

**BEFORE THE UNITED STATES SECRETARY OF COMMERCE**

Consistency Appeal of WesternGeco From an Objection by the North Carolina  
Division of Coastal Management

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**BRIEF OF THE STATE OF NORTH CAROLINA IN OPPOSITION TO  
WESTERNGECO'S REQUEST TO OVERRIDE CONSISTENCY DETERMINATION**

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The State of North Carolina, on behalf of itself and its Division of Coastal Management (“DCM”), submits that, for the following reasons, the Secretary of Commerce (“Secretary”) should decline to override DCM’s objection to the appellant’s consistency certification.

### **FACTS AND BACKGROUND**

On April 9, 2014, the appellant applied to the Bureau of Ocean Energy Management (“BOEM”) for a permit to conduct geophysical exploration on the outer continental shelf (“OCS”). CR Doc. 8 (application number E14-004).<sup>1</sup> The appellant’s planned survey area would span from roughly the southern border of South Carolina to the northern border of Virginia, encompassing an expanse off the coast of North Carolina. E.g., CR Doc. 8 at 7.

At least four other companies (Ion/GX Technology Corp., CGG Services (US) Inc., TGS, and Spectrum Geo, Inc. (hereinafter, the “other applicants”)) also applied around the same time for geophysical exploration permits to conduct similar activities. The proposed survey areas for the five companies, including the appellant’s, substantially overlap. SR Doc. K.

On August 20, 2014, DCM requested approval from the National Oceanic and Atmospheric Administration (“NOAA”) to review the applications of the appellant and the other applicants as “unlisted” activities pursuant to the Coastal Zone Management Act (“CZMA” or “the Act”), 16 U.S.C. § 1451 et seq. NCR Doc. 1. In support of its request, DCM submitted that the geophysical exploration activities proposed by the five companies (including the appellant) “may result in reasonably foreseeable effects to, among other coastal uses or resources, commercial and recreational fisheries.” NCR Doc. 2 at 6. NOAA approved this request. Id. at 8.

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<sup>1</sup> Please refer to the State’s letter of December 3, 2019 for an explanation of the format for record citations that the State has used in this brief.

Therefore, the five permit applicants were required to submit CZMA consistency certifications to North Carolina.

In early 2015, the State received consistency determinations from the other applicants, but not from the appellant. By mid-2015, the State had concurred with these certifications with conditions. SR Docs. A-D.

On January 6, 2017, BOEM denied the applications of all five companies. CR Doc. 9.

On April 28, 2017, the President issued Executive Order 13,795, titled “Implementing an America-First Offshore Energy Strategy.” 82 Fed. Reg. 20,815 (May 3, 2017). This order directed the Secretaries of Commerce and the Interior to take several steps to expedite exploration and development of the OCS, including areas off North Carolina’s coast. *Id.* at 20,815-17. The Secretary of the Interior followed three days later with Order No. 3350, which directed BOEM to “[e]xpedit[e] consideration of appealed, new, or resubmitted seismic permitting applications for the Atlantic.” SR Doc. L at 2. Pursuant to this order, BOEM wrote to the appellant that BOEM had “rescind[ed] the denial of permit application number E14-004 and resume[d] its evaluation.” CR Doc. 10 at 1. The other applicants received similar letters.

In December 2017, DCM informed the other applicants that “new information now available to the State raises additional, different, and significant concerns regarding harms to the State’s resources that may be caused by [the] proposed . . . surveys.” SR Docs. M-P at 6. All of this new information was developed after the State concurred in the other applicant’s consistency certifications. Therefore, the State requested that each of the other applicants submit supplemental consistency certifications. *Id.*; see also 15 C.F.R. § 930.66. DCM followed with a letter to BOEM requesting that BOEM not issue exploration permits until the other applicants

complied with the supplemental consistency process. SR Doc. F. To date, the other applicants have yet to submit supplemental consistency certifications.

In order for BOEM to issue the geophysical exploration permits at issue here, the companies not only need to comply with the CZMA's consistency process, the applicants also need approval from the National Marine Fisheries Service ("NMFS") pursuant to the Marine Mammal Protection Act to "take" marine mammals. See 16 U.S.C. § 1371(a)(5)(D). On November 30, 2018 NMFS issued Incidental Harassment Authorizations ("IHA") to all five companies under the Marine Mammal Protection Act. E.g., CR Doc. 3. Several entities (including North Carolina) sued the Secretary, NMFS, and others, alleging that the IHAs were erroneously issued. S.C. Coastal Conservation League v. Ross, No. 2:18-cv-3326-RMG (D.S.C. filed Dec. 11, 2018). That litigation remains pending in federal district court. BOEM has yet to take any further action on any of the pending applications for exploration permits.

Meanwhile, areas off the coast of North Carolina remain off limits to oil and gas development because they are not included in any leasing program under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 et seq. On June 28, 2017, BOEM initiated a process under OCSLA to develop a new program for the leasing of oil and gas rights in the OCS by issuing a request for information and comments. 82 Fed. Reg. 30,886 (July 3, 2017). On December 11, 2017, BOEM announced the availability of the Draft Proposed Program for the 2019-2024 Outer Continental Shelf Oil and Gas Leasing Program ("DPP"). 83 Fed. Reg. 829 (Jan. 8, 2018). The DPP proposes to open to leasing nearly all areas off the coast of the continental United States, including the area off North Carolina's coast. The Department of the Interior is still several steps from finalizing a lease plan. The DPP must be followed by a proposed program, a proposed final program, a full environmental impact statement, and final

program approval. Until a final lease plan is approved that includes leasing in the Atlantic OCS, development of oil and gas in the Atlantic cannot proceed no matter what any exploration reveals about those resources. The State has registered its opposition to the DPP. SR Docs. Q & R.

What that final lease plan will permit, if anything, is far from clear. On March 29, 2019, the United States District Court for the District of Alaska partially vacated Executive Order 13,795. Certain areas of the OCS had previously been withdrawn from consideration for leasing under section 12(a) of OCSLA, 43 U.S.C. § 1341(a). These withdrawals included areas off the North Carolina coast. See SR Doc. T. Section 5 of Executive Order 13,795 purported to revoke those withdrawals. The court concluded that section 5 violated OCSLA and therefore the court vacated section 5. An appeal is pending before the United States Court of Appeals for the Ninth Circuit. League of Conservation Voters v. Trump, 363 F. Supp. 3d 1013 (D. Alaska 2019), app. pending, No. 19-35461 (9th Cir.). The Department of the Interior is evaluating what impact the district court ruling may have on its leasing plans. See SR Doc. EEE at 3 ¶ 5; SR Doc. FFF. In the eight-plus months since that ruling, Interior has taken no formal public action to advance the lease program process.

Although the process for opening the Atlantic OCS to leasing remains in its infancy, the appellant submitted to DCM its consistency certification on March 12, 2019. NCR Doc. 3. NOAA concluded that the certification was minimally sufficient to trigger DCM's three-month review period. See SR Doc. H at 1; 15 C.F.R. §§ 930.54(e), .58, .60(c). Despite NOAA's view of the completeness of the application, DCM requested that the appellant submit further information to support its certification.<sup>2</sup> SR Docs. G & H.

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<sup>2</sup> The appellant's view that DCM "withdrew its request" for further information, Br. at 3, is incorrect and is contrary to the record.

DCM reviewed all of the materials submitted by the appellant (including materials submitted in response to DCM's request, see SR Doc. I), received public comment, conducted a public hearing, received input from relevant agencies, and consulted subject matter experts to receive input on the impacts of seismic testing. DCM also reviewed the new information that it requested that the other applicants address through supplemental consistency certifications. NCR Doc. 4 at 6-7. Based on all of the information before it, DCM concluded that the appellant's "proposal . . . is inconsistent with the relevant enforceable policies of North Carolina's approved coastal management program." Id. at 10. Therefore, DCM objected to the appellant's certification. This appeal followed.

#### **STANDARD OF REVIEW**

"The appellant bears the burden of submitting evidence in support of its appeal . . ." 15 C.F.R. § 930.127(f). In other words, "[a]n absence of adequate information in the record inures to the State's benefit because such an absence would prevent [the Secretary] from making the required findings" in support of the appellant. Appeal of Mobil Oil Exploration & Producing U.S. Inc. at 7 (June 20, 1995); see also 15 C.F.R. § 930.130(d) (requiring that the Secretary override a State objection only "when the information in the decision record supports this conclusion").

