

**Nine Atlantic Coast States Scoping Document:
Framework for Establishing a Regional Fisheries Compensation Fund
Administrator for Potential Impacts to the Fishing Community from
Offshore Wind Energy Development**

December 12, 2022

Nine Atlantic Coast States (the States) of Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Maryland, and Virginia are working together to advance and ultimately implement a consistent regional approach for administration of financial compensation paid by developers to address adverse effects of offshore wind (OSW) energy development on the U.S. Eastern Seaboard's (i.e., Atlantic Coast) commercial and for-hire¹ recreational fishing industries in the absence of current federal authorities for doing so. The States are requesting input from members of the commercial and for-hire recreational fishing industry, renewable energy industry, corporate and financial management, and others with direct involvement in issues regarding OSW energy siting and development, as well as interested members of the public, to help design an effective and efficient way to accomplish this important shared objective.

Background

Overview of Issue

The U.S. has established an ambitious goal to implement renewable energy as part of an effort to increase energy independence and to mitigate the changes in climate. To help achieve this national goal as well as individual state renewable energy goals, coastal states have committed to include OSW as part of their future energy plans. Because coastal states are reliant on seafood as part of their complex economic portfolios, they are committed to ensuring sustainable seafood and domestic food security be maintained into the future. The junction of OSW and fishing is a complex intersection where solutions are needed to advance the long-term sustainability of both industries.

The hierarchy for effective coexistence between the OSW and fishing industries is built on four key principles described below in order.

1. Avoid potential impacts to fisheries and fishing industries;
2. Attempt to minimize impacts when avoidance is not possible;
3. Where impacts cannot be fully avoided or minimized, implement mitigation measures;
and

¹ For-hire includes party and charter recreational fishing businesses

4. Provide financial compensation to affected entities as the final step if other forms of mitigation cannot resolve the impact.

Although compensation is the last step to consider regarding this mitigation hierarchy, the States agree that the availability of this option is vital to ensuring coexistence of robust and dynamic OSW energy and fishing industries. Experience to date with siting and development of OSW energy in the region indicates that a standardized framework is necessary to ensure compensation in addressing aggregated adverse economic effects on fisheries equitably and efficiently.

Fisheries compensation has been utilized as a mitigation approach in other countries as well as the United States (BOEM 2021a; DEA 2018; FLOWW 2015;). While there are currently no overarching regulatory mechanisms for compensation, two states have already required developers to establish compensatory mitigation funds to offset potential impacts on the fishing industry and to fund training, technology updates, and research aimed at better understanding those potential impacts (MACZM 2020; RICRMC 2021). Collectively, such programs have established the beginnings of how these types of compensatory mitigation strategies might work within the U.S. OSW industry.

Nine Atlantic Coast states have collaborated to develop the foundation to establish an overall compensation framework and governance structure for a Regional Fund Administrator to manage claims for fishery compensatory mitigation as it relates to OSW construction and operations. The States are undertaking this effort with the acknowledgement that additional federal legislative or administrative actions may be necessary for some of the concepts, ideas, and proposals being put forth in this Scoping Document to be fully implemented.

OSW Development on the U.S. East Coast

Worldwide, the demand for renewable energy is rising because of the increased desire by countries to find alternative, clean energy sources to reduce carbon emissions caused by the combustion of fossil fuels and the associated impacts expected from climate change. OSW development is of particular interest due to the consistency and speed of winds off the coast and its energy-source proximity to densely populated coastal municipalities. OSW energy generation has been around globally since the first projects came online in Europe in the early 1990s. The first OSW farm, Vindeby Offshore Wind Farm, was installed off Denmark in 1991, and the industry has been on a rapid increase in scale and efficiency over the last thirty years. As of 2022, Europe leads the world in OSW generation with 28,363 megawatts (MW) generated from 123 wind farms (WindEurope 2022). European countries with installed capacity for OSW include Belgium, Denmark, Finland, France, Germany, Ireland, Netherlands, Norway, Portugal, Spain, Sweden, and the U.K. (WindEurope 2022).

Until recently, there was no federal goal for OSW in the United States. However, in 2021, the Biden Administration established a target of 30 gigawatts (GW) of OSW capacity by 2030. In early 2022, the Administration announced a new and separate goal to deploy 15 GW of additional installed floating OSW capacity by 2035, which builds on the Administration's goal to deploy 30 GW of OSW by 2030. States across Southern New England and the Mid-Atlantic regions of the U.S. East Coast currently have over 43 GW in OSW energy goals, making these the fastest-growing areas for OSW development in the country. The current Atlantic OSW lease

areas from Massachusetts to South Carolina are shown in **Figure 1** below. Additional goals for the Gulf of Maine are expected to raise this goal further in a region where many areas suitable for OSW energy development are also utilized by other ocean users, including both commercial and for-hire recreational fishing (BOEM 2022).

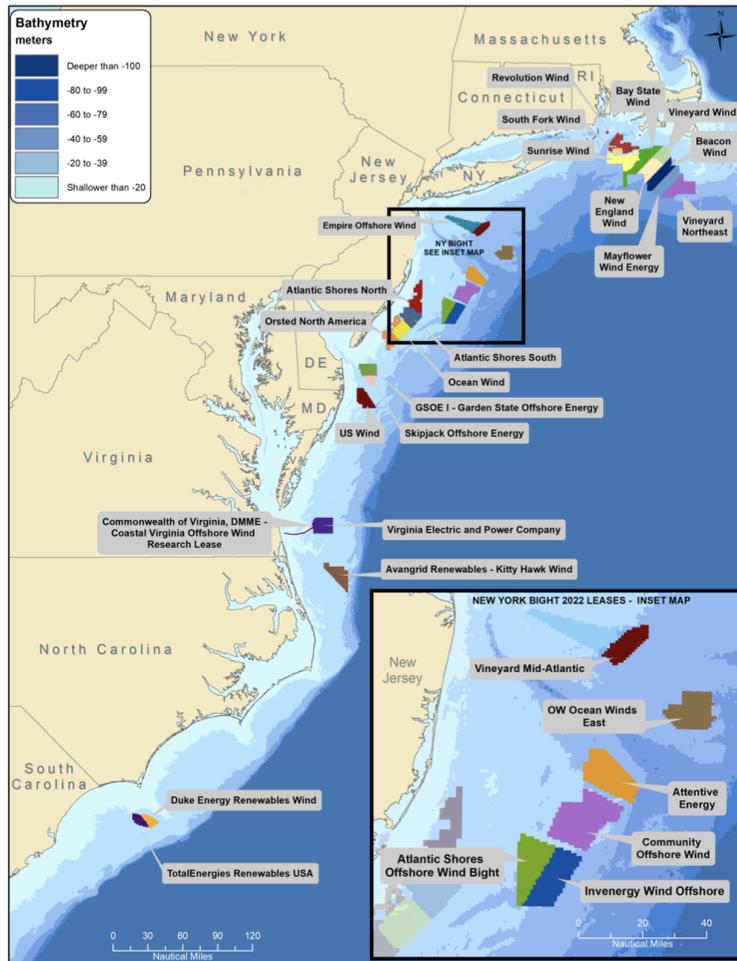


Figure 1: Atlantic OSW lease areas in the Southern New England and Mid-Atlantic regions (BOEM, n.d.).

