



September 4, 2024

Jolie Harrison, Chief
Permits and Conservation Division,
Office of Protected Resources
National Marine Fisheries Service
Submitted via email: ITP.hilt@noaa.gov

Re: Community Offshore Wind, LLC (COSW) Renewal of Incidental Harassment Authorization (IHA) to Take Marine Mammals in the New York Bight

Dear Ms. Harrison,

On August 21, 2024, the National Marine Fisheries Service (NMFS) issued a request for comments on the proposed IHA renewal to COSW for site characterization activities in the New York Bight, specifically within Bureau of Ocean Energy Management (BOEM) Outer Continental Shelf (OCS) Lease Area OCS-A 0539 and associated Export Cable Route survey area.

The Wampanoag Tribe of Gay Head (Aquinnah) (Tribe) requests that no IHAs are renewed in the New York Bight until the following issues are addressed:

- NMFS continues to administer Section 7 consultations and take permits without complying with Executive Order 13175 that requires meaningful government-to-government consultation with Tribes on matters like this, that have tribal implications. The Tribe's history includes the endangered North Atlantic Right Whale (as seen on our Tribal logo above) as part of its creation story.
- NMFS and BOEM continue to improperly segment offshore wind activities in the Atlantic Ocean which should be considered cumulatively.¹ In the New York Bight area alone NMFS has authorized or is in the process of authorizing harassment by TerraSond Limited; Attentive Energy, LLC; Invenergy Wind Offshore, LLC; and Bluepoint Wind, LLC. The cumulative harassment of marine mammals and other listed species needs to be studied to truly make an opinion regarding jeopardy to listed species, particularly the North Atlantic Right Whale – whose population remains at critically low levels. We do not agree with categorically excluding these permitting

¹ <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable>

actions under the National Environmental Policy Act without looking at the cumulative impact of projects in the New York Bight.

- The investigation into the Vineyard 1 blade failure and the subsequent debris that have washed up along our homeland of Noepe, now Martha's Vineyard, needs to be completed. The debris from the blade failure, consisting of green and white foam along with larger fiberglass pieces, chards and splinters, has raised significant concerns about its potential negative and adverse impact on the environment, marine life, and human health. Prior to any further federal action concerning offshore wind farms, the implications of this debris on marine mammals, shellfish, and humans needs to be studied.
- We oppose any further take related to offshore wind until the Coast Guard has finished establishing shipping safety fairways. Offshore wind development needs to be balanced with navigational safety

We understand and support the need to move away from fossil fuels and into renewable energy, however, we cannot support the rapid pace of massive deployment of this nascent industry and in such a manner that unduly burdens the First People of North America, and more specifically the us, the *People Of The First Light*. These impacted species are our relatives and, as seafaring peoples, integral to our traditional lifeways and cultural practices. Protections for these severely endangered whales themselves, as well as the environment and habitat that nourishes and sustains them, requires meticulous, careful and deliberate consideration. The United States has legal and moral obligations to protect our ways of life and this includes preserving these priceless ecosystems, so that our future generations may continue to live according to our traditions.

Please feel free to contact me with any questions at chairwoman@wampanoagtribe-nsn.gov.

In Balance, Harmony and Peace,



Chairwoman Cheryl Andrews-Maltais
The Wampanoag Tribe of Gay Head (Aquinnah)

CC: Jolie Harrison, Division Chief, Office of Protected Resources, NMFS
Liz Klein, Director, Bureau of Ocean Energy Management
Hon. Debra Haaland, Secretary of the Interior
Hon. Elizabeth Warren, Senator
Hon. Edward Markey, Senator
Hon. Bill Keating, Congressman, Ninth District
Bryan Newland, Assistant Secretary-Indian Affairs, Department of Interior
Anthony Morgan Rodman, Senior Policy Advisor for Native American Affairs, White House Domestic Policy Council
PoQueen Rivera, Executive Director, White House Council on Native American Affairs
Shaun Deschene, Director of Office of Native American Business Development, Department of Commerce
Kevin M. Sligh Sr., Director, BSEE
Bronia E. Ashford, Tribal Liaison Officer, BSEE

A FEDERALLY ACKNOWLEDGED TRIBE



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September 5, 2024

Attn: Jolie Harrison, Chief
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Submitted via email

Re: Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys Off New York and New Jersey in the New York Bight, Docket No. RTID 0648-XE150

Dear Chief Harrison:

