



*Ocean Advocacy
Since 1984*

Clean Ocean Action

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May 22, 2023

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

RE: Incidental Take Authorization: Community Offshore Wind, LLC Marine Site Characterization Surveys off New Jersey and New York, Docket No. RTID 0648-XC817

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. COA submits the following comments to the National Oceanic and Atmospheric Administration’s (“NOAA”) National Marine Fisheries Service (“NMFS”) in opposition to the request for an Incidental Harassment Authorization (“IHA”) from Community Offshore Wind, LLC (henceforth, the “Applicants”) for marine site characterization surveys for the development of offshore wind (“OSW”) energy power plants off the coast of New Jersey and New York.¹

The IHA request, if approved, would authorize the “takes” of marine mammals by “Level B harassment” over the course of one year. According to the Public Notice, “Underwater sound resulting from [Community Offshore Wind’s] marine site characterization survey activities, specifically HRG surveys, have the potential to result in incidental take of marine mammals in the form of Level B harassment.”²

From the outset, it is shocking that the NMFS is moving aggressively forward reviewing and issuing IHAs, as well as Incidental Take Regulations (“ITR”) and associated Letter of Authorizations (“LOA”), with little to no baseline assessment of marine mammal studies in the region. Indeed, the New Jersey Department of Environmental Protection (NJDEP) has just recently authorized a marine mammal monitoring plan for whales. The absence of baseline data will result in the absence of good science. Indeed, NMFS agency officials are also frustrated: “‘We’re building this ship as we’re sailing it,’ NMFS scientist Andrew Lipsky said last October at

¹ Federal Register Notice, [“Takes of Marine Mammals Incidental to Specified Activities: Taking Marine Mammals Incidental to Marine Site Characterization Surveys in the New York Bight”](#) for Community Offshore Wind, Published 4/21/2023.

² See *id.*

a conference on wind power. ‘When we don’t think through the science, we often get ourselves in trouble.’ ”³

This IHA request, if approved, would allow the Applicants to “take” or “harass” **14,193 marine mammals** by “Level B Harassment” during the pre-construction activities for an offshore wind power plant. According to the Federal Register Notice, the marine mammals included in the proposed take amounts are of **15 different species** and include the following endangered species:

- North Atlantic right whale: 24
- Fin whale: 76
- Sei whale: 24
- Sperm whale: 10.⁴

Per the Marine Mammal Protection Act (“MMPA”), other federally protected whales in the Applicant’s proposed take amounts by Level B harassment include:

- Humpback whales: 46
- Minke whales: 304
- Common bottlenose dolphins (offshore and coastal): 1,431
- Atlantic white-sided dolphins: 427
- Common dolphins: 5,572
- Harbor porpoise: 1,912
- Gray and Harbor seals: 3,910, and
- other protected dolphins and porpoise species.⁵

COA notes that this application to “take” marine mammals is in addition to the **14 current “active” take authorizations (IHAs and ITRs)** to harass marine mammals for preconstruction and construction activities for offshore wind power plants on the East Coast.⁶ Collectively, these take authorizations are already allowing the harassment of hundreds of thousands of marine mammals. In addition, there are **14 “in process”** authorizations to harass hundreds of thousands of marine mammals on the East Coast for preconstruction and construction activities, many of which have open public comment periods.

Indeed, it appears there are no limits by BOEM for the allowance of incidental take impacts from the current application as well as for the full scope of pending OSW proposals as provided by the NMFS:

By 2030 the Northeast large marine ecosystem will be occupied by over 2.4 million acres of leases, 3,400 turbines, and 10,000 miles of submarine cables;

³ Sennott, Will and Anastasia Lennon. “Blown Away: Fishermen Endangered by Offshore Wind’s Political Power.” The New Bedford Light, April 18, 2023, <https://www.propublica.org/article/fishermen-endangered-offshore-wind-political-power>.

⁴ Federal Register Notice, [“Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys in the New York Bight”](#) for Community Offshore Wind, Published 4/21/2023.

⁵ See *id.*

⁶ National Oceanic & Atmospheric Administration, “Incidental Take Authorizations for Other Energy Activities (Renewable/LNG), as seen 5/22/2023, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable>.

*and an additional 5.7 million acres is also under consideration for further development.*⁷

It is impossible for marine mammals to adapt to such massive industrial scope and scale of offshore wind development with each project at minimum causing the excessive impacts described by just one Applicant's project. The activities described in the Applicant's IHA request have been documented to result in species harassment, hence the need for incidental take authorizations.

The mission of the NOAA NMFS Office of Protected Species is "responsible for the protection, conservation, and recovery of more than 160 endangered and threatened marine and anadromous species under the Endangered Species Act. The goal of the ESA is to conserve these species and the ecosystems they depend on."⁸ The government is obligated to provide assessments of the potential and real marine ecosystem impacts, and then stipulate policies and regulations to avoid and reduce negative impacts and ensure appropriate and meaningful mitigation of the unavoidable impacts. This also requires, at minimum, a fair, comprehensive, and independently peer-reviewed pilot project for this unproven, large-scale industry in US waters. Indeed, this also requires sound science supported by robust baseline ecological assessments and independent and peer-reviewed studies which are currently planned, only just begun, or underway and incomplete.

