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Submitted via electronic mail

Jolie Harrison
Chief, Permits and Conservation Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
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Re: Comments on a Notice to Modify the Incidental Harassment Authorization for Marine Site Characterization Surveys in the OCS–A–0483 Lease Area and the Coastal Waters off Virginia

Ms. Harrison,

The Southern Environmental Law Center (“SELC”) submits these comments on behalf of Conservation Law Foundation, Defenders of Wildlife, Natural Resources Defense Council, Whale and Dolphin Conservation, Sierra Club Virginia Chapter, Assateague Coastal Trust, Inland Ocean Coalition, the International Marine Mammal Project of Earth Island Institute, and NY4WHALES, in response to the National Marine Fisheries Service’s (“NMFS”) proposal to modify an incidental harassment authorization (“IHA”) originally issued to Dominion Energy Virginia (“Dominion”) on September 8, 2020, for high-resolution geophysical (“HRG”) surveys off the coast of Virginia in the area of Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS–A–0483) and in the coastal waters off Virginia (“Project Area”), in support of the Coastal Virginia Offshore Wind Commercial Project.¹ Our organizations highlighted the numerous deficiencies with the Draft IHA in comments submitted to the agency on July 17, 2020, which are attached and incorporated by reference here.²

Our organizations are profoundly concerned about NFMS’ authorization for Dominion to incidentally harass roughly *90 times* more Atlantic spotted dolphin than were previously authorized earlier this fall. The agency’s updated Level B take limit—a staggering 2,427 animals, up from merely 27 animals—represents about 5% of the total population and is more than 750% greater than the potential biological removal for the population.³ This change runs contrary to the conservation mandate of the Marine Mammal Protection Act (“MMPA”).

¹ Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys Off of Coastal Virginia, 85 Fed. Reg. 71,881 (Nov. 12, 2020).

² Letter from SELC et al. to Jolie Harrison, Chief, Permits & Conservation Div., Nat’l Marine Fisheries Serv. (NMFS) (July 17, 2020) [hereinafter “Draft IHA Comments”], provided as Attachment 1.

³ See Sean A. Hayes et al., *U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments – 2019*, NMFS (July 2020), available at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region>, at 232.

The MMPA requires that NMFS, in authorizing harm, meet a number of basic, protective standards: that only “small numbers” of marine mammals will be taken, that the impacts on those species and populations will be “negligible,” and that, through mitigation, the “least practicable adverse impact” on marine mammals and their habitat is achieved.⁴ At every step, the agency must use the “best scientific evidence available.”⁵ The proposed modification falls short of these standards for a number of reasons.

First, the agency’s interpretation of “small numbers” is contrary to the purpose of the MMPA. The MMPA allows NMFS to authorize takes of “small numbers” of marine mammals under certain conditions.⁶ The statute does not define this term, but the “small numbers” requirement is distinct from the agency’s “negligible impact” analysis.⁷ Here, the agency proposes to take “small numbers of spotted dolphins relative to the population size (less than 5 percent), as take that is less than one third of the species or stock abundance is considered by NMFS to be small numbers.”⁸ Yet this fails to consider the unique conservation status of individual populations. Rather than apply a 30% ceiling for all species, NMFS should revisit its “small numbers” interpretation to consider whether the specific take percentage for Atlantic spotted dolphin will ensure that population levels are maintained at or restored to healthy population numbers.⁹

Second, NMFS’ updated negligible impact analysis consists of mere conclusory statements which underestimate the potential impacts of HRG surveys on small cetaceans like the Atlantic spotted dolphin. The MMPA authorizes NMFS to issue an IHA only if the agency finds that the authorized harassment caused by a “specified activity” will have a “negligible impact” on marine mammals.¹⁰ Here, NMFS argues that because “no new information” suggests that the previous negligible impact finding for Atlantic spotted dolphin should change, the proposed 90-fold increase in takes will have a negligible impact on the stock.¹¹ The agency supports this finding with the fact that harassment is expected to be of “lower severity, predominantly in the form of avoidance of the sound source and potential occasional interruption of foraging.”¹² Such a cursory analysis is wholly inadequate in light of the magnitude of the change in take levels Dominion is requesting. In fact, the existing science indicates that Atlantic

⁴ 16 U.S.C. § 1371(a)(5)(D).

