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**DEPARTMENT OF NATURAL RESOURCES AND  
ENVIRONMENTAL CONTROL**  
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SECRETARY

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Ms. Jolie Harrison, Chief  
Permits and Conservation Division  
Office of Protected Resources  
National Marine Fisheries Service  
National Oceanic and Atmospheric Administration  
1315 East-West Highway  
13th Floor  
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 in the New York  
Bight and Central Atlantic (RTID 0648-XC355)

Dear Chief Harrison:

On November 4, 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 TerraSond Limited (TerraSond) for authorization to take marine mammals incidental to marine site characterization surveys in the New York Bight (off of New York and New Jersey) and in the Central Atlantic (from Delaware to North Carolina). 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 November 4, 2022 publication in the Federal Register (RTID 0648-XC355). The Delaware Department of Natural Resources and Environmental Control (DNREC) appreciates the opportunity to comment on the IHA.

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 TerraSond's proposed site characterization survey activities, specifically high-resolution geophysical (HRG) surveys, in addition to the potential for vessel strikes, 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). DNREC has been engaged in the Bureau of Ocean Energy Management’s (BOEM) planning process regarding potential areas for commercial offshore wind development leases in the Central Atlantic and appreciates the opportunity to comment on this preliminary activity prior to official regulatory engagement.

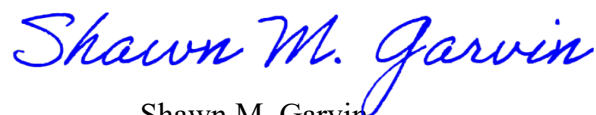
Responsible renewable energy development in the Atlantic Region, stewardship of marine and estuarine habitats, and the success of the coastal economy are important in Delaware. DNREC has reviewed the proposed IHA and analyzed the potential effects of incidental take to 21 species of marine mammals in the form of behavioral harassment from activities associated with the site characterization studies.

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.

North Atlantic right whales (*Eubalaena glacialis*) have been listed as endangered under the Endangered Species Act since 1970. The most recent population estimate (Pettis et al. 2022) is 336 individuals<sup>1</sup>. As these whales frequent the project area, DNREC recommends TerraSond consider adopting NOAA Fisheries [proposed changes](#) to the North Atlantic right whale vessel speed rule to further reduce the likelihood of mortalities and serious injuries to endangered right whales from vessel collisions.

Thank you for the opportunity to review and comment on the proposed IHA (RTID 0648-XC355). If you have any questions, please contact Ms. Kristi Lieske with DNREC’s Division of Climate, Coastal and Energy at (302) 739-9283.

Sincerely,



Shawn M. Garvin  
Secretary

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<sup>1</sup> Pettis HM, Pace III RM, Hamilton PK. 2022. North Atlantic right whale consortium 2021 annual report card. Boston (MA): North Atlantic Right Whale Consortium. 25 p. Available from: [https://www.narwc.org/uploads/1/1/6/6/116623219/2021report\\_cardfinal.pdf](https://www.narwc.org/uploads/1/1/6/6/116623219/2021report_cardfinal.pdf) (Accessed November 18, 2022).

December 5, 2022

*Submitted via electronic mail*

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**Re: Comments on a Draft Incidental Harassment Authorization for Site  
Characterization Surveys for Offshore Wind in the Central Atlantic Call Area**

Ms. Harrison,

The Southern Environmental Law Center (“SELC”) submits these comments on behalf of Conservation Law Foundation, Mass Audubon, National Wildlife Federation, Natural Resources Defense Council, New Jersey Audubon, Ocean Conservation Research, Oceanic Preservation Society, Surfrider Foundation, and Whale and Dolphin Conservation, in response to the National Marine Fisheries Service’s (“NMFS”) proposal to issue an incidental harassment authorization (“IHA”) under the Marine Mammal Protection Act to TerraSond Limited (“TerraSond”), for marine site characterization surveys in the New York Bight and Central Atlantic, in support of offshore wind energy development.<sup>1</sup> These comments will be focused on the proposed areas on the continental shelf of the Central Atlantic, hereinafter the “Project Area” or “Central Atlantic Call Area.”

Our groups are united in support of responsibly developed offshore wind as a tremendous opportunity to fight the climate crisis, and we have long advocated for policies and actions needed to bring it to scale in an environmentally protective manner. Responsible development of offshore wind energy: (1) avoids, minimizes, mitigates, and monitors for adverse impacts on wildlife and habitats; (2) minimizes negative impacts on other ocean uses; (3) includes robust consultation with Native American tribes and communities; (4) meaningfully engages state and local governments and stakeholders from the outset; (5) includes comprehensive efforts to avoid negative impacts to underserved communities; and (6) uses the best available scientific and technological data to ensure science-based and stakeholder-informed decision making.