Instead, the government is fast-tracking projects, including the Applicant's project. There are numerous Memorandums of Understanding and Memorandums of Agreement between federal agencies to streamline approval of OSW projects. In fact, in early May 2023, the Biden Administration announced a new Memorandum of Understanding.⁹ Further, there are several OSW projects in the NY/NJ region designated federal as "Fast-41 projects." However, fast-tracking projects is not protective of marine species. The government's fast-tracking of OSW projects is inconsistent with good governance of public resources, the precautionary principle, and most importantly, laws including the Endangered Species Act ("ESA"). From the outset:

Section 7(a)(2) of the ESA requires BOEM, in consultation with NOAA Fisheries, to ensure that any action the agencies authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered species or result in the destruction or adverse modification of designated critical habitat; this coordination is accomplished through ESA section 7 consultations. BOEM and

⁷ Andy Lipsky, NOAA Fisheries. "Fisheries, Wildlife, and Ecosystem Science in a New Era of Offshore Wind Energy Development." NOAA Ecosystem Based Management and Ecosystem Based-Fisheries Management Seminar Series, March 9, 2022, <https://www.youtube.com/watch?v=Dh7yBEDHzL8>.

⁸ National Oceanic & Atmospheric Administration, "About Us: Office of Protected Resources," as seen on 12/9/2022, <https://www.fisheries.noaa.gov/about/office-protected-resources>

⁹ The White House, "FACT SHEET: Biden-Harris Administration Outlines Priorities for Building America's Energy Infrastructure Faster, Safer, and Cleaner," May 10, 2023, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/10/fact-sheet-biden-harris-administration-outlines-priorities-for-building-americas-energy-infrastructure-faster-safer-and-cleaner/>

NOAA Fisheries are required by the ESA to use the best scientific and commercial data available when carrying out these consultations.¹⁰

It is important to note here that there are ***no*** permitting rules for marine site characterization surveying activities. COA finds it shocking and unconscionable that there are no permitting requirements for geological and geophysical surveys under the Bureau of Ocean Energy Management (“BOEM”). The recent BOEM Modernization Rule proposal states:

Although BOEM requires a lessee to submit the results of certain surveys to BOEM in order to obtain approval of its COP, those regulations do not require BOEM's approval of a permit for such surveys. Instead, BOEM has provided guidance on conducting such surveys and also includes terms and conditions in renewable energy leases that require lessees to submit survey plans to BOEM for review in advance of their survey activities. BOEM's review of the plans, while not an approval process, does provide BOEM an opportunity to communicate with lessees to ensure the lessees' survey results will meet BOEM's information needs and to ensure certain environmental conditions are met in conducting the surveys.¹¹

Given this, it raises more questions about how it was possible that BOEM asserts without question that there is absolutely “no evidence” that offshore wind activities have any connection to the unprecedented number of dead whales that continued to wash-up on beaches in the NY/NJ region since December 2022. It is now clear there are no regulations; there are no “rules of the road” regarding survey work. Without such regulations, how can BOEM possibly make such a claim? Is the only requirement for survey vessels currently under the Marine Mammal Protection Act (“MMPA”) requiring IHA authorizations, which are limited in scope? In the Proposed Modernization Rule, BOEM admits not having the regulatory authority to govern surveys: “BOEM's existing renewable energy regulations do not expressly govern survey activities.”¹²

Further, regarding impacts to marine life from offshore wind development, NOAA Fisheries assumes the success of mitigation measures for impacts from offshore wind development. Before mitigation is considered, avoidance and minimization are required. However, without baseline studies and a pilot project to determine impacts, how can mitigation measures be established? This massive cumulative impact of multiple projects by a nascent US industry has not been assessed, and as described above has no precedence or permitting system. What is this mitigation strategy based on? What if mitigation measures fail? Since there is no transparent, consistent publicly available real-time assessment and reporting activities, how will NMFS even know? How are you judging if mitigation measures are enough to prevent harassment to marine

¹⁰ NOAA Fisheries, “Section 7: Types of Endangered Species Act Consultations in the Greater Atlantic Region,” as seen 4/30/2023, <https://www.fisheries.noaa.gov/insight/section-7-types-endangered-species-act-consultations-greater-atlantic-region>.

¹¹ Federal Register, “Renewable Energy Modernization Rule,” Bureau of Ocean Energy Management, Publication Date: 1/30/2023, <https://www.federalregister.gov/documents/2023/01/30/2023-00668/renewable-energy-modernization-rule>.

¹² See *id.*

mammals during the survey work? What are the ecological guardrails? How and when would it be determined that additional harassment is occurring, and work must stop?