Currently, the United States has limited deployment of OSW with just two demonstration-scale OSW projects in operation: Ørsted’s Block Island Wind Farm (30 MW) and Dominion’s Coastal Virginia OSW pilot project (12 MW). However, several projects are planned to start construction in 2023. The American Clean Power Association (ACP)² estimates that by 2030 the OSW energy industry is expected to invest between \$28 and \$57 billion into the U.S. economy. With an expected annual economic output of \$12.5 to \$25.4 billion per year, depending on installation levels and the proportional supply chain growth during that time, project development,

² The “American Clean Power Association (ACP)” was formally known as the “American Wind Energy Association (AWEA)”;

construction, operations, and decommissioning efforts within the industry are expected to support between 45,000 to 83,000 jobs in the United States (AWEA 2020).

Status of Fisheries Socio Economics

The commercial fishing industry is a key part of both the economy and culture in much of the coastal United States, and the communities on the East Coast are no exception. According to the 2022 National Oceanic and Atmospheric Administration (NOAA) Fisheries Economics of the U.S. report, the seafood industry supported 1.2 million full- and part-time jobs and generated \$165.5 billion in sales, \$43.4 billion in income, and \$67.6 billion in value-added impacts nationwide as of 2019 (NOAA Fisheries, 2022a). Here, the commercial fishing industry not only directly supports those fishing, processors and dealers, but also influences multiple community and state-level tourism, service, and marine infrastructure support industries. Less tangibly but importantly, the commercial fishing industry is integral to community identity, sense of place, and historic traditional use. The combined commercial fishing effort for coastal states from Maine to South Carolina accounted for 1.2 billion pounds of seafood, with a landed value of \$2.1 billion in 2019 (NOAA Fisheries 2022c).³ The year 2019 was chosen to reflect the most recent data available for both fishing landings and jobs data because it reflects the state of the industry before the impacts due to the COVID-19 pandemic and its ramifications on the supply-chain.

From Maine to South Carolina, the commercial fishing industry supports 360,000 jobs, including full-time and part-time careers supported directly or indirectly by the sale of seafood or purchases of inputs to the commercial fishing industry (NOAA Fisheries 2022b). The five states that produce most commercial fishing-related jobs in the region are Massachusetts (148,000), followed by New Jersey (52,000), Maine (46,000), New York (42,000), and Virginia (24,000).

The combined recreational fishing effort for coastal states from Maine to South Carolina accounted for \$3.1 billion in added value to this region in 2019 (NOAA 2022b). The recreational fisheries in this region brought in 156 million pounds of fish for personal consumption in 2019 (NOAA 2022c). Additionally, from Maine to South Carolina, the recreational fishing industry supports 46,500 jobs (NOAA 2022b). The five states that produce the most recreational fishing-related jobs in the region are North Carolina (16,000), followed by South Carolina (9,100), New York (4,700), New Jersey (3,900), and Virginia (3,100).

Extensive fisheries landing data can be found in NOAA Fisheries' annual Fisheries of the United States reports⁴. Additionally, estimated socioeconomic impacts of Atlantic OSW development can be found on NOAA Fisheries' Socioeconomic Impacts of Atlantic OSW Development page.⁵

³ <https://www.fisheries.noaa.gov/resource/document/fisheries-united-states-2020>. The report was published in 2022 using the most recently available data which is 2020 data.

⁴ Ibid.

⁵ <https://www.fisheries.noaa.gov/resource/data/socioeconomic-impacts-atlantic-offshore-wind-development>.

Offshore Wind Related Fisheries Compensation in the United States

Overview of current federal and state policy

While other countries have used financial compensation as mitigation for damages to fishing gear and lost fishing opportunities due to the development and operation of OSW, the United States currently lacks a standardized approach to fisheries compensatory mitigation that is consistently applied to all OSW projects. As the Bureau of Ocean Energy Management (BOEM) notes in its draft *Guidelines for Mitigating Impacts to Commercial and Recreational Fisheries on the Outer Continental Shelf Pursuant to 30 CFR Part 585* (BOEM 2021b): “There are no existing Federal policies or laws explicitly and specifically requiring compensation of economic loss from displacement attributed to offshore energy installations.” Moreover, coastal states’ laws and policies concerning review of OSW projects differ. For example, authority under the Coastal Zone Management Act (CZMA) is limited. NOAA has advised that coastal states cannot require a federal agency or applicant to provide compensatory mitigation through CZMA reviews, although states may recognize such mitigation agreed to with a developer as suitable to address coastal effects. Consequently, CZMA review on its own is not a reliable means for the development and enforcement of fisheries compensation packages.

BOEM, however, does have independent authority to impose mitigation measures on entities that have an approved Construction and Operations Plan (COP). BOEM’s regulations authorize the imposition of terms and conditions on plans it approves, which may include compliance with mitigation measures (see, e.g., 30 C.F.R. 585.633(a), 585.633(b)(2), and 585.628(f)). Notably, BOEM may require mitigation measures as conditions of COP approval that are in addition to applicant proposed measures and supported by findings in the project-specific environmental review required by the National Environmental Policy Act (NEPA).

Some states have used or are considering use of their various authorities to address potential adverse economic effects on the fishing industry. Thus, a state, if it has the authority to do so, could require an applicant to provide compensation that could be used to supplement those not covered by BOEM in approving a COP to address reasonably foreseeable effects identified through the NEPA review process.