As we work to promptly establish America’s important new offshore wind energy industry to transition us away from harmful fossil fuels, we must minimize harm to vulnerable marine mammals in the process. The Central Atlantic Call Area is vast and supports important migration and foraging habitat for numerous marine mammal species, including the highly endangered North Atlantic right whale. Given the critically imperiled and declining status of the

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<sup>1</sup> Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys in the New York Bight and Central Atlantic, 87 Fed. Reg. 66,658 (Nov. 4, 2022).

right whale, NMFS must be especially careful to ensure that offshore wind activities in the Central Atlantic are carried out with the utmost consideration for this species and its habitat.

TerraSond proposes to conduct site assessment and characterization surveys, including high-resolution geophysical surveys, that are set to commence “as soon as possible upon issuance of an IHA” and may last for up to a year.<sup>2</sup> Concerningly, survey activities are planned throughout the *entire* Central Atlantic Call Area, a nearly *three-million-acre* area stretching off the coast of Delaware to North Carolina.<sup>3</sup> This is despite the fact that two weeks after NMFS noticed the Proposed IHA, the Bureau of Ocean Energy Management further winnowed the Central Atlantic Planning Area by publishing draft Wind Energy Areas (“WEA”) that cover only less than a third of the entire Project Area.<sup>4</sup> Because the draft WEAs may be winnowed further before they are final, the actual area requiring site assessment and characterization surveys to advise project development will likely end up being a fraction of what TerraSond is planning to survey. NMFS’s plan to issue an IHA for an area that is three times the size of the areas currently being considered for offshore wind development is highly concerning, especially when considering the status of the right whale population and this area’s importance to the species.

As we have highlighted in previous letters, right whales are rapidly declining toward extinction, and only about 340 individuals remain in the population.<sup>5</sup> The species is currently experiencing an Unusual Mortality Event—designated by NMFS due to unsustainable levels of mortality and serious injury from vessel strikes and entanglement in fishing gear<sup>6</sup>—and its recovery is further hindered by underwater noise pollution and climate change driven habitat shifts. Put simply, right whales cannot withstand further losses or additional stress if the species is to reverse its decline and eventually recover.<sup>7</sup>

The continental shelf waters of the Central Atlantic Call Area represent important migratory habitat and increasing foraging habitat for right whales. Acoustic and aerial data show that a sizable portion of the population passes through the Central Atlantic every year during their seasonal migration between their northern feeding grounds and their southern calving

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<sup>2</sup> *Id.* at 66,660.

<sup>3</sup> *Id.* at 66,660-61, Figure 1.

<sup>4</sup> The size of draft WEAs A-D (excluding areas off the continental shelf not proposed to be surveyed) is 858,937 acres. See *Draft: Development of the Central Atlantic Wind Energy Areas*, BUREAU OF OCEAN ENERGY MGMT. (Nov. 16, 2022), available at <https://www.boem.gov/renewable-energy/state-activities/central-atlantic>, at 131. The size of the area proposed by TerraSond is 2,841,712 acres. 87 Fed. Reg. at 66,661.

<sup>5</sup> Press Release, *North Atlantic right whales’ downward trend continues as updated population numbers released*, NEW ENGLAND AQUARIUM (Oct. 24, 2022), <https://www.neaq.org/about-us/news-media/press-kit/press-releases/north-atlantic-right-whales-downward-trend-continues-as-updated-population-numbers-released/>.

<sup>6</sup> NAT’L MARINE FISHERIES SERV. (NMFS), *2017–2022 North Atlantic Right Whale Unusual Mortality Event* (last visited Dec. 5, 2022), <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2022-north-atlantic-right-whale-unusual-mortality-event>.