In sum, COA requests that NMFS deny this IHA request because:

1. there are no permitting requirements for geological and geophysical surveys under the Bureau of Ocean Energy Management (“BOEM”).
2. it is an incomplete evaluation due to the lack of new information and new protection strategies under development by federal agencies, particularly for the critically endangered North Atlantic right whale (“NARW”).
3. it would allow thousands of Level B takes of endangered, threatened, and/or protected marine mammal species, including the NARW, which will have significant and more than “negligible” impacts on a species on the precipice of extinction.
4. it will unacceptably add impacts to the already detrimental cumulative impacts of the numerous take authorizations and requests from the Applicant’s previous activities and projects in the region, as well as those requests and authorizations for other offshore wind industry companies’ previous, current, and forthcoming take authorizations for preconstruction, construction, operation, and decommissioning of OSW facilities,
5. it raises other issues of importance, including lack of fairness, transparency, and accountability; and
6. it fails to address the cumulative impacts and effects of previous and concurrent preconstruction surveys and construction activities in the region.
7. an independent assessment is needed to determine if the unprecedented geotechnical and geophysical activities may be linked to the spike of whale and dolphin strandings in the region of the offshore wind project.

It is unacceptable and harmful to marine resources, to be moving forward with incidental take authorizations at the current scope and scale of OSW energy development without sound science, transparency, due diligence, and meaningful public engagement. Clean Ocean Action urges NMFS to reject the Applicant’s IHA request for the construction of an offshore wind power plant for the reasons outlined below in these comments.

I. Deny and Rescind the IHA request, as well as other “in process” take authorization requests, due to the: A.) Five-Year Strategy to protect NARW under development, B.) Lack of basic research about impacts to large whales, C.) Unprecedented number of whale deaths occurring in a short period of time along the NJ/NY coast starting in December 2022.

A. Five-Year Strategy to Protect NARW is Under Development

The Bureau of Ocean Energy Management (“BOEM”) and NOAA Fisheries’ “Draft North Atlantic Right Whale and Offshore Wind Strategy” (hereafter “Draft Strategy”) was proposed for public review but has not yet been finalized. This five-year protection plan for the North Atlantic right whale (“NARW”), while flawed and incomplete, is currently under development and stipulates the dire status of the NARW and need for additional protection. To ensure the best chance of survival, incidental take authorizations for the Applicant must be halted until the

strategy is complete and measures to avoid, minimize or eliminate harm are determined so they can be applied to these projects.

The NARW is one of the most critically endangered species. Based on the population status, the outlook for the survival of the NARW is grim, especially with new threats, including offshore wind energy development. The NMFS' last five-year review of the NARW, published in 2017, notes that the species' population grew from 270 to 483 whales between 1990 and 2010; but the number of individuals remaining declined to 440-458 by 2017.¹³ The 2017 five-year review further notes that NMFS declared an unusual mortality event ("UME") under the Marine Mammal Protection Act ("MMPA") in August 2017 after 15 known NARW deaths occurred within a four-month span. The NARW population has continued to decline. In October 2021, the North Atlantic Right Whale Consortium announced that just 336 individual NARWs remain.¹⁴ The Draft Strategy affirms this dire status in Section 2.3 where it states:

"The potential biological removal (PBR) level for the species, defined as the maximum number of animals that can be removed annually while allowing the stock to reach or maintain its optimal sustainable population level, is less than 1 (Hayes et al. 2022)." ¹⁵ (Emphasis added)

To be clear, ***not one*** of the remaining NARW can be lost, an unambiguous and stern statement. It goes on to state: "The species has low genetic diversity, as would be expected based on its low abundance, and the species' resilience to future perturbations is expected to be very low (Hayes et al. 2018)." ¹⁶ This information suggests that harassment can have population impacts and must be avoided or significantly reduced to protect the NARW population. It is possible that construction "perturbations" would likely trigger Level A & Level B Harassment impacts to the NARW. Yet, the proposed IHA does not list Level A impacts to the NARW. Based on this, for the protection of the NARW, all industrial full-scale construction for offshore wind energy should be paused until the federal agencies determine how best to eliminate or avoid all impacts, Level A or B, on the NARW.

B. Lack of Basic Research About Impacts to Large Whales

In addition, there is a lack of basic research of the impacts of OSW energy development on large whale species in U.S. waters, particularly in the mid-Atlantic region. It is reckless to move forward without the scientific baseline assessments for what harm may or could occur to whales before issuing any permits and authorizations, including IHAs, ITRs, and associated LOAs.

¹³ *North Atlantic Right Whale (Eubalaena glacialis) 5-year Review: Summary and Evaluation*, NATL. MARINE FISHERIES SERV. GREATER ATLANTIC REGIONAL FISHERIES OFFICE (2017), <https://www.fisheries.noaa.gov/resource/document/5-year-review-north-atlantic-right-whale-eubalaena-glacialis> [hereafter "2017 5-Year Review"].

¹⁴ 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.

¹⁵ U.S. Department of Interior Bureau of Ocean Energy Management and U.S. Department of Commerce National Oceanic and Atmospheric Administration NOAA Fisheries, *Draft BOEM and NOAA Fisheries North Atlantic Right Whale and Offshore Wind Strategy*. October 2022, page 5.

