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July 25, 2016

Betsy Nicholson, NE RPB Federal Co-Lead  
National Oceanic and Atmospheric Administration  
National Marine Fisheries Service, Northeast Regional Office  
55 Great Republic Drive  
Gloucester, MA 01930-2276

**Re: Northeast Regional Ocean Plan Comments**

Dear Ms. Nicholson:

On behalf of the Fisheries Survival Fund (“FSF”), we submit the following comments regarding the Draft Northeast Regional Ocean Plan (“ocean plan”).<sup>1</sup> FSF represents the significant majority of the full-time limited access permit holders in the Atlantic scallop fishery. Our members are home-ported along the Atlantic coast from North Carolina and Virginia north through New Jersey, Connecticut, and Massachusetts.

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, which has given us unique insight into the deficiencies of current permitting and environmental review processes. Therefore, we have been highly supportive of the spirit of the ocean plan: improving these processes to increase stakeholder consultation, reduce conflicts, and ultimately improve planning efficiency for multiple uses of our offshore resources.

In 2010, the Obama Administration issued the National Ocean Plan by executive order, which created Regional Planning Bodies (“RPB”) and tasked those bodies with developing regional ocean plans. The purpose of the plans is to create a framework for ocean planning activities in each region, and the RPBs may only do so under existing management authorities. We commend the Northeast RPB for the substantial amount of work its staff and members have done to prepare and present the first of these ocean plans for public comment. In particular, the Northeast Data Portal is an extremely valuable product that should continue to be developed and improved. However, several aspects of the plan fall short of fulfilling its promise to reduce conflict during

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<sup>1</sup> Northeast Regional Planning Body, *Northeast Ocean Plan (Draft)* (May 25, 2016) [hereinafter, *Draft Ocean Plan*].

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siting decisions, while other parts of the plan threaten to overreach the RPB's limited authority, as detailed below.

**I. THE RPB MUST NOT RECOMMEND MANAGEMENT MEASURES OR IDENTIFY AREAS FOR SPECIAL MANAGEMENT**

FSF and its members oppose the plan's establishment of a framework to designate "Important Ecological Areas" ("IEA"), and its anticipation that the Ecosystem-Based Management Work Group will continue to identify and define IEAs for at least the near future.

First and foremost, the ocean plan does not identify a justification for designating IEAs, nor the purpose for which such designations may be used. It only states that IEAs are "habitat areas and the species, guilds, or communities critical to ecosystem function, resilience, and recovery."<sup>2</sup> The frameworks state that such areas have: (1) high productivity; (2) high biodiversity; (3) high species abundance; (4) vulnerable marine resources; and (5) rare marine resources. In short, areas most important to fisheries are logically likely to coincide with areas of high productivity and species abundance, and fishing grounds are therefore likely to be among the core areas that the RPB identifies as IEAs.

The RPB cannot—and should not attempt to—dictate how our fisheries are managed (or how commercial fishing must coexist with renewable energy projects). As the ocean plan plainly states, the National Ocean Policy did not give the RPB or any other agency the authority to create new laws or regulations. Existing statutes and regulations prescribe the goals, their prioritization, who must implement them, and the lawful outcomes of such implementation.

Nor should IEAs be used to trump or end-run established fishery management measures. Commercial and recreational fisheries in federal waters are managed by the National Marine Fisheries Service and regional Fishery Management Councils ("Councils") pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, first enacted in 1976. Fisheries management is among the oldest and well-developed ocean planning activities in the United States. Councils have developed complex and spatially explicit regulations in each region in order to achieve optimum yield;<sup>3</sup> that is, to maximize economic and biological stability. Moreover, both the New England and Mid-Atlantic Fishery Management Councils are undergoing major efforts to characterize and protect fisheries habitat in their respective regions. New England recently completed an exhaustive, 13+ year effort to improve its science-based habitat protections, and is

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<sup>2</sup> *Id.* at 188.

<sup>3</sup> *See* 18 U.S.C. § 1851(a)(1).

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currently beginning to use the studies completed during that effort to develop even more comprehensive ecosystem-based management measures.

