December 12, 2022

Program Manager
Office of Renewable Energy Programs
Bureau of Ocean Energy Management
45600 Woodland Road
Sterling, VA 20166

Re: Guidance on Information Needed for Issuance of a Notice of Intent (NOI) Under the National Environmental Policy Act (NEPA) for a Construction and Operations Plan (COP), Docket No. BOEM-2022-0056

Submitted via www.regulations.gov

Dear Program Manager:

The American Clean Power Association[1] (ACP) and National Ocean Industries Association (NOIA)[2] submits these comments on the Bureau of Ocean Energy Management's (BOEM) Draft Guidance on Information Needed for Issuance of a Notice of Intent (NOI) Under the National Environmental Policy Act (NEPA) for a Construction and Operations Plan (COP) ("Draft Checklist"). Both ACP and NOIA submit these comments on behalf of their offshore wind developer members, representing the capacity to deliver as many as 70 gigawatts (GW) of offshore wind energy necessary to achieve the Administration's ambitious offshore wind and climate goals. ACP and NOIA recognize that the federal permitting process for offshore wind projects is in need of increased predictability and accountability, for both our member developers and the various agencies who are tasked with reviewing and approving COPs. To that end, ACP and NOIA support BOEM's goal of creating a reasonable and tailored checklist of the data, reports, and other submissions that will *per se* be deemed sufficient to publicly commence the NEPA process.

However, ACP and NOIA believe the Draft Checklist misaligns with its intended goals in several key respects—and hope that this comment period is the start of a dialogue between developers and regulators that results in improvements to the whole permitting process. Overall, offshore wind project developers accept and embrace their principal responsibility to carefully design and obtain necessary information regarding their proposed projects, and to prepare robust initial COP submissions that enable BOEM and other agencies to efficiently fulfill their environmental review and permitting roles. It also is inherently in developers' best interests—not just BOEM's—to complete information gathering and

[1] ACP is the national trade association representing the renewable energy industry in the United States, bringing together hundreds of member companies 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. In the Central Atlantic, ACP represents several developers interested in building commercial-scale offshore wind projects.
[2] NOIA is a national trade organization that represents and advances a dynamic and growing offshore energy industry, including federal wind lessees. NOIA and its members provide solutions that support communities and protect workers, the public, and the environment. For nearly 50 years, NOIA has been committed to ensuring a strong, viable U.S. offshore energy industry capable of meeting the energy needs of our nation in an efficient and environmentally responsible manner.

analysis as soon as practicable to expedite COP submissions, associated reviews, and ultimately COP and other federal permit approvals. The Draft Checklist, however, would prematurely and unduly frontload and increase informational requirements to formally commence the NEPA or FAST-41 processes, and create broad grounds for BOEM to deem a COP "incomplete." In doing so, the Draft Checklist overlooks the logical evolution of projects during the NEPA process, including early external input during the scoping that precedes publication of an NOI, and fosters unnecessary delays and costs studying and reporting on alternatives that are later dismissed from further consideration.

We appreciate that the Draft Checklist is a product of high workloads and limited agency resources. BOEM has seen at least an eight-fold increase in COPs under review between 2018 and the present day, exacerbated by a *de facto* two-year freeze on all offshore wind permitting in the last Administration that created a veritable logjam. While BOEM has increased its renewable energy staff, it still faces a resource gap; other key agencies are also awaiting a long-overdue increase in hiring for offshore wind permitting. This resource crunch has been amplified by other factors, including disputes among agencies over NEPA alternatives; sensitivities over information requested by consulting parties under Section 106 of the National Historic Preservation Act (NHPA); new and mandatory procedures for managing timeline delays once a project is posted on the FPISC dashboard; and—yes—uncertainty regarding what constitutes a "good enough" COP to begin the NEPA process.

These problems are temporary and solvable. Indeed, BOEM has already shown progress in the processing of COPs, as exemplified by today's release of two DEISs.[3] BOEM and its cooperating agencies should get more resources and gain permitting "muscle memory" and a body of agency experience with environmental review of COPs as more projects go through agency review. Consistent with NEPA regulations (*e.g.*, 40 C.F.R. §§ 1501.7-.8, 1506.5), we also encourage BOEM and its sister agencies to actively include developers and utilize their analytical resources in NEPA reviews of their proposed projects.

We urge BOEM to continue seeking creative efficiencies that accelerate the offshore wind industry's capacity to build clean energy infrastructure that will help solve the climate crisis and create a new and secure domestic industry—and to be cautious about creating restrictive guidance that slows down the process unnecessarily. In the meantime, ACP and NOIA request that the Draft Checklist not be applied, either formally or informally, until BOEM has received and meaningfully incorporated public comments and has provided its final guidance to the regulated community.

Summary of ACP and NOIA Comments

We appreciate the spirit of the Draft Checklist in pointing toward a more certain permitting process, as well as the fact that it provides for a degree of flexibility in certain data submittals. As described more fully in Section I below, however, the Draft Checklist may actually create more issues where it was originally intended to correct and requires

[3] *See* https://www.boem.gov/newsroom/press-releases/boem-advances-review-two-proposed-wind-projects-atlantic-coast.

substantial revision and reconsideration for processes that may better meet common goals of BOEM and the offshore wind industry prior to finalization.

First, if implemented without modification, the Draft Checklist would likely extend the overall federal offshore wind permitting timeline by more than a year. Developers' submittal of a COP would take approximately 6-12 months longer due to new obligations to include full and complete reports for data that could previously be submitted after issuance of the NOI, particularly (but not limited to) geotechnical and geophysical (G&G) data and the resulting marine site investigation report (MSIR), marine archaeological resources assessment (MARA), underwater noise (UWN) assessment, and U.S. Army Corps of Engineers (USACE) permit-level assessments. Compounding this delay is the increased time it likely would take BOEM to conduct completeness and sufficiency reviews of these more complex and data-heavy assessments. Moreover, ACP and NOIA believe it is unlikely that the frontloaded data will allow BOEM to make up for lost time after it issues the NOI, as there is still a high likelihood that the NEPA process and external input from agencies and stakeholders will result in requests for additional data analysis and evaluation. A longer and less predictable permitting process would have serious commercial implications for individual projects and the industry as a whole—as well as undermine realization of the Administration's offshore wind energy and climate goals.

