

June 27, 2022

Submitted via electronic mail to ITP.Potlock@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 New England Wind, Phase 1 Park City Wind Marine Site Characterization Surveys (87 Fed. Reg. 32,123, May 27, 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 from Massachusetts to New York. 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. A full 30 days is needed to give stakeholders time to review and give substantive comments. There are often many projects moving forward and stakeholders are balancing numerous comment opportunities and deadlines at once. The Fisheries Service should not be

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).

adopting processes that are inconsistent with 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) and use the "South of the Islands, as a newer, year-round, core North Atlantic right whale foraging habitat". 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. The Fisheries

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

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 supportive of 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. 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 best available 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 New England Wind 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.

Oceana's Comments on IHA-New England Wind

June 27, 2022

Page 10 of 10

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 that reads "Beth Lowell". The signature is written in a cursive, flowing style.

Beth Lowell
Vice President, United States
Oceana
Washington, DC



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

June 27, 2022

Jolie Harrison
Chief, Permits and Conservation Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway, F/PR1 Room 13805
Silver Spring, MD 20910

**Re: Application from Park City Wind for an Incidental Harassment Authorization
Pertaining to Marine Site Characterization Surveys from Massachusetts to Long Island,
New York (Agency/Docket Number: RTID 0648-XB758)**

Dear Chief Harrison:

Clean Ocean Action (“COA”) is a regional, broad-based coalition of conservation, environmental, fishing, boating, diving, student, surfing, women’s, business, civic, and community groups with a mission to improve the water quality of the marine waters off the New Jersey/New York coast. We submit the following comments in opposition to the application that has been submitted by Park City Wind, LLC (“PCW” or “the Applicant”) for an incidental harassment authorization (“IHA”) under the Marine Mammal Protection Act (“MMPA”). This IHA application would allow the Applicant to take marine mammals during marine site characterization surveys in coastal waters from Massachusetts to Long Island, New York (“NY”) which are allegedly occurring to inform the siting and design of an offshore wind energy development (“OWS”) project at Lease Area OCS-A 0534.

Section 101(a)(5)(A) of the MMPA allows citizens who engage in activities other than commercial fishing to request authorization for incidental, but not intentional, harassment of “small numbers” of marine mammals pursuant to that activity for a period of no more than five years.¹ The National Marine Fisheries Service (NMFS), which has been delegated the authority to administer the relevant legal framework, may allow harassment 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.² “Negligible impact” is, in turn, defined as an impact that is not reasonably likely or expected to “adversely affect the

¹ 16 U.S.C. § 1371(a)(5)(A)(i).

² *Id.* § 1371(a)(5)(A)(i)(I).

species or stock through effects on annual rates of recruitment or survival.”³ Finally, the applicable legal framework distinguishes between “Level A” takes and “Level B” takes. In the context of OWS and related activities, “Level B harassment” refers to “any act of pursuit, torment, or annoyance 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.”⁴ “Level A” takings, on the other hand, refer to “any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild.”⁵

After reviewing this application, COA urges NMFS to deny the IHA application under consideration for three (3) reasons: first, the proposed activities will have more than a negligible impact on North Atlantic Right Whales (“NARWs”); second, the application does not account for the severity of the effects of the activities in question on common dolphins within the survey area; and third, because of the critical data gap that currently exists with respect to harbor seals’ use of the survey area.

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

a. *Inaccurate Overestimation of North Atlantic Right Whale Population*

COA objects to this IHA application’s baseline estimation that there are 368 individual NARWs remaining in the wild. This estimation is, as NMFS posits, consistent with the NARW stock assessment in the agency’s 2021 Draft Stock Assessment Report (“SAR”). The 95% confidence interval for this estimation, notably, is 356-378 individuals. This confidence interval is notable because even the lower end of this range is higher than the most recent census taken by the North Atlantic Right Whale Consortium (“the Consortium”), who announced in October 2021 that just 336 individual NARWs remain.⁶ NMFS apparently agrees with the Consortium’s assessment for most other purposes. For example, the agency’s webpage for the NARW currently reads, “The North Atlantic right whale is one of the world’s most endangered large whale species; the latest preliminary estimate suggests there are fewer than 350 remaining.”⁷ A closer look at the species’ status reveals details that are particularly alarming. To start, there are fewer than 100 breeding female NARWs. The reproduction rate for NARWs is at a forty-year low and the body length of new calves is declining, in part due to the frequent sub-lethal stresses that the species endures.⁸ This development will likely create a problematic cycle for the NARW’s survival, as smaller female NARWs produce fewer calves.⁹

³ 50 C.F.R. § 18.27(c).

⁴ 16 U.S.C. § 1362(18).

