



MARINE MAMMAL COMMISSION

5 June 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) 4 May 2023 notice (88 Fed. Reg. 28656) and the letter of authorization (LOA) application submitted by Dominion Energy Virginia (Dominion Energy) 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 Coastal Virginia Offshore Wind Commercial (CVOW-C) project and other associated activities. The CVOW-C windfarm area is located approximately 43.5 km off Virginia Beach, Virginia¹, in water depths of 19.9 m to 38.1 m.

Background

Dominion Energy is proposing to conduct (1) impact and vibratory pile driving to install up to 176 tapered 7.5/9.5-m monopiles² to support wind turbine generators (WTGs) and 12 2.8-m pin piles to support three offshore substations with a jacket foundation, (2) vibratory pile driving to install and remove up to nine cofferdams, (3) impact pile driving to install up to 108 1.07-m goal posts, 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 (i.e., chirps, sparkers, boomers), parametric sub-bottom profilers, ultra-short baseline positioning equipment, multibeam echosounders, side-scan sonars, and magnetometers.

Proposed mitigation measures include seasonal and temporal restrictions on pile-driving activities³, 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 lease area OCS-A 0483.

² Although 176 WTGs are proposed to be installed, modeling to estimate harassment takes was based on the installation of 183 WTGs, which accounts for up to 7 piles that may have to be reinstalled at different locations.

³ Impact pile driving would occur only between 1 May and 31 October during daylight hours. No more than two monopiles or pin piles would be installed in a single day, and there would be no concurrent pile driving.

Wind energy proposed rules in general

The Commission's review of NMFS's *Federal Register* notice and associated Dominion Energy 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 [15 May 2023](#) letter regarding Empire Offshore Wind, LLC (Empire Wind), 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 Empire Wind, Sunrise Wind, Revolution Wind, or Ocean Wind, it is unclear whether and how NMFS plans to address the issues raised, and respond to the recommendations provided, by the Commission in those previous letters. In the absence of responses to previous detailed comments, the Commission does not believe it would be prudent to provide an exhaustive letter regarding similar issues for the Dominion Energy 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 Dominion Energy proposed rule. The ongoing issues as they relate to the Dominion Energy rulemaking concern underestimated numbers of Level A and B harassment takes⁴ (including failing to round up to group size), incomplete SFV measurement requirements, insufficient mitigation and monitoring measures⁵, errors and omissions in the preamble to and the proposed rule, 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 of concern 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

Reference

Jones D.V., and D.R. Rees. 2022. Haul-out counts and photo-identification of pinnipeds in Chesapeake Bay and Eastern Shore, Virginia: 2020/2021 annual progress report. Final report. Prepared for U.S. Fleet Forces Command, Norfolk, Virginia. 51 pages.
https://www.navy-marinespeciesmonitoring.us/files/9716/4849/9188/Jones_and_Rees_2022_VA_pinniped_haul-out_surveys_FINALv2_28March2022.pdf

⁴ NMFS allocated the estimated number of pinniped takes equally for harbor and gray seals, even though harbor seals occur in much greater numbers than gray seals off Virginia (e.g., Jones and Rees 2022).

⁵ NMFS's proposed minimum visibility zone of 2.0 km is insufficient, since the Level A harassment zones for impact pile driving range from 3.2 to 5.7 km and the Level B harassment zones range from 5.5 to 6.2 km for North Atlantic right whales. Based on the size of the Level A and B harassment zones and requirements for other previous proposed rules (as well as NMFS's presumed observation distance of 1.5 km), a single monitoring vessel is insufficient.