

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

FISHERIES SURVIVAL FUND, <i>et al.</i>	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. No.
	)	
SALLY JEWELL, <i>et al.</i>	)	
	)	
Defendants.	)	
	)	

**DECLARATION OF JAMES GUTOWSKI**

I, James Gutowski, declare and state as follows:

1. I am the President of the Fisheries Survival Fund (FSF), an organization that represents the vast majority of the Limited Access Scallop Fleet.
2. I am a director, and a board member of FSF. Full-time Atlantic scallop fishermen, holders of limited access permits issued by the federal government, formed FSF nearly twenty years ago, in March of 1998. FSF was organized to address regulatory proposals that threatened to bankrupt the industry and to develop better scientific information about the scallop resource and better approaches to scallop conservation and management. FSF has more than 200 current participants, each of whom primarily, if not entirely, fish for scallops using scallop dredges.

**FSF and Scallop Fishery Management**

3. The limited access scallop fishery is conducted from Georges Bank, off Massachusetts, through Virginia. FSF members' vessels are similarly homeported from Massachusetts to North Carolina.
4. Since its inception, FSF consistently has advocated for interests of its participants and the full-time limited access scallop fleet. The New England Fishery Management Council ("New England Council") has principal management authority over the scallop fishery. Indeed, since 1998, FSF has participated in the Atlantic scallop regulatory process literally every step of the way.
5. FSF also has monitored closely and participated, when and as needed, in the management of species that are incidentally caught in scallop fishing operations. To that end, FSF has dedicated time and resources attending meetings and writing comments for the New England Council and, less frequently, the Mid-Atlantic Fishery Management Council

(“Mid-Atlantic Council”) as the scallop industry’s main advocate in these arenas regarding the management of fisheries for groundfish, summer flounder, and monkfish, among others.

6. Over the past decade, FSF has combined the experience and knowledge of its participants with outside scientific and academic experts to generate much-improved strategies for the industry and the environment. FSF’s hard work has paid off as Atlantic scallop biomass (a measure of abundance) has surpassed target levels, and interactions with non-target species have declined substantially.
7. FSF participants have teamed with gear technologists and university scientists to greatly reduce the unintended incidental catch (“bycatch”) of fish species other than scallops. For example, FSF participants have helped develop and utilize a real-time online bycatch avoidance system administered by the School of Marine Sciences and Technology at the University of Massachusetts-Dartmouth. FSF financially supports these efforts.
8. The scallop fishery also funds a \$15 million annual Research Set-Aside program, in which a set-aside of fishery quota is awarded through a competitive grant process in order to support fishery research on topics such as industry-based abundance surveys, bycatch reduction, and minimization of sea turtle interactions.
9. The New England Council’s Atlantic Sea Scallop Fishery Management Plan and its implementing regulations govern the Atlantic sea scallop fishery.
10. In 2004, Amendment 10 to the Scallop FMP overhauled the regulatory structure governing the scallop fishery. Amendment 10 created a regulatory process that allows managers to designate certain areas as rotational access areas, which are closed to fishing when aggregations of juvenile scallops are discovered in resource surveys conducted by the federal government and teams of university scientists. When these scallops mature, the access areas are reopened subject to controlled harvest by fixing the total number of trips and pounds of scallops per trip.
11. Amendment 10 also refined the process for allocating a fixed number of days each year, known as “days-at-sea” (“DAS”), that can be fished in areas that generally are open to scallop fishing (that is, areas that are not access areas or closed to scallopers for other reasons). In each case, the allocation of access area trips and open area DAS are allocated to achieve a target level of harvest found to be sustainable over the long run. These harvest levels, and other minor changes to the scallop management regime, are set periodically (usually every year).
12. FSF championed the practice of rotational harvest in the scallop fishery. By fishing in areas of high scallop concentrations, fishermen are able to reduce the amount of time they need to spend fishing to make their trip. By that step alone, the scallop dredge impact on the ocean bottom habitat is reduced, scallop yield is increased, and the potential that dredges will inadvertently catch other fish species, such as groundfish, summer flounder, and monkfish, is decreased.
13. Currently, scallop stocks are at or near historic high levels of abundance.

14. The rotational management model developed through Amendment 10 has led the Atlantic scallop fishery to become one of the most highly valued in the nation.
15. Importantly, the scallop fishery relies on its ability to utilize rotational management areas and open areas off the New England and Mid-Atlantic coasts for its continued sustainability.
16. Rotational scallop fishing requires a carefully balanced distribution of access to scallop grounds, divided among access areas and open (DAS) areas. When areas are closed to the fishery, the overall catch limits for the fishery decrease due to complexities of the catch projection models. Displaced efforts in open areas, in particular, that result from a fishery closure also: (1) increase localized fishing pressure in locations that may not readily support such pressure; (2) change catch composition and therefore reverse progress made on bycatch reduction efforts; and (3) increase gear bottom contact time when vessels are forced to fish in less efficient areas, thereby increasing habitat impacts and incidental catch across the fishery's range.
17. Multiple closures throughout the fishery's area of operations compound these impacts.
18. Currently, many closures exist throughout the fishery's range. Many are managed by the New England Council for habitat protection. Proposals that would close additional fishing grounds for renewable energy or other uses are increasing in frequency.

