

**DOCKETED**

<b>Docket Number:</b>	17-MISC-01
<b>Project Title:</b>	California Offshore Renewable Energy
<b>TN #:</b>	256180
<b>Document Title:</b>	Three of Four Reference Studies About OSW Impacts
<b>Description:</b>	Commercial Fishermen's "Bill of Rights"
<b>Filer:</b>	susan fleming
<b>Organization:</b>	California Energy Commission
<b>Submitter Role:</b>	Commission Staff
<b>Submission Date:</b>	5/3/2024 4:18:55 PM
<b>Docketed Date:</b>	5/3/2024

### **1.3 Commercial Fishing "Bill of Rights"**

In performing the duties and exercising the powers and discretion provided in the Bylaws and this Charter, the Trustees 'Committee shall be governed by and act in furtherance of the following principles protecting commercial fishing activities:

**A. The Public Trust Doctrine.** The Public Trust Doctrine is based upon ancient Roman, Spanish, and English legal principles which protect the right to fish, the right to navigate, and the right to access public tidelands and submerged lands. The United States Supreme Court, *Martin v. Waddell* (1842) 41 U.S. (16 Pet) 367, 410, held that the state's title to its tide and submerged lands,

“...is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing” free from obstruction or interference from private parties.

**B. California Constitution, Article I, Declaration of Rights, Section 25,** based upon ancient principles of the Public Trust Doctrine, provides:

“SEC. 25. The people shall have the right to fish upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this State for the purpose of fishing in any water containing fish that have been planted therein by the State; provided, that the legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken.”

**C. California Constitution, Article X Water, Section 4, provides:**

“SEC. 4. No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public

purpose, or to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.”

#### **D. Commercial Fishing Protected Property Rights and Privileges**

Members of the Organizations and other qualified fishermen engaged in commercial fishing businesses have vested property rights and interests which should be considered by the Trustees in performing their duties under the Bylaws and this Charter, including, without limitation:

1. Commercial fishing businesses have vested property rights including commercial fishing vessels, technology, extensive personal property, equipment, machinery, supporting onshore personal and real property.
2. Commercial fishing businesses have vested “good will” value under California Civil Code Section 1263.510 which include “the benefit that a business gains as a result of its location,” including Morro Bay Harbor, Port San Luis and proximity to commercial fishing areas; “reputation for dependability, skill or quality”; and any other circumstances contributing to the “going concern” value of commercial fishing businesses.
3. Commercial fishing businesses have various licenses including master’s licenses, commercial fishing vessel licenses, and “commercial fishing license, permit or other entitlement” issued by the California Department of Fish and Wildlife pursuant to California Fish and Game Code (Section 7857, et seq.), and U.S. Government permits including Pacific Coast Federal Ground-Fish Fishing Permits. These licenses, permits and other entitlements are protected by the principles of due process and should be recognized as vested property interests of commercial fishing businesses.
4. Commercial fishing businesses also have docking, mooring, anchorage and other rights and privileges issued by the governing authorities of the respective harbors, and priority to the allocation of those entitlements.

**E. Statutory Priorities for Commercial Fishing Activities, both On-Shore and Off-Shore**

**1. Commercial Fishing Priorities under the California Coastal Act (California Public Resources Code):**

a. Coastal Act Section 30230 states:

*“Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.”*

b. Coastal Act Section 30234 states:

*“Facilities serving the commercial fishing and recreational boating industries shall be protected and, where feasible, upgraded. Existing commercial fishing and recreational boating harbor space shall not be reduced unless the demand for those facilities no longer exists or adequate substitute space has been provided. Proposed recreational boating facilities shall, where feasible, be designed and located in such a fashion as not to interfere with the needs of the commercial fishing industry.”*

c. Coastal Act Section 30234.5 states:

*“The economic, commercial, and recreational importance of fishing activities shall be recognized and protected.”*

**2. The Federal Coastal Zone Management Act establishes and recognizes the priorities for coastal dependent uses including commercial fishing activities.**

**3. The Certified Local Coastal Programs for the County of San Luis Obispo and for the City of Morro Bay protect and give priority to commercial fishing activities and on-shore support facilities through specific policies implementing Coastal Act policies.**