Clean Ocean Action (COA) is a regional, nonpartisan environmental organization with a mission to improve and protect the water quality of the marine waters off the New Jersey/New York coast. COA has been actively following offshore wind development in the New York/New Jersey Bight for almost two decades. Over the past several years, COA has engaged with the National Marine Fisheries Service (NMFS) and other state and federal agencies regarding offshore wind development in this region, including the Incidental Harassment Authorization (IHA) issued to Community Offshore Wind (COSW) in 2023.¹

¹ *E.g.* Clean Ocean Action, Incidental Take Authorization: Community Offshore Wind, LLC Marine Site Characterization Surveys off New Jersey and New York, Docket No. RTID 0648-XC817 (May 22, 2023) Clean Ocean Action, Comments re Incidental Take Authorization: Attentive Energy LLC Marine Site Characterization Surveys off New Jersey and New York (2023), Docket No. RTID 0648-XC805 (May 22, 2023); Clean Ocean Action, Comments re. Incidental Take Authorization: “Leading Light”/Invenergy Wind Offshore, LLC Marine Site Characterization Surveys off New Jersey and New York, Agency/Docket Number: RTID 0648-XC970 (June 21, 2023); Clean Ocean Action, Comments re. Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys Off New York, New Jersey, Delaware, and Maryland (Feb. 5, 2024).

COSW has completed some of the survey work authorized under the original IHA and requests a renewal IHA to conduct similar activities for an additional year.² The take estimates were adjusted based on the remaining trackline to be analyzed, incorporating a 400-km area that was inadvertently omitted from the original IHA.³ Some species' take estimates were also adjusted for updated population density studies.⁴ The proposed renewal IHA would authorize 8,938 total takes, including fifteen (15) North Atlantic right whale (NARW) that are critically endangered, as well as twenty-nine (29) Humpback and 192 Minke whale takes,⁵ all of which are experiencing an Unusual Mortality Event (UME) and require greater consideration and protection.⁶

Added to these comments, COA also stands by and incorporates by reference its comments on the initial IHA, as we disagree with NMFS's counterarguments to those comments and maintain that more clarification is needed. COA submits the following additional comments.

I. Change in Trackline

The National Oceanic and Atmospheric Administration's (NOAA) procedures for IHA renewals state that they are applicable to situations where the authorized activities would be "up to another year of identical or nearly identical activities as were covered by the initial IHA (or a subset of those activities)".⁷ Here, however, NMFS proposes to add 400 km of trackline, as this area was inadvertently excluded from the 2023 IHA as a result of a miscommunication.⁸ Without further explanation, NMFS determined that this adjustment is a minor change that does not affect the previous analyses, mitigation and monitoring needs, or take estimates.⁹

"Nearly identical" has not been defined in NOAA protocols, so this standard is subjective. As such, NMFS must provide documentation for its determination that the activities are nearly

² Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys in the New York Bight, 89 FR 67592, 67594 (Aug. 21, 2024).

³ *Id.*

⁴ *Id.* at 67595.

⁵ *See id.*

⁶ NOAA FISHERIES, *2017-2024 North Atlantic Right Whale Unusual Mortality Event* (last updated July 29, 2024), <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2024-north-atlantic-right-whale-unusual-mortality-event>; NOAA FISHERIES, *2016-2024 Humpback Whale Unusual Mortality Event Along the Atlantic Coast* (last updated July 16, 2024), <https://www.fisheries.noaa.gov/national/marine-life-distress/2016-2024-humpback-whale-unusual-mortality-event-along-atlantic-coast>; NOAA FISHERIES, *2017-2024 Minke Whale Unusual Mortality Event Along the Atlantic Coast* (last updated July 16, 2024), <https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2024-minke-whale-unusual-mortality-event-along-atlantic-coast>.

⁷ NOAA FISHERIES, *Incidental Harassment Authorization Renewals*, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals> (last updated Aug. 31, 2022).

⁸ *See* Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys in the New York Bight, 89 FR 67592, 67594.

⁹ *Id.*

identical and do not warrant further review. As the agency charged with applying the best available science to development proposals, NMFS must provide the public with the factual basis for its conclusions. Not doing so makes the finding arbitrary and capricious.