Designation of IEAs is therefore, at best, a redundant exercise. Far more likely is that certain interest groups will try to use IEA designations to force unilateral changes to fisheries management that are not based in the Magnuson-Stevens Act and that risk the biological and economic sustainability that Congress, the Councils, states, and fishermen have worked so carefully to achieve.

The ocean plan should work to eliminate, not promote, end-runs around established, inclusive fishery management processes. Indeed, the Obama Administration itself is acting out of keeping with the ocean plan's core engagement principles. As you may know, the Administration recently proposed several areas off the coast of New England to be designated as national monuments under the Antiquities Act.<sup>4</sup> Notably, this process is occurring not only in the absence of public input or stakeholder consultation; it is occurring without any environmental impacts analysis or scientific review. FSF and other fishery groups strongly oppose any large-scale closure, enacted unilaterally and outside the stakeholder-based collaborative processes that have been statutorily prescribed and carefully cultivated in the fisheries management arena. Not only is the monuments process undemocratic but it could have substantial unintended adverse impacts across New England.

The RPB should likewise be extremely concerned about any unilaterally-enacted ocean planning activities. We believe that it should actively oppose *any* offshore activity, permit, or designation that does not follow the core principles of the ocean plan, including operation under existing authorities and improved communication.

Likewise, ongoing IEA designation activities without clear purpose or utility simply have no place within the context of effective planning. The RPB must therefore not continue with IEA designation activities unless, at a minimum, it clearly states its purpose for doing so and actively opposes the use of the resulting IEAs for marine monuments, special use areas, or any other management outcomes that contravene the fishery management councils' public processes.

## **II. THE OCEAN PLAN DOES NOT RESOLVE FISHERY CONFLICTS WITH OFFSHORE ENERGY SITING**

The ocean plan's overarching goals are improved decision making, increased compatibility between uses, and promotion of healthy ecosystems. We agree there is an urgent need to reduce conflict in marine activities, and particularly between fisheries and energy development projects.

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<sup>4</sup> 16 U.S.C. § 431-433.

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One need look only to highly contentious siting decisions for offshore wind facilities to see that the process is broken.

In the Northeast, developers have submitted unsolicited bids to construct wind energy facilities in key fishing grounds, such as Horseshoe Shoal and Cholera Bank, that would displace commercial and recreational fishermen and harm critical biological resources. The Bureau of Ocean Energy Management's ("BOEM") current regulations allow those bids to be fast-tracked; fisheries conflicts are only truly considered in the months before turbines are placed in the water, after many years of time and money have already been invested. This has led to poor relations, project delay, litigation, and unnecessary expense for all parties involved.

To the extent that the regional ocean plan may be able to increase communication and fisheries consultation early in the siting process, FSF has been supportive and active in its development. To be certain, the plan's focus on improved coordination and communication is positive. However, in evaluating whether the plan will truly prevent or reduce these types of conflicts from happening in the future, one must ask whether a Cape Wind- or New York Bight-style siting conflict could occur if the plan is adopted as drafted. The answer is a resounding yes. The draft plan does not improve upon existing authorities in a practical sense. It fails to assure meaningful outcomes that will prevent future conflicts via the BOEM unsolicited bid process—an approach that is, by its nature, exclusive and prejudicial.

#### *Existing Authorities*

The RPB has the authority to develop regional coastal and marine spatial plans.<sup>5</sup> It is "not [a] regulatory bod[y] and ha[s] no independent legal authority to regulate or otherwise direct Federal, State, tribal, or local government actions."<sup>6</sup> On the other hand, several authorities exist that require BOEM to consult with, and defer to, fisheries interests during the siting and operation of offshore energy facilities. 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.<sup>7</sup> It explicitly preserves "the character of the

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<sup>5</sup> Exec. Order No. 13547 (July 19, 2010).

<sup>6</sup> National Ocean Council, *National Ocean Policy Implementation Plan* (Apr. 2013), at 23

<sup>7</sup> 43 U.S.C. § 1333(a)(1).