⁵ *Id.*

⁶ H.M. Pettis, et al., *North Atlantic Right Whale Consortium 2021 Annual Report Card: Report to the North Atlantic Right Whale Consortium* (2022), https://www.narwc.org/uploads/1/1/6/6/116623219/2021report_cardfinal.pdf.

⁷ *North Atlantic Right Whale*, NMFS (last accessed June 6, 2022), <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale>.

⁸ See Joshua D. Stewart, et al., *Decreasing body lengths in North Atlantic right whales*, 31 *CURRENT BIOLOGY* 14, 3174-3179 (2021), <https://doi.org/10.1016/j.cub.2021.04.067>.

⁹ See Joshua D. Stewart, et al., *Larger females have more calves: influence of maternal body length on fecundity in North Atlantic right whales*, 689 *MARINE ECOLOGY PROGRESS SERIES* 179, 179-189 (2022), <https://doi.org/10.3354/meps14040>. This phenomenon has been attributed to sublethal stressors, such as acoustic and vessel trauma, diverting energy from breeding females’ calf productivity.

This IHA application's estimate of NARWs is based on a draft SAR that has not yet been finalized and NMFS openly defers to the Consortium's more conservative estimate of remaining individuals in other published materials, so COA objects to NMFS's use of the 368-individual estimate in this IHA application. NMFS's use of the 368-individual estimate is especially inappropriate for purposes of calculating the percentage of remaining NARWs that the Applicant may incidentally harass in the course of its marine site characterization surveys off the coast from Massachusetts to New York. Even by the proposed IHA's own math, the Applicant's request to harass 30 NARWs amounts to 8.2% of all remaining individuals. However, when calculated using the Consortium's estimate of 336 remaining individuals, the Applicant's request to harass 30 NARWs proportionally rises to 8.92% of the entire species. As a matter of ensuring that the public is reviewing and commenting upon materials which accurately reflect the impacts of the proposed activities, NMFS should reject the application.

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

Furthermore, COA objects to the conclusion that the activities covered by the requested IHA will result only in Level B harassment of NARWs, as opposed to Level A harm—i.e., physical injury or death. COA urges NMFS to deny this application because it fails to account for Level A takes that (1) are reasonably likely to occur due to the proposed activities, and (2) will have more than a mere negligible impact on NARWs. In this respect, COA notes that vessel strikes pose one of the largest threats to NARWs. The only vessel strike avoidance measures included in this IHA application are separation distances of 500 meters from North Atlantic right whales, restricted vessel speeds, and operational maneuvers.¹⁰ These limited and few vessel strike avoidance measures are solely directed toward the vessels supporting the Applicant's survey activities. However, the proposed activities will also increase the risk of collisions between NARWs and vessel traffic unrelated to OSW activities as both navigate around the site characterization and assessment activities in question while they occur. As such, NMFS should not approve the application under consideration.

In addition, COA objects to NMFS' determination that the underwater noise generated by the proposed activities will result only in Level B harassment of NARWs. NARWs rely on sound to breed, navigate coastlines, and find food.¹¹ Anthropogenic noise interferes with their ability to eat, mate, and navigate, so it is essential to their survival that the NARWs' sounds travel the ocean undisturbed.¹² NARWs 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.¹³ Considered together, the cumulative amount of underwater noise requested by this IHA application would not only be an annoyance to NARWs, but it will injure

¹⁰ *Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to New England Wind, Phase 1 Park City Wind Marine Site Characterization Surveys*, 87 FR 32123, 32136 (May 27, 2022) [hereafter "*Application*"].

¹¹ See Richard Schiffman, *How Ocean Noise Pollution Wreaks Havoc on Marine Life*, YALE ENV'T 360 (Mar. 31, 2016), http://e360.yale.edu/features/how_ocean_noise_pollution_wreaks_havoc_on_marine_life.

¹² *Id.*

¹³ *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

the species' stock by interfering with their ability to eat, mate, and navigate. COA therefore requests that NMFS reject the Applicant's proposed IHA for site surveys. The application's failure to account for the Level A harms that can reasonably be expected from the activities in question warrants further explanation before it would be appropriate for NMFS to approve this IHA application. NMFS should deny this application.

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

Next, COA objects to NMFS's conclusion that the Applicant's request to harass 30 NARWs for its survey activities off the coast from Massachusetts to New York will have a negligible impact on the species. Even when taking this claim at face value, the agency is authorizing harassment of nearly 9% of the remaining 336 NARWs within a one-year span, which is significant in and of itself. Such widespread disruption of this vulnerable species through noise, vessel collisions, and other risks posed by the proposed activities will only serve to jeopardize NARW's recruitment and survival by interfering with their ability to communicate with each other, find food, and avoid threats.

