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April 6, 2022

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

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 Ocean Wind (“the Applicant”) for an incidental harassment authorization (“IHA”) under the Marine Mammal Protection Act (“MMPA”) to take marine mammals during construction of the Applicant’s offshore wind energy development (“OWED”) project.

Under Section 101(a)(5)(A) of the MMPA, citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region may request authorization for incidental, but not intentional, take 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 takes under the MMPA only if the agency determines that the total number of authorized incidental takes during the five-year period will have only 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 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 offshore wind energy development and related activities, “Level B harassment” refers to “any act of pursuit, torment, or announcement 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,

¹ 16 U.S.C. § 1371(a)(5)(A)(i).

² *Id.* § 1371(a)(5)(A)(i)(I).

³ 50 C.F.R. § 18.27(c).

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 application under consideration because it fails to accurately capture both the severity of the impacts that the covered activities will have on the North Atlantic Right Whale (“NARW”), as well as the impact that the proposed activities will have on the recruitment and survival rates of NARWs, common bottlenose dolphins, and other invaluable marine mammal species that are protected under the MMPA.

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

a. Inaccurate Overestimation of North Atlantic Right Whale Population

COA objects to the proposed IHA’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

Since the proposed IHA’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, COA objects to NMFS’s use of the 368-individual estimate in the proposed IHA, especially for purposes of calculating the percentage of remaining NARWs that the Applicant may incidentally harass in the course of its marine site characterization surveys in coastal waters between New York and Massachusetts. Even by the proposed IHA’s own math, the Applicant’s request take limit of 66 NARWs over five years amounts to 17.93% of the remaining individuals. However, when calculated using the Consortium’s estimate of 336 remaining individuals, the Applicant’s requested take limit of 37 proportionally rises to 19.64% of all remaining NARWs. As a matter of transparency, NMFS should reject the application.

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

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 Apr. 4, 2022), <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>.

Furthermore, COA objects to the conclusion that the activities covered by the proposed IHA will result only in Level B harassment of NARWs, as opposed to Level A harm—i.e., physical injury or death. COA asks that NMFS not approve the renewal because the application fails to account for Level A takes that (1) are reasonably likely to occur due to the activities in question 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 the proposed IHA are separation distances of 500 meters from North Atlantic right whales, restricted vessel speeds, and operational maneuvers.⁸ These limited and few vessel strike avoidance measures are solely directed toward the vessels supporting the Applicant’s construction and operation activities. However, the proposed activities will also increase the risk of collisions between NARWs and vessel traffic unrelated to OWED activities as both navigate around the construction and operations in question while they occur. NMFS should not approve the application under consideration until its vessel strike avoidance measures fully account for the harm that will be realized by collisions between NARWs and non-OWED traffic that is displaced due to the activities covered by the IHA.

In addition, COA objects to NMFS’ determination that the underwater noise generated by these activities will result only in Level B harassment of NARWs. NARWs rely on sound to breed, navigate coastlines, and find food.⁹ Anthropogenic noise interferes with their ability to eat, mate, and navigate, so it is essential to their survival that these sounds travel the ocean undisturbed. *Id.* North Atlantic right whales 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 has been correlated with noise pollution.¹⁰ Considered together, the cumulative amount of underwater noise allowed by the IHA request is not just an annoyance to NARWs, but also has the potential to injure the NARW species stock by interfering with nearly one-fifth of the remaining NARWs’ ability to eat, mate, and navigate. Accordingly, COA requests that NMFS reject the Applicant’s IHA. The application’s failure to account for the Level A harms that can reasonably be expected from the construction and operation activities in question warrants further explanation before it would be appropriate for NMFS to issue the proposed IHA.

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

Next, COA objects to NMFS’s conclusion that the proposed IHA’s requested take limit of 66 NARWs for its construction and operation activities off the NJ coast will have a negligible impact on the species. Even when taking this claim at face value, the agency is authorizing harassment of nearly twenty percent (20%) of the remaining 336 NARWs within a five-year span, which is significant in and of itself. Furthermore, these takes will compound upon those that have already occurred under the terms of the IHAs approved for Applicant’s site characterization and assessment activities. Under the terms of these earlier IHAs, the Applicant

⁸ *Application for Marine Mammal Protection Act Rulemaking and Letter of Authorization*, OCEAN WIND OFFSHORE WIND FARM 125 (February 2022), https://media.fisheries.noaa.gov/2022-03/OceanWind1OWF_2022_508APP_OPR1.pdf [hereafter “*Application*”].

⁹ 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.

¹⁰ *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

has already been allowed to take nine (9) NARWs.¹¹ Approving the proposed IHA in its current form would effectively allow the Applicant alone to incidentally harass a cumulative total of 75 NARWs—22.3% of the remaining population. Such widespread disruption of this vulnerable species through noise, electromagnetic fields (“EMF”), and other outputs from the full array of offshore activities related to Applicant’s OWED project 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.