⁵ See, e.g., 16 U.S.C. § 1373(a).

⁶ 16 U.S.C. § 1371(a)(5)(D)(i).

⁷ See, e.g., *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 903-04 (9th Cir. 2012).

⁸ 85 Fed. Reg. at 71,885.

⁹ H.R. Rep. No. 103-439, at 22, 1994 WL 93670 (Mar. 21, 1994); see *Native Vill. of Chickaloon v. Nat’l Marine Fisheries Serv.*, 947 F. Supp. 2d 1031, 1052–53 (D. Alaska 2013) (upholding agency’s “small numbers” determination where the agency did not “categorically establish 10% as a small number; rather, it determined, through consideration of the available data, that 10% was a small number in the specific context of the Cook Inlet beluga whale and the nature of the proposed activity”).

¹⁰ 16 U.S.C. § 1371(a)(5)(D)(i). To make a finding of “negligible impact” under its regulations, NMFS must determine that the authorized harassment “cannot be reasonably expected to, and is not reasonably likely to, adversely affect” annual rates of recruitment or survival in any marine mammal species or population. 50 C.F.R. § 216.103.

¹¹ 85 Fed. Reg. at 71,885.

¹² *Id.*

spotted dolphin, a particularly acoustically sensitive species,¹³ have the potential to be displaced,¹⁴ shift their behavioral state,¹⁵ and stop or alter vocalizations¹⁶ in response to a variety of anthropogenic noises, with potentially adverse energetic effects even from minor changes.¹⁷

Furthermore, our organizations would like to reiterate that the agency's reliance on a 160 dB threshold for behavioral harassment is not supported by best available scientific information (which indicates that Level B takes occur with near certainty at levels well below this threshold), as discussed in our Draft IHA Comments.¹⁸ Reliance on such an outdated, incorrect threshold further underestimates impacts and results in an inaccurate negligible impact analysis.

Finally, as described in our Draft IHA Comments, we do not agree that the mitigation measures in the IHA—which remain unchanged despite the significant modification in take numbers—are adequately protective of Virginia's marine mammals.¹⁹ In authorizing “take” by incidental harassment under the general authorization provision of the MMPA, NMFS must prescribe “methods” and “means of effecting the least practicable adverse impact” on marine mammals and set additional “requirements pertaining to the monitoring and reporting of such taking.”²⁰ We once again urge the agency, especially in light of the higher-than-expected detections of Atlantic spotted dolphin in the Project Area, to modify Dominion's IHA as follows:

- HRG surveys should commence, with ramp-up, during daylight hours only, to maximize the chance that marine mammals are detected and confirmed clear of the exclusion zone;
- NMFS should establish a standard 500-meter exclusion zone for all marine mammal species around survey vessels; and
- a combination of visual monitoring—by four protected species observers adhering to a two-on/two-off schedule—and passive acoustic monitoring should be used at all times that survey work is underway, and, for efforts that continue into the nighttime, night vision or infrared technology should also be used.

Our organizations would also like to restate the recommendations in our Draft IHA Comments which focused on the need for stronger mitigation measures for North Atlantic right

¹³ Caroline R. Weir, *Overt responses of humpback whales (Megaptera novaeangliae), sperm whales (Physeter microcephalus), and Atlantic spotted dolphins (Stenella frontalis) to seismic exploration off Angola*, AQUATIC MAMMALS (2008) (pronounced response of Atlantic spotted dolphin to airgun noise).

