

January 15, 2023

Karen Baker
Program Chief
Office of Renewable Energy
Bureau of Ocean Energy Management
45600 Woodland Road, VAM-OREP
Sterling, VA 20166

Via *regulations.gov*

Re: Empire Wind COP DEIS [Docket No. BOEM-2022-0053]

Dear Ms. Baker:

The Sabin Center for Climate Change Law (“Sabin Center”) submits these comments on the Bureau of Ocean Energy Management’s (BOEM) draft environmental impact statement (DEIS) for the construction and operations plan (COP) that Empire Offshore Wind, LLC (“Empire Wind”) submitted for its proposed offshore wind project (the “Project”)

The Sabin Center submits these comments for the limited purpose of encouraging BOEM to fully analyze: (1) the climate change risks facing the Project; and (2) the climate change risks facing marine mammals under the No Action Alternative, including, in particular, the extent to which climate change poses a population-level risk to marine mammals.

1. Climate Change Risks Facing the Project

To ensure that the Project is designed to withstand the increasing effects of climate change, BOEM should analyze the climate change risks facing the Project and the Project’s resilience to those risks. The Sabin Center recommends that BOEM incorporate this analysis into Section 2.1 of the DEIS as part of BOEM’s analysis of alternatives.

There is a legal basis for performing this analysis. In August 2016, the Council on Environmental Quality (CEQ) issued final guidance (the “2016 GHG Guidance”) instructing federal departments and agencies to consider the risks that climate change poses to projects.¹ The

¹ Memorandum from Christina Goldfuss, Council on Environmental Quality, for Heads of Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews 24 (Aug. 1, 2016), <https://perma.cc/BUQ9-99JH> (emphasis added); *see also* Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 81 Fed. Reg. 51,866 (Aug. 5, 2016), <https://www.govinfo.gov/content/pkg/FR-2016-08-05/pdf/2016-18620.pdf> (announcing issuance of

2016 GHG Guidance provides, in relevant part:

Climate change effects on the environment and **on the proposed project** should be considered in the analysis of a project considered vulnerable to the effects of climate change such as increasing sea level, drought, high intensity precipitation events, increased fire risk, or ecological change. In such cases, a NEPA review will provide relevant information that agencies can use to consider in the initial project design, as well as alternatives with preferable overall environmental outcomes and improved resilience to climate impacts. For example, an agency considering a proposed long-term development of transportation infrastructure on a coastal barrier island should take into account climate change effects on the environment and, as applicable, consequences of rebuilding where sea level rise and more intense storms will shorten the projected life of the project and change its effects on the environment.²

While the 2016 GHG Guidance was withdrawn in 2017,³ CEQ instructed agencies in 2021 to “consider all available tools and resources in assessing GHG emissions and climate change effects of their proposed actions, including, as appropriate and relevant, the 2016 GHG Guidance” until new guidance is finalized.⁴

More recently, on January 9, 2023, CEQ published interim guidance (“2023 Interim GHG Guidance”), which explicitly directs federal agencies to “consider the ways in which a changing climate may impact the proposed action and its reasonable alternatives, and change the action’s environmental effects over the lifetime of those effects.”⁵ The 2023 Interim GHG Guidance explains as follows:

Consideration of alternatives provides an agency decision maker the information needed to examine other possible approaches to a particular proposed action (including the no action alternative) that could alter environmental effects or the balance of factors considered

the 2016 Climate Guidance).

² *Id* (emphasis added).

³ Withdrawal of Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 82 Fed. Reg. 16,576, 16,576–16,577 (Apr. 5, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-04-05/pdf/2017-06770.pdf>.

⁴ Notice of Rescission of Draft Guidance, 86 Fed. Reg. 10,252, 10,252 (Feb. 19, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-02-19/pdf/2021-03355.pdf>.

⁵ Notice of Interim Guidance, 88 Fed. Reg. 1,196, 1,200 (Jan. 9, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-01-09/pdf/2023-00158.pdf>.

in making the decision. **Agencies make better informed decisions by comparing relevant GHG emissions, GHG emission reductions, and carbon sequestration potential across reasonable alternatives, assessing trade-offs with other environmental values, and evaluating the risks from or resilience to climate change inherent in a proposed action and its design.**⁶

The 2023 Interim GHG Guidance further explains that “[c]limate resilience and adaptation may be particularly relevant to the description of a proposed action, the alternatives analysis, and the description of environmental consequences.”⁷ Along the same lines, the 2023 Interim GHG Guidance provides that “[c]onsidering the effects of climate change on a proposed action, and reasonable alternatives (as well as the no-action alternative), also helps to develop potential mitigation measures to reduce climate risks and promote resilience and adaptation.”⁸

For a more detailed explanation of the legal basis for considering climate change impacts on a project and a catalog of relevant government guidance documents, please see Section 4.2 and Appendix 2 of the Sabin Center’s February 2022 paper on *Evaluating Climate Risk in NEPA Reviews: Current Practices and Recommendations for Reform*,⁹ which is attached hereto as Exhibit A. As the February 2022 paper explained, “[w]ithout first considering . . . how climate impacts will affect a project and the surrounding environment, agencies cannot possibly hope to make a decision that reflects the most ‘beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and intended consequences,’” within the meaning of 42 U.S.C. § 4331(b)(3), “and are thus at risk of violating their statutory responsibilities” under NEPA.¹⁰

Notably, BOEM has already performed the type of analysis we are recommending at an earlier stage of the review process, but only with respect to the construction and operation of one meteorological tower in the lease area. Specifically, in the Revised Environmental Assessment for *Commercial Wind Lease Issuance and Site Assessment Activities on the Atlantic Outer Continental Shelf Offshore New York* (2016), BOEM described the effects of climate change, including stronger storms and sea level rise, and concluded that “[t]hese ongoing effects will have no impact on a meteorological tower” during the five years in which the tower would be used.¹¹

⁶ *Id.* at 1,203-04 (emphasis added).

