

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION
No. 2:20-CV-00059

THE STATE OF NORTH CAROLINA,

Plaintiff,

v.

WILBUR ROSS, in his official capacity as United States Secretary of Commerce, NEIL JACOBS, in his official capacity as Assistant Secretary of Commerce for Environmental Observation and Prediction, and the NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,

Defendants.

COMPLAINT

5 U.S.C. § 702
28 U.S.C. § 2201

INTRODUCTION

1. This case concerns North Carolina's objection under the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 et seq. to the plan of WesternGeco, LLC to conduct seismic surveying off the State's coast. A seismic survey is conducted using extraordinarily powerful bursts of sound from an array of airguns. These sounds harm marine life and coastal resources.

2. Pursuant to the CZMA, North Carolina objected to this proposed survey. An objection has the effect of barring federal permits from issuing. On administrative appeal by the project's proponent, the National Oceanic and Atmospheric Administration ("NOAA") overrode North Carolina's objection,

allowing the project to proceed (pending the issuance of all permits). As alleged below, and as North Carolina will show, NOAA's decision should be vacated because it failed to comply with the CZMA and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq.

JURISDICTION AND VENUE

3. This case arises under the CZMA and the APA. This Court has jurisdiction over these claims under 28 U.S.C. § 1331.

4. This Court has personal jurisdiction over the defendants. Defendants Ross and Jacobs are United States government employees in their official capacities, and Defendant NOAA is an agency of the United States. All are subject to nationwide service of process pursuant to 28 U.S.C. § 1391(e)(1) and Fed. R. Civ. P. 4(i)(2).

5. Venue is proper in the Eastern District of North Carolina under 28 U.S.C. § 1391(e)(1) because this civil action is brought against officers of the United States acting in their official capacities and an agency of the United States; the plaintiff resides in every district in North Carolina; and no real property is involved in this action.

PARTIES

6. Plaintiff the State of North Carolina (the "State") is a sovereign state.

7. Defendant Wilbur Ross is the United States Secretary of Commerce. Secretary Ross is named in his official capacity only.

8. Defendant Neil Jacobs is the Assistant Secretary of Commerce for Environmental Observation and Prediction and is performing the duties of Under Secretary of Commerce for Oceans and Atmosphere. Dr. Jacobs is named in his official capacity only.

9. Defendant NOAA is a federal agency within the United States Department of Commerce.

STATUTORY AND REGULATORY BACKGROUND

A. The Outer Continental Shelf Lands Act

10. The Outer Continental Shelf Lands Act (“OCSLA”) allows the United States to grant “oil and gas lease[s] on submerged lands of the Outer Continental Shelf.” 43 U.S.C. §§ 1331, 1337(a)(1).

11. OCSLA allows the Secretary of the Interior to “authorize[]” “any person” to “conduct geological and geophysical explorations” on areas of the outer continental shelf (“OCS”) that are not leased. 43 U.S.C. § 1340(a)(1).

12. Part 551 of title 30 of the Code of Federal Regulations governs geological and geophysical (“G&G”) exploration “on unleased lands” of the OCS. 30 C.F.R. § 551.2(a). This program is administered by the Department of the Interior’s Bureau of Ocean Energy Management (“BOEM”). Any person “must

have a BOEM-approved permit to conduct G&G exploration . . . for oil, gas, or sulphur resources” on unleased lands of the OCS. Id. § 551.4(a). The survey at issue in this case is proposed to occur on unleased lands of the OCS and therefore requires a permit from BOEM.

B. The CZMA’s consistency process

13. The CZMA allows each “coastal state” to adopt a “management program” “to guide public and private uses of lands and waters in the coastal zone” and to submit such program to the Secretary of Commerce “for review and approval.” 16 U.S.C. § 1453(4), (12), § 1454. North Carolina’s “coastal zone” extends three miles into the Atlantic Ocean. Id. § 1453(1); 43 U.S.C. § 1312.

14. After the State’s management program has been approved, any applicant for a federal permit to conduct any activity affecting any land or water use or natural resource of the State’s coastal zone must provide the State with a certification. The applicant must certify “that the proposed activity complies with the enforceable policies of the state’s approved program and that such activity will be conducted in a manner consistent with the program.” 16 U.S.C. § 1456(c)(3)(A). This requirement applies regardless of whether the permitted activity under review will occur within or wholly outside the State’s coastal zone.

