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Public Comments Processing
ATTN: Undine Kipka

Re: Outer Continental Shelf Air Permit – South Fork Wind, LLC 130 MW Windfarm – EPA Permit # OCS-R1-04

Submitted to: http://www.regulations.gov Docket No. EPA-R01-OAR-2021-0392

The American Clean Power Association ("ACP")[1] submits these comments in response to the U.S. Environmental Protection Agency's ("EPA" or "Agency") Revised Outer Continental Shelf Air Permit (South Fork Wind, EPA Permit # OCS-R1-04) ("SFW Revised Permit") Notice and its request for comment on a revision to the draft permit that removed the requirement to obtain emission offsets for construction emissions. As discussed in more detail below, ACP agrees with EPA's legal interpretation that the Clean Air Act ("CAA") does not require offsets for construction emissions and supports the permit revisions that reflect this understanding. ACP believes EPA's interpretation and conclusions are supported by the CAA framework, statutory provisions, and agency practice and precedent.

[1] ACP is the national trade association representing renewable energy industry in the United States, bringing together over 1,000 member companies, 120,000 members, and a national workforce located across all 50 states with a common interest in encouraging the deployment and expansion of renewable energy resources in the United States. By uniting the power of wind, solar, storage, and transmission companies and their allied industries, we enable the transformation of the U.S. power grid to a low-cost, reliable, and renewable power system. ACP members include wind turbine manufacturers, component suppliers, project developers, project owners and operators, financiers, renewable energy supporters, utilities, marketers, customers and their advocates. Additional information is available at http://www.cleanpower.org.

I. COMMENTS

A. The CAA Framework and Key Regulatory Provisions Support EPA's Revisions and Legal Interpretation Regarding Eliminating Offset Requirements for Construction Projects

1. The Plain Language of the CAA on Timing of the Offset Requirements Supports EPA's Interpretation

ACP agrees with EPA's conclusion that the text of the CAA supports EPA's revised interpretation that the offset requirements of CAA 173(c)(1) may only apply to emissions from the operation of an OCS source and not to the construction activity itself. First, the plain text of the CAA specifically requires quantifying offsets at the time operation begins—and not before. Specifically, Section 173(a)(1)(A) requires the NNSR program to "provide that permits to construct and operate may be issued if . . . the permitting agency determines that by the time the source is to *commence operation*, sufficient offsetting emissions reductions have been obtained …" (emphasis added); and Section 173(c)(1) requires sufficient offsetting emission reductions to be "in effect and enforceable" "by the time a new or modified source *commences operation*." The CAA does not provide further detail as the precise issue of what types of emissions increases are subject to the offset requirements of CAA Section 173(c)(1). The plain language of Section 173, therefore, supports EPA's interpretation. Because an offshore wind facility cannot commence operation until after it is constructed, ACP agrees with EPA that it is not appropriate to take into account the emissions related to construction.

2. EPA Regulatory Provisions Align with EPA's Interpretation

As EPA has noted, EPA's federal regulations for approving state and local NNSR programs for inclusion in state implementation plans, codified at 40 C.F.R. §51.165, are also silent on whether the offset requirement applies to construction emissions. However, EPA's regulations administering the NNSR program in states without an EPA-approved state program expressly exclude "construction emissions" from those regulations.[2] In particular, section IV.B. of 40 C.F.R. Part 51, Appendix S exempts from the emissions offset requirement various types of "temporary emission sources," including those "emissions resulting from the construction phase of a new source."[3] As EPA observed in the Supplemental Fact Sheet, and as discussed in more detail below, this appendix was promulgated from the Emissions Offset Interpretive Ruling, which was derived from other EPA guidance. Therefore, ACP agrees that regulatory NNSR requirements focus on operating emissions--particularly Appendix S provides distinct insight into EPA practice--and aligns with EPA's interpretation.

3. Past EPA Interpretations and Guidance Support EPA's Interpretation

As EPA noted in the Supplemental Fact Sheet, EPA's guidance and interpretations have also generally reflected this reasoning. EPA adopted the amendments to Appendix S in 1979 as an amendment to the "Emission Offset Interpretive Ruling," which reflected EPA guidance regarding temporary emissions. In the final rule, EPA

[2] 40 C.F.R. Part 51, Appendix S.
[3] *See* Section IV.B. of Appendix S (stating that "temporary emission sources, such as pilot plants, portable facilities which will be relocated outside of the nonattainment area after a short period of time, and emissions resulting from the construction phase of a new source, are exempt from Conditions 3 and 4 of this section," in which Conditions 3 and 4 specify the requirements to obtain emission offsets.)

explained it was revising the original Ruling to "exempt temporary emissions," such as pilot plants and "emissions resulting from the construction phase of a new source" from offsets and net air quality benefit requirements., noting that "[e]missions occurring for less than two years within the nonattainment area would generally be considered temporary."[4] In another notice, EPA stated:

> Emissions occurring for less than 2 years at one location would generally be considered temporary. Emissions for longer periods of time might also be considered to be temporary (such as the emissions related to the construction of power plants or other large sources) but should be dealt with on a case-by-case basis.[5]

This reasoning is also reflected the finding in the 1977 applicability determination cited in the Supplemental Fact Sheet, where the EPA held that the NNSR offset requirements would not apply to the Bayou Choctaw salt dome project in Louisiana. The reasoning in that applicability determination was based on the fact that temporary emission increases would only occur during the filling of the salt dome as a result of "tanker ballasting and barge loading" and that the NNSR program (including the emission offset requirements) is not intended "to cover situations where emissions occur for only a relatively short period of time and are associated with the construction of a new project."[6] Construction of offshore wind projects, like South Fork Wind, are just that:

[4] 44 Fed. Reg. 3,278
[5] 43 Fed. Reg. 26,394 (June 19, 1978).
[6] Supplemental Fact Sheet at page 10 (citing to EPA Letter to Dr. Robert L. Davies, Federal Energy Administration dated May 6, 1977). This reasoning has also been used with regard to applicability of a pilot plant. EPA Letter to Adlene Harrison, Region VI Regional Administrator, Apr. 24, 1978), https://www.epa.gov/sites/default/files/2015-07/documents/m42478.pdf.

temporary and transitory, with work on the Outer Continental Shelf occurring for only a relatively short period of time (typically less than two years).

