

April 20, 2022

Submitted via electronic mail to ITP.Corcoran@noaa.gov

Jolie Harrison, Chief, Permits and Conservation Division
Office of Protected Resources
National Marine Fisheries Service

Re: Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys Off of Delaware (87 Fed. Reg. 15,922, March 21, 2022)

Dear Jolie Harrison:

Oceana is the largest international ocean conservation organization solely focused on protecting the world's oceans, with more than 1.2 million members and supporters in the United States, including over 340,000 members and supporters on the U.S. Atlantic seaboard. For nearly twenty years, Oceana has campaigned to win strategic, directed campaigns that achieve measurable outcomes to help make our oceans more biodiverse and abundant.

Addressing climate change is important for oceans, wildlife, and our future. By shifting from fossil fuel energy to clean, renewable energy sources, the United States can help address this crisis. Oceana was pleased to see the Biden Administration's goal to deploy 30 GW of offshore wind power by 2030 while protecting biodiversity and cultural resources, including imperiled marine life such as the critically endangered North Atlantic right whale (NARW).

Oceana has engaged as a stakeholder in the management of U.S. fisheries and interactions with endangered species, with a particular interest in effective bycatch minimization and reduction, if not elimination, of fishing gear entanglement-related death, injury, and harm to protected species, including the NARW. In addition, Oceana is interested in seeing the reduction, if not elimination, of vessel strike-related death, injury, and harm to NARWs. For these reasons, in 2019, Oceana launched a binational campaign in the United States and Canada to urge the respective governments to effectively enforce environmental laws to protect this critically endangered species and Oceana is currently campaigning to protect these whales from their two biggest threats—entanglement in fishing gear and vessel strikes.

For almost 15 years, Oceana has been campaigning to oppose expanded offshore oil and gas exploration and development. Offshore drilling causes dangerous oil spills and perpetuates energy development based on fossil fuels. The United States must shift from fossil fuel-based energy

sources to clean energy. Offshore wind development has the potential to help bridge the transition to our clean energy future.

Oceana is supportive of offshore wind energy if it is responsibly sited, built, and operated throughout its lifespan. The proposals for offshore wind development in areas that the critically endangered NARW may frequent need to consider, avoid, and mitigate effects to protected species, particularly the NARW, to ensure that wind development will not come at the expense of the species. NARWs spend much of the year in the waters of New England and Eastern Canada with mothers migrating south to have calves in the U.S. Southeast region. Wind development in persistent aggregation habitats and calving grounds pose particular concern but those areas where NARWs migrate are likely more appropriate because of the reduced frequency, intensity, and duration of interactions with these areas. As offshore wind is developed along the eastern seaboard, strong measures are needed to protect this critically endangered species.

Oceana thanks you for the opportunity to submit comments as your agency considers an application for an Incidental Harassment Authorization (IHA) to support the site characterization of offshore wind projects near Delaware. To comply with the Marine Mammal Protection Act (MMPA), the Fisheries Service must reconsider its approach to renewing IHAs, including this one, with a shortened comment period. If the Fisheries Service chooses to renew this IHA, it must provide a full 30-day comment period for a renewal notice to ensure adequate public engagement.

This comment letter includes the following key points:

- The Fisheries Service must open a 30-day comment period to reauthorize the IHA.
- The IHA must include use of best available science, cumulative impacts analysis, and project conditions that avoid, minimize, and mitigate adverse environmental impacts.
- The IHA must include a vessel traffic plan to minimize the effects of service vessels on marine wildlife
- The IHA must include requirements to use effective reactive restrictions that are triggered by detection of protected species before or during site characterization activities.

Oceana submits these comments to help ensure that the proposed activities avoid adverse effects on marine mammals. If adverse effects cannot be avoided, then they should be minimized or mitigated. The Fisheries Service is the steward of the remaining NARWs that swim along our coasts and, as the agency responsible for their recovery, should ensure that the authorization of site characterization is based on the best scientific information available and that strong protections are in place before approving this or any proposed activity that may take, harass, or cause stress to NARWs.