15. There are two ways for a State to secure the right to require that a federal permit applicant submit a CZMA consistency certification. First, the state

agency may list in its coastal management program federal license or permit activities that affect its coastal uses and resources and for which the State will require certifications as a matter of course. See 15 C.F.R. § 930.53(a).

Alternatively, for federal licenses and permits that are not on the State’s list, the State may review these activities on a case-by-case basis. To do so, the State must notify the permit applicant that its unlisted activity has reasonably foreseeable coastal effects and therefore is subject to the CZMA consistency process. Id. §§ 930.53(a)(2), 930.54. The State’s notice is subject to disapproval by the Director of NOAA’s Office of Coastal Management (“OCM”). Id. §§ 930.11(f), 930.54(b).¹

16. Following the submission of a certification by a federal permit applicant, the state may notify the federal permitting agency whether “the state concurs with or objects to the applicant’s certification.” 16 U.S.C. § 1456(c)(3)(A).

17. If the state objects to a consistency certification for a federal permit, the permit applicant may “appeal” the objection to the Secretary of Commerce. 15 C.F.R. Part 930, Subpart H. This is not an appeal in the traditional sense. The CZMA does not task the Secretary with determining whether the State properly objected to the certification. Instead, the Secretary determines whether the State’s objection should be overridden. See id. §§ 930.120 - .121.

¹ The cited rules refer to the Office of Coastal Resource Management, not OCM. OCM superseded the Office of Coastal Resource Management, as noted in the Federal Register. 84 Fed. Reg. 38,118, 38,118/2 (Aug. 6, 2019).

18. One basis on which the Secretary may override a State's objection is a finding by the Secretary that "the activity is consistent with the objectives of" the CZMA. 16 U.S.C. § 1456(c)(3)(A). Implementing regulations specify that in order for the Secretary to make this finding, the proposed activity must "satisf[y] each of the following three requirements:"

(a) The activity furthers the national interest as articulated in § 302 or § 303 of the [Coastal Zone Management] 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.

19. If a federal permit applicant is required to submit a consistency certification, the federal permitting agency may not issue the permit over a State's objection unless the Secretary of Commerce overrides that objection. 16 U.S.C. § 1456(c)(3)(A).

20. Pursuant to the Department of Commerce's Organizational Order 10-15, § 3.01.u, the Secretary delegated to NOAA the authority to perform functions prescribed in the CZMA, including administering and deciding consistency appeals such as the one at the center of this case.

FACTUAL BACKGROUND

A. Seismic surveying and airguns

21. Seismic surveying is a technique for collecting data regarding oil and gas deposits beneath the bed of the ocean. To conduct the survey, a vessel will tow dozens of airguns just below the water surface. Trailing behind the airguns, attached to one or more streamers that may extend over seven miles, are thousands of listening devices. The airguns will let out a blast roughly every ten to fifteen seconds and the echoes will be recorded by the listening devices. A survey vessel typically travels slowly during survey operations—about 4.5 to 6 knots, or about 5 to 7 miles per hour.

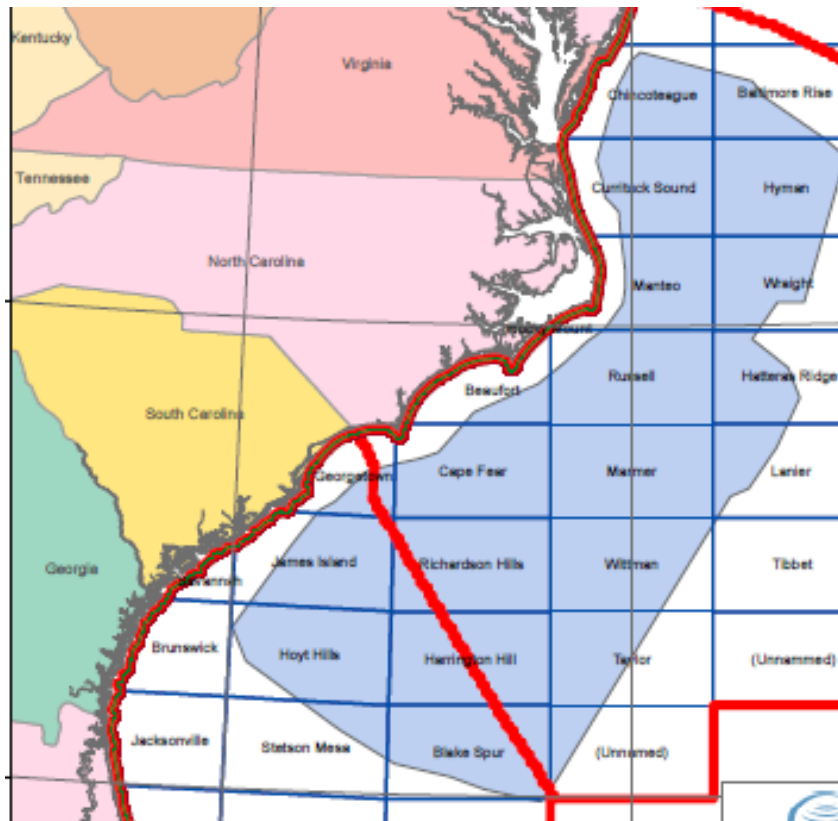
22. The data generated by the blasts and echoes can be analyzed to yield information about what oil and gas deposits, if any, might lie beneath the ocean floor.

