David E. Frulla

Kelley Drye & Warren LLP
Washington Harbour, Suite 400
3050 K Street, NW
Washington, DC 20007

Tel: (202) 342-8648
Fax: (202) 342-8451
dfrulla@kelleydrye.com

August 22, 2022

Via Electronic Submission

Amanda Lefton, Director
Bureau of Ocean Energy Management
Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Re: Fisheries Survival Fund Comments on BOEM's Guidelines for Mitigating Impacts to Commercial and Recreational Fisheries on the Outer Continental Shelf Pursuant to 30 CFR Part 585 [Docket No. BOEM-2022-0033]

Dear Director Lefton:

We represent the Fisheries Survival Fund ("FSF") and respectfully submit these comments regarding BOEM's Guidelines for Mitigating Impacts to Commercial and Recreational Fisheries on the Outer Continental Shelf ("OCS") pursuant to 30 CFR Part 585 ("Draft Guidelines"). FSF represents the significant majority of the Full-Time Limited Access scallop permit holders, home-ported from Massachusetts south through North Carolina. In short, the Draft Guidelines represent a credible start to the process of developing fishery mitigation and compensation guidelines, but significantly more remains to be analyzed and included for these guidelines to be reasonable and consistent with the law.

GENERAL APPROACH TO DEVELOPING MITIGATION MEASURES

To be consistent with significant new Biden Administration regulations and policy, the Final Guidelines should state expressly that the effects requiring mitigation and compensation include direct, indirect, and cumulative effects. The Council on Environmental Quality ("CEQ") recently amended its overarching National Environmental Policy Act ("NEPA") regulations to re-define "effects" or "impacts" to include those that are direct, indirect, and cumulative. 40 C.F.R. § 1508.1(g), amended by 87 Fed. Reg. 23453 (Apr. 20, 2022). The Administration's revision of the NEPA regulations represents a notable policy shift away from the Trump Administration CEQ's excision of NEPA's longstanding requirement to address indirect and cumulative effects or impacts.

There is no doubt this policy shift applies to BOEM's Draft Guidelines. CEQ regulations define "mitigation" to "mean[] measures that avoid, minimize or compensate for effects caused by a proposed action or alternatives described in an environmental document or record of decision and that have a nexus to those effects." 40 C.F.R. 1508.1(s) (emphasis added). For their part, the Draft Guidelines specifically incorporate NEPA's definition of "mitigation." Draft Guidelines, at 4. Now that NEPA regulations define "effects" and "impacts" to include direct, indirect, and cumulative effects, NEPA mitigation measures must reach all of these effects.

Likewise, BOEM's regulations prescribing the requirements for a SAP and a COP both require identification of "your proposed measures for avoiding, minimizing, reducing, eliminating, and monitoring environmental impacts." 30 C.F.R. §§ 585.610(a)(8) & 585.626(b)(15)(emphasis added). Consistently, the Draft Guidelines state that "[t]he scope of impacts or losses that should be addressed by compensatory mitigation should be based on the impacts identified in the various environmental documents including the lessee's COP and BOEM's assessments analyzing the potential effects of the lessee's submitted plans." Draft Guidelines at 7. "BOEM's assessments analyzing the potential effects of a lessee's submitted plans" include project-related NEPA documents. Accordingly, BOEM should construe the term "impacts" in 30 C.F.R. §§ 585.610(a)(8) & 585.625(b)(15), and in its Final Guidelines, to be coextensive with the terms "impacts" and "effects" under recently-revised NEPA regulations and extend this term to consider indirect and cumulative impacts.

BOEM should identify a broader and more updated array of planning tools. FSF would direct BOEM's attention specifically to the comments provided by Dr. Cate O'Keefe of Fishery Applications Consulting Team under the heading *General Approach to Developing Mitigation Measures* ("O'Keefe") at 1-2. These comments are attached hereto as Exhibit A. Dr. O'Keefe's CV is attached as Exhibit B.

