

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ENVIRONMENTAL APPEALS BOARD

)	
In re:)	
)	
Ocean Era, Inc. – Velella Epsilon Facility)	
)	NPDES Appeals No. 25-01M & No. 25-02
)	
NPDES Permit No. FL0A00001)	
)	
)	
)	

EPA REGION 4's COMBINED RESPONSE TO PETITIONS FOR REVIEW

AND

REQUEST FOR EXPEDITED CONSIDERATION

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<u>Attachment No.</u>	<u>Name of Document</u>
1	Modified Permit
2	Revised Permit Application
3	2022 Permit
4	DC Circuit Court Order for Stay
5	Letter Requesting Permit Modification
6	Modification Determination Memo
7	Public Notice of Draft Modification
8	Draft Modification Released for Public Comment
9	Fact Sheet Released with Draft Modification
10	Biological Evaluation
11	NMFS 2022 Letter of Concurrence
12	USFWS Email of October 2, 2024
13	EPA December 23, 2024 Letter Reinitiating Informal Consultation
14	NMFS Concurrence Letter of February 18, 2025
15	Response to Comments for Modified Permit
16	Final Fact Sheet for Modified Permit
17	Response to Comments for 2022 Permit
18	Ocean Discharge Criteria Evaluation for 2022 Permit

I. INTRODUCTION

On June 14 and 16, 2025, the Center for Food Safety (joined by six other environmental or public interest organizations¹) and Friends of Animals (hereinafter jointly referred to as “Petitioners” or individually as the “CFS” or “FOA”) petitioned for Environmental Appeals Board (“EAB” or “the Board”) review of a Clean Water Act (“CWA” or “Act”) National Pollutant Discharge Elimination System (“NPDES”) modified permit (hereinafter the “Petitions” or individually as the “CFS Petition” or “FOA Petition”) issued by the Environmental Protection Agency, Region 4 (hereinafter “the Region”) for a pilot-scale, offshore aquaculture facility known as the Velella Epsilon facility (the Facility) in the Gulf of America (the “Modified Permit”). The Modified Permit (Attachment 1), issued on May 15, 2025, makes only small changes to the 2022 NPDES permit in effect for the Facility. The Petitioners, however, do not limit their arguments to the narrow modifications and instead seek to relitigate a host of challenges to the 2022 NPDES permit as a whole – arguments which the Board previously considered and rejected. Because this Petition raises many issues already decided by this Board, and many issues that are not relevant to the changed conditions in the Modified Permit, EPA seeks expedited consideration of this appeal to prevent unjust delay.

The Petitioners challenge the Modified Permit on four broad grounds:

- (1) that the Region failed to consider or properly apply relevant factors under the CWA’s Ocean Discharge Criteria (“ODC”);
- (2) that the Region’s issuance of the Permit violates the National Environmental Policy Act (“NEPA”);
- (3) that the Region’s issuance of the Permit violates the Endangered Species Act (“ESA”);
- (4) that the Region’s issuance of the Permit violates the Marine Mammal Protection Act (MMPA) (only the CFS Petition asserts this ground).

¹ The other organizations are Recirculating Farms Coalition, Tampa Bay Waterkeeper, Suncoast Waterkeeper, Healthy Gulf, Sierra Club, and Food & Water Watch.

Before addressing the arguments raised by Petitioners, this Response sets forth the statutory and regulatory background relevant to this matter, the procedural history, the Region's actions in reviewing the modification request and issuing the Modified Permit, and the legal principles underlying the Board's review.

II. STATUTORY AND REGULATORY BACKGROUND

The Petition alleges error in the Region's decision-making under several federal statutes: the CWA, NEPA, the ESA, and the MMPA.

Clean Water Act

The CWA prohibits the discharge of pollutants into navigable waters unless authorized by another provision in the CWA. A principal means for complying with the Act is discharge authorization through an NPDES permit. *See* CWA §§ 301(a), 402(a); 33 U.S.C. §§ 1311(a), 1342(a). Individual NPDES permits apply the CWA's discharge control standards and monitoring and reporting requirements directly to specific facilities, such as the Vellella Epsilon aquaculture Facility. CWA § 402(a); 33 U.S.C. § 1342(a).

Section 301 of the Act, 33 U.S.C. § 1311, requires that NPDES permits contain effluent limitations, *e.g.*, limits on the amount or concentration of pollutants that may be discharged. The Act applies two approaches to these limitations: technology-based and water quality-based. At a minimum, permits must require limitations based on the application of statutorily prescribed levels of technology ("technology-based effluent limits" or "TBELs"). *See* CWA § 301(b)(1)(A), (b)(2)(A), (b)(2)(E); 33 U.S.C. § 1311(b)(1)(A), (b)(2)(A), (b)(2)(E). Where technology-based effluent limits are not sufficient to meet applicable state water quality standards, NPDES permits must include effluent limitations as stringent as necessary to ensure that applicable water quality standards are met ("water-quality based effluent limits" or "WQBELs"). CWA § 301(b)(1)(C);

33 U.S.C. § 1311(b)(1)(C).

EPA establishes nationally applicable TBELs in regulations known as effluent limitations guidelines (“ELGs”). CWA sections 301(b), 304(b), and 306 require EPA to establish ELGs to ensure that dischargers reduce pollutant discharges to the degree that can be achieved by identified technologies. 33 U.S.C. §§ 1311(b), 1314(b), 1316. Once established, however, dischargers may use any technology to meet those limitations. ELGs for point source direct discharges are given effect through “effluent limitations” that are incorporated under § 1311(b)(2) into permits. *See EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976).

In cases where no applicable ELG exists, permit issuers must use their “best professional judgment” or “BPJ” to establish appropriate TBELs on a case-by-case basis. *See In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 712 n.1 (EAB 2006) (citing CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1); 40 C.F.R. §§ 122.44, 125.3). These site-specific TBELs reflect the BPJ of the permit writer under 40 C.F.R. § 125.3(c)(2), taking into account the same statutory factors EPA would use in promulgating a national categorical rule, but considering unique factors relating to the applicant. Permits with technology limits that are developed on a case-by-case basis must consider: (1) the appropriate technology for the category of point sources for which the applicant is a member, based on all available information; and (2) any unique factors related to the applicant. 40 C.F.R. § 125.3(c)(2).

EPA has established ELGs for concentrated aquatic animal production facilities (“CAAPs”) at 40 C.F.R. part 451, including a New Source Performance Standard (“NSPS”) at 40 C.F.R. § 451.24. Under 40 C.F.R. § 451.1, the ELGs, including the NSPS, however, do not apply to facilities that produce fewer than 100,000 pounds per year of aquatic animals.

For point sources beyond the 3-mile seaward boundary that defines the scope of state NPDES program jurisdiction, there are no applicable state water quality standards. Water quality concerns for these discharges are instead addressed by section 403(c) of the Act, which requires that permits comply with the ODC set forth in EPA's longstanding implementing regulations found at 40 C.F.R. part 125 subpart M. *See* CWA § 403; 33 U.S.C. § 1343. The ODC prohibits the issuance of an NPDES permit when EPA determines that the discharge will cause unreasonable degradation of the marine environment. 40 C.F.R. § 125.123. A permit may be issued, however, when EPA determines, on the basis of available information, that the discharge will not cause unreasonable degradation of the marine environment after application of conditions contained in the permit. *Id.*; *Alaska Eskimo Whaling Comm'n v. EPA*, 791 F.3d 1088, 1094 (9th Cir. 2015). There are ten specific factors that EPA is required to consider in determining whether a discharge will cause unreasonable degradation of the marine environment, which are set forth at 40 C.F.R. § 125.122(a).

NPDES permits have a fixed term not to exceed five years and generally contain discharge effluent limitations and/or conditions as well as related monitoring and reporting requirements. *See* CWA § 402(a)(1)-(2), (b); 33 U.S.C. § 1342(a)(1)-(2), (b); 40 C.F.R. §§ 122.45, .46(a), .48.

NPDES permits may be modified pursuant to 40 C.F.R. § 122.62. When a NPDES permit is modified, only the conditions subject to modification are reopened for public comment when a modified draft permit is prepared. 40 C.F.R. §§ 122.62 ("When a permit is modified, only the conditions subject to modification are reopened."), 124.5(c)(2) ("In a permit modification under this section, only those conditions to be modified shall be reopened when a new draft permit is prepared."). All other aspects of the currently effective permit remain in effect for the duration of

the unmodified permit. 40 C.F.R. § 124.5(c)(2).

Endangered Species Act

ESA section 7(a)(2) requires all federal agencies to ensure, in consultation with the appropriate federal wildlife agency (e.g., the United States Fish and Wildlife Service (“USFWS”) and/or the National Marine Fisheries Service (“NMFS”), that their actions are not likely to jeopardize the continued existence of federally listed species or result in the destruction or adverse modification of a species’ designated critical habitat. 16 U.S.C. § 1536(a)(2).