¹⁴ Carolyn J. Stone & Mark L. Tasker, *The effects of seismic airguns on cetaceans in UK waters*, J. CETACEAN RESEARCH & MGMT. (Dec. 2005) (showing, in the presence seismic vessels, more pronounced displacement in small odontocetes than in larger cetaceans).

¹⁵ Howard Gray & Koen Van Waerebeek, *Postural instability and akinesia in a pantropical spotted dolphin, Stenella attenuata, in proximity to operating airguns of a geophysical seismic vessel*, J. NATURE CONSERVATION (Dec. 2011) (observing severe injury or impaired neurological function in spotted dolphin exposed to airgun noise).

¹⁶ Marc O. Lammers et al., *Acoustic monitoring of dolphin occurrence and activity in a MINEX training range*, PROCEEDINGS OF MEETINGS ON ACOUSTICS (July 10, 2016) (demonstrating repeated cessation of dolphin calls around Navy training with low-weight explosives).

¹⁷ Terrie M. Williams et al., *Swimming and diving energetics in dolphins: A stroke-by-stroke analysis for predicting the cost of flight responses in wild odontocetes*, J. EXPERIMENTAL BIOLOGY (Jan. 7, 2017); Marla M. Holt et al., *Vocal performance affects metabolic rate in dolphins: Implications for animals communicating in noisy environments*, J. EXPERIMENTAL BIOLOGY (Mar. 30, 2015).

¹⁸ See Draft IHA Comments at 11-12.

¹⁹ See *id.* at 15-22.

²⁰ 16 U.S.C. § 1371(a)(5)(D)(vi).

whales. In light of updated North Atlantic right whale population numbers released last month, which put the population size at 356 individuals,²¹ and given that whales are present in the Project Area year-round, we reiterate the need for strong mitigation measures on the activities covered by Dominion's IHA. In addition to the above measures, our organizations once again urge NMFS to:

- impose a seasonal restriction on HRG surveys that have the potential to injure or harass the North Atlantic right whale from November 1 through April 30, to avoid the time period that poses the highest risk for the population;
- establish, to the extent feasible, an extended 1,000-meter exclusion zone for North Atlantic right whales around survey vessels; and
- require that all vessels operating traveling *to and from* the Project Area maintain a speed of 10 knots or less throughout the survey period.²² NMFS should also consider requiring that Dynamic Management Areas become active anytime a single North Atlantic right whale is sighted or acoustically detected.

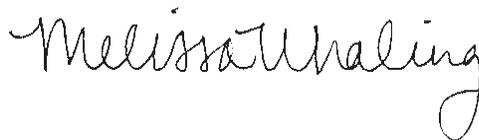
NMFS is charged under the MMPA with prioritizing the protection of marine mammals. For the above reasons, the agency must withdraw its proposed IHA modification and revise its analysis to be consistent with the agency's statutory obligations. Considering the elevated level of threat to all federally protected marine mammal species and populations in the mid-Atlantic, NMFS must ensure that any potential stressors posed by the proposed activity are mitigated to effectuate the least practicable impact on affected species and stocks.

Thank you for your consideration of these comments.

Sincerely,



Sierra B. Weaver, Senior Attorney
Southern Environmental Law Center



Melissa L. Whaling, Science & Policy Associate
Southern Environmental Law Center

[signature page follows]

²¹ *Right Whale Consortium: Only 356 North Atlantic Right Whales Survive*, DEFS. OF WILDLIFE (Oct. 30, 2020), <https://defenders.org/newsroom/right-whale-consortium-only-356-north-atlantic-right-whales-survive>.

²² We note that this measure is stronger than what our organizations previously requested in our Draft IHA Comments, which would have required all vessels operating *within* the Project Area to maintain a speed of 10 knots or less outside the period of November 1 and April 30, during which this speed limit would have been extended to all vessels traveling *to and from* the Project Area. We are strengthening this recommended measure given the declining population status of the North Atlantic right whale.

On behalf of:

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[Attachment]