Second, the Draft Checklist undermines the purposes of BOEM's project design envelope (PDE) approach—which the Draft Checklist simultaneously purports to retain—by forcing developers to either over-collect data on options that may be shelved during NEPA scoping (particularly export cable routes) or prematurely narrow their PDEs before they have fully considered a reasonable range of alternatives, including technological and engineering options, for inclusion in their COPs. The former outcome could unnecessarily increase costs and environmental impacts from surveys; the latter would potentially eliminate reasonable NEPA alternatives.

Third, the Draft Checklist is inconsistent with the purpose of NEPA scoping, particularly with respect to the development of a reasonable range of alternatives. NEPA scoping informs project design and maintains the decision space for developers and agencies. In 2020, the CEQ NEPA regulations were amended to change the NOI from the start of the scoping process to a better-informed public description of the expected DEIS based on consultation with the proposed action and likely cooperating agencies. Compare 40 CFR 1501.7 (2019) and 1501.9(d). It is inconsistent with the 2020 amendments and impracticable for BOEM to expect developers alone, prior to the NOI in all cases, to precisely define the contours of a proposed project, exhaustively examine all potential alternatives for the project, or conduct comprehensive surveys and reviews for all potential alternatives. Moreover, rather than prescribing a similar level of detail across project options within the PDE, the Draft Checklist should recognize that the applicant and agencies are expected and legally permitted to prioritize more detailed environmental review of a preferred alternative where one so emerges. Doing so will also facilitate the pre-NOI initial COP submission's definition of the proposed action, and thereby also enable BOEM's sister agencies such as the National Marine Fisheries Service (NMFS), U.S. Fish and Wildlife Service (FWS), and USACE to focus their respective reviews and consultations as applicable.

On that latter point, the Draft Checklist should reflect greater coordination among cooperating agencies to align expectations for pre-NOI activities and submissions, and to ensure that BOEM is not unilaterally specifying pre-NOI timing for subject matter that is largely within the ambit of non-BOEM agencies.

Finally, the Draft Checklist contains potential legal pitfalls to the extent it purports to limit statutory and regulatory provisions and applicable standards for a project to be placed on the FAST-41 dashboard and commence the NEPA process. Moreover, the Draft Checklist is entitled as covering information needed to issue an NOI, but then speaks to several activities that post-date the NOI. These concerns are heightened given that the Draft Checklist purports to be a guidance document rather than a substantive rule with associated required legal process. While we have concerns about the administrative process and level of external input for the development of this guidance document, we remain hopeful that it will meet its objectives as a guidance document and not result in *de facto* new regulatory requirements.

In recognition that the industry and BOEM need more certainty and consistency on what makes an initial COP submission sufficient to trigger an NOI, ACP and NOIA propose a compromise final checklist that avoids the most problematic elements of the Draft Checklist. As discussed further in Section II below, we recommend staged submittal of what are generally the most expensive and time-consuming reports:

Report	**Pre-NOI**	**Post-NOI Milestone**
MSIR	Preliminary Report using MSIR G&G guidelines for lease area and raw data using MSIR G&G guidelines for preferred or primary Export Cable Routes.	Final MSIR Report with full G&G for lease area and preferred or primary Export Cable Routes.
MARA	Preliminary report using literature and desktop research and available survey data	Final report using appropriate line spacing G&G data based on archeological guidelines.
Underwater Noise/Marine Mammal Exposure Modeling	Preliminary marine mammal exposure assessment in accordance with recent BOEM guidance	Final modeling and marine mammal exposure assessment, refined with more complete engineering and submitted as needed for NMFS MMPA application
Army Corp permit level assessments/	Preliminary Sediment Transport Analysis/wetlands identification	Final information needed for USACE permit application

Developers fundamentally need the flexibility to provide the information along a timeline that will not unduly delay the project, recognizing that BOEM must have certain items in order to issue its draft environmental impact statement (DEIS) and then to complete its

NEPA analysis. This proposed checklist should effectively meet both of those objectives. We have not proposed a definitive number of months for the post-NOI milestone because the needs could vary by report type and project. However, we believe 6 months after NOI issuance is the minimum amount of time needed to ensure BOEM and other agencies with the data it needs to complete the draft environmental impact statement (DEIS) and relevant consultative analyses. Based on a presumptive 1-year timeline between NOI and DEIS publication, this would allow approximately six months for the incorporation of information into the DEIS. (We note that it may be appropriate for this post-NOI milestone to be longer for certain items, such as the information required for the USACE permit application.) In any event, additional information including in response to DEIS comments can also be incorporated into the final EIS.

We also propose that developers be held accountable for meeting the post-NOI report submittal deadline by making it a milestone on the FPISC dashboard. Late submittal of the post-NOI reports could result in extension of deadlines in the FAST-41 Coordinated Project Plan (CPP), although we anticipate BOEM would exercise this discretion only when necessary. The FPISC dashboard can, should, and must be a critical tool for holding both agencies and developers accountable. Just as a developer who misses a deadline may face the possibility of delay, agencies that miss deadlines would also have an obligation to find a way to move other regulatory steps more rapidly and make up for time lost.

ACP and NOIA expect that the Draft Checklist is the start of an iterative discussion that includes cooperating and consulting agencies and improves the whole permitting process rather than just focusing on one gate. To that end, and as explained in Section III, we propose the final checklist be placed in the context of BOEM's coordination of authorizing agency and developer milestones that will bring additional predictability to the permitting process. These milestones include:

- Pre-application meetings, strongly preferred to be jointly, with all relevant federal agencies in which the developer shares preliminary information about its project objectives, constraints, and conceptual designs; and agencies share concerns regarding potentially affected resources that might affect survey plans and project design.
- Indicative timelines for BOEM to make completeness and sufficiency determinations after COP submission and prior to NOI issuance.
- Milestones for identification of NEPA alternatives, including an interagency meeting with developers within 4 months of the NOI (after the conclusion of the public scoping comment period) to discuss refinement of project alternatives and receive feedback from developers, and a 6-month post-NOI milestone for BOEM to finalize alternatives to be analyzed in the DEIS.
- A 6-month post-NOI "grace period" during which developers may refine their PDE without any risk of FAST-41 dashboard delays, if developer(s) elect to be a covered project. Narrowing (as opposed to expanding or shifting) the PDE after that period would not automatically result in a delay in release of the DEIS, and further PDE refinement may occur between issuance of the DEIS and Final EIS, including in

response to DEIS comments. This is intended to be a clarified version of what BOEM proposes in the Draft Checklist.

- A checklist of data and reports that developers may request to be submitted to BOEM post-COP approval with the facility design report (FDR), subject to a case-by-case departure determination under 30 CFR 585.103.