On a related note, this is only one of many OWED projects for which NARW takes have been requested, but NMFS appears to fail to account for this cumulative impact. 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 OWED lease sites. For instance, Atlantic Shores has been allowed to take 17 NARWs in the waters off New York and New Jersey for site characterization and assessment activities since April 2020;¹² Garden State Offshore Energy, LCC was allowed to take 14 NARWs under an IHA issued for site assessment and characterization activities off New Jersey and Delaware issued in June 2021;¹³ 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.¹⁴ These three IHAs alone allowed OWED developers to take more than 20% of the remaining NARW population within the last couple years, and approving the Applicant’s requested IHA in its current form would raise that number to 43% over the next five years.

This tally, it should be noted, does not account for NARWs that OWED projects have been authorized to take in other areas of the species’ migratory path, such as the waters off North Carolina and Virginia, nor takes requested by OWED-related IHA applications that are currently under review. It also does not account for NARW takes authorized by IHAs issued to industries other than OWED. Especially due to how uniquely endangered this species is and the ongoing Unusual Mortality Event (“UME”) that NARWs are experiencing, an existential threat is posed to the species by any obstacles to even one individual’s survival.¹⁵ Consequently, the best scientific literature cannot and does not justify the conclusion that the cumulative impact of harassing nearly a quarter of the species’ 336 remaining individuals in the span of just seven years (the five years covered by the application under review plus the two years covered by preceding IHAs for site assessment and characterization) is negligible. The scale of these impacts is egregious for even one offshore wind project, and yet this is just one of many such projects under review.

¹¹ 86 FR 26473 (May 10, 2021), <https://www.federalregister.gov/documents/2021/05/14/2021-10236/takes-of-marine-mammals-incident-to-specified-activities-taking-marine-mammals-incident-to>.

¹² 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>.

¹³ 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>.

¹⁴ 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>.

¹⁵ 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>.

In sum, the proposed IHA for Applicant's COP would authorize a sufficient number of Level B harassments of NARWs that the activities in question are likely or expected to adversely affect NARWs—both individuals and the stock as a whole—through their effects on the species' annual rates of recruitment and survival that this impact is substantial and unacceptable. Additionally, the activities covered by the IHA are reasonably likely to result in injury to the species as a whole, meaning that foreseeable Level A harms to NARWs are not covered by the IHA's terms and, thus, it would be inappropriate for NMFS to approve the application under consideration at this time. 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 proposal for an IHA. If NMFS does not stand to protect this species by denying this IHA, it is difficult envision the NARW's survival given the combined impacts, harassment, harm, and death that will befall the remaining population due to all of the OWED projects proposed in the Atlantic Ocean.

II. Excessive Impacts to Other Marine Mammal Species

In addition to COA's objections to approval of this application in light of the effects that the covered activities will have on the NARW, we are deeply troubled by the variety of species and total numbers of individual takes that the proposed IHA would allow over the course of its five-year term for the Applicant's construction and operation activities. Even by the Applicant's calculations, the proposed activities are projected to have a particularly severe impact on local stocks of Common bottlenose dolphin and Harbor seals. COA urges NMFS to deny the proposed IHA.

a. *Common Bottlenose Dolphins*

Common bottlenose dolphins are highly social and intelligent marine mammals, and arguably the most recognized and beloved cetacean. In addition to their inherent value to the American public, these dolphins play an important role in marine ecosystems and are increasingly important drivers of economic growth for tourism and related industries in the U.S.¹⁶

Common bottlenose dolphins are found in estuarine, coastal, continental shelf, and oceanic waters of the western North Atlantic ("wNA"). Distinct stocks of common bottlenose dolphin have been identified in coastal and offshore waters off the U.S. East Coast: a smaller stock present in estuarine, coastal, and shelf waters from Florida to Long Island, and a larger, more robust stock found further offshore in deeper waters of the continental shelf from Florida to Canada.¹⁷ The activities covered by the proposed IHA would impose considerable harm upon both stocks.

¹⁶ Susan Reverman, *Dolphin's Ecological Importance*, SEATTLE POST-INTELLIGENCER (last accessed Apr. 5, 2022), <https://education.seattlepi.com/dolphins-ecological-importance-5511.html>; *The Economics of Marine Mammals*, MARINE MAMMAL COMMISSION (last accessed Apr. 5, 2022), <https://www.mmc.gov/priority-topics/value-marine-mammals/>.

