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To: Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.[1]

Comments on the Park City Wind LLC IHA Application

National Marine Fisheries Service ("NMFS") has received a petition from Park City Wind LLC ("Park City Wind"), a wholly owned subsidiary of Avangrid Renewables, LLC, requesting authorization to take small numbers of marine mammals incidental to construction activities associated with the New England Wind Offshore Wind Farm in a designated lease area on the Outer Continental Shelf (OSC–A 0534) (the "Petition"). The Petition should be denied.

The North Atlantic Right Whale ("NARW") population is now estimated to be at only 336 individuals[2] and its Potential Biological Removal ("PBR") is down to 0.7. "This means that for the species to recover, the population cannot sustain, on average over the course of a year, the death or serious injury of a single individual due to human causes."[3] NMFS has a statutory duty under the Marine Mammal Protection Act ("MMPA") to *ensure* that not a single NARW suffers serious injury or death. NMFS must not issue an IHA or Letters of Authorizations ("LOAs") for any take of the NARW unless NMFS can, and does, prescribe measures necessary to *ensure* that

[1] These comments are submitted on behalf of Allco Renewable Energy Limited, Allco Finance Limited and Thomas Melone.
[2] 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.
[3] Federal Register, Vol. 87, No. 146, at 46922 (2022) ("NMFS Proposed Speed Rules").

death or serious injury of a single whale does not occur. Two recent scientific studies[4] confirm that as climate refugees, the NARW have returned year-round to their historical feeding and mating grounds—the wind energy lease areas south of Martha's Vineyard—as illustrated below from *O'Brien 2022*.

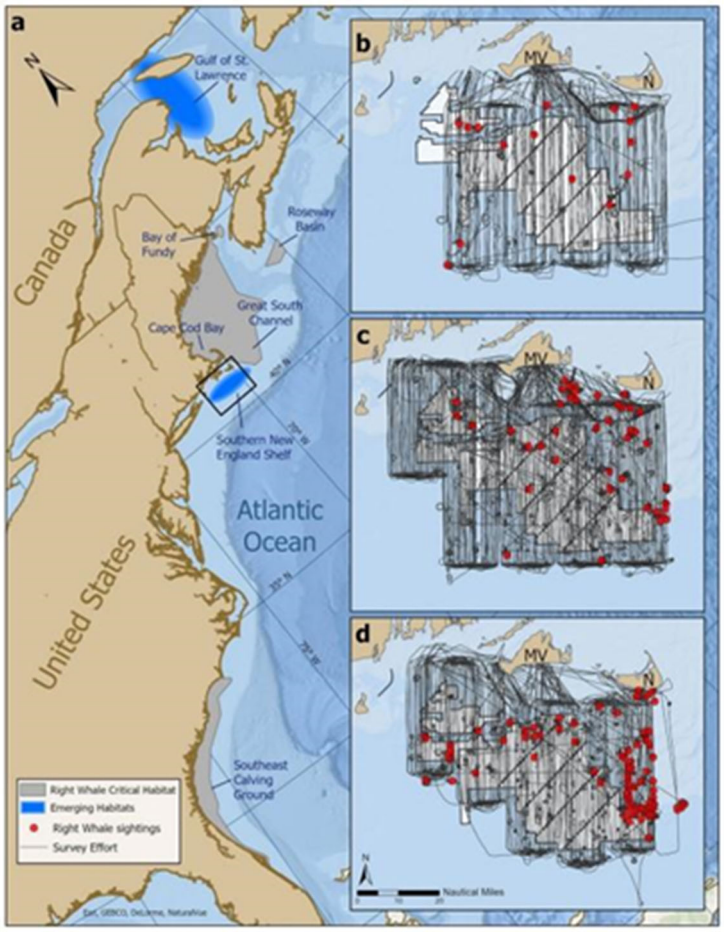

Figure 1. Known right whale habitats in the Northwest Atlantic. (**a**) Gray polygons encompass known right whale habitats; blue ovals represent emerging habitats. Black box and insets show the New England Aquarium broad-scale survey area. (**b**–**d**) Broad-scale survey effort (black lines) and right whale sightings (red circles) during three different time periods: (**b**) 2011–2012, (**c**) 2013–2015, (**d**) 2017–2019. White shading represents MA/RI wind energy lease areas. MV = Martha's Vineyard, N = Nantucket. Figure was created using ArcGIS Pro (version 2.9.2).

The Petition seeks authorization to take a massive 239 NARWs. By any measure that does not constitute small numbers. Worse, the Petition does not address all the construction and operation activities. Rather only a limited number of "sound-producing" activities are reviewed.

