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Jolie Harrison
Chief, Permits and Conservation Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway, F/PR1 Room 13805
Silver Spring, MD 20910

Re: Application from Atlantic Shores Offshore Wind Bight for an Incidental Harassment Authorization Pertaining to Marine Site Characterization Surveys Off New Jersey and New York (Agency/Docket Number: RTID 0648-XC058)

Dear Chief Harrison:

Clean Ocean Action (“COA”) is a regional, broad-based coalition of conservation, environmental, fishing, boating, diving, student, surfing, women’s, business, civic, and community groups with a mission to improve the water quality of the marine waters off the New Jersey/New York coast. We submit the following comments in opposition to the application that has been submitted by Atlantic Shores Offshore Wind Bight, LLC (“Atlantic Shores” or “the Applicant”) for an incidental harassment authorization (“IHA”) under the Marine Mammal Protection Act (“MMPA”). This IHA application would allow the Applicant to take marine mammals during marine site characterization surveys in coastal waters off New Jersey (“NJ”) and New York (“NY”), which are allegedly occurring to inform the siting and design of an offshore wind energy development (“OSW”) project at Lease Area OCS-A 0541.

Section 101(a)(5)(A) of the MMPA allows citizens who engage in activities other than commercial fishing to request authorization for incidental, but not intentional, harassment of “small numbers” of marine mammals pursuant to that activity for a period of no more than five years.¹ The National Marine Fisheries Service (NMFS), which has been delegated the authority to administer the relevant legal framework, may allow harassment under the MMPA only if the agency determines that the total number of authorized incidental takes during the five-year period will have a “negligible impact” on the relevant species or stock.² “Negligible impact” is, in turn, defined as an impact that is not reasonably likely or expected to “adversely affect the

¹ 16 U.S.C. § 1371(a)(5)(A)(i).

² *Id.* § 1371(a)(5)(A)(i)(I).

species or stock through effects on annual rates of recruitment or survival.”³ Finally, the applicable legal framework distinguishes between “Level A” takes and “Level B” takes. In the context of OSW and related activities, “Level B harassment” refers to “any act of pursuit, torment, or annoyance which has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.”⁴ “Level A” takings, on the other hand, refer to “any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild.”⁵

After reviewing this application, COA urges NMFS to deny the IHA application under consideration for two (2) reasons: first, the proposed activities will have more than a negligible impact on North Atlantic right whales (“NARWs”); and second, because of the critical data gap that currently exists with respect to harbor seals’ use of the survey area.

I. Inaccurate and Incomplete Analysis of Impacts on North Atlantic Right Whales

a. Inaccurate Overestimation of North Atlantic Right Whale Population

COA objects to this IHA application’s baseline estimation that there are 368 individual NARWs remaining in the wild. This estimation is, as NMFS posits, consistent with the NARW stock assessment in the agency’s 2021 Draft Stock Assessment Report (“SAR”). The 95% confidence interval for this estimation, notably, is 356-378 individuals. This confidence interval is notable because even the lower end of this range is higher than the most recent census taken by the North Atlantic Right Whale Consortium (“the Consortium”), who announced in October 2021 that just 336 individual NARWs remain.⁶ NMFS apparently agrees with the Consortium’s assessment for most other purposes. For example, the agency’s webpage for the NARW currently reads, “The North Atlantic right whale is one of the world’s most endangered large whale species; the latest preliminary estimate suggests there are fewer than 350 remaining.”⁷ A closer look at the species’ status reveals details that are particularly alarming. To start, there are fewer than 100 breeding female NARWs. The reproduction rate for NARWs is at a forty-year low and the body length of new calves is declining, in part due to the frequent sub-lethal stresses that the species endures.⁸ This development will likely create a problematic cycle for the NARW’s survival, as smaller female NARWs produce fewer calves.⁹

³ 50 C.F.R. § 18.27(c).

⁴ 16 U.S.C. § 1362(18).

⁵ *Id.*

⁶ H.M. Pettis, et al., *North Atlantic Right Whale Consortium 2021 Annual Report Card: Report to the North Atlantic Right Whale Consortium* (2022), https://www.narwc.org/uploads/1/1/6/6/116623219/2021report_cardfinal.pdf.