1) The role of Incidental Harassment Authorizations

The MMPA was adopted fifty years ago with the goal of protecting and promoting the growth of marine mammal populations “to the greatest extent feasible commensurate with sound policies of

resource management” in order to “maintain the health and stability of the marine ecosystem.”¹ To protect marine mammals from human activities, the MMPA prohibits the “take” of marine mammals including activities that harass, hunt, capture, or kill, or any attempt to harass, hunt, capture, or kill any marine mammal.² In limited circumstances, the Fisheries Service, the agency responsible for protecting most marine mammal species,³ may grant exceptions to the take prohibition, such as for the incidental, but not intentional, taking of marine mammals for certain activities, which is done via incidental take authorizations.⁴

The Fisheries Service can only grant an incidental take authorization if the take request is for “small numbers of marine mammals of a species or stock” and will have only “negligible impact.”⁵ It is important to note that when granting an incidental take authorization, the Fisheries Service must require mitigation measures that achieve “the least practicable impact on such [marine mammal] species or stock and its habitat.”⁶

Under the Fisheries Service’s regulations, there are two types of incidental take authorizations: IHAs and Letters of Authorization (LOA). LOAs can only be issued after the Fisheries Service promulgates incidental take regulations for the activity. An IHA is limited to one year, and the action authorized may only have the potential to result in harassment.⁷ For actions that could result in any “serious injury”⁸ or mortality of a marine mammal, the Fisheries Service’s regulations indicate that incidental take regulations must be promulgated after notice and the opportunity to comment.⁹ LOAs can be issued pursuant to incidental take regulations for up to five years.¹⁰

2) The Fisheries Service Must Open a 30-Day Comment Period to Reauthorize the IHA

The Fisheries Service must end its approach of renewing IHAs while only giving the public 15 days to comment. The expedited process that the Fisheries Service included in the IHA is a violation of the MMPA, which requires a 30-day public comment period for all IHAs, including reauthorizations. The Fisheries Service should not be adopting processes that are inconsistent with

¹ 16 U.S.C. § 1361(6).

² 16 U.S.C. §§ 1361(2), 1371.

³ The Fish and Wildlife Service, within the Department of the Interior, is responsible for dugongs, manatees, polar bears, sea otters and walrus. See U.S. Fish and Wildlife Service, *Marine Mammals*, <https://www.fws.gov/international/animals/marine-mammals.html> (last visited May 3, 2021).

⁴ 16 U.S.C. § 1371(a); *Incidental Take Authorizations under the Marine Mammal Protection Act*, NOAA FISHERIES <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act> (last visited May 3, 2021) (listing renewable energy activities as activities for which incidental take authorizations have been issued).

⁵ 16 U.S.C. § 1371(a)(5)(A), (D).

⁶ 16 U.S.C. § 1371(a)(5)(D)(ii)(I) (for IHAs); 16 U.S.C. § 1371(a)(5)(A)(i)(II)(a) (for LOAs).

⁷ 16 U.S.C. § 1371(a)(5)(D)(ii)(I).

⁸ The Fisheries Service defines the term “serious injury” as “any injury that will likely result in mortality. 50 C.F.R. § 216.3.

⁹ 50 C.F.R. § 216.105(b).

¹⁰ 50 C.F.R. § 216.106(a).

its statutory obligations. The IHA renewal process runs contrary to the text and legislative history of the MMPA and finds no support in MMPA regulations.

In the event of a need for IHA renewal, the agency must issue a Federal Register notice and open a 30-day public comment period. Otherwise, the IHA will be procedurally deficient, making it vulnerable to litigation and creating uncertainty for the project proponents.

a) *The expedited renewal process violates the plain language of the MMPA*

The Fisheries Service's failure to give the public 30 days to comment on the reauthorization of the IHA is a violation of the MMPA's plain language. The MMPA clearly states that the Fisheries Service must provide a 30-day public comment period for every IHA, and the agency has failed to provide an adequate explanation of why the 30 days are not required for renewals.

Section 101(a)(5)(D)(i) of the MMPA states that an IHA may be granted "for periods of not more than 1 year."¹¹ When the Fisheries Service receives an application, it must publish a proposed IHA in the Federal Register "not later than 45 days" after receiving the application and must provide a 30-day public comment period.¹² The Fisheries Service must then approve the IHA "not later than 45 days" after the end of the public comment period if the IHA meets the MMPA's standards.¹³ Therefore, the agency may publish a proposed IHA in the Federal Register and make a final decision faster than the 45-day windows, but the 30-day public comment period cannot be shortened. In other words, a decision on an IHA must be made no later than 120 days of receiving an application but can be made in less time so long as there is a 30-day public comment period.

