineyard Wind I Record of Decision.

PROS	CONS
• Would not require new legislation or regulations • Would be equitable and predictable • Potentially longer timeline to calculate appropriate amounts once project details are known •Could incentivize impact reduction through project design rather than upfront impact fee assessment on lease	• BOEM has provided no justification or framework for using this mechanism • Timing late in process could result in uncertainty throughout project development • BOEM has limited fishing expertise on staff, would need to work directly with fishing industry (or through NMFS) to better understand impacts and need

6. **Federal Fishermen's Contingency Fund** (currently used for oil & gas)

What: Every year, BOEM Secretary charge royalties on oil and gas leases to create a de facto insurance fund for fishery loss claims

- Administered by NMFS, payment amounts set annually by BOEM/DOI Secretary

- Compensation based on 50% of gross income lost, not profits
- Requires commercial fishermen to file report within 15 days of returning to port after discovering the damage or loss, and can only file one claim in an area
- Amount in fund can never exceed $2,000,000 and no developer can be charged more than $5,000 per year per permit

PROS	CONS
• Unbiased claims review with no developer participation • Administered by fishery experts, not energy experts • Predictable process and uniform across projects	• Requires legislation • Only applicable to oil and gas • Differing spatial scales of OSW from oil and gas, different number of developers may not make this directly translate • Only covers impacts associated with gear loss

Components of Valuation

Types of losses for consideration:

- Direct vs. indirect impacts
- Lost fishing revenue: gear removal, temporary closures, increased pressure on other fishing grounds due to displacement, changes in target species abundance
- Gear or vessel loss/repair
- Incurred costs of longer transit time, loss of dock space, increased insurance costs

Duration of funding:

- Construction: fishing closures during installation
- Lifetime of project: permanent (operational or abundance reduction/loss) or semi-permanent (i.e. conditions reduce number of fishable days) displacement
- Decommissioning: closures during decommissioning

Basis of Valuation:

- Receipts from dealers of landings value (based on spatial analysis)
- Receipts from equipment vendors, for lost gear, etc.
- Methodology to assess and establish “fair market value”: landings, dealers, shoreside & value-added processing

Mechanisms for Administering

When	Who (administrator)	How (payouts)
• Upfront • Yearly/periodically over course of project (ex. 30 years)	• 3rd party trust • Fishing industry controlled trust (new or existing associations or other structure) • Developer controlled • Developer (direct payments) • State (or federal) controlled trust • Set-aside programs	• Claims-based • Direct payments

How Fees May Be Used

Stipulations in final agreements will likely define what compensatory mitigation funds can be used for based on approval by the administrator. Impact fees and grants may support the following:

- Direct Impacts: Gear loss, business losses, access restrictions;
- Redesign: Design, construction and modification of commercial fishing vessels
  - Including but not limited to increased fuel efficiency, reduced carbon emissions, improved stability and capability of supporting sustainable fishing practices, such as harvesting and on-board storage and processing methods;
- Innovation: research, development, acquisition and deployment of advanced technologies:
  - Including but not limited to sonar, radar, radio communications, satellite and global position and other locating and tracking devices;
- Marketing: Seafood marketing and seafood promotion programs;
- Cooperative research: Industry-driven science related to offshore wind or other fisheries topics;
- Buyouts to reduce capacity or retire fishing vessels/permits; or
- Permit banks or other new entrant set-asides.

Eligibility

Most impact fees to date are proposed to be claims-based; once an individual or business submits a claim, evaluation will occur to determine if the claim meets the eligibility requirements.

Eligibility requirements are variable and could include:[1]

- Valid state/federal commercial fishing permit;
- Valid vessel registration and applicable registrations;
- Residence or business registration in a certain state;
- Membership in a third-party organization that may administer impact fees;
- Documentation of state/federal tax status;
- Documented landings history;
- Gear replacement or dealer receipts; and
- Acceptance of terms and conditions, legal rights, liability waivers, or other agreements.

See **Appendix I** for Overview of Current Agreements

[1] List adopted from NYSERDA "Draft Fisheries Compensation Overview" document.