II. Categorical Exclusion & Cumulative Impacts

In the notice for the proposed renewal IHA, NMFS states that it is using Categorical Exclusion B4 of its Companion Manual for the National Oceanic and Atmospheric Administration's Administrative Order 216-6A, excluding incidental take authorizations with no anticipated serious injury or mortality from subsequent National Environmental Policy Act (NEPA) analysis.¹⁰ No further NEPA analysis is anticipated, though this is only a preliminary determination.¹¹ However, NMFS provides no justification as to why it believes no extraordinary circumstances apply.¹²

The Companion Manual states that a categorical exclusion may only be applied when no extraordinary circumstances apply and lists several extraordinary circumstances including “highly controversial environmental effects . . . environmental effects that are uncertain, unique, or unknown; or the potential for significant cumulative impacts when the proposed action is combined with other past, present and reasonably foreseeable future actions, even though the impacts of the proposed action may not be significant by themselves.”¹³

The term "controversial" refers to "[the existence of a] substantial dispute . . . as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use."¹⁴ Commenters are not limited to the sources in the administrative record to establish controversy; in *Greenpeace U.S.A. v. Evans*, the district court used scientific literature outside of the administrative record to establish scientific controversy.¹⁵

There is considerable uncertainty regarding the effects of preconstruction surveying on marine mammals, as outlined in COA's comments on the initial IHA. To add to that analysis, because marine mammal hearing is difficult to study, animals are often grouped based on anatomy, rather than studying the hearing of specific species and how they may be impacted by surveying activities and construction noise.¹⁶ There is a particularly glaring data gap regarding mysticete hearing: “no

¹⁰ *Id.* at 67593.

¹¹ *Id.*

¹² *Id.*

¹³ NAT'L OCEANIC & ATMOSPHERIC ADMIN., POLICY & PROCEDURES FOR COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT AND RELATED AUTHORITIES (effective Jan. 13, 2017), <https://www.noaa.gov/sites/default/files/2021-10/NOAA-NAO-216-6A-Companion-Manual-03012018%20%281%29.pdf>.

¹⁴ *Greenpeace U.S.A. v. Evans*, 688 F. Supp. 579, 582 (W.D. Wash. 1987).

¹⁵ *Id.* at 584.

¹⁶ *E.g.*, Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys in the New York Bight, 88 FR 32735, 32744 (May 22, 2023).

direct measurements of hearing ability have been successfully completed for mysticetes.”¹⁷ Regarding pinnipeds, a 2015 University of Santa Cruz study indicated that they are more sensitive to high-frequency noise than was previously predicted.¹⁸ The same study outlined a myriad of factors that could affect how noise travels in the marine environment, suggesting that frequency is far from the whole story of how noise reaches and affects pinnipeds.¹⁹

This speaks to how little is currently understood, especially given that proposed offshore wind development has increased exponentially in the New York Bight in a short amount of time. Although multiple entities have been conducting marine site characterization surveys as offshore wind continues to rapidly develop, COA’s concerns about insufficient baseline study of marine mammal hearing applies to any offshore wind project that does not properly account for remaining scientific uncertainty, which is currently all offshore wind projects proposed for the North Atlantic. Changes to a population or species can happen quickly, so since BOEM has an underdeveloped understanding of marine mammal species’ current status, the agency cannot accurately plan for future protections and mitigation of potential impacts. Further, courts have held that the presence of mitigation measures including protected species observers does not eliminate the existence of a controversy, since logistical and financial constraints could prevent those measures from being enforced.²⁰

NMFS recently responded to a different set of comments by COA expressing concerns with an IHA for another offshore wind project by referencing Thorne and Wiley’s 2024 paper entitled, “Evaluating drivers of recent large whale strandings on the East Coast of the United States.” Importantly, the authors’ conclusion highlights the need for further study of marine mammal strandings, cumulative impacts of offshore wind development, and mitigation measures, rather than suggesting their findings should be treated as the final resolution of the issue.²¹ COA has also reached out to the authors proposing to discuss methodological questions, such as the focus on commercial vessel traffic and not other economic sectors, and the methodology for defining the location and year of each IHA.

NMFS also does not provide a justification in the IHA proposal for its claim that this IHA does not cumulatively have the potential for significant impacts on the quality of the environment.²² In the New York Bight since 2015, a total of 403,765 takes have been authorized by IHAs, 762 by

¹⁷ *Id.*

¹⁸ Kane Cunningham, *Pinniped Hearing in a Changing Acoustic Environment*, U.C.S.C. ESCHOLARSHIP (2015), <https://escholarship.org/uc/item/737223k8>

¹⁹ *Id.*

²⁰ See *Greenpeace U.S.A. v. Evans* at 585.

²¹ L.H. Thorne & D.N Wiley, *Evaluating drivers of recent large whale strandings on the East Coast of the United States*, Conservation Biology (May 29, 2024), <https://doi.org/10.1111/cobi.14302>.

²² Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys in the New York Bight, 89 FR 67592.