The agency asserts that if it includes an opportunity to comment on a renewal at the time of the proposed IHA, the original comment period will count towards the 30-day requirement.¹⁴ The text of the MMPA, however, does not explicitly or implicitly recognize an expedited renewal process with a 15-day comment period for IHAs even if the agency determines the activities are nearly identical.

The agency's explanation ignores the timeframe set out in the MMPA. The 30-day comment period must be opened after receiving the application for the IHA. Regardless of how the agency attempts to frame it, the expedited process is a violation of the MMPA. The Fisheries Service cannot segment the original IHA from the renewal for the purpose of keeping IHAs below the one-year limit but also have them count as the same IHA for purposes of the 30-day comment requirement. The only interpretation that comports with the language of the MMPA is for the Fisheries Service to require applicants to submit a new application and open a new 30-day public comment period.

¹¹ 16 U.S.C. § 1371(a)(5)(D)(i).

¹² 16 U.S.C. § 1371(a)(5)(D)(iii).

¹³ *Id.*

¹⁴ Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys, 85 Fed. Reg. 63,508 (Oct. 8, 2020).

b) *The expedited renewal provision is inconsistent with the legislative history of the MMPA*

The legislative history of the Section 101(a)(5)(D) similarly provides no support for the Fisheries Service's position. In fact, it provides evidence that the agency's interpretation is a violation of the MMPA. The MMPA's IHA provision was added as part of the statute's 1994 amendments, with the stated purpose of addressing procedural problems with harassment authorizations.¹⁵ The Committee on Merchant Marine and Fisheries, which added the section to the bill, included the following statement in its report:

New subparagraph (D)(iii) establishes specific time limits for public notice and comment on any requests for authorization which would be granted under this paragraph. The Committee notes that, in some instances, a request will be made for an authorization identical to one issued in the previous year. In such circumstances, the Committee expects the Secretary to act expeditiously in complying with the notice and comment requirements. There is no need, in such a case, for the Secretary to use the full 120 days allowed.¹⁶

This statement corroborates the plain reading of the MMPA. The statement shows that the specific timing Congress set out for authorizations includes any reauthorizations. While there is room for the Fisheries Service to expedite the 45-day periods before and after the comment period, the legislative history makes clear that it must comply with the 30-day notice and comment requirement. This is consistent with Congress using the phrase "not later than 45 days" for these decision-making periods but not using similar language for the 30-day period. The Fisheries Service must therefore continue to offer a 30-day public comment period even for re-authorizations like the one at issue here.

c) *The expedited renewal provision is not supported by MMPA regulations*

The Fisheries Service has previously cited to 50 C.F.R. § 216.107(e) as its authority for renewing IHAs with a truncated comment period, but that provision does not authorize the agency to avoid the 30-day public comment period and does not apply outside of Arctic waters. 50 C.F.R. § 216.107(e) states that IHAs in Arctic waters may be renewed for additional year-long periods,¹⁷ but the provision makes no mention of avoiding the 30-day comment period. Even if that regulation were interpreted to eliminate the 30-day comment period for renewals, it would also be a violation of the MMPA for the reasons outlined above. When adopting a process to issue IHAs, the agency must look to the text of the statute. The agency cannot rely on previous regulations to support its current unlawful interpretation.

¹⁵ Marine Mammal Protection Act Amendments of 1994, P.L. 103-238, § 4, 108 Stat. 532 (1994); H.R. Rep. No. 103-439 (1994).

¹⁶ H.R. Rep. No. 103-439 (1994).

¹⁷ 50 C.F.R. § 216.107(e).

For these reasons, it is clear that the agency's interpretation of the MMPA finds no support in the text, legislative history, or implementing regulations of the statute. To cure this deficiency, the Fisheries Service must reissue the Federal Register notice and give the public a full opportunity to comment.

3) Comments on the Contents of an IHA for Site Characterization

In order to issue an IHA for site characterization or any offshore wind project, the Fisheries Service must ensure that the application meets the requirements for an IHA and that the IHA includes conditions that will guarantee the site characterization surveys have the least practicable impact on marine mammal species or stocks and their habitats in and around the project site. Oceana hopes the comments provided on these important elements will make the site characterization successful while also considering the adverse effects on marine mammals.

a) Use Best Available Science

The MMPA was the first congressional act to include a "best available science" mandate.¹⁸ The statute requires use of "best scientific evidence available" in determining any waiver of the moratorium on the taking and importation of marine mammals and marine mammal products.¹⁹ Additionally, MMPA implementing regulations require the agency to use the "best scientific information available."²⁰ The Fisheries Service must therefore comply with the "best available science" mandate in analyzing whether or not to authorize incidental takes.