BOEM should encourage lessees in relatively contiguous areas to consolidate or coordinate fisheries outreach, mitigation, monitoring, and compensation to the maximum extent practicable. BOEM should encourage lessees in a relatively contiguous area to consolidate their processes that involve the fishing industry, from "pre-activity engagement" (*see* Draft Guidelines at 4), through the claims process (*see* Draft Guidelines, at 10). For instance, in the New York Bight, six lessees will cause impacts to the scallop fishery from windfarm construction and operations and thus confront scallop revenue exposure. Based on how the scallop fishery is managed, all permit holders would suffer a similar loss. It would be neither efficient nor effective for the approximately 340 limited access scallop permit holders to submit claims to six lessees each—or for FSF to try and coordinate engagement and related obligations with six different lessees.

The Guidelines should more clearly articulate they are binding on lessees because they are derived from the Outer Continental Shelf Lands Act and BOEM's regulations implementing this organic statute. Each guideline is couched in terms of what a lessee "should" do. *See, e.g.*,

Draft Guidelines at 5. But in response to questions during fisheries listening sessions, BOEM appeared to assure the fishing industry that it has authority to hold developers to these mitigation and compensation standards as part of SAP, COP, and GAP approval. The extent of a lessee's obligation to comply with these Guidelines should be stated up front, not left for subsequent construction and debate.

The preface to the Draft Mitigation Guidelines states:

> Except to the extent that the contents of this document derive from requirements established by statute, regulation, lease, contract, or other binding legal authority, the contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding legal requirements, related agency policies, and technical issues.

These Guidelines do, in most relevant part, have a basis in "statute, regulation, … and other binding legal authority." More specifically, as BOEM's Draft Guidelines explain, agency regulations require that a lessee's plans "do[] not unreasonably interfere with other uses of the OCS" and "do[] not cause undue harm or damage to natural resources; life (including human and wildlife); property; [and] the marine, coastal, or human environment." (Emphasis added). *See* 30 C.F.R. §§ 585.606, 621, and 641 (cited in, *inter alia*, Draft Guidelines, page 3). Further, BOEM's regulations define the "human environment" to mean "the physical, social, and economic components, and factors that interactively determine the state, condition, and quality of living conditions, employment, and health of those affected, directly or indirectly, by activities occurring on the OCS." 30 CFR § 585.112 (emphasis added). These regulations are based on Section 8(p)(4) of the Outer Continental Shelf Lands Act ("OCSLA"). Accordingly, a lessee's duty to mitigate and compensate for fisheries-related impacts is, indeed, "derive[d] from requirements established by statute, regulation … or other binding legal authority."

Moreover, the Draft Guidelines suggest that "the scope of impacts or losses that should be addressed by compensatory mitigation should be based on the impacts identified in the various environmental documents including the lessee's COP and BOEM's assessments analyzing the potential effects of the lessee's submitted plans." Draft Guidelines, at 7. The requirement to prepare a COP derives from OCSLA and BOEM's implementing regulations, not NEPA.[1] This

[1] In implementing NEPA mitigation guidance, CEQ explained that NEPA mitigation requirements are not binding, but rather "ensure[] that the public and decision-makers are fully informed of any promised mitigation and an agency's clear commitment to perform or ensure the performance of that mitigation, which in turn strengthens the basis for the NEPA analysis and documentation that the agency has prepared. This guidance is designed to enhance the integrity of the NEPA analysis when it relies on mitigation." 76 Fed. Reg. 3843, 3844 (Jan. 21, 2011). This NEPA-based obligation is what BOEM appeared to be identifying in the listening session referenced above. But then these guidelines tellingly distinguish substantive agency requirements, such as those contained in OCSLA and BOEM's implementing regulations from NEPA requirements, stating, "It is an agency's underlying authority that provides the

distinction is material. Because a lessee's obligations are derived in pertinent part from OCSLA and BOEM regulations, 30 C.F.R. Part 585 Subpart F prescribes more than just "Information Requirement[s]." *But see* Draft Guidelines at 3 (header for chart).

By the same token, BOEM's articulation of Project Siting, Design, Navigation, and Access Measures and Safety Measures should be mandatory, not precatory.

PROJECT SITING, DESIGN, NAVIGATION & ACCESS

BOEM did incorporate measures recommended by various fishing organizations, including FSF. To be clear, though, lessees may implement each and every mitigation measure set forth in Subparts A & B, but it still will be difficult, if not impossible, for vessels fishing with mobile towed gear, such as a scallop dredge, to operate safely within windfarms. Thus, these design and safety elements do not represent a substitute for adequate compensation for long-term or permanent displacement, should such displacement arise.