¹⁶ *See id.*

1. Failure to include crucial scientific assessments and consultations

In a May 2022 letter obtained under the Freedom of Information Act by Bloomberg Law, Dr. Sean Hayes, PhD, Chief of Protected Species, NOAA NEFSC, clearly documents and confirms the NARW's fragile hold on existence. First, the Chief of Protected Species notes that there are less than 350 remaining NARW animals.¹⁷ Again, COA notes, the Draft North Atlantic Right Whale and Offshore Wind Strategy states that not one animal can be lost.

Looking later in the development phases of OSW facilities, the letter from Dr. Hayes states:

The development of offshore wind poses risks to these species, which is magnified in southern New England waters due to species abundance and distribution. These risks occur at varying stages, including construction and development, and include increased noise, vessel traffic, habitat modifications, water withdrawals associated with certain sub-stations and resultant impingement/entrainment of zooplankton, changes in fishing effort and related potential increased entanglement risk, and oceanographic changes that may disrupt the distribution, abundance, and availability of typical right whale food (e.g., Dorrell et al 2022).¹⁸

It is clear that any further disturbance of the NARW species will have an impact on this critically endangered species. Some scientists estimate that the species will go extinct within 20 years with current threats.¹⁹

2. Threats to Marine Mammal Health & Survival

The threats to marine mammals, including NARW, include:

negative impacts to whale habitat which may take the form of development, pollution, noise, overfishing, and climate change. Shipping channels, aquaculture, offshore energy development, and recreational use of marine areas may destroy whale habitat or displace whales which would normally use the area. Oil spills and other chemical pollutants are also a threat to whales and the prey which they feed on.²⁰

Specifically, about offshore wind development impacts on the marine ecosystem, NMFS says,

Scientists around the world are still investigating the potential impacts of offshore wind energy development on marine life. Site assessment, construction, and operations could interact with marine life on the seabed, in the water, and at the surface. For example, offshore wind energy projects could:

¹⁷ Letter from Sean A. Hayes, PhD, Chief of Protected Species, NOAA NEFSC, to Brian R. Hooker, Lead Biologist Bureau of Ocean Energy Management, Office of Renewable Energy Programs, dated May 13, 2022.

¹⁸ See *id.*

¹⁹ Pennisi, Elizabeth. "The North Atlantic right whale faces extinction." Science, November 7, 2017, <https://www.science.org/content/article/north-atlantic-right-whale-faces-extinction>.

²⁰ Conserve Wildlife Foundation of New Jersey, "New Jersey Endangered and Threatened Species Field Guide: North Atlantic Right Whale," as seen 12/9/2022, <http://www.conservewildlifenj.org/species/fieldguide/view/Eubalaena%20glacialis/>

- *Increase ocean noise, which could affect the behaviors of fish, whales, and other species*
- *Introduce electro-magnetic fields that impact navigation, predator detection, communication, and the ability for fish and shellfish to find mates*
- *Change existing habitats by altering local or regional hydrodynamics*
- *Create a “reef effect” where marine life cluster around the hard surfaces of wind developments*
- *Impact organism life cycle stages, including larval dispersal and spawning*
- *Change species composition, abundance, distribution, and survival rates*
- *Increase vessel traffic, which could lead to more vessel strikes*
- *Release contaminants that can be consumed or absorbed by marine life.*²¹

Offshore wind, in the current proposed scale, scope, and magnitude significantly added to the threats to marine mammals, including noise, vessel strikes, and impacts to prey. Access to food sources for large whales is essential. The importance of the waters off New Jersey as feeding grounds for all marine mammals is increasing.

The threats to marine life, including NARW, from offshore wind development activities are year-round. It is documented that North Atlantic right whales are in the region at all times of the year. Data from WhaleMap and the Mid-Atlantic Ocean Data Portal indicate an abundance of NARWs off the NJ coast throughout the year²². Further, a Right Whale Slow Zone southeast of Atlantic City was effective in December 2021²³. According to the Conserve Wildlife Foundation of New Jersey:

*Within the western North Atlantic Ocean, right whales feed during spring, summer, and fall in temperate and subpolar latitudes near eastern Canada and the northeastern U.S. During the winter, many individuals from this population can be found off the northeast coast of Florida and Georgia, their breeding and calving grounds. Some right whales, however, may remain at their northern feeding grounds during the winter.*²⁴

Other studies concur finding year-round presence of right whales in the mid-Atlantic (Whitt et al Atlantic). Right whales are present in the mid-Atlantic more often than previously believed.”²⁵

The Applicant’s activities will increase the number of vessels in the ocean in the project area, leading to an increased threat of harm by vessel strikes to marine mammals. Specifically,

²¹ National Oceanic & Atmospheric Administration, National Marine Fisheries Service, “Offshore Wind Energy: Protecting Marine Life,” <https://www.fisheries.noaa.gov/topic/offshore-wind-energy/protecting-marine-life>, as seen 5/14/2023.

²² See <https://whalemap.org>; <https://portal.midatlanticocean.org>.

²³ National Oceanic & Atmospheric Administration, Fisheries, “Extension of Right Whale Slow Zone Southeast of Atlantic City, NJ.” As seen, 11/15, 2022: <https://content.govdelivery.com/accounts/USNOAAFISHERIES/bulletins/2fef565>.