⁷ *North Atlantic Right Whale*, NMFS (last accessed July 6, 2022), <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>.

⁸ See Joshua D. Stewart, et al., *Decreasing body lengths in North Atlantic right whales*, 31 *CURRENT BIOLOGY* 14, 3174-3179 (2021), <https://doi.org/10.1016/j.cub.2021.04.067>.

⁹ See Joshua D. Stewart, et al., *Larger females have more calves: influence of maternal body length on fecundity in North Atlantic right whales*, 689 *MARINE ECOLOGY PROGRESS SERIES* 179, 179-189 (2022), <https://doi.org/10.3354/meps14040>. This phenomenon has been attributed to sublethal stressors, such as acoustic and vessel trauma, diverting energy from breeding females’ calf productivity.

This IHA application's estimate of NARWs is based on a draft SAR that has not yet been finalized and NMFS openly defers to the Consortium's more conservative estimate of remaining individuals in other published materials. As such, COA objects to NMFS's use of the 368-individual estimate in this IHA application. NMFS's use of the 368-individual estimate is especially inappropriate for purposes of calculating the percentage of remaining NARWs that the Applicant may incidentally harass in the course of its marine site characterization surveys off the coasts of New Jersey and New York. Even by the proposed IHA's own math, the Applicant's request to harass 24 NARWs amounts to 6.6% of all remaining individuals. However, when calculated using the Consortium's estimate of 336 remaining individuals, the Applicant's request to harass 30 NARWs proportionally rises to 7.14% of the entire species. As a matter of ensuring that the public is reviewing and commenting upon materials which accurately reflect the impacts of the proposed activities, NMFS should reject the application.

b. Inaccurate Characterization of Impacts to North Atlantic Right Whales as Negligible

Furthermore, COA objects to the conclusion that the activities covered by the requested IHA will result only in Level B harassment of NARWs, as opposed to Level A harm—i.e., physical injury or death. COA urges NMFS to deny this application because it fails to account for Level A takes that (1) are reasonably likely to occur due to the proposed activities, and (2) will have more than a mere negligible impact on NARWs. In this respect, COA notes that vessel strikes pose one of the largest threats to NARWs. The only vessel strike avoidance measures included in this IHA application are separation distances of 500 meters from North Atlantic right whales, restricted vessel speeds, and operational maneuvers.¹⁰ These limited and few vessel strike avoidance measures are solely directed toward the vessels supporting the Applicant's survey activities. However, the proposed activities will also increase the risk of collisions between NARWs and vessel traffic unrelated to OSW activities as both navigate around the site characterization and assessment activities in question while they occur. As such, NMFS should not approve this application.

In addition, COA objects to NMFS' determination that the underwater noise generated by the proposed activities will result only in Level B harassment of NARWs. NARWs rely on sound to breed, navigate coastlines, and find food.¹¹ Anthropogenic noise interferes with their ability to eat, mate, and navigate, so it is essential to their survival that the NARWs' sounds travel the ocean undisturbed.¹² NARWs have been observed increasing their call amplitude with the rise of background noise, and noise pollution has been correlated with an increase in stress-related fecal hormone metabolites.¹³ Considered together, the cumulative amount of underwater noise requested by this IHA application would not only be an annoyance to NARWs, but it will injure the species' stock by interfering with their ability to eat, mate, and navigate. COA therefore

¹⁰ *Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Site Characterization Surveys Off New Jersey and New York in the Area of the Atlantic Shores Lease Area (OCS-A 0541)*, 87 FR 38067, 38088 (June 27, 2022) [hereafter "*Application*"].

¹¹ See Richard Schiffman, *How Ocean Noise Pollution Wreaks Havoc on Marine Life*, YALE ENV'T 360 (Mar. 31, 2016), http://e360.yale.edu/features/how_ocean_noise_pollution_wreaks_havoc_on_marine_life.