The section 7 process begins with a determination whether a proposed action “may affect” listed species or designated critical habitat in a geographical area. 50 C.F.R. § 402.14(a). If the agency determines that the proposed action will have no effect on listed species or critical habitat in the action area, section 7 consultation is not required. *See id.* If, however, the agency determines the action “may affect” listed species or critical habitat, the agency may proceed to formal consultation or consider whether the action is “likely to have an adverse effect” on the listed species or critical habitat. *Id.* § 402.14(a), (b)(1).

If the agency determines that the action “is not likely to adversely affect,” it may then request concurrence from the relevant wildlife agencies through informal consultation. *See* 50 C.F.R. § 402.13. If the wildlife agency concurs, the agency need not engage in formal consultation. *See id.* § 402.14(b)(1).

Marine Mammal Protection Act

Section 102(a) of the MMPA prohibits the “take” of a marine mammal without Federal authorization. 16 U.S.C. § 1372(a). National Oceanic and Atmospheric Administration (“NOAA”) regulations define “take,” in relevant part, as “to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill any marine mammal.” 50 C.F.R. § 216.3. The

definition goes on to specifically include certain actions, such as “the restraint or detention of a marine mammal, no matter how temporary,” “the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal,” and “feeding or attempting to feed a marine mammal in the wild.” *Id.* Pursuant to section 101(a)(5) of the MMPA, NOAA may issue incidental take authorizations. 16 U.S.C. § 1371(a)(5). Unlike ESA section 7, the MMPA does not impose interagency consultation obligations for agency actions.

National Environmental Policy Act

NEPA requires all federal agencies, before taking “major Federal actions significantly affecting the quality of the human environment,” to prepare a “detailed statement” discussing the environmental impacts of, and the alternatives to, the proposed actions. NEPA § 102(2)(C); 42 U.S.C. § 4332(2)(C). A federal agency need not prepare a detailed statement if it first prepares a concise environmental assessment (“EA”) that makes a finding of no significant impact (“FONSI”). 40 C.F.R. §§ 1501.5, 1501.6. The EA shall “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact,” and “[b]riefly discuss the purpose and need for the proposed action . . . and the environmental impacts of the proposed action and alternatives.” 40 C.F.R. § 1501.5(c).

CWA section 511(c)(1), however, explicitly provides that, with two limited exceptions, “no action of the [EPA] taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA].” 33 U.S.C. § 1371(c)(1); *accord In re Dos Republicas Res. Co.*, 6 E.A.D. 643, 647 (EAB 1996). One of the exceptions is for the issuance of an NPDES permit for “a new source as defined in section [306].” *Id.* A “new source” is further defined at 40 C.F.R. § 122.2 as a facility that (i) is subject

to a New Source Performance Standard (“NSPS”) promulgated pursuant to Section 306 of the CWA, and (ii) commenced construction after promulgation of the applicable NSPS. *See also* 40 C.F.R. § 122.29.

It is EPA’s policy to undertake voluntary NEPA reviews in circumstances where they can be particularly helpful for decision-making, notwithstanding the action being exempt from NEPA. EPA’s Policy for Voluntary Preparation of NEPA Documents, 63 Fed. Reg. 58,045 (Oct. 29, 1998) (“Voluntary NEPA Policy”). The Voluntary NEPA Policy makes clear, however, that “[t]he voluntary preparation of [NEPA] documents in no way legally subjects the Agency to NEPA’s requirements.” *Id.* at 58,046.

III. FACTUAL AND PROCEDURAL BACKGROUND

On October 27, 2018, the Region received a complete NPDES permit application from the Permittee for the Facility. Aquaculture facilities, such as the Facility, discharge pollutants, including fecal material and excess fish feed. The Permittee sought NPDES permit authorization to discharge these pollutants. The construction and installation of the Facility’s net-pen and anchoring system on the sea floor also requires a U.S. Army Corps of Engineers (“USACE”) permit under section 10 of the Rivers and Harbors Act (“RHA”), 33 U.S.C. § 403.² The Facility, as described in its Revised Application submitted for the Modification, is a “temporary, small-scale, demonstration net pen ... rearing a single cohort (20,000) of red drum.” *See* Revised Permit Application, Attachment 2, on Form 1 at page 3.

The Region first issued an NPDES permit to the Permittee for the Facility in 2020 (2020 Permit), following a public comment period and hearing, in accordance with the process outlined in 40 C.F.R Part 122. Because the ELG for CAAPs did not apply to the Facility, the Region

² The USACE completed a public comment period for the RHA permit in November 2024 but has not yet issued its permit.

established TBELs for the Permit using BPJ. Specifically, the Region determined that the ELG requirements at 40 C.F.R. § 451.24 are appropriate and the 2022 Permit imposed those requirements as a BPJ TBEL. Multiple petitioners—many of whom are the same as those in the current Petition—sought review of the 2020 Permit before the Board. On May 6, 2022, the EAB issued a decision that partially remanded and partially denied review of the permit appeal (Order). *In Re Ocean Era, Inc.*, 18 EAD 678 (2022). In its Order, the Board directed the Region to clearly state whether it determined that the permitted discharge from the Facility would not cause unreasonable degradation of the surrounding marine environment. The Board denied review of all other issues raised. In response, the Region supplemented the 2020 permit record and issued a final permit on June 9, 2022 (2022 Permit). (Attachment 3, 2022 Permit). The 2022 Permit remains effective for CWA purposes and is subject to a Petition for Review in the D.C. Circuit Court of Appeals. The Court of Appeals review is currently stayed to allow the Board’s consideration of the instant Petitions to be completed prior to briefing in the Court of Appeals. (Attachment 4, D.C. Circuit Order for Stay).

On July 5, 2023, the Permittee submitted a written request to the Region for permit modification under 40 C.F.R § 124.5 (Attachment 5, Letter Requesting Permit Modification). On July 15, the Permittee submitted a revised permit application and detailed information to support the EPA’s consideration of the modification request (Revised Permit Application, Attachment 2). The requested permit modification described four facility or operational alterations: 1) the species of fish to be cultured (from Almaco Jack to Red Drum); 2) a decrease to the maximum amount (by weight) of fish produced (from 88,000 lbs to 55,000 lbs); 3) a change to the net material (copper to monofilament); and 4) a change to the type of mooring system, from swivel point mooring system to a stationary cage attached to a grid mooring system. Attachment 2,

Revised Permit Application.

The Region examined the potential impacts associated with the project changes under potentially applicable laws and regulations, such as the CWA, the ESA, the National Historic Preservation Act (NHPA), the Coastal Zone Management Act (CZMA), the National Marine Sanctuaries Act (NMSA), and NEPA, among others. *See* Attachment 6, Modification Determination Memo. As part of its analysis for the Modified Permit, the Region coordinated with various federal agencies, including the USFWS and the NMFS to determine the extent to which the permit changes might impact the prior analysis under the ESA. *Id.*

On October 24, 2024, the Region released for public notice and comment a draft Modified Permit and other associated documents for the modified project. Attachment 7, Public Notice of Draft Modification; Attachment 8, Draft Modification Released for Public Comment; Attachment 9, Fact Sheet Released with Draft Modification. Consistent with the limitations in 40 C.F.R. § 125.4(c) and 122.62, the Region solicited comments from the public on only the revised conditions of the draft Modified Permit.

IV. THE REGION'S REVIEW OF THE PROPOSED MODIFICATION

As previously discussed, the Permittee requested a limited set of changes to the 2022 Permit: a change to the fish species being cultured, and associated changes to fish feed and a reduced fish production amount; a change in net material from copper to monofilament; and changes to the Facility mooring and anchoring system. These changes are reflected in the Modified Permit (Attachment 1).

The Region carried out an analysis of the proposed changes to ensure that the Modified Permit would comply with potentially applicable statutes and regulations, including the CWA's

Section 403 ODC, the ESA, and NEPA.³ The following discussion documents the Region's careful consideration of issues raised by the proposed permit modification and its reasoned decision-making that led to issuance of the Modified Permit.