²⁴ Conserve Wildlife Foundation of New Jersey, “New Jersey Endangered and Threatened Species Field Guide: North Atlantic Right Whale,” as seen 12/9/2022, <http://www.conservewildlifenj.org/species/fieldguide/view/Eubalaena%20glacialis/>

²⁵ New York State Department of Environmental Conservation, “Species Status Assessment,” as seen 12/9/2022, https://www.dec.ny.gov/docs/wildlife_pdf/sgcnnatrightwhale.pdf.

“collisions with ships are an increasing threat to right whales...Right whales are especially slow-moving, compared to other large whales, and therefore more susceptible to being struck by ships.”²⁶ Further, the take authorizations issued by NMFS include the requirement of Protected Species Observers (“PSO”) on board vessels. However, as NOAA itself states: “Right whales can be very difficult to spot from a boat due to their dark color and lack of a dorsal fin. Poor weather and sea state or low light conditions can make spotting these whales nearly impossible.”²⁷

COA urges NMFS to specifically assess the cumulative impacts on marine mammals, particularly the NARW, from all the vessels associated with the Applicant’s project as well as other offshore wind projects proposed or underway in this region.

3. *Excessive Takes of Marine Mammals*

Under 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, takes of “**small numbers**” (*emphasis added*) of marine mammals pursuant to that activity for a period of no more than five years.²⁸ The 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 a “negligible impact” on the relevant species or stock.²⁹ “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.”³⁰ 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.”³¹ “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.”³²

Recently, NMFS announced a disturbing “biological opinion”³³ for Ocean Wind 1, another massive OSW project proposed off New Jersey, that states the project will “likely to adversely

²⁶ Conserve Wildlife Foundation of New Jersey, “New Jersey Endangered and Threatened Species Field Guide: North Atlantic Right Whale,” as seen 12/9/2022, <http://www.conservewildlifenj.org/species/fieldguide/view/Eubalaena%20glacialis/>

²⁷ National Oceanic & Atmospheric Administration, National Marine Fisheries Service, “Reducing Vessel Strikes to North Atlantic Right Whales,” <https://www.fisheries.noaa.gov/national/endangered-species-conservation/reducing-vessel-strikes-north-atlantic-right-whales> as seen on 5/15/2023.

²⁸ 16 U.S.C. § 1371(a)(5)(A)(i).

²⁹ *Id.* § 1371(a)(5)(A)(i)(I).

³⁰ 50 C.F.R. § 18.27(c).

³¹ 16 U.S.C. § 1362(18).

³² *Id.*

³³ National Oceanic & Atmospheric Administration, National Marine Fisheries Service, “NOAA Issuing Biological

affect, but is not likely to jeopardize, the continued existence of any species of ESA-listed whales, sea turtles, or Atlantic sturgeon or destroy or adversely modify any designated critical habitat.” This federal does not exude confidence in the protection of marine life; in fact, it is alarming. This biological assessment and opinion are just for *one* of the many OSW projects – Ocean Wind 1. Cumulatively, with all the issued and pending take authorizations for the 30 projects in the Northeast, how many issued takes will cause impacts on species populations? What are thresholds for action should those cumulative takes cause harm? What are the response plans for impacts to marine mammals should populations decline or be impacted?

a) *COA rejects the numbers proposed in the application as “Small”*

The number of takes in this Draft IHA for the Applicant is **14,193 marine mammals**. These take numbers are not “small;” however, of greater concern is the cumulative impacts of all the projects concurrently under siting and characterization, construction, and operation, and later, decommissioning. The take numbers are outrageous and fail to meet the legal requirements for mammal protection, much less for endangered species.

North Atlantic Right Whales

The harm that offshore wind energy development may inflict upon NARWs throughout site assessment, construction, and operation, is widely recognized.³⁴ Offshore wind projects will significantly exacerbate the existing threats posed to NARWs by ship collisions and entanglements. With such low population numbers, and, as noted earlier, based on the recommendation by a federal scientist that not one NARW can be lost, cumulative impacts must be considered for NARWs and other endangered species.

Moreover, the impacts of activities that may be authorized in this IHA request will compound those that already occurred under the terms of the Applicant’s previous IHA for site characterization and assessment. Moreover, the aforementioned sum must be considered alongside other takes of marine mammal species, including the critically endangered NARWs, that NMFS has authorized for other wind activities along the species’ migratory range from North Carolina to Maine. Such authorizations include those for site characterization, assessment, and construction activities that are simultaneously occurring for offshore wind energy development lease sites.

Again, currently, there are **14 Active Incidental Take Authorizations** (for marine site characterizations and construction) and **14 “in process” Incidental Take Authorizations** (for marine site characterizations and construction) for offshore wind projects from Maine to South Carolina. It is also important to note that this take request precedes the future take authorizations needed for continued construction, operation, and decommissioning.

Opinion on the Ocean Wind 1 Offshore Energy Project,” April 4, 2023, <https://content.govdelivery.com/accounts/USNOAAFISHERIES/bulletins/352c198>.