In addition, the lack of recognition and accounting of cumulative impacts is unacceptable. This is only one of many OSW projects and associated site assessment activities for which NARW harassment has been requested, but NMFS appears to fail to account for cumulative impacts. There are also other takes of NARWs authorized for other activities in the region that must be considered as well, including activities that are simultaneously occurring for other nearby OSW lease sites. For instance, Atlantic Shores has been allowed to harass 17 NARWs in the waters off New York and New Jersey for site characterization and assessment activities since April 2020;¹⁴ Garden State Offshore Energy, LLC was allowed to harass 14 NARWs under an IHA issued for site assessment and characterization activities off New Jersey and Delaware issued in June 2021;¹⁵ and Orsted was recently issued an IHA permitting 37 takes of NARWs for site assessment and characterization activities in the waters between New York and Massachusetts.¹⁶ These three IHAs alone have collectively allowed OSW developers to harass more than 20% of the remaining NARW population within the last three years, and approving the IHA application under consideration would increase this total to more than 29% over a four-year period.

Furthermore, this tally accounts *only* for site assessment activities, and does not consider the number of takes required for construction and operation of all of these OSW projects, which will likely require an even higher number of takes than the survey activities preceding them. This tally likewise does not account for the harassment of NARWs that have been authorized for OSW projects in other areas of the species' migratory path, such as the waters off North Carolina and Virginia, nor the takes that have been requested by OSW-related IHA applications which are still under review. Also absent from this sum are NARW takes authorized by IHAs issued to industries other than OSW. An existential threat is posed to NARWs by any obstacles that affect

¹⁴ 86 FR 21291 (Apr. 22, 2021), <https://www.federalregister.gov/documents/2021/04/22/2021-08354/takes-of-marine-mammals-incident-to-specified-activities-taking-marine-mammals-incident-to>.

¹⁵ 86 FR 33676 (June 11, 2021), <https://www.federalregister.gov/documents/2021/06/25/2021-13530/takes-of-marine-mammals-incident-to-specified-activities-taking-marine-mammals-incident-to>.

¹⁶ 87 FR 13977 (Mar. 11, 2022), <https://www.federalregister.gov/documents/2022/03/11/2022-05102/takes-of-marine-mammals-incident-to-specified-activities-taking-marine-mammals-incident-to>.

even one individual's survival, especially due to how uniquely endangered this species is and the ongoing Unusual Mortality Event ("UME") that NARWs are experiencing.¹⁷ The scale of these impacts in the proposed IHA is excessive for even one offshore wind project, and yet this is just one of many such projects under review.

In conclusion, the IHA application's requested allowance of Level B harassments of 30 NARWs would adversely affect the species' annual rates of recruitment and survival to a substantial and unacceptable degree.¹⁸ Since the activities covered by the IHA are reasonably likely to result in injury to the species as a whole, which qualifies as Level A harm, but the requested IHA's terms do not account for any Level A takes to NARWs, it would be unacceptable for NMFS to approve the application under consideration. It is imperative that NMFS exercise its authority to protect one of the world's most vulnerable and critically endangered species, the North Atlantic right whale, and the agency should fulfill this obligation by rejecting this IHA proposal. If NMFS does not stand to protect this species by denying this IHA, it is difficult to envision the NARW's survival given the combined impacts, harassment, harm, and death that will befall the remaining population due to all of the OSW projects and their associated activities proposed in the Atlantic Ocean.

II. Excessive Impacts to Short-Beaked Common Dolphins

Two varieties of common dolphin species can be found in U.S. waters: short-beaked common dolphins and long-beaked common dolphins. Both species are highly social, energetic, and familiar to the American public. Additionally, these dolphins play an important role in marine ecosystems and are increasingly important drivers of economic growth for tourism and related industries in the U.S.¹⁹ Due to their similarities, these two dolphin varieties were once believed to be the same species, but the taxonomic distinction between the two has recently crystallized.²⁰

The application in question requests an astonishing 10,176 takes of short-beaked common dolphins at the Level B harassment level over the course of the next year. By the Applicant's own math, this figure represents nearly 6% of the entire species, which is significant in and of itself. Moreover, this projected impact to the short-beaked common dolphins from the

¹⁷ See *2017–2022 North Atlantic Right Whale Unusual Mortality Event*, NAT'L MARINE FISHERIES SERV. (Mar. 23, 2022), <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2022-north-atlantic-right-whale-unusual-mortality-event>.