I. The Draft Checklist Contains Several Key Deficiencies

The Draft Checklist contains several significant weaknesses, largely stemming from its default presumption that nearly all data pertinent to a proposed offshore wind project must be packaged and submitted to BOEM prior to issuance of the NOI. Such an approach would cause major and unnecessary delays to the overall permitting process with profound commercial and environmental consequences, and would contradict both the PDE approach to permitting and the requirements of NEPA and FAST-41.

a. The Draft Checklist Would Create Significant Permitting Delays by Prematurely Requiring Nearly All Project Data and Reports to Be Submitted Prior To NOI

By effectively requiring all project-related data to be submitted in the initial COP before commencing the public phase of the NEPA scoping process or obtaining FAST-41 coverage—particularly detailed G&G surveys and associated assessments that rely on such data surveys—the Draft Checklist would likely extend the entire offshore wind permitting process by over a year. This extra time is compared to the *status quo ex ante*, when BOEM allowed lessees to compile the most granular, time-consuming, and expensive reports at the same time BOEM conducted scoping under NEPA and began to prepare its draft environmental impact statement (DEIS). Such delays would cause significant commercial disruptions to individual projects, prevent a large tranche of projects from achieving at least NOI by the beginning of 2025, and detract from the Administration's goals of approving 16 COPs by 2025 and deploying 30 GW of offshore wind energy by 2030.

As discussed in detail in Section II below, certain COP data requirements are particularly time-consuming and expensive. Many of these requirements arise from the detailed G&G data that developers are required to collect in the form of vessel surveys that map out the seabed and subsurface in the project area and along potential export cable routes to shore. These survey campaigns and associated reports, which include the MSIR, MARA, and UWN assessments, take years to complete, and are affected by conditions imposed by NMFS and BOEM lease provisions, weather uncertainties, and potential challenges associated with survey vessel availability.[4]

[4] We note that developers do not always receive clear guidance and direction from BOEM and consulting agencies on data needed or validation of survey plans to meet consultation data requirements, often resulting in developers needing to alter their survey campaigns while vessels are in the field—which can add costs and safety exposure. If federal agencies provide direction and requests after campaigns are complete for a season, developers will have to wait until next survey campaign and submit new survey plans for agency review.

Both the industry and permitting agencies lose efficiencies if developers are prevented from gathering some of the required data and prepare these reports *in parallel* with BOEM reviewing the initial COP submission for completeness and sufficiency, scoping NEPA alternatives with cooperating agencies and public stakeholders, and undertaking preparation of the DEIS. Under the Draft Checklist, that time is frontloaded so developers would now be required to collect *all* of their G&G data and conduct the associated offshore assessments prior to submitting their COPs for initial BOEM review, rather than conducting the assessments after COP submission and concurrently with the development of the DEIS. If the surveys and reports were all required to be developed *before* BOEM COP review, scoping, and DEIS development instead of in parallel, the additional time to collect survey data would suddenly be tacked on as a separate activity prior to DEIS development. As discussed in more detail below, this approach is unnecessary; DEIS development entails far more than survey data review and integration, and many DEIS activities can be conducted without the use of such data. In addition, by frontloading data collection, some of which may not be utilized or may need to be re-collected during DEIS development, additional costs and delays are tantamount. *We estimate that developers would be delayed in submitting their COPs 6 to 12 months later than they did before the Draft Checklist*.

It is important to emphasize that the delay could be even longer because BOEM and the relevant cooperating agencies would now need to review terabytes of extra data and detailed reports prior to determining whether the COP was "complete and sufficient" such that an NOI could be issued.[5] Note that our estimates for timeline delays assume that developers can plan for the new guidance contained in the Draft Checklist; those delays could be amplified for projects that have already submitted initial or revised COPs or have already signed survey contracts under previous guidance and schedule assumptions.

ACP and NOIA and their members are also highly skeptical that BOEM would be able to make up for lost time after issuance of the NOI. The Draft Checklist does not address many of the root causes of delays that have consumed or extended the (presumptive two-year) NOI-to-ROD timeline[6], including (a) federal agencies' aforementioned lack of sufficient resources to process the current COP logjam; (b) lack of timely resolution of lead/cooperating inter-agency debates regarding the reasonableness of proposed NEPA alternatives; and (c) cooperating agency challenges interfacing with BOEM's PDE approach.

The permitting delays described above would be highly disruptive to the economics of affected offshore wind projects, in both obvious and more indirect ways. Such delays, in turn, would place heavy burdens on ratepayers, jeopardize job-creating supply chain investments, and threaten attainment of the Administration's offshore wind goals.

Achieving federal permitting approvals is a "critical path event" in the offshore wind development process. That means any delay or uncertainty in the timing of such approvals also delays final investment decisions (FID), including manufacturing key components such

[5] If this completeness and sufficiency review period does *not* end up taking months longer, that would beg the question of why the granular data was needed prior to the NEPA scoping stage in the first place. As discussed in Section II below, we believe it is not needed.
[6] Draft Checklist at 2.

as wind turbine generators, foundations, subsea cables, and electrical service platforms—as well as the chartering of specialized construction vessels. This is highly problematic in 2022, with the U.S. and global markets for such components and vessels is as tight as they have ever been. Delays in FID can result in higher costs across the board, as well as additional delays in procurement. Here is an indicative example of just one way permitting delays can compound costs and cause additional delays:

- The Draft Checklist causes an NOI to be pushed back from December 2022 to December 2023. As a result, the ROD is now anticipated in March 2026 instead of March 2025.
- Developer had initially intended to sign a final charter for a wind turbine installation vessel (WTIV) during the summer of 2025, but now must wait until at least summer 2026.
- The vessel charterer now must increase its fee by 20% to guarantee availability in 2026, or cannot make the WTIV available until the summer of 2027 (and now at a higher cost because of increased global demand for the vessel).

Depending on the power price negotiated for the project, that extra vessel cost may be passed along to ratepayers, or it may significantly dent the project's business case. And completion of the project could be delayed for *two years*. There are a multitude of similar examples, given the vast number of vendors that provide supplies and services for the development of an offshore wind project. These delays and costs could continue to compound and lengthen as new leases are issued and demand for components, vessels, and ports increases.

