

June 2, 2015

Betsy Nicholson
Federal Co-Lead for Northeast Regional Ocean Planning
NOAA Ocean Service
Greater Atlantic Regional Office
55 Great Republic Drive
Gloucester, MA 01930-2276

Dear Ms. Nicholson and RPB members:

On behalf of the Fisheries Survival Fund (“FSF”), we submit the following comments on the Northeast Regional Planning Body’s (“RPB’s”) work to develop the Northeast Regional Ocean Plan (“ocean plan”) in advance of its upcoming meeting on June 3-4 in Mystic, CT. FSF represents the significant majority of full-time limited access permit holders in the Atlantic scallop fishery. Our members are home-ported along the Atlantic coast from Massachusetts and Connecticut south through New Jersey, Virginia, and North Carolina.

Throughout the past several years, FSF has engaged extensively in the planning process for offshore energy and other ocean projects in the Northeast and Mid-Atlantic. This on-the-ground experience has given us unique insight into the deficiencies of current permitting and environmental review processes. We have learned that there are many ways in which these processes can be improved to increase stakeholder consultation, reduce conflicts, and ultimately improve planning efficiency for multiple uses of our offshore resources. Some of these improvements are well within the purview of the RPB; that is, they are tangible steps the RPB could take and/or recommend that would greatly reduce future use conflicts within the existing management structure, and could be accomplished with minimal investment.

Accordingly, the following is a brief history of our experience and proposed solutions for the RPB to consider as it drafts its ocean plan.

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Problem #1: Public Notice and Consultation Requirements Are Not Met Effectively

As you know, a wide range of offshore projects are at various stages of consideration, proposal, and operation in the Northwest Atlantic Ocean. The projects span multiple uses including wind energy, deepwater port facilities, sand extraction, aquaculture, seismic airgun surveys (for both scientific studies and oil and gas prospecting), and defense activities, among others. The pace of these projects is accelerating; often, multiple projects are announced in a single week or month.

Action agencies are required to consult with other user groups as a matter of law and policy.¹ However, such consultation does not always happen, and we acknowledge it may be burdensome for an agency or a project developer to identify and address the concerns of every single user group that could conceivably have a conflict with a proposal. In the absence of agency-initiated consultation, any fisheries interests or, indeed, any person with any interest in offshore activities, that wish to provide input must monitor each agency's actions individually and either engage the agency ad hoc or participate in the environmental review process.

It would be nearly impossible for a stakeholder to track each and every offshore proposal that may affect his or her industry. From the outset, the Administrative Procedure Act requires any agency proposing to permit an offshore project, or to conduct environmental review on such a project, to publish notification in the Federal Register.² However, not all agencies do so. For example, the National Science Foundation ("NSF") recently permitted a Rutgers University-led survey offshore New Jersey that is using seismic airgun blasts similar to those for oil and gas prospecting to measure long-term changes in seabed sedimentation. Despite the seismic blasts following a 4900-km survey line in an area that is heavily commercially and recreationally fished during the busiest fishing months of the year, the only public notice of the project was an Environmental Impact Statement ("EIS") posted on the NSF's website. Similarly, the Bureau of Ocean Energy Management ("BOEM") is considering permits for multiple oil and gas seismic surveys in the Mid-Atlantic and, while the agency is accepting public comment on the applications, it is doing so without publishing official Federal Register notices. Therefore, even simply monitoring the Federal Register would not be an effective way to stay informed.

The environmental review process provides another legally-mandated opportunity for public notice and comment. While all federal projects are subject to environmental review,³ including public participation, the action agencies responsible for each project have differing

¹ We have described this legal requirement in previous letters and, for the sake of brevity, incorporate those letters by reference.

² 5 U.S.C. § 553(b).

³ 42 U.S.C. § 4332(2)(C).

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approaches to conducting such review. Often the public, including affected stakeholders, is unaware of proposals and developments until far too late in the process to make meaningful engagement or planning efforts, if it is even possible at all. For example, under the “Smart from the Start” initiative for offshore wind farm permitting, BOEM only issues a Call for Information from the public *after* energy companies spend substantial time and money resources developing specific bids for a Wind Energy Area. In New York, for example, three private companies have spent what likely amounts to millions of dollars so far to develop a proposal for an offshore wind facility, and the agency has spent significant resources on its review. Only after the Call for Information did the agency and the corporations learn that the proposed area overlaps prime scallop and other commercial fishery grounds, recreational fishing areas, a proposed liquefied natural gas (“LNG”) terminal, and shipping lanes. This system benefits nobody. The timing of input matters. As we have urged in previous letters to the RPB and many of the action agencies, it is absolutely critical to improve public outreach *before* projects are so far along in the planning phase that they are effectively irrevocable, or revocable only if substantial resources have been wasted.

Proposed Solutions:

1. Create a centralized registry or database describing *all* projects under consideration regionally. This simple mechanism would allow interested parties to monitor developments and directly engage with agencies or project representatives in order to streamline the resolution of potential conflicts—saving time and money for those who propose projects as well as existing users.
2. Clarify each action agency’s environmental review process in one easily accessible document. Promote agency commitment to utilize the Federal Register and follow standard practices for public input.

