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August 10, 2018

VIA ELECTRONIC SUBMISSION

Doreen Harris, Large Scale Renewables Team Director
New York State Energy Research and Development Authority
17 Columbia Circle
Albany, NY 12203-6399

Re: RFI OSW-2018 Comments

Dear Ms. Harris:

On behalf of the Fisheries Survival Fund ("FSF"), we offer the following comments regarding the New York State Energy Research and Development Authority's ("NYSERDA") Request for Information OSW-2018 ("RFI"). FSF represents the significant majority of the full-time limited access permit holders in the Atlantic scallop fishery. Organized in 1998, FSF's participants include over 200 such permit holders, home-ported from the South Coast of Massachusetts, south through Connecticut, New York, New Jersey, Virginia and North Carolina. We appreciate the opportunity to offer feedback to assist NYSERDA in developing a Request for Proposals ("RFP") for Offshore Wind Renewable Energy Credits ("OREC") pursuant to the New York State Public Service Commission ("NY PSC") *Order Establishing Offshore Wind Standard and Framework for Phase 1 Procurement* issued in Case No. 18-E-0071 and dated July 12, 2018.

FSF greatly appreciates the particular attention NYSERDA and NY PSC have paid to critical fisheries issues during the development of the Order and RFI. As you know, and as we have stated repeatedly in past comment letters to NY PSC, the Bureau of Ocean Energy Management ("BOEM"), and others, the development of offshore wind energy facilities will have significant and potentially devastating impacts to the scallop fishery and resource. In order to minimize and mitigate these foreseeable impacts, the entire process of offshore energy leasing, permitting, operations, and procurement needs to proceed with full consideration of fish stock health and fishing practices. However, though the Order presents a positive step forward in including these interests in the development of offshore renewable energy, the timeline presented by NY PSC and NYSERDA is extremely challenging. As FSF had less than one week to assemble these comments, we want to emphasize the importance of revisiting these critical issues in a Phase

2 process before any procurement activity occurs regarding sites that are not leased as of this time. The Phase 2 process should also apply to the additional lease sites if procurement agreements from those sites are developed later than 2019. We further request NYSERDA to work directly with fishing industry members, including through its Fisheries Technical Working Group (F-TWG) and any other regional coordination efforts that may emerge, to refine and improve upon these recommendations.

As requested, this comment letter will provide concise responses to specific questions in the RFI, in order to inform the development of NYSERDA's evaluation factors for OREC bids.

I. RFI QUESTION 28:

If a fishing compensation program is submitted in conjunction with the fisheries management plan, how should the proposer quantify the economic impacts? How should the fishing compensation plan be considered along with other economic benefits (Order, p. 48)?

Federal standards have been developed over the last 25 years to analyze and quantify the economic impacts of proposed regulations.[1] These standards are especially apt to apply to the windfarm proposal impact analyses because, though this is a New York procurement, the underlying permitted activities (i.e. offshore wind energy leasing and fishing) are federal. The experience of federal agencies in performing these analyses, as well as the judicial case history surrounding them are, therefore, readily applicable to, and can even provide best practices for quantifying the economic impacts of windfarm development proposals for the New York Bight.

Rather than prescribing a specific methodology for evaluating the economic impact of federal regulations, the body of regulations, executive orders, and memoranda that have been written on this topic instruct that the quality of information disseminated for public analysis (and, in fact, all information) is increased when it has three elements: utility, integrity, and objectivity.[2] We recommend that the impact analyses and the data that underlie the impact analyses of all windfarm development proposals be reviewed for these three characteristics. An impact analysis

[1] One of the earliest regulations on impact analysis was "Regulatory Planning was Executive Order 12866, which was enacted in September 1993. See also The Regulatory Flexibility Act (5 U.S.C. 601 et seq.), The Information Quality Act (44 U.S.C. 3504(d)(1) and 3516), Executive Order 13563, and the March 9, 2009 Presidential Memorandum on Scientific Integrity.

[2] By regulation, most federal agencies now have their own information quality standards. See for example National Oceanic and Atmospheric Administration Information Quality Guidelines, http://www.cio.noaa.gov/services_programs /IQ_Guidelines_103014.html ("NOAA's IQ Guidelines") (Accessed August 9, 2018)

that is based on the best available science is more likely to accurately assess the costs of wind energy facility construction and operation on the affected fisheries and surrounding communities, allowing BOEM and the State of New York to better plan for and mitigate these impacts.

