



**Gatzke Dillon & Ballance LLP**  
L A W Y E R S

June 7, 2023

*By Federal Express, Email, and NOAA Web Portal*

Jolie Harrison, Chief  
Permits and Conservation Division  
Office of Protected Resources,  
National Marine Fisheries Service  
1315 East-West Highway,  
Silver Spring, MD 20910  
ITP.Carduner@noaa.gov

*Re: Comments On Dominion Energy Request for a Five-Year Letter of Authorization and Incidental Take Regulations for Coastal Virginia Offshore Wind (CVOW) Project (NOAA–NMFS–2023–0030)*

Dear Ms. Harrison:

This firm represents the Committee for a Constructive Tomorrow (CFACT), the American Coalition for Ocean Protection (ACOP), and The Heartland Institute (Heartland)<sup>1</sup> on matters relating to federal and state government permitting for the Coastal Virginia Offshore Wind (CVOW) project. All three organizations – CFACT, ACOP, and Heartland – oppose the CVOW project on grounds that it will adversely affect the human and natural environment; pose unacceptable threats to federally-listed endangered species; cause environmental damage reaching across the globe; result in significant and long-lasting impacts on already at-risk populations in the United States and abroad; damage local tourism; generate unacceptable air quality impacts; interfere with defense-related and other radar; radically disturb long-standing uses of the outer continental shelf, in violation of the Outer Continental Shelf Lands Act (OCSLA); and utterly fail in its stated purpose of reducing greenhouse gas (GHG) emissions and stemming climate change. Worse, the project will cause these impacts while simultaneously driving up the cost of electricity for ratepayers in Virginia.

We provide these comments on the proposed Incidental Take Regulations and Letter of Authorization (collectively, the “LOA”) requested by Dominion Energy (Dominion), the applicant for the Coastal Virginia Offshore Wind (CVOW) project.

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<sup>1</sup> The Heartland Institute is a non-partisan, non-profit research institute that has been in operation since 1984. Heartland is one of the world’s leading free-market think tanks, with a mission to discover, develop, and promote free-market solutions to social and economic problems.

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As an initial matter, the analysis that accompanies the proposed ITR and LOA reflects the mindset of an agency that has been “captured” by the very industry it is supposed to be regulating. It is clear that NMFS intends to grant Dominion permission to harass and, if necessary, physically harm various marine mammal species native to the waters off the coast of Virginia, including the federally-listed North Atlantic Right Whale (NARW), whose numbers have dropped precipitously in the last four years. If the CVOW LOA is approved, NARW will continue to be threatened and pushed ever-closer to extinction, all for the sake of a wind energy project that will only encourage more growth and consumption and will, in the end, do nothing to reverse climate change.

#### **A. No EIS Accompanied the LOA**

The proposed LOA, if granted, will allow Dominion to harass up to 762 whales while constructing the CVOW project. In light of this significant and foreseeable impact, the proposed LOA should be accompanied by an Environmental Impact Statement (EIS). NMFS claims such an EIS exists elsewhere, but we searched and could not find it.

The Empire Wind EIS clearly implies harassment can kill. Here is a key excerpt:

It is possible that pile driving could displace animals into areas with lower habitat quality or higher risk of vessel collision or fisheries interaction. Multiple construction activities within the same calendar year could potentially affect migration, foraging, calving, and individual fitness. The magnitude of impacts would depend upon the locations, duration, and timing of concurrent construction. Such impacts could be long term, of high intensity, and of high exposure level. Generally, the more frequently an individual’s normal behaviors are disrupted or the longer the duration of the disruption, the greater the potential for biologically significant consequences to individual fitness. The potential for biologically significant effects is expected to increase with the number of pile-driving events to which an individual is exposed.

Empire Wind DEIS v.1, Page 3.15-14, PDF page 372

[https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Empire\\_Wind\\_DEIS\\_Vol1.pdf](https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Empire_Wind_DEIS_Vol1.pdf)

The potential threats described above need to be assessed for the specific conditions of the Dominion CVOW project. We looked forward with great interest to see how the LOA EIS handles these potentially extreme impacts. The basic question is simple -- what are the reasonable and likely impacts of such extensive harassment of whales?

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NO EIS was prepared for the proposed LOA. Instead, NMFS refers us to BOEM's EIS for the entire project. Here is the announcement:

"NMFS proposes to adopt the BOEM Environmental Impact Statement (EIS), provided our independent evaluation of the document finds that it includes adequate information analyzing the effects of promulgating the proposed regulations and LOA issuance on the human environment."