## **F. Contractual Protections for Commercial Fishing Businesses**

1. Castle Wind Agreement (October 6, 2018):
  - a. This Charter and the Bylaws are the result and evolution of an Agreement Between Morro Bay Commercial Fishermen's Organization, Port San Luis Commercial Fishermen's Association ("Organizations") and Castle Wind LLC ("Castle Wind Agreement") entered into on October 6, 2018, concerning a potential offshore wind project, or projects, off the coast of San Luis Obispo County subject to various governmental reviews and approvals ("Project").
  - b. The Agreement recognized that the Project has the potential to impact the Qualified Members of the Organizations operating from the Morro Bay Harbor and Port San Luis through, for instance, the potential loss of fishing grounds within the "Covered Area."<sup>11</sup>
  - c. The Agreement acknowledged "that commercial fishing activities are coastal dependent uses receiving the highest priority under the California Coastal Act and the Federal Coastal Zone Management Act, the continuing viability of which is of critical importance to maintaining the Commercial fishing industry along the California coast."
  - d. The Agreement provided that "the Parties acknowledge that the commercial fishing industry, represented by the Organizations, is subject to substantial economic pressures, is vulnerable from a range of regulatory, economic, and market impacts, and that the cumulative effects of the Project coupled with these pressures, may impact Qualified Members of the Organizations."
  - e. The Agreement acknowledged that "the Organizations are relying upon the good faith and representations by Castle Wind that the provisions of this Agreement are enforceable and will be implemented in conjunction with any offshore wind project developed by Castle Wind within the Covered Area."
  - f. The Agreement established various mitigation measures to be implemented by a California mutual benefit corporation, which is now referred to as the Morro Bay Lease Areas Mutual Benefits Corporation ("MBLA MBC") in accordance with the California Corporations Code Section 7110 et. seq. (Section 1.1(a).) which is intended to minimize the anticipated impacts of the Project on the members of the Organizations.

- g. The Bylaws and this Charter implement and supersede the mitigation measures contemplated by the Charter Wind Agreement into comprehensive and empowered institutions capable of protecting the long-term viability of the commercial fishing activities from Morro Bay Harbor and Port San Luis during all phases of off-shore wind projects in the BOEM Morro Bay Lease Areas.

**G. City of Morro Bay, Castle Wind Community Benefits Agreement (November 29, 2018)**

In administering its responsibilities under this Charter, the Trustees' Committee shall recognize that the priority, preservation and enhancement of the commercial fishing activities from Morro Bay Harbor and Port San Luis has been expressly recognized by the City of Morro Bay which entered into a "Community Benefits Agreement, Castle Wind Morro Bay Offshore Wind Farm Project," effective November 29, 2018, which granted to Castle Wind an exclusive option to lease the City owned outfall conduit lease regarding "the City owned and controlled submerged outfall structure formerly utilized by the Morro Bay Power Plant capable of being effectively reutilized to route the export cable that will electrically connect the Project to the Morro Bay substation," and "thereby interconnect with the high-voltage transmission system operated by the California Independent System Operator."<sup>21</sup> The City required Castle Wind to comply with the Commercial Fishermen's Agreement as a condition of the exclusive option for on-shore support facilities granted to Castle Wind: "The Parties acknowledge the Morro Bay community will benefit from the Fisherman's Agreement, entered into between Fishermen's Organizations and Castle Wind, Dated October 6, 2018 ('Fisherman's Agreement'). Under the Fishermen's Agreement, Castle Wind has committed to minimize and mitigate the anticipated impacts to the commercial fishermen from the Morro Bay and Port San Luis communities who operate within the Covered Area and are proximate to the Project."

**H. California Coastal Commission Conditions Protecting Commercial Fishing Activities from Morro Bay Harbor and Port San Luis.**

On June 14, 2022, the California Coastal Commission considered and conditionally concurred in Consistency Determination CE-0004-22, for the Bureau of Ocean Energy Management (BOEM) in federal waters offshore of San Luis Obispo County, approximately 20 miles off Cambria, to conduct a lease sale for up to 240,898 acres of federal waters for the future development of offshore wind energy facilities. The Consistency Determination “allows lessees to conduct site characterization and assessment activities and submit a construction and operations plan for development of offshore wind energy on their leases.” The Commission found that, “Lease activities and future offshore wind development also have the potential to adversely affect fishing and fishermen through exclusion and displacement from fishing grounds, increase costs and time at sea to reach new fishing grounds, loss of future fishing grounds and loss or disruption of harbor space and fishing infrastructure at ports.” (CCC Adopted Findings, p.5.) The Commission adopted the following conditions:

“4. **Safe Navigation:** BOEM will work with stakeholders including the US Coast Guard (USCG), National Oceanic and Atmospheric Administration (NOAA) /NMFS, the fishing and maritime industries and state agencies to ensure safe navigation through the lease areas. Safe navigation may entail designation of transit corridors.” (p. 15.)