[4] E. Quintana-Rizzo *et al*., "*Residency, demographics, and movement patterns of North Atlantic right whales Eubalaena glacialis in an offshore wind energy development area in southern New England, USA*," Endangered Species Research, Vol. 45: 251–268 (2021) (NMFS 53318-53335) ("*Quintana 2021*"). O. O'Brien *et al*., *Repatriation of a historical North Atlantic right whale habitat during an era of rapid climate change* (July 20, 2022). ("*O'Brien 2022*").

Nor does the Petition review all the other take of the NARW that NMFS has authorized, failing to analyze the cumulative impact on the NARW.

A. The Park City Wind Petition Does Not Satisfy The Small Numbers Requirement.

The MMPA permits NMFS to authorize the harassment of only "small numbers of marine mammals of a species or population stock." 16 U.S.C. §1371(a)(5)(D)(i). The statutory phrase "small numbers of marine mammals" is not defined in the MMPA. "When a term goes undefined in a statute, we give the term its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd*., 566 U.S. 560, 566 (2012). In the only decision to squarely grapple with the meaning of "small numbers" under the MMPA, a federal court concluded that "[a] definition of 'small number' that permits the potential taking of as much as 12% of the population of a species is plainly against Congress' intent." *NRDC v. Evans*, 364 F. Supp. 2d 1083, 1152 (N.D. Cal. 2003) ("*Evans*"). When interpreting nearly identical language in the Copyright Act of 1976, courts have unanimously concluded that the statutory phrase "a relatively small number," 17 U.S.C. §405(a)(1), excludes proportions over ten percent. *See, e.g.*, *NEC Corp. v. Intel Corp.*, No. C-84-20799-WPG, 1989 WL 67434, at *4 (N.D. Cal. Feb. 6, 1989) ("An examination of twenty federal court decisions that have considered the matter discloses none in which 10.6% was held to be a relatively small number. The highest percentage found to have been within the exception is 9% "). These decisions relied on the plain meaning of "relatively small number," not any consideration unique to the Copyright Act.

1. The Park City Wind Petition "Take" Does Not Constitute Small Numbers.

"The plain language indicates that 'small numbers' is a separate requirement from 'negligible impact.'" *Evans*, 364 F. Supp. 2d at 1102. A number is small if it is "few in number," "little," Webster's Third New International Dictionary 2149 (1986), or "little or close to zero in an objectively measurable aspect (such as quantity)." Merriam-Webster Online Dictionary (2022), https://www.merriam-webster.com/dictionary/small (accessed September 7, 2022). Seventy-one percent (71%) of a population that is facing extinction and whose PBR is 0.7 is not a "few" members of the population or a "little" number.

That "small numbers" cannot mean seventy-one percent (71%) of a species facing extinction, and cannot exceed the PBR, is confirmed by that phrase's use elsewhere in the MMPA. Congress imposed an identical "small numbers of marine mammals" requirement on authorizing activities that may seriously injure or kill marine mammals. 16 U.S.C. §1371(a)(5)(A)(i); 50 C.F.R. §216.107(a). "'[I]dentical words used in different parts of the same act are intended to have the same meaning.'" *Penobscot Nation v. Frey*, 3 F.4th 484, 497 (1st Cir. 2021) quoting *Sullivan v. Stroop*, 496 U.S. 478, 484, 110 S. Ct. 2499 (1990). If the Petition were right that seventy-one percent (71%) is a "small number," that would mean Congress intended to allow *each* permittee to injure or kill seven out of every ten animals in each affected marine mammal population. Yet allowing such extensive harm would directly conflict with the MMPA's protective purpose, as it could quickly lead to the extinction of the species, *see* 16 U.S.C. § 1361(1), (2), (6) (describing the purposes of the MMPA), and certainly would in the case of the NARW.

In the case of the NARW, because the PBR is 0.7, the population cannot sustain, on average over the course of a year, the death or serious injury of a single individual due to human causes. Thus, because the small numbers requirement of 16 U.S.C. §1371(a)(5)(A)(i) and 50 C.F.R. §216.107(a), could not exceed 0.7, and the language is the same as applied to harassment, small numbers must mean a number no greater than the PBR for the species. Thus, no take of any kind of the NARW can be considered to be "small numbers."

2. Segmentation of Park City Wind's Activities Is Unlawful.

The Petition improperly segmented its analysis, considering Park City Wind's construction surveys and pile driving as unrelated activities, and ignoring all other Park City Wind construction, operation and decommissioning activities. Under the Petition's approach there is no limit to how small Park City Wind could slice its activities so it appears that the "take" of the NARW represents small numbers.

