

Responses of Conservation Law Foundation to DOER Request for Stakeholder Comment

January 18, 2019

1. Please provide the following information with your comments:

a. Name of Organization:

Conservation Law Foundation

2. **Section 83C of Chapter 169 of the Acts of 2008 (“Section 83C”), as amended by Chapter 188 of the Acts of 2016, An Act to Promote Energy Diversity, allows the distribution companies to conduct one or more competitive solicitation through a staggered procurement schedule developed by the distribution companies and the Department of Energy Resources (“DOER”) with any subsequent solicitation occurring within 24 months of the previous solicitation. With respect to the next procurement, please respond to the following questions regarding the timetable:**

a. What are the advantages or disadvantages to issuing the subsequent solicitation prior to June 29, 2019 (“Subsequent Solicitation”)?

Advantages:

- Would ensure that the next tranche of OSW is developed as soon as possible, to maintain momentum in building an offshore wind industry in Massachusetts that can contribute significantly to the Commonwealth’s greenhouse gas reduction requirements and workforce development goals.
- Would encourage economic development, including more supply chain development and local jobs in Massachusetts, especially considering New York’s recent announcement of a 9,000 MW target for offshore wind.

Disadvantages:

- May favor earlier leaseholders, who have had more time to assess their lease areas than entities who acquired lease areas in the 2018 auction, and who have direct experience in 83C bidding. There is no clear evidence, however, that the sophisticated corporate entities that have recently acquired leases would not be able to participate in an RFP during any period in 2019.

b. Does the BOEM lease sale, and any subsequent data collection at the newly leased sites, affect the potential timing of when proposals should be due under the Subsequent Solicitation?

No. The statutory time period for issuing a subsequent solicitation was not conditioned on any factors regarding the potential territories in which projects could be developed, and the due date of proposals under that solicitation should not be extended beyond the open solicitation period used in the first 83C solicitation.

c. Once the Subsequent Solicitation is issued, please discuss the advantages and disadvantages of longer or shorter time-frames for responsive bids. Please be specific regarding the time periods you are discussing.

The time period should be shorter than the open solicitation period used in the first 83C solicitation. Multiple qualified bidders submitted serious and competitive bids in the time allowed for the first 83C

solicitation, and the local offshore wind industry has matured in the interim. A related question is the bid evaluation period; the Department should significantly shorten the amount of time required to evaluate the bids, as the bid evaluation team has been through the process once before. The Department should choose a schedule both for bid submission and bid evaluation with all possible haste that leaves a winning bidder a reasonable amount of time (at least two months) to take advantage of the unique opportunity window offered by the December 31, 2019 expiration of the ITC.

d. What are ways in which the Subsequent Solicitation could take advantage of the expiring federal Business Energy Investment Tax Credit (ITC)?

Offshore wind facilities at the scale of the 83C procurements may qualify for the renewable energy production tax credit (PTC), 26 U.S.C. § 45, and may opt to elect the up-front business energy investment tax credit (ITC), 26 U.S.C. § 48, in lieu of the PTC. The American Taxpayer Relief Act of 2012, Pub. L. No. 112-240 (ATRA) modified PTC and ITC, replacing the prior “placed in service before X date” standard with a “begins construction before X date” standard.

The date before which construction needs to begin to qualify for the PTC or ITC in lieu of the PTC under the ATRA was January 1, 2014. The Tax Increase Protection Act of 2014, Pub. L. No. 113-295 (TIPA) extended the PTC “begin construction” date by one year, to January 1, 2015. The Protecting Americans from Tax Hikes Act of 2015, Pub. L. No. 114-113 (PATH Act), extended the full PTC for facilities beginning construction before Jan. 1, 2017, and implemented a step down phase out of the PTC for wind projects beginning construction between Jan. 1, 2017, and Jan. 1, 2020 (80% PTC for 2017 begin construction date, 60% PTC for 2018 begin construction date, and 40% PTC for 2019 begin construction date). The PATH Act also extended the option for PTC-eligible developers to elect the ITC in lieu of the PTC.