The appellant also "bears . . . the burden of persuasion." Id. § 930.127(f). For the appellant to prevail, the appellant must demonstrate by "a preponderance of the evidence . . . that the grounds for an override of the state's objection have been met." Appeal of Chevron U.S.A., Inc. at 6 (Jan. 8, 1993).

## ARGUMENT

### **I. THE APPELLANT CANNOT MEET ITS BURDEN TO WARRANT DISMISSAL ON PROCEDURAL GROUNDS.**

The appellant interposes two threshold arguments in an attempt to bar the Secretary from considering the State's position on the merits. The Secretary should refuse this invitation.

#### **A. DCM's objection fully complied with the statute and the rules.**

The appellant first alleges that the Secretary should override DCM's objection on procedural grounds because DCM was required to, but allegedly did not, "describe how the proposed activity is inconsistent with specific enforceable policies of the management program." Br. at 5 (quoting 15 C.F.R. § 930.63(b)).

"The precise question at issue is the content of the notice a state is required to provide in order to forestall a federal agency from conclusively presuming the state's concurrence." Millennium Pipeline Co., L.P. v. Gutierrez, 424 F. Supp. 2d 168, 175 (D.D.C. 2006). To this question, the United District Court for the District of Columbia has held that "[t]he statute requires only that the notice indicate whether 'the state concurs with or objects to the applicant's certification.'" Id. at 175-76 (quoting 16 U.S.C. § 1456(c)(3)(A)). "The phrase does not limit a state objection to a decision on the consistency issue itself or prevent a construction that a state may validly object to a certification on other grounds . . . ." Id. at 176.

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<sup>3</sup> As an initial matter, the Secretary lacks any authority "to override the State's objection on procedural grounds." 65 Fed. Reg. 77,124, 77,151/3 (Dec. 8, 2000). Under the Act, the question before the Secretary on appeal is not the propriety of the State's objection. The Secretary is only to determine whether, despite the State's objection, the project should proceed because it is, for example, consistent with the objectives of the Act. See 16 U.S.C. § 1456(c)(3)(A). The only other avenues provided by the statute for a project to proceed are that the State "concurs with . . . the applicant's certification" or "fails to furnish the required notification" in a timely manner. Id. Because the Secretary's "override . . . on procedural grounds" goes to neither of those provisions and, regardless, the Secretary's authority to hear appeals does not encompass those provisions, the Secretary lacks authority to "override" an objection "on procedural grounds." See 65 Fed. Reg. at 77,151/3. The State is aware that the Secretary has previously rejected the contention that he lacks authority to override objections on procedural grounds. The State is preserving the issue for judicial review.



The appellant reads the rules to be more restrictive than the unqualified terms of the statute. Because the statute does not limit the State's objection to "the consistency issue itself," id., the State would have satisfied the statute even if it had not "'describe[d] how the proposed activity is inconsistent with specific enforceable policies of the management program.'" See Br. at 5. DCM clearly objected to the certification. E.g., NCR 4 at 10 ("DCM has reviewed WesternGeco's consistency submission . . . and . . . objects to the proposal . . ."). Nothing more is required. The Secretary may not go behind the objection to evaluate its substantive sufficiency.

Regardless, the State clearly "'describe[d] how the proposed activity is inconsistent with specific enforceable policies of the management program,'" see Br. at 5, and therefore satisfied that requirement as well. The Secretary's review on this issue is narrow and procedural. The Secretary "need only determine that the State has cited policies that are part of its management program, and has explained how the proposed project will be inconsistent with those policies." Appeal of Henry Crosby at 3 n.2 (Dec. 29, 1992). The Secretary does not "determine the 'substantive' validity of the underlying state objection." Appeal of Chevron U.S.A. Inc. at 6 (Oct. 29, 1990). That is, the Secretary does not question "whether the state has correctly interpreted and applied the provisions of its Federally-approved coastal management program in determining whether a proposed activity was inconsistent with the state's coastal management program." Id.

The appellant does not contest that the policies cited by DCM are a part of the State's management program. The only issue is whether DCM "explained how the proposed project will be inconsistent with those policies." Henry Crosby at 3 n.2.

DCM made this showing. For example, DCM relied on 15A N.C. Admin. Code 7M .0401(a), which sets forth that "the development of energy facilities and energy resources shall

avoid significant adverse impact upon vital coastal resources or uses, public trust areas and public access rights.” DCM also applied 15A N.C. Admin. Code 7M .0801(a), which states: “It is hereby declared that no land or water use shall cause the degradation of water quality so as to impair traditional uses of the coastal waters.”<sup>4</sup> That rule clarifies that “commercial and recreational fishing” are traditional uses of coastal waters. Id.; see also NCR Doc. 4 at 5.

DCM then identified over two dozen interjurisdictional fish species that “spend at least a portion of their life cycle or migrate between the estuarine system, State ocean waters, and beyond three miles offshore in the Atlantic Ocean,” i.e. federal waters. NCR Doc. 4 at 8. Many of these are commercially and recreationally important species. Id. at 8-9. DCM documented the tremendous value in terms of both activity and dollars of these resources to the State. Id. at 9. The fish themselves are “vital coastal resources” and the fishing activities are “vital coastal . . . uses.” See 15A N.C. Admin. Code 7M .0401(a).

DCM relied on comments of the North Carolina Division of Marine Fisheries (“DMF”) and attached those comments to its objection. DMF discussed the various impacts to fish from “loud intermittent sounds” such as those produced by “seismic surveys.” NCR Doc. 4 at 15-17. DMF concluded that “behavioral studies have shown reduced catch rate [sic] lasting for several days after the termination of airgun use.” Id. at 15.

Based on DMF’s input, DCM found:

These sounds may interfere with the normal behavior of fish species and reduce their catchability due to displacement from areas of forage, spawning and refuge, and in the water column particularly in areas where they normally concentrate. The displacement of fish can affect overall abundance, thereby affecting

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<sup>4</sup> Under both federal and state law, “the man-induced alteration of the . . . physical [or] biological . . . integrity of water” are included within the term water “pollution.” 33 U.S.C. § 1362(19); see also N.C. Gen. Stat. § 143-213(19) (similar).

economically valuable fisheries and operations throughout the regional survey area.

Id. at 5. This and other supporting materials led DCM to conclude that “the proposed seismic surveys would have significant adverse impacts on fish and marine food webs, sensitive fish habitats, commercial, recreational, and subsistence fisheries, and the coastal economy. For these reasons, DCM finds that the proposed project is inconsistent with all of the enforceable policies listed herein.” Id. at 10.

The appellant complains that DCM merely listed enforceable policies and then listed a number of “concerns,” without connecting the latter to the former. Notice of Appeal at 5; see Br. at 4 (“incorporat[ing] and reassert[ing]” threshold procedural arguments from Notice of Appeal). This incorrectly characterizes DCM’s objection. DCM first identified the location of the activity and catalogued the applicable enforceable policies. NCR Doc. 4 at 2-5. As set forth above, DCM then detailed the impacts of the appellant’s proposed activity on coastal resources and uses, and these impacts precisely related back to the enforceable policies that DCM had previously set forth. NCR Doc. 4 at 5-7, 9, 12-17.

DCM did far more than what was required. In Appeal of Ass’n de Propietarios de los Indios, Inc. (Feb. 19, 1992), Puerto Rico “identifie[d] three public policies and objectives” and “assert[ed] that the activities are not in accordance with those public policies and objectives.” Id. at 6-7. The grounds provided were that the activities would be located in an estuarine reserve that supported “mangrove forests, 60 species of birds, and an endangered species” and would occur in a “coastal high hazard area.” Id. at 7. This skeletal discussion “contain[ed] sufficient detail to” show “[h]ow the proposed project [was] inconsistent with specific elements of the management program.” Id. 6-7 (quoting 15 C.F.R. § 930.96 (1992)). DCM went beyond what the Secretary

found sufficient in Ass'n de Proprietarios. See also Appeal of Exxon Co., U.S.A. at 6-7 (June 14, 1989) (finding that a two-sentence discussion of inconsistency was sufficient).