The NARW is a critically endangered species that has experienced a large decline in the last decade. The most recent population estimate is just 336 remaining whales.²¹ This 2020 population estimate is an eight percent decrease from the previous year's estimate. As NOAA considers the IHA renewal application, it must use the most recent population estimate.

NARWs are known to feed, socialize and breed in the U.S. northeast and eastern Canada before mothers migrate south to calve and then return to the Northeast. As the Federal Register notes, NARWs use the proposed survey area as part of a migratory corridor Biologically Important Area (BIA) for NARWs. However, in the last decade the seasonal habitat usage of NARWs has shifted to include new waters and different seasonality. The IHA application and analysis must be sure to use the most recent and best available science for this critically endangered species, including recent habitat usage patterns for the study area and up to date seasonality information that may differ from the March-April and November-December migration periods cited in the notice. The

¹⁸ 16 U.S.C. §§ 1361 et seq. (mandating the use of "best scientific evidence" as well as the "best scientific information available" in several provisions, including the moratorium provision at 16 U.S.C. § 1371).

¹⁹ 16 U.S.C. § 1371(a)(3)(A).

²⁰ 16 U.S.C. § 1371(a)(3)(A); 50 C.F.R. § 216.105(c) ("[R]egulations will be established based on the best available information.").

²¹ New England Aquarium. 2021. Population of North Atlantic right whales continues its downward trajectory, https://www.neaq.org/about-us/news-media/press-kit/press-releases/population-of-north-atlantic-right-whales-continues-its-downward-trajectory/?fbclid=IwAR3VJcauSifygKxU4ZICau0Cd_fo2t4KU6RSJK7WSmkGRLYLGHpjz1_WkY

Fisheries Service should fully consider both the use of the area and the effects of chronic stressors on the health and fitness of NARWs.

Chronic stressors are an emerging concern for NARW conservation and recovery, and research suggests that a range of stressors on NARWs have stunted growth rates.²² Disruptive site characterization activities may not only startle NARWs in this area, but also cause chronic stress to the whales. The whales may seek other feeding areas at great energetic cost, decreasing their fitness, body condition and ability to successfully feed, socialize and mate.

The IHA renewal must be sure to use the most recent and best available science for this critically endangered species, including updated population estimates, recent habitat usage patterns for the study area, and a revised discussion of acute and cumulative stress on whales in the region.

b) Fully Consider Cumulative Effects

While an individual activity such as a site characterization may have negligible effects on the marine environment or a negligible number of interactions with protected species, many offshore wind-related activities are being considered in the region. It is important that the Fisheries Service fully consider the discrete effects of each activity and the cumulative effects of the suite of approved, proposed, and potential activities on marine mammals including NARWs and ensure that the cumulative effects are not excessive before issuing or renewing an IHA.

c) Project Conditions

Consistent with the requirement to achieve “the least practicable impact on such species or stock and its habitat,” the IHA must include conditions for the survey activities that will first avoid adverse effects on NARWs in and around the survey site and then minimize and mitigate the effects that cannot be avoided. This should include a full assessment of which activities, technologies and strategies are truly necessary to achieve site characterization to inform development of the offshore wind projects and which are not critical. If, for example, a lower impact technique or technology will provide necessary information about the site without adverse effects, that should be permitted while other tools with more frequent, intense, or long-lasting effects should be prohibited.

4) Vessel traffic associated with Wind Energy Area

Site characterization activities will increase the vessel traffic in and around the project area. The IHA must include a vessel traffic plan to minimize the effects of service vessels on marine wildlife including requirements for all vessels associated with the project, regardless of function, ownership, or operator to meet the following:

a) Observers

All vessels associated with the proposed site characterization should be required to carry and use protected species observers (PSOs) at all times when under way. Because visual sighting of

²² Stewart, et al. 2021. Decreasing body lengths in North Atlantic right whales. *Current Biology* 2021, 31, 1-6.