Finally, we note that although EPA has previously included offsets for construction emissions in its permits for two other offshore wind projects (one of which was never constructed), EPA has discretion to change its interpretation, as a matter of administrative law, and that interpretation is afforded deference.[7] To that end, EPA has provided a reasoned explanation for its changed interpretation, and the interpretation is consistent with the statutory text, structure, and objectives of the CAA.

4. Past State Practice Supports EPA's Interpretation

The D.C. Circuit has interpreted section 328(a)(1) of the CAA to mean that OCS sources within 25 miles of shore be subject to "identical" requirements as those applicable to sources in the closest onshore area ("COA").[8] 40 C.F.R. §55.5(d) states that "[o]ffsets shall be obtained based on the applicable requirements of the COA." State practice also aligns with EPA's interpretation.

Massachusetts and other states, in practice, have not required offsets for construction emissions in air permits issued under its NNSR program. In the case of Massachusetts, which is the COA for South Fork Wind, the relevant NNSR regulations (codified at 310 C.M.R. 7.00, Appendix A) do not specifically address whether the

[7] *See F.C.C. v. Fox Television Stations, Inc.,* 556 U.S. 502, 515–16 (2009)*; Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–843 (1984).
[8] *See Santa Barbara City Air Pollution Control District v. U.S. E.P.A.*, 31 F.3d 1179, 1180 (D.C. Cir. 1994).

NNSR offset requirements apply to construction emissions from new and modified major sources. In some cases, states have expressly stated that the NNSR offset requirements do not apply the short-term emissions attributable to the construction of the new or modified major sources. In addition, the New Jersey Administrative Code at Title 7, Chapter 27 and Subchapter 18 states that: "Notwithstanding the provisions of [N.J.A.C. 7:27-18.3] (c) or (d)…, no person is required to secure emission offsets for temporary emission increases that occur during and result directly from the construction, reconstruction, or modification of the newly constructed, reconstructed, or modified equipment or control apparatus" (N.J.A.C. 7:27-18.3(h)).

Given all this, ACP believes EPA's interpretation of the section 173 of the CAA and its rationale for omitting offset requirements for emissions increases associated with the construction of a new or modified OCS source, such as an offshore wind project, is well reasoned, supported by law, and consistent with precedent.

B. Eliminating the Construction Offset Requirement is Consistent with the Air Quality Goals of the CAA

The elimination of the construction offset requirement for OSW generating facilities is also consistent with air quality goals of the CAA, including the requirements for achieving "reasonable further progress" (RFP) in nonattainment areas, as provided under sections 171, 172, and 173 of the CAA. Those requirements are intended to assure that nonattainment areas will continue to make reasonable progress in meeting its air quality goals by obtaining sufficient emissions reductions in the airshed to offset the emissions increases from new or modified major stationary sources. Similarly, section

328 of the CAA requires EPA to regulate OCS sources in order to attain and maintain the ambient air quality standards.

As discussed above, the construction of offshore wind projects is temporary and transitory, generally lasting one to two years. On the other hand, operation of offshore wind generating facilities can result in the curtailment or even shutdown of existing onshore fossil generation in the same airshed – specifically the Ozone Transport Region. This shifting of electric generation from fossil fueled generation to clean offshore renewable energy resources would likely result in substantial overall net emission reductions for the airshed.[9]

In addition, during the operational phase of offshore wind projects, when NOx emissions are much less, the generation of renewable electricity would go far beyond what is required for meeting its RFP goals by achieving annual net NOx emission reductions. The actual net air quality benefits from the new OSW generating facilities would be most likely much greater than those achieved by an onshore new stationary source that must secure emissions offsets under the NSR permit program. In the revised permit, EPA correctly concludes that, through its assessment of the ambient air quality demonstration submitted by SFW, that there will be no significant impacts at Class I areas resulting from construction of SFW. On the other hand, since an offshore wind facility would be located offshore many miles from the mainland, the emissions from the

[9] *See* Bureau of Ocean Energy Management, South Fork Wind Farm and South Fork Export Cable Project Final Environmental Impact Statement at H-19 (Aug. 2021) ("Air quality in the region could be improved in the long term because an additional operating wind farm would offset emissions from fossil fuel–generated energy sources.").

offshore wind facility are likely anticipated to have at most only minimal air quality impacts on onshore areas. This means that the offsetting emission reductions resulting from the curtailment or shutdown of onshore fossil fuel generation will not just be mitigating the potential air quality impacts from the new offshore wind facility, but also enhancing considerably the air quality in the onshore areas in the Ozone Transport Region where the ozone nonattainment problems are the greatest.

II. CONCLUSION

ACP appreciates the opportunity to provide these comments supporting the EPA's revisions to the Air Permit on the OCS, and wholly agrees that construction activities should be excluded from emission offset requirements. If you have any questions, please do not hesitate to contact the undersigned at the contact information listed below.

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