However, the EIS for CVOW does not discuss the LOA or the large number of whale "takes" it allows. We looked and found nothing on this subject.

Our approach was to conduct key word searches. Here are the results:

Search on "LOA"

There is just one occurrence, a passing reference to Table 40 of the original NMFS application, which is now obsolete. There is no discussion of the impact of the now proposed LOA.

Search on "Authorization"

There are two clusters of NMFS-related text, both of which merely explain that the BOEM EIS functions as the EIS for the harassment authorization. One occurrence is in the executive summary and the second is in the main document. Neither occurrence actually discusses the impacts of the proposed LOA.

Search on "Harassment"

There are just three occurrences, all in a table of definitions. There is no discussion of harassment, much less the impact of these many proposed harassments.

In short there is no EIS for the proposed LOA. NMFS might argue that the EIS discussion concerning the project amounts to an EIS for the proposed regulations and LOA, but it is impossible to have an EIS for an action that has never been discussed.

An EIS for the LOA is required under NEPA, and until one is produced the LOA cannot be issued or the regulations thereto finalized. NMFS (or BOEM) must assess the reasonably likely, adverse impacts of the huge number of proposed harassments – with special attention to how they may alter the behavior of marine mammals in a manner lethal to them. The CVOW project has not received final approval of its EIS, COP, BiOP or other permits required to be issued by various federal agencies. Therefore, any approval of this LOA until Dominion has finalized these permits is premature and unlawful.

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## **B. Inadequate Analysis of Construction-Related Impacts on Marine Mammals**

As demonstrated below, the LOA analysis of the Project's construction-related impacts on marine mammals is deficient. The specific defects are discussed individually below.

1. The LOA does not require that construction of the Project result in zero human-caused mortality of the NARW, even though the Potential Biological Removal (PBR) level for the NARW mandates that outcome.

In 2021, the National Marine Fisheries Service (NMFS) issued a Potential Biological Removal (PBR) level for the NARW of 0.7. This means that "the population cannot sustain, over the course of a year, the death or serious injury of a single NARW due to human causes" (emphasis added). In other words, the experts at the federal government's premier scientific agency determined that there can be *zero human-caused mortalities* for the NARW on an annual basis if the species is to survive.

The Notice of Proposed Rulemaking (NPR) for Dominion Energy's LOA request, issued by NOAA/NMFS on May 4, 2023, states in Table 7 that there will be 8.1 human-caused mortalities of the NARW associated with the Project every year for five years. According to footnote 3, "These values, found in NMFS SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (e.g. commercial fisheries, ship strike)." Therefore, in order to prevent further declines in the NARW population (i.e., to prevent human-caused mortality of NARW beyond the 0.7 PBR), construction and operation of the Project itself should not result in a single human-caused NARW fatality.

The LOA analysis claims there will be no Level A harassment of the NARW (which could cause serious injury or death) resulting from the CVOW project, but that is hard to square with the facts. More than 100 different ships will traverse the Project area 24 hours per day, seven days per week, 365 days per year, for a period of 5 years, resulting in thousands of ship crossings to, from, and within the Project. The sonar mapping ships themselves - the ones most likely to cause interference with NARW communication - will be operating "daily". This is a recipe for disaster for the NARW. Added to this are the pile driving noise and vessel strike impacts that will occur as a result of the Project. Moreover, the Project's pile driving noise and boat traffic will force NARW to deviate from their normal feeding and migration behaviors, pushing them into areas where they will encounter other risks, such as unregulated vessel traffic, predators, and fishing gear entanglement. None of these potential effects of the Project are addressed in the LOA.

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2. The IHA does not contain the "best scientific information available." NOAA and BOEM clearly state in the "Draft North Atlantic and Right Whale Strategy," which they jointly issued on October 21, 2022, that numerous studies and research will be required to be completed in the future before they can obtain the legally requisite information.

Less than one year ago, BOEM and NOAA released a 100 plus page document entitled the "Draft North Atlantic Right Whale and Offshore Wind Strategy." The Strategy was formulated to "identify areas where agencies will work together to improve the *necessary science, information and indigenous knowledge*" to support the goals of developing 30 gigawatts of offshore wind." The Strategy was designed to "leverage the resources and expertise of both agencies to collect and apply the *best available information to inform our future decisions*" ((emphasis added), quote by BOEM Director Amanda Lofton)

For example, according to the Strategy, one of the "large data gaps" in OSW [Project] impact assessments is the indirect impact of offshore wind (OSW) projects on marine mammal prey availability and consumption potential" (p.10, emphasis added). Thus, "increased risk of strikes from vessels involved in OSW projects" is one of the areas requiring further study. (p.10). "Ongoing research efforts supported by BOEM, NOAA, OSW industry and other partners... provide the *best available evidence* to inform consideration of the effects of OSW on NARWs" (p.11, emphasis added.)