<sup>7</sup> The Potential Biological Removal level for the species is now 0.7, meaning that not even a single individual can be lost to human activities each year if the species is to avoid extinction. Sean A. Hayes et al., *U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments–2021*, NMFS (May 2022), available at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports>, at 23.

grounds.<sup>8</sup> The entire shelf portion of the Call Area is accordingly designated by NMFS as a Biologically Important Area for migrating right whales.<sup>9</sup> In addition, evidence exists to consider this area a seasonally important foraging area.<sup>10</sup> Scientists now observe right whales regularly spending more time in the Mid-Atlantic year round.<sup>11</sup>

In addition to the size and location of the proposed area, our groups are also concerned about the potential for additional requests from geophysical survey companies like TerraSond, as well as future offshore wind lease holders, to survey the very same area proposed here. In the oil and gas context, it is common for geophysical survey companies to conduct independent, overlapping surveys over the same areas of the outer continental shelf in pursuit of the same information.<sup>12</sup> In addition, offshore wind developers may want to conduct their own surveys in their respective lease areas after leases are issued in the Central Atlantic Planning Area, meaning this important habitat area could be subjected to repeated site characterization surveying by multiple different companies over many years. We are extremely concerned about the cumulative impacts of such activities on right whales for efforts that will end up being redundant. Indeed, such concerns for cumulative impacts of geophysical surveys on right whales have been raised in the context of oil and gas exploration by marine mammal experts and affected states.<sup>13</sup>

These concerns about cumulative impacts are heightened by the substantial number of site assessment surveys for offshore wind already conducted and planned throughout right whale habitat. Currently, 18 offshore wind projects have been leased in the Mid-Atlantic and are at various stages of permitting. Since June 2017, NOAA Fisheries has permitted or is considering permitting 108 vessels to conduct geophysical survey activities over more than 10,000 survey days, resulting in more than 400 instances of harassment (i.e., Level B takes) of right whales—a number now greater than the population size of the species.<sup>14</sup> This is a serious concern given

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<sup>8</sup> Genevieve E. Davis et al., *Long-term passive acoustic recordings track the changing distribution of North Atlantic right whales (*Eubalaena glacialis*) from 2004 to 2014*, NATURE SCI. REPORTS (Oct. 18, 2017); Daniel P. Salisbury et al., *Right whale occurrence in the coastal waters of Virginia, U.S.A.: Endangered species presence in a rapidly developing energy market*, MARINE MAMMAL SCI. (Oct. 15, 2015); Susan Barco et al., *Marine Mammal and Sea Turtle Sightings in the Vicinity of the Maryland Wind Energy Area July 2013-June 2015*, VA. AQUARIUM (2015).

<sup>9</sup> Erin LaBrecque et al., *Biologically important areas for cetaceans within U.S. waters – East Coast region*, AQUATIC MAMMALS (2015).

<sup>10</sup> NAT'L OCEANIC & ATMOSPHERIC ADMIN., *Ecology of the Northeast US Continental Shelf: Zooplankton* (last visited Dec. 5, 2022), <https://www.nefsc.noaa.gov/ecosys/ecosystem-ecology/zooplankton.html> (finding a hot spot for *Centropagidae* copepods, on which right whales feed, nearby off the coast of Virginia outside the whales' normal migratory season).

<sup>11</sup> Davis et al. (2017), *supra*; Salisbury et al. (2015), *supra*. NMFS itself currently recognizes these areas as having year-round right whale presence. NMFS, *Section 7 Species Presence Table: Atlantic Large Whales in the Greater Atlantic Region* (last visited Dec. 5, 2022), <https://www.fisheries.noaa.gov/new-england-mid-atlantic/consultations/section-7-species-presence-table-atlantic-large-whales>.

<sup>12</sup> See, e.g., Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Geophysical Surveys in the Atlantic Ocean, 82 Fed. Reg. 26,244 (June 6, 2017).

<sup>13</sup> See Letter from Dr. Rebecca J. Lent, Exec. Dir., Marine Mammal Comm'n, to Jolie Harrison, Chief of Permits & Conservation, Protected Res. Office, NMFS (July 6, 2017), available at <https://www.mmc.gov/letters-and-reports/letters/2017-marine-mammal-commission-letters-and-agency-responses/>, at 14. See also Letter from Atlantic State Governors to Sec'y Wilbur L. Ross, Jr., U.S. Dep't of Com. & Sec'y Ryan Zinke, U.S. Dep't of Interior (Dec. 20, 2018), <https://governor.nc.gov/documents/files/seismic-testing-letter-122018/download>.

<sup>14</sup> NMFS, *Incidental Take Authorizations for Other Energy Activities (Renewable/LNG)* (last visited Dec. 5, 2022), <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable>.

that right whales are unable to withstand additional disturbance. Although not analyzed in the IHA process, vessel strike risk is also a significant issue.

Finally, our groups are deeply concerned that existing protections for right whales during site assessment and characterization surveys—outlined in this Proposed IHA as well in the other recently issued IHAs—fall far short of what is needed to protect the species during these activities. Several of the undersigned groups have urged NMFS to reinstate its critically flawed 2021 Programmatic Informal Consultation under the Endangered Species Act (“ESA”), which covers the proposed activity, because it relies on grossly outdated scientific information about the right whale and fails to include mitigation measures that meet the ESA’s requirements.