3. The Petition Has Ignored Other NMFS Authorizations.

By its plain language an incidental harassment take authorization under section 1371(a)(5)(D) requires the aggregation of all "request[s] by citizens" for the same kind of activity within the same specified geographical region. "Specified geographical region means an area within which a specified activity is conducted and that has certain biogeographic characteristics." 50 C.F.R. §216.103. The Petition has acted arbitrarily and capriciously in ignoring the other requests by citizens for the same type of activity—surveys for, and construction and operation of OSW farms in the geographical region that shares biogeographic characteristics.

4. The Petition Fails To Properly Define The "Specified Geographical Region."

The specified geographical region must be determined based upon common biogeographic characteristics. 50 C.F.R. §216.103. Even the narrowest approach would include in the "specified geographic region" at a minimum the entire area south of Martha's Vineyard that has now become an important mating and foraging habitat for the NARW, as depicted in Figure 1 from the *O'Brien 2022*. More broadly, the specified region should be based upon the range of the NARW in the United States because from a biogeographic standpoint, the region in which the NARW exists defines the biogeographic region as to them. But here the Court does not need to decide at this point which region is the appropriate one based certain biogeographic characteristics because NMFS took no look, much less a hard look, at the proper specified geographical region based upon biogeographic characteristics.

B. NMFS's Negligible Impact Analyses Must Consider All Activities of Park City Wind.

To be lawful, an agency's action must "be the product of reasoned decisionmaking." *State Farm*, 463 U.S. at 52. An agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made," and must not

"entirely fail[] to consider an important aspect of [a] problem." *Id*. at 43. NMFS's negligible-impact determination must account for the overlapping, additive impacts of the full panoply of Park City Wind's COP activities and the other IHAs and LOAs issued that involve "take" of the NARW. Under the MMPA, NMFS cannot lawfully authorize any action unless it will have "a negligible impact on [each marine mammal] species or stock." 16 U.S.C. §1371(a)(5)(D)(i)(I). An impact is "negligible" if it "cannot be reasonably expected" to "adversely affect the species" by reducing "annual rates of recruitment or survival." 50 C.F.R. §216.103. NMFS must evaluate whether all the IHAs and take of NARW it authorized when added to the Petition's would have more than a negligible impact on the NARW.

Courts have recognized in analogous contexts that an agency's analysis of a proposed action is irrational if it fails to consider the real-world environmental stressors that will influence how, and how significantly, the proposed action affects the environment. For example, in *Concerned Friends of the Winema v. U.S. Forest Service*, the court held that the agency improperly evaluated "the adverse effects of . . . grazing on [a] sensitive species" when it considered only authorized grazing, ignoring unauthorized grazing occurring in the same place. No. 1:14-CV-737-CL, 2016 WL 10637010, at *8-9 (D. Or. Sept. 12, 2016), *R. & R. adopted by* 2017 WL 5957811 (D. Or. Jan. 18, 2017); *see also U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1001, 1018-19 (D.C. Cir. 2002) (finding arbitrary agency decision to analyze only noise from air tours and not from other flights in measuring flight noise levels at the Grand Canyon).

NMFS itself has previously agreed that, in evaluating whether an activity's impact will be negligible, it must consider the other stressors to which it will be added. In promulgating its definition of "negligible impact," NMFS asserted that "the impacts . . . from successive or contemporaneous activities must be added to the baseline of existing impacts to determine

negligible impact." 54 Fed. Reg. 40,338, 40,342 (Sept. 29, 1989). NMFS recognized that even impacts that are "fairly minor" could "be more than negligible when measured against a baseline that includes a significant existing take of marine mammals from the other activities." *Id.*

The flaw in NMFS's approach to date with respect to other take of the NARW is perhaps best exposed by the absurd results it would permit. The primary purpose of the "negligible impact" standard is to prevent the "extinction or depletion" of marine mammal species, 16 U.S.C. §1361(1), by "ensuring that marine mammals are maintained at healthy population levels," H.R. Rep. No. 97-228, at 11 (1981); *see* 16 U.S.C. § 1361(2). But, by its rationale to date, if NMFS concluded that injuring ten endangered whales would have a negligible impact on the species, it could authorize applicants to simultaneously injure *all* remaining whales—perhaps repeatedly—so long as it did so in separate authorizations and no individual applicant injured more than ten. By that logic, even if an activity would, when added to other stressors on the species, lead to extinction, NMFS could authorize that activity so long as its impact was "negligible" if viewed in isolation. At least one court has refused to allow NMFS to apply the "negligible impact" standard in a way that would risk "authorizing the wiping out of endangered and threatened species." *Conservation Council for Haw. v. NMFS*, 97 F. Supp. 3d 1210, 1221 (D. Haw. 2015).