While certain developers have derided the fishing industry's concerns regarding navigability and safety of fishing vessels within wind turbine arrays, and while BOEM has consistently presumed fishing will resume within wind energy areas[2], the fishing industry's concerns regarding windfarm access are already being borne out. For instance, BOEM cites to documentation that the fishing industry is expressing legitimate, well-founded concerns relating to safety and navigability in the form of the National Academies of Science Engineering and Medicine's report on *Wind Turbine Generator Impacts to Marine Vessel Radar*. *See* Draft Guidelines, at 7 n.7.

Indeed, as FSF has repeatedly explained in prior comments, neither BOEM nor lessees can point to any place in the world where mobile gear fishermen—and certainly not mobile gear fishermen towing as extensive gear sets as scallop dredges—have been able to operate within windfarms. Either mobile gear is prohibited, or mobile gear fishermen do not elect to fish within these turbine arrays. Thus, as explained in more detail below, a reservation of loss over a five-year period based on a diminishing level of displacement would not fully capture the loss to be compensated if that loss proves permanent, not temporary. Any compensation system will need to be of sufficient duration and flexibility to accommodate long-term resource loss, if and when fishermen's concerns over access are proven justified.

BOEM's guidance relating to project siting, design, navigation and access should counsel lessees that project design considerations are unique to each lease area. Not all wind projects

basis for the agency to commit to perform or require the performance of particular mitigation." *Id.* (emphasis added).

[2] Such as by phasing recommended revenue exposure reserve funds for compensation down and out over a five-year period. Draft Guidelines, at 9.

will affect all fisheries. BOEM should, therefore, recommend that lessees focus on a refined set of fisheries participants that are impacted regionally to inform realistic and context-specific turbine and sub-station array layouts, transit requirements, and buffer zones around and between wind project areas. *O'Keefe*, at 3. FSF agrees that if turbine layouts are not consistent between adjoining lease areas, lessees must provide suitable buffer zones to allow safe navigation and access. As the fishing industry has repeatedly explained, however, a one nautical mile buffer is simply inadequate. *But see* Draft Guidelines, at 6.

Project design criteria must more specifically account for regulated fishery areas. These areas include habitat conservation areas, essential fish habitat, regulated time-area restrictions for specific species and/or gear types, and spatial-temporal rotational management, such as scallop access areas. In instances where wind project boundaries abut or overlap fishery regulated areas, additional mitigation measures may be needed, including financial compensation. *O'Keefe*, at 3. Buffer zones adjacent to scallop access areas, such as those provided for in the New York Bight, should also be required.

SAFETY MEASURES

The Guidelines' discussion of installation time windows should take fishing-related considerations more into account. The Draft Guidelines appropriately focus on lessees' considerations of installation time windows. Draft Guidelines, at 6. The Guidelines should be more specific about the fishing activities that should be taken into account, such as "peak seasons," seasonal market variability, and regulated fishing seasons and temporal closures. *O'Keefe*, at 3.

ENVIRONMENTAL MONITORING

BOEM's Environmental Monitoring Guidelines should be broader and more specific. FSF appreciates BOEM's recommendation that "lessees work with State and Federal fisheries management agencies to explore the need and methods to monitor changes in fishing activity as a result of proposed offshore wind energy development." Draft Guidelines at 7. There are two elements to changes in fishing activity that BOEM should unpack in more detail under the Draft Guidelines Section D. As explained above, fishing—and especially mobile gear fishing—will, as a practical matter, be disrupted as a result of offshore wind energy development. It is important to monitor changes in fishing activity caused by physical impediments installed as a result of the planned mass ocean industrialization.