The appellant cites for support only 15 C.F.R. § 930.63(b), which requires that the State “describe how the proposed activity is inconsistent with specific enforceable policies of the management program.” Br. at 5. The appellant complains that DCM did not describe “a nexus linking its concerns regarding impacts of the proposed activity to its enforceable policies.” Id. The appellant’s argument raises form over substance. DCM set forth the relevant policies and then discussed impacts that are inconsistent with those policies. Whatever specific format or wording the appellant would have preferred DCM use is not required by the rule.

**B. The State’s position on any previous consistency certifications is irrelevant, and even if it were relevant, it is not a cause for dismissal.**

The appellant contends that the Secretary should override the State’s consistency objection because the State previously declined to object to allegedly similar activities. Br. at 5-7. This is an invalid basis for override that the Secretary has previously rejected.

The appellant fails to identify any statute, rule or other authority to support its position. The rules allow the Secretary to override an objection as a “threshold matter” “[i]f the State agency’s consistency objection is not in compliance with section 307 of the Act and the regulations contained in subparts D, E, F, or I of this part.” 15 C.F.R. § 930.129(b). The appellant has not contended that the fact that the State previously declined to object to other allegedly similar activities renders the objection out of compliance with section 307 or any of the cited rules. Therefore, the appellant’s argument lacks any basis in law.

This very argument was raised in Chevron (1993). In that matter, the appellant claimed that “because Florida found earlier oil and gas projects consistent with its coastal management program, and did not provide any justification for its change in position with regard to [the

appellant's] proposed project," the Secretary was required to override the State's objection. Id. at 3-4. That argument, the Secretary concluded, was "without merit" because it went to whether the State correctly determined that the activity was consistent with the State's coastal management program, which is not what the Secretary is reviewing in a consistency appeal. Id. at 4; see also Appeal of Jose R. Perez-Villamil at 3 n.6 (Nov. 20, 1991) (rejecting argument based on previous grants of consistency certification to other nearby projects); Mobil (1995) at 9-10 (reviewing objection regarding seventh well after state had concurred with certification regarding six other wells).<sup>5</sup>

The appellant argues that DCM's concurrence with previous certifications renders its objection to the appellant's certification "arbitrary and capricious." Br. at 7. That is exactly the problem with the appellant's position. The Secretary is not permitted to make that determination. Chevron (1990) at 4 (rejecting request to "set aside the state's determination as arbitrary" because such arguments are outside the scope of consistency appeals).

Even if the appellant's contention had some legal basis, it would fail on the facts. Well over a year prior to the appellant submitting its consistency certification to DCM, DCM requested that the other applicants submit supplemental certifications to address "new information now available to the State [that] raises additional, different, and significant concerns regarding harms to the State's resources that may be caused by [the] proposed . . . surveys." SR Docs. M-P at 6. Although the other applicants have not yet complied, the request made by DCM

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<sup>5</sup> The appellant also seems to suggest that the Secretary consider an alleged bias by the State against the appellant's proposed activity. Br. at 7. The Secretary has previously rejected the argument that he may consider a state's alleged bias. Appeal of Union Exploration Partners, Ltd. at 7-8 (Jan. 7, 1993); Appeal of Mobil Exploration & Producing U.S. Inc. at 9 (Jan. 7, 1993).

demonstrates DCM's view that the current state of science undermines the soundness of those prior certifications.<sup>6</sup>

For all of these reasons, the Secretary should reject the appellant's threshold arguments.

**II. THE ACTIVITY IS NOT CONSISTENT WITH THE OBJECTIVES OF THE CZMA.**

In order to prevail, the appellant must demonstrate that its "activity is consistent with the objectives of the [CZMA]." 16 U.S.C. § 1456(c)(3)(A). NOAA's rules require that the appellant must show that the activity "satisfies each of the following three requirements:"

(a) The activity furthers the national interest as articulated in § 302 or § 303 of the Act, in a significant or substantial manner,

(b) The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively[, and]

(c) There is no reasonable alternative which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program. . . .

15 C.F.R. § 930.121. The appellant has not made this showing.

**A. The activity does not further the national interest as articulated in § 302 or § 303 of the Act, in a significant or substantial manner.**

The first element requires the appellant to show that "[t]he activity furthers the national interest as articulated in § 302 or § 303 of the Act, in a significant or substantial manner." Id. Sections 302 and 303 include a number of policies and objectives. The Secretary's determination here is not simply to identify one or more policies or objectives that the project may further and ignore those of which the project may run afoul. Prior to 2001, the question of whether a project

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<sup>6</sup> The appellant's contention that the new information identified by DCM inadequately distinguishes the appellant's certification from the previous certifications, Br. at 7, fails because it goes to the merits of the State's decision. Regardless, the appellant is wrong regarding the lack of significance of this new information. See, e.g., pp. 28-30, infra.

furthered the national interest was a very low bar. The Secretary was required to find merely that the project “further[ed] one or more of the competing national objectives or purposes contained in sections 302 or 303 of the Act.” 15 C.F.R. § 930.121(a) (1999). This formulation was criticized as “a mere checklist approach resulting in the appellant automatically satisfying this element,” 65 Fed. Reg. at 77149/3, and was amended, effective 2001. The current language of the rule is more consistent with the Act, which requires that the activity be “consistent with the objectives of this chapter,” 16 U.S.C. § 1456(c)(3)(A), and not that it be consistent with only “one or more of the competing” objectives of the Act. Accordingly, the Secretary must take into account all of the relevant national interests identified in sections 302 and 303 to determine whether the proposed activity “further[s]” those “national interests.”

The appellant relies on subsections 302(a), (c), (f), and (j) and 303(2)(D). The appellant’s project does not “further[] the national interest” as articulated in these and other subsections.

***Subsection 302(a).*** Subsection 302(a) states a “national interest in the effective management, beneficial use, protection and development of the coastal zone.” 16 U.S.C. § 1451(a) (emphasis added). A related national interest is found in subsection 303(1), where Congress “declare[d] that is the national policy . . . to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations.” Id. § 1452(1).

None of the appellant’s activities will actually occur in “the coastal zone.” The project is not “beneficial use” or “development of the coastal zone.” Only the project’s effects will be felt in the coastal zone. The appellant contends that the project will further the national interest because it will have “minimal physical impact on the coastal zone.” See Br. at 10. Put another way, the project allegedly furthers the national interest because the alternative method of

exploration – drilling wells – is even worse for the coastal zone. See id. If this were the proper interpretation of the statute, then any project would further the national interest so long as the proponent could point to an alternative that was more damaging to the State’s coastal zone. That simply cannot be what Congress intended. Inflicting “minimal physical impact on the coastal zone,” Br. at 10, is not “protect[ing]” the coastal zone. It is only damaging it less, which is still quite the opposite of “preserv[ing], protect[ing], . . . and where possible, . . . restor[ing] or enhance[ing], the resources of the Nation’s coastal zone for this and succeeding generations.”

To the extent, if at all, that the project furthers the policies in subsection 302(a), it also contradicts subsection 302(a) at least in part and contradicts the policies in subsection 303(1) in full. Looking at subsections 302(a) and 303(1) in tandem, this project does not further the national interest.

**Subsection 302(j).** Subsection 302(j) provides that there is a “national objective of attaining a greater degree of energy self-sufficiency.” 16 U.S.C. § 1451(j). Nowhere does the appellant even attempt to show how its project would close any gap that remains on the Nation’s path to “energy self-sufficiency.” Cf. Appeal of Broadwater Energy LLC et al. at 12 n.73 (Apr. 13, 2009) (analyzing alternative energy supplies in order to assess “the national importance of” the proposed energy project). In fact, the United States will already be “energy self-sufficien[t]” by the time this appeal is resolved. The U.S. Energy Information Administration (“EIA”) projected in 2019 that the United States would become a net energy exporter in 2020 and would remain a net exporter of energy through 2050. SR Doc. S at 7; see, e.g., Appeal of AES Sparrows Point LNG, LLC et al. at 15 n.50 (June 26, 2008) (relying on the EIA’s Annual Energy Outlook). According to the EIA, the trade surplus for energy will not be marginal. For example, in 2025 – before any production from the Atlantic OCS would occur, see SR Doc. W at 40, 42 n.4, 49, 101,



106 (indicating lengthy period for development of new leases) – the EIA projects that the U.S. will export nearly fifty percent more energy than it imports. See SR Doc. U. The imbalance will peak in 2033 when exports will exceed imports by over seventy-five percent. In the out year – 2050 – the gap will still be over thirty percent.