One of the future mitigation requirements mentioned throughout the Strategy is the Passive Acoustic Monitoring (PAM) system. According to the Strategy, PAM systems would be designed and installed for each of the 17 proposed offshore wind projects. Most importantly, the Strategy calls for "a minimum of 3-5 years of monitoring and using continuous PAM archival recorders *immediately prior* to construction"(emphasis added). PAM systems are especially important because visual and aerial observation is not available at night, nor in dense fog or heavy seas - conditions which will prevail *at least 50% of every day*.

It is undisputed that in order to carry out the objectives of the MMPA, BOEM and NOAA must utilize the "best scientific information available." If the information is unavailable, BOEM must say so and describe efforts to obtain it. The PAM systems required by NOAA's own admission have not yet been installed, much less tested and utilized. Nor have the numerous studies identified in the Strategy been completed. In short, BOEM and NOAA have recognized that there are deficiencies in their knowledge of the "presence, abundance, distribution, and seasonality of NARWs" and specifically established a complex process of research outlined in the Strategy to remedy these short-comings. No approval of the IHA should occur until the relevant agencies demonstrate that they have implemented the Strategy and obtained the information and utilized it in finalizing their approval of the IHA

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### 3. Inadequate Analysis of Vessel Strikes

The LOA analysis fixates almost exclusively on one impact: noise from pile-driving and other activities associated with installing the 100 wind turbines. Missing from this analysis, however, is perhaps the most serious threat to NARW and other marine mammals – namely, vessel strikes or collisions. Rather than take a hard look at this issue and determine the actual magnitude of this particular impact and its ability to result in both Type A and Type B harassment, the LOA analysis largely ignores it, stating in cursory fashion that the mitigation measures that Dominion has agreed to implement will take care of the problem.

These mitigation measures, while appearing to limit vessel speeds to 10 knots per hour, actually provide numerous exceptions to that restriction, provided the vessel in question employs a qualified observer to look out for whales and other marine mammals that might lie in the path of the boat. There is no evidence that such observers are able to detect marine mammals, especially those well below the water's surface, in time to avoid collisions. Passive Acoustic Monitoring (PAM), while helpful, will not fill the "detection" gap, as it will only pick up whales that are actively vocalizing. Some whales, such as the NARW, often go days or weeks without vocalizing, which means they would not be detected by PAM. Thus, the mitigation measures are unproven. Worse, it appears that NMFS, in calculating the amount of take for the project, omitted any take from vessel strikes. Thus, NMFS is assuming that the mitigation to prevent vessel strikes will be 100 percent effective, and there is no data to back up that assumption.

Even the Southern Poverty Law Center, Massachusetts Audubon, NY4Whales, Oceana, and Surfrider all admit that that "the vessel strike avoidance measures [in the LOA] are insufficient." Approval of this LOA will clearly be contrary both to the requirements of the PBR and the findings of human caused mortality in the NOPR. Even Level B harassment, which is specifically requested and recognized as likely, can result in harm to whales. While such harassment may not result in direct deaths, the any cumulative injury or behavior modification it induces can result indirectly in a whale deaths.

Dr. David Wojick wrote about the likelihood of increased ship collisions from the Dominion project in an article last September. This article was directed to several key NMFS people. Here is a central excerpt:

Dominion's Construction and Operation Plan (COP) provides the necessary navigation data in Appendix S: Navigation Risk Assessment. Ironically this assessment is all about the risk to ships, not to whales. The project creates what amounts to an intense noise wall that the whales will undoubtedly go around, either to the East or to the West. Immediately to the East lies the westernmost lane of

the very busy coastal ship traffic. To the West lies the equally busy coastal barge traffic. Both are deadly. It seems like the project was deliberately located where there is the least shipping traffic. This would make sense if it were not for the whales. As it is the project closes the low shipping corridor, which the whales undoubtedly use. Being hit by ships is a leading cause of death to the whales.

See <https://www.cfact.org/2022/09/27/how-to-kill-whales-with-offshore-wind/>

In light of the known dangers of vessel strikes, the LOA must fully analyze the extent to which project-related vessels, especially the fast-moving crew transfer vessels, may harass and injure NARW and other marine mammals. To exclude this analysis from the LOA and the take authorization itself is a violation of the MMPA.