Experience to date

To address fisheries and fishing impacts identified through review of OSW energy projects to date and in consultation with affected states, developers proposed and BOEM has approved different types of fisheries mitigation funds.⁶ The methodology to calculate the resulting mitigation packages differed by project and by state. These agreed-to mitigation packages included funds to offset direct economic impacts to the fishing industry, funds for research programs to better understand how fishing will be affected by OSW development, innovation funds to support adaptive fishing practices, and navigation enhancements and safety training to support the coexistence of the fishing and OSW energy industries. BOEM’s NEPA review and resulting Record of Decision incorporated these findings and the developer proposed funds.

⁶ For instance: BOEM. 2021a. *Record of Decision Vineyard Wind 1 OSW Energy Project Construction and Operations Plan*.

BOEM's COP approvals included enforceable conditions of approval for compensatory fisheries mitigation funds. This case-by-case, state-by-state approach resulted in differences for each project and in each state regarding data inputs, economic exposure methodology, and stakeholder engagement.

Individual developers have also established gear loss compensation funds to reimburse equipment losses and, in some cases, the resultant lost income from gear loss. However, inconsistencies between gear loss programs and approaches also exist.

Summary

OSW fisheries compensatory mitigation to this point has been variable by project and state due to different state jurisdictions and authorities and developers with different approaches regarding collection, administration, and disbursement of identified compensation funds. The creation of project-specific funds and administrators means fishermen may need to seek compensation from multiple entities under different rules. These differences emphasize the need to consistently address impacts to fishing industries regardless of homeport or state regulatory authorities and to create a unified approach to administering mitigation funds. The States are seeking ideas on how fund administration may best be done equitably and efficiently.

Call to Action

The States recognize the importance of developing OSW as a clean and robust renewable regional energy resource to help transition away from reliance on fossil fuels and retaining thriving fisheries and the sustainable economic benefits they have long provided as the backbone and integral part of the identity of many coastal communities. Accordingly, the States have been working together to develop a consistent regional approach for administration of financial compensation paid by developers to address adverse effects of OSW energy development on the U.S. Eastern Seaboard's (i.e., Atlantic Coast) commercial and for-hire recreational fishing industries. This approach is intended to serve all impacted along the Atlantic Coast, regardless of whether a fishing entities' particular state did or did not participate as part of the nine States' effort.

In June 2021, the States sent a letter to the Biden Administration expressing that the expansion of the OSW industry creates an unprecedented opportunity for the United States to capture significant economic development activity and build equity in coastal communities while improving air quality and increasing the options for energy diversity. The States stressed the importance of federal-state partnerships in realizing this opportunity and emphasized the shared federal-state responsibility to address critical areas of port infrastructure, permitting, research and development, fisheries support, and natural resource restoration and mitigation (Joint Governors Letter, 2021).

The States established a States working group that met periodically with BOEM and NOAA to inform them of the work. Based on these initial conversations, in November 2021 the States drafted a letter to BOEM to encourage the use of a standardized fisheries compensatory mitigation framework in COPs and Environmental Impact Statements (EIS) (Regional State Letter to BOEM, 2021). The States believe this approach would:

- Provide a uniform framework which is consistent, equitable, and transparent;

- Support increased efficiency and enhanced coordination with the potential to reduce uncertainty for OSW developers, states, regions, and fishing communities; and
- Encourage and provide a financial incentive for OSW developers to design projects in accordance with the mitigation hierarchy per the Council of Environmental Quality (CEQ) regulations (40 CFR 1508.1(s)).

In response to the States' letter, BOEM published a Request for Information (RFI) to obtain input from the public, especially the fishing community, on avoiding, minimizing, and compensating for impacts from OSW energy projects to commercial and for-hire recreational fisheries (BOEM 2021b). The comment period on the RFI closed on January 7, 2022, and a Draft Mitigation Guidance (BOEM Guidance) was released in June 2022 (BOEM 2022).⁷ This draft guidance outlines a basic framework for developers to follow as they develop their OSW projects to best avoid, minimize, and mitigate potential impacts on the fishing community.

Nine States' Objective: Establish a Regional Fund Administrator for the Atlantic Coast

With the release of the Draft Fisheries Mitigation Framework, BOEM established that they can require the identification of funds for fisheries compensation under the Outer Continental Shelf Lands Act (OCSLA) if there is a need demonstrated through the NEPA process. BOEM furthermore notes in their draft guidance: "Funds may be established at the project level, company level (multiple projects), or regional multi-lessee level." However, BOEM has stated that they lack the regulatory authority to establish or administer a fund that would hold and manage the compensation funds. BOEM stated in the overview of its Draft Fisheries Mitigation Framework: "BOEM lacks legal authority to create or oversee a central funding mechanism for compensatory mitigation. BOEM also lacks authority to require contributions to a particular compensation fund, absent a previous commitment or obligation for the lessee to do so." (BOEM, 2022)⁸

Recognizing this gap in authority, the States are collaborating to advance the establishment of a Regional Fund Administrator that is fair, equitable, and transparent for all Atlantic Coast commercial and for-hire recreational fishing entities and developers, regardless of where they port from or land their catch. This could serve as a single mechanism to file claims for displacement or losses from multiple projects adversely affecting fishing. To accomplish this, the States are operating with the following overarching goal:

To establish a credible regional administrator for managing and distributing fisheries compensatory mitigation funds for OSW for the U.S. eastern seaboard.

⁷ https://www.boem.gov/sites/default/files/documents/renewable-energy/DRAFT%20Fisheries%20Mitigation%20Guidance%2006232022_0.pdf

⁸ https://www.boem.gov/sites/default/files/documents/renewable-energy/Overview%20Fisheries%20Mitigation%20Guidance%2006232022_0.pdf

Process Identification

To advance the development of a Regional Fund Administrator, the States identified two working groups to discuss key topics related to fund administration:

- The Governance, Funding, and Engagement Working Group focuses on fund governance options, funding needed to establish an administrator, and stakeholder engagement process options.
- The Technical Working Group focuses on issues of losses and costs, eligibility, data integrity, and logistics of a claims and appeals process.

The workstreams of these two working groups have been informed by the public comments⁹ BOEM received on their Draft Fisheries Mitigation Guidance Document (BOEM 2022), including those raising concerns about the adequacy of the guidelines for fully accounting for all costs and losses.¹⁰ The States' working groups understand that BOEM's Fisheries Mitigation Guidance will largely inform developers on how to address impacts that otherwise cannot be avoided, minimized, or mitigated, under BOEM's independent authority to impose mitigation measures on entities that have an approved COP. Such fisheries compensatory mitigation would be paid into a yet-to-be-defined fund, but the guidance provides very limited direction on how such funds are administered and how monies are to be paid to those seeking claims for compensation. Thus, the States' focus is on a Regional Fund Administrator and how that administrator might manage the process for paying affected parties.