To support its projections, the EIA estimated the technically recoverable resources from the Atlantic OCS. The EIA estimated that 3.3 billion barrels of crude oil and 31.7 trillion cubic feet of dry natural gas were technically recoverable from this region. SR Doc. V. at 2-3. These figures are less than, but generally consistent with, BOEM’s earlier estimates. SR Doc. W at 83.

The EIA reported that the U.S. became a net exporter of natural gas in 2017. SR Doc. S at 7. The agency projected that by 2025, U.S. exports of natural gas would outpace imports by nearly three to one. See SR Doc. U. According to the EIA, “U.S. dry natural gas production increased by 12% in 2018 to 28.5 billion cubic feet per day (Bcf/d), or 31.5 quadrillion Btu, reaching a new record high for the second year in a row.” SR Doc. X at 2; see also SR Doc. YY.

The EIA also projected that “the United States becomes a net exporter of petroleum liquids after 2020” based on increases in domestic crude oil production and a decline in consumption in the United States. SR Doc. S at 7; see also SR Doc. W at 42 (“The U.S. became a net exporter of petroleum products in 2011”). In fact, “U.S. crude oil production increased by 17% in 2018, setting a new record of nearly 11.0 million barrels per day (b/d).” SR Doc. X at 2. The vast majority – if not entirety – of this increase in production is from tight oil, not offshore. E.g., SR Doc. S at 28. In the reference case, the country remains a net exporter of petroleum for the next thirty years. Id. at 33.

The United States is now the global leader in both natural gas and petroleum production. E.g., SR Doc. X at 1. The Nation still imports crude oil. However, the amount of oil that would

be recoverable from off the State's coast is just a small fraction of what is likely available from other U.S. offshore locations, SR Doc. W at 87, and the United States remains a significant net energy exporter regardless.

The appellant touts that Executive Order 13,795 reiterated that “[i]ncreased domestic energy production on Federal lands and waters . . . reduces reliance on imported energy.” Br. at 13 (quoting 82 Fed. Reg. at 20,815). Whatever national interest the broad generalizations from this executive order describe are irrelevant because the executive order was not “articulated in § 302 or § 303 of the Act,” 15 C.F.R. § 930.121(a), as required by the consistency appeal rules. Regardless, the abstract proposition that increased energy production reduces reliance on imported energy has no applicability to a Nation that already is a net exporter of energy.

Only two years after the President signed Executive Order 13,795, the White House hailed the arrival of “American [e]nergy [d]ominance.” See SR Doc. Y at 1. The White House noted its “work[] to open up new export opportunities for American energy producers” and the recent significant increases in exports of crude oil, natural gas, and coal. Id. at 3. Absent from this White House statement was any mention of current or projected offshore production. Even BOEM has recognized that newly-developed OCS resources would only “further improve the trade balance” in energy that would already be “in[] balance” by the time any production occurred in the area to be surveyed by the appellant. SR Doc. W at 42. The appellant’s exploration project cannot further any “national objective of attaining a greater degree of energy self-sufficiency” because that objective has already been achieved.

***Subsections 302(c) and (f), and 303(2)(D).*** Subsections 303(c) and (f) do not state any “national interest.” The term “national interest” as used in section 930.121 relates to “the policies and objectives of the Act.” 65 Fed. Reg. at 77,150/2. Subsections 302(c) and (f) are statements of

fact, not policy or objective. For example, subsection (c) states that “[t]he increasing and competing demands upon the lands and waters of our coastal zone . . . have resulted in” certain adverse effects. This indicates a current state, but does not indicate what Congress believed ought to be done about this current state. It is a factual finding, not a policy or objective.

Simply because NOAA’s rules reference “the national interest as articulated in § 302 or § 303 of the Act” does not transform every corner of sections 302 and 303 into statements of the “national interest.” Section 302 itself is titled “Congressional findings,” which contrasts with section 303’s heading: “Congressional declaration of policy.” Moreover, although subsections 302(a) and (j) explicitly state a “national interest” and a “national objective,” respectively, subsections 302(c) and (f) do not use similar language. Subsections 302(c) and (f) do not state any “national interest.” The appellant improperly relied on subsections 302(c) and (f).

The appellant’s reliance on subsection 303(2)(D) is also problematic ab initio. The appellant contends that this subsection creates a national interest in prioritizing certain energy facilities and that this provision applies because its activities are “one of the first steps in the siting process.” Id. This is incorrect. Section 303(2)(D) announces a “national policy . . . to encourage and assist the states” to “develop[] and implement[]” their own coastal “management programs” which, in turn, “should . . . provide for . . . priority consideration” for major energy facilities. 16 U.S.C. § 1452(2)(D). The national interest is in creating a state planning process, not in directly prioritizing certain development.

Even if the appellant is correct that this subsection creates a “national interest” in prioritizing consideration for certain facilities, the appellant’s project is not one of those facilities that would receive priority consideration. Assuming for the sake of argument that the appellant’s project is an energy facility, subsection 303(2)(D) only applies to “major” energy facilities. The

appellant contends that its project is an energy facility, but conspicuously fails even call it a “major” energy facility, much less attempt to support such a conclusion. Br. at 10 & n.36 (arguing only that the project is an “energy facility”). Thus, the appellant is incorrect that its survey is “just the type of energy-related coastal use contemplated and prioritized” by the Act. Br. at 12. If any energy projects are “prioritized,” it is “major facilities related to . . . energy,” which does not include the appellant’s project. Indeed, the Secretary has issued several previous decisions regarding exploration activities but the appellant cites no decision in which the Secretary found exploration activities to be a “major facilit[y].” See Br. at 10. Therefore, subsection 303(2)(D) does not state any applicable “national interest.”

If the Secretary accepts the appellant’s argument that subsections 302(c) and (f) and 303(2)(D) state “the national interest,” then the Secretary must also accept that certain other provisions also state the national interest. Subsection 302(d) provides that “[t]he habitat areas of the coastal zone, and the fish, shellfish, other living marine resources, and wildlife therein, are ecologically fragile and consequently extremely vulnerable to destruction by man’s alterations.” Subsection 303(2)(A) discusses the “protection of natural resources . . . and fish and wildlife . . . within the coastal zone.” Subsection 303(2)(C) provides for “the management of coastal development . . . to protect natural resources and existing uses of [coastal] waters.” As discussed above, the proposed project will adversely affect a number of interjurisdictional fish species, which are resources of the coastal zone. See p. 8, supra. Congress has determined that these species are “ecologically fragile” and “extremely vulnerable to destruction by man’s alterations.” 16 U.S.C. § 1451(d). The appellant protests that it has struck “the Congressionally-mandated balance between conservation and development of coastal resources.” Br. at 12. But it has not, because it would not “develop[] . . . coastal resources” at all. It only degrades them. The

appellant would only further its own corporate interest at the expense of the coastal zone, and not, as the rules require, “further[] the national interest.” See 15 C.F.R. § 930.121(a).

*Significant or substantial.* “Not only must the Project further the national interest as articulated in Sections 302 or 303 of the CZMA, it must do so in a significant or substantial manner.” Broadwater Energy at 10 (footnote omitted); see also 15 C.F.R. § 930.121(a). The “intent” of NOAA in adding the phrase “significant or substantial” to the rule was to “emphasiz[e] the need for an appellant to demonstrate that the proposed activity is of such import to the national goals for coastal resource management that, despite the will of State and local government decision makers, the Secretary of Commerce should independently review the proposed activity to determine its consistency with the CZMA.” 65 Fed. Reg. at 77,150/2. The appellant must make this demonstration “on the evidence in the decision record.” Appeal of Weaver’s Cove Energy, L.L.C. et al. at 11 (June 26, 2008).