whales, including NARWs is difficult, particularly in low light conditions, the IHA should require service vessels to complement observer coverage with additional monitoring technologies, such as infrared (IR) detection devices for whales and other protected species. Research suggests that a complementary approach combining human and technological tools is most effective for marine mammal detection.²³

b) Speed

Research suggests that reducing vessel speed can reduce risk of vessel collision mortality by 80-90 percent for large whales like the NARW.²⁴ Due to the risk of ship strikes to NARWs in the project area, the IHA should limit all vessels of all sizes associated with the proposed site characterization to speeds less than 10 knots at all times with no exceptions.

c) Separation Distance

Consistent with Fisheries Service regulations under the Endangered Species Act for all vessels and aircrafts, the IHA must include requirements for all vessels to maintain a separation distance of at least 500 meters from NARWs at all times.

d) Vessel Transparency

To support oversight and enforcement of the conditions on the high-resolution geophysical (HRG) survey, the IHA should require all vessels to be equipped with and using a Class A Automatic Identification System (AIS) device at all times while on the water. This should apply to all vessels, regardless of size, associated with the project. Class A AIS is a cost-effective technology used in marine industries around the world. AIS provides information including the vessel's identity, location, course, and speed in a format that is compatible with most data collection, storage, and analysis programs.

e) Applicability and Liability

The IHA must require all vessels associated with the project, at all phases of development, follow the vessel plan and rules regardless of ownership, operator, contract. Exceptions and exemptions will create enforcement uncertainty and incentives to evade regulations through reclassification and redesignation. The Fisheries Service can simplify this by requiring all vessels to abide by the same requirements, regardless of size, ownership, function, contract, or other specifics. The IHA must also specify that developers are explicitly liable for behavior of all employees, contractors, subcontractors, consultants, and associated vessels and machinery.

f) Transparency and Reporting

The project will be a private enterprise conducted on shared public waters and as such, the IHA must include a requirement for all phases of the site characterization to subscribe to the highest level of transparency, including frequent reporting to federal agencies, requirements to report all visual and acoustic detections of NARWs and any dead, injured, or entangled marine mammals to

²³ Smith, et al. 2020. A field comparison of marine mammal detections via visual, acoustic, and infrared (IR) imaging methods offshore Atlantic Canada. *Marine Pollution Bulletin*. 154 (2020) 111026.

²⁴ Conn and Silber. 2013. Vessel speed restrictions reduce risk of collision-related mortality for North Atlantic right whales. *Ecosphere* (4)4. April, 2013. 1-16.

the Fisheries Service or the Coast Guard as soon as possible and no later than the end of the PSO shift.

To foster stakeholder relationships and allow public engagement and oversight of the permitting, the IHA should require all reports and data to be accessible on a publicly available website.

5) Shutdown Requirements

Despite the best information informing seasonal restriction on site characterization activities, it is likely interactions with NARWs will occur in and around the project site. The IHA must include requirements to use effective reactive restrictions that are triggered by detection of protected species by visual, acoustic, or other means before or during site characterization activities. Key conditions should include:

- Creation of clearance zones for NARWs that extend at least 1,000 meters with requirements for HRG survey vessels to use PSOs and Passive Acoustic Monitoring (PAM) to establish and monitor these zones with requirements to cease surveys if a NARW enters the clearance zone.
- A shutdown requirement if a NARW or other protected species is detected in the clearance zones noted above, unless necessary for human safety. If this exemption occurs the project must immediately notify the Fisheries Service with reasons and explanation for exemption and a summary of the frequency of these exceptions must be publicly available to ensure that these are the exception rather than the norm for the project.
- When safe to resume, HRG surveys should be required to use a soft start, ramp-up procedure to encourage any nearby marine life to leave the area.

6) Conclusion

Oceana is enthusiastic about the Biden Administration's focus on development of offshore wind in U.S. waters as part of an effective and responsible response to the climate crisis. The potential for development of offshore wind in U.S. waters is significant and should be pursued without delay. As the Administration advances offshore wind development projects, there is an opportunity to advance clean energy goals while protecting biodiversity.

Oceana recognizes the necessity of site characterization in the wind development process and urges the Fisheries Service to only issue an IHA for this survey if it includes a thorough discussion of the new science discussed above and includes the range of conditions that will ensure the site characterization surveys are conducted responsibly with the least practicable impact on marine mammals.

Oceana looks forward to our ongoing engagement in the Orsted projects and offshore wind more generally and appreciates the opportunity to provide these comments. These comments have been carefully developed and we consider these to be substantial comments deserving a response from the agency.