23. The sounds emitted by seismic survey airguns are among the loudest that humans regularly introduce into the ocean and can propagate hundreds of miles through the water. Due to reverberation, noise levels remain significantly elevated even between pulses over fifty miles from the survey vessel. Therefore, while a survey is underway, there is no “quiet time” in the water over an expansive radius around the vessel.

24. A single survey can continue for months at a time and operate day and night (except when a survey vessel experiences downtime, for example due to weather).

B. WesternGeco's survey

25. In April 2014, WesternGeco applied to BOEM for a permit to conduct geophysical exploration in the Atlantic Ocean. The survey area would stretch from South Carolina's southern boundary to Virginia's northern boundary and include the entire length of North Carolina's coast. The blue polygon in the figure below, which is excerpted from WesternGeco's application, shows the areal extent of the survey.



26. WesternGeco proposes to conduct a two-dimensional survey using one vessel to tow an array of twenty-four airguns. Seismic operations are planned for approximately 208 days over a period of about a year. WesternGeco is prohibited from operating its airguns within 30 kilometers (18.6 miles) of the coast.

C. The impact of airguns on North Carolina's coastal uses and resources

27. A number of uses and resources of North Carolina's coastal zone would be adversely affected by the proposed seismic surveying. These uses and resources include commercial and recreational fishing, tourism, research and endangered species.

28. Airguns can affect North Carolina's coastal uses and resources in situ. Because of the distances over which acoustic energy can propagate in the ocean and the proximity of the survey in this case to North Carolina's coastal zone, the noise from airguns can affect marine life while species are in state waters even if the airguns never enter state waters.

29. Airguns can also affect the State's coastal uses and resources because many important species of fish and mammals that will be affected by the airguns migrate between state and federal waters. These are referred to as interjurisdictional species. These species may be affected by the noise emanating

from airguns while in federal waters, and then return to state waters in an injured state, or fail to return at all due to impacts from the airguns.

i. Commercial and recreational fishing

30. North Carolina has a nationally significant fishing industry, particularly its recreational fishery. North Carolina is fifth in the nation in total expenditures and durable goods expenditures related to recreational fishing. From Delaware to Florida, North Carolina trails only Florida in total number of saltwater angler trips annually.

31. From 2013 to 2017, North Carolina commercial fishing landed an average of over 58 million pounds of seafood with an average annual ex-vessel value of over \$91 million. Of these amounts, a total of over 9 million pounds of seafood valued at \$22 million dollars was landed from federal waters.

32. Commercial and recreational fishing in North Carolina combine to support nearly 50,000 jobs, and annually create \$1.7 billion in income and account for \$3.9 billion in sales. Much of this economic activity occurs in counties that have limited other sources of employment or revenue.

33. Noise from seismic surveying interferes with the normal behavior of fish species and reduces their catchability due to displacement from areas of forage, spawning, and refuge, and affects overall abundance. Additionally, the survey vessel, with its miles-long array of listening devices and its associated

support vessels, will cause space conflicts with North Carolina-based recreational and commercial fishing vessels.

34. Accordingly, seismic surveying will negatively affect North Carolina's commercial and recreational fisheries, which are uses of the coastal zone, and will affect fish in North Carolina's coastal waters, which are a resource of the coastal zone.

ii. Threatened and endangered species

35. The population of the endangered North Atlantic right whale likely numbers below four hundred individuals and the species' very existence is at risk. 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 on which the whales depend for most of their vital functions. The proposed survey may negatively affect the whales' ability to reproduce, which could be devastating given the whales' exceptionally low population and their inherent relatively low birthrate.