⁷ *Id.* at 1,208.

⁸ *Id.* at 1,209.

⁹ Romany M. Webb et al., *Evaluating Climate Risk in NEPA Reviews: Current Practices and Recommendations for Reform*, Sabin Center for Climate Change Law, Columbia Law School & Environmental Defense Fund (Feb. 2022), https://scholarship.law.columbia.edu/sabin_climate_change/185.

¹⁰ *Id.* at 23.

¹¹ See U.S. Department of the Interior, Bureau of Ocean Energy Management, *Commercial Wind Lease Issuance and Site Assessment Activities on the Atlantic Outer Continental Shelf*

This Revised Environmental Assessment is incorporated by reference in Section 1.4 of the DEIS.

The DEIS should provide a similar type of analysis with respect to climate change risks facing onshore and offshore components of the Project. In the DEIS, BOEM briefly addresses climate change risk in at least one instance, noting, at page 3.14-11, that one “office/administration building” connected to the Project “would have at-grade parking beneath the building in order to elevate the first-floor level to mitigate against possible flooding and sea level rise.” BOEM should consider the extent to which climate change induced sea level rise and flooding will affect other components of the Project.¹² BOEM should also consider other climate-related risks relevant to offshore wind energy projects, including, but not limited to, changes in the frequency of high-wind events, extreme storms, and frozen precipitation, as well as changes in wave action and shifts in wind turbulence intensity and direction.¹³ For more information on climate change risks facing wind energy facilities, the Sabin Center recommends the report titled *NYSERDA: Offshore Wind Climate Adaptation and Resilience Study* (February 2021), which is attached hereto as Exhibit B.¹⁴

2. Climate Change Risks Facing Marine Mammals Under the No Action Alternative

In Section 3.15.3 of the DEIS, which addresses “Impacts of the No Action Alternative on Marine Mammals,” BOEM should analyze the extent to which the impacts of climate change under the No Action Alternative pose a population-level threat to marine mammals. BOEM has performed precisely that type of analysis in most other EISs for offshore wind projects, including the final EIS for South Fork Wind (August 2021) and four draft EISs issued in connection with wind projects in 2022: Ocean Wind 1 (August 2022), Revolution Wind (August 2022), Sunrise Wind (December 2022), and Coastal Virginia Offshore Wind (December 2022). In those other analyses, BOEM has found that, under the No Action Alternative:

- “Impacts associated with climate change have the potential to reduce reproductive success and increase individual mortality and disease occurrence, which could have population-level effects.”¹⁵

Offshore New York Revised Environmental Assessment (2016) at 4-163, https://www.boem.gov/sites/default/files/renewable-energy-program/State-Activities/NY/NY_Revised_EA_FONSI.pdf.

¹² ICF International, Inc., *NYSERDA: Offshore Wind Climate Adaptation and Resilience Study* (Feb. 2021) 27, <https://www.nyserdera.ny.gov/-/media/Project/Nyserda/Files/Programs/Offshore-Wind/Offshore-Wind-Climate-Adaptation-and-Resilience-Study.pdf>.

¹³ *Id.* at 13-21.

¹⁴ *Id.*

¹⁵ U.S. Department of the Interior, Bureau of Ocean Energy Management, *Ocean Wind 1 Offshore Wind Farm Draft Environmental Impact Statement* (June 2022) at 3.15-11,

- “Climate-related impacts . . . could have population-level implications for some at-risk species.”¹⁶
- “[P]opulations that are already vulnerable, such NARW [North Atlantic Right Whale], may face increased risk of extinction as a consequence of climate change.”¹⁷

The DEIS for Empire Wind, however, does not contain any such assessment. An analysis of the likelihood of population-level impacts to marine mammals under the No Action Alternative is essential for BOEM to accurately establish the environmental baseline against which to evaluate impacts of the project. Since a large-scale buildout of wind projects (including offshore wind) is a central element of the U.S. effort to reduce greenhouse gas emissions, this analysis would also help readers assess what would happen to marine mammal populations if this large-scale buildout does not occur. Therefore, the Sabin Center recommends that BOEM perform such an analysis here, as it has done in evaluating similar projects.

Thank you for the opportunity to submit comments on the Project, and please feel free to contact the Sabin Center with any questions.

Sincerely,

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<https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/OceanWind1-DEIS-Vol1.pdf> [hereinafter “Ocean Wind 1 DEIS”]; U.S. Department of the Interior, Bureau of Ocean Energy Management, *Draft Environmental Impact Statement for the Sunrise Wind Project* (Dec. 2022) at 3-263, https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Sunrise%20Wind%20Draft%20Environmental%20Impact%20Statement_508.pdf.

¹⁶ U.S. Department of the Interior, Bureau of Ocean Energy Management, *Coastal Virginia Offshore Wind Commercial Project Draft Environmental Impact Statement* (Dec. 2022), at 3.15-12, https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/CVOW-C_DEIS_Volume%20I.pdf.

¹⁷ Ocean Wind 1 DEIS at 3.15-31; U.S. Department of the Interior, Bureau of Ocean Energy Management, *South Fork Wind Farm and South Fork Export Cable Project, Final Environmental Impact Statement* (August 2021) at 3-62, <https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/SFWF%20FEIS.pdf>; U.S. Department of the Interior, Bureau of Ocean Energy Management, *Revolution Wind Farm and Revolution Wind Export Cable Project Draft Environmental Impact Statement* (Sept. 2022) at 3.15-10, https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/Revolution_Wind_DEIS_Vol1_508.pdf.