1. Utility refers to the "usefulness of the information to its intended users, including the public."[3] One aspect of "utility" is clarity. To be useful the information needs to be presented in sufficient detail to be understandable by the reviewer. Another aspect is transparency. Information is more useful when the source and the methods by which the information was collected are provided to the reviewer. The source and the means of collection for the data provide a reviewer with context and permit information to be verified and replicated.

   Thus, we recommend that New York State instruct that proposers present all data in their impact analyses of offshore wind energy development proposals in such detail, with sourcing and data collection methods given, so as to allow the data to be replicated and verified. We recommend that New York and BOEM set up a data verification process that is incorporated into proposal reviews.

2. Objectivity means that information is presented in an "an accurate, clear, complete, and unbiased manner and in a proper context,"[4] and that the substance of the material presented should be "accurate, reliable, and unbiased information"[5] Specifically, when scientific, financial, technical, or economic analysis is used, such analysis is based on "the best reasonably obtainable scientific, technical, economic, and other information."[6] This information, "shall be generated, and ... developed, using sound statistical and research methods."[7] Furthermore, "[i]f data and analytic results have been subjected to formal, independent, external peer review, the information may generally be presumed to be of acceptable objectivity."[8]

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[3] NOAA's IQ Guidelines.

[4] *Id.*

[5] *Id.*

[6] Executive Order 12866 of September 30, 1993, p. 2, § 1(7).

[7] NOAA's IQ Guidelines. For examples of how data is made checked to assure that it is accurate, reliable, and unbiased, see the Objectivity section in NOAA's IQ Guidelines.

[8] "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies" OMB Final Guidelines, October 1, 2001. https://obamawhitehouse.archives.gov/omb/fedreg_reproducible (Accessed August 9, 2018).

Thus, we recommend that the State of New York establish a peer review process to review studies submitted by the windfarm developers as part of their proposal. In addition, we recommend that all proposals be reviewed by subject matter experts to establish that the information presented within them is based on the best obtainable current research on the conditions of the affected marine habitats and on the economic conditions of the relevant fisheries.

3. Integrity means that after information is gathered and processed it is protected "from unauthorized access or revision, to ensure that the information is not compromised through corruption or falsification."[9] The integrity of information is crucial to reasonably relying upon it as the basis for an impact analysis.

   Thus, we recommend that the proposals be reviewed to confirm that all the conclusions presented in the proposals accurately reflect the studies and data presented as sources.

The characteristics of utility, objectivity, and integrity of information form the basis for two generally accepted processes for analyzing the economic impacts, (i) Regulatory Impact Assessments ("RIAs") and (ii) Regulatory Flexibility Analyses ("RFA"). These two widely utilized and accepted processes have been developed and refined for analyzing and presenting the analysis of economic impacts of regulations. RFA analysis, which focusses on the impacts to small businesses, non-profits, and governments,[10] is especially relevant to the analysis of the economic impacts of windfarm proposals because the affected fisheries are mainly composed of small businesses.

Because of the widespread and accepted use of RIAs and RFAs, RIAs and RFAs should serve as models for how development proposals can quantify their economic impacts. The structure of RIAs and RFAs can also be used to assist with the comparison of the impacts of various development plans on the fisheries and marine populations that are affected by the construction and operation of the windfarms. Evaluation of the alternatives presented in these assessments will assist the proposers, the State of New York, and BOEM in selecting plans that minimize disruption to affected fisheries and applicable communities and maximize benefits both to the developers and the populations that are dependent on the Bight.

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[9] NOAA's IQ Guidelines.

[10] These groups will hereafter be referred to collectively as small entities.

Following the guidelines for the preparation of RIAs and RFAs, we recommend that proposers be instructed all proposals for development should include the following elements in their impact analyses:

1. A description and an estimate of the entities that the plan will affect,[11] including the diversity in sizes of the affected entities and the revenues and profitability, in terms of absolute dollar value and margin, of each group.[12]

2. An examination of the changes in costs to the relevant sectors and small entities affected by the proposal.[13] To the extent possible, different subgroups within the entities should be categorized by size and similar economic characteristics.[14]

3. A description of alternative proposals, both for the design of the windfarm and of the measures taken to mitigate the impacts to the fisheries and marine habitats, which the developer has considered.[15] The inclusions of such a description encourages transparency in the proposal process.