CWA Section 403: Ocean Discharge Criteria

As documented in EPA's Permit Modification Determination Memo (Attachment 6), the primary pollutants proposed for discharge (fish feed, nutrients, solids, etc.) will decrease under the revised permit conditions as a result of the reduced total amount of fish produced over a year due to the slower growth rate and size of Red Drum as opposed to Almaco Jack. Consequently, loadings for these pollutants, including nutrient loads and water column concentrations of nitrogen and phosphorus, will be reduced. Pollutant monitoring will be conducted during the permit term for these pollutants to the same extent as provided in the 2022 Permit. The Facility will still be exposed to strong, consistent currents capable of assimilating and dispersing solids and nutrients without adverse effects. (Attachment 6, Modification Determination Memo at pages 8-9, 12). Furthermore, the 2022 Permit and the Modified Permit include a condition requiring the permittee to stay 500 meters away from any hard bottom habitat to minimize the risk of deposition impacting those habitats. *Id.*, at 9, 16, 18-20)

The water quality and depositional modeling for pollutants considered in the 2022 Permit remain relevant to the proposed permit modification because of the assumptions used in the modeling calculations and software. For example, the salmonid fecal settling velocity was used in the 2022 Permit modeling instead of the settling velocity for Almaco Jack because salmonids are well-studied, validated, and permitted to have a maximum benthic impact assessment due to their higher fecal settling velocities. *Id.*, at 9. The feed settling velocity (9.50 cm/s) and the fecal

³Although NEPA does not apply to the Ocean Era permit action, the Region followed NEPA procedures pursuant to the Voluntary NEPA Policy.

particle settling velocity (0.64 cm/s) used in the 2022 permit model simulations are within the range reported for Red Drum in a recent study, which is 3.67–15.68 cm/s for feed settling velocity and 0.17–5.24 cm/s for fecal particle settling velocity. *Id.*

Ultimately, the Region determined that the proposed changes to the facility under the Modified Permit would not impact the Region’s ODC Evaluation (“ODCE”) prepared for the 2022 Permit. The Region concluded that the Modified Permit would not cause unreasonable degradation of the marine environment and that no adjustments to the ODCE conducted for the 2022 Permit were necessary. *Id.*

Endangered Species Act, Section 7 Consultation

A Biological Evaluation (“BE”) was prepared by the Region and USACE to jointly assess the potential direct, indirect, and cumulative effects that the proposed actions in the 2022 Permit might have on listed and proposed species, as well as on designated and proposed critical habitat. Attachment 10. The BE concluded that the potential threats posed by the 2022 Permit project to protected species—such as disturbance, entanglement, vessel strikes, and water quality issues—were highly unlikely to occur or were extremely minor in severity. With respect to species within the jurisdiction of the USFWS, the BE found that the project would not affect the species. For some species within the jurisdiction of NMFS, the BE found that the project may affect but was not likely to adversely affect (“NLAA”) the species, and EPA initiated informal consultation with NMFS for the 2022 Permit.

On August 27, 2019, the USFWS notified the Region that it did not object to the 2022 Permit issuance for the proposed project and had no additional comments. On September 30, 2019, NMFS concurred with the Region’s “not likely to adversely affect” determinations with respect to some species and revised the determinations to “no effect” for other species for the

2022 Permit.⁴

Under 50 C.F.R. § 402.16, reinitiation of consultation is required if any one of four thresholds is triggered, including when new information shows effects of the action that may impact listed species or critical habitat in a way or to an extent not previously considered. The Region determined that the Modified Permit application required reinitiation of ESA Section 7 consultation with respect to water quality, vessel strikes and disturbance, fish aggregation, entanglement, and marine debris. The Region also evaluated and consulted on the potential effects on critical habitats, the continuing validity of the 2019 BE, and new species or critical habitats designated since the 2022 Permit issuance.⁵

Based on the foregoing, the Region determined that initiating informal ESA Section 7 consultation with USFWS was not necessary, as the project would not affect any species within USFWS jurisdiction, a decision USFWS agreed with. (Attachment 12, USFWS Email of October 2, 2024. The Region reinitiated informal consultation with NMFS regarding species under their jurisdiction, pursuant to ESA's Section 7 implementing regulations at 50 C.F.R §§ 402.16(a)(2) and (3). Attachment 13, EPA December 23, 2024 Letter Reinitiating Informal Consultation. In reinitiating consultation, the Region (and USACE) determined that the changes in the Modified Permit are not likely to adversely affect some species and critical habitats and would have no effect on other species and critical habitats in the action area. *Id.* On February 18, 2025, NMFS concurred in the EPA's determination that the proposed action is not likely to adversely affect the NMFS ESA-listed species and/or designated critical habitat. Attachment 14, NMFS

⁴ Following the final NPDES permit issuance in 2022, NMFS issued a letter of concurrence (NMFS 2022 LOC) that amended the consultation record with supplemental analysis related to the project's potential impacts. Attachment 11, NMFS 2022 LOC. The LOC did not change NMFS's determination that the Ocean Era project is not likely to adversely affect any listed or proposed species or designated or proposed critical habitat.

⁵ The Queen Conch (*aliger gigas*), Nassau Grouper (*epinephelus straitus*), Rice's Whale (*balaenoptera ricei*), Green Sea Turtle (*chelonina mydas*), Pillar Coral (*dendrogyra cylindrus*) and Black-Capped Petrel (*pterodroma hasitata*), were identified as either new or proposed species listings or critical habitat designations.

Concurrence Letter of February 18, 2025.

Marine Mammal Protection Act

As noted above, the MMPA does not require federal agencies to consult when issuing permits for projects in federal waters. A project proponent, such as the Permittee, is responsible for complying with the MMPA and obtaining any necessary marine mammal authorization program certificate and avoiding prohibited takes.

Notwithstanding the absence of any MMPA consultation obligation, the Region and USACE evaluated the potential impacts on ESA-listed marine mammals within the proposed action area in the BE for the 2022 Permit. Attachment 10, Biological Evaluation. The potential impacts on marine mammals not listed under the ESA were assessed in the environmental assessment⁶ (EA) by both permitting agencies and NMFS, and the EA led to a determination of no significant impact. In its analysis of the Modified Permit, the Region determined that the changes to the federal action do not indicate the potential for significant effects and therefore do not require an EA supplement. The underlying assumptions of the original analysis remain valid and still support EPA's FONSI. *See* Modification Justification Memo (Attachment 6), at pages 27-30.

National Environmental Policy Act

As noted above, the National Environmental Policy Act ("NEPA") requires federal agencies to assess the environmental impacts of certain proposed actions before making decisions. In actions subject to NEPA requirements, federal agencies are responsible for ensuring that their environmental review procedures under NEPA comply with the Council on Environmental Quality's (CEQ) regulations (40 CFR Parts 1500-1508). In addition, federal

⁶ The Region voluntarily used NEPA procedures to evaluate and disclose the impacts in the 2022 Permit's proposed action since it determined that such an analysis would be beneficial.

agencies have their own procedures to implement the CEQ regulations to facilitate efficient decision making and ensure that federal agencies make decisions in accordance with the policies and requirements of NEPA. The EPA and USACE implementing regulations for NEPA are 40 C.F.R. Part 6 and 33 C.F.R. Part 230 and Part 325 Appendix, respectively.⁷

Section 511(c) of the CWA, 33 U.S.C. §1371(c), exempts the issuance of NPDES permits from the requirements of NEPA except in the case of permits for “new sources,” as defined in CWA Section 306. The Facility does not meet the definition of a “new source” under CWA Section 306, and therefore, issuance of the 2022 Permit and the Modified Permit are exempt from NEPA. *See* Footnote 10 at page 24, below. However, as a matter of discretion, the Region voluntarily applied NEPA procedures to issuance of the 2022 Permit and to the Modified Permit pursuant to Voluntary NEPA Policy, because it determined such an analysis would be helpful. The environmental review process, documented in the EA, showed that no significant environmental impacts are expected from the current proposed action.

The CEQ regulations provide information about when a supplemental EA should occur within 40 CFR 1501.5(h). EPA’s NEPA implementing regulations at 40 CFR 6.200(h) also provide guidance about when a reevaluation is required following the completion of a final EA. The Region undertook an analysis, under EPA’s Voluntary NEPA Policy, and in coordination with the cooperating agencies (USACE and NMFS), to assess whether a reevaluation was warranted and determined that the changes to the modified federal action and new circumstances relevant to environmental concerns do not indicate the potential for significant effects and

⁷ The CEQ and EPA are in the process of revising NEPA regulations pursuant to Executive Order 14154, Unleashing American Energy, 90 Fed. Reg. 8353 (Jan. 29, 2025). CEQ has provided guidance to affected agencies, indicating that “[w]hile these revisions are ongoing, agencies should continue to follow their existing practices and procedures for implementing NEPA.” <https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ-Memo-Implementation-of-NEPA-02.19.2025.pdf>

therefore do not require a supplement. The underlying assumptions of the original analysis remain valid and still support the Region’s FONSI. *See* Attachment 6, Modified Permit Determination Memo, at pages 27-31.

Other Authorities

In addition to the ODCE, ESA Consultation, and voluntary NEPA review, the Region addressed other statutory obligations in the permit review process. These include the Essential Fish Habitat provisions of the Magnuson Stevens Act, the National Historic Preservation Act, the Coastal Zone Management Act, the Fish and Wildlife Coordination Act, the Migratory Bird Treaty Act, and the National Marine Sanctuary Resources Act. However, Petitioners did not challenge EPA’s compliance with these other statutes.

Permit Issuance and Submittal of Petitions

On May 15, 2025, the Region issued the Modified Permit (Attachment 1) along with a document titled Response to Significant Comments, published with the Modified Permit. Attachment 15, Response to Comments for Modified Permit (RTC). In addition to the RTC, the Modified Permit was accompanied by an updated Final Fact Sheet. Attachment 16, Final Fact Sheet.

The Petitioners filed the Petitions on June 14⁸ and 16⁹, 2025.