C. The Takes Caused By Park City Wind's Activities Are Not Incidental.

1. Park City Wind's Soft-Start Is Intentional Take.

NMFS may not authorize the intentional taking by harassment of even a single marine mammal. Park City Wind will initiate each pile driving event with a "soft start" where the pile driving hammer will be throttled back to less than maximum power, thus giving the whales a "warning" of what is to come. The theory is that the "soft start" will convince the whales to leave the construction zone before the full-magnitude pile driving begins. The "soft start", however, is

not incidental harassment but purposeful, intentional harassment, a type of hazing, designed to push the NARW out of their habitat. It is not accidental. *See*, 50 C.F.R. §216.103 ("Incidental harassment, incidental taking and incidental, but not intentional, taking all mean an accidental taking.") Thus, Park City Wind's soft start constitutes an intentional take that NMFS cannot authorize, and that Park City Wind cannot lawfully engage in.

2. Park City Wind's Soft Start Also Constitutes Unauthorized Level A Harassment.

Level A harassment, as defined in the MMPA for non-military readiness activities, is any act of pursuit, torment, or annoyance that has the potential to injure a marine mammal in the wild. Even if the "soft start" strategy effectively pushes all right whales out of the Level A exposure zone (i.e., 7.25 km from the pile driving area), there is no evidence the whales will be safe. On the contrary, there is considerable evidence that the whales will be exposed to increased threats from fishing gear entanglement and vessel strikes. For example, Area 534 is one of the most heavily fished areas in the Massachusetts Outer Continental Shelf with hundreds perhaps thousands of vertical buoy rope trap/pots for lobster and crab. By forcing right whales out of the WDA, the Park City Wind soft start program will drive the whales right into this network of fishing ropes, heightening the threat of entanglement. The threat of vessel strikes against whales will also increase outside the WDA, as vessels in this area are not subject to NMFS's sometimes applicable 10 knot speed limit; nor are they required to have a PSO onboard looking for whales.

In addition, to the extent the soft start forces feeding whales to leave and try to locate food elsewhere, the loss of foraging opportunity, in itself, may be damaging, especially given data showing that malnutrition has caused female NARWs to lose weight and exhibit signs of reduced physical health. NMFS contends that right whales which have been prevented from foraging in the WDA during pile driving will simply come back and resume feeding once the pile driving

stops. There is, however, no evidence to support this argument. For example, NMFS cites Goldbogen et al. 2013a and Melcon et al. 2012 for the proposition that "exposed animals will be able to return to normal behavioral patterns (i.e., socializing, foraging, resting, migrating) after the exposure ends," claiming these two studies reflect the "best available information". In fact, however, the Goldbogen and Melcon studies focus on blue whales exclusively, not right whales, [Goldbogen]; [Melcon]. The Goldbogen article discusses blue whale "lunge feeding", which has nothing to do with right whale responses to noise; and the Melcon study addresses blue whale responses to mid-frequency sound, whereas right whales hear at a low-frequency. [Goldbogen]; [Melcon]. More importantly, neither study asserts that whales, once exposed to harassment-level noise, will quickly return to normal behaviors once the noise comes to a stop.

The more relevant studies indicate that "low-frequency-sound" whales, such as the right whale, behave unpredictably to repeated pulse noise, such as pile driving, which means NMFS has no way of knowing whether the right whales, once driven off their preferred feeding grounds and forced to find food elsewhere, will return to the WDA to restart their foraging effort. The Petition never discloses, much less analyzes, the impacts of pushing right whales out of the WDA for three to six hours at a time (each pile driving event takes about 3 hours, and Park City Wind has given itself the option of conducting two such events per day). In fact, NMFS's latest update to its discussion of the NARW on its website,[5] lists "ocean noise" as one of the top four threats to the NARW's survival, undermining NMFS's conclusions with respect to not only the soft-start intentional take, but that existing ocean noise has no effect on the NARW.

> Ocean noise from human activities such as shipping, boating, construction, and energy exploration and development has increased in the Northwest Atlantic. Noise from these activities can interrupt the normal behavior of right whales and interfere with their communication. It may also reduce their ability to detect and avoid predators and human hazards, navigate, identify physical surroundings, find food,

[5] https://www.fisheries.noaa.gov/species/north-atlantic-right-whale.

and find mates.

In terms of the statutory requirements, the NMFS has no basis on which to conclude that the impacts of pushing the whales out of their home through intentional hammer noise, "cannot be reasonably expected" to "adversely affect the species" by reducing "annual rates of recruitment or survival." 50 C.F.R. §216.103.