4. A description of the steps the proposer has taken to "minimize the significant economic impact on small entities, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted" [16]

5. An explanation of "why each of the other significant alternatives to the rule considered" by the proposer, "which affect the impact on small entities was rejected."[17]

6. A list of assumptions and uncertainties that underlie the analysis.[18] That is, the economic impact analysis should include the sources of the data used in the economic or technical analysis. If an estimate includes an element of uncertainty, a range of values for that

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[11] How to Comply With the Regulatory Flexibility Act (August 2017), at 45.

[12] *Id.* at 12.

[13] *Id.* at 32.

[14] *Id.* at 30.

[15] *Id.* at 32.

[16] *Id.* at 45-46.

[17] *Id.*

[18] *Id.* at 21.

estimate should be given that reflects the degree of uncertainty, rather than just presenting a point estimate.[19]

These steps will help to guarantee the utility, objectivity, and integrity of the economic impact analyses.

Aside from providing a structure for the impact analyses, prior application of RIAs and RFAs, both in general and with regard to fisheries, provides additional guidance on how economic impacts should be evaluated by developers, New York, and BOEM. We recommend that these additional guidelines be incorporated into the guidance to proposers and into the standards for proposal reviewing for quantifying economic impacts of the proposed windfarm developments:

- Impacts should be defined to include costs of compliance due to each proposal and the economic implications that derive from additional compliance costs such as economic viability (including closure of fisheries), competitiveness, productivity, and employment of the affected vessels.[20] "Compliance costs should be broadly defined to include the value of forgone fishing opportunities, increased operating costs, and costs associated with higher levels of debt servicing."[21]

- Impacts should also include changes in benefits and costs of groups of individuals, businesses of differing sizes, and other entities (including small communities and governmental entities) as a result of the proposal.[22] Proposals should show how special care was taken so as not to disproportionately affect any entity or subgroup.

- Impact analysis should analyze, and describe in detail actions that will be taken to minimize, cumulative impacts on the affected entities as a result of the windfarm design proposed.[23] That is, proposals should not view the fisheries and the marine habitats of the New York Bight in isolation. They must understand that the construction of windfarms may add to the impacts experienced by fisheries from events outside of the New York Bight. For example, vessels fishing in the Bight will have fewer options for locations to shift their fishing grounds outside of the Bight

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[19] *Id.* at 30.

[20] *Id.* at 32.

[21] Guidelines for Economic Reviews of National Marine Fisheries Service Regulatory Action (March 2007), at 29.

[22] *Id.* at 10.

[23] *Id.* at 13.

because of closures and relocations due to the construction and operation of other offshore energy projects along the Northeast coast.[24]

- Proposals should recognize that changes in profitability will more significantly impact vessels with lower profit margins, such as vessels that trawl for less profitable fish, disproportionally. A 5% loss in profitability may be tolerable to a vessel that has a 20% profit margin, but may make a vessel with a 6% profit margin less competitive and lead that vessel to, eventually, shut down operations. Proposals should demonstrate through their presentation of alternatives that the preferred development plan is the one that minimizes the impact to profit across the affected entities.

- If a proposer is not able to quantify economic impacts within a proposal because the necessary data in unobtainable, the proposer "may provide general descriptive statements regarding the rule's effects." [25] This option is a last resort and should only be used when it is not possible for the proposer to complete a quantitative analysis.[26]

- If a proposer is uncertain about how to proceed in the absence of reliable data on which to base an impact analysis, the proposer should document aggressive and meaningful public outreach to obtain such data.[27]

- "[I]t is not permissible to omit known information in order to skew the results."[28] Proposals that omit or skew data should be returned to the proposer for revision. Honest assessments of both the benefits and the negative impacts of each proposal is necessary for an accurate comparison of all development plan alternatives and to better plan for and mitigate the impacts of each proposal.

- Any information relied upon in the analytical process must be included in the impact analysis,[29] to assure the transparency of the data and to allow for results to be verified.

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[24] Letter from NOAA National Marine Fisheries Service Greater Atlantic Regional Office to Luke Feinberg RE: Docket BOEM-2018-0004 (June 7, 2018), at 3.

[25] How to Comply With the Regulatory Flexibility Act (August 2017), at 34.

[26] *Id.*

[27] *Id.* at 47.

[28] *Id.* at 75.

[29] *Id.* at 76.

- A reasonable attempt should be made to conduct the analysis over a sufficient period of time to allow a consideration of all expected effects. [30] The construction and operation of offshore wind energy facilities are expected to continue into the next several decades. Making the period of analysis too short would undervalue the impacts and the benefits of the proposal.