But it is equally important to obtain baseline information and monitor changes to the environment in which managed and protected species live to determine whether offshore wind arrays will cause long-term changes in species distribution and abundance. It is especially important to consider these latter issues as part of an "environmental monitoring" program. Indeed, monitoring for these species effects is as important to fisheries mitigation and

Exhibit B

Comments of Fisheries Survival Fund

Docket No. BOEM-2022-0033

BOEM Guidelines for Mitigating Fisheries Impacts

Catherine E. O'Keefe

Principal Consultant

Tying science to management for sustainable solutions

99 Bakerville Road ~ South Dartmouth, MA 02748
(978) 766-0536 ~ okeefe@fisheryapps.com ~ www.fisheryapps.com

PROFESSIONAL SUMMARY

Catherine O'Keefe has over 20 years of experience in the fishery science and management fields, including employment in local, state, and federal agencies, academic institutions and non-profit organizations. Dr. O'Keefe focuses on the interface between science and policy, specializing in fishery policy analysis, fisheries management advice, fishery-dependent data applications, stakeholder engagement, and science communications. Dr. O'Keefe has participated in fish stock assessment and management plan development for species ranging from North Carolina to Atlantic Canada, has experience with state and federal permitting review for development of offshore wind, and has extensively engaged with stakeholders in the marine-user community.

EDUCATION

- PhD: Living Marine Resources, Fisheries, 2013 - University of Massachusetts Dartmouth
- MA: Biology, Fisheries, 2005 - Boston University Marine Program
- BA: Biology, Fisheries, 1999 - Hampshire College

EXPERIENCE

Fishery Applications Consulting Team 2020 - Current

- Owner and principal consultant for woman-owned small business focused on fisheries science and management.
- Applications to support fishery management decisions, fishery data collection systems, meeting and conference facilitation, coexistence of offshore wind energy and fisheries, and stakeholder engagement.

University of Massachusetts Dartmouth, SMAST 2016 – Current

- Adjunct Professor, Department of Fisheries Oceanography.
- Graduate course instruction and graduate student thesis and dissertation committees.

Massachusetts Division of Marine Fisheries 2016-2020

- Marine Science and Policy Manager.
- Lead and support policy development, fisheries management, and scientific research for the Commonwealth.
- Support research, policy, and permitting review for development of offshore wind energy.
- Lead development of Division of Marine Fisheries Strategic Plan for 2019-2023.
- Serve on select New England Fisheries Management Council (NEFMC) and Atlantic States Marine Fisheries Commission (ASMFC) committees; serve as Policy Director to the Massachusetts Marine Fisheries Institute.

University of Massachusetts Dartmouth, School for Marine Science and Technology (SMAST) 2006-2016

- Research Professor and Principal Investigator on scallop and groundfish research topics.
- Lead and assist in grant proposals, reports, presentations at meetings and peer-reviewed scientific contributions.
- Manage SMAST Fisheries research budgets, including the 7-year $25 million Marine Fisheries Institute program.
- Chief Scientist on offshore scallop surveys.

Northeast Fisheries Observer Program 2005-2006

- Data Editor.
- Quality control editing of raw data collected by observers of commercial fisheries.
- Data quality audits, participation in observer trainings, Oracle database research.

PROJECTS & AFFILIATIONS

Recent Contracts

- Atlantic Groundfish Council: External Review of Canadian MSC Certified Fisheries (2022-current)
- NEFMC: "Sea Scallop Survey Work Group Facilitator" (2021-current)
- SMAST/CINAR: "Analysis of New England Groundfish Catch Rates" (2021-current)
- Vineyard Wind: "Compensatory Mitigation for Impacts to Fishing Industry" (2020-current)
- NEFMC: "Evaluation of the Atlantic Sea Scallop Rotational Management Program" (2021-2022)
- SMAST/CINAR: "Participatory Design Workshops to Evaluate Changes to Ecosystem Surveys" (2021-2022)
- NEFMC: "Monkfish Discard Estimation and Total Allowable Landings Calculation" (2020-2021)
- Nova Scotia Swordfishermen's Assoc: "Evaluation of the Canadian Swordfish Management System" (2021)
- Cape Cod Commercial Fishermen's Alliance: "Applying Electronic Monitoring Data in Assessments" (2020-2021)
- AECOM: "Wind Energy Economic Exposure and Impacts of Fisheries" (2020-2021)
- Royal Society for Protection of Birds: "Seabird Bycatch Mitigation for Gillnet Fisheries" (2020-2021)
- Northeast Seafood Coalition: "Technical Review of Northeast Multispecies Amendment 23 DEIS" (2020)

