

Observations on marine protected areas and marine mammals submitted in the Strategic Environmental Assessment proceeding regarding the Plan for the Sustainable Energy Transition of Eligible Areas ("PiTESAI")

This document contains the text of the observations submitted to the Italian Ministry of Ecological Transition, on September 13, 2021, by ClientEarth and the Marine Mammal Protected Areas Task Force of the International Union for the Conservation of Nature (the "**Task Force**") as part of the Strategic Environmental Assessment ("**SEA**") proceeding relating to the adoption of the Plan for the Sustainable Energy Transition of Eligible Areas (so-called "**PiTESAI**"), provided for by Article 11-*ter* of Decree-Law No. 135 of December 14, 2018, converted into Law No. 12 of February 11, 2019.

As its name suggests, the purpose of the PiTESAI is to identify, throughout Italy, the areas that are suitable for hydrocarbon research, prospection and cultivation activities. Once the PiTESAI is adopted, the designation of these areas will have a significant impact on the permits required to carry out these activities as well as on pending proceedings. Specifically, the lack of compatibility of the areas will result, depending on the circumstances, in the revocation or expiration of the existing concessions or the rejection of the applications submitted.

Within the framework of the SEA proceeding leading up to the adoption of the PiTESAI, ClientEarth and the Task Force wished to bring to the attention of the Ministry of Ecological Transition considerations of vital importance in relation to the protection of marine habitats and species, with particular attention to mammals, against the exercise of the above-mentioned activities related to the exploitation of hydrocarbons.

The text of the comments submitted follows.

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TEXT OF THE OBSERVATIONS

(Automatic translation from Italian)

Dear Sirs,

With reference to the above, please consider the following.

ClientEarth is an international non-profit, non-governmental organization that uses the power of law to protect people and the planet. In parallel, the **Marine Mammals Protected Areas Task Force of the International Union for Conservation of Nature** (the "**Task Force**") is composed of a *pool of* international experts to identify, establish, monitor and manage marine mammal protected areas on a global scale, promoting effective spatial solutions and best practices for marine mammal conservation.

As part of their respective activities aimed at protecting marine biodiversity in the Mediterranean and in the spirit of esteem and cooperation that animates their relationship, ClientEarth and the Task Force have deemed it appropriate to submit the following observations as part of the Strategic Environmental Assessment procedure prodromal to the adoption of the Plan for the Sustainable Energy Transition of

Eligible Areas ("PiTESAI") provided for by art. 11-ter of Decree-Law No. 135 of December 14, 2018 ("Decree-Law 135/2018"), converted into Law No. 12 of February 11, 2019.

In this regard, ClientEarth and the Task Force have an interest in noting the following.

1) On the designation of marine protected areas by the Italian Republic

As the Ministry is aware, art. 6, paragraph 17, of Legislative Decree no. 152 of 3 April 2006 (the "Environmental Code") provides that 152 (the "**Environmental Code**") provides that "*within the perimeter of marine and coastal areas protected in any way for environmental protection purposes, by virtue of national or regional laws or in implementation of acts and conventions of the European Union and international conventions, the activities of research, prospecting and cultivation of liquid and gaseous hydrocarbons in the sea are prohibited, pursuant to Articles 4, 6 and 9 of Law 9 January 1991, no. 9. The prohibition is also established in the sea areas located within twelve miles from the coastlines along the entire national coastal perimeter and from the external perimeter of the abovementioned protected marine and coastal areas*". Consistent with this provision, the draft version of the PiTESAI submitted for public consultation shows that in the areas identified within these limits there is an absolute restriction on the exercise of activities related to the exploitation of hydrocarbons. These areas include those belonging to the so-called Natura 2000 Network, as designated pursuant to Directive 92/43/EEC ("**Habitats Directive**") and Directive 2009/147/EC ("**Birds Directive**").

In this regard, it is necessary to point out that, following the letter of formal notice sent on 9 June 2021 pursuant to art. 258 TFEU, the European Commission has initiated infringement procedure no. INFR(2021)2028 against the Italian Republic. This procedure, as known to Your Honourable Ministry, concerns the violation by the Italian Republic of its obligation to complete the so-called Natura 2000 network through the designation of the relevant protected areas pursuant to the above-mentioned Directives. The current Italian Natura 2000 network does not adequately cover the various types of habitat and species in need of protection. The most serious gaps concern marine species, such as the Mediterranean monk seal, the loggerhead sea turtle (*Caretta caretta*) and the bottlenose dolphin (*Tursiops truncatus*), and marine habitats, such as reefs. Marine site designations are also missing for several seabird species, such as the greater shearwater (*Calonectris diomedea*) and the lesser Mediterranean shearwater (*Puffinus yelkouan*).