Beyond the macro effects of any type of permitting delay, there are several reasons *a delay in issuance of an NOI* would be uniquely harmful. First, the Draft Checklist makes the NOI the gateway to permitting certainty through the development of a CPP under FAST-41. This change would push the CPP development approximately 6-12 months later than it is currently being completed. The project schedule allows developers and their investors to plot out other decisions along the aforementioned critical path. While we recognize that the CPP needs to be achievable, and that delays within the CPP are problematic, delaying the creation of a CPP is uniquely damaging in that it is contrary to the intent of FAST-41, keeps the entire permitting process open-ended, and holds back the rest of the project timeline.

Second, the lack of a CPP makes it more challenging for developers to invest in the full suite of G&G data collection and associated reports, which will run in the multiple tens of millions of dollars. These major capital expenditures would be made prematurely, prior to having any certainty regarding when the permitting process will commence or reach completion. In addition, developers' larger information-gathering and COP preparation efforts are undertaken at varying levels of risk, given the nature of offshore wind lease rights prior to subsequent COP approval.

Even assuming the developer can work with its suppliers and customers to keep the project on a path to financial viability, it will inevitably result in a delay in the start of construction—potentially much longer than the original permitting delay, particularly in light of time-of-year work restrictions. This, in turn, will delay supplier investments in onshore facilities to manufacture components and vessels and jobs created by those

investments. All the while, thousands of megawatts of carbon-free and secure domestic energy will be on the drawing board and not in the water. At a moment when the impacts of climate change are reaching devastating levels, we can ill afford to be delaying the permitting and construction of offshore wind energy projects.

b. The Draft Checklist Is Inconsistent with The Evolution of an Offshore Wind Project Under BOEM's Well-Established Project Design Envelope-Based NEPA Process

The Draft Checklist would upend BOEM's PDE-driven NEPA process (which the Draft Checklist purports to retain) and force either over-collection of information in the COP for alternatives that may not be carried forward for detailed study in the DEIS, or premature design and siting choices. These concerns especially pertain to various export and interconnection cable routes, but also to project components on the BOEM lease itself. The end result is a waste of developer and agency resources and unnecessary distortion of NEPA analyses before the NOI is even issued.

By requiring the most granular survey data and reports prior to NOI issuance and thus NEPA scoping, the Draft Checklist clashes with BOEM's well-established PDE approach. The purpose of the PDE is to give developers "appropriate flexibility to accommodate final design decisions in later stages of the process."[7] This, in turn, "allow[s] BOEM to analyze the environmental impacts of the proposed project in a manner that could reduce or eliminate the need for subsequent environmental and technical reviews"[8] so long as subsequent project modifications stay within the PDE analyzed by BOEM in a DEIS. The PDE approach, which is used in many European offshore wind permitting regimes, allows COP submissions to explore multiple options for (among other things) cable routes, wind turbine layout and size, and foundation types—all while still advancing the permitting process. This optionality is particularly helpful in an industry where technologies develop quickly and new siting concerns may arise mid-process.

But many of these benefits are lost if a developer is forced to exhaustively examine all potential alternatives for the project before NEPA scoping has even begun. NEPA scoping, especially early scoping, is intended to inform project design and maintain BOEM's and the developer's decision space. But by frontloading the most extensive data collection and project analysis, the Draft Checklist seems to undermine the natural evolution of projects during the NEPA process, including in *response* to early external input. This approach is also likely to waste the time and resources of developers who would be required to over-collect data on project options—particularly cable routes—that are dismissed from further consideration during NEPA scoping, to say nothing of the federal agencies having to review those data and reports. Extra time on the water also unnecessarily increases the risk of vessel accidents. This result does not serve NEPA's twin aims of environmentally informed decision-making and public involvement.

[7] *See* Draft Guidance Regarding the Use of a Project Design Envelope in a Construction and Operations Plan (January 2018) at 2, *available at* https://www.boem.gov/sites/default/files/renewable-energy-program/Draft-Design-Envelope-Guidance.pdf.
[8] *Id.* at 4.

c. The Demand for All Data Before NOI Is Unnecessary in Light of Principles of NEPA Scoping and Alternatives Identification

Additionally, the Draft Checklist is inconsistent with NEPA because BOEM does not need the most detailed and granular reports in a COP submission to facilitate meaningful scoping and identify a reasonable range of alternatives for study in the DEIS.

Scoping under the CEQ NEPA regulations may begin "as soon as practicable after the proposal for action is sufficiently developed for agency consideration."[9] The purpose of NEPA scoping is to identify significant issues to be analyzed in the DEIS, particularly as it considers reasonable alternatives and potential mitigation measures, narrowing the discussion of other issues in the DEIS to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.[10] BOEM, the lead agency, is responsible for allocating assignments for preparation of the DEIS with cooperating agencies, providing for other environmental review, authorization, and consultation requirements so their required analyses and studies can be prepared concurrently and integrated with the EIS, and managing the relationship between the timing of the preparation of environmental analyses and the lead and cooperating agencies' tentative planning and decision-making schedule. It is not necessary for either BOEM or its cooperating agencies to have all data in order to perform (or assist in performing) these tasks for offshore wind projects. The modified checklist that ACP and NOIA propose in Section II would result in agencies having more than enough information about projects for scoping and DEIS preparation, including a robust PDE description, environmental analysis, and supporting preliminary and desktop reports.

BOEM's recent NEPA alternatives screening criteria constitute a powerful tool for ensuring that granular data is not needed at the NOI stage.[11] The NOI is only required to include a "preliminary description" of the proposed action and alternatives the DEIS will consider.[12] We understand that one of the key drivers of the Draft Checklist is the fact that certain cooperating agencies have indicated that they need final G&G reports and final acoustic modeling before they can fully weigh in with recommendations for potential NEPA alternatives. We believe that the final reports are not necessary for cooperating agencies to complete this task before the NOI is published because in nearly every case, the reasonable range of alternatives is apparent from the detailed project information and preliminary reports that would still be provided in the COP, including under ACP's and NOIA's proposed modified checklist as described in Section II below.