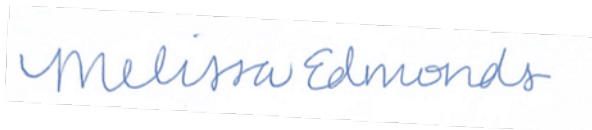
The right whale’s seriously imperiled status demands implementation of protections to safeguard the species during all stages of offshore wind development. The direct and indirect noise impacts from site characterization surveys, including potential habitat displacement that may exacerbate existing threats, as well as increased risks of vessel collisions, must be fully addressed from the start. Per the mitigation hierarchy, this first begins with *avoidance* of impacts. Removing surveying of areas with low potential for offshore wind development can help limit harm.<sup>15</sup>

For the above reasons, NMFS should limit the Proposed IHA to the final WEAs for the Central Atlantic and put measures in place to avoid redundant surveying work. Our organizations are excited about the contribution that offshore wind development in the Central Atlantic WEAs will ultimately make in providing clean energy. However, NMFS must ensure that the proposed activity proceeds in a manner that is protective of vulnerable marine wildlife, particularly the critically endangered right whale.

Sincerely,



Sierra B. Weaver, Senior Attorney  
Coast and Wetlands Program Leader  
Southern Environmental Law Center



Melissa L. Edmonds  
Science & Policy Analyst  
Southern Environmental Law Center

[signature page to follow]

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<sup>15</sup> L. Bennun et al., *Mitigating biodiversity impacts associated with solar and wind energy development: Guidelines for project developers*, IUCN & THE BIODIVERSITY CONSULTANCY (2021), available at <https://portals.iucn.org/library/node/49283>.

On behalf of:

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December 5, 2022

*Submitted via electronic mail to [ITP.Laws@noaa.gov](mailto:ITP.Laws@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 in the New York Bight and Central Atlantic (87 Fed. Reg. 66,658, November 4, 2022)**

Dear Jolie Harrison:

Oceana is the largest international 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 in the New York Bight and Central Atlantic. 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.

TerraSond proposes survey activities throughout the Central Atlantic Call Area, a nearly three-million-acre area stretching off the coast of Delaware to North Carolina. However, since the notice for the Proposed IHA was published BOEM further winnowed the Central Atlantic Planning Area by publishing draft Wind Energy Areas (WEA) that cover less than a third of the proposed area. Because the draft WEAs will likely be winnowed further at their final stage, and even further still at the lease sale stage, the actual area developed will likely end up being a fraction of what TerraSond is planning to survey. NMFS should not issue an IHA that covers an area larger than the final WEAs or the final leases that are sold.

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.”<sup>1</sup> 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.<sup>2</sup> In limited circumstances, the Fisheries Service, the agency responsible for protecting most marine mammal species,<sup>3</sup> 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.<sup>4</sup>

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.”<sup>5</sup> 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.”<sup>6</sup>

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.<sup>7</sup> For actions that could result in any “serious injury”<sup>8</sup> 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.<sup>9</sup> LOAs can be issued pursuant to incidental take regulations for up to five years.<sup>10</sup>

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<sup>1</sup> 16 U.S.C. § 1361(6).

<sup>2</sup> 16 U.S.C. §§ 1361(2), 1371.

<sup>3</sup> 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).

<sup>4</sup> 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).

<sup>5</sup> 16 U.S.C. § 1371(a)(5)(A), (D).

<sup>6</sup> 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).

<sup>7</sup> 16 U.S.C. § 1371(a)(5)(D)(ii)(I).

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

<sup>9</sup> 50 C.F.R. § 216.105(b).

<sup>10</sup> 50 C.F.R. § 216.106(a).

## **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 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."<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.

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<sup>11</sup> 16 U.S.C. § 1371(a)(5)(D)(i).

<sup>12</sup> 16 U.S.C. § 1371(a)(5)(D)(iii).

<sup>13</sup> *Id.*

<sup>14</sup> 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).

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.

**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.<sup>15</sup> 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.<sup>16</sup>

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. §

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

<sup>16</sup> H.R. Rep. No. 103-439 (1994).

216.107(e) states that IHAs in Arctic waters may be renewed for additional year-long periods,<sup>17</sup> 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.

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.<sup>18</sup> 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.<sup>19</sup> Additionally, MMPA implementing regulations require the agency to use the "best scientific information available."<sup>20</sup> 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.<sup>21</sup> 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.