V. PRINCIPLES GOVERNING BOARD REVIEW

Under 40 C.F.R. § 124.19, a petitioner must meet procedural and substantive thresholds before the Board will review the permit. The Board has described the procedural thresholds to include “timeliness, standing, issue preservation, and compliance with the standard of specificity

⁸ Center for Food Safety (“CFS”), et al.

⁹ Friends of Animals (“FOA”)

for review.” *In re MHA Nation Clean Fuels Refinery*, 15 E.A.D. 648, 652 (EAB 2012); *In re Beeland Group*, 14 E.A.D. 189, 194-95 (EAB 2008). If the petitioner meets the procedural requirements, the Board will review the contested permit decision to determine whether the challenged aspects of the permit decision are based on “a clearly erroneous finding of fact or conclusion of law.” 40 C.F.R. § 124.19(a)(4); *In re Stonehaven Energy Management*, 15 E.A.D. 817, 823 (EAB 2013).

A petitioner must do more than restate comments made during the public comment period for a permit—a petitioner is also obligated to address the agency’s comment responses and explain why they are erroneous or justify further review. “The Board has consistently denied review of petitions which merely cite, attach, incorporate, or reiterate comments previously submitted on the draft permit.” *In re Peabody Western Coal Co.*, 15 E.A.D. 406, 411-12 (EAB 2011) (citing *In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review), *aff’d*, 614 F.3d 7, 11-13 (1st Cir. 2010)); *see also In re Peabody Western Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005) (“[P]etitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer’s subsequent explanations.”).

As stated previously, for each issue for which it seeks review, the petitioner bears the burden of demonstrating clear error. 40 C.F.R. § 124.19(a)(4). To do so, the petitioner “must specifically state its objections to the permit and explain why the permit issuer’s previous response to those objections is clearly erroneous, an abuse of discretion, or otherwise warrants review.” *MHA Nation*, 15 E.A.D. at 653; *see also In re Guam Waterworks Auth.*, 15 E.A.D. 437, 449-50 (EAB 2011).

When a petitioner seeks review of issues that are primarily technical in nature, the Board

gives substantial deference to the permit issuer. *MHA Nation*, 15 E.A.D. at 653. This may occur, however, only after the Board reviews the administrative record to determine whether “the permit issuer made a reasoned decision and exercised his or her ‘considered judgment.’” *Id.* (citing *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997)). In its review of the record, “the Board looks to determine whether the record demonstrates that the permit issuer duly considered the issues raised in the comments and whether the approach ultimately adopted by the permit issuer is rational in light of all the information in the record.” *In re City of Attleboro, MA Wastewater Treatment Plant*, 14 E.A.D. 398, 411 (EAB 2009). “If the Board is satisfied that the permit issuer gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, the Board typically will defer to the permit issuer.” *In re Upper Blackstone Water Pollution Abatement District*, 14 E.A.D. 577, 608 (EAB 2010). “[W]here the views of the Region and the petitioner indicate bona fide differences of expert opinion or judgment on a technical issue, the Board will typically defer to the Region.” *In re NE Hub Partners*, 7 E.A.D. 561, 568 (EAB 1998) (citing *In re Envotech, L.P.*, 6 E.A.D. 260, 284 (EAB 1996) (“[A]bsent compelling circumstances, the Board will defer to a Region’s determination of issues that depend heavily upon the Region’s technical expertise and experience.”) (other citations omitted)).

The Board has noted that it analyzes petitions for review guided by the caution in the preamble to the 40 C.F.R. part 124 permitting regulations that the Board’s power of review “should be only sparingly exercised.” *MHA Nation*, 15 E.A.D. at 652 (quoting Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)). This is consistent with EPA’s policy favoring final adjudication of most permits “at the permit issuer’s level.” *Id.*

VI. ARGUMENT

As previously noted, the Petition challenges the Permit on four broad grounds:

- (1) that the Region failed to consider or properly apply relevant factors under the CWA's ODC;
- (2) that the Region's issuance of the Permit violates NEPA;
- (3) that the Region's issuance of the Permit violates the ESA;
- (4) that the Region's issuance of the Permit violates the MMPA (only the CFS Petition asserts this ground).

As explained below, the Modified Permit comports with applicable law and reflects rational determinations supported by the permitting record. In addition, the Petitioners have disregarded the regulatory command at 40 CFR §§ 122.62 and 124.5(c)(2) that only modified provisions are reopened when an NPDES Permit is modified. Instead, Petitioners have seized on this narrow permit modification to relitigate the issues raised in their original EAB challenge to the 2022 Permit, issues which are not materially affected by the modification and which the EAB has already fully resolved against Petitioners. To the extent that Petitioners seek to frame previously litigated issues as newly relevant in light of the small changes to the proposed Facility, those attempts are without factual basis. Moreover, Petitioners largely ignore the Region's explanations in the RTC relating to issues raised in the Petition and do not explain why the Region's responses are clearly erroneous or inadequate. Finally, on the merits, Petitioners have failed to meet their burden of demonstrating a clear error by EPA. Accordingly, the Region respectfully requests that the Board deny review of the Modified Permit.

A. Petitioners Fail to Limit Their Petition to Issues Relating to the Changed Permit Conditions

As an initial matter, the Petitioners' claims disregard the regulatory limitation, in the review of modified permits, to matters that relate to the changed permit provisions. EPA regulations specifically state that only the modified provisions are reopened when a permit is modified. 40 CFR §§ 122.62, 124.5(c)(2). Thus, issues raised in the Petitions that do not relate

to the modified provisions are not justiciable. *In re Waste Technologies Industries*, 4 E.A.D. 106, 116 n.16 (EAB 1992) (“The [Petitioner’s] arguments are, in large measure, criticisms of the permit that the [Petitioner] could have raised when the original permit determination was made in 1983. ... objections to that determination are outside the scope of the instant permit modification determination and are not subject to review in this proceeding.”). The Region’s RTC specifically notes that many comments, including many of Petitioners,’ improperly raised issues that were not related to the changed permit provisions in the Modified Permit. *See* RTC, Attachment 15, at pages 6, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35, 36, 37 and 40.

Several issues raised in the Petition are not even arguably affected by the modification and should be denied summarily.

1. The Changed Conditions of the Modified Permit Do Not Provide a Basis for Relitigating the Potential Contribution of Facility Discharges to the Occurrence of HABs.

The CFS brief at pages 25-27 and 52-54 and the FOA Petition at pages 13-18 argue that the Modified Permit will contribute to HABs in the Gulf and that the Modified Permit record fails to adequately address this concern. Both Petitioners make these arguments in connection with the CWA ODC portion of their Petitions and, for CFS, also in connection with an assertion that the EA, BE and ODCE are outdated. However, neither Petition explains how the changed conditions of the Modified Permit impact this issue. In the 2022 Permit record the Region determined that the proposed discharges would not be a significant contributor to HABs because, although nutrient discharges can contribute to HAB development, the proposed discharge is so small in relation to the Gulf and its currents that it did not pose a significant environmental threat. This determination was supported by modelling that indicated the nutrient discharge would be barely discernible a short distance from the facility. *See* EAB Decision, 78 EAD at

702-705.

In response to the Petitioners' attempt to relitigate the HABs issue, the Region in its RTC noted that the concern did not relate to the changed permit conditions and that the nutrient discharge, the only aspect of the discharge alleged to be a contributor to HABs, would actually decrease under the Modified Permit because of the reduced fish production amount of Red Drum as opposed to the Almaco Jack proposed for production under the 2022 Permit (a maximum of 88,000 lbs for the 2022 Permit vs 55,000 lbs in the Modified Permit). *See* RTC at 17, 19, 25.

Petitioners point to the continued occurrence of HABs in the Gulf and the continued progression of climate change since the 2022 Permit was issued as a basis to reopen this issue. However, these are not new or unanticipated issues and do not provide a basis for the wholesale reopening of the 2022 Permit that Petitioners seek to compel. In the analysis underlying the 2022 Permit, the EPA fully considered climate issues and the continuing occurrence of HABs. The Petitioners provide no valid explanation in their Petitions of how these issues relate to the changed conditions in the Permit.

2. The Changed Conditions of the Modified Permit Do Not Provide a Basis for Relitigating the Risk of Pathogen Discharge From the Proposed Facility.

FOA's Petition at pages 11-12 and the CFS Petition at pages 28-29 argue that the risk that pathogens will be released under the Modified Permit was not adequately addressed in the Modified Permit record. Petitioners make this argument in connection with their CWA ODC challenge. However, in the Modified Permit Determination Memo, at page 13, the Region stated:

The draft modified permit maintains conditions to reduce the probability of fish contracting diseases and limit pathogen transfer such as a veterinarian certificate attesting to fish health, and best management practices to prevent and minimize the indirect transfer or discharge of aquaculture pathogens. ...Additionally, the netting is a smooth non-fibrous material that minimizes the development of biofouling marine benthic fauna on its surface. By limiting the amount of biofouling on the cage, the cultured fish receive increased water flow that maintains water quality levels that are optimal for fish health.

