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August 7, 2015

Rick Robins, Chairman
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
Dover, Delaware 19901

Re: Ecosystem and Ocean Planning Committee Habitat Policy Discussion

Dear Chairman Robins:

As you know, we represent the Fisheries Survival Fund (“FSF”). FSF’s participants include over 250 full-time Atlantic scallop limited access permit holders. FSF respectfully submits these comments regarding the Mid-Atlantic Fishery Management Council (“Council”) Ecosystem and Ocean Planning Committee’s (“Committee”) upcoming discussion of its policy related to anthropogenic activities that impact fish habitat on August 10, 2015.

First and foremost, we commend the Council on proactively addressing this urgent issue through thoughtful deliberation and action. 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 regions. 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 consultation with fisheries experts, reduce conflicts, and ultimately improve planning efficiency for multiple uses of our offshore resources. It is absolutely critical that fisheries groups have a stronger voice in current offshore planning efforts, and the Council is ideally suited to provide this voice.

FSF rejects the notion that fisheries resources can be effectively protected solely through the mechanism of EFH consultation. In this letter, we highlight some of the problems with the current reliance on such consultations. We then provide recommendations for improving the EFH consultation process, as well as recommendations for other steps the Council can take to improve offshore planning on behalf of fisheries stakeholders.

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I. OFFSHORE ANTHROPOGENIC ACTIVITIES COULD HAVE DEVASTATING IMPACTS TO THE REGION'S FISHERIES

As you are aware, various agencies are proposing an increasing number of offshore anthropogenic activities in or near productive Mid-Atlantic fishery grounds. Such projects include multiple wind farms, an LNG import facility, seismic surveys for both oil and gas prospecting and academic studies, sand extraction for beach replenishment, and artificial reefs, among others. These developments, individually and cumulatively, will have significant impacts on the health of fishery stocks, extending far beyond each project's footprint.

Proposed construction activities will unequivocally and irreversibly change the benthic and pelagic environment. In addition to direct disturbance of substrate that provides benthic habitat to fish stocks, seabed scour, along with other construction effects, will lead to greatly increased sedimentation in the water column. Any foreign object at or near the seafloor will also create turbulence and eddies, which will disturb larval distribution. While the potential loss of benthic habitat and sedimentation from anthropogenic activities are sufficiently alarming by themselves, additional impacts will occur from harmful sound frequencies, heat impacts, threats to safety and navigation, and potentially catastrophic oil or gas spills, among other problems.

Although these activities threaten the sustainability of many fishery resources, we are most familiar with the risks to scallops, which serve as but one example of how impacts to a fishery can rapidly compound. Adult organisms are sessile, attaching to the seabed and filtering plankton from water as it moves past. As such, they can only survive in areas with firm sand, gravel, or cobble substrate and low levels of inorganic suspended particulates.¹ Scallops will therefore disappear from areas in which the substrate is replaced with rocks and concrete and sedimentation clouds the water column. Construction activities will also modify the water column itself. Any foreign object at or near the seafloor will create turbulence and eddies, which influence scallop spat settlement and the viability of scallop beds as a whole. Scallop larvae are planktonic, and thus are suspended in the water column during the early stage of their lives. Although planktonic scallops travel with currents, these larvae generally settle in similar places from year to year, as they mature into spat. "Spatfall (the settling of larval scallops to the bottom), and the period immediately following, is thought to be particularly important in the formation of scallop beds and in determining year class size."² There is no evidence of mass migrations by scallops after spatfall.³ The movements of sea scallops are

¹ Deborah Hart & Antonie Chute, *Essential Fish Habitat Source Document: Sea Scallop, *Placopecten magellanicus*, Life History and Habitat Characteristics Second Edition*, NOAA Technical Memorandum NMFS-NE-189 (Sept. 2004), at 13.

² *Id.* at 1-2 (internal citations omitted).

³ *Id.* at 2.

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usually localized, and random or current-assisted.⁴ Once aggregations of adults are formed, they remain essentially stationary.⁵ Changes to an existing scallop bed's benthic environment and the currents that larval scallops rely on to be transported to that bed, therefore, pose significant risks to future scallop generations and the scallop resource as a whole.⁶

In addition to these types of stock-level impacts, anthropogenic activities entirely change the ecosystem composition. Modifications in species composition and habitat resources have far-reaching, radiating effects all along the food chain, as the predator and prey species of affected animals will experience compounding disturbances from each offshore development activity. Such disturbances also affect bycatch composition in all regional fisheries—further exacerbating biological and economic impacts and increasing management challenges.