¹⁷ *Stock Assessment for the Common Bottlenose Dolphin (Tursiops truncatus truncatus): Western North Atlantic Northern Migratory Coastal Stock*, NATL. MARINE FISHERIES SERV. 67 (2021), https://media.fisheries.noaa.gov/2021-07/f2020_AtlGmexSARs_NmigBottlenoseDolphin.pdf?null.

i. Coastal stock

The coastal stock of bottlenose dolphins in the wNA has experienced a recovery since experiencing an unusual mortality event (“UME”) in the late 1980s, but it is still considered a strategic stock for purposes of the MMPA and currently numbers roughly 6,639 individuals.¹⁸ Nevertheless, the application under consideration reveals that Applicant’s construction and operation activities at this lease site will result in 14 Level A takes of dolphins in this stock and another 1,310 Level B takes—a whopping 19.94% of the total remaining stock.¹⁹ This projected impact to the coastal stock of wNA common bottlenose dolphins from the Applicant’s construction and operation activities is particularly egregious given the 1,410 Level B takes of this stock that Applicant has already been allowed for its site assessment and site characterization activities.²⁰ If NMFS approves the application under consideration, the Applicant alone will be permitted to take a cumulative total of 40% of the vulnerable coastal wNA common bottlenose dolphin between the five years covered by the proposed IHA and the two IHAs that were previously issued for site assessment and characterization.

The noise, EMF, and other outputs from Applicant’s construction and operation activities will plainly impede these dolphins’ ability to locate food, avoid predators, and communicate with other members of their pod, with serious implications for the recruitment and survival of the stock as a whole. NMFS should therefore uphold its obligation under the MMPA and deny Applicant’s request for this IHA.

ii. Offshore stock

In addition to COA’s concerns about the proposed activities’ impacts on the coastal stock of wNA common bottlenose dolphins, we also urge NMFS to reject this application because of the anticipated effect of these activities on the offshore stock of wNA common bottlenose dolphins. Over the course of the IHA’s five-year duration, the Applicant would be allowed to take 5,030 dolphins from this stock, which represents more than 8% of the stock’s population.²¹ This figure is particularly alarming because these cetaceans are uniquely vulnerable to underwater noise from human disturbance and other forms of human-related injuries, especially because they use sound to communicate with each other and hunt for food.²² The noise and other disturbances emanating from the Applicant’s proposed activities will be an extensive disruption for the offshore stock of wNA common bottlenose dolphins, with clear repercussions for the stock’s

¹⁸ *Id.* at 68; *Glossary: Marine Mammal Protection Act*, NATL. MARINE FISHERIES SERV. (last accessed Apr. 5, 2022), <https://www.fisheries.noaa.gov/laws-and-policies/glossary-marine-mammal-protection-act#strategic-and-depleted-stocks>. “Strategic stock” is defined by the MMPA as a marine mammal stock: for which the level of direct human-caused mortality exceeds the potential biological removal level; which, based on the best available scientific information, is declining and is likely to be listed as a threatened species under the Endangered Species Act within the foreseeable future; or which is listed as a threatened or endangered species under the ESA, or is designated as depleted under the MMPA.

¹⁹ *Application* at 116.

²⁰ 86 FR 26473, *supra* n.11.

²¹ *Application* at 116.

²² *Common Bottlenose Dolphin*, NATL. MARINE FISHERIES SERV. (Dec. 29, 2021), <https://www.fisheries.noaa.gov/species/common-bottlenose-dolphin>.

rates of recruitment and survival. COA therefore urges NMFS to reject the application under consideration at this time.

b. Harbor Seals – Lack of Data

While there are several species of seal that are anticipated to be impacted by these projects, New Jersey’s Department of Environmental Protection (“DEP”) has highlighted a particular lack of known information regarding the use of the Applicant’s OWED 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.²³ Besides their wide recognition among the American public, harbor seals also play a major role in maintaining balance in marine food webs as well.²⁴ Despite the unique importance of this species, however, COA maintains there is not sufficient baseline information about how harbor seals use the waters at lease site OCS-A 0498 to conclude that the activities covered by the proposed IHA will have a negligible impact on harbor seals. More 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.²⁵ This admission strongly suggests that decisionmakers do not yet have sufficient information about the role of these lease areas 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.

As a final matter, the application under consideration identifies the type, number of vessels, and number of vessel trips that are anticipated during the proposed construction activities.²⁶ However, the application fails to explain how these factors relate to the number and type of takes requested. In the absence of this information, NMFS should not permit these activities to move forward.

²³ *Harbor Seal*, NATL. MARINE FISHERIES SERV. (last accessed Feb. 28, 2022), <https://www.fisheries.noaa.gov/species/harbor-seal>.

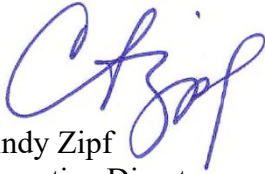
²⁴ *Seals*, INTL. FUND FOR ANIMAL WELFARE (last accessed Feb. 22, 2022), <https://www.ifaw.org/animals/seals#:~:text=As%20one%20of%20the%20keystone,%2C%20polar%20bears%2C%20and%20sharks>.

²⁵ “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.

²⁶ *Application* at 22-23.

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

Respectfully submitted,



Cindy Zipf
Executive Director



Zachary Klein, Esq.
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