- Species abundance and fishery effort vary over a year and from year to year.[31] Proposals must reflect that construction and operations will have different impacts depending on what time periods they take place. Proposals should show that construction and operations have been planned to minimize the impacts on the affected fisheries and marine habitats.

When impacts are expected to be long lived, as in the case of these wind energy facilities, the predicted values for these impacts should be presented as a net present value of the discounted sum of the stream of predicted impacts. This allows the future impacts of multiple alternative proposals to be easily compared, rather than having to do a year by year comparison.

II. RFI QUESTION 30(D):

What information and documentation should be required of proposers to demonstrate viability (please be specific as to the type of information and the level of detail which should be submitted), as follows, based on the criteria listed in the Order (Order, p. 53): Proposed Technology: What level of detail should a proposer provide with respect to the project design and construction plan? How specific must a development plan be with respect to turbine arrangement, number and size of turbines, foundation design, turbine / blade selection, electrical collector station, export cable design / route, landfall location, and interconnection point(s)?

NYSERDA should (1) require that the project design and construction plan be specific enough to solicit meaningful responses, while (2) allowing for adaptive fisheries impacts minimization and mitigation as the project develops.

First, any proposal must provide a plan specific enough to gauge the environmental and fisheries impact that will be caused by the development. This includes information not only related to the specifics of the proposed infrastructure, but baseline information on the current state of the area and the historical fisheries presence. Without this baseline information, it will be impossible

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[30] Guidelines for Economic Reviews of National Marine Fisheries Service Regulatory Action (March 2007), at 19.

[31] Letter from NOAA National Marine Fisheries Service Greater Atlantic Regional Office to Luke Feinberg RE: Docket BOEM-2018-0004 (June 7, 2018), at 3

to determine how the environment and fisheries are being impacted as development moves forward. In addition, the proposal should include specifics as to planned community outreach and a mitigation plan, as discussed further below.

Second, any proposal should incorporate a Project Design Envelope ("PDE") approach at the earliest stages of development, so that alternatives can be more meaningfully considered by fishing industry participants. BOEM offers guidelines for such an approach in its January 2018 Draft Guidance Regarding the Use of a Project Design Envelope in a Construction and Operations Plan ("BOEM's Draft PDE Guidance").[32] However, BOEM merely suggests the use of a PDE during the construction and operations phase of project design. This approach should be required for any project, implemented even before the lease stage, and incorporated throughout all project phases.

The proponent should also incorporate adaptive measures to mitigate fisheries impacts in its PDE. As outlined by BOEM's Draft PDE Guidance, a PDE approach "allows a project proponent the option to submit a reasonable range of design parameters within its permit application, allowing a permitting agency to then analyze the maximum impacts that could occur from the range of design parameters, and may result in the approval of a project that is constructed within that range." Should a proponent utilize the PDE approach, those plans should be designed with the goal of further minimizing environmental and fishery impacts as more information on the site is gathered through community outreach and research.

III. RFI QUESTION 30(I):

Environmental Impact: At the time of proposal submission, what geotechnical, geophysical, biological, and archeological studies should be completed and available?

Proposers must not only engage in one-off studies with regard to fisheries conditions and impacts, but use the wealth of information available from the industry, fishery management councils, and NOAA. Any proposer should be required to submit a thorough description of the "affected environment" as it pertains to fishery resources and activities. Rather than being a simple compilation of independent facts, as any proposer should be required to demonstrate a thorough understanding of the baseline context of fisheries conditions in the area of the lease, including through biological information such as survey data as well as summaries of management plans for all affected fisheries, and any special spatial management considerations. This information must be presented in such a way that allows for subsequent impacts to be measured and described.

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[32] Available at https://www.boem.gov/Draft-Design-Envelope-Guidance/.

Once site-specific baseline data is developed, proposers must provide a plan for monitoring changes to existing conditions. The Order and RFI are silent with regard to monitoring plans, although they are absolutely critical components of any research framework. We therefore urge NYSERDA to require developers to submit such plans as part of any proposal, based on best management practices and recommendations developed by the F-TWG.

IV. RFI QUESTION 31(A):

What factors should NYSERDA consider in determining the RFP's setback requirement?

NYSERDA must ensure that any setback requirement is properly weighed against other factors. Often, areas are excluded from offshore wind energy leasing or build-out due solely to their distance from shore—inadvertently forcing their location on core fishing grounds instead. It is simply not justifiable to have a blanket setback requirement without imposing an analogous one to exclude at least the most important fishing grounds from development.

