

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: Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Construction and Operation of the Revolution Wind Offshore Wind Farm Offshore of Rhode Island (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 incidental take regulations (ITRs) and a Letter of Authorization (LOA) for construction of an offshore wind project near Rhode Island. This comment letter includes the following key points:

- The LOA must include use of best available science, cumulative impacts analysis, and project conditions that avoid, minimize, and mitigate adverse environmental impacts.
- The LOA must include a vessel traffic plan to minimize the effects of service vessels on marine wildlife
- The LOA 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 ITR and LOA 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. Due to the rapidly changing situation for NARWs and the need to react quickly to protect the species, the Fisheries Service should issue five-year ITRs but limit LOAs under this and similar applications to one-year periods instead of the proposed five-year LOA.

1) The role of Letters of Authorization

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

¹ 16 U.S.C. § 1361(6).

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: Incidental Harassment Authorizations (IHA) and LOAs. LOAs can only be issued after the Fisheries Service promulgates ITRs 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 ITRs must be promulgated after notice and the opportunity to comment.⁹ LOAs can be issued pursuant to ITRs for up to five years.¹⁰

2) Comments on the Contents of an LOA for Construction

ITRs and LOAs for construction of any offshore wind project must ensure that the application meets the requirements set out in the MMPA and its implementing regulations and that the ITRs and LOAs include conditions that will guarantee that construction activities have the least practicable impact on marine mammal species or stocks and their habitats in and around the project site.¹¹ Given the dire situation of NARWs, the Fisheries Service should make clear in any ITR or

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 walruses. 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 ITRs).

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).

¹¹ 50 C.F.R. § 216.105(b)(2).

LOA for wind projects on the East Coast, that the activities cannot result in any Level A harassment, serious injury, or mortality of NARWs.

Oceana hopes the comments provided on these important elements will make the construction 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.¹² 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.¹³ Additionally, MMPA implementing regulations require the agency to use the “best scientific information available.”¹⁴ 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.¹⁵ This 2020 population estimate is an eight percent decrease from the previous year’s estimate. As NOAA considers the LOA application, it must use the most recent population estimate.

In the years since the leasing process was completed for the Wind Energy Area near Massachusetts, NARWs have shifted their aggregation and feeding areas. Because of this shift the region south of Nantucket and Martha’s Vineyard is now considered a year-round “core habitat” for foraging NARWs where up to 100 whales have been seen during aerial surveys in recent years.^{16,17}

Additionally, new research has demonstrated that since 2017, NARWs have been sighted in wind energy development areas off Massachusetts and Rhode Island nearly every month, with sightings being most common between late winter and spring. Research suggests that around 23% of the entire species is present in these areas between late winter and spring.¹⁸ The importance of this

¹² 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).

¹³ 16 U.S.C. § 1371(a)(3)(A).

¹⁴ 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.”).

¹⁵ 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_fo2t4KU6RSJIK7WSmkGRLYLGHpjz1_WkY

¹⁶ Erin M. Oleson, Jason Baker, Jay Barlow, Jeff E. Moore, Paul Wade. 2020. North Atlantic Right Whale Monitoring and Surveillance: Report and Recommendations of the National Marine Fisheries Service’s Expert Working Group. NOAA Tech. Memo. NMFS-F/OPR-64, 47 p.

¹⁷ Leiter, et al. 2017. North Atlantic right whale *Eubalaena glacialis* occurrence in offshore wind energy areas near Massachusetts and Rhode Island, USA. *Endangered Species Research* July 2017, 45-59.

¹⁸ Quintana-Rizzo, E., Leiter, S., Cole, T.V.N., Hagbloom, M.N., Knowlton, A.R., Nagelkirk, P., Brien, O.O., Khan, C.B., Henry, A.G., Duley, P.A. and Crowe, L.M., 2021. Residency, demographics, and movement patterns of North Atlantic right whales *Eubalaena glacialis* in an offshore wind energy development in southern New England, USA. *Endangered Species Research*, 45, pp.251-268.

area should not be underestimated. The true importance of the area to NARWs year-round needs to be analyzed before an LOA is issued. Specifically, the 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.¹⁹ Disruptive site characterization or construction 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 LOA 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 an LOA.

c) Project Conditions

Consistent with the requirement to achieve “the least practicable impact on such species or stock and its habitat,” the LOA must include conditions for the survey and construction activities that will first avoid adverse effects on NARWs in and around the area 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 and construction to inform development of the offshore wind projects and which are not critical. If, for example, a lower impact technique or technology will achieve the same goals without adverse effects, that should be permitted while other tools with more frequent, intense, or long-lasting effects should be prohibited.