Professional Affiliations

- American Institute of Fishery Research Biologists, 2011-current (President 2020-current)
- American Fisheries Society, 2011-current
- University of Massachusetts Dartmouth Alumni Association Board, 2020-current

Professional Working Groups

- NEFMC: Science and Statistical Committee, Member, 2020-2021; Vice-Chair, 2021-current
- NEFMC: 2022 Management Track Assessment, Peer Review Panel Member, 2022
- NEFMC: 2020 TRAC Assessment, Peer Review Panel US Representative, 2021
- NEFMC: 2020 Management Track Assessment, Peer Review Panel Member, 2020
- NEFMC: Herring, Skate, Monkfish Committee, Member, 2016-2020
- NEFMC: Scallop Plan Development Team, Member, 2007-2012; 2016-2020
- ASMFC: Atlantic Herring Board, Member, 2016-2020; Chair, 2020
- Massachusetts Fisheries Working Group on Offshore Wind, Member, 2016-2020
- Massachusetts Marine Fisheries Institute, Policy Director, 2016-2020
- Stellwagen Bank Sanctuary Advisory Council, Member, 2016-2020

SELECTED PUBLICATIONS

O'Keefe, C.E. and Scallop Plan Development Team. 2022. Evaluation of the Atlantic Sea Scallop Rotational Management Program. New England Fishery Management Council.

O'Keefe, C.E., S.X. Cadrin, G. Glemarec and Y. Rouxel. 2021. Efficacy of time-area fishing restrictions and gear-switching as solutions for reducing seabird bycatch in gillnet fisheries. Reviews in Fisheries Science and Aquaculture. https://doi.org/10.1080/23308249.2021.1988051.

Maguire, J.J. and C.E. O'Keefe. 2021. External Review of the MSC Certified Canadian Swordfish Fisheries – North West Atlantic Canada Longline and Harpoon.

O'Keefe, C.E. 2021. Evaluation of Monkfish Discard Estimation for Calculating Total Allowable Landings. New England Fishery Management Council.

Lowman, B.A., C. O'Keefe and S. Cadrin. 2021. Predictive models of yellowtail flounder bycatch in the US sea scallop fishery on Georges Bank. Journal of Northwest Atlantic Fisheries Science 52: 1-18.

Maguire, J.J., R. Merrick, P. Sullivan and C. O'Keefe. 2020. Autumn 2020 Management Track Peer Review Panel Report.

O'Keefe, C.E., S.X. Cadrin and M. Sissenwine. 2018. Accountability Measures for Northeast Fisheries: A Workshop to Examine Best Practices: Workshop Report. Massachusetts Marine Fisheries Institute.

Stokesbury, K.D.E., C.E. O'Keefe, and B.P. Harris. 2016. Fisheries Sea Scallop. *In*: Scallops: Biology, Ecology, Aquaculture and Fisheries 3rd edition (eds) S.E. Shumway and J.G. Parsons. Elsevier Science, Amsterdam.

O'Keefe, C.E., S.X. Cadrin and J. Wiersma. 2015. Fishery-Dependent Data in New England Groundfish Stock Assessments. Appendix 3 in Fishery Data for Stock Assessment Working Group Report. New England Fishery Management Council.

Lewison, R. A.J. Hobday, S. Maxwell, E. Hazen, J.R. Hartog, D.C. Dunn, D. Briscoe, S. Fossette, C.E. O'Keefe, et al. 2014. Dynamic Ocean Management: 21st century approaches for marine resource management and conservation. Bioscience 65(5): 486-498.

O'Keefe, C.E., S.X. Cadrin and K.D.E. Stokesbury. 2014. Evaluating effectiveness of time/area closures, quotas/caps and fleet communications to reduce fisheries bycatch. ICES Journal of Marine Science 71(5): 1286-1297.

O'Keefe, C.E. and G.R. DeCelles. 2013. Forming a partnership to reduce bycatch. Fisheries 28(10): 434-444.