The consequence of the Italian Republic's breach of that obligation is that areas which should be subject to an absolute exclusionary constraint within the meaning of Article 6(17) of the Environmental Code are instead deprived of any protection against the impact of activities connected with the exploration, prospecting and production of hydrocarbons, thereby aggravating the effects of the breach in question.

Notwithstanding the clear breach by the Italian Republic of its obligations under the Habitats Directive, that circumstance is contrary not only to the Italian Republic's obligation, in accordance with the principle of '*useful effect*', to ensure that Community law is as effective as possible, but also gives rise to a scenario in which the application of a rule, Article 6(17) of the Environment Code, is prevented as a result of a breach of an obligation arising from the law of the European Union itself.

In this regard, it is worth noting, as the Ministry is aware, that the obligations deriving from the Habitats Directive and the Birds Directive apply even before the Member States comply with the duty of designation. If, in fact, from a scientific point of view and according to the criteria provided for by the Habitats Directive, it appears that a site must be designated under the Habitats Directive and the Birds Directive, the protection of this site must in any case be safeguarded from the moment when the legal obligation of designation arises. As it clearly emerges from the interpretation of the Court of Justice of the European

Union¹ as well as of the European Commission, in fact, even in case of non-designation, Member States are in any case obliged to safeguard the ecological interest of the sites which, on the basis of the Habitats Directive and the Birds Directive and by applying the measures provided *therein*, should be protected, resulting in any case, in general, bound for the purposes of the Plan now submitted for consultation².

Moreover, Article 6, Section 17, of the Environmental Code, for the purpose of prohibiting the exercise of activities related to the exploitation of hydrocarbons, considers relevant the marine areas "**protected in any capacity**". Well, in the case in question, the title of protection is represented by the obligations referred to above, arising from the duty of the Italian Republic to ensure compliance with the principle of the so-called "*useful effect*" with respect to the application of the Habitats Directive and the Birds Directive.

For this reason, it is emphasized the need for This Ministry, for the purposes of identifying the areas suitable for the exercise of activities related to the exploitation of hydrocarbons and the related consequences referred to in Article 11-ter, paragraph 8 of Decree-Law. 135/2018, in accordance with the obligations arising from the EU law, takes into due consideration this scenario, qualifying, on the basis of the above considerations, as "not compatible" with the provisions of the Plan the areas that the Italian Republic would have had to designate pursuant to and according to the criteria of the Habitats Directive and the Birds Directive and which, if it had complied with this obligation, would be, in particular, protected by the absolute exclusion constraint under Article 6, paragraph 17, of the Environment Code.

2) Additional considerations related to the presence of marine mammals and the identification by the Task Force of Important Marine Mammal Areas (so-called "IMMAs")

ClientEarth and the Task Force look favourably on the considerations contained in the draft PiTESAI with reference to IMMAs (ref. n. 34 of the table "*List of environmental categories and constraints identified for the elaboration of PiTESAI*") and, more generally, to the protection obligations towards marine species, such as cetaceans, protected under art. 12 and ss. and Annex IV of the Habitats Directive (ref. n. 41 of the table).

In this regard, in addition to the proposed constraints of attention and without prejudice to the obligations for the protection of cetaceans foreseen by the international, community and national reference norms, ClientEarth and the Task Force recall how the **contribution offered by the identification of IMMAs** is also **essential to identify from the scientific point of view, marine areas of particular value, which, if they respect the criteria that impose their legal protection according to the above-mentioned norms (among which, in particular, the Habitats Directive, according to the criteria of Annex III or, for the species listed in Annex IV, as a protection measure according to art. 12 of the Directive), give rise to the binding consequences described in paragraph 1 above.**

The identification of the IMMAs, therefore, is of central relevance for the purposes of identifying the areas that the Italian Republic should have designated pursuant to and in accordance with the criteria of the Habitats Directive and, consequently, for the purposes of qualifying such areas as not compatible with the provisions of the Plan, also with respect to the legal consequences referred to in Article 11-ter, paragraph 8, of Decree-Law 135/2018.

¹ On all of them, Court of Justice of the European Union, C-117/03 and C- 244/05.

² See, in this regard, the document "*Management of Natura 2000 sites Guidance on the interpretation of Article 6 of Directive 92/43/EEC (Habitats Directive)*" referred to in European Commission Communication of 21 November 2018 No. C(2018) 7621 final

In this framework, ClientEarth and the Task Force, for the purposes of the adoption of the Plan, have an interest in recommending to Your Ministry particular attention with reference to the areas described below due to their relevance for the presence of cetaceans. These considerations are, in part, based on the results of the *workshop* on the identification of IMMAs in the Mediterranean ³, organized by the Task Force in October 2016 in Chania, Greece (the results of which can be consulted *online* on IMMA E-ATLAS ⁴) and, in part, on scientific knowledge acquired in subsequent years.