We look forward to working with you to advance responsibly developed offshore wind to meet this Administration's ambitious clean energy goals while protecting biodiversity, including the critically endangered North Atlantic right whale.

Thank you,

A handwritten signature in black ink, appearing to read "Beth Lowell". The signature is fluid and cursive, with the first name "Beth" being more prominent than the last name "Lowell".

Beth Lowell
Deputy Vice President, US Campaigns
Oceana
Washington, DC



STATE OF DELAWARE
**DEPARTMENT OF NATURAL RESOURCES AND
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Ms. Jolie Harrison, Chief
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National Oceanic and Atmospheric Administration
1315 East-West Highway
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Silver Spring, MD 20910

RE: Request for Comments on Takes of Marine Mammals Incidental to Specified Activities;
Taking Marine Mammals Incidental to Marine Site Characterization Surveys Off of Delaware

Dear Chief Harrison:

On March 21, 2022, the National Oceanic and Atmospheric Administration (NOAA) National Marine Fisheries Service (NMFS) published a notice in the Federal Register of the proposed Incidental Harassment Authorization (IHA) requested by Orsted Wind Power North America, LLC, (Orsted) on behalf of Garden State Offshore Energy, LLC (Garden State) and Skipjack Offshore Energy, LLC (Skipjack) for authorization to take marine mammals incidental to marine site characterization surveys offshore of Delaware in the Lease Areas OCS-A 0482 and 0519, and the associated export cable route area off the coast of Delaware. Additionally, NOAA NMFS seeks comments on the possible one-year renewal that could be issued under certain circumstances and if all requirements are met as specified in the March 21, 2022 publication in the Federal Register.

Marine site characterization surveys are a necessary component of the initial offshore wind facility design process to obtain baseline data and conditions for future development. Underwater sound resulting from Orsted's proposed site characterization survey activities, specifically high-resolution geophysical (HRG) surveys have potential to result in harassment of marine mammals in the area. The Marine Mammals Protection Act (MMPA) Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 et seq.) prohibits the "take" of marine mammals, unless NMFS finds that the taking will have a negligible impact on the species or

stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). The Delaware Department of Natural Resources and Environmental Control (DNREC) has not yet received an application related to the proposed construction and operation of an offshore wind energy facility for regulatory review and appreciates the opportunity to comment on this preliminary activity occurring prior to official regulatory engagement.

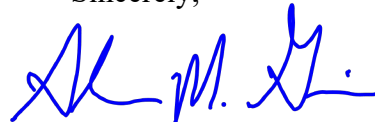
Supporting responsible renewable energy development in the Atlantic Region, conservation of marine and estuarine habitats, and the success of the coastal economy are of the utmost importance to Delaware. DNREC has reviewed the proposed IHA and analyzed the potential effects of incidental take to 16 species of marine mammals in the form of behavioral harassment from underwater sound associated with the site characterization studies.

NOAA NMFS has identified 16 species of marine mammals for which take is expected and proposed to be authorized for this action. In this list, Gray seals (*Halichoerus grypus*) and Harbor seals (*Phoca vitulina*) are included in Order Carnivora – Superfamily Pinnipedia. DNREC recommends Harp seals (*Pagophilus groenlandicus*) and Hooded seals (*Cystophora cristata*) also be included within the list of potentially impacted species as both are known to occur in Delaware waters. There are increasing reports of young Harp seals in Delaware, suggesting that it is likely they occur in the project area. Hooded seal observations are more rare, however it would be beneficial to include all species occurring in the area, regardless of infrequency.

DNREC commends the establishment of marine mammal exclusion zones (EZ) around the HRG survey equipment with monitoring conducted by protected species observers (PSOs) among other mitigation measures. DNREC is supportive of the use of passive acoustic monitoring in combination with monitoring by PSOs, especially during nighttime operations to allow for earlier detection of marine mammals entering the EZs, thus minimizing any negative impacts to protected species.

Thank you for the opportunity to review and comment on the proposed IHA. If you have any questions, please contact Kristi Lieske, Planner for the Delaware Coastal Programs at (302) 739-9283.