¹² *Id.*

¹³ *North Atlantic Right Whale 5-Year Review*, NOAA FISHERIES SERV. NE. REG'L OFFICE 11-12 (Aug. 2012), http://www.nmfs.noaa.gov/pr/pdfs/species/narightwhale_5yearreview.pdf

requests that NMFS reject the Applicant's proposed IHA for site surveys. The application's failure to account for the Level A harms that can reasonably be expected from the activities in question warrants further explanation. NMFS should therefore deny this application.

c. Failure to Account for Cumulative Impacts to the North Atlantic Right Whale

Next, COA objects to NMFS's conclusion that the Applicant's request to harass 24 NARWs for its survey activities off the coasts of New Jersey and New York will have a negligible impact on the species. Even when taking this claim at face value, the agency is authorizing harassment more than 7% of the remaining 336 NARWs within a one-year span, which is significant in and of itself. Such widespread disruption of this vulnerable species through noise, vessel collisions, and other risks posed by the proposed activities will only serve to jeopardize NARW's recruitment and survival by interfering with their ability to communicate with each other, find food, and avoid threats.

In addition, the lack of recognition and accounting of cumulative impacts is unacceptable. This is only one of many OSW projects and associated site assessment activities for which NARW harassment has been requested, but NMFS appears to fail to account for cumulative impacts. There are also other takes of NARWs authorized for other activities in the region that must be considered as well, including activities that are simultaneously occurring for other nearby OSW lease sites. For instance, Atlantic Shores has been allowed to harass 17 NARWs in the waters off New York and New Jersey for site characterization and assessment activities since April 2020;¹⁴ Garden State Offshore Energy, LLC was allowed to harass 14 NARWs under an IHA issued for site assessment and characterization activities off New Jersey and Delaware issued in June 2021;¹⁵ and Orsted was recently issued an IHA permitting 37 takes of NARWs for site assessment and characterization activities in the waters between New York and Massachusetts.¹⁶ These three IHAs alone have collectively allowed OSW developers to harass more than 20% of the remaining NARW population within the last three years, and approving the IHA application under consideration would increase this total to more than 29% over a four-year period.

Furthermore, this tally accounts *only* for site assessment activities, and does not consider the number of takes required for construction and operation of all of these OSW projects, which will likely require an even higher number of takes than the survey activities preceding them. This tally likewise does not account for the harassment of NARWs that have been authorized for OSW projects in other areas of the species' migratory path, such as the waters off North Carolina and Virginia, nor the takes that have been requested by OSW-related IHA applications which are still under review. Also absent from this sum are NARW takes authorized by IHAs issued to industries other than OSW. An existential threat is posed to NARWs by any obstacles that affect even one individual's survival, especially due to how uniquely endangered this species is and the

¹⁴ 86 FR 21291 (Apr. 22, 2021), <https://www.federalregister.gov/documents/2021/04/22/2021-08354/takes-of-marine-mammals-incident-to-specified-activities-taking-marine-mammals-incident-to>.

¹⁵ 86 FR 33676 (June 11, 2021), <https://www.federalregister.gov/documents/2021/06/25/2021-13530/takes-of-marine-mammals-incident-to-specified-activities-taking-marine-mammals-incident-to>.

¹⁶ 87 FR 13977 (Mar. 11, 2022), <https://www.federalregister.gov/documents/2022/03/11/2022-05102/takes-of-marine-mammals-incident-to-specified-activities-taking-marine-mammals-incident-to>.

ongoing Unusual Mortality Event (“UME”) that NARWs are experiencing.¹⁷ The scale of these impacts in the proposed IHA is excessive for even one offshore wind project, and yet this is just one of many such projects under review.

In conclusion, the IHA application’s requested allowance of Level B harassments of 24 NARWs would adversely affect the species’ annual rates of recruitment and survival to a substantial and unacceptable degree.¹⁸ Since the activities covered by the IHA are reasonably likely to result in injury to the species as a whole, which qualifies as Level A harm, but the requested IHA’s terms do not account for any Level A takes to NARWs, it would be unacceptable for NMFS to approve the application under consideration. It is imperative that NMFS exercise its authority to protect one of the world’s most vulnerable and critically endangered species, the North Atlantic right whale, and the agency should fulfill this obligation by rejecting this IHA proposal. If NMFS does not stand to protect this species by denying this IHA, it is difficult to envision the NARW’s survival given the combined impacts, harassment, harm, and death that will befall the remaining population due to all of the OSW projects and their associated activities proposed in the Atlantic Ocean.