V. RFI QUESTION 32(A),(B):

Are there examples of best management practices that could serve as a useful starting point for environmental and commercial fishing considerations? What information should proposers be required to provide in their fisheries mitigation plan to demonstrate potential mitigation measures in this area? What level of specificity is appropriate?

There are several helpful best management practices ("BMPs") guidelines for offshore wind energy facilities as they relate to fisheries, including: (a) the Fishing Liaison with Offshore Wind and Wet Renewables Group ("FLOWW") Best Practice Guidance for Offshore Renewables Developments: Recommendations for Fisheries Liaison ("FLOWW BMPs: Fisheries Liason");[33] (b) the FLOWW Best Practice Guidance for Offshore Renewables Developments: Recommendations for Fisheries Disruption Settlements and Community Funds ("FLOWW BMPs: Settlements and Community Funds");[34] (c) Seafish's Best Practice Guidance for Fishing Industry Financial and Economic Impact Assessments;[35] (d) BOEM's Final Report on Best Management

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[33] Available at https://www.sff.co.uk/wp-content/uploads/2016/01/FLOWW-Best-Practice-Guidance-for-Offshore-Renewables-Developments-Jan-2014.pdf.

[34] Available at https://www.thecrownestate.co.uk/media/1776/floww-best-practice-guidance-disruption-settlements-and-community-funds.pdf.

[35] Available at http://www.seafish.org/media/634910/ukfen%20ia%20best%20practice%20guidance.pdf.

Practices and Mitigation Measures ("BOEM BMP");[36] and (e) BOEM's Draft PDE Guidance. These guidelines provide a BMP framework for issues relating to (a) Community Outreach, (b) Baseline Information and Forming a Plan for Project Siting, Design, Navigation, and Access, (c) a Fisheries Mitigation Plan, (d) Environmental Monitoring Plan/Continuous Monitoring, and (e) Compensation for Business Losses.

"Best management practices (BMPs) are planning measures, construction techniques, and operational procedures to reduce adverse impacts. Mitigation measures are project-specific, preventative, corrective, and/or compensatory actions to reduce or offset adverse impacts."[37]

Community Outreach

BOEM BMP No. 1[38] and FLOWW BMPs: Fisheries Liaison detail BMPs for establishing fisheries communication and outreach plans. "Designation of a fisheries liaison during early planning stages has been shown to be a critical element to effective communication between the fishing industry and the offshore wind energy sector."[39] Plans should include appointing at least two people for outreach/communication support: "a fisheries liaison (FL) who works for the lessee, and a fisheries representative (FR), who will be nominated by the fishing industry and may be funded by the lessee but not directly employed by the lessee."[40] The FR "most importantly should be trusted by those in the fishing industry whose views he will be expected to represent to the [FL] and therefore the ... developer."[41] Regional Fishery Management Councils and any regional efforts for coordination of state- and developer-led fishery consultation should similarly be a continuing part of the dialogue. The key to successful outreach as outlined by both documents is constant contact between the developer and the fishing industry.

As the starting point for the developer's obligations, the lease language should specifically require the developer to mitigate the effects of development upon fisheries. Significant guidance

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[36] Ecology and Environment, Inc. 2014. Development of Mitigation Measures to Address Potential Use Conflicts between Commercial Wind Energy Lessees/Grantees and Commercial Fishermen on the Atlantic Outer Continental Shelf Report on Best Management Practices and Mitigation Measures. A final report for the U.S. Department of the Interior, Bureau of Ocean Energy Management, Office of Renewal Energy Programs, Herndon, VA. OCS Study BOEM 2014-654. Available at https://www.boem.gov/OCS-Study-BOEM-2014-654/.

[37] BOEM BMP at 5-1.

[38] *Id.* at 5-12-13.

[39] *Id.* at 4-2.

[40] *Id.* at 5-12.