Sincerely,



Shawn M. Garvin
Secretary



Responsible Offshore Development Alliance

April 20, 2020

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

Re: Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys Off of Delaware; Docket No. NOAA-NMFS-2022-05935

Dear Ms. Harrison,

The Responsible Offshore Development Alliance (RODA) submits the following comments regarding the National Marine Fisheries Service (NMFS) incidental harassment authorization (IHA) to take marine mammals incidental to marine site characterization surveys off of Delaware requested by Ørsted Wind Power North America, LLC on behalf of Garden State Offshore Wind Energy, LLC and Skipjack Offshore Energy, LLC.¹ These comments, while responsive to the proposed IHA for the Garden State and Skipjack projects, are also directed toward others under development in the U.S. Atlantic.

RODA is a national coalition of independent fishing businesses, associations, companies and community members committed to ensuring the compatibility of new offshore development with their businesses. Members of our coalition operate in federal and state waters and shoreside throughout the New England, Mid-Atlantic, and Pacific coasts.

Fishermen are extremely concerned about potential impacts to protected resources arising from the construction of offshore wind energy (OSW) facilities. We have submitted comments expressing the fishing industry's concerns regarding the process for authorization of marine mammal takes in OSW activities, particularly: (1) in contrast to the strict regulations for marine mammal harassment and takes applied to the fishing industry; and (2) authorizations that are segmented throughout OSW project phases without a cumulative, holistic analytical approach. As you know, many Atlantic fisheries are severely constrained by regulations designed to minimize North Atlantic right whale (NARW) and other protected resource interactions, and any increase in take or harassment of these species will very likely result in further impacts to fishing operations.

Lack of Cumulative Effects Analysis and Segmented Process

Every phase of the OSW development process has the potential to impact marine mammals and protected species. Each of the activities associated with pre-construction surveys, construction, operations, monitoring surveys, and decommissioning will require some type of permit or authorization for interaction

¹ 87 Fed. Reg. 15922 (Mar. 21, 2022).

with protected species. To our knowledge, there are no resources easily accessible to the public to understand what authorizations are required for each of these activities. This is detrimental not only to having a well-informed public who are then asked to provide comment and input, but suggests a lack of cumulative perspective of OSW development activities from numerous projects to our protected resources. We recommend that NMFS improve the transparency of this process and move away from a segmented phase-by-phase and project-by-project approach to IHAs.

Increased Uncertainty for Marine Mammal Surveys

The Bureau of Ocean Energy Management (BOEM) has previously determined that the effects on survey aerial coverage for marine mammals, including the North Atlantic Right Whale (NARW), will substantially impact NMFS' ability to continue using current methods to fulfill its mission of precisely and accurately assessing protected species. This will result in an unacceptable level of uncertainty in protected resource management. It will also potentially result in an event that may otherwise be a "harassment" event become a mortality event, if entanglement response is delayed, hampered, or made impossible and injured whales cannot be rescued. So too is the cessation of NMFS protected resource surveys a threat to climate science itself; assessment of protected resource and fish stocks over long time series is a key factor in understanding ecosystem health, function and shifts and responses to climate change.

Concerns Regarding Treatment of Whales in OSW Permitting

A major concern is the high amount of increased vessel traffic associated with the OSW projects throughout the region in areas transited or utilized by certain protected resources. BOEM has also estimated that construction of each future OSW project would require an additional 25-46 vessels per project operating in the proximal geographic area at any given time, and that up to four projects would be under construction at the same time in the next few years.² This large increase in traffic would greatly increase the risk of ship strike to the endangered NARW. NMFS has stated that slowing down vessel traffic and reducing ocean noise, as well as reducing risks of entanglements are key to regulation and management plans. However, vessel speed restrictions are not fully mandated or enforced for OSW vessels.

Additionally, associated increases in vessel noise could contribute to the suite of ongoing stressors impacting the NARW population. Noise has been found to interfere with right whale communication and increase their stress levels. In turn, "females that undergo energetic stress from reproduction may be more susceptible than males to dying from chronic injuries such as those from entanglement or vessel strikes."³ Noise from human activities, such as that which would occur with activities associated with wind energy installation and operation of the proposed project, can disrupt normal behavior of NARWs and may further reduce their ability to identify physical surroundings, find food, navigate, and find mates.

The Marine Mammal Commission (MMC) has raised several concerns on other proposed IHAs for OSW development. As they are more knowledgeable on impacts of pile driving and acoustics to marine mammals,

² Vineyard Wind SEIS, p. 3-111.