36. The North Atlantic 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. The North Atlantic right whale supports uses of North Carolina's coastal zone that would be negatively affected by the proposed survey.

37. The Northwest Atlantic Distinct Population Segment of loggerhead sea turtles is a threatened species. In 2014, it received extensive critical habitat protection along the beaches of North Carolina.

38. Impacts to loggerhead sea turtles from seismic surveying may include auditory injuries or behavioral avoidance that interferes with nesting activities. Aside from acoustic impacts, sea turtles could also be injured by seismic surveying through an increase in vessel traffic and accidental fuel discharges.

39. Loggerhead sea turtles regularly nest on the beaches of North Carolina. The turtles are an object of local research and rescue efforts and attract tourists. The turtles support uses of North Carolina's coastal zone and are a resources of the State's coastal zone.

iii. Other resources of the coastal zone

40. Other species of mammals, fish and crustaceans, such as beaked whales, also are resources and/or support uses of North Carolina's coastal zone and will be adversely affected by seismic surveying.

iv. Cumulative effects from multiple overlapping surveys

41. The effects on North Carolina's coastal uses and resources would be exacerbated by multiple, simultaneous, overlapping surveys. In addition to the survey project proposed by WesternGeco in this case, four other companies ("Other Survey Companies") are also seeking permits to conduct seismic surveys

of the Atlantic OCS during the same period. Each of the four surveys is planned to encompass an area of the Atlantic Ocean that includes the entire length of North Carolina's coastline. The surveys will continue for months—up to a year—and traverse multiple tracklines from less than twenty miles to hundreds of miles off the North Carolina coast. The tracklines will be spaced as close as 6 km (about 3.7 miles) apart.

42. The noise produced by these overlapping surveys would be temporally and spatially pervasive within the survey region for months because sound propagation and reverberation would negate any quiet periods. This type of chronic disturbance creates chronic stress among marine life. Chronic stress reduces immune and endocrine function, which leaves marine life more vulnerable to disease. It also negatively impacts reproductive fitness.

43. Chronic stress is of particular concern regarding the endangered North Atlantic right whale. The health of the female population is already just above the threshold of reproductive success.

44. Chronic noise is also a significant problem for beaked whales. Beaked whales are present year-round in the Cape Hatteras region, and have been observed in the North Carolina coastal zone. Beaked whales exhibit extreme, potentially life-threatening, reactions to anthropogenic sounds. Moreover, beaked whales

demonstrate site fidelity, making them less capable of avoiding environmental stress.

D. The Incidental Harassment Authorizations

45. Pursuant to the Marine Mammal Protection Act, 16 U.S.C. § 1361 et seq., activities like seismic surveying that “take,” e.g., injure, disturb or kill, marine mammals are generally prohibited. The National Marine Fisheries Service (“NMFS”) may authorize incidental (but not intentional) “takes” only upon making certain findings, including that the authorized activity will “take” only “small numbers” of marine mammals and will have no more than a “negligible impact” on each marine mammal species or stock. Id. § 1371(a)(5)(D).

46. On November 30, 2018, NMFS issued incidental harassment authorizations (“IHAs”) to WesternGeco and the Other Survey Companies to conduct seismic surveying in the Atlantic OCS and to “take” various amounts of the marine mammals that will be affected by the surveys. The surveys can only be conducted with a valid IHA. The IHAs expire on November 30, 2020.

47. A number of parties filed complaints in the United States District Court for the District of South Carolina alleging that NMFS erred in issuing the IHAs. Ten states, including North Carolina, as well as WesternGeco and the Other Survey Companies were permitted to intervene in the consolidated cases as

plaintiffs and defendants, respectively. See S.C. Coastal Conservation League et al. v. Ross, 2:18-cv-03326-RMG (D.S.C.). That case remains pending.

E. NCDCM’s objection to WesternGeco’s consistency certification

48. North Carolina has an approved coastal management program. The North Carolina Division of Coastal Management (“NCDCM”) is a division of the North Carolina Department of Environmental Quality, which is an agency within the Executive Branch of the State. NCDCM has been delegated the authority to administer the State’s CZMA consistency review process.