#### **Personal Interest in the Present Case**

19. I am a resident of Barnegat Light, NJ, where I am the owner of the F/V *Kathy Ann*, which is a federally permitted Limited Access Scallop Vessel.
20. In past years I have spent over 300 days, in a single year, at sea captaining scallop vessels. I now run the shoreside operations of my business.
21. I support myself and my family principally from the proceeds of my scallop fishing business.
22. I have personally fished for scallops in the NY Wind Energy Area (NY WEA) and my vessel fishes in the NY WEA on a regular basis.

#### **The New York Wind Energy Area**

23. The NY WEA encompasses productive scallop grounds that are extremely important to my business and to the business of FSF's other members. A loss of access to fishing grounds within the NY WEA will have a significantly detrimental impact on my business and many others.
24. Scallop vessels will no longer be able to fish for scallops in the NY WEA if a wind energy facility is built there, for many reasons including: (1) they cannot maneuver among wind turbines; (2) dredge gear can snag or tangle in underwater cables; and (3) there would be major safety concerns due to the proximity of busy shipping lanes.

25. BOEM must carry out the proper analysis prior to officially leasing out areas to companies for construction, due to the importance of this fishery area. It must adequately and accurately characterize the potential impacts to the industry from construction on this site. BOEM has not yet conducted such an analysis.
26. I personally have participated in BOEM's fishery-focused meetings relating to the NY WEA, and our representatives have attended others and provided extensive written comments on behalf of FSF. BOEM never considered, nor reasonably responded to, any of our input and did not include our input in its environmental review process or in its decision to issue a Final Sale Notice for the NY WEA.
27. FSF has submitted formal written comments detailing the conflicts between scallop fishing and a potential wind energy facility in the NY WEA, including a response to BOEM's Request for Interest in 2013, a July 2014 letter responding to the Call Area announcement, and another detailed comment letter in response to the Draft Environmental Assessment in July 2016.
28. FSF representatives first interacted with BOEM personnel face-to-face regarding what is now the NY WEA at a meeting at BOEM's headquarters in Herndon, Virginia on July 11, 2014 (attendance list attached hereto as "Exhibit 1"). FSF requested this meeting to discuss its concerns with the Call for Information that was issued for what was then the NY Call Area. Specifically, FSF informed the BOEM employees of the importance of the area to scallop fishing, and the incompatibility of scallop dredging and wind energy facilities.
29. Over one year later, on October 10, 2015, Brian Hooker emailed Ms. Hawkins and Mr. Minkiewicz (attached hereto as "Exhibit 2"), to inform them that, at the time of the FSF/BOEM meeting, BOEM had not yet begun the "Area Identification" process for the proposed lease area. He stated that BOEM was now entering that phase and invited FSF representatives and members to stakeholder meetings in New York or New Jersey the following month.
30. FSF members attended the meeting in Point Pleasant, NJ on November 4, 2015. BOEM presented information regarding fisheries activity in the Call Area, but made it very clear that it was not considering alternative sites.
31. On March 16, 2016, BOEM announced it had completed the Area Identification process and was officially designating the area as the NY WEA. The Area Identification announcement made no mention of fisheries uses or resources whatsoever.<sup>1</sup>
32. FSF members also attended stakeholder meetings regarding the Draft EA for the NY WEA in June 2016, including one in New Bedford, Massachusetts, and again expressed concerns about the lack of alternative site consideration and poor quality data related to the scallop fishery and resource. BOEM's responses to these comments has consistently been that it has not yet considered the impacts of a wind energy facility to the scallop resource, and that issuance of a lease and site assessment activities will have no impacts.

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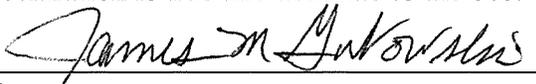
<sup>1</sup> <https://www.boem.gov/NY-Area-ID-Announcement/>.

33. BOEM's EA for the wind lease issuance underestimates the importance of the area to the fishery, showing that BOEM did not consider the information provided through public meetings and comments.
34. Appropriate consultation would include consideration of alternative sites for wind energy development or excluding areas of heavy fishing activity from lease consideration. BOEM has done neither. Instead, it has proceeded all the way to a lease sale without doing more than providing a cursory (and incorrect) overview of the fishery in its EA, using poor quality data.