3. Park City Wind's Pile-Driving Activities Do Not Constitute Incidental Take.

Park City Wind is conducting its construction activities in the region where the NARW now live year-round and which is now critical foraging and mating grounds. [*Quintana 2021, O'Brien 2022*.] Justice (then Judge) Ketanji Brown Jackson stated that "[K]nowing and intentional takes cannot be deemed incidental." *Pac. Ranger, LLC v. Pritzker*, 211 F. Supp. 3d 196, 202 (D.D.C. 2016). Justice Jackson's opinion in *Pritzer* with amazing prescience is precisely on point with the facts of Park City Wind:

> Applied to the "take" context, the terms "accidental" and "non-intentional" therefore plainly do not describe the harassment of whales that occurs when commercial fishermen know that whales are in the vicinity of where they wish to conduct a highly disruptive multi-hour tuna-fishing operation and nevertheless press on with that operation.

Here, Park City Wind will be conducting a highly disruptive multi-hour pile-driving operation knowing that whales are in the vicinity. Therefore, the "take" involved in the Park City Wind pile driving operation is "knowing," and is neither "accidental" nor "non-intentional." As such, under Justice Jackson's MMPA definition, none of the Park City Wind pile driving can be authorized under the MMPA using an LOA. In addition to being a knowing "take" under Justice Jackson's MMPA definition, Park City Wind's take is done knowingly and purposely under the standards of the Model Penal Code ("MPC") which defines knowingly as follows: "A person acts knowingly with respect to a material element of an offense when…he is aware that his conduct is

of that nature…if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result" (Model Penal Code in § 2.02(2)(b)). A person "purposely" commits an act if he acts with a "conscious object[ive] to engage in conduct of that nature or to cause such a result; and [] if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist." *Id*. § 2.02(2)(a). Park City Wind's take of the NARW is done both knowingly and purposely under the MPC definition. It is done knowingly because the take is practically certain to occur. It is done purposely because it is Park City Wind's "conscious object[ive] to engage in conduct of that nature," i.e., conduct that will take, and Park City Wind is aware of the "existence of such circumstances" that take will occur.

D. The Petition Fails To Adequately Address The Risk Of Repeated Harassment From Overlapping Or Continuous Activity.

As a corollary to its obligation to rely on the best available science, NMFS cannot rely on assumptions or guesswork or presumptions about critical issues or fail to address known risks. When the agency, rather than analyzing a potential risk, simply assumes it will not occur based on "speculation or surmise," its analysis is arbitrary and capricious. *See Bennett v. Spear*, 520 U.S. 154, 176 (1997); *see also Ohio River Valley Envtl. Coal., Inc. v. Kempthorne*, 473 F.3d 94, 102-04 (4th Cir. 2006) (finding that agency's "failure to analyze" effects of an action in way that might make program "less environmentally protective" rendered approval arbitrary). The Petition fails to rationally address the impact of repeat harassment on the NARW.

"Studies indicate noise from shipping increases stress hormone levels in NARWs (Rolland et al. 2012), and modeling suggests that their communication space has been reduced substantially by anthropogenic noise (Hatch et al. 2012). The authors also suggest that physiological stress may contribute to suppressed immunity and reduced reproductive rates and fecundity in NARWs

(Hatch et al. 2012; Rolland et al. 2012)." The Petition fails to properly analyze the effects on the NARW of the repeated harassment.

Respectfully Submitted,

/s/Thomas Melone
Thomas Melone

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Comment on Park City Wind LOA application

1 message

Zorotrian, Tiffany <tzorotrian@ufl.edu> Tue, Sep 20, 2022 at 1:27 PM
To: "ITP.Daly@noaa.gov" <ITP.Daly@noaa.gov>

Dear Chief Jolie Harrison,

While reviewing the Park City Wind LOA application, I noted in the UXO section (11.3.3) that the text states: "The onset of gastrointestinal injury for all animals assuming detonation of an E12 bin and 10 dB of attenuation is 125 m, which is lower than all PTS onset ranges for any marine mammal species (Hannay and Zykov 2021); therefore, the mitigation zones proposed in Table 69 would protect all marine mammals from gastrointestinal injury."

I found this confusing as the 125 m distance is less than the zones to PTS/TTS injury proposed in table 69. I thought that the distance referenced for GI injury may be a typo, but was unable to locate the details of the Hannay and Zykov 2021 document in the reference list. I'm sure that I can find it online, but wanted to bring these things to your attention.

Thank you,

Tiffany J. Zorotrian, MSc, LVT, CVT
International Veterinary Forensic Sciences Association Member
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