In order for the activity to “significant[ly]” advance the national interest of the Act, it must do so in an “important, notable, [or] valuable” way. 65 Fed. Reg. at 77,150/2 (quotation marks omitted). For a project to “substantial[ly]” further the Act’s interests, it “must be more than related to one of the category of objectives described in §§ 302 or 303 – it must contribute to the national achievement of those objectives in an important way or to a degree that has a value or impact on a national scale.” Id.

In support of the project’s “significan[ce],” the appellant avers that the project “has the potential to increase domestic resources on a national scale and to obviate any further exploration activities where resources are absent.” The appellant also contends that without its data, the country will waste “time and energy . . . on policy debates” and the industry may waste “time and investment” exploring areas where “resources are not present.” Br. at 13. None of this meets

the regulatory standard. Whether the project is an initial step in a lengthy and uncertain process that, years from now, could “increase domestic resources on a national scale” is irrelevant because the appellant has not shown that an increase in domestic resources is needed to meet any national interest identified in the Act. The record, as discussed above, indicates just the opposite.

The appellant also fails to show how its data would help to lessen the amount of time spent on policy debates. The appellant never indicates that it will make its data publicly available. Even if it would, the appellant does not indicate what policies that are being debated would be resolved by its data, particularly considering that the appellant could be one of many companies that generates data for the same region. See SR Doc. K.

To the extent that the industry may waste “time and investment” exploring areas where “resources are not present,” Br. at 13, the appellant fails to provide any measure of this alleged outcome. The appellant has the burden of proffering evidence to support its case. A bald assertion that “time and investment” of some unspecified quantity is necessarily “significant” on a national scale fails to meet that burden. Moreover, the appellant identifies no “national interest” in the Act in optimizing the business of OCS development.

The only<sup>7</sup> argument that the appellant makes that its project “substantial[ly]” furthers the national interest is that “[t]he Secretary has found that proposed oil and gas exploratory activities have furthered the national interests as articulated in Sections 302 and 303 in every CZMA appeal involving such activities to date.” Br. at 11 (footnote omitted). However, all of those decisions pre-date the change in the rules. All of those decisions relied on the less rigorous “one or more of” language in the pre-2000 rule and are therefore unpersuasive. More to the appellant’s

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<sup>7</sup> The argument that immediately follows in the appellant’s brief appears to relate only to the contention that the project “further[s] the national interest,” Br. at 12, but does not appear to relate to the “significant or substantial” part of section 930.121(a).

point, all of these decisions pre-date the addition of the “significant or substantial” requirement to the regulations. Therefore, although the Secretary may have found in those decisions that exploration projects furthered the national interest, he did not find that they significantly or substantially furthered that interest.

Further, all of those decisions occurred before the United States became a net exporter of energy and so are factually inapplicable. To this point, NOAA indicated in 2006 that it could not conclude that it would “always be the case or [would] be the case in any particular situation” that “oil and gas activities . . . further the national interest in a significant or substantial manner.” 71 Fed. Reg. 788, 803/3 (Jan. 5, 2006). NOAA reiterated that “all Secretarial appeal decisions are made on a case-by-case basis and rely on the record developed for that case.” *Id.* Therefore, the appellant cannot simply rely on the outcomes of the Secretary’s previous decisions on this issue.

Finally, the collection of data itself is not a goal. It is only a means to an end. And it is only “one of the first steps,” Br. at 10, in a process of several considerably complex steps. As noted above, the area to be surveyed is currently off limits to development, and the federal government’s process to open the area to leasing is lingering at a very early stage. The appellant cannot sustain the position that one of five proposed surveys, representing the earliest steps of a lengthy process that may not even advance past the initial stages is somehow “significant or substantial” and requires that the Secretary override a State’s objection.<sup>8</sup> This is particularly so,

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<sup>8</sup> The State is aware that some surveys of the OCS are conducted under exclusive contracts. In the exclusive contract model, the survey company contracts with a single firm to provide only that firm with its survey data. Under the open contract model, a survey company conducts the survey and then sells the data to whichever firms choose to buy it.

The record does not show which contracting model any of the five surveys discussed herein are using. If exclusive contracts are being used in the Atlantic, the appellant may contend that although four other companies are also seeking to survey the area, those data would only be shared with four firms, which allegedly could negatively impact subsequent development of the resource. This argument would fail for at least two reasons. First, there is no legal requirement that the industry arrange its relationships this way. Indeed, the industry trend is away from the exclusive contract model. Industry participants should not be permitted to manufacture a significant contribution to a

considering that other companies may make similar data available. As such, the appellant's project would not significantly or substantially further any national interest of the Act. 15 C.F.R. § 930.121(a).

**B. Any national interest that may be furthered by the activity does not outweigh the adverse coastal effects, when those effects are considered separately or cumulatively.**

For the appellant to succeed, it must show by a preponderance of the evidence that any national interest in the project outweighs its adverse coastal effects. E.g., Broadwater Energy at 13. The record establishes that the appellant cannot meet its burden.

*Direct, Indirect, and Cumulative Adverse Coastal Effects.* The proposed project will cause several significant “reasonably foreseeable . . . direct . . . and indirect (cumulative and secondary) effects” on the State’s “coastal use[s] or resource[s].” 15 C.F.R. § 930.11(g).

*First*, the proposed activity will adversely affect the State’s commercial and recreational fishing industries. See id. § 930.11(b). The coastal fishing industry in North Carolina, including both commercial and recreational fishing, is estimated to support almost 50,000 jobs, create over \$1.5 billion in yearly income, and account for \$3.9 billion in sales annually. NCR Doc. 4 at 12. Seismic sounds may interfere with the normal behavior of fish species and reduce their catchability due to displacement from areas of forage, spawning, and refuge, and affect overall abundance, thereby affecting economically valuable fisheries and operations throughout the survey area. Id. at 5, 14. BOEM acknowledged, when studying the effects of the proposed seismic surveys, that airguns may result in changes to “behavioral responses, masking of

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national interest of the Act simply by contracting away their rights. Second, nothing in the record demonstrates the added advantage to the development of the resource of having five sets of data instead of four. Therefore, the appellant has not demonstrated that the fifth survey would “further[] the national interest . . . in a significant . . . manner,” instead of furthering the national interest in merely an incremental or marginal manner.



biologically important sounds, temporary hearing loss, and physiological effects.” CR Doc. 23 at 18. BOEM also found that the sounds generated by airguns could cause “short-term, localized reduction in fish catch.” *Id.* at 20. It also documented that vessel exclusion zones would interrupt fishing activities. BOEM did not consider these effects to be negligible, and it noted similar impacts to recreational fisheries. *Id.*

As discussed above, North Carolina is home to over two dozen interjurisdictional fish species which spend time in both state and federal waters. *See* p. 8, *supra*; NCR Doc. 4 at 8; 15 C.F.R. § 930.11(b). Many of these fish are commercially and recreationally important, e.g., summer flounder, snapper-grouper complex. *E.g.*, NCR Doc. 4 at 28 tbl. 2. The record demonstrates that the proposed survey will affect these resources and uses.

*Second*, the survey will adversely affect biological resources of the coastal zone. “The sounds that seismic arrays produce are among the loudest that humans regularly introduce into the ocean . . . .” SR Doc. Z at 5 ¶ 10. “[A]coustic energy from seismic airgun surveys can propagate hundreds to thousands of kilometers in marine environments.” *Id.* at 15 ¶ 35. The sound “has a number of characteristics that heighten its potential to harm marine fishes and invertebrates. . . . includ[ing] its frequency, output and amplitude.” SR Doc. AA at 7 ¶ 18.

Numerous studies have described adverse effects from seismic sounds to marine mammals,<sup>9</sup> fish, and invertebrates, including injury and death. *E.g.*, SR Docs. Z at 4-5 ¶¶ 8-9;

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<sup>9</sup> “North Carolina has a higher diversity of marine mammals than anywhere along the east coast of the United States or the Gulf of Mexico . . . .” SR Doc. PP at 4. Marine mammals in the North Carolina coastal zone include dolphins, seals, porpoises, whales, and manatee. SR Doc. QQ at 80-83, 89-123; SR Doc. RR. North Carolina, in cooperation with other state, private and federal entities, “participates in various efforts to protect [marine mammals] as an integral part of our coastal ecosystem.” SR Doc. PP at 5; *see also* SR Doc. SS. The harm caused by seismic surveys “undermines state efforts to protect and foster the growth of our marine mammal populations.” SR Doc. PP at 5. In addition, the marine mammals present in and near the State’s coastal zone support North Carolina-based tourism and are an object of important scientific research in the State. *E.g.*, SR Docs. TT, UU, VV, Z at 1 ¶ 2, DD at 1-16 ¶¶ 2-44, EE at 6 ¶ 15, and SS at 2-3 ¶¶ 3-4. As a result, harm to these marine mammals will result in adverse coastal effects for the State.