[41] FLOWW BMPs: Fisheries Liaison at 18.

can be found in the United Kingdom, home to approximately 45% of offshore wind capacity in Europe. There, a developer "shall do what he reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or on any such flora, fauna, features, sites, buildings or objects."[42] In Northern Ireland and Scotland, the language is even clearer: a person authorized to generate or supply electricity "shall avoid, so far as possible, causing injury to fisheries or to the stock of fish in any waters."[43]

An illustrative example of how a developer's community outreach obligations can be written into a lease can be found in the Beatrice Offshore Wind Farm Consent:

> The Company must continue its membership in the [commercial fisheries working group], or any successor group formed to facilitate commercial fisheries dialogue to define and finalize a Commercial Fisheries Mitigation Strategy. As part of any finalized Commercial Fisheries Mitigation Strategy ("CFMS"), the Company must produce and implement a mitigation strategy for each commercial fishery that can prove to the Scottish Ministers that they will be adversely affected by the Development. Should it be deemed necessary by the [working group], investigations into alternative gear for the scallop fishing industry in the Moray Firth must form part of the CFMS. The CFMS to be implemented must be approved in writing by the Scottish Ministers. The Company must implement all mitigation measures committed to be carried out by the Company within the CFMS so far as is applicable to the Development. Any contractors, or sub-contractors working for the Company, must co-operate with the fishing industry to ensure the effective implementation of said CFMS.[44]

Baseline Information and Forming a Plan for Project Siting, Design, Navigation, and Access

FLOWW BMPs: Fisheries Liaison Section 5 and BOEM BMP No. 2[45] provide BMPs for the planning phase of development – including alignment and placement of turbines – and BOEM BMP No. 3 contains BMPs for safety within the wind farm.

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[42] Electricity At of 1989 Schedule 9 ¶¶ 1, 3.

[43] *Id.* ¶ 3; Electricity (Northern Ireland) Order 1992 ¶ 3

[44] Marine Scotland Consent Granted by the Scottish Ministers under Section 36 of the Electricity Act of 1989 to Construct and Operate the Beatrice Offshore Wind Farm Electricity Generating Station, Outer Moray Firth, Annex 2, Condition 32 (Mar. 19, 2014).

[45] FLOWW BMPs: Fisheries Liaison at 22-27.

Baseline testing and subsequent surveying are essential to determine what mitigation measures might be necessary throughout the life of the project. As such, it is essential that both the developers and fishermen provide each other sufficient detail as to their plans and practices in order to allow for the swift resolution of issues as they arise. Scientific data on fish stocks and fisheries and accurate effort and landing data from the fishing industry is necessary to determine when mitigation is necessary and to calculate compensation where no alternative is feasible.

With this baseline information, the developer should map out a plan for (a) removing productive fishing grounds from any development siting, (b) designing the wind farm to minimize and mitigate fishery impacts, and (c) establishing a system for compensating fishery losses that cannot be otherwise fully minimized.

Fisheries Mitigation Plan

The primary goal of a mitigation plan is to allow fishing to continue unencumbered whenever possible, with financial compensation as a measure of last resort. The FLOWW BMPs: Fisheries Liaison provides guidance on BMPs for a fisheries mitigation plan, particularly in sections 7 and 9. In addition, examples of creative strategies that have permitted fishing to continue around a wind array include:

- The developers of the Horns Rev Offshore Wind Farm in Denmark agreed to bury cables 1 meter into the seabed to protect the cables from damage by fishing gear and anchors, thus allowing continuous fishing in and around the wind farm.

- The Kentish Flats Extension Wind Farm (U.K.) created travel corridors to minimize potential collisions between fishing vessels and wind towers, and all cables were to be buried deep enough to allow continued fishing in the farm.[46]

- The Inch Cape Offshore wind Farm developers worked with the Scottish Fishermen's Federation ("SFF"), which includes the Scallop Association, to consult with the SFF to create a Development Specification and Layout Plan that would minimize the impacts on the fishermen and locate the structures such that scalloping could continue on the site. In addition, the developer was required to undertake a study to assess the feasibility of alternative scallop gear for use within the wind farm project.

- Utilizing the PDE approach to shift project design to minimize fishery impacts.

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[46] *See, e.g.*, BOEM BMP at 4-2.

In addition, the developer should offer creative methods of partnering with the fishery to generate new sources of income. Some examples include:

- Hiring fishing vessels for work performed on the wind farm.
- The 300 MW Thanet windfarm developer guaranteed all fuel purchases would be made through the Thanet Fishermen's Association, which provided substantial revenue to the fishery.
- Scotland Fishing vessels have served as guard boats for oil and gas installations.

The developer should further commit to the any best practices established by the F-TWG or other related site-specific or regional efforts.