³⁴ See Conservation Law Foundation, et al., *Strong Mitigation Measures Are Essential to Protect the North Atlantic Right Whale During All Phases of Offshore Wind Energy Development* (Feb. 2022), https://www.nrdc.org/sites/default/files/narw-mitigation_feb2022.pdf; Vineyard Wind – NGO Agreement (Jan. 22, 2019), <https://www.nrdc.org/sites/default/files/vineyard-wind-whales-agreement-20190122.pdf>.

Of all species under consideration in this application, the NARW population is the most susceptible to even the slightest harm. Also, COA notes that vessel strikes pose one of the largest threats to NARWs. According to NOAA, “vessels of nearly any size can injure or kill a right whale³⁵.” If approved, the survey vessels will add more vessels and round-trip vessel trips to an already busy port region, thereby adding more opportunities for vessel strikes. For accountability and fairness, how and who will determine which vessel struck a NARW or other species if that should happen? Especially given the threat posed to NARWs as a species by even one instance of a vessel collision, and the existence of NARW in the project area, NMFS should reject/deny the Applicant’s request.

In addition, noise is a significant threat to the survival of whales:

Noise pollution created by ship traffic or offshore construction may negatively impact whales by disrupting otherwise normal behaviors associated with migration, feeding, alluding predators, rest, breeding, etc. Any changes to these behaviors may decrease survival, simply by increasing efforts directed at avoidance of the noise and the perceived threat.³⁶

A growing source of noise pollution that interferes with NARWs’ most vital social functions is offshore wind-related activities. More specifically, low frequency noise from large ships involved in offshore wind-related activities overlaps with the acoustic signals used by right whales. These large whales rely on sound to breed, navigate coastlines, and find food. Right whales communicate with one another by making calls, which can cover distances of more than 20 miles.³⁷ The calls let whales stay in touch, share information about food, help mates find each other, and keep groups together while traveling.

Rising levels of ocean noise are interfering with whales’ ability to communicate. Anthropogenic noise interferes with their ability to eat, mate, and navigate; therefore, it is essential to their survival that these sounds travel the ocean undisturbed.³⁸ 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.³⁹

b. Excessive Takes of Other Marine Mammal Species, including Endangered & Threatened

³⁵ See *id.*

³⁶ Conserve Wildlife Foundation of New Jersey, “New Jersey Endangered and Threatened Species Field Guide: North Atlantic Right Whale,” as seen 12/9/2022, <http://www.conservewildlifenj.org/species/fieldguide/view/Eubalaena%20glacialis/>

³⁷ Woods Hole Oceanographic Institution, “Right Whales,” as seen 11/15/2022, <https://www.whoi.edu/know-your-ocean/ocean-topics/ocean-life/marine-mammals/right-whales/>.

³⁸ National Oceanic & Atmospheric Administration, Fisheries, “North Atlantic Right Whale,” as seen 11/15/2022, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>.

³⁹ *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

Clean Ocean Action finds the variety of species and total number of individual Level B takes proposed by the Applicant unsupportable. The Applicant's request is for the taking of a small number of marine mammal species by Level B harassment; the 9,086 marine mammal takes is by far not "small." The takes also include endangered and protected marine mammals, including nearly 5,000 dolphins of various species.

Bottlenose dolphin are highly social, and arguably the most recognized and beloved small cetacean.⁴⁰ In addition to their inherent value to the American public, the dolphins are an increasingly important driver of economic growth for tourism and related industries.⁴¹ The cumulative impact of harassing thousands of bottlenose dolphin may be considerable and irreversible, but these impacts are not considered in the application as currently proposed. How can NMFS justify taking this number of bottlenose dolphins, or any animal for that matter, for construction of one private company's offshore wind projects? These shortcomings merit the rejection of the Applicant's take request.

Furthermore, COA also strongly encourages NMFS to reject the take request due to deficiencies in its analysis concerning the proposed activities' effects on 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.⁴² Besides their wide recognition among the American public, harbor seals also play a major role in maintaining balance in marine food webs as well.⁴³

Despite the unique importance of this species, however, COA maintains there is not sufficient baseline information about how harbor seals use the waters at the Applicant's lease site to conclude that the activities covered by the application will have a negligible impact on harbor seals. More specifically, a COA employee attended a virtual "Science Saturday" event in early 2022 at which a representative of the New Jersey Department of Environmental Protection ("NJDEP") 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.⁴⁴ 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 by this application. With this in mind, the Applicant requests the taking of **1,955** harbor seals and **1,955** gray seals by Level B takes, for a total Level B harassment of **3,910 seals**. With so little

⁴⁰ *Common Bottlenose Dolphin*, MARINE MAMMAL CENTER (visited Feb. 28, 2022), <https://www.marinemammalcenter.org/animal-care/learn-about-marine-mammals/cetaceans/common-bottlenose-dolphin>.

⁴¹ *The Economic of Marine Mammals*, MARINE MAMMAL COMMISSION (visited Feb. 28, 2022), <https://www.mmc.gov/priority-topics/value-marine-mammals/>.