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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.<sup>8</sup>

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.<sup>9</sup> 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.”<sup>10</sup> Finally, in order to issue a license for ownership, operation, and 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.”<sup>11</sup>

In 2011, BOEM (then “BOEMRE”) signed a Memorandum of Understanding (“MoU”) 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.<sup>12</sup> Under this agreement, BOEM must consult with NOAA early in the energy siting process in order to identify areas of particular concern to fisheries. The agencies themselves must also identify and seek out relevant private parties “to provide sufficient information to the other agency to inform their decision-making processes.”<sup>13</sup>

In actual practice, however, the MoU’s required information exchange rarely occurs, and when it does, it is either insufficient or too late to be of use. As a result, ocean wind energy development often steams ahead without the advantage of data on the marine environment, benthic communities, or fishing effort, locations, seasons, and restrictions that are readily available from the New England Fishery Management Council, the Mid-Atlantic Fishery Management Council, NMFS, and fishermen themselves. If the requisite information exchange did occur, ocean wind developers could avoid siting projects on lucrative fishing grounds that support important fishing

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<sup>8</sup> *Id.* at § 1332(2).

<sup>9</sup> 33 U.S.C. § 1501(a)(2).

<sup>10</sup> *Id.* at § 1501(b).

<sup>11</sup> *Id.* at § 1503(c)(4).

<sup>12</sup> *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).

<sup>13</sup> *Id.* at 3.

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operations; private parties would be saved from having to engage in duplicative processes; and actual, timely development of offshore wind farms could happen. The record shows that wind projects *do* proceed when advance planning occurs. For example, the Block Island Wind Farm—the only offshore wind facility actually under construction in the nation—was permitted relatively quickly under Rhode Island’s Ocean Special Area Management Plan (“SAMP”). State officials and stakeholder representatives worked together through the SAMP to identify suitable areas and minimize conflicts in wind energy project siting *before* bids were developed, which streamlined the permitting process that followed.

In reality, due to BOEM’s unsolicited bid process’ ongoing lack of compliance with the above-referenced laws and guidelines, conflicts have emerged. In but one example of the many problems with the current offshore permitting and leasing process, a consortium of three downstate New York power companies was able unilaterally to nominate an area just offshore Long Island for a wind farm under the Bureau of Ocean Energy Management (BOEM)’s “Smart from the Start” program. Just by nominating this area, the company triggered BOEM to initiate a solicitation that led to two other wind energy companies placing bids for the unilaterally selected area. Only after these bids were submitted and processed did the agency issue a Call for Information to offer existing ocean users the chance to explain their interests in that area.

Responses to the Call revealed just about every type of ocean user conflict imaginable. For starters, NMFS/NOAA and the New England Council submitted letters urging BOEM to consider the extensive fishing activity in the proposed area. Portions of the area overlap Essential Fish Habitat, as well as important fishing grounds for a wide range of commercially prominent species. Fisheries Survival Fund, for the scallop industry, has repeatedly provided BOEM with survey and fishery data showing the substantial scallop biomass and fishing activity in the Call Area. Even the American Wind Energy Association expressed concerns over the viability of a wind farm in the call area.

Despite this information, BOEM is proceeding with a lease sale for the area in question.<sup>14</sup> BOEM’s roll-out for its Smart from the Start program in 2010 claimed the program would enable better and quicker decisions on wind energy development areas and proposals. The comment record in response to the Call reveals, however, that it is inefficient and ineffective for BOEM to enable private companies to lay claim to the valuable ocean areas without a well-structured process. A wide range of stakeholder groups, from the fishing industry to environmental organizations, have stressed the importance of early consultation on siting wind energy projects in response to this and other Calls for Information. We, too, have advocated repeatedly for intelligent advance planning for proposed wind energy projects.

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<sup>14</sup> See 81 Fed. Reg. 36344 (June 6, 2016).

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BOEM's current regulations, moreover, allow those unilaterally-developed unsolicited bids to be fast-tracked; fisheries conflicts are only truly considered under National Environmental Policy Act ("NEPA") analysis regarding the "construction and operations" phase of a wind facility's development; that is, in the months just before turbines are to be placed in the water, after many years of time and money have been invested.