One major reason federal agencies should not need such extensive data to determine the range of NEPA alternatives is that BOEM's NEPA screening criteria, consistent with

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[9] 40 CFR 1501.9(a).
[10] 40 CFR 1501.9(f)(1)-(5). *See also,* the Department of the Interior NEPA regulations, which describe scoping as "an opportunity to introduce and explain the interdisciplinary approach and solicit information as to additional disciplines that should be included." 43 CFR § 46.235(a).
[11] *See* https://www.boem.gov/sites/default/files/documents/renewable-energy/BOEM%20COP%20EIS%20Alternatives-2022-06-22.pdf.
[12] 40 CFR 1501.9(d)(2).

governing NEPA regulations, set boundaries for the development of alternatives. Specifically:

- The alternative must meet the "primary goals of the applicant," which includes not just meeting existing contractual energy generation obligations but also future offtake opportunities.[13] ACP and NOIA would note that even this criterion undersells the importance of economic viability, as bids for offtake necessarily account for economies of scale arising from being able to optimize use of the entire lease area. In other words, even if none of the lease is subject to an offtake agreement, an alternative that significantly shrinks the developable footprint of a lease could nonetheless jeopardize a project's economic viability.
- The environmental benefits of the alternative must be based in scientific evidence, and must outweigh the increase in impacts caused by the alternative.[14] We recommend that alternatives that substantially increase net greenhouse gas (GHG) emissions as compared to the proposed action (by, for instance, substantially reducing the amount of wind energy generated) should be viewed as presumptively unreasonable, particularly in light of our national GHG reduction goals.
- The alternative must be technically feasible and practical,[15] which eliminates many if not most potential design changes suggested by federal regulators lacking the engineering expertise held by project proponents.

Rigorous application of these screening criteria means that a *reasonable* alternative should not differ dramatically from the proposed action. Conversely, if BOEM adopts ACP's and NOIA's recommendation in Section III(a) that the final checklist also incorporates BOEM's leadership of inter-agency pre-application meetings, which already often occur, cooperating agencies will have more time to consider potential NEPA alternatives and developers will be better able to incorporate agency feedback on potential environmental impacts into their surveys and PDEs.

Between the guardrails of BOEM's screening criteria and the benefits of early agency consultation, as well as lessons learned from the completed or ongoing NEPA review of numerous OSW projects, federal regulators should have sufficient information from the proposed final checklist in Section II to fully inform a discussion of NEPA alternatives at the scoping stage. G&G survey reports submitted post-NOI should not trigger completely new NEPA alternatives, although they could be useful in informing considered mitigation measures and further narrowing the PDE in the DEIS or FEIS.

We also note that even the preferred alternative in the DEIS is subject to revision in the FEIS. Indeed, BOEM has latitude to newly define an alternative in the FEIS as a preferred alternative, or to adopt a hybrid alternative in a Record of Decision (ROD), so long as the impacts of that alternative were evaluated in the DEIS. The PDE approach already accomplishes this without the unduly burdensome and unrealistic overlay of the Draft Checklist.

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[13] *Id.* at 6-7.
[14] *Id.* at 7.
[15] *Id.* at 8-9.

d. The Draft Checklist Conflicts With FAST-41

Finally, the Draft Checklist contains potential legal pitfalls to the extent it purports to limit statutory and regulatory provisions and applicable standards for a project to be placed on the FAST-41 dashboard. Offshore wind developers are allowed under federal law to opt into the FAST-41 process, and participating agencies should avoid imposing *de facto* obligations that hinder participation in that process.

FAST-41 coverage is not contingent on first achieving a NEPA milestone, and eligibility for "covered project" status is based on the applicability of NEPA to the proposed project rather than BOEM's definition of the project according to its NOI standards. 42 U.S.C. § 4370m(6). If BOEM, as the lead agency, initially determines that a project is not a covered project, then 42 U.S.C. § 4370m-2(b)(2)(B) allows the project sponsor to submit to the FPISC Executive Director a further explanation as to why the project is a covered project. The Executive Director then has 14 days from the date of the facilitating or lead agency's adverse determination to render a "final and conclusive" determination as to whether the project is a covered project. 42 U.S.C. § 4370m-2(b)(2)(C).

BOEM concerns about the need for further definition of a covered project should be addressed in the CPP development process under FAST-41, which is the proper time to address data sufficiency matters and uncertainties. *See, e.g.*, 42 U.S.C. § 4370m-11.[16] Once a project is placed on the dashboard, the agencies have 60 days to prepare a CPP to adopt a permitting timetable that shall be a "concise plan for coordinating public and agency participation in, and completion of, any required Federal environmental review and authorization for the project." 42 U.S.C. § 4370m-2(c)(1)(A).

And NEPA envisions that data gaps identified during scoping should not delay commencement of the entire process under 40 C.F.R. § 1501.9(f) and § 1502.21. Similarly, Interior's NEPA regulations provide that even during the Draft EIS stage, parallel agency reviews should not be a cause for delaying the larger NEPA effort: "[t]he draft environmental impact statement must list all Federal permits, licenses, or approvals that must be obtained to implement the proposal. The environmental analyses for these related permits, licenses, and approvals should be integrated and performed concurrently. The bureau, however, need not unreasonably delay its NEPA analysis in order to integrate another agency's analyses. The bureau may complete the NEPA analysis before all approvals by other agencies are in place."[17] The Interior NEPA regulations further acknowledge that

[16] BOEM's incomplete quotation of OMB/CEQ guidance memorandum M-17-14 in footnote 7 of the Draft Guidance makes clear that FAST-41 does not affect the applicability of NEPA ("The implementation of FAST-41 cannot have the effect of limiting the ability of an agency from meaningfully carrying out its obligations under other authorities") as does the FAST-41 savings clause, 42 USC 4370m-2(c)(2)(E). The cited section 4.6 of M-17-14 makes clear that that under FAST-41, "if a project is not subject to NEPA, it cannot be a covered project." But the quoted section 4.6 of the OMB/CEQ guidance pertains to the limited circumstances of specific statutory provisions that conflict with a 14-day review of an Initiation Notice. The main discussion in the OMB/CEQ Guidance makes clear that "covered project" is one that is "subject to NEPA" and should not be confused with agency application processes. (M-17-14 at 4.6, "The agency's review of the Initiation Notice is separate and distinct from the agency's review of the project sponsor's application for an authorization, and the acceptance of an Initiation Notice does not guarantee that the application will be accepted for review. Furthermore, the ongoing review of the Initiation Notice does not prohibit the lead, FAST-41 cooperating, or participating agencies from working on the environmental review and authorization process under their agency procedures.").

[17] 43 CFR § 46.430(b).

the agency may face incomplete or unavailable information, permitting the agency to allow for flexibility in the delivery of data due to consideration of factors such as cost, including the non-monetary cost of delay.[18]

BOEM regulations provide that the COP contain all the required information necessary to conduct technical and environmental reviews,[19] but this requirement is not incongruent with having a project deemed a FAST-41 "covered project." Indeed, there has been no showing that BOEM or another agency's statutory obligations or the ability of an agency to carry out a project or any other provisions of law regarding a project, plan or program, would justify an adjustment to the dashboard process.[20]

At present, a developer is able to place its project on the FAST-41 dashboard before commencement of the permitting process—i.e., prior to the issuance of an NOI. But the Draft Checklist would turn the FAST-41 process on its head by effectively requiring collection of all data prior to a project being placed on the dashboard. The final checklist cannot impose binding new requirements on applicants absent, at a minimum, public notice and comment rulemaking.