II. Harbor Seals – Lack of Data

While there are several species of seal that are anticipated to be impacted by offshore wind projects, New Jersey’s Department of Environmental Protection (“DEP”) has highlighted a particular lack of known information regarding the use of the Applicant’s OSW lease area by harbor seals. Frequently spotted along both the East and West Coasts of the U.S., harbor seals are known for resting on floating ice with their head and rear flippers elevated in a “banana-like” position, leading to their popularity with excited winter beach-goers.¹⁹ Besides their wide recognition among the American public, harbor seals also play a major role in maintaining balance in marine food webs as well.²⁰

Despite the unique importance of this species, however, COA maintains there is not sufficient baseline information about how harbor seals use the waters off the NJ/NY coast to conclude that the activities covered by this IHA application will have a negligible impact on harbor seals. More

¹⁷ See *2017–2022 North Atlantic Right Whale Unusual Mortality Event*, NATL. MARINE FISHERIES SERV. (Mar. 23, 2022), <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2022-north-atlantic-right-whale-unusual-mortality-event>.

¹⁸ *North Atlantic right whales*, INTL. FUND FOR ANIMAL WELFARE (last accessed June 6, 2022), <https://www.ifaw.org/animals/north-atlantic-right-whale> (“[T]he death of even one animal can have a critical impact on the species’ survival.”); Rosalind M. Rolland, et al., *Evidence that ship noise increases stress in right whales*, 279 THE ROYAL SOCIETY 2363-368 (2012), <https://royalsocietypublishing.org/doi/epdf/10.1098/rspb.2011.2429>; *Noise Pollution May Be the Final Straw for a Critically Endangered Whale*, OCEANA (May 18, 2016), <https://oceana.org/blog/noise-pollution-may-be-final-straw-critically-endangered-whale/> (“According to Rice, dozens of studies across different species of vertebrates confirm that noise increases stress hormones, which in turn suppress the immune system. ‘If you’re really stressed out,’ he said, ‘you’re more likely to get sick.’”)

¹⁹ *Harbor Seal*, NATL. MARINE FISHERIES SERV. (last accessed June 16, 2022), <https://www.fisheries.noaa.gov/species/harbor-seal>.

²⁰ *Seals*, INTL. FUND FOR ANIMAL WELFARE (last accessed June 16, 2022), <https://www.ifaw.org/animals/seals#:~:text=As%20one%20of%20the%20keystone,%2C%20polar%20bears%2C%20and%20sharks.>

specifically, a COA employee recently attended a virtual event at which a DEP representative indicated that, to date, no one has tracked harbor seals to understand the species' pre-construction use of offshore wind energy lease areas off the NJ coast.²¹ This admission strongly suggests that decisionmakers do not yet have sufficient information about the role of areas in and near the geographic range of this proposed IHA's activities in harbor seals' life-cycles to substantiate the numbers of harassments expected to occur or the conclusion that the activities covered by the proposed IHA will not rise to a Level A taking under the MMPA. NMFS should therefore reject the requested IHA. This species must be the focus of an independent baseline assessment that more thoroughly accounts for the role it plays in the ecosystem before NMFS allows the activities covered by this application to move forward.

III. Conclusion

While the above comments focus on those species to which the quantitative impacts are anticipated to be most significant, Clean Ocean Action is also deeply concerned about the wide range of marine mammal species that will be impacted by the proposed activities. The current lack of data pertaining to OSW's interactions with the marine environment gives us deep reservations about the long-term implications of these activities on other species as well, especially given the Applicant's inability to accurately calculate impacts at this time.

On a final note, NMFS must ensure that any activities covered by this IHA application do not occur during the peak migratory season, nor during the most biologically sensitive periods for affected species, such as breeding and calving periods.

For the foregoing reasons, Clean Ocean Action requests that NMFS reject the IHA application under consideration. Should you have any questions or would like to further discuss the concerns that Clean Ocean Action has identified above, please feel free to contact us.

Respectfully submitted,



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²¹ "Science Saturday: Offshore Wind," LONG BEACH ISLAND FOUNDATION OF ARTS AND SCIENCES (Feb. 19, 2022). Specifically, the NJDEP representative identified the tracking of harbor seals off the NJ coast to understand their use of lease areas prior to the construction of offshore wind turbines as a project concept that NJDEP is currently considering.