II. FISHERIES ARE LEGALLY PROTECTED TRADITIONAL USES OF THE OUTER CONTINENTAL SHELF

Pursuant to the relevant statutory authority, action agencies must protect existing fishery activities when evaluating an application for an offshore development project. The Outer Continental Shelf Lands Act (“OCSLA”), as amended by the Energy Policy Act of 2005, governs the development, production, and transportation of resources in the seabed, subsoil, and all installations attached to the seabed.⁷ It explicitly preserves “the character of the waters above the outer Continental Shelf as high seas” and demands that “the right to navigation and fishing therein shall not be affected” by leasing of OCS submerged lands.⁸

Other statutes build upon the OCSLA to develop specific measures for licensing, construction, and operation of other offshore activities. For example, the Deepwater Port Act of 1974 and its subsequent amendments impose upon the agencies the legal obligation to “prevent or minimize any adverse impact which might occur as a consequence of the development of such ports” in relation to the marine and coastal environment.⁹ Further, nothing in the act may “affect the legal status of the high seas, the superjacent airspace, or the seabed and subsoil, including the Continental Shelf.”¹⁰ Finally, in order to issue a license for ownership, operation, and

⁴ *Id.*

⁵ *Id.*

⁶ To the extent structures placed into the ocean upset ocean gyres, this will cause further disruption to spatfall throughout the Mid-Atlantic.

⁷ 43 U.S.C. § 1333(a)(1).

⁸ *Id.* at § 1332(2).

⁹ 33 U.S.C. § 1501(a)(2).

¹⁰ *Id.* at § 1501(b).

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construction of a deepwater port, the Secretary of Transportation must determine “that the deepwater port will not unreasonably interfere with international navigation or other reasonable uses of the high seas, as defined by treaty, convention, or customary international law.”¹¹

Fishery uses are also protected as a matter of policy. The National Ocean Policy prioritizes the adoption of coastal and marine spatial planning (“CMSP”): “a comprehensive, adaptive, integrated, ecosystem-based, and transparent spatial planning process, based on sound science, for analyzing current and anticipated uses of ocean, coastal, and Great Lakes areas.”¹² Under this approach, areas should be identified that are “most suitable for various types or classes of activities in order to reduce conflicts among uses, reduce environmental impacts, facilitate compatible uses, and preserve critical ecosystem services to meet economic, environmental, security, and social objectives.”¹³ As part of the CMSP approach, extensive consultation and stakeholder engagement is required in order to enhance mutual understanding of existing uses and to improve development planning.¹⁴

In addition to the National Ocean Policy, specific agreements between agencies provide substantial protections to fishery interests. In 2011, BOEM (then “BOEMRE”) signed a Memorandum of Understanding with the National Oceanic and Atmospheric Administration (“NOAA”) to formally implement coordination and collaboration on activities relating to development of energy resources on the OCS.¹⁵ With regard to the 5-Year Oil and Gas Leasing Program, BOEM must consult with NOAA early in the process in order to identify areas of particular concern. The agencies must also include relevant private parties “to provide sufficient information to the other agency to inform their decision-making processes.”¹⁶

III. THE EFH CONSULTATION PROCESS, ON ITS OWN, IS INSUFFICIENT FOR EFFECTIVE PROTECTION OF FISHERY RESOURCES

At present, despite the strong legal protections afforded to existing fisheries, the primary driver of communication between fisheries managers and the action agencies for offshore

¹¹ *Id.* at § 1503(c)(4).

¹² White House Council on Environmental Quality, *Final Recommendations of the Interagency Ocean Policy Task Force* (July 19, 2010) at 41.

¹³ *Id.*

¹⁴ *Id.* at 47.

¹⁵ *Memorandum of Understanding on Coordination and Collaboration Regarding Outer Continental Shelf Energy Development and Environmental Stewardship between the U.S. Department of the Interior and U.S. Department of Commerce* (May 19, 2011).

¹⁶ *Id.* at 3.

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projects is the Essential Fish Habitat (“EFH”) consultation. The EFH consultation process is mandated by the Magnuson Stevens Fishery Conservation and Management Act (MSA), and implementing regulations require the National Marine Fisheries Service (“NMFS”) to work with the Councils to share information and coordinate comments and recommendations on federal actions that may adversely affect EFH.¹⁷ At the Council’s Ecosystem Advisory Panel (“Ecosystem AP”) meeting on July 21, 2015, NMFS representatives stated that EFH was the best avenue for influencing decision making from other agencies, and asked the Council to delineate specific fisheries impacts and priorities with regard to specific types of developments.