II. ACP and NOIA Propose a Final Checklist That Provides Both Certainty and Flexibility

ACP and NOIA propose the following four crucial modifications to the NOI checklist, along with the additional milestones set forth in Section III below. These milestones could be included in the FPISC dashboard, and developers' satisfaction of these milestones should avoid agency delays. If the agreed milestone passes, the developer would work to expeditiously submit the report(s), while we anticipate that agencies would commit to make best efforts to minimize any schedule delays.

We proffer these proposed checklist modifications and milestones below as an invitation to further dialogue and collaboration with the industry and BOEM and its key cooperating and consulting agencies, with an eye toward crafting a final checklist that works for developers and regulators alike. We envision a transparent and iterative process working toward a final NOI Checklist, one that could serve as a model for future improvements to the permitting process.

a. MSIR

PROPOSAL

- Preliminary Report using MSIR G&G guidelines for lease area and raw data using MSIR G&G guidelines for Export Cable Routes.
- Post-NOI: Final MSIR Report with full G&G for lease area and preferred or primary Export Cable Routes.

[18] Id. at §§ 46.120 & 46.125.
[19] 30 CFR 585.628(a).
[20] 42 U.S.C. §§ 43709m-6(d) & (e).

RATIONALE
Under the Draft Checklist, a developer would need to complete detailed level 30m line spacing work more than a year in advance of NOI in order to allow for (a) processing of data, (b) conducting the necessary offshore assessments and submitting them to BOEM for an approximately 5 to 6-month review of the COP. Due to the early stage in the project development process, the detailed 30m survey would need to be done for numerous potential lease area layouts and export cable routes on many routes that would ultimately be discarded. Requiring that all surveys and reports prior to NOI would result in a several month delay in COP submission, and also be a waste of resources and increased risk of vessel accidents as discussed in Section I(b) above.

We propose, as an alternative, that COPs be deemed complete and sufficient to proceed to an NOI if they contain a preliminary MSIR report that analyzes lease area data collected pursuant to BOEM's G&G Guidelines,[21] and contains raw data for the developer's preferred or primary export cable routes. This standard would demonstrate a baseline level of effort and information in time for NEPA scoping, while avoiding data over-collection and allowing necessary additional time for developers to collect and process the full suite of data in time for full consideration within the DEIS.[22]

b. MARA

PROPOSAL
- Pre-NOI: Preliminary MARA with the COP based on literature and desktop research and available survey data.
- Post-NOI: Final MARA using appropriate line-spacing G&G data based on archeological guidelines.

RATIONALE
In addition to the reasoning described in Section II(a) above, ACP and NOIA's proposed approach for the MARA would align with BOEM's own policy on NEPA substitution for the NHPA Section 106 consultation process, which sets forth the following milestones:

NOI – Identify Historic Properties/Area of Potential Effects
DEIS – Assess Adverse Effects
FEIS – Resolve Adverse Effects[23]

Under BOEM's own NEPA substitution policy, the full MARA would not be necessary to achieve the objectives of the NEPA substitution process at NOI. Rather, BOEM would need to

[21] BOEM Guidelines for Providing Geophysical, Geotechnical, and Geohazard Information Pursuant to 30 CFR Part 585 (May 2020), *available at* https://www.boem.gov/sites/default/files/documents/about-boem/GG-Guidelines.pdf.
[22] We welcome further dialogue regarding the timing and necessity of G&G data for secondary potential ECRs that would only be considered if primary or preferred routes later found to be unplausible or impractical.
[23] *See* National Environmental Policy Act (NEPA) Substitution for Section 106 Consulting Party Guide (August 2021) at 2, *available at* https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/BOEM_NEPASubstitution_ConsultingPartyGuide_Final_revised.pdf#:~:text=Under%20the%20%E2%80%9CNEPA%20substitution%20for%20Section%20106%E2%80%9D%20process%2C%20BOEM,NOI)%2.

receive the full MARA (as well as the other complete onshore reports) with sufficient time to fully assess adverse effects in the DEIS, and resolve them in conjunction with the FEIS and ROD and any accompanying agreement under Section 106.

By the same token, it is not necessary for consulting parties to know the precise location of every potential submerged historical resource or paleo-channel at the start of the Section 106 consultation process. Rather, it is sufficient for BOEM to share and receive feedback on the types of mitigation measures that may be imposed if and when such resources are discovered and reported in the final MARA. So long as BOEM and project proponents are transparent about when full information will be available, consulting party expectations can be managed.

We propose that a final MARA submission milestone of at least 6 months after NOI would give BOEM sufficient time to make this determination. This timeline would also provide the opportunity for consulting parties to fully consider any new information in advance of a final resolution of adverse effects in the ROD.

ACP and NOIA appreciate that the Draft Checklist provides for the delivery of the TARA post-NOI.[24] Presumably, BOEM has done this because the onshore components of the PDE are in flux at the NOI stage when multiple landfall locations, points of interconnect (POIs), and onshore routes are being considered. An extensive TARA at NOI would result in significant resources being spent on many project elements that will be discarded. Further, a TARA on all project elements at NOI would be infeasible due to the lack of site control at that stage. ACP and NOIA would appreciate BOEM applying this same logic to other onshore assessments—see, for example Section II(d) below regarding USACE permit data and reports.

c. Underwater Noise (UWN) and Marine Mammal Exposure Modeling

PROPOSAL

- Pre-NOI: Preliminary marine mammal exposure assessment in accordance with recent BOEM guidance
- Post-NOI: Final modeling and marine mammal exposure assessment, refined with more complete engineering and submitted as needed for NMFS MMPA application.

RATIONALE

Final acoustic assessments are refined and better informed as deliverables like the MSIR are finalized; they are also more realistic at this later stage, as developers make PDE refinements to parameters such as layout, wind turbine model, and foundation design. Thus, a final UWN report is subject to the same time and cost constraints as the final MSIR described in Section II(a) above.[25]

[24] Draft Checklist at 11 ("If an applicant requests to delay submission of the TARA and related proposed mitigation measures, the COP should include a schedule committing to when this information will be provided to BOEM.").
[25] Developers also are unlikely to have a full unexploded ordnance (UXO) removal plan available pre-NOI, let alone the ability to model for those impacts.