Pile driving

Offshore wind development will include installation of equipment at the project site and may include both driven piles and piles installed using vibratory techniques. Each of these produce disruptive noise in and around the project area and NMFS should include clear requirements on these activities to minimize the effects of the project. Specifically, the LOA should prohibit pile driving during seasons when protected species are known to be present or migrating in the project

¹⁹ Stewart, et al. 2021. Decreasing body lengths in North Atlantic right whales. *Current Biology* 2021, 31, 1-6.

area, in addition to any dynamic restrictions due to the presence of NARW or other endangered species.

Clearance Zones for all pile driving, including vibratory

If piling installation is permitted to the LOA must require both acoustic and visual clearance zones to ensure protected species are not in the affected area. Oceana suggests that NMFS include an acoustic clearance zone that extends at least 5,000m in all directions from the location of the driven pile, including a visual clearance zone that extend at least 5,000m in all directions from the location of the driven pile and an acoustic exclusion zone of at least 2,000 meters from the location of the driven pile.

These zones should be monitored and enforced via:

Acoustic monitoring

Acoustic monitoring should be undertaken using near real-time PAM, assuming a detection range of at least 10,000m, should be undertaken from a vessel other than the pile driving vessel, or from a stationary unit, to avoid the hydrophone being masked by construction related noise. PAM should be used during impact pile driving, vibratory pile driving installation of the cofferdam, and HRG surveys.

Visual monitoring

Visual monitoring should use PSOs stationed at the pile driving site and on additional vessels, as appropriate, to enable monitoring of the entire clearance zone.

Each vessel should have a minimum of 4 PSOs following a two-on, two-off rotation, each responsible for scanning no more than 180° of the horizon per pile driving locations. Human observation should be supplemented with IR technology and drones, where appropriate.

Timing and Prohibitions on Pile Driving

Acoustic and visual monitoring should begin at least 60 minutes prior to the commencement or resumption of pile driving and should be conducted throughout the duration of pile driving activity. Visual observation of the Visual Clearance Zone should continue until 30 minutes after pile driving.

Because avoidance of protected species is critical, the LOA should include a prohibition on initiating pile driving within 1.5 hours of civil sunset or in times of low visibility when the visual clearance zone cannot be monitored. Oceana understands that in *rare* circumstances pile driving must proceed after dark for safety reasons. If this occurs the project must notify NMFS 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.

3) Vessel traffic associated with Wind Energy Area

Construction activities will increase the vessel traffic in and around the project area. The LOA 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 construction should be required to carry and use protected species observers (PSOs) at all times when under way. Because visual sighting of whales, including NARWs is difficult, particularly in low light conditions, the LOA 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.²⁰

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.²¹ Due to the risk of ship strikes to NARWs in the project area, the LOA should limit all vessels of all sizes associated with the proposed construction 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 LOA 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 during construction, the LOA 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 LOA 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 LOA

²⁰ 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.

²¹ 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.

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 LOA must include a requirement for all phases of construction 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 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 LOA should require all reports and data to be accessible on a publicly available website.

4) Noise Reduction

Best commercially available technology and methods should be used to minimize sound levels from pile driving coupled with a robust monitoring and reporting program to ensure compliance.

Viable noise reduction technologies include as bubble curtains, noise mitigation systems, or sound dampeners. The projects should achieve no less than 10dB (SEL) in combined noise reduction and attenuation, taking as a baseline, projections from prior noise measurements of unmitigated piles from Europe and North America.

Compliance with these requirements is critically important and the LOA should require field measurements to be taken throughout the construction process including on the first pile installed. These compliance measurements should be taken by independent evaluators at intervals established to reduce observer bias and ensure full compliance with noise reduction requirements.