⁴² *Harbor Seal*, NATL. MARINE FISHERIES SERV. (visited Feb. 28, 2022), <https://www.fisheries.noaa.gov/species/harbor-seal>.

⁴³ *Seals*, INTL. FUND FOR ANIMAL WELFARE (visited Feb. 22, 2022), <https://www.ifaw.org/animals/seals#:~:text=As%20one%20of%20the%20keystone,%2C%20polar%20bears%2C%20and%20sharks>.

⁴⁴ "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.

baseline information available about seals and their use of the project area and waters off New Jersey, NMFS should therefore reject the Applicant's take request.

C. Unprecedented number of whale deaths occurring in a short period of time along the NJ/NY coast starting in December 2022

Especially in light of the NARW's critically endangered status, the ongoing Unusual Mortality Event that this species is experiencing and, consequently, the existential threat posed to the species by obstacles to even one individual's survival, the best scientific literature cannot justify harassing even one of the 336 remaining individuals in a short timeframe for the Applicant's construction activities. Harassing one NARW is not negligible; it is significant. This is particularly true upon consideration of the multitude of additional NARW takings that the Applicant will be pursuing for the continued preconstruction, as well as the construction, operation, and decommissioning phases of the Applicant's projects. Again, not one NARW can be lost according to federal scientists, as previously noted.

Further, according to reports of dead marine mammals to Clean Ocean Action the Marine Mammal Stranding Center⁴⁵ to date, **11 whales and at least 35 dolphins and porpoises** have washed ashore dead in the NY/NJ region since December 2022. COA, along with members of the public, including over 358,250 people, have called for a pause in any offshore shore wind related activities until an investigation is conducted into the potential causes of the whale and dolphin deaths. Based on the NMFS list of impacts caused by offshore wind, which includes noise and ship strikes, it is plausible that the preconstruction offshore wind activities can be connected with these marine mammal deaths and must be thoroughly investigated. Indeed, there are more harassment authorizations under review and in process.

In response to this request, NMFS, BOEM and Marine Mammal Commission have denied a possible link; however, no evidence has been presented to detail these findings by the agencies, to date. Following the denials, these agencies stated that the whale deaths were due to increased ship strikes and increased whale populations in the region. However, no substantiating data was provided on either alleged cause. Can the NMFS provide studies and evidence that whales are increasing in the region during the winter?

It should be noted that less than 50% of the whales had evidence of ship strikes, and ship strikes do not necessarily determine cause of death. Whales may have been hit after death or been impaired by another cause, and then secondarily hit by a ship. Also, due to their erratic and frequent activity, survey ships should not be discounted as a cause without evidence.

To fact check the increased shipping narrative, COA reviewed the data from the Port Authority of NY/NJ Twenty Equipment Unit (TEU) data, which shows commerce was down over 20% in December, when whales first started frequently washing-up, and commerce declined about 25%

⁴⁵ Marine Mammal Stranding Center, "NJ Cetacean Strandings from December 2022 Through Present," <https://mmssc.org/cetaceans-2002-2023> as seen 5/15/2023.

to date from January - March of 2023.⁴⁶ Therefore, it is not accurate to say increased shipping was the definitive cause of ship strikes on whales during this time.

It is imperative for an independent investigation to identify the cumulative impacts of preconstruction activities on marine life prior to moving forward with reviewing and issuing further harassment authorizations, whether it be for marine site characterizations or construction, operation, and decommissioning phases of offshore wind projects. COA urges NMFS to reject the Applicant's take request.

II. Other Issues of Importance, including Lack of Fairness, Transparency, and Accountability

The COA concerns discussed in the previous section is not exhaustive; as the MMPA recognizes, every marine mammal is important, and the effects of the proposed activities on other species—including those that are also actively included in the recent unprecedented whale deaths and the Unusual Mortality Events, such as the North Atlantic right whale and humpback whale—should encourage NMFS to demand more baseline data and severely restrict the Applicant's authorized takes for the activities in question. COA consequently urges NMFS to reject the Applicant's IHA request.

Further, a serious issue of concern is a lack of accountability. Again, as referenced above,

By 2030 the Northeast large marine ecosystem will be occupied by over 2.4 million acres of leases, 3,400 turbines, and 10,000 miles of submarine cables; and an additional 5.7 million acres is also under consideration for further development.⁴⁷

Never has an ecosystem been under such massive industrial development pressure and impact over a span of less than decade. Given this unimaginable and unprecedented scope and scale of industrial offshore wind development in the Northeast region, and off the New Jersey and New York coasts in particular, NMFS must provide clarity and due process *now* for the determination of accountability. At what point will there be too many accumulated Level A and Level B harassments from offshore wind energy development or other activities? What are the guardrails to determine how many takes will be too many? How will NMFS distinguish between impacts, such as those from the wind industry as compared to those from other shipping traffic, especially as wind facilities are built-out and marine life and ships are concentrated into more narrow corridors? Who will be responsible and how will accountability be managed? How will the number of takes be lowered over time to address the additional, cumulative stress to marine life? Or will it be?