BOEM's current regulations that segment NEPA analysis violate the law. On July 5, the United States Court of Appeals for the District of Columbia Circuit struck a blow for coordination, invalidating BOEM's flawed NEPA analysis regarding the long-delayed, unsolicited, Cape Wind project. The decision was sharply critical of BOEM's practice of parsing out environmental review among its lease issuance and wind facility construction phases of a project. In response to BOEM's argument that certain geological data was at least sufficient to support its initial decision to issue a lease, even if may not support downstream construction activities, the Court wrote:

The Bureau distinguishes between the "*initial* decision" to issue a lease and the consequences of that decision... [but] NEPA does not allow agencies to slice and dice proposals in this way. Agencies must take a "hard look" at the environmental effects of a major federal action "*and consequences* of that action."... The impact statement must therefore look beyond the decision to offer a lease and consider the predictable consequences of that decision.<sup>15</sup>

The failure to consider fisheries information in the earliest possible stages of planning decisions is inexcusable, illegal, and impractical. We have therefore repeatedly urged the RPB to develop effective protocols and agreements that ensure reasonable protections for historic fishing grounds and other existing ocean uses in accordance with the law. We must move away from a process in which stakeholders are responding piecemeal to poorly conceived plans, after substantial resources have been invested in their development.

#### *RPB Recommendations*

As stated above, although existing authorities require consultation and cooperation, certain agencies often fail to follow their own rules and guidelines, such as the BOEM/NOAA MoU. Unfortunately, the proposed measures in the ocean plan largely impose consultation requirements on project proponents that have a vested interest in having their projects approved where they want them. They do nothing to improve agency compliance. The plan's recommendations include, in relevant part:

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<sup>15</sup> *Public Employees for Envtl. Responsibility v. Hopper*, No. 14-5301 (D.C. Cir. July 5, 2016) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989)).

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... agencies should discuss with the proponent of the proposed project or activity (and the lead agency for NEPA review should address in the scoping process) a systematic process to identify and engage stakeholders who may be affected by the proposed project.”<sup>16</sup>

Furthermore, asking private developers to identify and engage stakeholders, while important, will not ensure the latter’s concerns are addressed. What’s more, this provision may alert project proponents of potential stakeholder conflicts, but will do nothing to cause BOEM itself to reconsider its most egregious practices—particularly since the unsolicited bid process does not even include scoping. The ocean plan goes on to state that:

Project proponents should seek to identify, engage, and incorporate information from stakeholders before filing a permit application or otherwise formally initiating the review process to ensure that stakeholder information helps inform both the project application and subsequent public, stakeholder, and agency review.<sup>17</sup>

Again, the plan illegally places the onus for reducing conflict squarely onto self-interested would-be developers, and relieves the agency of any meaningful responsibility. BOEM and other agencies simply must commit to ensuring that they, *as well as* project proponents, are adequately identifying and protecting existing uses as required by law.

In another statement relevant to this process, the ocean plan inaptly states:

Whether the projects being considered result from solicited or unsolicited proposals, or are for commercial development or for research purposes, the Plan will assist BOEM and project developers, to the extent practicable, in identifying the relevant species or locations that require further detailed data collection through the assessment of a site. BOEM guidelines for developers include the recommendation to use the most recent data available to inform any proposed survey work. Developers may also use the information to inform the siting of their structures within a lease area.<sup>18</sup>

Not only does this statement fail to recognize that BOEM’s unsolicited bid process is fundamentally incompatible with collaborative multi-stakeholder planning, it focuses solely on data collection and provides no guidance on weighing conflicts. As currently drafted, the plan

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<sup>16</sup> *Draft Ocean Plan* at 145.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 109.



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focuses on “identifying” and “engaging” existing uses, but does not ensure that agencies give meaningful consideration to conflict reduction and avoidance. Nor does it create agency commitments to meeting consultation requirements and use priorities that are already within existing legal and regulatory authorities.