The promotion of disease prevention practices within the cage decreases the transfer risk of pathogens or diseases to native fish outside of the culture system.

This information is repeated in the Region's RTC on this issue, at pages 11-12, which further notes that:

... the potential impact from pathogens and parasites is not significantly altered by the change in species in the modified permit. Additionally, the 2022 permit and modified permit requires Ocean Era to follow specific best management practices (BMPs) for fish health management to prevent and minimize the transfer of pathogens. The implemented BMPs must include fish inspection, fish sampling, or a fish monitoring program to allow for early detection of potential fish pathogens. This could include sampling wild fish near the facility to provide a reference of potential parasites that could cause infection. Ocean Era must develop BMPs that are facility-specific, and must be reviewed and approved by EPA prior to the commencement of discharge. ...

The need for drug treatment is mitigated by the strong open ocean currents that will constantly flush the fish culture area, operational practices such as regular maintenance and cleaning of the cage, the anti-biofouling properties of the net mesh material, and the lack of nearby aquaculture facilities that can spread diseases and pathogens. Additionally, the risk of disease transmission is mitigated by a NPDES permit condition that requires a health certificate from a licensed veterinarian prior to stocking to ensure that the fish are healthy and free from certain pathogens and diseases.

The Region's Response to Comments for the 2022 Permit (2022 RTC) (Attachment 17), at pages 19-20, further discussed the pathogen risk from an aquaculture facility generally and found it to be small. The Region explained that there is very little information available on the effects of such pathogen transfer, but the information that is available suggests that there is little risk of harm from the transfer of pathogens to wild stock. The 2022 RTC states that "EPA evaluated the direct and indirect potential impacts from pathogens and parasites in multiple documents when developing effluent limitation guidelines (ELGs) and performance standards for the CAAP industry." The 2022 RTC noted that the permit conditions, which incorporate the CAAP standards, address a number of the concerns raised with respect to pathogens and disease transfer through non-numeric effluent limits in the form of "best management practices." The Region determined that these best management practices—e.g., facility-specific fish health

management conditions to minimize pathogen transfer—and the permit condition requiring a certificate of health from a veterinary inspection would be sufficient to address any concerns. Nothing in the Petitions demonstrates that there is an appreciably greater risk of pathogen spread due to the change in species or cage design, or that the risk of pathogen spread is not adequately addressed by the cited permit conditions.

3. The Changed Conditions of the Modified Permit Do Not Provide a Basis for Relitigating the Risks Associated with Antibiotic Use

FOA's Petition at pages 35-37 and the CFS Petition at pages 27-28, argue that the risk that antibiotics usage under the Modified Permit will result in an increase in antibiotic resistance and that this risk was not adequately addressed in the Modified Permit record. The FOA discussion regarding antibiotics is submitted in connection with NEPA allegations, which is not even applicable to the issuance of the Modified Permit. The CFS argument relating to antibiotic usage is made in connection with its CWA ODC challenge.

As with the 2022 Permit, the use of antibiotics is authorized under the Modified Permit, but there is nothing about the changed conditions of the permit that appreciably impact the potential that use of antibiotics at the facility will result in increased antibiotic resistance. The Modified Permit does not change any provisions related to authorization of drug usage or BMPs related to use of drugs.

EPA addressed the potential risks associated with antibiotic usage at page 12 of the RTC. Specifically, the Region's RTC notes that EPA assessed impacts from drug usage in the 2022 Permit's ODCE and concluded that the NPDES permit conditions will ensure no significant environmental impacts and that the discharges from the facility will not cause unreasonable degradation of the marine environment.

The RTC at page 12 describes a number of permit conditions that will address risks from

drug usage, such as (1) a requirement that the administration of drugs be performed under the control of a licensed veterinarian; (2) a requirement that use of any medicinal products including therapeutics, antibiotics, and other treatments be reported to the EPA; (3) required reporting of the types and amounts of medicinal product used and the duration it was used; (4) a requirement that all drugs, pesticides, and other chemicals be applied in accordance with label directions. In addition, the RTC indicates that the need for drug treatment is mitigated by the strong open ocean currents that will constantly flush the fish culture area, operational practices such as regular maintenance and cleaning of the cage, the anti-biofouling properties of the net mesh material, and the lack of nearby aquaculture facilities that can spread diseases and pathogens.

The ODCE for the 2022 Permit (Attachment 18) analyzed potential risks of antibiotic usage in aquaculture facilities leading to increases in antibiotic resistance. The ODCE analysis of this issue is at pages 40-42 of the ODCE, and EPA found that “[t]he concentrations of antibiotics outside of the immediate proximity of the fish pens are regarded by most authors as being too low to have adverse effects.” ODCE at 42. The ODCE further found, at pages 42-43, even where the use of antibiotics in aquaculture is extensive, the “transfer of drug resistance from fish to human pathogenic bacteria,” has been shown to be “unlikely.”

The EAB determined in its decision on the 2022 Permit that Petitioners did not meet their burden to demonstrate clear error in EPA’s analysis of risks posed by use of pharmaceuticals and the potential increase in antibiotic resistance. 18 EAD at 706-07. There is nothing about the Permit Modification that warrants relitigation of this issue.

4. NEPA Is Not Applicable

Both Petitions assert NEPA claims as they did in Petitions for review of the 2022 Permit. In its previous decision, the Board rejected Petitioners’ NEPA claims. *See* 18 EAD 678, at 694-

699 (2022). In its 2022 decision, the Board noted that “Petitioners failed to timely present any argument as to why NEPA is applicable to this Permit, despite the Region’s explanation that it is not.” 18 EAD at 699. The Region has continued to make clear in its fact sheet and RTC that NEPA procedures have been applied to this permit on a voluntary basis and NEPA is inapplicable to the Modified Permit. Petitioners have ignored these responses and failed to identify any legal basis for NEPA challenge to the Modified Permit, which plainly fits within a statutory exemption to NEPA.¹⁰ There is nothing about the changed permit conditions in the Modified Permit that makes NEPA applicable, and thus it is not a proper subject for review of the Modification. Petitioners continue their pursuit of NEPA claims without rebutting the Region’s clear statements that it is inapplicable. *See* RTC at page 5, fn 5; Modified Permit Determination Memo at 27-28 (“While EPA voluntarily used NEPA review procedures in conducting the analysis for the NPDES permit issuance, EPA also has explained that the voluntary preparation of these documents in no way legally subjects the Agency to NEPA’s requirements.”). Thus, Petitioners’ attempts to challenge the adequacy of EPA’s voluntary NEPA analysis does not warrant review and should be summarily rejected by the Board.

B. The Region’s Issuance of the Permit Modification Complies with the ODC

Petitioners raise a number of issues in connection with the Region’s ODC determinations. For example, the Petitioners cite to issues of release of damaged facility components during storms, fish escapes, and release of microplastics as potentially causing unreasonable

¹⁰ CWA Section 511(c)(1) expressly exempts NPDES permit issuance from NEPA requirements unless the permit is for a “new source” as defined under CWA Section 306. The Facility is not a “new source” because a “new source” is defined under 40 CFR 122.2 as a facility that (i) is subject to a New Source Performance Standard (NSPS) promulgated pursuant to section 306 of the CWA, and (ii) commenced construction after promulgation of the applicable NSPS (see 40 CFR 122.29 and 40 CFR 122.2). There is no NSPS applicable to the Facility because the volume of production proposed by the Facility does not meet the minimum threshold (100,000 lbs annual production) for triggering applicability of the Effluent Limitation Guidelines for Concentrated Aquatic Animal Production facilities at 40 CFR Part 451, including the NSPS at 40 CFR 451.24.

degradation of the marine environment. While these issues, like other issues addressed above¹¹, are not significantly impacted by changed conditions in the Modified Permit, the Petitioner's arguments on these issues are addressed below. In responding to these arguments, the Region does not concede that they are sufficiently related to changed permit conditions to be raised in a Petition for Review of the Modified Permit.

1. The Risk of Structural Failure of Facility is Adequately Addressed in the Modified Permit

Both Petitioners raise a concern that the Facility will suffer structural damage as a result of severe storms and release structural components or cultured fish into the environment. *See, e.g.*, CFS Petition at pages 47-49 (asserting such an incident would violate the Ocean Dumping Act, also known as the Marine Protection, Research , and Sanctuaries Act ("MPRSA"), 33 U.S.C. § 1401 *et. seq.* *See also* FOA Petition at page 27 ("EPA failed to consider the increased likelihood of major storms resulting in damage or debris from the modified VE Project").