⁴⁶ The Port Authority of New York and New Jersey, "Facts and Figures," as seen 4/30/2023, <https://www.panynj.gov/port/en/our-port/facts-and-figures.html>.

⁴⁷ Andy Lipsky, NOAA Fisheries. "Fisheries, Wildlife, and Ecosystem Science in a New Era of Offshore Wind Energy Development." NOAA Ecosystem Based Management and Ecosystem Based-Fisheries Management Seminar Series, March 9, 2022, <https://www.youtube.com/watch?v=Dh7yBEDHzL8>.

On another matter, how will population dynamics be measured as species populations decline from stress or injury from offshore wind development? Or food scarcity as migratory fish populations move or as fish structure changes? Or will the agencies simply place blame on “climate change” as a catch-all to lower populations of marine mammals? How many marine mammals can be harassed and injured before the populations, and associated ecosystems, collapse, all for the current unfounded benefits of the new offshore wind energy industry? How many takes, for individual projects or requests or cumulatively, are too many? The current process by which takes are evaluated must include cumulative impacts to populations from all incidental take requests and authorizations. These questions and issues, among others, must be addressed at the outset to ensure transparency and accountability for the impacts to the living marine ecosystem from this wholesale, rapid industrial development of the ocean.

Further, numerous IHAs have already been issued, and ITRs and NOAs for construction are already in process for many offshore wind energy projects in the region and along the East Coast of the United States. It is essential that systems are in place to monitor the impacts from these activities in these areas. Impacts must be documented and fully investigated to inform forthcoming incidental take requests and authorizations. Monitoring reports are not enough. It is necessary for on-the-ground independent scientists and response teams to be in the areas included in incidental take authorization areas to monitor for impacts so immediate response or investigation can occur.

As an example, on December 5, 2022, an infant endangered Sperm Whale washed-up on the beach in Keansburg, NJ.⁴⁸ Thankfully, volunteers at the Marine Mammal Stranding Center were able to be on the scene. Given that massive, large-scale offshore wind project activities are already underway in this region, an organization charged with responding to an endangered marine mammal incident should be fully funded by the state and federal agencies to collect the animal, if possible, or be provided the means to conduct a thorough and immediate investigation, including a comprehensive necropsy, to determine that cause of death. The investigation should include what, if any, offshore wind energy related activities, or other offshore activities, were ongoing within the window of time the animal was potentially impacted. An immediate response and thorough investigation of such incidents is necessary to ensure accountability and the protection of marine mammal species.

Of further note, COA protests the double standard that has developed for the offshore wind industry when it comes to protecting marine mammals. COA acknowledges the importance of reducing other common harms to NARWs and other marine mammals, such as entanglements and vessel strikes, but these efforts to help the species will be of limited benefit if they coincide with an increased tolerance for other activities that torment and annoy these invaluable creatures. The noise, electromagnetic fields, and drilling associated with offshore wind development and the site characterization activities that precede them, as well as the construction, operation, and decommissioning activities, must be treated as the serious and amplifying threats to the NARW, and other marine mammals, that they are—no different than entanglements or vessel strikes.

⁴⁸Radel, Dan. “Infant 12-foot sperm whale washes up dead on Keansburg beach.” Asbury Park Press, 12/5/2022. <https://www.app.com/story/news/local/animals/2022/12/05/keansburg-nj-infant-sperm-whale-washes-up-dead-beach/69703142007/>

NMFS should seize the opportunity to set a strong precedent for protecting NARWs and all whales by denying the Applicant’s take request.

III. Conclusion

In sum, COA urges the NMFS to reject and deny the Applicant’s harassment “take” request of **9,086 marine mammals** for marine site characterization activities for an offshore wind power plant and the associated export cables. It is clear the Applicant’s activities would cause an unacceptable number of Level B harassments of extremely at-risk and endangered North Atlantic right whales, as well as an unacceptable amount of Level B take authorizations for other marine mammal species, including other federally protected whales, dolphins, porpoises, and seals.

For the North Atlantic right whale, the activities in question are reasonably likely or expected to adversely affect this critically endangered species—both individuals and the stock as a whole—through effects on the species’ annual rates of recruitment and survival; this impact cannot reasonably be merely minimal or negligible. It is imperative that NMFS engage in all means possible to avoid harassment to all the uniquely significant species protected by the MMPA, especially the NARW, and to protect ecosystems.

In addition, the cumulative impacts from all incidental take requests and authorizations for offshore wind projects in the same region, as well as for other uses, must be considered when reviewing each application for “takes” of marine mammal species. The total takes for all species affected must be considered alongside takes that NMFS has authorized for other wind activities including for site characterization, assessment, and construction activities (and later, operation and decommissioning activities) that are simultaneously occurring in the region and in the migration areas for marine life.

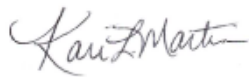
For the foregoing reasons, COA strongly urges NMFS to reject Community Offshore Wind’s request for an Incidental Harassment Authorization.

Should you have any questions or would like to further discuss these concerns, please feel free to contact us.

Respectfully submitted,



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