BB at 5 ¶¶ 11, 13; AA at 4, 10 ¶¶ 9, 28; CC at 2, 5 ¶¶ 4, 10; DD at 10-11 ¶ 29 EE at 2-3 ¶¶ 4-5; FF at 12-15 ¶¶ 27-32; GG at 4-6 ¶¶ 8-10; HH at 5-7 ¶¶ 9-10; II at 2-4 ¶¶ 4-8; and JJ - NN. For example, studies have demonstrated increased mortality of scallops and compromised immune function of spiny lobsters. SR Docs. KK, JJ. These studies indicate that seismic surveying may negatively affect “North Carolina’s molluscan bivalve and crustacean fisheries,” including the State’s hard blue crab fishery which is the State’s “highest revenue-generating fishery, consistently grossing over \$20 million in ex-vessel value.” SR Doc. G at 4. Clams and scallops are particularly vulnerable to the effects of repeated exposure due to their sessile nature. *Id.* DMF also identified potential decreases in zooplankton having “cascading impacts” on the food web, causing further impacts to the survival of individuals or populations. NCR Doc. 4 at 17.

*Third*, the proposed activity will cause space and use conflicts. As BOEM has found, seismic surveying will interrupt commercial fishing activities by damaging bottom founded fishing gear and interfering with other settling fishing gear, and may divert recreational fishing away from preferred fishing locations. CR Doc. 23 at 20, 115. Survey activities are also likely to interfere with some of the dozens of fishing tournaments hosted each year off the North Carolina coast, resulting in significant lost revenues. See NCR Doc. 4 at 17.

The appellant notes that it has agreed to a mitigation condition that the State imposed on the other applicants over four and a half years ago to “avoid, minimize, and mitigate” use

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For example, beaked whales are present year-round in the Cape Hatteras region, SR Doc. EE at 4-5 ¶10, and have been observed in the North Carolina coastal zone. *E.g.*, SR Doc. QQ at 111. These whales have a particular vulnerability to anthropogenic acoustic impacts given their demonstrated site fidelity. SR Doc. SS at 26; SR Doc. EE at 4 ¶ 7. Because beaked whales have “limited home ranges,” “extended periods of disturbance would have adverse consequences” by displacing them “from their core habitat.” SR Doc. DD at 15 ¶ 40. “[T]here is strong reason for concern that seismic survey sounds could trigger behavioral reactions that lead to serious injury or death to beaked whales.” SR Doc. HH at 5-6 ¶ 9.

conflicts. Br. at 20; e.g., SR Doc. A at 3. As discussed above, the Secretary does not, in this appeal, review the State's objection for consistency with previous concurrences. Moreover, the appellant fails to demonstrate that this condition would avoid impacts to catch rates, particularly given the sheer volume of commercial and recreational fishing, diving, and other activities in these waters. See, e.g., NCR Doc. 4 at 5-6, 9, 12-18, 21-27 tbl. 1.

*Fourth*, the proposed activity will harm endangered and threatened species. See 15 CFR § 930.11(b); Sparrows Point at 31. The North American right whale has enjoyed a long connection to the State's coastal zone, including as an historical fishery resource, a basis for tourism, and an object of important local scientific research. E.g., SR Docs. PP at 4, TT, UU, VV, WW, Z at 1 ¶ 2, DD at 1-16 ¶¶ 2-44, EE at 6 ¶ 15, and SS at 2-3 ¶¶ 3-4. This critically endangered species numbers below 500 individuals and its future is in serious doubt. SR Doc. SS at 20-21, 23-26. The mitigation measures in the IHAs are insufficient to prevent harm given that of the 188 sightings from 1998-2015, 22 percent occurred in areas not protected from exposure to seismic activity. This represents a minimum of 8.4% of the endangered population. Id. at 26. Airgun noise is "a major potential stressor for right whales because it travels across very large distances of ocean and occupies the same acoustic frequencies that the whales depend on for most of their vital functions." SR Doc. FF at 12 ¶¶ 27.

In addition, the Southeast U.S. is one of the most important nesting sites for loggerhead sea turtles worldwide. SR Doc. XX at 20. The Northwest Atlantic Distinct Population Segment of loggerhead sea turtles received extensive critical habitat protection along the beaches of North Carolina in 2014. 79 Fed. Reg. 39,756 (July 10, 2014). Preliminary data from this year indicate that sea turtles laid 2,359 nests along North Carolina's coastline. SR Doc. ZZ. As BOEM observed when assessing the impacts of seismic surveying in the Atlantic, "breeding adults,

nesting adult females, and hatchlings could be exposed to airgun seismic survey-related sound exposures at levels of 180 dB re 1  $\mu$ Pa or greater. Potential impacts could include auditory injuries or behavioral avoidance that interferes with nesting activities.” CR Doc. 23 at 109. Aside from acoustic impacts, sea turtles could also be injured by seismic surveying through an increase in vessel traffic and accidental fuel discharges. *Id.* at 110-11.

*Fifth*, these coastal effects would be magnified by the cumulative impacts of other seismic surveys. Cumulative effects are “the effects of an objected-to activity when added to the baseline of other past, present, and reasonably foreseeable future activities in the area of, and adjacent to, the coastal zone in which the objected-to activity is likely to contribute to adverse effects on the natural resources of the coastal zone.” Sparrows Point at 39 (citation omitted).

Currently, the appellant is one of five companies proposing to conduct seismic airgun exploration for oil and gas off North Carolina’s coast. The five reasonably foreseeable surveys would cover a large overlapping area off the State’s coast. All of these surveys would likely occur close in time. See, e.g., 83 Fed. Reg. 63,268, 63,268/3 (Dec. 7, 2018). “The noise produced by these five large-scale surveys would be temporally and spatially pervasive within the region.” SR Doc. AA at 14 ¶ 42. This “saturat[ion] [of] near-shore habitats with airgun noise” will cause “mortality, developmental impairment, decrements in vital function and other harms” to “both coastal and offshore species.” *Id.*

Through multipath propagation and reverberation “sounds emanating from seismic airguns . . . lead to a continuous increase in the sound level” for “months at a time.” *Id.* at 7 ¶¶ 21-22. An expert witness has vividly depicted both the aerial extent of the sound field from a single vessel and the lack of any “‘quiet’ period between the pulses.” SR Doc. Z at 15-18 ¶¶ 36-39. A composite map showing the scale and concentration of seismic airgun use for the five

applicants was created based on information in the IHA application submitted by each company. SR Doc. AAA at 2 (¶¶ 3-4), 5. In the survey area, several simultaneously operating vessels would cover close to 90,000 trackline miles over roughly 850 survey days in less than two years. SR Doc. Z at 21 ¶ 48. The interwoven tracklines combined with the widespread and continuous noise created by each vessel demonstrate the compounding effect of multiple surveys.

This chronic disturbance and resulting chronic stress would magnify the effects of the appellant's activity. "Chronic stress in all mammals . . . reduces immune and endocrine function, negatively affecting reproductive fitness and leaving them vulnerable to disease." SR Doc. FF at 14 ¶ 30. For example, long-term "repeated exposure to constant seismic airgun noise will induce and increase chronic physiological stress in right whales." Id. This is of particular concern because "[m]any of the adult female[]" right whales even now "have health scores that are just above the threshold of reproductive success." Id. This is in addition to the many other impacts of widespread airgun use on mammals. SR Doc. Z at 7-14 ¶¶ 19-34; SR Doc. BB at 2-7 ¶¶ 4-13.