Figure 2 below seeks to characterize the scope and focus of this States' effort.

⁹ <https://www.regulations.gov/docket/BOEM-2022-0033>

¹⁰ Public comment concerns included but were not limited to "allotted time period" for when impacts could occur, shoreside multiplier being an underestimate, proposed "cumulative impacts" not being fully addressed, and assumptions that all fisheries can transition and full co-existence is possible regardless of gear type, ways of fishing, and size of vessel. For purposes of this Scoping Document, "cumulative impacts" are defined as in 32 CFR § 651.16. NEPA analyses must assess cumulative effects, which are the impacts on the environment resulting from the incremental impacts of the actions when added to other past, present, and reasonably foreseeable future actions.

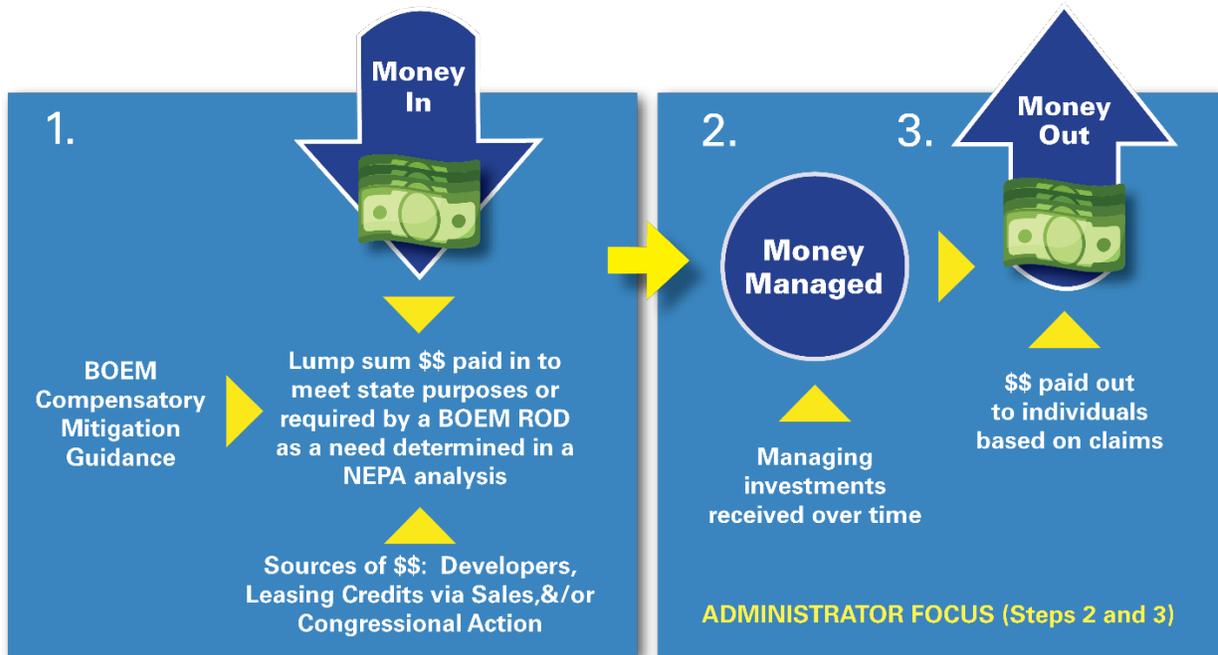


Figure 2: Relationship of Compensatory Monies into and out of a Fund

How compensatory mitigation is determined is not the focus of this Scoping Document, but the relationship between those funds and anticipated payments is important to acknowledge. The States note that any compensation funds associated with individual OSW projects would be the foundational source for creating a Regional Fund Administrator. Ideally, the amount paid into the fund to address economic impacts on fisheries, as determined in accordance with a methodology in BOEM’s Guidance and any other applicable requirements (e.g., under other federal or state authorities) must be commensurate with, adequate to, and within the requirements of that identified funding to address what monies can be paid out in individual claims.

The States acknowledge that it is not clear at this time that funds that would be paid under BOEM’s Guidance would be solely sufficient to address all impacts to fisheries that may result from development of OSW projects, for instance, those not foreseeable when the NEPA review is conducted. Thus, additional funding options may need to be considered. See just below in *Intended Purpose* for further considerations on this issue.

Separately from this RFI, the question of monies into the fund are being addressed in several ways. BOEM has issued draft guidance on how to determine fisheries compensatory mitigation appropriate for a proposed OSW project and has included payment of such compensation as mitigation to address identified adverse impacts on fisheries in the Record of Decision for OSW projects it has reviewed and approved. Individual states have or are engaging in reviews of specific proposed projects and have used or are considering use of state laws and policies on public utilities’ purchase of energy, CZMA authority, or other authorities, to help ensure that the total compensation dollars paid is commensurate with the adverse effects on fisheries not

otherwise mitigated. Also, there are discussions among the OSW industry, some states, and elected officials about the potential for Administration and/or Congressional action to authorize use of some of the money paid by a developer for the federal lease for its OSW project for fisheries compensatory mitigation.

Due to the evolving process to define and establish compensatory fisheries mitigation, the States recommend that action is needed to establish an administrator of those funds. Limited examples of agreements exist to provide specific estimates of expected total compensatory mitigation funds collectively from all OSW projects along the Atlantic Coast at this time. However, the States assume that the total dollar value for a fund for the Atlantic Coast based on general review of the current, albeit limited number of agreements, could be in the \$100 millions of dollars.

SCOPE OF FRAMEWORK TO ADVANCE A REGIONAL ADMINISTRATOR

The States have identified and scoped out key topics and subtopics related to establishing a Regional Fund Administrator, described below. As noted in the RFI accompanying this scoping document, the states are inviting comment and may make changes to or refine this scope based on consideration of those comments received.

1. Intended Purpose of a Compensation Program

The States propose that the initial intended purpose of compensation would be to compensate for losses and increased costs incurred by individual fishing industry entities from impacts from OSW development for the duration of said losses and increased costs as borne by the industry.