49. North Carolina’s coastal management program does not list the exploration activities at issue here as activities that may affect the State’s coastal uses or resources. Therefore, on or about August 20, 2014, NCDCM requested approval from OCM’s predecessor agency to have WesternGeco’s application be subject to CZMA consistency review by North Carolina as an unlisted activity.

50. On or about November 18, 2014, OCM approved NCDCM’s request to have the WesternGeco permit application undergo CZMA consistency review as an unlisted activity.

51. WesternGeco submitted its consistency certification to NCDCM on March 12, 2019. After receiving public comment, holding a public hearing, soliciting and receiving input from expert researchers, consulting other North Carolina state agencies, and receiving further information from WesternGeco,

NCDCM concluded that the proposed activity would be “inconsistent with the relevant enforceable policies of North Carolina’s approved coastal management program.” (NOAA p. 008112) (Citations to documents that NOAA assembled and sequentially paginated in this matter are prefaced by “NOAA p.”) Therefore, NCDCM objected to WesternGeco’s consistency certification.

52. WesternGeco filed a notice of appeal to the Secretary of Commerce. The parties submitted briefs and supporting materials, and NOAA solicited input from federal agencies.

F. NOAA’s override on appeal by WesternGeco

53. On June 15, 2020, NOAA, over the signature of Defendant Jacobs acting on behalf of NOAA and by delegation from Defendant Ross, issued its Decision and Findings by the U.S. Under Secretary of Commerce for Oceans and Atmosphere in the Consistency Appeal of WesternGeco from an Objection by the State of North Carolina (“Decision”). This Decision is attached as Exhibit 1 and incorporated into this complaint.

54. By this decision, NOAA “over[ro]de[] the State’s objection to the proposed survey” and as a result “the State’s objection to the proposed survey no longer operates as a bar under the CZMA to federal agencies issuing, in accordance with all applicable law, licenses or permits necessary to conduct the

proposed survey.” Decision at 44. However, to reach this decision, NOAA committed several legal and factual errors that each render it invalid.

- i. NOAA legally erred and failed to support its conclusion that the project would further the national interest as articulated in the CZMA in a significant and substantial manner.*

55. In its Decision, NOAA, as it must in order to override a state objection, found that “[t]he activity furthers the national interest as articulated in § 302 or § 303 of the [Coastal Zone Management] Act, in a significant or substantial manner.” See 15 C.F.R. § 930.121(a). NOAA rested this conclusion on two grounds.

56. First, NOAA found that the proposed survey would “further the national interest in developing the resources of the nation’s coastal zone by acquiring and providing subsurface, geological and geophysical data over a large area to identify areas of potential oil and gas resources and to inform potential policy decisions regarding further exploration and development.” Decision at 13.

57. Contrary to NOAA’s decision, the documents before NOAA fail to identify or demonstrate any development or even a single activity associated with WesternGeco’s survey that would, or even may, occur in the coastal zone. Nor did NOAA identify or demonstrate any development or any activity in the coastal zone that would be furthered even indirectly by WesternGeco’s survey. The documents before NOAA show that the proposed survey would result in only adverse effects

in the coastal zone. Therefore, NOAA's finding that the project would "further the national interest in developing the resources of the nation's coastal zone" was not supported.

58. Even if the project would further the national interest in the development of the resources of the coastal zone, it would not do so "in a significant and substantial manner." 15 C.F.R. § 930.121(a). NOAA concluded that the project would further this national interest "in a significant and substantial manner" because, it found, the collection of data is important to good decision making "regarding exploratory drilling for oil and gas on the Atlantic OCS in an orderly manner" and the most recent surveys of the Atlantic OCS are outdated. Decision at 20. That rationale may support a finding that the project would contribute to development of the Atlantic OCS in a significant and substantial manner, but it does not show that the project will further the "development of the coastal zone," 16 U.S.C. § 1451(a), in a significant and substantial manner.

59. Second, NOAA found that WesternGeco's survey would "further[] the national interest as articulated in § 302 or § 303 of the [Coastal Zone Management] Act, in a significant or substantial manner" because it would "further the national interest in energy self-sufficiency." Decision at 15.

60. However, the documents before NOAA showed that, according to the United States Energy Information Administration ("EIA"), the United States is

now a net energy exporter and the EIA projects that the country will remain a net energy exporter for nearly three decades.