³ See <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>.

we defer to their expertise and recommend NMFS fully review the concerns they identify in their public comments.⁴ In particular, MMC cites poor analyses such as underestimation of harassment takes from impact and vibratory pile driving, noise, insufficient and incomplete monitoring measures and reporting requirements. As identified, those issues may result in costly closures or strict management restrictions for fisheries. We urge NMFS to use the best available science including the most comprehensive models for estimating marine mammal take and developing robust mitigation measures.

On September 9, 2020, seventeen environmental NGOs submitted a public comment letter outlining several concerns and recommendations related to the IHA for site characterization surveys required for OSW projects. Again, we defer to their expertise but echo their concerns regarding: a) the lack of sufficient data and observations of NARWs and other protected species in the WEAs and associated cable routes that are not sufficiently described by the models used by NMFS, b) the failure to take a cumulative look at take and harassment as there are numerous areas to be developed and each project will submit an IHA, c) the untested proposed mitigation and insufficient monitoring measures intended to minimize impacts to protected species, and d) no long term monitoring plans for marine mammals and protected species. This coalition provided concrete recommendations for improving mitigation measures for surveys, including: (1) to incorporate additional data sources including real-world observational data into calculations of marine mammal density and take; (2) not adjust take numbers downward for large whales based on unproven mitigation measures; (3) require mitigation measures that meet the least practicable adverse impact standard; and (4) strengthen its vessel speed restrictions. We urge NMFS to ensure that each of these important topics raised by whale experts are fully addressed.

Fishermen Will be Affected by Protected Resource Take

Negative impacts to local fishermen and coastal communities as a result of a potentially adverse impact to marine mammals (e.g. vessel strike resulting in death or severe injury) are not mentioned nor evaluated in the LOA request for this project, and should be included in a comprehensive analysis. The lack of an adequate analysis of individual and cumulative impacts to these protected mammal species is concerning, given that fishermen are already highly restricted in their ability to harvest due to NARWs protections. For instance, all MA state waters are closed to lobster gear from Feb. 1 - May 15th, with the exception of waters south and southwest of the Cape.

The entire fishing industry pays the price to protect highly migratory NARWs, not just those closest to the project area. An impact to NARWs off the South Atlantic will result in impacts to fisheries in Maine, impacts in Cape Cod Bay impact fishermen in Southern New England, and so on. These reverberating impacts are not addressed in this request.

Robust Mitigation and Clarified Accountability Measures

RODA is appreciative of the efforts OSW developers, NMFS, and others have conducted to develop and adopt mitigation measures in order to minimize construction impacts to marine mammals. However, the adequacy of these measures, as all information provided to the government by interested private parties,

⁴ RODA has cited these comments in previous comment letters.

requires robust independent review. For example, multiple studies exist suggesting that Passive Acoustic Monitoring (PAM) has limited success in detecting NARWs due to their infrequent vocalization. The effectiveness of visual observation in detecting NARW is similarly uncertain, particularly since at-sea conditions rarely meet ideal standards (i.e. crew breaks, rough seas, location of spotter vessels, low light, or other factors that limit visual detection). We encourage NMFS to evaluate the proposed IHA with utmost care utilizing the best available science.

Fundamental questions still remain regarding what happens if harm will exceed the threshold under the proposed IHA: what can be done if take or harassment surpasses expected levels? Can a project realistically stop mid-construction or mid-operation after taxpayers have spent billions of dollars on its development? Fisheries are subject to accountability measures by law – up to and including cessation of all activity – if scientifically-based catch limits are exceeded. What accountability measures will apply to ensure that OSW developers are likewise responsible for their own impacts, and the burdens of those are not also assigned to fishermen, should they occur?

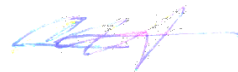
The fishing industry wants to see the protection of marine mammals and protected species and thus ask that NMFS consideration of LOAs for offshore wind developers be applied equitably across industries. First and foremost, we must protect the marine ecosystems upon which we all rely. Secondly, the OSW industry must be accountable for incidental takes from construction and operations separately from the take authorizations for managed commercial fish stocks. Lastly, there must be a clear IHA threshold for OSW activities regionally and across project phases. With dozens of projects conducting surveys, construction, operation, and decommissioning now and in the next 30+ years, there appears to be no forward-looking plan to address all this new activity that poses a threat to marine mammals and protected species.

Thank you for your consideration of these comments.

Sincerely,



Lane Johnston, Programs Manager



Annie Hawkins, Executive Director



Fiona Hogan, Research Director
Responsible Offshore Development Alliance