The States propose this in keeping commensurate with the likely funds and amounts established under BOEM's Draft Fisheries Mitigation Guidance. The States recognize that there could be additional impacts assessed in State reviews and impacts not assessed in the NEPA document since NEPA focuses on reasonably foreseeable impacts only. Thus, due to unanticipated implications, funds based solely on BOEM guidance could be depleted before all valid claims are paid and this remains an uncertainty that will need to be addressed. In addition, the degree to which specific gear types are compatible with OSW, with what foundation types, at what turbine distance, and so forth is not known at time. Thus, the current draft BOEM Draft Fisheries Mitigation Guidance may not be sufficient to cover all losses and costs borne by the fishing industry or segments of it over the life of an OSW project¹¹. The States also recognize that depending on the dollars paid in and how the compensated claims are filled, funds may not be depleted through the claims process and excess or surplus monies that remain will require a determination of allocation. The States note that if there are excess funds, their distribution to other fishery-related uses would need to be determined. The States also conclude that if the BOEM's Fisheries Mitigation Guidance addresses for-hire recreational fishing losses and costs

¹¹ See public comments on this matter at <https://www.regulations.gov/docket/BOEM-2022-0033/comments>

in its recommended calculations, then for-hire recreational fishing could be compensated, along with the commercial fishing industry, in similar but appropriate fashion.

The States recognize the importance and high need for additional transition and resilience funds that would be distributed to help the fishing industry or specific fisheries/gear types of the industry transition adapt to the long-term presence of OSW on traditional fishing grounds. Resilience and transition funds would not be based upon demonstrable losses from impacts but rather support for the fishing industry to “keep fishing” considering a new large-scale ocean use. Some examples of such fundable activities might include but are not limited to:

- Cooperative research;
- Investments in supporting infrastructure (improvements in slips and docks, cold storage facilities, fuel docks, ice machines, etc.);
- Gear and vessel innovation (and trials for testing new fishing methods);
- Support for participation in management process;
- Funding to offset devaluation of businesses, including vessels, processing, permits;
- Permit banks;
- Resource enhancement; and
- Scholarship and internships.

Since it has not been determined how such additional monies can be secured or under which authorities this would exist, the States are prioritizing that the Regional Fund Administrator focus initially on individual compensatory mitigation based on claims due to losses or increased costs. However, the Regional Fund Administrator could expand its scope to fund transition, adaptation, and resilience if additional monies become available or as authorities are identified. This is a characteristic that the States could consider as this process moves forward to select a Regional Fund Administrator. The States also recognize that at a future point, the Regional Fund Administrator might seek to coordinate with or integrate funds already established for OSW projects in Massachusetts and Rhode Island.

2. Anticipated Losses and Costs

The States propose that an important function of the Regional Fund Administrator is to provide compensation to individuals and businesses in the fishing industry for losses and costs associated with OSW development. The States have identified at least some potential types of losses and costs for which compensation could be provided, as shown in **Table 1** below, though the States have not determined if sufficient data would be available to justify each of such losses and costs for which fishery nor if the compensatory mitigation funds from OSW projects will be sufficient to cover all quantifiable losses and costs. Gear loss and associated lost fishing effort are not included in **Table 1** since several gear loss programs are already established and being managed by the OSW developers themselves. However, the Regional Fund Administrator could undertake such efforts in the future, if desired and practicable. The development of OSW in U.S. waters is early in its development and there may be unanticipated and unforeseen losses or costs at this time. Thus, the Regional Fund Administrator will need to have the

flexibility to assess claims and potentially address new associated new types of losses and costs and adapt the program accordingly.

The States recognize that the Regional Fund Administrator will have to consider and address a range of costs and losses to different fisheries, geographic regions, gear types, and shoreside businesses. The States have discussed that some kinds of fishing and fishing gear may be compatible with OSW development and require compensation only during construction when fishing may not be allowed in the project areas. Some fishing and gear types may require additional funds beyond construction in the shorter term so the industry could adapt its fishing practices. Transitions may require compensation for losses while making changes, longer-term reductions in catch due to changes in fishing practices or gear types, the retrofitting of gear and vessels, and training of captains and crew. Additionally, some fishing could be incompatible with OSW altogether given fishing practices, gear type, and other factors giving rise to questions surrounding long-term compensation. The degree to which each of these scenarios plays out is not yet fully understood, but the States recognize flexibility is needed for the Regional Fund Administrator to adjust to future conditions. Please note that **Table 1** does not address the non-monetarily valued costs that changes in ocean use may impose on families, communities, and local fishing cultures.

Please note that the term “permit” is used in **Table 1** and the rest of the document, but is interchangeable with the term “license,” as terms vary by state.

Table 1: Potential losses and costs to be considered for compensation for project areas, including transmission/cable routes affected by OSW development

Potential lost revenue due to:
<ul style="list-style-type: none">• Displacement from a fishing area• Surveys of the lease or project areas• Pre-construction• During construction• Post-construction (operations and maintenance)• Decommissioning• Up or downstream effects to shoreside fishing businesses• Transition from highly productive to less productive fishing ground• Reduced catch in lease areas• Devaluation of fishing business (vessel, shoreside, etc.)• Permit devaluation

Potential increased costs due to:

- Need to acquire new or modified gear
- Need to acquire new or modified navigation equipment (e.g., radar)
- Increased fishing effort (i.e., slower towing in an array, more time to haul traps within an array, etc.)
- Transit time/cost around arrays or to new fishing areas
- Increases in insurance costs
- Dockage and offloading fees, as there is potential for competition for limited space in ports and harbors to increase.¹²

How private insurance claims may relate to the compensation fund is another question that needs further consideration. Insurance held by either a fishing business or OSW project, or both, may cover certain kinds of damages; for example, those related to collisions and allisions between a fishing vessel and a cable or other OSW infrastructure. Insures, on the other hand, are highly unlikely to cover losses associated with dislocation from fishing areas. The Regional Fund Administrator will need to establish processes to ensure that no party seeks to file duplicative claims for losses by seeking insurance claims and then also payout through a compensatory mitigation fund.

3. Regional Geographic Scope

The States propose implementing a regional approach to fund administration under which a single Regional Fund Administrator develops claims processes and distributes funds for all or most compensatory fisheries mitigation dollars paid to address impacts to fisheries from construction, operation, and decommissioning of OSW projects along the U.S. Atlantic Seaboard.

The States believe that such an approach will increase fairness, transparency, and efficiency across projects and states, lower administrative cost through scale, provide greater consistency for all, streamline processes and procedures, address the aggregating impacts of changes in ocean use from OSW, and aid in helping the fishing industry adapt to fishing with OSW projects in the water.