4. Inadequate analysis of construction-related noise impacts

The LOA application highlights several potential impacts on the whales from high noise levels during construction:

- Exposure of marine mammals to sound sources can result in, but is not limited to, no response or any of the following observable responses: increased alertness; orientation or attraction to a sound source; vocal modifications; cessation of feeding; cessation of social interaction; alteration of movement or diving behavior; habitat abandonment (temporary or permanent); and in severe cases, panic, flight, stampede, or stranding, potentially resulting in death
- Avoidance is the displacement of an individual from an area or migration path as a result of the presence of a sound or other stressors and is one of the most obvious manifestations of disturbance in marine mammals
- Behavioral change, such as disturbance manifesting in lost foraging time, in response to anthropogenic activities is often assumed to indicate a biologically significant effect on a population of concern. Five out of six North Atlantic right whales exposed to an acoustic alarm interrupted their foraging dives (Nowacek *et al.*, 2004).
- Sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate between acoustic signals of interest. North Atlantic right whales have been observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.*, 2007)

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- Sound can induce stress. Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. Correspondingly, increased noise levels can be expected to increase stress diverting energy from other functions
- Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (*e.g.*, crustaceans, cephalopods, fish, and zooplankton).

The LOA analysis, however, doe *not* actually examine whether and to what extent the CVOW project will cause these effects.

5. NMFS/NOAA allows applicants to determine protected mammal abundance in an arbitrary and capricious manner

NMFS and NOAA have issued numerous Letters of Authorization (LOA) for incidental take of marine mammals by offshore wind development companies consulting with the applicants during the application and approval process. The agencies have established take limits using species stock estimates and expected species densities in subject lease areas in an arbitrary and capricious manner. Consider the table below, which shows the take requests of two recent LOAs issued prior to the current Coastal Virginia Offshore Wind (CVOW) application.

Table 1: Recent five-year Incidental Take requests for the North Atlantic Right Whale (NARW)

Variable	Vineyard Wind	Ocean Wind 1	Coastal Virginia
LOA Date	5/1/2023	11/25/2022	Current
NARW Take Request	20	14	23
NARW Population Estimate	394	368	346
Maximum Estimated NARW Presence Month Construction Allowed	June	December	May
Maximum Estimated NARW Presence/100KM <sup>2</sup>	0.308	0.045	0.015
Maximum Presence Compared to Coastal Virginia	21 X	3 X	-
Estimated Presence Version Used	2017	2022	2022

Source: Roberts and Halpin, Duke University, the Northeast Regional Planning Body, the University of North Carolina Wilmington, the Virginia Aquarium and Marine Science Center, and NOAA



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The agencies have approved recent projects without establishing a maximum allowed monthly estimated density of critically endangered North Atlantic right whales in months construction is allowed. Allowed densities vary by a 20-fold difference, and there is no standard for the source data. The best current estimate of NARW population is 336 animals but each project uses a higher and different estimate from 346 to 394 animals. NMFS/NOAA should establish a NARW population number to be used in all applications.

#### 6. Inadequate and Unenforceable Mitigation Measures

In recent years, wind energy companies have persuaded state and federal regulators that wind farm operators are capable of self-monitoring, self-reporting, and self-policing when it comes to environmental mitigation measures. As a result, most of the state and federal agencies that regulate wind energy projects place most if not all responsibility for environmental mitigation in the hands of the operators themselves, with very little government oversight. This has not always worked out well for the animals affected by the wind turbines. For example, a recent lawsuit in Ohio revealed that a wind energy plant owned by Avangrid (formerly Iberdrola) had killed thousands of birds. Yet Avangrid fought to keep this information from becoming public. (See *Blue Creek Wind Farm, LLC v. Ohio Department of Natural Resources* (2016) 16 CV 004414.)

With regard to mitigating the impacts of the Dominion project, NMFS has imposed seasonal restrictions on pile driving. Specifically, no pile driving may occur between January 1 and April 30, as this is the period during the year when the highest densities of NARWs is expected. This restrictive period, however, is far too short, especially since NARW densities are higher in May, June, and December than they are in January. Further, NMFS admits that NARWs reside in this area all year-round. So the January-through-April pile driving restriction will not prevent take of NARWs during the other times of year.