The argument in the CFS Petition that EPA failed to consider potential violations of the MPRSA (or the Ocean Dumping Act) when issuing the Permit is not referenced in any comments on the Modified Permit, nor does CFS articulate how the MPRSA relates to issuance of an NPDES Permit.¹² The construction of the Facility would not be subject to the MPRSA. Thus, this argument revolves around pure speculation that the Facility could be abandoned by the permittee or dislodged by a storm and become oceanic debris. Although there is no statutory basis for an MPRSA argument in the context of NPDES permit issuance, the Region will address

¹¹ The Petitions argue that contributions to HABs, release of pathogens and use of antibiotics causing increased antibiotic resistance are additional justifications for reviewing the Modified Permit under the CWA ODC ground, but those issues are fully addressed above at pages 19-24 in the context of the Region's discussion of issues that are not within the scope of the changed conditions of the permit.

¹² Indeed, the NPDES process is expressly carved out from the scope of the MPRSA. See 33 U.S.C. § 1402(f) (Dumping "does not mean a disposition of any effluent from any outfall structure to the extent that such disposition is regulated under the provisions of the Federal Water Pollution Control Act").

this as an argument about the risk of Facility destruction in a storm and the impacts of a release of facility components in that event, an issue that was fully addressed in the 2022 Permit record, and in the RTC for the Modified Permit.

On page 17 of the RTC, the Region noted “the NPDES permit requires a facility-specific plan that minimizes the potential for the facility to be damaged during a storm-event and cause significant impact to the environment. Specifically, the permittee will be required to create facility specific BMPs, and a facility damage prevention and control (FDPC) plan, to ensure the facility is being operated and maintained to mitigate environmental impacts during any disaster and prevent the release of commercial aquatic animals. Requiring mitigation in the permit is an appropriate way to lower the level of significance of the action due to extreme weather events.” Similarly, at page 20 of the RTC for the Modified Permit, the Region stated: “The cage system is designed to survive storm events by lowering the cage, which will be completely submerged during storms. The EPA has determined that the operational design will result in a low probability of escape. Furthermore, as with the original permit, the Modified Permit contains conditions requiring structural maintenance and a FDPC plan to mitigate the risk of disasters that may cause fish escapes.”

This issue was further addressed on page 26 of the RTC:

The permittee will lower the cage during storm events to lessen the threat of damage to the facility due to increased water current velocities. Prior to commencing operations, Ocean Era will detail protectionary measures within their BMP and FDPC plans. These risks were addressed in the original permit issuance, but the facility described in the original permit was designed differently and used different materials. The change in cage materials and design do not appreciably change the level of risk of structural failure. As noted in the Modification Determination Memo, the new design has more attachment points to the ocean floor that should minimize the risk of structural failure. In addition, the Modified Permit contains a new condition requiring an engineering analysis prior to the facility being placed in federal waters to confirm that it can withstand expected

conditions in the environment of the project.¹³ Moreover, risks posed by storms were addressed in the record for the 2022 Permit, and the risks posed by storms are not appreciably different as a result of the changed conditions in the modified permit.

As with the 2022 Permit, the risk of structural damage or failure, including as a result of storms, is adequately addressed by the Modified Permit. The changed permit conditions do not appreciably change this risk, and increased number of attachment points and the required dynamic engineering analysis that must be performed prior to installation may actually reduce this risk. The EAB considered and rejected concerns relating to the potential release of cultured fish due to extreme storms causing damage to the Facility in its decision on the 2022 Permit. 18 EAD at 708-10. The EAB noted the requirements for facility specific BMPs, and a facility damage prevention and control (FDPC) plan to ensure the Facility is being operated and maintained to mitigate environmental impacts during any disaster. The EAB also noted the feature that allows submersion of the facility during storms to protect from storm impacts. The Petitioners fail to demonstrate clear error in the Region's determination that the Modified Permit adequately addresses the risks that structural damage to the Facility during storms or other events could result in release of Facility components or cultured fish.

2. The Risk of Fish Escapes is Adequately Addressed in the Modified Permit

The risk of fish escapes as potentially resulting in unreasonable degradation of the marine environment is substantially related to the risk of structural failure of the Facility discussed in the preceding section. In addition, the impact of fish escapes with or without structural failure is further addressed as an ESA issue, below at pages 36-37, in the ESA discussion. That discussion, combined with the discussion above regarding structural failure, demonstrate that the Petitioners' claims relating to fish escapes are without merit. The Petitioners have failed to

¹³Permit Part II.B.16: The permittee shall conduct and provide to EPA a site-specific dynamic analysis of both the SeaProtean pen and mooring system at least 60-days prior to installation of any equipment.

demonstrate clear error in connection with the Region's analysis of this issue.

3. The Risk of Impacts from Discharge of Microplastics is Adequately Addressed in the Modified Permit

Petitioners allege that the Region failed to adequately address the risk that microplastics would be released from the Modified Permit's authorization of the use of a microplastic (KikkoNet) material that could release microplastics into the Gulf, causing unreasonable degradation to the marine environment and harm to protected species as a result of ingestion or entanglement. FOA Petition at 27-28, CFS Petition at 47.

Threats posed by potential release of microplastics were addressed in the Modified Permit Record, at page 14-15 of the Modified Permit RTC. Specifically, the RTC stated:

the small plastic fibers from the breakdown of net fibers can contribute to microplastic pollution within the aquaculture area and wider ocean ecosystem. To help mitigate the risk of microplastic pollution from the proposed facility, Ocean Era has proposed to regularly monitor the strength of the net pen material and measure the width of the netting. When any netting is measured to be less than 1.4 mm due to degradation or material elongation, the fish will be removed, and the net pen will be retired. Net pen material replacement is unlikely given the short duration (~1-year) of cage deployment. The short duration of the facility within federal waters, replacement of net material as necessary, and the large amount of dilution available in the Gulf of America adequately mitigates any risk of microplastics.

The use of KikkoNet netting material instead of copper alloy mesh may introduce plastic particles into the marine environment due to the natural wear and tear of the mesh netting over time. While the KikkoNet mesh is known to be very durable for extended periods of time, there is the potential for some amount of wear and tear which may lead to plastic leaching into the water column. However, due to the durability of the netting, regular netting inspections, and the short time span of the project (only 1 year), the effects from natural wear and tear of the KikkoNet to ESA-listed species is expected to be insignificant. On February 18, 2025, NMFS issued an ESA concurrence letter that stated, "the proposed action is not likely to adversely effect the NMFS ESA-listed species and/or designated critical habitat." On February 18, 2025, NMFS also determined that under the FWCA that adverse effects that might occur on marine and anadromous fishery resources would be minimal and NMFS did not object the issuance of the permit under FWCA.

The Petitioners have not demonstrated that the Region's analysis of the microplastics issue is clearly erroneous.

4. Petitioner CFS incorrectly states that the Modified Permit “Left Out” a Mandatory Condition Required by the ODC and Failed to Consider Local Environmental Conditions.

At page 30-31 of the CFS Petition, CFS asserts that EPA failed to consider local environmental conditions and left out a mandatory revocation/modification clause from the NPDES permit.

First, with respect to the alleged failure to consider local environmental conditions, the Region notes that the location of the Facility is the same as the 2022 Permit, so it is unclear how this argument relates to the changed permit conditions. Further, this claim is not sufficiently articulated to allow the Region to understand it or respond to it, and it is not clear that it was included in the Petitioners’ comments on the draft permit.

With respect to the CFS Petition’s argument that the Modified Permit failed to include a mandatory condition, Petitioner makes no effort in its Petition to explain how this issue relates to the changed conditions in the Permit, and this issue should be summarily rejected for that reason. Moreover, CFS misrepresents the record and misapplies the law. Petitioner relies on a provision in the ODC at 40 C.F.R. §125.123(d) which requires that permits issued pursuant to 40 C.F.R. §125.123(c) include particular permit conditions set forth in §125.123(d). 40 C.F.R. §125.123(c) authorizes issuance of a permit in circumstances where there is not sufficient information to determine prior to permit issuance whether there will be unreasonable degradation of the marine environment. The 2022 Permit and the Permit Modification were not issued pursuant to 40 C.F.R. §125.123(c). EPA issued the permit under 40 C.F.R. 125.123(a). However, permit provisions from 125.123(d) were included in the permit as allowed by 40 CFR 125.123(a). Petitioner previously made this argument in its challenge to the 2022 Permit and it was rejected by the Board. *See* 18 EAD at 712 (“In issuing this Permit, however, the Region did not rely on

paragraph (c). ... As such, the permit conditions in 40 C.F.R. § 125.123(d) are not mandatory for this Permit as issued.”). The Board should again reject this meritless argument.

C. The Region has Met Its ESA Obligations in Connection with Issuance of the Modified Permit

The Petitioners argue that the EPA failed to comply with the ESA and did not adequately consider and address potential impacts to endangered and threatened species and their critical habitats from the Modified Permit. CFS Petition at pages 41-46, FOA Petition at pages 18-31. The ESA issues, like other issues addressed above, are not significantly impacted by changed conditions in the Modified Permit. Nevertheless, the Petitioners’ arguments on these issues are addressed below to demonstrate the Region’s careful consideration of potential impacts to protected species and habitats. In responding to these arguments, the Region does not concede that they are sufficiently related to changed permit conditions to be raised in a Petition for Review of the Modified Permit.