“7. **Impacts to Fishing and Fishing Communities:** a. BOEM will require lessees to have an independent fisheries liaison that is responsible for the coordination and communication of site activities with affected commercial and recreational fishing communities and harbor districts, including development and implementation of survey plans and SAPs. The fishing liaison will work with fishing communities and the harbor districts to coordinate survey and other activities and to develop a process for reporting and remediating conflicts between mariners and survey vessels/equipment. Lessees and fishing communities (including harbor districts) may choose to develop a signed/formal agreement that can be amended to reflect subsequent analysis and discussion between the fishing industry (entity as described below) or harbor district and developers on mechanisms for addressing impacts to commercial fishing.

b. BOEM will require lessees to submit reports on process, outreach, and outcomes of engagement with fishing communities and harbor districts and will provide copies of these reports to the Commission. All documents and analysis will be made publicly available and readily accessible, to the maximum extent practicable.

c. BOEM will work with the Commission and other state and federal agencies to develop and facilitate a working group consisting of fishing organizations and representatives from different regions/ports of the state, representing different fisheries and gear types, and in both the commercial and recreational sectors, lessees and state and federal agency staff. The working group will develop a statewide strategy for avoidance, minimization and mitigation of impacts to fishing and fisheries that prioritizes fisheries productivity, viability, and long-term resilience. The strategy should include protocols for communication, best practices for surveys and data collection, a methodology for comprehensive socioeconomic analysis of direct and indirect impacts to fishing, a framework for compensatory mitigation for unavoidable impacts, and a Fishing Agreement template that memorializes the elements of the strategy. The strategy should include specific consideration for those fisheries that are disproportionately and/or directly affected by offshore wind development.” (p. 16)

The Commission found that these conditions and its Consistency Review are not definitive identifications of potential impacts on commercial fishing (p. 73):

“In short, the information and analysis presented here and in CD-0001-22 should be viewed as a starting point. The data discussed in this document reflect information about fisheries more broadly but cannot

fully capture the nuance of fisheries operations for individual operators. Doing this will require a robust social and economic analysis to understand what the full suite of impacts are and what measures can be implemented to avoid, minimize, and where necessary, mitigate impacts to the commercial and recreational fishing industry of California.”

The Trustees 'Committee shall be involved in the review of all phases of offshore wind projects to assist in the preparation of the “robust social and economic analysis” identified by the Coastal Commission.

## **I. BOEM DUTIES TO PRESERVE COMMERCIAL FISHING ACTIVITIES:**

“Under subsection 8(p)(4) of OCSLA, BOEM must ensure that any activity under this subsection is carried out in a manner that provides for, among other goals, safety, protection of the environment, conservation of the natural resources of the OCS, prevention of interference with reasonable uses (as determined by the Secretary) of the [U.S.] exclusive economic zone, the high seas, and the territorial seas, and consideration of any other use of the sea or seabed, including use for a fishery. BOEM also has statutory obligations under NEPA (42 U.S.C. §§ 4321 et seq.) to evaluate social and economic impacts of a potential project. Under BOEM’s regulations, BOEM must coordinate with relevant Federal agencies, including those agencies involved in planning activities that are undertaken to avoid conflicts among users and to maximize the economic and ecological benefits of the OCS (30 CFR 585.102(a)(5)).”<sup>[3]</sup>

Each Wind Project Developer is required to submit plans (SAP, COP, GAP) which protect commercial fishing activities and:

1. “must demonstrate that” the Developers “have planned and are prepared to conduct the proposed activities in a manner that does not unreasonably interfere with other uses of the OCS and uses best management practices.” Source: 30 CFR 585.606(a)(3) & (6) (SAP); 30 CFR 585.621(c) & (f) (COP); and 30 CFR 585.641(c) & (f) (GAP);
2. “must submit” with their plans “a list of agencies and persons with whom” they “have communicated, or with whom [they] will communicate, regarding potential impacts associated with [the Developer’s] proposed activities. This description must contain the contact information and the issues discussed. Source: 30 CFR 585.610(a)(13) (SAP), 30 CFR 585.626(b)(17) (COP), 30 CFR 585.645(b)(14) (GAP);
3. “must submit additional information requested by BOEM.” Source: 30 CFR 585.610(a)(16) (SAP), 30 CFR 585.626(b)(23) (COP), and 30 CFR 585.645(b)(16) (GAP);
4. “must provide a description of the social and economic conditions of commercial and recreational fisheries that could be affected by the activities proposed in the plan.” Source: 30 CFR 585.611(b)(7) (SAP); 30 CFR 585.627(a)(7) (COP); and 30 CFR 585.646(b)(7) (GAP);
5. “BOEM may require additional information during the review of the plans and failure to provide the information may result in the disapproval of the plan.” Source: 30 CFR 585.613(d) (SAP); 30 CFR 585.628(e) (COP); 30 CFR 585.648(d) (GAP);



6. “must provide proposed measures for avoiding, minimizing, reducing, eliminating, and monitoring environmental impacts.” Source: 30 CFR 585.610(a)(8) 30 CFR 585.626(b)(15).<sup>[4]</sup>

<sup>1</sup> Terms are defined in the Bylaws.

<sup>[2]</sup> “Community Benefits Agreement, Castle Wind Morro Bay Offshore Wind Farm Project,” November 29, 2018, Section 4 (a), pp. 5-6.

<sup>[3]</sup> June 23, 2022 Draft “Guidelines for Mitigating Impacts to Commercial and Recreational Fisheries on the Outer Continental Shelf Pursuant to 30 CFR Part 58”.

<sup>[4]</sup> Id. Page 3.