Additionally, the final UWN report is not needed prior to NOI because NMFS and FWS need not initiate consultations with BOEM under Section 7 of the ESA until after the NOI and BOEM's submission of a request for consultation and Biological Assessment. Likewise, developers apply separately to NMFS for Marine Mammal Protection Act authorizations typically after COP submission and BOEM NOI issuance. Therefore, comprehensive data required for these processes need not be submitted in a COP prior to NOI. Finally, better definition of the proposed action after NOI also enables NMFS and FWS to more efficiently conduct their ESA analysis. Our proposed model timeline in Section III would provide more than sufficient runway for NMFS and FWS to fulfill their statutory obligations.

d. U.S. Army Corps of Engineers Report

PROPOSAL

- Pre-NOI: Preliminary Sediment Transport Analysis/wetlands identification.
- Post-NOI: Final information needed for USACE permit application.

RATIONALE

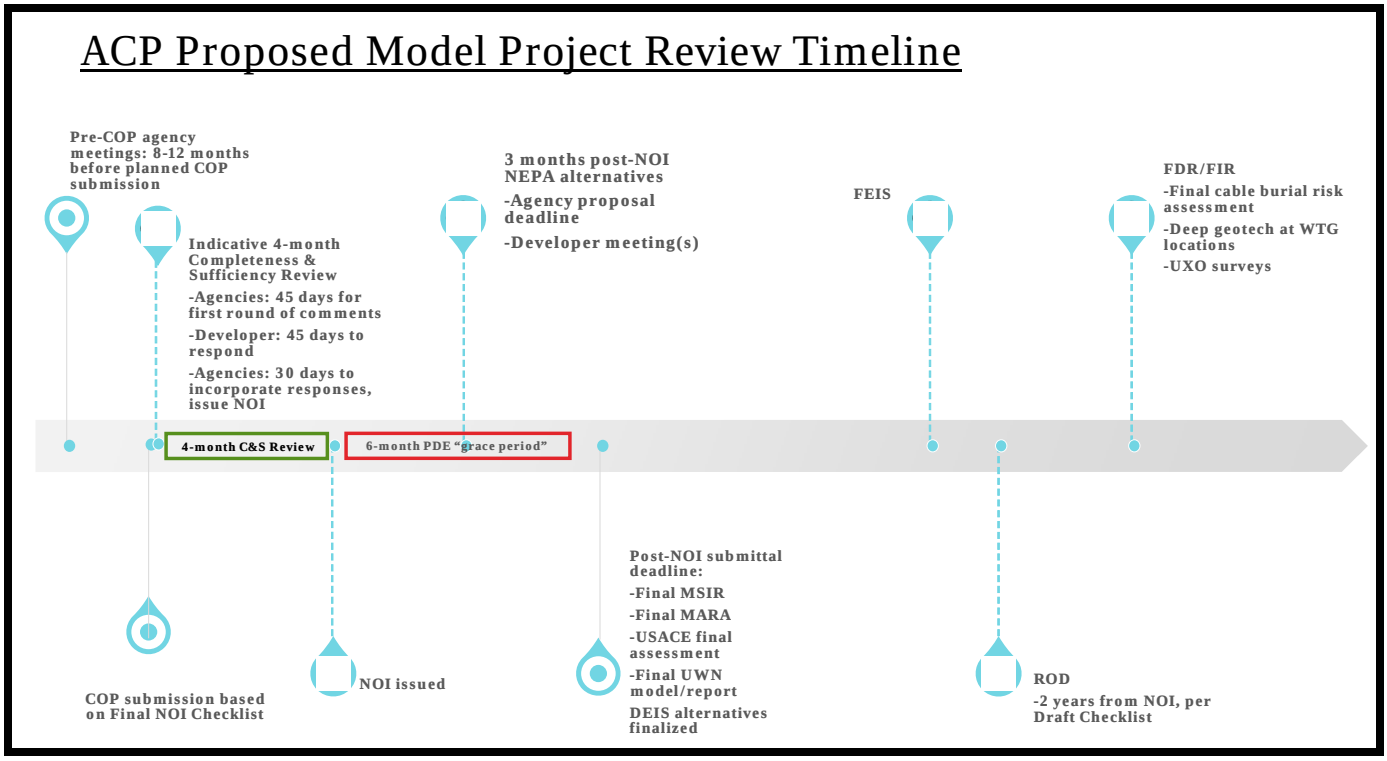
The Draft Checklist states that the project description "should include sufficient information for the U.S. Army Corps of Engineers to conduct its dredged or fill material analysis under 40 CFR part 230." It is unclear what is meant by "sufficient information," but to the extent BOEM intends for initial COP submittals to contain all information that would be contained in a USACE application for a CWA Section 404 dredge-and-fill permit, this is unnecessary at such an early stage in the permitting process. Developers typically do not submit USACE applications until well after NOI, but before issuance of the DEIS. The permit application that is submitted to USACE (and often jointly to state water quality agencies) is prepared for a proposed export cable route with identified reasonable alternatives for the Section 404 analysis, which are identified after NOI. It would be wasteful to require developers to submit permit level information prior to NOI for all cable routes that are under consideration at COP submittal.

Furthermore, the onshore components of the PDE are in flux at the NOI, when multiple landfall locations, POIs, and onshore routes are being considered. Providing permit level data at NOI would likewise result in significant resources being spent on many project elements that will be discarded as further project refinement occurs. Sufficient wetland and other assessments on all onshore project elements prior to NOI may not be feasible also due to the lack of site control at that stage.

BOEM and USACE should be able to receive the detailed sediment dispersion modeling and other permitting assessments under 40 CFR part 230 4-6 months prior to the DEIS. So long as the COP contains a qualitative analysis of anticipated water quality and wetland impacts at NOI, that should be sufficient for USACE to consider potential NEPA alternatives and mitigation measures at the scoping stage.