SELECTED PROJECT EXPERIENCE

Fisheries and Offshore Wind Development

Private Client, Confidential Project, Massachusetts. Reviewed global compensatory mitigation program applications related to offshore wind, oil and gas energy development. Assisted in developing a fisheries compensatory mitigation program for impacts related to offshore wind energy development in southern New England, including survey, construction, operation, and decommission phases.

Private Client, Confidential Project, New York. Analyzed fishery-dependent data sources to identify impacted resources for economic impact assessment. Conducted economic exposure analysis for offshore wind energy development in NY Bight and southern New England.

UMASS, Offshore Wind Impacts on Fishery Independent Surveys, Massachusetts. Developed and facilitated two participatory design workshops to inform simulation framework modeling to evaluate impacts of offshore wind energy development on the operations and data products from fishery-independent surveys.

MADMF, Fisheries Working Group for Offshore Wind. Reviewed offshore wind energy permitting and planning documents (SAP, COP, Fisheries Communications Plans, Economic Exposure Analysis). Co-authored 2018 report "Management objectives and research priorities for fisheries in MA and RI-MA offshore Wind Energy Areas."

Fisheries Data and Management

NEFMC, Scallop Survey Working Group, Massachusetts. Facilitation of working group dedicated to designing a coordinated strategy for fishery-independent surveys of Atlantic sea scallops. Identification of survey tools and methods to be applied in offshore wind energy development areas with recommendations directed to the Northeast Fisheries Science Center and New England Fishery Management Council.

NEFMC, Evaluation of Scallop Rotational Management, Massachusetts. Conducted an evaluation of the 20-year rotational management program applied for the Atlantic Sea Scallop Fishery Management Plan. Primary author of report documenting effectiveness of fishery management strategies and recommendations for continued prosecution of the fishery in a multi-user ocean environment.

CCCFA, Fishery Electronic Monitoring Data in Stock Assessment, Massachusetts. Reviewed and evaluated pilot and implemented electronic monitoring programs for fishery-dependent data collection in New England and Mid-Atlantic fisheries. Primary author of report documenting application of electronic technologies to monitor fishery activity and recommendations for applications of electronic monitoring data streams for fishery stock assessments.

NEFMC, Monkfish Discard Estimation Methods, Massachusetts. Analyzed fishery-dependent data to explore alternative methods for calculating discards in the Mid-Atlantic and New England monkfish fisheries. Primary author of report documenting performance of discard estimation and total allowable catch calculations with recommendations for implementation.

UMASS, Analysis of New England Groundfish Catch Rates, Massachusetts. Organized and facilitated outreach networks for fisheries stakeholders to provide input about fishing behavior and catch statistics to inform Research Track stock assessments for New England groundfish species.

UMASS, Fishery-Dependent Data Visioning, Massachusetts. Collaborated with NOAA Fisheries to conduct over 50 in-person interviews with members of the fishing industry to develop a modernized data collection and integration system for fishery-dependent data.

NEFMC, Fishery Data for Stock Assessment Working Group, Massachusetts. Contributor to New England Fishery Management Council working group to develop recommendations for the expanded use of fishery-dependent data sources in resource stock assessments.

EDF, Fishery-Dependent Data in New England Groundfish Stock Assessments. Reviewed stock assessments for all New England groundfish species to assess the application of fishery-dependent data sources and catch per unit effort indices. Primary author of report, "Fishery-Dependent Data in New England Groundfish Stock Assessments."

Fisheries Bycatch

Royal Society for Protection of Birds, Seabird Bycatch Mitigation for Gillnet Fisheries, Baltic Sea. Reviewed and synthesized seabird bycatch mitigation measures for gillnet fisheries in the Baltic Sea and other global regions. Primary author of O'Keefe, C.E., Cardin, S., Glemarec, G, and Rouxel, Y. 2021. Efficacy of time-area fishing restrictions and gear-switching as solutions for reducing seabird bycatch in gillnet fisheries. Reviews in Fisheries Science and Aquaculture. doi: 10.1080/23308249.2021.1988051.

UMASS, SMAST Bycatch Avoidance Program, Massachusetts. Developed and led bycatch avoidance program for 250 participating scallop vessels, including real-time bycatch communications with active vessels, bycatch hotspot mapping, stakeholder outreach/engagement, research grant awards and administration, peer-reviewed publications and presentations at professional meetings.