#### *The Need for Transparency*

A major component of effective communication that is almost entirely absent from the ocean plan is the concept of transparency. While the plan references transparency in relation to RPB activities, it is silent on an equivalent need in agency decision making processes. It is absolutely critical, not to mention fundamental to successful planning, that decisions are made in an open forum, with opportunities for meaningful public engagement at the beginning stages of project consideration. Moreover, the public must be informed of how its input was considered and weighed through informal channels as well as the formal administrative record.

#### *Conclusion*

In order to improve collaboration in ocean planning, the ocean plan would need to require action agencies to follow transparent, forward-thinking practices. This necessarily entails developing appropriate sites for development through a process that includes all affected stakeholders and agencies *before* a specific project proposal is developed. As written, the draft plan does not adequately improve upon existing authorities, despite its well-intended focus on improving collaboration. Finally, the draft plan should be revised to require agencies to be fully transparent in all decisions regarding siting, construction, and operations of new projects, in addition to through the legally-mandated environmental analysis of those projects.

### **III. THE NORTHEAST DATA PORTAL SHOULD CONTINUE TO BE EXPANDED AND IMPROVED**

FSF generally supports activities that could lead to increased assessments or enhanced understanding of the Northwest Atlantic ecosystem, so that those assessments may provide information that is currently missing from decision making. The most important aspect of any ocean planning process is that existing ocean uses are accurately described and considered before any siting proposals are analyzed. The utility of this information will depend on whether the data sets are: 1) comprehensive and robust; 2) up-to-date; and 3) actually used by agencies in ocean planning decisions.

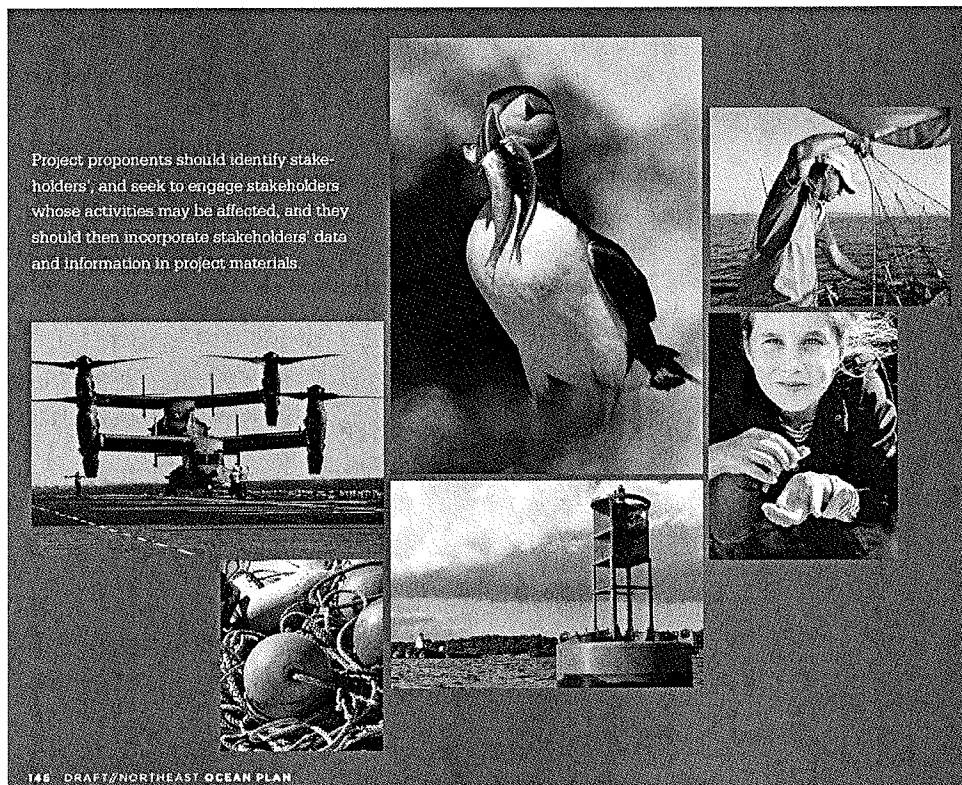
To this end, we believe the data portal should be updated as often as possible, if not in real-time, and should be expanded to include significantly more fisheries data. The ocean plan suggests

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that marine life and habitat data should be updated in a five-year cycle.<sup>19</sup> This time frame is not nearly often enough, due to rapidly changing biological and management contexts in fisheries. So, too, must the data set be expanded. Abundant information is available from stock assessments, cooperative research, the Northeast Fisheries Observer Program, and other sources that have yet to be included in the portal. FSF would be pleased to work with the Northeast Regional Ocean Council or any other partners in improving these fisheries elements of the portal.