III. The Final NOI Checklist Should Be Placed in The Context of a Comprehensive Permitting Schedule

The principal focus in any final checklist for NOI issuance should be pre-NOI activities. Given that the Draft Checklist also covers certain post-NOI activities, however, for the final NOI checklist to bring optimal predictability to the offshore wind permitting process, it should be preceded and succeeded by new developer and agency milestones, often reflecting best practices already experienced. The following timeline summarizes our proposal, with more detailed descriptions below. As with our proposal in Section II, we hope these recommendations will be viewed as the start of a dialogue between developers and the federal family.



a. Pre-COP Submission Interagency Meeting

We propose that BOEM establish an interagency pre-COP submission meeting (or series of meetings) that includes the developer and each of the permitting, consulting, and cooperating agencies. This meeting should take place as early as reasonably possible, ideally at 8-12 months before planned COP submission, and would be a critical opportunity for the agencies to:

- Identify resource concerns to inform the proposed turbine layouts and cable routes
- Inform the developer's survey strategy
- Identify data gaps and agency needs

This meeting would also be a formal occasion for developers to understand publicly available data across resources, as well as to get initial feedback on their development objectives, conceptual design, and preliminary PDE. This early coordination would also facilitate seamless integration into the FAST-41 process following COP submission, should a developer elect to participate.

b. Indicative Timeline for Completeness and Sufficiency Review of COP

In order to fully capture the efficiencies of an NOI checklist, ACP and NOIA propose that it be paired with an indicative timeline for BOEM's completeness and sufficiency review of the COP prior to NOI. As indicated in Section I(a) above, permitting timelines are essential to a developer's ability to make commercial decisions; this timeline would help bracket what is presently a critical but open-ended segment of the permitting process. We recognize that this timeline must contain milestones for both the submitting developer and the reviewing agency, and suggest the following straw schedule:

- Agencies: 45 days for first round of comments
- Developer: 45 days to respond to comments
- Agencies: 30 days to review responses

For pre-NOI materials submitted in support of the MSIR, we anticipate that BOEM will not need to fully analyze the contents of the preliminary report and raw data, and therefore should be able to complete a brief sufficiency review within 30 days of submittal.

Assuming this indicative timeline was followed, BOEM would either issue an NOI or provide a confidential written explanation of why the COP does not meet the NOI checklist criteria.[26]

c. NEPA Alternatives Milestones

As discussed in Section I(c) above, the resolution of issues and selection of a reasonable range of NEPA alternatives is currently a major source of delay. This process could be streamlined in two ways. First. limitations could be placed on the amount of time cooperating agencies have to propose alternatives after issuance of the NOI; this could be paired with a milestone by which the range of alternatives is locked in for purposes of preparing the DEIS. Second, developers can be included in the interagency discussion over alternatives in a more formal manner, rather than being unnecessarily kept at the periphery until the list of alternatives is effectively complete. This would be particularly helpful given the importance of a potential alternative's economic and technical viability under BOEM's NEPA screening criteria, an issue for which the developer brings unique insight.

Accordingly, ACP and NOIA recommend that developers meet with BOEM and any cooperating agency 3 months after NOI (after the completion of the public comment period), and that BOEM provide the developer with a list of potential alternatives not already identified in the COP several weeks in advance of this meeting so the developer may have time to prepare responses on their viability. We also recommend a 6-month milestone for BOEM to finalize the range of alternatives for analysis in the DEIS. Both of these

[26] We note that the completeness and sufficiency review could be accelerated by onboarding the third party NEPA contractor prior to COP submittal and allowing them to help facilitate BOEM's pre-NOI review.

milestones could be added to the FAST-41 dashboard, and would help ensure that interagency NEPA alternatives discussions do not last indefinitely and cause secondary delays to other milestones.

d. Additional Clarity on BOEM's Six Month Post-NOI Deadline for Refining the PDE

ACP and NOIA note BOEM's intent setting a benchmark of 6 months after publication of the NOI for developers to "narrow" the PDE without causing delays in project review. While we share BOEM's interest in ensuring that it has sufficient time to incorporate PDE changes into the DEIS and applicable consultation documents,[27] we are concerned that without the requisite flexibility, this policy could inadvertently discourage companies from refining their PDE when doing so would streamline the permitting process. Developers must be able to progress their projects commercially during the NEPA process, and should not be expected to maintain all PDE options equally over the presumptive two years between NOI and ROD.

In order to avoid this unintended consequence, ACP and NOIA suggest the following clarifications:

- We recommend that the 6-month post-NOI period refer to "refinement" of the PDE, as not all anticipated changes will necessarily be characterized as "narrowing."
- We recommend that this 6-month post-NOI period be characterized as a "grace period" to make clear that BOEM does not disfavor further refinement of the PDE, including during the period between DEIS and FEIS.
- We recommend that BOEM specify that if a developer wishes to refine its PDE *after* the 6-month post-NOI grace period, it may elect to either (a) proceed with a DEIS that analyzes the pre-grace period PDE; or (b) adjust the DEIS schedule to allow BOEM to amend the draft EIS with the refined PDE. This optionality will allow developers to choose between the risk that the DEIS may analyze an unrealistically broad PDE and the risk of a reasonable and proportionate schedule delay.
- Finally, we ask that BOEM commit to make best efforts to avoid schedule delays for refinements that post-date the 6-month post-NOI grace period, as many refinements to the PDE should not lengthen (and may even shorten) agency review periods. Indeed, unlike introducing new areas or elements into a project, narrowing the footprint within what is already being studied in a pending DEIS is not a valid basis to delay NEPA review and permitting.

e. Data Submitted with Facility Design Report

Finally, ACP and NOIA propose that the final NOI checklist account for developers' need to submit certain data and reports with the FDR as a condition of COP approval. BOEM would determine the propriety of such submittals on a case-by-case basis under the regulatory departure standard pursuant to 30 CFR 585.103. The data and reports affected by this policy are not needed for the ROD, and would include:

[27] Draft Checklist at 5.

- Final cable burial risk assessment – PDE will determine maximum amount of cable that must be buried; so long as actual construction does not deviate from this figure, mitigation measures and impacts will be known at COP approval.
- Deep geotechnical explorations at wind turbine locations – This data is only needed for engineering analysis; any environmental effects are localized, well understood, and can be addressed in terms and conditions of COP approval.
- Unexploded ordnance surveys and disposition – These are only needed once precise areas of seabed disturbance are known; mitigation measures and impacts will be known after COP submission or at COP approval.

Conclusion

The Draft Checklist has major deficiencies that must be remedied in order to ensure the timely permitting of enough generating capacity in the coming years to meet the nation's offshore wind and climate mitigation goals. However, ACP and NOIA sincerely view BOEM's proposal as the start of a vital conversation regarding ways to introduce much-needed certainty to COP preparation and federal permitting processes—both before and after the issuance of an NOI. We hope BOEM and its cooperating agencies will continue this dialogue as we pursue our mutual goal of standing up a new American clean energy industry.

Sincerely,

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