Given the differences in fisheries, fishing industries, and the States' interests in the Gulf of Mexico and the West Coast, as well as the sheer complexity of all U.S. coastal states engaging in this kind of organizing effort, the States are not seeking a national approach at this time but

¹² This may include revenue loss to the extent transient fishing operations are unable to secure berthing or other shoreside facilities in those ports and harbors

recognize this effort could be the foundation to inform the Regional Fund Administrator in other areas.

4. A Unified Regional Fund

The States propose that the Regional Fund Administrator distribute compensation based on a common set of rules and procedures applicable to OSW energy projects for the region rather than a project-by-project approach to achieve efficiency, economies of scale, and account for the regional nature of fishing.

The States recognize that the fisheries compensatory mitigation paid to date is now held by more than one bank or comparable financial institution. The States propose that the Regional Fund Administrator be authorized to initiate and accept transfer of this money from future and if possible, current fund holders to the regional compensation fund for distribution using a common and consistent approach. The States recommend that developers, to the extent possible, use one or a limit number of fiduciaries to minimize the transaction costs of a Regional Fund Administrator having to develop and legally prescribe the relationship between itself and numerous fiduciaries.

The States have considered that a Regional Fund Administrator might function as manager of multiple approaches. This might include a single Regional Fund Administrator who would manage a fund of funds, meaning that funds for various OSW projects would be managed by a single administrator but would be distributed based on different rules established by each payor. This is like how many community foundations operate, serving as single manager of multiple family and other funds, each with their own rules and goals. However, the States have not endorsed this approach because it would likely decrease efficiency and fairness above today's status quo of project-by-project approaches.

5. Key Qualities of an Administrator

The central function of the Regional Fund Administrator would be to manage and distribute fisheries compensatory mitigation funds to address impacts of OSW energy development along the East Coast of the United States. The States propose that the Regional Fund Administrator be designed, and its functions carried out to ensure:

- Strong fiduciary control;
- Credibility in the eyes of stakeholders;
- Rigorous conflict-of-interest policies;
- Competency and efficiency in managing funds;
- Sustainability for the foreseeable future;
- Timeliness and maximization of funds paid out;
- Minimization of administrative costs and burdens;
- Prevention of waste, fraud, and abuse;
- Extensive fishery industry experience, knowledge, and understanding;

- Effective collaboration with stakeholders; and
- Ability to provide technical assistance to stakeholders.

6. Key Tasks of an Administrator

Regional Fund Administrator tasks identified by the States are outlined in **Figure 3** below.

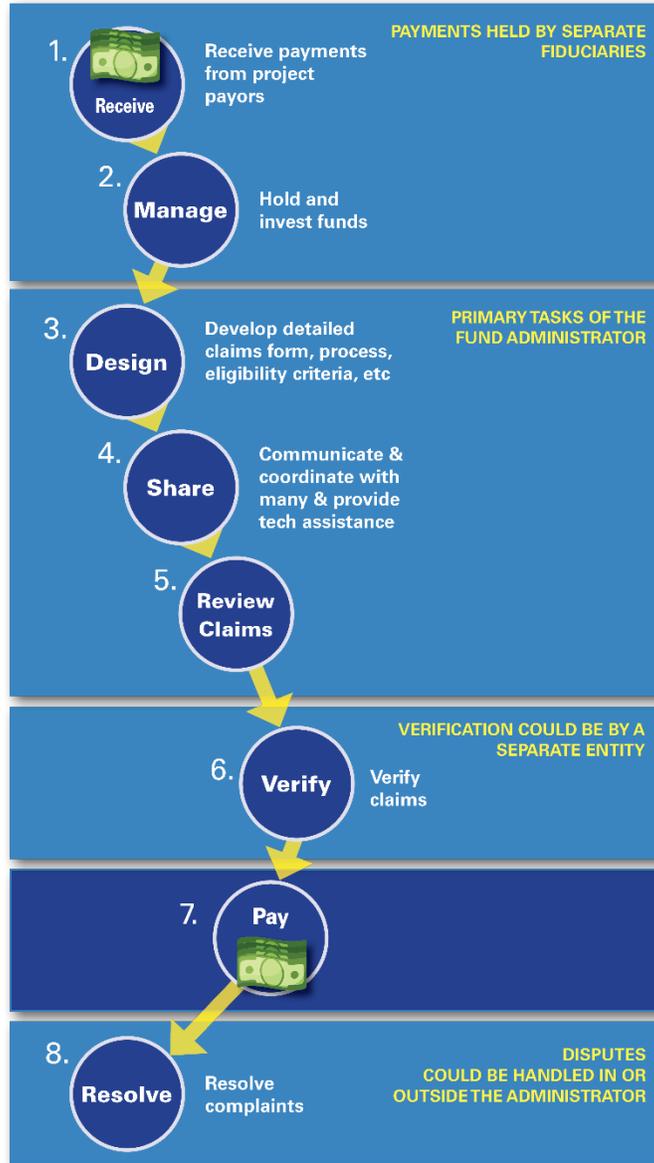


Figure 3: Potential Tasks for A Regional Fund Administrator

In the context of the tasks outlined in **Figure 3**, the States suggest the following of the Regional Fund Administrator:

- Funds in aggregate would be held by one or as few independent fiduciary institution(s) as possible (Holders of Funds such as banks or investment funds).

- The Regional Fund Administrator would have the authority to enter contractual arrangements with Holder(s) of Funds to transfer monies to the Regional Fund Administrator in some periodic or other predetermined and agreed upon manner, as needed to pay eligible claims for compensation and costs related to administration of the fund. The Regional Fund Administrator will be subject to payor conditions for release of funds (timing of release, for instance).
- The Regional Fund Administrator would primarily be responsible for designing detailed claims processes to review, and for verifying and qualifying claims, and paying claims to eligible claimants. Verification of claims would likely take place by a separate entity with ready access to state and federal fisheries data or deep knowledge of fisheries.¹³
- The Regional Fund Administrator would need to share information about the Fund, how to access the claims process, and provide technical assistance to claimants.
- The Regional Fund Administrator will develop an appeals process, defined under clear and likely limited conditions. This process could be managed by the Regional Fund Administrator or separately by another entity.

The States have considered two possible options for how to take the next steps in developing the detailed eligibility criteria, claims process, review timelines, forms, and other related processes, described below. Either of these options would require robust stakeholder engagement and inputs from interested parties.