- (i) **Northern Adriatic:** marine areas facing the regions of Veneto, Emilia-Romagna and Marche. These areas are characterized by the presence of the "*Northern Adriatic IMMA*", with the bottlenose dolphin (*Tursiops truncatus*), protected according to Annexes II and IV of the Habitats Directive, as qualifying species⁵.

For the areas not included in the prohibition as per art. 4 of Law n. 9 of January 9, 1991, as modified by art. 26, paragraph 2, of Law n. 179 of July 21, 2002, in relation to the waters of the Gulf of Venice, in the stretch of sea between the parallel passing through the mouth of the Tagliamento river and the parallel passing through the mouth of the Goro branch of the Po river, we recommend to Your Excellency the Ministry the need to take into consideration, for the purposes of the adoption of the PITESAI and from the point of view of what described in paragraph 1, the areas that, due to the presence of the bottlenose dolphin, should have benefited from the designation of the area in question. the Ministry the need to take into consideration, for the adoption of the PiTESAI and in view of what described in paragraph 1, the areas that, due to the presence of the bottlenose dolphin, should have been designated according to and in compliance with the criteria of the Habitats Directive. As the Ministry is aware, in fact, species such as the bottlenose dolphin, included in Annex II of the Habitats Directive entail the obligation for Member States to designate the relative areas. These obligations, as described above and, moreover, with specific reference to the bottlenose dolphin, have been violated by the Italian Republic and are the subject of infringement procedure no. INFR(2021)2028 initiated by the European Commission.

- (ii) **Lower Adriatic Sea:** marine areas facing Puglia. These areas are partially occupied by the *Southern Adriatic and Northern Ionian Sea Area of Interest*. The so-called *Areas of Interest (Aoi)* are areas that have not yet reached the IMMA status. In this case, the area is of specific interest for two species: the bottlenose dolphin (Annexes II and IV of the Habitats Directive) and the zyphium (*Ziphius cavirostris*, included in Annex IV of the Habitats Directive and particularly sensitive to sounds, such as those generated by seismic *surveys*). In addition to the strict protection obligations required by the Habitats Directive for the species included in Annex IV, with reference to the presence of the bottlenose dolphin, reference is made to point (i) above.
- (iii) **Gulf of Taranto:** the Gulf of Taranto is affected by an offshoot of the *Southern Adriatic and Northern Ionian Sea Aoi* mentioned in point (ii) above. Subsequent research has highlighted the ecological importance of the Gulf for a number of cetacean species, including the bottlenose dolphin (Annexes II and IV of the Habitats Directive) and the striped dolphin (*Stenella coeruleoalba*, Annex IV of the Habitats Directive)⁶. The considerations made in points (i) and (ii) above also apply here.

³ <https://www.marinemammalhabitat.org/download/final-report-regional-workshop-mediterranean-sea-important-marinemammal-areas/>

⁴ <https://www.marinemammalhabitat.org/imma-eatlas/>

⁵ <https://www.marinemammalhabitat.org/portfolio-item/northern-adriatic/>

⁶ Carlucci R., Cipriano G., Paoli C., Ricci P., Fanizza C., Capezzuto F., Vassallo P. 2018. *Random forest population modelling of striped and common bottlenose dolphins in the Gulf of Taranto (Northern Ionian Sea, Central-eastern Mediterranean Sea)*, in *Estuarine, Coastal and Shelf Science*, 204:177-192. <https://doi.org/10.1016/j.ecss.2018.02.034>

In addition to the above, for the sake of accuracy, it should be noted that, contrary to what is indicated in point 34 of Table 1.3-1 "List of environmental categories and constraints identified for the preparation of PiTESAI", which indicates the IMMAs as not being cartographable, the related cartography is available online, as anticipated, on the IMMA E-ATLAS at the following link: <https://www.marinemammalhabitat.org/imma-eatlas/>, and that the related *shapefiles* and *metadata* can be obtained free of charge upon request to the Task Force (link: <https://www.marinemammalhabitat.org/immas/imma-spatial-layer-download/>).

In the light of all the above, This Ministry is requested to give adequate consideration to the above observations for the purposes of the adoption of the PiTESAI and, in particular, the identification of the areas suitable for the exercise of activities concerning the search, exploration and cultivation of hydrocarbons, also for the purposes of the legal consequences outlined in Article 11-ter, paragraph 8, of Decree-Law 135/2018.

We remain at your complete disposal for any clarification that may be necessary, and we are grateful for the opportunity to send you our best regards.

Sincerely,

for ClientEarth

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