



Clean Ocean Action
49 Avenel Blvd.
Long Branch, NJ 07740
Info@cleanoceanaction.org
732-872-0111

February 7, 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 Ørsted’s (“the Applicant’s”) request for renewal of its 2020 incidental harassment authorization (“IHA”) to incidentally take marine mammals in the course of the Applicant’s marine site characterization surveys in coastal waters from New York to Massachusetts. Specifically, we ask that NMFS reject this request on the basis that the number of incidental takes proposed for the North Atlantic Right Whale (“NARW”) will have more than a negligible impact on the species.

Under Section 101(a)(5)(A) of the Marine Mammal Protection Act (“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. 16 U.S.C. § 1371(a)(5)(A)(i). 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. *Id.* § 1371(a)(5)(A)(i)(I). “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.” 50 C.F.R. § 18.27(c). 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, nursing, breeding, feeding, or sheltering.” 16 U.S.C. § 1362(18). “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.” *Id.*

First, we object 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 still higher than the most recent census taken by the North Atlantic Right Whale Consortium (“the Consortium”), who announced in October that just 336 individuals remain.¹ 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.”² Because 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 37 NARWs amounts to 10.05% 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 11.01% of all remaining NARWs. As a matter of transparency, the proposed IHA’s calculations must accurately reflect the quantifiable extent of the harm that it will permit the Applicant’s activities to inflict on one of the planet’s most endangered species.³

Second, COA objects to NMFS’s conclusion that the proposed IHA’s requested take limit of 37 NARWs for its marine site characterization activities in the coastal waters between New York and Massachusetts will have a negligible impact on the species. Even when taking this claim at face value, the agency is authorizing harassment of more than eleven percent (11%) of the remaining 336 NARWs, which is significant in and of itself. When considered cumulatively, approving the proposed IHA in its current form would effectively allow the applicant to incidentally harass nearly a quarter of all remaining NARWs over the course of a two-year period. Moreover, the impacts of activities authorized by the proposed IHA renewal will compound upon those that already occurred under the terms of the Applicant’s original IHA, which also allowed for the incidental harassment of 37 NARWs, as well as other takes of NARWs authorized for other activities in the region, including site characterization and assessment activities that are simultaneously occurring for other nearby OWED lease sites. Especially due to how endangered this species is, the ongoing Unusual Mortality Event that NARWs are experiencing and, consequently, the existential threat posed to the species by any

¹ 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.

² *North Atlantic Right Whale*, NMFS (last accessed Feb. 7, 2022), <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>.

³ See Katharine Deuel, *New Rules to Protect Endangered Whales Fall Short*, PEW CHARITABLE TRUSTS (Nov. 17, 2021), <https://www.pewtrusts.org/en/research-and-analysis/articles/2021/11/17/new-rules-to-protect-endangered-right-whales-fall-short>.

obstacles to even one individual's survival, the best scientific literature cannot justify the conclusion that the cumulative impact of harassing nearly one quarter of the species' 336 remaining individuals in the span of just two years can be characterized as negligible.

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 first 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. 87 FR 760. All of these vessel strike avoidance measures are clearly directed toward the vessels engaged in site characterization activities for the Applicant, yet the application never accounts for avoiding vessel strikes caused by NARWs avoiding or otherwise being displaced from the waters covered by the IHA.

The activities covered by the Applicant's renewed IHA would also, by its own terms, allow the Applicant to produce sufficient underwater noise that it will lead to the harassment of 37 NARWs over the next year and 74 NARWs in total for this one site; nevertheless, the IHA apparently presumes that this underwater noise and the activities causing it will not lead to NARWs and anthropogenic maritime traffic through these waters endeavoring to avoid the Applicant's site characterization vessels and supporting equipment (e.g., buoys). Especially given the threat posed to NARWs as a species by even one instance of a vessel collision, NMFS should not approve the requested IHA renewal until the application fully acknowledges and addresses these impacts of the authorized activities.

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.⁴ 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.⁵ 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 a quarter of the remaining NARWs' ability to eat, mate, and navigate. Accordingly, COA requests that NMFS rejects the Applicant's IHA renewal or suspend the agency's decision on the application until it accounts for the Level A harms that can reasonably be expected from the site characterization activities in question.

⁴ 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.

⁵ *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

Finally, in addition to Clean Ocean Action's aforementioned objections to NMFS approving the renewal of the Applicant's IHA in light of the impacts that the covered activities will have on the NARW, Clean Ocean Action is also concerned about the wide variety of other takes that the IHA renewal would authorize for a second consecutive year. For instance, we draw attention to the 2,211 takes of common dolphin and 916 takes of harbor porpoises that approving the Applicant's IHA renewal would allow to occur for a second consecutive year within the area in question. The non-injurious harassment of nearly 4,500 common dolphin and 1,800 harbor porpoises within a two-year span will likely have significant cumulative impacts on these species, but these impacts are not considered in the IHA as currently proposed. Likewise missing from the proposed IHA is consideration of how the identified MMPA-protected species will be affected by the ecosystem changes that will necessarily occur when more than 10,000 individual marine mammals are harassed or taken within a two-year timeframe, as renewing the Applicant's IHA would allow it to do here. Clean Ocean Action is consequently deeply concerned about the variety of species and total number of individual takes that the IHA would authorize, and we urge NMFS not to renew it until the factors are addressed.

In sum, COA respectfully asserts that, even when taken at face value, the renewed IHA would authorize a sufficient number of Level B harassments of NARWs that the activities in question are reasonably 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 cannot reasonably be considered to be merely minimal. Additionally, COA asserts that the activities covered by the IHA are reasonably likely to result in Level A harms to NARWs that are not covered by its terms, thus rendering approval an inappropriate course of action for NMFS to pursue at this time. It is imperative that NMFS engage in all means possible to avoid harm to one of the world's most vulnerable and critically endangered species, the North Atlantic right whale, and protect its precious ecosystem. For the foregoing reasons, COA objects to the Applicant's proposed IHA and asks that NMFS deny the request for renewal.

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.
Policy Attorney