- *Option 1: Design First, Hire Second.* The States, in consultation with the fishing industry and OSW developers, would complete the detailed design and process work for establishing the Regional Fund Administrator prior to the Regional Fund Administrator being selected. The Regional Fund Administrator would then have a prescribed and detailed set of tasks to accomplish and serve primarily in a ministerial or trustee role, with limited decision making with respect to how to manage the process. This approach would require sufficient funds and expertise to establish such a complex entity.
- *Option 2: Hire First, Design Second.* The States would establish a final or interim governing body which, in consultation with the fishing industry and OSW developers, would then select and hire the Regional Fund Administrator. In turn, the Regional Fund Administrator would work with the States, fishing, and OSW industries, to finalize details of how the compensation fund would operate in accordance with the basic approach outlined in this Scoping Document and as refined based on consideration of responses to this Scoping Document's associated RFI. Under this option, the Regional Fund Administrator would have a more significant - if not lead - role in designing how the compensation fund would be managed.

¹³ One developer, for instance, has contracted with a reputable fishing association to verify claims given their extensive knowledge of fishing, fishing records, and fishing data.

7. Technical Considerations for Fund Administration and a Compensation Framework

The primary technical responsibilities of the Regional Fund Administrator include determinations of funds eligibility by verifying claims, details for which are described below.

7.1. Eligibility for Compensation

Regarding eligible claimants, the States propose that permit holders that can prove their eligibility would be compensated for qualified losses and costs. In addition to permit holders and vessel crew members, shore-side fisheries-related businesses (processors, manufacturers, distributors, and haulers of seafood products) would be eligible for compensation if their claims demonstrate that their businesses experienced loss of income due to unrecovered economic activity resulting from displacement of fisheries in the OSW energy project area. The project area is intended to include the turbine array area, including inter-array cabling, any OSW related substations, and export cables from the array to landfall.

Eligibility could be determined by the selected Regional Fund Administrator based on the BOEM Fisheries Mitigation Guidance and structured input from appropriate stakeholders such as the commercial fishing industry, NOAA, academic institutions, and OSW industry experts. An individual's eligibility to file a claim could be based on a variety of factors, including proof of recent use of an identified fishing location and/or historical spatial and temporal fishing data for a period (e.g., 3 or 10 years), yet to be determined.

7.2. Evidence of Impacts and Burden of Proof

The evidence of impacts could fall squarely and solely on the fishing industry, making it difficult if not impossible to support a claim. The reasons for imperfect evidence are numerous: limitations to existing fisheries data, limitations to methodologies for identifying fishing with existing data (i.e., NOAA's fishery footprints), lack of spatially precise data, COVID impacts on fishing, fluctuations in market demand, state and federal fishery management actions, climate change impacts, and others. Thus, the evidence required for claims needs to be practical and achievable and not overly burdensome nor prohibitive of making a reasonable claim. There will also have to be an established and legally justifiable and defensible burden of proof that should be reasonable and achievable for legitimate claims.

Overall, the claims process will need to be simple as possible, fair, transparent, limit the administrative burden and transaction costs on all parties, reduce potential gaming and fraud, and resolve uncertainties and data limitations in the fishing industry's favor.

7.3. Administrative Fees

The States are continuing to consider and are not proposing a specific mechanism or percentage fee for covering administrative costs of the Regional Fund Administrator at this time.

The States suggest the Regional Fund Administrator will need to fund its operations in an efficient manner. Preferably, administrative fees are covered outside of the mitigation funds to protect those funds for maximum payout to eligible claims.

Given the limited examples of funds established to date, there have been at least two different approaches for administrative costs that might serve as examples. In one project, monies for establishing and funding the Regional Fund Administrator's activities were not set aside up front but are born by the OSW developer as a separate cost and this expectation was built into the overall agreement between the state and developer.

In another example, the agreement requires that the earnings (e.g., interest) accrued on the escrow account (where compensation funds are deposited) would cover the costs to establish and implement the distribution of funds. The costs are not covered outright by the principal (money placed in the fund) but by the earnings on the funds. That agreement requires specified return rates for the escrow account. The Regional Fund Administrator is required to review the financial status of the escrow account annually. If the costs to administer the fund exceed the income earned in three consecutive years, the developer is required to cover the deficiency. In any case, administrative funds for the Regional Fund Administrator should be covered to avoid imposing undue costs on States, those seeking claims, or others as part of the claims process.

7.4. Data Verification

Due to the complexity of data sharing and confidentiality agreements, the States propose that the Regional Fund Administrator utilize existing entities with data access and sharing already in place, to the extent practicable, rather than trying to build that capacity in-house and enter into new data sharing and confidentiality agreements with existing data providers.

To verify claims, access to confidential fisheries data will be necessary. If the Regional Fund Administrator were to directly be responsible for claim verification, an agreement with NOAA Fisheries allowing the Regional Fund Administrator access to confidential fisheries data would be required, which may introduce legal conflicts if the Regional Fund Administrator does not have a prior agreement with NOAA Fisheries. Any data sharing would have to be consistent with applicable law, including Section 402 of Magnuson Stevens Fishery Conservation and Management Act.

The States have recognized the potential difficulty of obtaining such an agreement and an existing entity (e.g., NOAA Fisheries, state agencies, the Atlantic States Marine Fisheries Commission, or the Atlantic Coastal Cooperative Statistics Program) that already handles confidential fisheries data should be employed to carry out the claim's verification step. NOAA Fisheries and/or State agencies could act as this entity; however, staffing issues, agency mandates and policies, and challenges with receiving outside funds to cover staff costs may preclude them from serving in the data verification role. The States themselves could each serve this role since State fishery agencies typically have access to data.

However, this approach might be cumbersome and inefficient since multiple agencies would need to be consulted in certain cases, causing increased administrative costs and untimely delays in the evaluations of claims. Alternatively, the Regional Fund Administrator could contract with an entity that already has established data agreements in place such as the Atlantic States Marine Fisheries Commission (ASMFC) or the Atlantic Coastal Cooperative Statistics Program (ACCSP). Entities with these data agreements already handle numerous sources of confidential fisheries state and federal data and would be able to verify individual

claims. Overall organizational mission objectives and staffing needs would have to be evaluated to ensure this need can be successfully met.

8. Appeals Process

The States propose that the details of such grievance processes be designed by the Regional Fund Administrator once established, with oversight from its governing body and advisory boards.