Level A harassment and 402,003 by Level B harassment.²³ At the time of writing, there are eleven (11) separate active IHAs in the New York Bight, and four (4) others in progress besides the current project.²⁴ The offshore wind development proposed in recent years, particularly during the Biden Administration, is part of a federal and state governmental effort to increase domestic offshore wind generation according to targets and mandates.²⁵ Therefore, surveying and construction for multiple projects around the same time and location is completely foreseeable; indeed, many surveying projects are already occurring.

Because of the uncertainty of the impacts of offshore wind development combined with the number of projects that are reasonably certain to occur in similar timeframes and geographic areas, the categorical exclusion should not apply. Instead, NMFS should be required to conduct further NEPA analysis for the project, considering the cumulative effects of the proposed IHA relative to other authorized takes in the area, including the activities conducted under the 2023 IHA.

III. Protected Species Observer Reports

The primary method for assessing compliance with an IHA is the reports by Protected Species Observers (PSO). However, these reports are rarely published publicly in any consistent way unless and until a developer applies for an IHA renewal. Renewals require a preliminary PSO report showing that the previously authorized activities did not result in an unanticipated level of takes.²⁶

²³ See, e.g., NOAA FISHERIES, *Incidental Take Authorizations for Other Energy Activities (Renewable/LNG)*, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable> (last updated Aug. 26, 2024).

²⁴ *Id.* (Terrasond Limited Marine Site Characterization Surveys in the New York Bight & Central Atlantic Call Area; Orsted Wind Power North America, LLC Marine Site characterization Surveys off of New York to Massachusetts; Renewal of Vineyard Northeast, LLC 's Marine Site Characterization Survey from Massachusetts to New Jersey; Orsted Wind Power North America, LLC's Site Characterization Surveys off Delaware; Revolution Wind, LLC Construction of the Revolution Wind Energy Facility off of Rhode Island; Empire Wind, LLC Construction of the Empire Wind Project (EW1 and EW2) off of New York; Renewal of Bluepoint Wind, LLC's Marine Site Characterization Surveys off of New York and New Jersey in the New York Bight; Reissuance of Park City Wind Marine Site Characterization Surveys off of Massachusetts to New York; Atlantic Shores Offshore Wind, LLC's marine site characterization surveys off of New York, New Jersey, Delaware, and Maryland; Sunrise Wind, LLC's Construction and Operation of the Sunrise Wind Offshore Wind Farm off of New York; Orsted Wind, LLC Construction of the Ocean Wind 1 Wind Energy Facility off New Jersey; Renewal of Invenergy Wind Offshore, LLC's Marine Site Characterization Surveys in the New York Bight; Vineyard Wind 1 LLC's Construction of the Vineyard Wind Offshore Wind Project off of Massachusetts (Phase 2); Atlantic Shores Offshore Wind, LLC's Construction of the Atlantic Shores Offshore Wind Energy Projects); Attentive Energy LLC Marine Site Characterization Surveys off New Jersey and New York (2023).

²⁵ The White House, FACT SHEET: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs (Mar. 29, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-biden-administration-jumpstarts-offshore-wind-energy-projects-to-create-jobs/>; N.J. Exec. Order No. 307 (Sept. 21, 2022); N.Y. Climate Leadership & Community Protection Act (L. 2019, ch. 106).

²⁶ Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys in the New York Bight, 89 FR 67593.

Here, COSW submitted a PSO report disclosing their surveying and mitigation activities as well as the number, location, and behavioral response of animals they observed. Unfortunately, these observations are unable to answer the questions and uncertainties discussed in Section II. Longer-term and more robust study is needed to resolve these issues and determine the cumulative ecological effects of surveying activities for offshore wind, including but not limited to changes in migration, breathing, nursing, breeding, feeding, or sheltering patterns.

Takes recorded in PSO data could, however, be cross-referenced with the coordinates of marine mammal strandings to determine whether there is a correlation between offshore wind surveying activities and strandings. As of August 13, 2024, in New Jersey and New York, 62 whales and 154 dolphins or porpoises have stranded since December 2022.²⁷ NMFS must investigate these strandings using PSO data, to improve the best available science to predict and potentially prevent impacts to marine mammals. Doing so would help resolve the public controversy surrounding offshore wind and comports with NMFS's mission to be a steward of the nation's ocean resources and their habitat.²⁸

IV. Unclear Number of Anticipated Renewals

CSOW's original IHA was granted on June 30, 2023, and the proposed IHA would extend until 2025.²⁹ COSW surveyed 19,092 km of trackline and has 11,775 km left to complete.³⁰ According to CSOW, "[c]hallenges and delays with procurement, mobilization, and downtime contributed to less survey being completed during the original IHA period than anticipated."³¹

This explanation does not indicate that the additional year will be sufficient to complete the remaining work. The challenges and delays CSOW described could just as easily occur next year as this year. As such, it is unclear whether there will likely be another renewal IHA proposed and authorized at the end of the current IHA, should it be granted.