5) Shutdown Requirements

Despite the best information informing seasonal restriction on site characterization and construction activities, it is likely interactions with NARWs will occur in and around the project site. The LOA 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 and construction activities. Key conditions should include:

- A prohibition on initiating pile driving if a North Atlantic right whale or other protected species is detected by visual or acoustic surveys within the acoustic or visual clearance zones described above.
- Condition for resumption of pile driving after the lead Protected Species Observer confirms that no North Atlantic right whale or other protected species have been detected within the acoustical and visual clearance zones.
- 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 urges the Fisheries Service to only issue ITRs and LOAs for this construction if it includes a thorough discussion of the new science discussed above and includes the range of conditions that will ensure the construction is completed responsibly with the least practicable impact on marine mammals. And due to the quickly evolving situation for NARWs, Oceana asks that the Fisheries Service limits LOAs associated with this project to one year.

Oceana looks forward to our ongoing engagement in the Revolution Wind project 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,



Beth Lowell
Deputy Vice President, US Campaigns
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December 13, 2021

Mr. Jeffrey Willis
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(Sent via email)

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Re: CRMC Files 2021-07-010 & 2021-06-029 - Revolution Wind, LLC

The Rhode Island Saltwater Anglers Association (RISAA) represents over 7,500 recreational anglers and 28 affiliate clubs in Rhode Island, Connecticut and Massachusetts. We have been active participants in Ocean Planning activities from the start of the Ocean Special Area Management Plan (OSAMP) in 2008. RISAA is submitting this request for a hearing regarding the proposed project to express our interest and concern. Our enclosed comments are not complete due to the extensive nature of the materials already available such as the 151 page Fisheries Research and Monitoring Plan dated October 2021 and our limited ability to conduct a complete technical review. We ask that any comment period regarding this project remain open for an extended time (at least 6 months) to allow RISAA and other fisheries representatives to spend more time reviewing the extensive amount of technical materials.

We are very concerned with the speed that the Ocean that we use for fishing is being changed by activities related to the installation of wind turbines. Our members are reporting changes in the area surrounding the Block Island Wind Farm's 5 turbines and in the areas further to the south and east where geophysical surveys are being conducted prior to actual turbine construction.

The proposed Revolution Wind project location and the location of the export cable includes many areas where our members routinely fish for cod, summer flounder, striped bass, tuna, sharks and many other species critically important to the economy of Rhode Island recreational fishing. We are particularly concerned that, due to unreasonable political pressure, this project will be permitted to move forward without proper consideration of ecological and fisheries impacts especially in light of the recent history of uncontrolled permitting of the South Fork Wind project on Cox Ledge in areas specifically noted by the OSAMP as Areas of Particular Concern because they are glacial moraines.

The proposed Revolution Wind project has the same concerns regarding OSAMP Areas of Particular Concern and is also located closer to ports used by RI recreational fishers and includes major disturbance into Narragansett Bay because of the proposed placement of the Export Cable.

Right from the start we can comment that all disturbance inside of the COLREG line should be conducted during winter months to minimize impacts on the extensive use of this entire area by recreational fishing interests. Potential short & long term impacts due to resuspension of toxic materials and turbidity increase must be assessed in detail. In addition, a preliminary review of the Fisheries Research and Monitoring Plan dated October 2021 identifies no plan for sampling using techniques employed by recreational fishing. As RISAA has commented for many years, this Plan must be expanded to include fisheries sampling using rod and reel surveys before, during, and after construction both in the turbine area and in the area planned for the export cable. In addition, a significant effort must be made to determine the value of recreational fishing in both of these areas. This project must not be allowed to continue the fallacy established by South Fork Wind that just because there are not good data quantifying the value of recreational fishing in some areas, then recreational fishing does not exist and is worthless. The proponents of this project have a responsibility to quantify the importance and value of existing recreational fishing through observation, survey, interviews, data review and whatever other methods are available prior to drafting any Impact Study on this proposed project. It is not acceptable to just say that recreational fishing does not exist, because it does exist and it is important to the RI economy and the livelihood of thousands of Rhode Islanders and it will be impacted by the proposed project.

We look forward to the opportunity to review and comment on the proposed project but we hope for a process that will consider the environment and fisheries rather than simply bowing to political pressures.

Sincerely,



Richard Hittinger, Acting President



Greg Vespe, Executive Director

Cc (via email): BOEM, Senator Whitehouse, Senator Reed, Representative Langevin, Representative Cicilline, NOAA, ROSA