The surveys will focus in part on a location off North Carolina that is favored by beaked whales. Beaked whales "are particularly vulnerable to the cumulative adverse effects of disturbance." SR Doc. EE at 5 ¶ 12. For this species, it is irrelevant that the surveys would not "co-occur in time and space." Id. at 4 ¶ 9. "What matters is repeated exposure," as will occur with multiple overlapping surveys. Id. Beaked whales are very highly sensitive to acoustic disturbances and exhibit extreme reactions to anthropogenic sound. SR Doc. HH at 3 ¶ 8. "[T]here is strong reason for concern that seismic survey sounds could trigger behavioral reactions that lead to serious injury or death to beaked whales." Id. at 5 ¶ 9.

The appellant alleges a lack of harm, in part, because "thousands of marine seismic surveys have occurred since the 1950s demonstrate[ing] that fisheries and seismic activities can

and do coexist.” Br at 14-15. Simply because seismic surveys have occurred does not demonstrate lack of harm. The current research on which the State continues to rely points to environmental impacts that were not identified until recently. See SR Doc. DDD at 3 ¶ 5.

***The appellant’s critique of recent studies.*** Several recent studies support the reasonably foreseeable adverse coastal effects discussed above. SR Doc. BB at 2-5. In summary, these studies demonstrate that the proposed seismic survey activities directly affect fish “by masking biologically-relevant sounds and altering normal behaviors, and can possibly affect the survival of individuals or populations.” SR Doc. G at 4. The research supports that “displacement of fish could change distribution of fish in the water column, reduce catches, and affect economically valuable fisheries and operations.” Id. Additionally, the research considers changes in zooplankton abundance and mortality from seismic activities that “could result in cascading impacts on various trop[h]ic levels within the food chain.” Id.

The appellant focuses on the two studies by McCauley et al. and Paxton et al. Br. at 17-20. The McCauley study has been recognized as a “critically important paper on the effect of seismic air guns on zooplankton” based on its observation of a “greater than 50% reduction in abundance in over 58% of all zooplankton taxa, and . . . significantly more (two to three times) dead zooplankton in . . . tow[ed] [nets] after exposure.” See SR Doc. SS at 26-27. The study “clearly point[s] to an unrecognized and fundamentally destructive impact of seismic [exploration] on the marine ecosystem” because “[z]ooplankton form the base of the food chain for cetaceans.” Id. at 27 (emphasis in original).

The appellant alleges certain “shortcomings in McCauley’s methodology” in an attempt to discount the study’s significance. Br. at 17-18. “[W]hile the study has limitations, these critiques do not negate its results.” SR Doc. CC at 3 ¶ 9. Indeed, contrary to the appellant’s

avertment, NMFS did not dismiss McCauley’s study as “unvalidated.” Br. at 18. Instead, citing McCauley, it concluded that “recent evidence indicates that seismic airguns may lead to a significant reduction in zooplankton,” CR Doc. 7 at 78 (emphasis added), and that industry’s “dismissal of the study seems to reflect an unsubstantiated opinion,” 83 Fed. Reg. at 63,280/2.

The appellant also substantially mischaracterizes the McCauley study. McCauley did not “use[]” a “3-D survey.” Br. at 18; see also id. at 17 (referencing a “3-D seismic survey”). The study demonstrated a “significant reduction in zooplankton,” CR Doc. 7 at 78 , using a single airgun – one that is “substantially smaller” than some of those that are used for 2-D surveys such as the appellant’s. SR Doc. AA at 14 ¶ 40; SR Doc. NN at 6. Further, 2-D surveys typically use eighteen to thirty-six airguns compared to the single gun used by McCauley. See CR Doc. 27 at 48. McCauley’s results underestimate the impacts from projects such as the appellant’s. SR Doc. AA at 14-15 ¶ 40.

McCauley’s critics “appear to concede that large-scale effects” to zooplankton from seismic exploration “might well occur.” SR Doc. BBB at 55. However, the appellant contends that “ocean circulation” will “greatly reduce[]” these impacts. Br. at 17. At the least, the ecosystem would suffer “a temporary disruption in the food supply,” and the killing of larval forms, which would have longer term impacts on the adult zooplankton population. SR Doc. BBB at 55.

The appellant’s attempt to undermine McCauley by reference to the later work of Richardson et al. is not persuasive. Br at 17. Even Richardson acknowledged that McCauley “was the first large-scale study of the impacts of seismic activity on zooplankton” and that “[i]t overturn[ed] current thinking that impacts on zooplankton are minimal.” SR Doc. CCC at 22 (emphasis removed; quoting Richardson et al. (2017)).

Regarding the study by Paxton et al., the appellant contends that “Paxton does not provide data that can be used to infer that fish are displaced or are harmed by seismic surveys.” Br at 19. The Paxton study documented “a near complete abandonment of the reef habitat,” SR Doc. DDD at 27, “during exposure to seismic noise, . . . suggesting a multi-species response to airgun noise,” SR Doc. MM at 5. The appellant is correct that Paxton does not provide evidence of long-term effects, but it does not refute those effects either. SR Doc. DDD at 28; see also id. at 27-28 (responding to criticisms of Paxton’s study). Paxton’s reef study is particularly relevant because it studied an area off the North Carolina coast designated as Essential Fish Habitat. SR Doc. CCC at 23.

*The proposed project fails the balancing test.* As demonstrated, the appellant’s project fails to further the national interest identified in the Act. On the other hand, the impacts from seismic exploration have been documented, including by BOEM. These impacts will occur in both federal waters and in the State’s coastal zone. Therefore, the appellant cannot show that the project’s contribution to the national interest “outweighs the activity’s adverse coastal effects.” 15 C.F.R. § 930.121(b). Even if, for the sake of argument only, the activity’s coastal impacts are minimal and the project has some minimal contribution to a statutorily-recognized national interest, the project’s minimal contribution to the national interest still would fail to “outweigh[] the activity’s adverse coastal effects.”<sup>10</sup>

## **CONCLUSION**

For these reasons, the Secretary should not override the State’s consistency objection.

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<sup>10</sup> The State does not contend in this proceeding that there is any “reasonable alternative” that “would permit the activity to be conducted in a manner consistent with the enforceable policies” of its coastal management program. See 15 C.F.R. § 930.121(c); Br. at 22.



Respectfully submitted,

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December 3, 2019

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing Brief of the State of North Carolina in Opposition to WesternGeco's Request to Override Consistency Determination has been served on all parties and/or counsel by electronic mail (by agreement of the parties) to the addresses shown below:

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- U . Total\_Energy\_Supply\_Disposition\_and\_Price\_Summary.csv (downloaded from U.S. Energy Information Admin. website on Nov. 11, 2012)
- V . U.S. Energy Information Admin., Oil & Gas Supply Module (Jan. 2019)
- W . Bureau of Ocean Energy Mgmt., 2019-2024 Natl. Outer Continental Shelf Oil & Gas Leasing Draft Proposed Program (Jan. 2018)
- X . U.S. Energy Information Admin., "The U.S. leads global petroleum and natural gas production with record growth in 2018" (Aug. 20, 2019)

