



MARINE MAMMAL COMMISSION

15 May 2023

Ms. Jolie Harrison, Chief
Permits and Conservation Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910-3225

Dear Ms. Harrison:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's (NMFS) 13 April 2023 notice (88 Fed. Reg. 22696) and the letter of authorization (LOA) application submitted by Empire Offshore Wind, LLC (Empire Wind) seeking promulgation of regulations under section 101(a)(5)(A) of the Marine Mammal Protection Act (the MMPA). Taking of marine mammals would be incidental to construction of the Empire Wind 1 and 2 (EW 1 and 2, respectively) offshore wind energy facilities and other associated activities. The EW 1 and 2 windfarm area is located approximately 22 km south of Long Island, New York, and 31.4 km east of Long Branch, New Jersey¹, in water depths of 24 to 44 m.

Background

Empire Wind is proposing to conduct (1) impact pile driving to install 147 monopiles, either 9.6 or 11 m in diameter, to support wind turbine generators and 24 2.5-m pin piles to support two offshore substations, (2) vibratory pile driving to install and remove five cofferdams *or* impact pile driving to install casing pipes and goal posts to assist in construction of the export cable route, (3) vibratory pile driving to remove timber berthing piles and install sheet piles at the onshore substation C marina, and (4) high-resolution geophysical (HRG) site characterization surveys of the lease area, inter-array cable locations, and export cable route corridors and landfall sites, using non-parametric sub-bottom profilers (including chirps), parametric sub-bottom profilers, ultra-short baseline positioning equipment, multibeam echosounders, side-scan sonar, and marine magnetometers.

Proposed mitigation measures include seasonal restrictions on construction activities², use of a sound attenuation system with minimum operating requirements, visual and passive acoustic monitoring to implement clearance, delay and shut-down procedures, sound field verification (SFV; with mitigation and monitoring zone adjustments and/or additions to the sound attenuation system as needed to achieve the modeled 10-dB reduction), soft-start and ramp-up procedures, and various vessel strike avoidance measures.

¹ In the Bureau of Ocean Energy Management (BOEM) lease area OCS-A 0512 and New York state waters, within the New York Bight.

² Impact pile driving could occur May through November, with pile driving in December only if necessary.

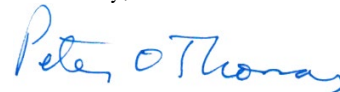
Wind energy proposed rules in general

The Commission's review of NMFS's *Federal Register* notice and associated Empire Wind documents revealed numerous issues of concern. Many of the same or similar issues were discussed in the Commission's previous letters regarding requests for authorizations to take marine mammals incidental to wind farm construction and operations, including its [13 March 2023](#) letter regarding Sunrise Wind, LLC (Sunrise Wind), its [13 January 2023 letter](#) regarding Revolution Wind, LLC (Revolution Wind), its [6 December 2022 letter](#) regarding Ocean Wind, LLC (Ocean Wind), and its [1 March 2021](#) letter regarding South Fork Wind, LLC.

Since final rules have yet to be issued for Sunrise Wind, Revolution Wind, or Ocean Wind, it is unclear whether and how NMFS plans to address the issues raised, and recommendations provided, by the Commission in those previous letters. In the absence of responses to previous detailed comments, the Commission does not believe it prudent to provide a detailed review of similar issues for the Empire Wind proposed rule at this time. Rather than reiterating much of the same rationale and justification, the Commission's previous letters and the recommendations therein should be reviewed and considered in the context of the Empire Wind proposed rule. The similar and ongoing issues as they relate to the Empire Wind rulemaking concern underestimated Level A and B harassment zones and numbers of takes (including group size estimates), incomplete SFV measurement requirements, insufficient mitigation and monitoring measures³, errors and omissions in the preamble to and the proposed rule⁴, and the general issue of quality control and quality assurance in NMFS's preparation of proposed incidental take authorizations.

The Commission stands ready to discuss with NMFS the issues on this and the previous proposed rules in greater detail. Please contact me if you have any questions.

Sincerely,



Peter O. Thomas, Ph.D.,
Executive Director

³ This is the first construction-related wind energy proposed rule in which (1) the minimum visibility zone is less than the shut-down zone for mysticetes and sperm whales during impact installation of monopiles and (2) a second vessel would not be required to be used to implement the various mitigation measures. Protected species observers would be required only on the pile-driving vessel.

⁴ For example, the proposed rule did not specify the information that must be included in any interim or final SFV report, which is inconsistent with previous proposed rules.