In addition to the January-through-April restriction, NMFS also proposes “clearance zones” for NARWs and other mammals as a means of addressing pile driving noise impacts once the restriction period terminates (i.e., May 1). Specifically, if a marine mammal is observed approaching or entering a designated clearance zone, pile driving may not commence until the animal leaves or until 30 minutes have elapsed without redetection of the animal. This sounds reasonable, except that it only applies to the *start* of pile driving. It does not apply to marine mammals that may enter the clearance zones *after* pile driving has commenced. If this happens – and it most assuredly will – Dominion is not required to halt pile driving. So long as Dominion believes that a shutdown is not “technically feasible”, it doesn’t need to stop. In this situation, no protection is afforded the animal in question. The lack of federal oversight during this most critical circumstance is a major failing of the NMFS approach to regulating this Project and all other proposed offshore wind projects.

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### **C. No Analysis of Operational Impacts on Marine Mammals**

The analysis for the LOA focuses solely on the Project's *construction-related* impacts on marine mammals (e.g., noise effects from pile-driving). It fails completely to evaluate the extent to which the *operation* of the Project could affect the species in question. For example, the wind turbines, when operational, generate noise that is transmitted underwater and can be heard by marine mammals in the area, including NARW. A 2013 study conducted for the Scottish Government, titled "Modelling of Noise Effects of Operational Wind Turbines Including Noise Transmission Through Various Foundation Types," concluded that wind turbines, especially those that use monopile foundations such as those proposed by Dominion, produce noise that can be detected by whales at distances reaching 18 kilometers.<sup>2</sup> Such noise impacts can and do alter whale behavior, leading to potential displacement of the whales from their preferred habitat. By failing to evaluate (or even mention) this potential impact of the Project, NMFS has violated the MMPA and the Endangered Species Act.

Other operational impacts on marine mammals include vessel strikes during routine maintenance activities and oil spills from the hundreds of gallons of petroleum maintained within each wind turbine. These impacts, like operational noise from the turbines themselves, were omitted from the analysis conducted by NMFS. In addition, the analysis for the LOA completely ignores the potential for the Project's 100 wind turbines to disrupt communication between and among marine mammals, especially NARWs. It is likely that the hard structures of the turbines, which will run the entire depth of the water column, will deflect the clicks and other sounds of marine mammals, thereby degrading the animals' ability to navigate and communicate. This topic should have been addressed in the LOA analysis report but was not.

Dominion did not request and NMFS is not proposing to authorize take incidental to operational noise. Instead, NMFS will require Dominion Energy to measure operational noise levels to confirm they have dissipated quickly, allowing ambient sound levels to return to normal. Monitoring, however, is no solace to the effected whales if, as we suspect, the Project's operational noise will be damaging and chronic for NARW and other marine mammals.

The same potential harmful impacts described above during construction could exist during operation with the primary difference operational noise will be nearly continuous for decades. No turbines approaching the size of the 14 to 16 megawatt turbines planned for this project have been built in the ocean anywhere on the globe. A study by Stöber and Thomsen (2021) estimated the operational noise from the larger, more recent generation of direct-drive wind turbines. Their

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<sup>2</sup> Marmo, B., Roberts, I., Buckingham, M.P., King, S., Booth, C. 2013. "Modelling of Noise Effects of Operational Offshore Wind Turbines Including Noise Transmission Through Various Foundational Types". Edinburgh: Scottish Government.

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findings demonstrated noise levels could be up to 170 to 177 dB for a 10 megawatt turbine. Furthermore, noise levels were likely to diminish to NOAA Level B harassment levels of 120 dB at about 0.9 miles away from the turbine. Since planned turbine spacing is only on about a 1-mile grid, noise levels will likely significantly exceed Level B harassment limits throughout the project area and for one mile beyond the project boundary.

Clearly, operational noise poses a serious and potentially deadly threat, and drive NARW closer to extinction, especially if the cumulative impact of other proposed offshore wind projects is considered. No LOA should be issued until at least one of the planned 16 MW turbines is actually built in the ocean with sound levels measured and reported accurately. Building the project with sound measured only after the Project is built is unacceptable.

In addition, according to a letter from NOAA/NMFS biologist Sean Hayes, Ph.D., dated May 13, 2022, the operation of large-scale offshore wind projects will significantly disrupt water column stratification, resulting in dispersion of the dense patches of zooplankton that NARW need to feed on to survive. Dr. Hayes refers to this as a “population-level” impact and recommends that all offshore wind projects be located at least 20 kilometers from known NARW foraging areas. The LOA analysis, however, does not discuss this issue at all.