FSF strongly cautions against a strategy that relies on the EFH consultation process to prevent serious fisheries impacts from conflicting offshore anthropogenic activities. We have seen through experience that EFH consultation does not, and is not designed to, lead to meaningful changes in project design or siting that will mitigate impacts to fisheries. As a result, we urge the Council to consider drafting recommendations that both improve and add to the protections afforded by EFH consultation.

A. Any EFH Consultation Occurs Too Late in the Planning Process to Offer a Meaningful Opportunity for Change

The timing of input matters. As we have urged in previous letters to the Regional Planning Bodies (“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 after substantial public and private resources have been wasted. The cumulative effect of multiple renewable energy sites along the Atlantic Coast must be rigorously assessed at the preliminary stages, including at the moment of application or during consideration of an unsolicited lease request. However, the early consultation guidance for EFH falls short of creating either a rigorous or a timely review process.

NMFS’ EFH guidance on early coordination simply states that, if an action agency requests information on EFH, such information should be provided, and that potential adverse effects to EFH should be discussed during preliminary planning and coordination.¹⁸ Early consultation is, therefore, not at all mandatory—it is based on the action agency’s discretion.

¹⁷ 50 C.F.R. § 600.905(c).

¹⁸ National Marine Fisheries Service, *Essential Fish Habitat Consultation Guidance*, http://www.habitat.noaa.gov/pdf/efh_consultation_guidance_v1_1.pdf §2.4 (Apr. 2004) (“When an action agency requests information on the presence of ESA listed species or critical habitat in a particular location, that agency should also be informed of the presence of EFH and the associated MSA managed species and life stages, if applicable. Likewise, if an action agency requests information on the presence of EFH in a particular location, that agency should also be informed of the presence of ESA listed species and critical habitat, if applicable... Similarly, issues related to potential adverse effects on the EFH should be discussed along with ESA concerns during preliminary planning and coordination.”)

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This consultation must be both automatic and required as soon as a permit application is received.

In the absence of early coordination, “[n]otification occurs when NOAA Fisheries receives a draft EIS [environmental impact statement].”¹⁹ Draft EISs are generally available only at very late stages of project development—usually close to the time of approval—and this is therefore far too late to constitute effective notification. Even more alarmingly, for reviews that require abbreviated or expanded consultation, the guidance states that “[n]otification generally would occur when NOAA Fisheries receives an EFH Assessment from the Federal agency.”²⁰ EFH assessments prepared by other agencies are often woefully factually inaccurate, as FSF has documented in multiple previous letters to action agencies.

B. EFH Consultation Does Not Require an Action Agency to Make Reasonable Modifications to a Project Plan

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. Moreover, there are no known criteria that would determine when there is too much of a conflict to proceed with a given offshore development. 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 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?

Through the EFH consultation process, NMFS’ ultimate authority rests solely in its ability to make conservation recommendations, and the action agency may determine whether to accept those recommendations. Thus, NMFS’ power to actually re-site or modify a project to protect fishery resources through the EFH consultation is severely limited. Moreover, action agencies themselves make the initial determination of whether or not a proposed project “may adversely affect” EFH and whether expanded consultation is appropriate. With the action agency responsible for both defining the scope of an EFH consultation and choosing whether to adopt NMFS’ conservation recommendations, how far can those recommendations go in a situation in which uses are fundamentally incompatible?

¹⁹ *Id.* §2.2.

²⁰ *Id.*

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C. EFH Consultation Does Not Address Cumulative Impacts

At the July Ecosystem AP meeting, NMFS representatives stated that, in the absence of a full EIS preparation, the agency is not capable of calculating the cumulative impacts of multiple offshore projects. Meeting attendees discussed whether such an analysis might be a good task for the RPB or other group tasked with coordinating communication among multiple stakeholders.

The scallop resource, in particular, is extremely sensitive to the cumulative effects of multiple closures and environmental disturbances. Due to the complexities in the Scallop Fishery Management Plan, including the rotational management model with its combination of open and access areas, the constriction of a scallop fishing area not only limits fishing opportunities in that area, but decreases overall allowable catch levels under the applicable fishery management regime. The cumulative effects of multiple offshore energy developments, as well as fisheries habitat closures, will therefore be amplified. The success of the rotational management system, which incorporates shifting scallop distributions and real-world conditions, is dependent on the fishery's ability to access traditional fishing grounds as necessary. Nips and tucks from a series of offshore leases thus have a cumulative impact not only on where scallopers fish, but on allowable catch levels resource-wide. To date, no federal agency has addressed this segmentation of development, nor considered the full effects of any of these actions as required by law.