In support of their ESA arguments, Petitioners cite a variety of potential impacts from the Facility, including (1) the potential that vessel strikes and accidental by-catch could harm marine species as a result of vessel traffic associated with the Facility,¹⁴ (2) the potential that the Facility will function as a Fish Aggregation Device (FAD), leading to increased vessel traffic, and increased visits from protected species,¹⁵ (3) the possibility of entanglement,¹⁶ (4) impacts from escaped fish,¹⁷ and (5) a claim that the Region failed to analyze potential impacts to newly listed species or habitats. Other potential impacts to protected species cited by Petitioners include impacts from light pollution, impacts from changed baseline conditions, and impacts from

¹⁴ See, e.g., CFS Petition at pages 41-47, FOA Petition at 22-24.

¹⁵ CFS Petition at page 43-44 and the FOA Petition at pages 18-22.

¹⁶ FOA Petition at pages 24-28, CFS Petition at pages 41-43

¹⁷ FOA Petition at 33-34, CFS Petition at 29, 43-44

HABs.

Petitioners have failed to meet their burden of showing the Region clearly erred in its consideration of the Modified Permit under the ESA. The Region addresses the issues of increased vessel traffic, the Facility functioning as a FAD, entanglements and potential impacts from escaped fish below — the other impacts cited by Petitioners under the ESA ground have been addressed elsewhere in the Region’s response, are not sufficiently articulated, or are so clearly unrelated to changed permit conditions that they do not require further elaboration here. Additionally, where, as here, the action agency received concurrence from the expert consulting agencies, its determination with respect to the ESA is entitled to further deference. *See, e.g., Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 11 F. Supp. 2d 529, 548-49 (D.V.I. 1998) (in informal consultation “FEMA was entitled to rely on the conclusion of the FWS”); *In Re Ocean Era, Inc.*, 18 EAD at 719 (Where EPA’s determination was “reviewed and considered by FWS and NMFS,” the petition is construed as challenging “the expertise not only of the Region, but of the consulting agencies that reviewed EPA’s evaluation and agreed with the Region’s determination.”).

1. Vessel Strikes and Accidental By-catch

The risks of vessel strikes and accidental by-catch are not materially increased by changes effected by the Modified Permit. Potential harms from these risks were determined to be unlikely and/or insignificant, and were adequately addressed, in connection with the 2022 Permit. The risks of vessel strikes were further considered in the Modified Permit Determination Memo at page 13 (“EPA has determined that the exposure routes associated with vessel strikes and disturbance will be the same as evaluated in the 2019 BE, the NMFS 2022 LOC, and the 2022 Permit record. Therefore, effects due to vessel strike and disturbance from the project

modifications are extremely unlikely to occur”).

The Region responded to this concern in the RTC at pages 8, 17-18, and 28 (Attachment 15). The RTC notes that, after the 2022 Permit was issued, NMFS updated its Concurrence issued during ESA informal consultation with an additional Letter of Concurrence supplementing the prior concurrence. Attachment 11, NMFS 2022 LOC. The NMFS 2022 LOC redefined the project’s action area to include any Ocean Era vessel route in addition to the radius around the project location. This expansion of the action area by NMFS did not alter the species that were considered, or the determination by NMFS that the proposed facility is not likely to adversely affect listed species.

In connection with the Modified Permit, EPA shared relevant information with NMFS and reinitiated consultation by letter dated December 23, 2024 (Attachment 13). On February 18, 2025, NMFS issued an ESA concurrence letter (Attachment 14) that stated, “the proposed action is not likely to adversely affect the NMFS ESA-listed species and/or designated critical habitat.” This concurrence letter also stated that “As explained in our 2019 concurrence letter, we do not believe any ESA-listed marine mammal species will occur in the action area for this project or be close enough for there to be any potential routes of effects to these species.” There is no basis for the EAB to review this determination.

2. Facility Functioning as Fish Aggregating Device

Petitioners claim that the Region failed to consider the fact that the release of excess feed could cause the Facility to function as a Fish Aggregation Device (“FAD”) and lead to impacts to ESA protected species that were not adequately addressed in EPA and the USACE’s BE. The Board rejected this claim in its Decision on the 2022 Permit, 18 EAD at 716.

Analysis of the FAD issue is not changed by any of the changed permit conditions,

notwithstanding FOA's assertion at page 20 of its Petition that the FAD characteristics will be augmented by use higher protein feed, existence of a larger facility footprint, and employment of a net more prone to algae and crustacean growth.

The larger footprint of the Facility has primarily to do with anchorage features and lines and not the size of the net pen itself, which will hold a smaller mass of fish with lower feed rates and will increase in diameter only from 56 feet to 84 feet. *See* Attachment 6, Modification Determination Memo, Page 5, Tables 1 and 2. This will not result in any change to how the Facility functions as a FAD. Similarly, Petitioners do not explain how the different feed makes the Facility attract more fish, as the quantities of feed will be less (resulting in a lower overall protein load) and FOA has not provided information demonstrating that relevant fish species will be more intensely attracted to the marginally¹⁸ higher protein content. Finally, any increase in algae and crustacean growth would be offset by the more frequent cleanings that FOA cites as creating more vessel traffic risk.

The Region addressed the FAD issue at page 13-14 of the Modified Permit Determination Memo (Attachment 6) ("In an effort to reduce biofouling, the applicant has indicated that biofouling reduction strategies will be implemented (e.g., regular inspections and maintenance, brushing, pressure washing). Therefore, the increase in biofouling from the modified netting material is likely to be negligible and the effects due to fish aggregation from the proposed project modifications are insignificant."). The FAD issue was further addressed in the RTC at page 17-18, describing the conclusion that the Facility's potential functioning as a

¹⁸ At page 28 of the RTC, the Region compared the feed content and noted that the fish feed contents (protein, phosphorus, and nitrogen) for Almaco Jack and Red Drum are compared in EPA's Permit Modification Determination memo. For feeding while the fish are considered juvenile, the feed protein and nitrogen amounts for Almaco Jack and Red Drum are the same. The amount of protein for adult Almaco Jack and Red Drum are 41% and 44%, respectively. The phosphorus amount for juvenile Red Drum is 0.4% less; for adult fish the phosphorus amount is 0.2% less for Red Drum. The nitrogen and phosphorus load are less for the Modified Permit due to the maximum amount of fish production being reduced by 33,000 lbs.

FAD was not likely to adversely affect any listed species or designated critical habitat. This conclusion was reflected in the 2022 NMFS LOC (Attachment 11) from NMFS which expanded the Service's analysis of the FAD issue, and in which NMFS repeated its concurrence in the Region's NLAA determination. NMFS again concurred in the NLAA determination in reinitiated consultation relating to the Modified Permit. The Petitioners have failed to demonstrate that the Region's consideration of the FAD issue was clearly erroneous or inadequate.

3. Entanglement

Both Petitioners assert that the Modified Permit does not adequately address the risk to protected species of entanglement with facility materials. However, the risks of entanglement associated with the new facility design are addressed in the Modified Permit Determination Memo at pages 14-15. The Determination Memo notes that, while the number of mooring lines is increased, any risk associated by the increase in lines is offset by the fact that, unlike the 2022 Permit's swivel point mooring system, the grid mooring system under the Modified Permit keeps lines at constant tension, and entanglement risk is increased when lines are slack. The Memo further notes that the only times the lines will be slack under the new design is when the Facility is submerged to avoid storm impacts, and under the protected species monitoring plan, workers will be able to monitor for any listed species interactions during most situations that the cage is being raised and lowered. For these reasons, the Region concluded that the addition of mooring lines will not increase the risk of entanglement to any listed species and the effects from entanglement due to the project gear modifications are insignificant.

The Modified Permit Determination Memo also addressed the risk of entanglement associated with the net material, where KikkoNet has replaced copper as the material. As described in the Modified Permit Determination Memo, the "KikkoNet is a hard plastic chain-

link material that is highly predator resistant and withstands oceanic conditions for several years. The Kikkonet material has a long history of being used in marine aquaculture internationally. Unlike woven monofilament netting, Kikkonet is a UV stabilized polyethylene terephthalate monofilament. Kikkonet is kept in tension and is rigid like the previous copper alloy mesh netting considered in the 2022 permit consultation.” The Region considered a previous EA and Biological Opinion for a Hawaii aquaculture facility, which found that the usage of advanced monofilaments like Kikkonet in marine aquaculture, because of their rigidity, offer a low risk of entanglement of marine mammals and help prevent cage breaches. The Determination Memo noted that, in “open ocean environments, the net material is kept in tension which reduces the likelihood of entanglement.” Further, the KikkoNet proposed is the same mesh size as the original proposed mesh size (40mm). The risk of entanglement, particularly by sea turtles, in the mesh netting is unchanged from the 2022 Permit. Modified Permit Determination Memo at 15. Furthermore, Ocean Era is required to develop operational practices (e.g., net pen inspections, routine net maintenance, debris removal, and monitoring of net pen thickness material) that ensures structural integrity and limits the risk of entanglement.