Problem #2: Information in Environmental Reviews Is Often Incorrect or Inadequate

The quality of information is critical to an effective environmental review. However, the action agencies have published EISs that have major flaws, perhaps due to the deep complexities in the management of offshore resources. For example, last December the Coast Guard and Maritime Administration jointly issued a Draft EIS for the Port Ambrose LNG Terminal project that contained wildly erroneous information about the scallop fishery.⁴ While we cannot know

⁴ The Draft EIS, among other oddities, presented scallop catch by “shell weight” (a unit that is not and has never been recorded in catch records), included data only through 2008, failed to recognize that the entire area was Essential Fish Habitat (“EFH”) for scallops in its mandatory EFH assessment, and did not include scallops in a list

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what led to the omission of this key information, we do know that this major conflict should have been discovered prior to the development of site plans and massive agency resources spent on developing the 1800 page Draft EIS.

We have seen similar problems with other reviews. New York's draft Ocean Action Plan, for instance, relied upon a faulty study that characterized scallops as a "groundfish" and derived information on their abundance from the National Marine Fisheries Service's Northeast Fisheries Science Center trawl surveys.⁵ Scallop biomass is estimated through annual federal and academic institution dredge surveys; scallops are not caught in the groundfish trawl survey. This mistake was overlooked by reviewers, as results were "ground truthed" by ocean users who were selected from a group of individuals and organizations who had previously worked with the NY Department of State.⁶ Because, due to harbor conditions, scallops caught offshore New York are regularly landed in New Jersey, no persons with knowledge of the fishery were involved in the process—despite the massive value of scallops located offshore New York. This series of errors highlights the risks involved when ocean planning is not inclusive and collaborative.

The RPB is currently engaged in efforts to characterize ocean uses in the Northeast and to build tools to compile relevant biological and economic data. While we are hopeful that the characterization efforts will reduce the likelihood of these mistakes in the future, there are fundamental problems with their effectiveness. For the scallop fishery, for instance, annual assessments of the resource inform management decisions. The success of rotational management, which has led the Atlantic scallop fishery to become fully sustainable and the most lucrative in the nation, is dependent upon the flexibility to determine what areas to open to fishing each year in response to those assessments. Furthermore, "snapshots" of historical uses cannot describe the fishery's actual footprint, as fishing grounds must shift from year to year. Due to these difficulties with the characterization process, additional backstop measures must be implemented to ensure that agency reviews are complete.

Proposed Solutions:

1. Improve public consultation requirements as described above.
2. Identify appropriate personnel within each agency (either pre-existing staff or in new coordinating positions) to serve as the primary reference point for information on each potential use of an area.

of benthic organisms that would be affected in the proposed project area, despite acknowledging that the project would impact all benthic species.

⁵ New York Department of State, *Offshore Atlantic Ocean Study* (July 2013) at 132.

⁶ *Id.*

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Problem #3: Action Agencies Are Not Positioned to Determine the Severity of a Conflict

Environmental review processes impose no hard and fast criteria for weighing a proposed project's impact on existing users and the human and natural environment. It is reasonable to expect each agency will base its decision using its own institutional values; that is, the action agency will most likely view its own proposed project as a higher priority than those proposed by others, or than preexisting uses of ocean resources. Accordingly, in a situation where two agencies may be proposing projects in the exact same location, or where one agency proposes a project in the same location as an existing use managed by another agency, which agency should be the one to stand down? Or, more succinctly, how much conflict is too much to proceed?

There are, in fact, sources of law mandating that certain uses are protected. For example, BOEM has a legal obligation under the Outer Continental Shelf Lands Act, as amended by the Energy Policy Act of 2005, to protect existing "reasonable uses," such as commercial fishing, and consider areas for fishing and navigational purposes, in issuing leases for offshore oil and gas development.⁷ That law further prescribes that "the character of the waters above the outer continental shelf as high seas and the right to navigation and fishing therein shall not be affected" by BOEM's leasing of OCS submerged lands.⁸ Other sources of law also prioritize certain uses over others.

Proposed Solution:

1. Review the existing legal framework surrounding offshore resources, and clarify on the record which uses are protected or afforded deference.

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To summarize, we urge the RPB to make tangible progress toward reducing conflicts over competing offshore resources by following the suggestions listed above. As we have stated before, early consultation on permitting and leasing decisions is critical. The RPB, while it lacks authority to amend the law or regulatory processes that prioritize existing resource users, is well-situated to drive adjustments such as these to ensure that activities are well-coordinated and that communication is effective. We appreciate the opportunity to submit these comments, and look forward to continuing to work with the RPB to develop solutions to offshore use conflicts. Please

⁷ 43 U.S.C. §§ 1337(p)(4)(I), (J).

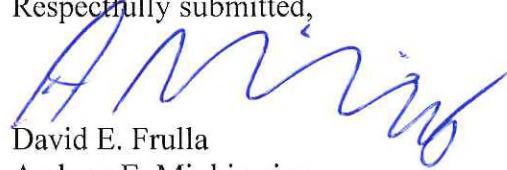
⁸ *Id.* § 1332(2).

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do not hesitate to contact us if you have any questions or if we can provide additional information.

Respectfully submitted,



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