NMFS commonly issues multiple consecutive approvals; for example, similar surveying activities by Atlantic Shores Offshore Wind, LLC and Vineyard Wind Northeast, LLC have been approved in this region since 2020 and 2022, respectively, either by one-time renewals or in the form of new

²⁷ Nat'l Oceanic & Atmospheric Admin., Marine Mammal Health & Stranding Response Program Nat'l Stranding & Response Prog., National Stranding Database (received May 20, 2024) (supplemented with verified volunteer/local news reports, on file with Clean Ocean Action).

²⁸ See NOAA FISHERIES, *About Us*, <https://www.fisheries.noaa.gov/about-us> (last visited Sept. 5, 2024).

²⁹ Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys in the New York Bight, 88 FR 42322 (June 30, 2023); Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys in the New York Bight, 89 FR 67953.

³⁰ COMMUNITY OFFSHORE WIND, INCIDENTAL HARASSMENT AUTHORIZATION RENEWAL REQUEST FOR THE NON-LETHAL TAKING OF MARINE MAMMALS DURING A SITE CHARACTERIZATION SURVEY (June 14, 2024), <https://www.fisheries.noaa.gov/s3/2024-08/COSW-2024-RenewalIHA-App-OPR1.pdf>.

³¹ *Id.* at 4.

IHAs.³² In circumstances such as these, when it is not clear how long the proposed activities will span, a Letter of Authorization (LOA) would be more appropriate. NMFS recommends that agencies apply for LOAs rather than IHAs when the proposed activities are expected to last longer than one year.³³

V. North Atlantic Right Whales (NARW)

COA maintains our objection to allowing takes of NARW due to the species' fragile status. Although no serious injury or mortality is proposed to be authorized in this instance, even Level B harassment could, by definition, affect migration, breathing, nursing, breeding, feeding, or sheltering.³⁴ Noise disturbances to NARW could increase the species' stress levels, according to information on NOAA's website.³⁵ NMFS proposes to require a 500-meter distance between vessels, equipment, and NARW and all other federally endangered marine mammals, but the agency is still anticipating that NARW will experience Level B harassment.³⁶

COA believes that preserving the existence of the NARW warrants pausing offshore development off the Atlantic coast.³⁷ During this pause, COA urges NMFS to assess cumulative impacts to this most endangered species, including the total number, speed, and distance of vessel trips for preconstruction, construction, operation/maintenance, and decommissioning activities for all the concurrent projects in the region.

VI. Conclusion

For the above reasons, NMFS should reject COSW's application to renew its IHA. In addition, NMFS should work with other agencies to produce or commission an independent study about marine mammal mortality on the east coast. It is both reasonable and responsible to conduct further

³² Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Off of New York and New Jersey, 85 FR 21198 (Apr. 16, 2020); Taking Marine Mammals Incidental to Marine Site Characterization Off of New York and New Jersey, 86 FR 21289 (Apr. 22, 2021); Taking Marine Mammals Incidental to Marine Site Characterization Off New Jersey and New York for Atlantic Shores Offshore Wind, LLC, 87 FR 24103 (Apr. 20, 2022); Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys Offshore of New Jersey and New York, 88 FR 38821 (June 9, 2023); Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys Off New Jersey and New York, 88 FR 54575 (August 10, 2023); Takes of Marine Mammals Incidental to Specified Activities; Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Site Characterization Surveys Offshore From Massachusetts to New Jersey for Vineyard Northeast, LLC, 87 FR 52913 (Aug. 30, 2022); Taking Marine Mammals Incidental to Site Characterization Surveys Offshore From Massachusetts to New Jersey for Vineyard Northeast, LLC, 89 FR 51501 (June 18, 2024).

³³ NOAA FISHERIES, *Incidental Authorizations Under the Marine Mammal Protection Act*, <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act> (last visited June 26, 2024).

³⁴ 16 U.S.C. § 1362(18).

³⁵ NOAA FISHERIES, *North Atlantic Right Whale*, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale> (last visited Feb. 2, 2024).

³⁶ Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental Marine Site Characterization Surveys Off New York and New Jersey in the New York Bight, 89 FR at 64419.

³⁷ 16 U.S.C. § 1371(a)(5)(A)(i).

investigation into the cause of the marine mammal deaths mentioned in Section III and refrain from issuing IHAs until the agency can definitively determine the cause(s).

Respectfully submitted,



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Clean Ocean Action



Toni Groet
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Clean Ocean Action