#### **D. No Analysis of Cumulative Impacts on Marine Mammals**

Another major shortcoming of the LOA analysis is that it does not assess *cumulative* impacts on the affected marine mammals. Instead, it treats the Project as if it were to be installed and operated in a vacuum, where no other impacts (or projects) exist. For example, the analysis does not provide data on the existing underwater noise conditions in the project area, so there is no way to tell whether the current, ambient sound environment at and near the Project site is already so saturated with noise that whales and other marine mammals are struggling to maintain basic behaviors fundamental to their respective life histories. This information is critical to any assessment of the Project’s contribution to this noise environment. If the project area currently experiences noise levels at which that marine mammals already experience difficulty in detecting threats, communicating, navigating, and performing other behaviors, then any additional noise emitted from the Project is likely to worsen the situation, perhaps to a dangerous degree. And one must remember that some of the affected species – and, again, the one of greatest concern is the NARW – have shown sharp declines in just the last 36 months. Thus, the concern is not theoretical; it is real and it is acute and immediate. Unfortunately, however, the NMFS analysis does not address this important issue or even acknowledge it as a threat.

The NMFS analysis likewise provides no information on the number of vessels that currently travel in and near the project area. As a result, neither NMFS nor the public has any idea how significant

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the current vessel-strike risk might be or how much that risk would be intensified by the Project. The data set forth in the NMFS report is simply insufficient to address this issue.

Then there is the matter of the other Atlantic seaboard wind farms which are slated to be installed along with the proposed Project. As we explained in our NEPA comments on the CVOW EIS, the key to conducting a proper cumulative analysis is making sure it considers all projects with a potential to contribute to the impact in question. The NMFS report, like the CVOW DEIS, fails this fundamental test, as it does not account for impacts from the other wind projects that are planned for construction within NARW habitat. These wind farms, when combined with the proposed Project, take up hundreds of square miles of ocean and have the potential to cause significant impacts on NARW and other marine mammals. Again, however, the NMFS report on the proposed LOA does not discuss the cumulative impacts of these projects (including the proposed Project), resulting in a gross underreporting of the actual threats to NARW and other marine mammals that live in and/or migrate through this part of the Atlantic ocean. What is especially distressing is that these other wind farms will soon be requesting their own LOAs from NMFS; and NMFS will again act as if each permit request is singular and insulated from every other and does not create cumulative impacts. This defies logic and undermines our ability to properly manage the nation's biological resources.

The Draft North Atlantic Right Whale and Offshore Wind Strategy itself recognizes the need for a comprehensive analysis of all East Coast Wind projects on marine mammals and other protected species, particularly the NARW: "Effects to NARWs could result from exposure to a single project and may be compounded by exposure to multiple projects. It is important to recognize that NARWs migrating along the U.S. Atlantic Coast travel through nearly every proposed OSW development." (p.11)

Accordingly, it is critical that the LOA analysis of Project-related impacts on NARWs be cumulative and include all proposed OSW projects. This cumulative analysis will likely show that the combined Projects would fail to meet the zero human caused mortality requirement embodied in the PBR standard.

**E. Executive Order 14008 violates the "major questions" doctrine established by the Supreme Court in *West Virginia v. EPA*.**

Executive Order (EO) 14008 establishes what BOEM and NOAA consider to be an "all of government " mandate applied to the construction and operation of offshore wind energy. This EO is cited many times by both agencies as the document directing them to become "partners" with wind energy developers, as opposed to their traditional role of being regulators who set limits on and exercise oversight over such endeavors. Removal of the independent oversight regulatory authority of these agencies by this EO underscores the intrusion by the Executive Branch into the

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fundamental oversight responsibility of an independent agency established by Congress. This removal of oversight authority demonstrates that the EO impinges on the domain of the legislature to establish laws. Because of the large economic implications the Biden administration's offshore wind goals, this EO runs afoul of the the "major question doctrine" reaffirmed recently by the U.S. Supreme Court in *West Virginia v. EPA*. Congress did not intend agencies with oversight and regulatory authority to become "partners" with any industry over which it exercises such oversight, particularly when it comes to issues of safety, national security, and environmental protection.

## CONCLUSION

For the foregoing reasons, the analysis prepared by NMFS for the proposed LOA is insufficient. We recommend that NMFS delay issuance of the LOA until the concerns described herein are addressed.

Thank you for your consideration of these comments.

Very truly yours,



David P. Hubbard  
of  
Gatzke Dillon & Ballance LLP

DPH/rif

cc: Committee for a Constructive Tomorrow  
American Coalition for Ocean Protection  
The Heartland Institute