Environmental Monitoring Plan/Continuous Monitoring

BOEM BMP No. 4 contains BMPs for the continued environmental monitoring during the construction, operations, and decommissioning phases of a wind project development. In addition, developers should continue monitoring fish stocks and fisheries to determine how the fisheries are being impacted by the development and to determine whether it is possible to further minimize impacts.

Compensation for Business Losses

Compensation can be broken down into roughly three categories: (a) compensation for gear; (b) distribution settlements; and (c) community funds. A distribution settlement is a "[m]onetary payment for demonstrable loss of fishery access or economic disadvantage caused directly to active fishing vessels by disturbance or displacement by an [offshore renewable energy installation]."[47] A Fisheries Community Fund is a "fund established by an OREI developer which is to be used for the general betterment of the members of a fisheries community."[48]

FLOWW BMPs: Fisheries Liaison Sections 10-11 and BOEM BMP No. 5 contain BMPs for handling gear and equipment losses caused as a result of offshore infrastructure, as well as to purchasing "wind facility safe" fishing gear so that fishing can continue within an array.

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[47] FLOWW BMPs: Settlements and Community Funds at § 2.

[48] *Id.*

FLOWW BMPs: Settlements and Community Funds and BOEM BMP No 5 contain BMPs for distribution settlements and community funds. In addition, BOEM BMP at 4-4 to 4-5 contains examples of how the oil and gas industry has established community funds to compensate fishermen for economic and property losses caused by offshore oil and gas obstructions. Seafish's Best Practice Guidance for Fishing Industry Financial and Economic Impact Assessments contains guidance for calculating disruption settlements as a result of areas closed or restricted to fishing. "The overall aim of any settlement is to achieve a position whereby fishing interests are neither advantaged nor disadvantaged by the [offshore renewable energy installation]."[49]

VI. RFI QUESTION 32(C):

What commitment should proposers provide regarding how they will work with the commercial fishing communities to design and operate sites that provide the greatest practical access for commercial fishing (by gear type) and for commercial vessel (and other maritime shipping interest) navigation and transit through turbine arrays?

Proposers must work directly with fishing industry members, associations, and regional fishery efforts to achieve all of the goals enumerated in these comments. The industry holds a wealth of knowledge about, and experience with, our offshore environment. For instance, fisheries input should be solicited regarding turbine alignment. Such alignment should take into account tides, bathymetric features important to fishing patterns, and other relevant factors. This experience is not only an enormous asset in and of itself, but is critical to informing the emerging offshore renewable energy activities so that conflicts may be avoided, minimized, or mitigated.

Participants in the fisheries that occur in federal waters offshore New York are homeported throughout the East Coast, and operate their vessels on a regional, not state-level, scale. These communities have been overwhelmed by the rapid pace and piecemeal approach with which BOEM, Atlantic states, and developers have moved forward with offshore wind energy development. Fishing industry groups have extremely limited resources for meeting the enormous time commitments demanded by these processes.

In addition to engaging directly with fishing industry participants, NYSERDA should require developers to submit their plans for construction, operations, and decommissioning to the regional Fishery Management Councils for review. Specifically, both the New England Fishery Management Council and the Mid-Atlantic Fishery Management Council were statutorily created and charged with managing federal fisheries in the waters surrounding New York.[50] Each council

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[49] *Id.*

[50] *See* 16 U.S.C. § 1852(a),(h); *see also* 50 C.F.R. Part 648.

has a committee (the Habitat Committee and Ecosystems and Ocean Planning Committee, respectively) and related Advisory Panel that considers and manages interactions between managed fish stocks and the physical environment. In order to ensure the renewable energy projects develop in a manner that does not unreasonably impact fisheries, developers should submit information collected pursuant to the scientific inquiries described above to these committees for review and guidance.

The United States Coast Guard, as part of its 2016 Atlantic Coast Port Access Route Study, issued Marine Planning Guidelines recommending that any permanent structure be placed no closer than 2 nm from the parallel outer or seaward boundary of a traffic lane, and no closer than 5 nm from the terminations of an established Traffic Separation Scheme ("TSS").[51] Yet, BOEM has declared that it is under no obligation to follow the Coast Guard's recommendations when it issues a lease. It is nonsensical and dangerous to permit the governmental body responsible for navigational safety to have a mere advisory role in this critical issue. Thus, we request that NYSERDA require that any developer submit to the Coast Guard's recommended buffer zones between traffic lanes.

VII. RFI QUESTION 33:

What environmental data collected by developers should be made publicly available and what data should be considered proprietary?