61. NOAA failed to identify information in the documents before it that demonstrates how the project contributes to the country's energy self-sufficiency considering the federal government's own projections that the country is already energy self-sufficient and is expected to remain so for decades even without WesternGeco's survey. Instead, NOAA merely cited information related to this issue, but did not sufficiently link this information to its ultimate conclusion.

62. For example, NOAA remarked that in making its projections, the EIA "emphasize[d] . . . the high level of uncertainty involved in estimating technically recoverable resource[s]." Decision at 16. That may be so, but NOAA failed to show that this "high level of uncertainty" in one aspect of the equation would materially undermine the EIA's projections of continuing, long-term energy independence. As another example, NOAA touted BOEM's "need for continued OCS oil and gas production to continue to improve the balance of trade." Decision at 17. Whatever benefits "improv[ing] the balance of trade" may have, the CZMA's "national interest" that NOAA was ostensibly addressing regarded "energy self-sufficiency" specifically, not "improv[ing] the balance of trade" generally.

63. Even if the project would further the national interest in energy self-sufficiency, it would not do so “in a significant and substantial manner.” 15 C.F.R. § 930.121(a). NOAA supported its “significant and substantial manner” position regarding the national interest in energy self-sufficiency using the same facts as for the national interest in development of the coastal zone, i.e., that the data collected will supersede outdated data and support good decisions regarding the drilling of the Atlantic OCS.

64. The government’s own projections show that the country has achieved and will maintain self-sufficiency even without development of the Atlantic OCS that may be engendered by the proposed survey. Thus, the project does not significantly and substantially contribute to a national interest in energy self-sufficiency. Instead, it serves only a corporate business interest. Even if some development of the Atlantic OCS is necessary to maintain energy self-sufficiency, the interests served by this project would still remain primarily corporate. This fails to demonstrate any “significant and substantial” contribution to the national interests articulated by Congress in the CZMA.

65. For these and other reasons, the documents before NOAA did not support NOAA’s conclusion that the project would “further[]” either of these “national interests . . . in a significant and substantial manner.” 15 C.F.R. § 930.121(a).

ii. NOAA legally erred and failed to support its conclusion that the project's adverse coastal effects would be minor, localized and temporary.

66. Regarding the adverse impacts of WesternGeco's survey, NOAA found in general that the effects would be minor, localized and temporary. When assessing the impacts of the project on certain marine resources NOAA deferred to previous analyses by NMFS and BOEM. NOAA recognized that the previous analyses of NMFS and BOEM were conducted under different "analytical standard[s]" of different statutes. Therefore, NOAA claimed that it "closely reviewed, evaluated, and applied" NMFS's and BOEM's "underlying analysis" in order "to make findings on the questions of adverse coastal effects." Decision at 23 n.33.

67. The Decision fails to support that NOAA "closely reviewed, evaluated, and applied" the work of NMFS and BOEM. For example, NOAA was required to consider the cumulative effects of WesternGeco's project. 15 C.F.R. § 930.121(b). WesternGeco's survey area overlaps with the survey areas of the Other Survey Companies and all of these surveys are likely to occur during a similar timeframe. Therefore, NOAA purported to consider the cumulative effects of all five surveys on the resources of North Carolina's coastal zone.

68. In NOAA's assessment of cumulative effects on commercial and recreational fishing, NOAA did not indicate that it conducted any analysis of its

own. Instead, NOAA recited that these impacts were “considered in BOEM’s” 2014 analysis. NOAA thereafter simply restated what BOEM “determined,” “concluded” and “expected,” Decision at 41, with no indication that NOAA critically reviewed any of BOEM’s work.

69. Moreover, the work on which NOAA relied was not properly supported. For instance, when assessing cumulative effects, NMFS failed to explain how it concluded that there would not be significant overlap of tracklines.

70. NOAA also improperly minimized the gravity of the cumulative effects that will result from seismic surveying. For example, the total population of North Atlantic right whales is likely under four hundred, with fewer than one hundred reproductive females. The population is declining and the females are reproducing at rates well-below normal. By any measure, the very existence of the species is gravely imperiled.

71. In its IHAs, NMFS authorized the seismic surveys to cause nineteen Level B “takes” of North Atlantic right whales. Level B “takes” are “[d]isruption[s] of behavioral patterns.” (NOAA p. 000287) This “includes, but is not limited to, migration, breathing, nursing, breeding, feeding or sheltering.” (NOAA p. 000233) Such impacts to about five percent of a species that is on the brink of extinction cannot properly be characterized as “limited and fairly minor.” Decision at 41.