The Regional Fund Administrator could serve as an appeals manager authorized to consider and make decisions on grievances or disputes raised in the compensation process by a claimant, such as ones over eligibility or compensable losses and costs. Such appeals could also be handled externally through an appeals manager, administrative board, or other impartial entity.

9. Governance Structure

A governance structure must be established to provide oversight of Regional Fund Administrator to ensure the administrator properly executes their responsibilities and that the compensation program sustainably fulfills its designated purpose.

In general, the States assume there are four core elements to the overall Regional Fund Administrator structure: 1) Funds consisting of money paid by developers for impacts from individual OSW projects, likely held by a bank or similar fiduciary; 2) a Governing Board with oversight over the Regional Fund Administrator; 3) the Regional Fund Administrator; and 4) stakeholder and expert advisory boards. The States have identified several potential models for the governing board and stakeholder advisory functions which are discussed below.

The Governing Board would hold at least the following duties:

- Select the Regional Fund Administrator;
- Review the Regional Fund Administrator's performance periodically;
- Replace the Regional Fund Administrator for cause;
- Approve overall processes and procedures established by the Regional Fund Administrator;
- Select the auditor and receive and review annual audits;
- Conduct fiscal oversight to ensure the efficient and effective administration of the claims process;
- Solicit, review, and accept new members to the Governing Board; and
- Advise, if not approve, the membership and role of advisory bodies.

The Governing Board would need to have a clear legal status, by-laws, conflict of interest statements, and other governance elements. The Governing Board would need to include the following general three elements: 1) membership; 2) legal status; and 3) relation to the Regional Fund Administrator.

9.1. Governing Board Membership

The States propose the following options for Governing Board Membership in addition to a robust advisory process described further below. How initial board members are appointed, who makes on-going appointments to the board, the exact board composition, board member terms, and other matters have not been determined at this time.

Option #1: State-Led: Membership of the Governing Board would be made up of representatives from states along the Atlantic Coast whose fishing enterprises would be foreseeably affected by OSW development. The States also propose a meaningful advisory role for affected stakeholders including the commercial and for-hire recreational fishing industries and OSW energy developers.

Option #2: Fisheries Led: Membership of the Governing Board would be made up of representatives from the fishing industry including fishing and shoreside fishing-related businesses. The Board membership would need to consider diversity in fishing gear type, fishery, and geography though broader representation could be addressed through the advisory process. Clear conflict-of-interest policies would be in place to avoid the appearance or reality of self-dealing. There would need to be a meaningful advisory role for non-fishing stakeholders such as states and wind energy developers.

Option #3: Co-Led: Membership of the Governing Board would be made up of representatives from the fishing industry and from the states. To ensure a reasonably sized Board, the states might select Board membership from sub-regions and have those seats rotate across states over time. The Board might include one independent entity, with no association to any affected sector (OSW, fishing, or state government), to chair the board and provide an “odd number” of total seats. The fishing industry seats might also use a geographic distribution to ensure broad-based representation. Clear conflict-of-interest policies would be in place to avoid the appearance or reality of self-dealing.

9.2. Governing Board Relation to the Regional Fund Administrator

The States note that the Regional Fund Administrator could be an existing or newly established entity which would be retained under contract by the Governing Board

The Governing Board would enter a contract with the Regional Fund Administrator. Likely, the States would need to include seed or initial money for the Regional Fund Administrator to allow it to begin its operations prior to contracting with individual project fund holders. By contract, the Regional Fund Administrator’s term would be for a set period (e.g., five years), and renewable upon capable performance. The Regional Fund Administrator would need to have the legal status to receive and distribute money, enter contracts, and carry out the day-to-day business functions set forth in this Scoping Document. Although the Regional Fund Administrator could be created as a legal entity specific for the role described herein, the expense and time needed to establish such a new entity make that approach less desirable than retaining the services of a Regional Fund Administrator with basic processes and systems needed to do the job already in place. The States invite comments on existing entities, types of entities, such as trusts, and other legal arrangements by which the functions and fiduciary obligations of the Regional Fund Administrator could be effectively, efficiently, and accountably implemented.

9.3. Limitations

The States have discussed that the Governing Board would not likely have the authority to require a developer to distribute their compensatory mitigation fund through the Regional Fund Administrator because there is currently no single known federal or state statutory authority to do so. The States could choose to utilize their procurement authorities and other state authorities to encourage or require use of the Regional Fund Administrator. In addition, the efficient and effective administration of fisheries compensatory mitigation by a Regional Fund Administrator would likely provide incentives for OSW developers to participate. Other enticements could include but not be limited to bidding and operation fee credits and state procurement incentives or encouragements.

9.4. Advisory Boards, Committees or Panels

Through the process of establishing a Regional Fund Administrator, clear responsibilities and guidelines for the administrator will be identified. Once the Regional Fund Administrator is established, the States propose that regional or sub-regional advisory panels or committees consisting of fishing industry members and OSW developers could be created to advise the Governing Board. OSW developer participation in advisory boards should be limited to those with leases. The States have discussed that these advisory panels or committees would not have decision making responsibilities like a fiduciary board. The advisory board(s) would provide advice and insights born of their members' experience and make recommendations to ensure that the fund stays on track to meet the needs of both the fishing and OSW industries.

The advisory panel or panels would advise on:

- Design of the overall claims process;
- Eligibility criteria;
- Claims processes and procedures;
- Implementation and execution;
- Appeals process;
- Periodic review of the Administrator's performance and activities; and
- Dispute resolution or confirmation of claims.

The advisory panel or panels would need to consider how to solicit ideas and concerns from the full range of gear type users, fisheries, and regions potentially affected by OSW development and use the expertise of the following entities in an inclusive manner as they carry out their responsibilities:

- Organized commercial fishing associations;
- Organized for-hire recreational fishing associations;
- The range of gear types, fisheries, and regions potentially affected by OSW development;
- State marine fishing agencies;

- Regional bodies such as the Fisheries Management Councils and Atlantic States Marine Fishery Commission;
- Federal agencies including NOAA Fisheries and BOEM;
- Research institutions; and
- Subject matter experts in oceanography, fisheries science, socioeconomics, and other disciplines pertinent to the Regional Fund Administrator's responsibilities

Because fisheries are highly regional and often unique in nature, such advisory boards will have to consider sub-regional differences and needs. The States also discussed that subregional (Gulf of Maine, southern New England, New York Bight, Mid-Atlantic, Carolina Long Bays, etc.) expertise and nested approaches could be part of the Regional Fund Administrator's advisory structure.

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