Independent of whether any environmental data is or is not made publicly available or is considered proprietary, a process should be put in place to assure that environmental data used in the assessment of windfarm proposals is of the highest quality. The body of regulations, executive orders, and memoranda that have been written on this topic, and particularly the Information Quality Act of 2000, instruct that the quality of data used in analysis (and, in fact, all information) is increased when it has three elements: utility, integrity, and objectivity.[52] We recommend that any data used in the proposal process be reviewed for these three elements.

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[51] United States Coast Guard, *Atlantic Coast Port Access Route Study*, Docket Number USCG-2011-0351 (Feb. 24, 2016), Encl. 2, at 6.

[52] The original presentation of these three elements comes from The Information Quality Act, Enacted in December 2000. By regulation, most federal agencies now have their own information quality standards. *See, e.g.*, National Oceanic and Atmospheric Administration Information Quality Guidelines, http://www.cio.noaa.gov/services_programs /IQ_Guidelines_103014.html ("NOAA's IQ Guidelines").

4. Utility refers to the "usefulness of the information to its intended users, including the public."[53] One aspect of "utility" is transparency. Information is more useful when the source and the methods by which the information was collected are provided to the reviewer. The source and the means of collect for the data provide a reviewer with context and permit information to be verified and replicated. Thus, "utilizable" data may be confidently relied upon when reviewed in the proposals.

5. Objectivity means that information is presented in an "an accurate, clear, complete, and unbiased manner and in a proper context,"[54] and that the substance of the material presented should be "accurate, reliable, and unbiased information"[55] Specifically, when scientific, financial, technical, or economic analysis is used, such analysis is based on "the best reasonably obtainable scientific, technical, economic, and other information."[56] This information, "shall be generated, and ... developed, using sound statistical and research methods."[57] Furthermore, "[i]f data and analytic results have been subjected to formal, independent, external peer review, the information may generally be presumed to be of acceptable objectivity."[58] Thus, we recommend that when data is made publically available data it should be subjected to formal, independent, external peer review. When data is made proprietary, we recommend that, following, NOAA's IQ Guidelines that peer review be performed by a staff person at BOEM not involved in the evaluation of the proposal.[59]

6. Integrity means that after information is gathered and processed it is protected "from unauthorized access or revision, to ensure that the information is not compromised

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[53] NOAA's IQ Guidelines.

[54] *Id.*

[55] *Id.*

[56] Executive Order 12866 of September 30, 1993, p. 2, § 1(7).

[57] NOAA's IQ Guidelines. For examples of how data is made checked to assure that it is accurate, reliable, and unbiased, see the Objectivity section in NOAA's IQ Guidelines.

[58] "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies" OMB Final Guidelines. https://obamawhitehouse.archives.gov/omb/fedreg_reproducible (accessed August 9, 2018)

[59] NOAA's IQ Guidelines. ("Peer reviews, ranging from internal peer review by staff who were not involved in the development of the product to formal, independent, external peer review, are conducted at a level commensurate with the scientific information in the interpreted product").

through corruption or falsification."[60] The integrity of information is crucial to reasonably relying upon it as the basis for a proposal.

VIII. RFI QUESTION 34(A),(B):

How much funding should be made available to support State-sponsored environmental research, and over what timeframe? b. How could these funds be used to best reduce risk and advance responsible development of offshore wind?

Research into the interactions between offshore wind energy facilities and commercial fisheries is in its infancy and severely underfunded. Because performing scientific research in the marine environment is costly and time-consuming, FSF urges NYSERDA to invest in collaborative research with the fishing industry in order to reduce risk and increase credibility. Moreover, many studies require several years of data-gathering before any sound analysis can be performed. Therefore, FSF urges New York to dedicate as much money as possible to this important pursuit, and to do so as quickly as possible so that research may begin. However, it is extremely important that studies are selected on a competitive and carefully prioritized basis. FSF urges NYSERDA to work closely with the F-TWG, NOAA, and other regional efforts to better address these issues.

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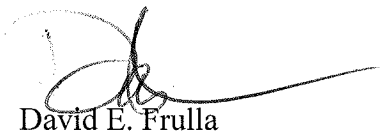
We appreciate this opportunity to comment on NYSERDA's RFI. We hope NYSERDA will take these recommendations into account and carefully consider the impacts to the scallop

[60] NOAA's IQ Guidelines.

fishery in developing its procurement protocol. Please do not hesitate to contact us if we can provide any further information or answer any questions about these comments.

Respectfully submitted,



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