The IRS’s criteria for whether or not a large-scale wind facility “begins construction” by the relevant date to qualify for the PTC, or a portion thereof, or to elect the ITC in lieu of the PTC, has been the subject of six guidance documents developing two primary tests, the Physical Work test and the 5% Safe Harbor. *See generally* Notice 2013-29, <https://www.irs.gov/pub/irs-drop/n-13-29.pdf>; Notice 2013-60, <https://www.irs.gov/pub/irs-drop/n-13-60.pdf>; Notice 2014-46, <https://www.irs.gov/pub/irs-drop/n-14-46.pdf>; Notice 2015-25, <https://www.irs.gov/pub/irs-drop/n-15-25.pdf>; Notice 2016-31, <https://www.irs.gov/pub/irs-drop/n-16-31.pdf>; and Notice 2017-04, <https://www.irs.gov/pub/irs-drop/n-17-04.pdf>.

The Physical Work test requires significant physical work to be undertaken, on or off site, by the qualifying date. *See* Notice 2013-29 § 4 and Notice 2016-31 § 5. There is not a fixed quantification of the minimum work required to satisfy the Physical Work test, but the IRS provides examples of what qualifies as significant physical work. *See* Notice 2014-46 § 3. The 5% Safe Harbor qualifies a developer for the PTC if they incur or pay 5% or more of the total cost of the project by the qualification date. *See* Notice 2013-29 § 5. In certain circumstances, costs incurred or paid between 3% and 5% of the total project cost may qualify the developer for a partial PTC. *See* Notice 2013-29 § 5.03; Notice 2014-46 § 5. Both the Physical Work test and the 5% Safe Harbor require follow up on the qualifying action with continuous efforts after the qualifying date through the in-service date of the facility, though the IRS guidance specifies acceptable disturbances or delays to continuity. *See* Notice 2013-29 § 5.02; Notice 2016-31 § 4.

It appears functionally impossible for a developer in offshore wind lease areas that could deliver power to Massachusetts to satisfy the on-site Physical Work test in advance of completion of federal permitting, which no potential bidder to the next RFP will have achieved in time. *See* Notice 2013-29 § 4 and Notice 2016-31 § 5 (giving examples of qualifying on-site physical work such as excavating and pouring foundations for wind projects). However, it appears conceivable that a developer who “wins” the next RFP before the end of 2019 could qualify for the 40% PTC or a portion thereof by undertaking or contracting for

sufficient activities off-site to meet the Physical Work test, or incurring or paying sufficient project costs to qualify for the 3% or 5% Safe Harbor, if the developer determines that it is willing to make those expenditures at risk without completed federal and state permitting or state contract approval.

e. What would be required in order for a potential bidder in the Subsequent Solicitation to secure the 2019 ITC?

See response to Question 2.d above. A developer could conceivably satisfy the off-site Physical Work test or the 5% Safe Harbor by spending at least 5% of the project's total cost before December 31. Any such expenditures in advance of completed permitting and final contract approval by the DPU would be at the developer's own risk.

f. What market conditions (technology, vessels, local supply chain, etc.) or ongoing data collection might necessitate a shorter or longer time period for proposal development prior to submission?

Offshore wind developers will be better equipped to respond to this question.

g. Should the timing of offshore wind energy procurements in other states have any impact on the procurement timeline of the Subsequent Solicitation?

If anything, the announcements of aggressive offshore wind goals in other large states like New York should ensure that the Department acts with all possible haste to issue the next 83C RFP. Staying ahead of other states in megawatts procured and contracts signed should help maintain the Commonwealth's ability to attract supply chain development, US corporate headquarters, and other associated economic benefits.

With respect to future multi-state coordination, the successful experience of Massachusetts, Connecticut, and Rhode Island with the first 83C solicitation process should inform the Department's decision for the next round. Massachusetts was able to attract sophisticated bids that met the Commonwealth's statutory criteria, and Connecticut and Rhode Island were able to contract with other Massachusetts bidders, reducing administrative burden. With Massachusetts' statutory deadline for RFP issuance as well as the expiring ITC, there is not sufficient time to spare to add any delay that would necessarily come from formal coordination with other states like the development and issuance of a joint RFP.