**IV. THE OCEAN PLAN SHOULD BE PRESENTED IN A MORE ACCESSIBLE FORMAT**

It is extremely difficult to print the plan and to find specific information within it as currently formatted. As an example, we were only able to locate information in the plan describing agency commitments regarding stakeholder consultation—the issue that most strongly impacts the largest group of people who actually make a living on the ocean—after extensive dedicated searching. Perhaps this is because the section is comprised more of pictures than text:



<sup>19</sup> *Draft Ocean Plan* at 55.

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In contrast, the RPB developed a document titled “Best Practices for Agency Coordination” for its November 2015 meeting. That document clearly and succinctly described suggested measures for stakeholder consultation:

Coordination with stakeholders

- In the context of the proposed project, agencies and the proponent should discuss how stakeholder interests are addressed by applicable authorities, and agencies with subject-matter jurisdiction should specifically identify management provisions that require characterization of stakeholder interests. Agencies should discuss with the project proponent, and the lead agency for NEPA review should address in the scoping process, the development of a systematic process by which to identify and engage stakeholders who may be affected by the proposed project in a manner relevant to consideration under existing authorities. Elements of such approach should include, but may not be limited to, the following components:
  - Using best professional knowledge, agencies should informally discuss with the project proponent known stakeholders who may be affected. (Such information does not relieve the project applicant of its exclusive responsibility to identify potentially affected stakeholders to the extent required or anticipated under the core authorities.)
  - Project proponents should identify and seek to engage stakeholders whose activities may be affected and incorporate data and information provided by stakeholders in project materials as appropriate. Interests that should be considered include, but may not be limited to, commercial, charter, and recreational fishing; commercial and recreational navigation; general recreation; marine infrastructure (cables and pipelines; other structures); military uses; cultural and historic interests; energy facilities; sand and gravel extraction; and any other interests specified under existing authorities.
  - To address the potential cumulative effects of a project on stakeholders when those effects may have a community-level impact, project proponents should identify and seek to engage coastal communities that have a particular relationship with a specific location and incorporate relevant data and information in project materials as appropriate.
  - Project proponents should seek to identify, engage, and incorporate information from stakeholders before filing a permit application or otherwise formally initiating the environmental review and permitting process to ensure that stakeholder information helps inform both the project application and subsequent public, stakeholder, and agency review.

Although this information seems to parallel what is in the ocean plan, its presentation in the plan is fragmented and housed under inappropriate headings and subheadings (to the extent that we are able to decipher the outline of such categories).

FSF and other commenters may have missed relevant information during this comment period due to the document’s disorganized and distracting format. If the RPB intends for the plan

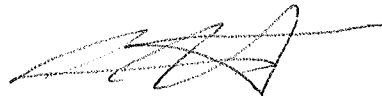
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to be used as a serious reference document, it must release a professional, text-only version. It should be comparable to other readable management documents; that is, in portrait format with an executive summary and bulleted table of contents.

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In summary, FSF strongly supports the principles of the ocean plan and recognizes the need for effective offshore planning. If the RPB truly strives to reduce conflict in ocean planning and to improve ecosystem health, it would require agencies to engage in—not only pay lip service to—collaborative, inclusive decision making among existing users during siting deliberations for new ocean uses. It would also support the statutorily-constituted fishery management councils' approaches to sustainable fisheries management and not circumvent or complicate what is already a complex, but generally effective, process. Thank you for the opportunity to provide these comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David E. Frulla", with a long horizontal line extending to the right.

David E. Frulla  
Andrew E. Minkiewicz  
Anne E. Hawkins

*Counsel for Fisheries Survival Fund*