### Regional Planning Activities

35. The Northeast and Mid-Atlantic Regional Planning Bodies (RPB) have been meeting since 2013 to improve federal agency processes so that such agencies "work in a more coordinated, goal-oriented framework with states, tribes, and stakeholders."<sup>2</sup> BOEM is the federal co-lead for the Mid-Atlantic RPB, which submitted its Mid-Atlantic Regional Ocean Action Plan (OAP) for approval by the National Ocean Council in November 2016.
36. FSF has been extensively involved in the development of the OAP since the RPB's inception. It has participated in meetings of the RPB and several meetings of its subcommittees, and submitted detailed written comments with suggestions for improving stakeholder consultation in siting decisions for offshore activities on at least two occasions. Indeed, FSF representatives have authored published papers and attended international conferences related to effective marine spatial planning.
37. BOEM's unsolicited bid process runs contrary to the principles and recommendations the RPB adopted in the OAP. Rather than utilizing a negotiated, consensual process, it chose not to involve other stakeholders—much less other federal agencies—in the most important decision regarding the NY WEA. Instead, it allowed a private developer to make its own siting decision, and plans to address conflicts with existing uses only at the point that they have become as contentious as possible. It is clear that there is no degree of conflict with fisheries users of a site proposed for wind energy development through an unsolicited bid that would render the area inappropriate for development in BOEM's eyes. Instead, it chooses to exacerbate that conflict by inviting stakeholders to meetings but never paying their concerns anything but lip service.

Pursuant to 28 U.S.C. § 1746, I verify that all of the factual information contained in this Declaration is true and accurate to the best of my knowledge.

  
Name \_\_\_\_\_

12/7/16  
Date

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<sup>2</sup> <https://www.boem.gov/Mid-Atlantic-Regional-Planning-Body/>.

## **Exhibit 1**



## **Exhibit 2**

**From:** Hooker, Brian <brian.hooker@boem.gov>  
**Sent:** Monday, October 05, 2015 11:02 AM  
**To:** Hawkins, Anne; Minkiewicz, Andrew; Frulla, David E.  
**Cc:** Andrew Krueger; Isis Johnson; Amy Stillings  
**Subject:** Invitation for Feedback Regarding the NY Offshore Wind Call Area

Annie and Drew, a little more than a year ago we met with you in our office in Herndon regarding the offshore wind leasing process. During that meeting we mentioned that the "Area Identification" process for the area offshore NY had not yet begun. We have now entered that phase and would very much like your feedback regarding the use of the area as a scallop fishery and/or any concerns you may have regarding the impacts to the scallop resource if this area were developed.

As the invitations below show we have three meetings set up to get feedback on the use of the area as a fishery. We fully realize that the scallop fishery does not utilize the ports that were identified for holding these meetings. That is why we would like to offer a separate meeting with you if you are unable to attend one of the scheduled meetings below. If you do choose to attend one of the scheduled meetings, we recommend the NJ meeting, as participation may be lighter at that one. If none of these dates and locations work for you then we are happy to work with you to find a date and time, perhaps in DC or Sterling, that work for you.

Sincerely,  
Brian

The flyer features a background map of the New York and New Jersey coast. At the top left, it says "New York" and "You're Invited!". At the top right is the BOEM logo (Bureau of Ocean Energy Management) and the text "Offshore Wind, Recreational & Commercial Fishers". The main heading reads "NJ Fishermen: Please Provide Input to Help BOEM Identify an Offshore Wind Energy Area". Below this, it lists the event details: "Wednesday, November 4, 6-8 p.m.", "Ocean County Library-Point Pleasant Beach", "834 Beaver Dam Road", "Pt Pleasant, NJ". A paragraph explains that BOEM seeks input from the fishing industry via an informal workshop to help identify a wind energy area off the coast of New York and New Jersey. Another paragraph states that BOEM wants to better understand how the area (New York Call Area) is used for fishing before recommending an area for offshore wind leasing. The flyer concludes with the request: "Please come to this informal workshop to share your expertise!". There are two inset images: one showing a map of the offshore area with various zones, and another showing a fishing boat on the water near a wind turbine.

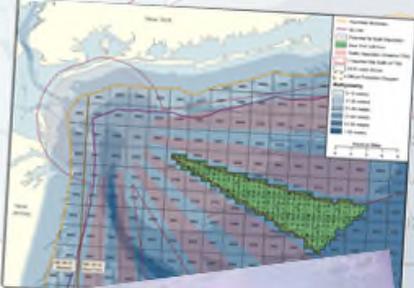
# You're Invited!

New York

**BOEM**  
BUREAU OF OCEAN ENERGY MANAGEMENT

Offshore Wind, Recreational  
& Commercial Fishers

**NY Fishermen: Please Provide Input to Help BOEM  
Identify an Offshore Wind Energy Area**



**Thursday, November 5, 6-8 p.m.**

Long Beach Library, Main Branch  
111 West Park Ave  
Long Beach, NY

**Friday, November 6, 4-6 p.m.**

Cornell Cooperative Extension of Suffolk County  
423 Griffing Avenue  
Riverhead, NY

BOEM seeks input from the fishing industry via an informal workshop to help us identify a wind energy area off the coast of New York and New Jersey. BOEM wants to better understand how the area (New York Call Area) is used for fishing before we recommend an area for offshore wind leasing.

***Please come to this informal workshop to  
share your expertise!***



New  
Jersey

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Marine Biologist  
[Bureau of Ocean Energy Management](#)  
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