- Y . “Pres. Donald J. Trump Is Unleashing Amer. Energy Dominance” (May 14, 2019)
- Z . Expert Declaration of Douglas Nowacek, Ph.D., submitted in S.C. Coastal Conservation League et al. v. Ross et al., No. 2:18-cv-3326-RMG (D.S.C. Feb. 20, 2019) (ECF 124-3)
- AA . Expert Declaration of Dr. Aaron Rice, submitted in S.C. Coastal Conservation League et al. v. Ross et al., No. 2:18-cv-3326-RMG (D.S.C. Feb. 20, 2019) (ECF 124-5)
- BB . Supplemental Expert Declaration of Douglas Nowacek, Ph.D., submitted in S.C. Coastal Conservation League et al. v. Ross et al., No. 2:18-cv-3326-RMG (D.S.C. Mar. 25, 2019) (ECF 233-2)
- CC . Supplemental Expert Declaration of Dr. Aaron Rice, submitted in S.C. Coastal Conservation League et al. v. Ross et al., No. 2:18-cv-3326-RMG (D.S.C. Mar. 25, 2019) (ECF 233-4)
- DD . Expert Declaration of Dr. Andrew J. Read, submitted in S.C. Coastal Conservation League et al. v. Ross et al., No. 2:18-cv-3326-RMG (D.S.C. Feb. 20, 2019) (ECF 124-4)
- EE . Supplemental Expert Declaration of Dr. Andrew J. Read, submitted in S.C. Coastal Conservation League et al. v. Ross et al., No. 2:18-cv-3326-RMG (D.S.C. Mar. 25, 2019) (ECF 233-3)
- FF . Expert Declaration of Dr. Scott D. Kraus, submitted in S.C. Coastal Conservation League et al. v. Ross et al., No. 2:18-cv-3326-RMG (D.S.C. Feb. 20, 2019) (ECF 124-2)
- GG . Supplemental Expert Declaration of Dr. Scott D. Kraus, submitted in S.C. Coastal Conservation League et al. v. Ross et al., No. 2:18-cv-3326-RMG (D.S.C. Mar. 25, 2019) (ECF 233-1)
- HH . Expert Declaration of Dr. Peter L. Tyack, submitted in S.C. Coastal Conservation League et al. v. Ross et al., No. 2:18-cv-3326-RMG (D.S.C. Feb. 20, 2019) (ECF 124-6)
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- NN . Robert D. McCauley et al., “Widely used marine seismic survey air gun operations negatively impact zooplankton,” *Nature Ecology & Evolution* (June 22, 2017)
- OO . [Exhibit letter not used]
- PP . Letter from N.C. Gov. Roy Cooper to Wilbur L. Ross, Jr., Sec’y, U.S. Dept. of Commerce (July 21, 2017) (with attachment)
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- RR . Barbie L. Byrd et al., “Strandings as indicators of marine mammal biodiversity and human interactions off the coast of North Carolina,” *Fishery Bull.* (2014)
- SS . Expert Declaration of D. Ann Pabst, Ph.D. (Nov. 25, 2019)
- TT . Sherry White, “Ask the Aquarium: When’s the Best Time to See Whales Off Our Coast?” *The Pilot* (Jan. 24, 2015)
- UU . Suggestions for Dolphin & Whale Watching in N.C. Coast, [https://www.tripadvisor.com/Attractions-g659485-Activities-c61-t188-North\\_Carolina\\_Coast\\_North\\_Carolina.html](https://www.tripadvisor.com/Attractions-g659485-Activities-c61-t188-North_Carolina_Coast_North_Carolina.html) (visited Dec. 2, 2019)
- VV . N.C. Whales & Whaling Symposium, <https://ncmaritimemuseumbeaufort.com/annual-north-carolina-whales-whaling-symposium/> (visited Nov. 25, 2019)
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- XX . Natl. Oceanic & Atmospheric Admin. et al., *Recovery Plan for the Northwest Atlantic Population of the Loggerhead Sea Turtle (Caretta caretta)* (2d rev. 2008)
- YY . Reuters Business News, “U.S. FERC approves construction of four LNG export projects in Texas” (Nov. 21, 2019)
- ZZ . N.C. Wildlife Resources Comm’n, *Sea Turtle Nest Monitoring Sys.*, <http://www.seaturtle.org/nestdb/?view=1> (visited Nov. 23, 2019)

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- BBB . Expert Declaration of Lawrence B. Cahoon, Ph.D. (Nov. 25, 2019)
- CCC . Expert Declaration of Roger D. Shew (Nov. 22, 2019)
- DDD . Expert Declaration of Douglas Nowacek, Ph.D. (Nov. 27, 2019)
- EEE . Declaration of Walter D. Cruickshank, submitted in S.C. Coastal Conservation League et al. v. Ross et al., 2:18-cv-03326-RMG (D.S.C. May 9, 2019) (ECF 281-1)
- FFF . The New York Times, “Interior Dept. Delays Its Plan to Open U.S. Coastline to Drilling” (Apr. 25, 2019)
- GGG . Letter from Marc Bernstein, N.C. Dept. of Justice, to Dr. Walter Cruickshank, Acting Dir., Bureau of Ocean Energy Mgmt. (Aug. 5, 2019)
- HHH . List of documents submitted to Bureau of Ocean Energy Mgmt. by N.C. on Aug. 5, 2019

**DOCUMENTS FROM THE CONSOLIDATED RECORD TO WHICH THE STATE OF NORTH CAROLINA CITES**

- CR 3 . Natl. Marine Fisheries Serv., Incidental Harassment Auth. (Nov. 20, 2018) (issued to WesternGeco)
- CR 7 . Natl. Marine Fisheries Serv., Biological Op. on the Bureau of Ocean Energy Mgmt.’s Issuance of Five Oil & Gas Permits for Geological & Geophysical Seismic Surveys off the Atlantic Coast of the U.S., & the Natl. Marine Fisheries Services’ Issuance of Associated Incidental Harassment Auths. (Nov. 28, 2018)
- CR 8 . WesternGeco, Application for Permit to Conduct Geological or Geophysical Exploration for Mineral Resources or Scientific Research on the Outer Continental Shelf, File No. E14-004 (Apr. 9, 2014)
- CR 9 . Letter from Michael Celeta, Reg’l Dir., Bureau of Ocean Energy Mgmt., to WesternGeco LLC (Jan. 6, 2017)
- CR 10 . Letter from Michael Celeta, Reg’l Dir., Bureau of Ocean Energy Mgmt., to WesternGeco LLC (May 16, 2017)
- CR 23 . Bureau of Ocean Energy Mgmt., Final Programmatic Emtl. Impact Statement for Atlantic OCS Proposed Geological & Geophysical Activities, vol. 1 (Feb. 2014)

- CR 27 . Collected industry comments re Atlantic geological & geophysical permit applications (various dates)
- NCR 1 . Letter from Braxton Davis, Dir., N.C. Div. Coastal Mgmt., to Paul Sholz, Acting Dir., Off. of Ocean & Coastal Resource Mgmt., Natl. Oceanic & Atmospheric Admin. (Aug. 20, 2014)
- NCR 2 .  
Letter from Jeffrey Payne, Acting Dir., Off. for Coastal Mgmt., Natl. Oceanic & Atmospheric Admin., to Braxton Davis, Dir., N.C. Div. Coastal Mgmt. (Nov. 18, 2014)
- NCR 3 . Letter from Gary Poole, Multiclient New Ventures Lead, WesternGeco, to Braxton Davis, Dir., N.C. Div. of Coastal Mgmt. (Mar. 12, 2019)
- NCR 4 . Letter from Braxton Davis, Dir., N.C. Div. Coastal Mgmt., to Gary Poole, WesternGeco (June 11, 2019)
- NCR 7 . WesternGeco's Notice of Appeal (July 10, 2019)

**DOCUMENTS FROM THE SUPPLEMENTAL RECORD SUBMITTED BY THE APPELLANT TO WHICH THE STATE OF NORTH CAROLINA CITES**

- A . Letter from Braxton Davis, Dir., N.C. Div. Coastal Mgmt., to Spectrum Geo, Inc., c/o Richie Miller, Pres. (Apr. 22, 2015)
- B . Letter from Braxton Davis, Dir., N.C. Div. Coastal Mgmt., to GXT, c/o Dan Virobik (Apr. 23, 2015)
- C . Letter from Braxton Davis, Dir., N.C. Div. Coastal Mgmt., to MCNV Marine N. Amer. CGG c/o Amber Stooksberry (May 22, 2015)
- D . Letter from Braxton Davis, Dir., N.C. Div. Coastal Mgmt., to TGS-NOPEC, c/o Gabriel Rolland (June 16, 2015)
- F . Letter from Braxton Davis, Dir., N.C. Div. Coastal Mgmt., to Kelly Hammerle, Natl. Program Mgr., U.S. Bureau of Ocean Energy Mgmt. (Mar. 13, 2018)
- G . Letter from Braxton Davis, Dir., N.C. Div. Coastal Mgmt., to WesternGeco, c/o Gary Poole (Apr. 11, 2019)
- H . Letter from Braxton Davis, Dir., N.C. Div. Coastal Mgmt., to WesternGeco, c/o Gary Poole (Apr. 15, 2019)

I . Letter from Gary Poole, WesternGeco, to Braxton Davis, Dir., N.C. Div. Coastal Mgmt.,  
(Apr. 23, 2019)