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<sup>17</sup> 50 C.F.R. § 216.107(e).

<sup>18</sup> 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).

<sup>19</sup> 16 U.S.C. § 1371(a)(3)(A).

<sup>20</sup> 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.").

<sup>21</sup> 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](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)

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 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.<sup>22</sup> 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**

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

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 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.<sup>23</sup>

**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.<sup>24</sup> 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

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<sup>23</sup> 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.

<sup>24</sup> 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 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 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

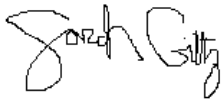


site characterization surveys are conducted responsibly with the least practicable impact on marine mammals.

Oceana looks forward to our ongoing engagement in these 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 "Sarah Giltz". The signature is stylized and cursive.

Sarah Giltz, Ph.D.  
Marine Scientist  
Oceana  
Washington, DC



ITP Laws - NOAA Service Account &lt;itp.laws@noaa.gov&gt;

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**Comment on Terrasond ITA request 87 FR 66658**

2 messages

**David Wojick** <dwojick@craigellachie.us>

Mon, Dec 5, 2022 at 4:47 PM

To: ITP.Laws@noaa.gov

Cc: Bob Stern &lt;drbob232@gmail.com&gt;

This request should not be granted until the project or projects in question are determined to be environmentally feasible. Serious questions regarding this feasibility have now been raised. See for example "Official Coalition Comments on BOEM right whale offshore wind strategy" submitted last week.

<https://www.cfact.org/2022/12/05/official-coalition-comments-on-boem-right-whale-offshore-wind-strategy/> and attached.

The future of offshore wind projects located on or near the NARW primary migration route is in doubt. Thus the requested taking authorization is premature. It is also dangerous to the NARW or it would not be needed. No takings should be authorized unless it is absolutely necessary. We will not know if this application is needed until the projects are approved, which may never happen.

Respectfully submitted,

David Wojick, Ph.D.  
Wardensville WV USA

**Wojick -- A comment on BOEM's proposed NARW OSW Strategy.pdf**

46K

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**ITP Laws - NOAA Service Account** <itp.laws@noaa.gov>

Tue, Dec 6, 2022 at 9:04 AM

To: David Wojick &lt;dwojick@craigellachie.us&gt;

Cc: Bob Stern &lt;drbob232@gmail.com&gt;

Received, thank you.

[Quoted text hidden]



ITP Laws - NOAA Service Account &lt;itp.laws@noaa.gov&gt;

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**Comments, Incidental Take Permit, Attn Jolie Harrison, Chief Permits and Conservation Division**

2 messages

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**James Binder** <jbinder6974@yahoo.com>  
Reply-To: James Binder <jbinder6974@yahoo.com>  
To: "ITP.Laws@noaa.gov" <itp.laws@noaa.gov>

Mon, Nov 7, 2022 at 11:32 AM

RE: Comments re Takes of Marine Mammals Incidental to Specified Activities: Taking Marine Mammals Incidental to Marine Site Characterization Surveys in the New York Bight and Central Atlantic, Federal Register Notice 87 FR 66658, published November 4, 2022.

I am a resident of Long Beach Island (LBI), NJ and directly impacted by the proposed permit. The NARW migrates through the waters off LBI and will be negatively impacted by the proposed action. In making comments on a BOEM document (ID BOEM -2022-0021-0001, JULY 2022) for review of the DEIS for the proposed Ocean Wind offshore windmill project, I noted that in the DEIS BOEM made a statement as follows: Section 3.15.3.3 Conclusions- In regard to the North American Right Whale "As stated above, the low population numbers of the NARW result in the potential to compromise the viability of the species due to the loss of a single individual." Any action to approve an incidental permit by NMFS could result in the killing of a single or multiple whales. Thus issuance of an incidental permit by NMFS says that it is ok to kill one or more Right Whales, thus it is ok to compromise the viability of the species. Is not the purpose of NMFS to protect endangered species, not find ways to accommodate offshore wind development? As noted in my comment document for the DEIS- Comment Tracking Number: I52-irpt-gbce- there are viable, land based clean energy alternatives that would negate the need to issue a take permit for wind energy development. NMFS , please focus on protecting this endangered species.

Thank you.

Jim Binder, P.E.

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**ITP Laws - NOAA Service Account** <itp.laws@noaa.gov>  
To: James Binder <jbinder6974@yahoo.com>

Mon, Dec 5, 2022 at 10:53 AM

Received, thank you.  
[Quoted text hidden]