It is, therefore, deeply alarming to FSF members to hear NMFS personnel state that it is impossible to analyze the cumulative effects of these offshore activities. Neither the RPBs nor other planning groups can assess cumulative impacts of multiple offshore projects to fisheries or to EFH, as such groups lack the technical expertise to do so. This is a serious problem that needs to be resolved in order to achieve effective environmental review as required by law.²¹

D. EFH Consultation Does Not Address Potential Impacts to Stocks that Are Not Tied to Substrate

EFH, as defined in the MSA, means "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity."²² While this definition is broad enough to cover as much physical habitat as a Council deems important for a given stock, it does nothing to protect against impacts that are purely biological or chemical in nature.

²¹ 48 C.F.R. § 1508.7.

²² 16 U.S.C. § 1802(10).

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IV. **THE EFH CONSULTATION PROCESS MUST BE IMPROVED**

While the EFH consultation process is not sufficient as a stand-alone option for Council engagement on offshore activities, it is certainly useful and should be improved. At a minimum, FSF urges the Council to fully consider the following options:

Request that NMFS update and improve its EFH consultation guidance

This guidance has not been updated since 2004 and is sorely outdated in light of the rapidly accelerating pace of offshore activities. While the MSA requires NMFS to make recommendations to any federal or state agency considering an activity that, in the view of the Council, is likely to substantially affect fish habitat, including EFH, the statute does not provide any framework for doing so.²³ The guidance must be revised to require earlier consultation and provide strict penalties for action agency non-compliance with EFH recommendations.

Consider alternative categories for EFH

NMFS staff stated at the July Ecosystem AP meeting that the current EFH designations are “too broad to be useful.” Presumably, this is because the current EFH was not designated to apply to potential impacts from anthropogenic activities. While it would be neither practical nor useful to designate all waters and substrate in which a species is found as EFH, neither does limiting EFH to small, truly critical habitat areas provide a suitable basis for assessing impacts from all types of offshore activities. Therefore, there may be benefits to defining multiple categories of EFH for stocks that are important to the fishery, depending on the type of impacts to which the EFH areas are vulnerable.

Explore ways to improve the quality of EFH consultations completed by action agencies

As we have experienced with projects such as the proposed Port Ambrose liquefied natural gas terminal and the National Science Foundation-funded Rutgers University study using seismic survey methods to measure climate change offshore New Jersey, when action agencies prepare EFH consultations they are often factually inaccurate or missing information. Due to the complexity of fisheries management and science, it is difficult for other agencies to accurately characterize a region’s fisheries and fishery resources. As a result, the Council should direct NMFS to develop formalized plans with other agencies, including sharing staff expertise, to improve the quality of such consultations.

²³ 16 U.S.C. § 1855(b)(3).

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Request NMFS to develop agreements with each action agency on early consultation

Clear standards for early consultation will minimize costs and complications associated with user group conflicts. Such agreements should also identify appropriate personnel within each agency to serve as the primary reference points for information on each potential use of an area.

V. **OTHER SOLUTIONS MUST BE ADOPTED IN CONJUNCTION WITH THE EFH CONSULTATION PROCESS**

In addition to improving the EFH consultation process, FSF offers the following recommendations to the Council.

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. Although NMFS currently hosts a website listing projects that have undergone EFH consultation, for the reasons described above, this has limited utility to stakeholders. Projects must be posted in a publicly accessible registry at the earliest practicable opportunity; that is, at the moment a permit application is filed, if not earlier.

Invite NMFS habitat staff to provide updates at every Council meeting

As the Ecosystem AP discussed, the Council must have frequent updates on proposed offshore activities. This critical exchange should be included with other reports and be a routine component of each meeting. Such a report will provide an opportunity to both Council members and the public to be informed of and comment on any projects that may impact fisheries.

Consider convening a standing committee to comment on offshore project applications

Most often, NMFS has only 30 or 60 days to complete or respond to EFH consultations. If notification does not occur before the response clock starts ticking, it is highly likely that the Council will not meet in time to have the opportunity to draft comments on certain projects. The Council should therefore designate a committee that may develop comments, should such a situation arise.

Consider clarifying that EFH consultation must include “fishery impacts consultation”

This will allow the Council an opportunity to comment on potential biological or chemical impacts from a given anthropogenic activity that would not directly impact EFH.

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Again, we sincerely thank the Council for taking action on this critical issue. We hope these recommendations are useful to you as you develop this policy. We look forward to working with you on ocean planning issues, and please do not hesitate to contact us if you have any questions or need additional information.

Sincerely,

A handwritten signature in cursive script that reads "A. Minkiewicz".

David E. Frulla
Andrew E. Minkiewicz
Anne Hawkins

Counsel for Fisheries Survival Fund