The Region also noted in the Modified Permit Determination Memo, at page 15, that “[t]he length of time the facility will be deployed, and the small-scale nature of the system, are additional factors that make entanglement impacts to ESA-listed species highly unlikely to occur or extremely minor in severity. The gear changes associated with the modified project will not pose any increased effects to ESA-listed species and critical habitat beyond those previously evaluated.”

The Region also addressed entanglement risk in its RTC, at page 14, noting that entanglement risk was also addressed in the re-initiated consultation with NMFS, which

concurred in the Region's determination that the modifications to the proposed activity are "not likely to adversely affect" some species and critical habitats, and will have "no effect" to other species or critical habitats that are relevant to the proposed action under ESA in the action area.

4. Fish Escapes

Petitioners' arguments regarding fish escapes are somewhat diffuse, with references to the CWA ODC and ESA both being raised as relevant grounds. In any case the risk of fish escapes has been addressed under the 2022 Permit and in further analysis in connection with the Modified Permit.¹⁹

The potential that a large-scale fish escape will occur is fully addressed above under the heading relating to the Risk of Structural Failure of Facility, starting on page 26. It is further worth noting that, as with the 2022 Permit's authorization of discharges associated with culturing of Almaco Jack, the culturing of Red Drum under the Modified Permit similarly involves native species, with use of first generation fingerlings from wild caught stock. Thus, there is no risk of genetic impacts to wild fish in the Gulf. *See* Modified Permit Determination Memo, at 13-14. The Board addressed claims that harms would occur due to fish escapes in connection with the Petitions relating to the 2022 Permit and denied review. *See* 18 EAD at 708-09. As with the 2022 Petition, the Modified Permit record adequately addresses fish escape risk and the Petitions do not demonstrate that the Region's analysis is clearly erroneous.

The Modified Permit RTC also addresses comments raised about the potential for fish escapes. For example, at page 20 of the RTC the Region states, "Fish escapes were analyzed in

¹⁹ The Modified Permit adds a clarifying condition relating to fish escapes, expressly prohibiting the intentional or negligent release of cultured fish. The clarifying provision was added in light of concerns raised about escaped fish and the potential that the permit could be misinterpreted as authorizing unlimited release. The 2022 Permit contains a standard NPDES condition requiring proper operation and maintenance of the permitted facility, and this provision would operate to prohibit intentional releases or releases that result from negligence. To ensure that this was understood by the permittee and the public, the clarifying provision was added.

the 2022 Permit record, and the same analysis applies even though the fish species has changed. There is not an appreciable difference in fish escape impacts posed by the change in species. The risks that escaped farm fish pose to wild populations are a function of the probability of escape, and the magnitude of the event that could cause an escape event. The cage system is designed to survive storm events by lowering the cage, which will be completely submerged during storms. The EPA has determined that the operational design will result in a low probability of escape. Furthermore, as with the original permit, the Modified Permit contains conditions requiring structural maintenance and a FDPC plan to mitigate the risk of disasters that may cause fish escapes.” The Region has properly addressed the risk of fish escapes in the Modified Permit and the Petitioners have failed to demonstrate that the Region’s analysis is clearly erroneous.

5. Newly Listed Species and Habitats

The CFS Petition suggests that the Region did not adequately consider the listing of a new protected species, the Rice’s Whale, because it was not addressed in the BE for the 2022 Permit.²⁰ However, the Region’s review of potential impacts to protected species and habitats, and the Region’s consultation with NMFS, did include consideration of newly listed species and habitats, including the Rice’s Whale. *See* Modified Permit Determination Memo at 16-17. The Region specifically noted that waters from the 100-meter isobath to the 400-meter isobath were identified as the core distribution area that informed the proposed critical habitat designation for the Rice’s Whale. The Facility will be located at approximately 40-meters depth, and would not be expected to have negative effects on the Rice’s Whale and its critical habitat. *Id.* The Region further found that the Modified Permit would not have adverse impacts on the other recently

²⁰ The Rice’s Whale was actually addressed in the 2022 Permit record, although at that time it was still considered a variant of the Bryde’s Whale. The Rice’s Whale was not determined to be a unique species until 2021. *See* Species Directory entry for Rice’s Whale at <https://www.fisheries.noaa.gov/species/rices-whale>.

listed species or critical habitats. *Id.* As noted above, NMFS concurred in the Region’s NLAA determination in its informal consultation for both the 2022 Permit and the Permit Modification.

The EAB rejected claims that EPA failed to fulfill its obligations under the ESA in connection with Petitions for review of the 2022 Permit. *See* 18 EAD at 713-719. In its decision, the Board found that the Region had appropriately discharged its ESA obligations. Nothing in the changed permit conditions requires a reexamination of those issues. Further, the Region did address the potential that the changes to the permit could affect protected species in its record for the Modified Permit and reinitiated consultation with NMFS in connection with the Modified Permit, and NMFS has concurred with the Region’s NLAA determination.

D. Marine Mammal Protection Act Imposes No Consultation Obligations on EPA when Issuing CWA Permits

The CFS Petition argues that the MMPA requires EPA to obtain proper authorization from NMFS before issuing the Permit, and that EPA failed to do so. This argument is not supported in statute or regulation – as there is no MMPA-based consultation or review obligation imposed on EPA when issuing permits --- the prohibition on takes would apply directly to the Permittee. Further, the MMPA requires an owner of a vessel engaging in commercial fishing operations to obtain authorization from NMFS prior to conducting activities that result in any incidental “takes” of marine mammals. *See* 16 U.S.C. § 1387(c)(2); 50 C.F.R. § 229.4. CFS has not explained how the MMPA applies directly to EPA’s action in issuing an NPDES permit. Thus, CFS has not satisfied the requirement of 40 C.F.R. § 124.19(a)(4)(i) to “clearly set forth, with legal and factual support, [its] contentions for why this issue should be reviewed.” Further, the MMPA issue in the Petition was not premised on any comments made on the Permit Modification, and accordingly is not cognizable in a Petition for Review under 40 CFR §124.19(a)(4)(ii).

E. The Region Requests that the Board Expedite its Consideration of This Matter to Avoid Unnecessary Delay

As demonstrated in the foregoing discussion, many of the issues raised in the Petitions lack a required connection to the changed conditions of the Modified Permit or fail to address the Region's RTC. Instead, the Petitioners seize on the narrow Modification to relitigate issues already addressed when the Region issued the 2022 Permit and already decided by the Board in its 2022 Order.

The Board has previously considered requests by EPA to expedite consideration where, as here, the Petitions failed to meet threshold requirements. *In re Dominion Energy Brayton Point, LLC*, 2009 EPA App. LEXIS 12. Here, Petitioners have failed to demonstrate that review is warranted pursuant to 40 C.F.R. § 124.19(a)(4) where they seek review of issues unaffected by the modification and also issues that have already been decided by this Board in its review of the 2022 Permit.

This unnecessary and duplicative review of previously adjudicated issues is not without harm. The challenge to the 2022 Permit is currently proceeding in the D.C. Circuit where Permittees have made representations to the court that they will not proceed with project construction until this appeal is resolved, and where the D.C. Circuit has similarly stayed litigation there until the EAB review process is completed. Thus, there is a real risk that Petitioners' overbroad appeal of this modification will delay a final adjudication of the merits of the 2022 Permit until after or very near the termination of the 2022 Permit's term in 2027.

For this reason, the Region urges the Board to complete its consideration of the instant Petitions promptly.

F. Stay

The Region notes that the Petition challenging the issuance of a Permit results in a stay of

contested permit conditions. In the case of a permit modification, only the changed terms are reopened; thus, only the changed terms of the Modified Permit are stayed, and this occurs by operation of law and requires no action by the Board. 40 C.F.R. § 124.16(a)(1).

G. Oral Argument

The Region does not believe that oral argument is necessary in this case. The Petitioners largely fail to focus their Petitions on changed conditions in the permit, and in many cases fail to address the Region's RTC. Where they do attempt to focus on changed conditions in the Modified Permit or to rebut the Region's RTC, their arguments are strained and lack merit. The Petitioners primarily remain concerned with the issues raised in their Petitions relating to the 2022 Permit, and the current Petitions should be promptly rejected to allow the appellate court litigation to proceed on the issues raised by Petitioners.

VI. CONCLUSION

For the foregoing reasons, the Petition for Review should be denied.

Respectfully submitted.

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I, Paul Schwartz, certify that, in accordance with 40 C.F.R. § 124.19(d)(3), this Response to Petition for Review does not exceed 14,000 words in length.

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CERTIFICATE OF SERVICE

I, Paul Schwartz, hereby certify that on December 18, 2020, I caused to be served a true and correct copy of the foregoing Response to Petition for Review, together with a copy of the certified Administrative Record Index, via the EAB's electronic filing system, and by sending a true and correct copy, via e-mail, to the following:

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