¹⁸ *North Atlantic right whales*, INT'L FUND FOR ANIMAL WELFARE (last accessed June 6, 2022), <https://www.ifaw.org/animals/north-atlantic-right-whale> (“[T]he death of even one animal can have a critical impact on the species' survival.”); Rosalind M. Rolland, et al., *Evidence that ship noise increases stress in right whales*, 279 THE ROYAL SOCIETY 2363-368 (2012), <https://royalsocietypublishing.org/doi/epdf/10.1098/rspb.2011.2429>; *Noise Pollution May Be the Final Straw for a Critically Endangered Whale*, OCEANA (May 18, 2016), <https://oceana.org/blog/noise-pollution-may-be-final-straw-critically-endangered-whale/> (“According to Rice, dozens of studies across different species of vertebrates confirm that noise increases stress hormones, which in turn suppress the immune system. ‘If you're really stressed out,’ he said, ‘you're more likely to get sick.’”)

¹⁹ *Common dolphin*, INT'L WHALING COMM'N (last accessed June 16, 2022), <https://www.handbook.iwc.int/en/species/common-dolphin>; *The Economics of Marine Mammals*, MARINE MAMMAL COMMISSION (last accessed June 16, 2022),

<https://www.mmc.gov/priority-topics/value-marine-mammals/>.

²⁰ *Short-beaked common dolphin*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Apr. 21, 2022), <https://www.fisheries.noaa.gov/species/short-beaked-common-dolphin>.

Applicant's site characterization and assessment activities is particularly egregious given the 24,735 requested Level B takes of short-beaked common dolphins that NMFS has already entertained for OSW-related activities off the NY coast within the last two months.²¹ If NMFS approves the IHA application now under review, the agency would effectively allow OSW-related activities to harass an eye-popping total of 20.2% of the MMPA-protected common dolphin stock during a period of less than two years.

The noise, vessel collisions, and other risks posed by Applicant's survey activities will plainly impede common dolphins' ability to locate food, avoid predators, and communicate with other members of their pod, with serious implications for the recruitment and survival of the stock as a whole. Therefore, NMFS should uphold its obligation under the MMPA and deny the Applicant's request for an IHA.

III. Harbor Seals – Lack of Data

While there are several species of seal that are anticipated to be impacted by offshore wind projects, New Jersey's Department of Environmental Protection ("DEP") has highlighted a particular lack of known information regarding the use of the Applicant's OSW lease area by harbor seals. Frequently spotted along both the East and West Coasts of the U.S., harbor seals are known for resting on floating ice with their head and rear flippers elevated in a "banana-like" position, leading to their popularity with excited winter beach-goers.²² Besides their wide recognition among the American public, harbor seals also play a major role in maintaining balance in marine food webs as well.²³

Despite the unique importance of this species, however, COA maintains there is not sufficient baseline information about how harbor seals use the waters off the NJ/NY coast to conclude that the activities covered by this IHA application will have a negligible impact on harbor seals. More specifically, a COA employee recently attended a virtual event at which a DEP representative indicated that, to date, no one has tracked harbor seals to understand the species' pre-construction use of offshore wind energy lease areas off the NJ coast.²⁴ This admission strongly suggests that decisionmakers do not yet have sufficient information about the role of areas in and near the geographic range of this proposed IHA's activities in harbor seals' life-cycles to substantiate the numbers of harassments expected to occur or the conclusion that the activities covered by the proposed IHA will not rise to a Level A taking under the MMPA. NMFS should therefore reject the requested IHA. This species must be the focus of an independent baseline

²¹ See 87 FR 29292 (May 13, 2022); 87 FR 30468 (May 10, 2022); 87 FR 24121 (Apr. 22, 2022).

²² *Harbor Seal*, NATL. MARINE FISHERIES SERV. (last accessed June 16, 2022), <https://www.fisheries.noaa.gov/species/harbor-seal>.

²³ *Seals*, INTL. FUND FOR ANIMAL WELFARE (last accessed June 16, 2022), <https://www.ifaw.org/animals/seals#:~:text=As%20one%20of%20the%20keystone,%2C%20polar%20bears%2C%20and%20sharks.>

²⁴ "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.

assessment that more thoroughly accounts for the role it plays in the ecosystem before NMFS allows the activities covered by this application to move forward.

While the above comments focus on those species to which the quantitative impacts are anticipated to be most significant, Clean Ocean Action is also deeply concerned about the wide range of marine mammal species that will be impacted by the proposed activities. The current lack of data pertaining to OSW's interactions with the marine environment gives us deep reservations about the long-term implications of these activities on other species as well, especially given the Applicant's inability to accurately calculate impacts at this time.

On a final note, NMFS must ensure that any activities covered by this IHA application do not occur during the peak migratory season, nor during the most biologically sensitive periods for affected species, such as breeding and calving periods.

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

Respectfully submitted,


Cindy Zipf
Executive Director


Zachary Klein, Esq.
Policy Attorney