72. In addition, NOAA failed to reasonably address the most recent relevant science. For example, NOAA was presented with two recent studies—McCauley (2017) and Fields (2019)—that assessed the impacts of seismic surveying on zooplankton. Zooplankton is the foundation of the marine food chain. NMFS had previously recognized “the large scale of effect” on zooplankton from airguns that was demonstrated by McCauley. 83 Fed. Reg. 63,268, 63,280 (Dec. 7, 2018) (NOAA p. 002985). But NOAA asserted that “Fields produced results inconsistent with those of McCauley.” Decision at 27 n.40. To resolve this issue, NOAA claimed that NMFS had “reviewed” Fields’ work. *Id.* However, the document that supposedly captures this agency “review[]” is marked “For Internal Use Only” and merely describes the issue and states a conclusion. (NOAA p. 010867-89) It does not demonstrate a considered “review[]” by NMFS as an agency on this issue.

73. For these and other reasons, the documents before NOAA did not support NOAA’s conclusion that the effects of the project (including the cumulative effects) “would be primarily limited, minor, and short-term.” Decision at 42.

iii. NOAA’s errors regarding the national interest and the coastal effects infect and invalidate its balancing of those two factors.

74. NOAA concluded that “the national interest furthered by the proposed survey outweighs the proposed survey’s adverse coastal effects.” Decision at 44.

75. Having failed to properly assess both parts of this balancing test, NOAA's conclusion that "the national interest furthered by the proposed survey outweighs the proposed survey's adverse coastal effects" lacks an adequate factual basis.

CLAIM FOR RELIEF

NOAA violated the CZMA and the APA.

76. The APA requires a reviewing court to "hold unlawful . . . agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A) & (C); see also id. § 702 (right of review).

77. As shown above, NOAA erred by concluding that:

a. "the proposed survey would further the national interest in developing the resources of the coastal zone" in a "significant and substantial manner," Decision at 22-23;

b. "the proposed survey would further the national interest . . . in attaining a greater degree of energy self-sufficiency" in a "significant and substantial manner," id.;

c. "the adverse coastal effects" would be, for the most part, "localized, minor, and temporary," see id. at 30, 31, 37;

d. the “cumulative or aggregate effects of the proposed surveys would not be significant, but rather, would be primarily limited, short-term, and minor,” id. at 43; and

e. “the national interests furthered by the proposed survey outweigh the proposed survey’s adverse coastal effects,” id.

78. In making these errors, NOAA acted arbitrarily and capriciously, abused its discretion, acted contrary to law, and acted in excess of its statutory authority and limitations. 5 U.S.C. § 706(2)(A) & (C). Accordingly, NOAA, by and through Defendant Jacobs, acting on behalf Defendant Ross and executing functions delegated by Congress to Defendant Ross, violated the APA.

79. The APA dictates that a reviewing court “shall . . . set aside” any agency action before it that violates the Act. 5 U.S.C. § 706(2).

80. Accordingly, this Court should hold unlawful and set aside the Decision.

81. In addition, “[i]n the case of an actual controversy,” the Declaratory Judgment Act authorizes this Court to “declare the rights and other legal relations” of the parties. 28 U.S.C. § 2201.

82. There is an actual controversy between the State and the Defendants regarding whether the Defendants issued the Decision in violation of the CZMA

and the APA. Therefore, this Court may declare the rights of North Carolina regarding whether its objection under the CZMA ought not be overridden.

REQUEST FOR RELIEF

THEREFORE, the Plaintiff respectfully requests that this Court:

- A. Declare that the Defendants violated the CZMA and the APA by issuing the Decision;
- B. Hold unlawful and set aside the Decision;
- C. Grant the Plaintiff its costs of the suit, including reasonable attorneys' fees to the extent authorized by law;
- D. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

JOSHUA H. STEIN
Attorney General

/s/ Marc D. Bernstein
Marc D. Bernstein
Special Deputy Attorney General
N.C. State Bar No. 21642
mbernstein@ncdoj.gov

/s/ Mary L. Lucasse
Mary L. Lucasse
Special Deputy Attorney General
N.C. State Bar No. 39153
mlucasse@ncdoj.gov

N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602
(919) 716-6600 - Phone
(919) 716-6767 - Fax

Attorneys for the State of North
Carolina

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