

**U.S. Department of the Interior
Minerals Management Service
Atlantic OCS Region**

SPECIAL INFORMATION

January 2009

Compliance with the Endangered Species Act and Marine Mammal Protection Act for Geological and Geophysical Activities on the Atlantic OCS



Photo: NOAA (www.nmfs.gov).

How would we comply with the Endangered Species Act?

Section 7(a) of the Endangered Species Act (ESA) mandates that all Federal agencies consult with the Secretary of Commerce or Interior (via the National Marine Fisheries Service (NMFS) or the U.S. Fish and Wildlife Service (FWS)) to ensure that any “agency action” is not likely to

- (1) jeopardize the continued existence of any endangered or threatened species or
- (2) result in the destruction or adverse modification of an endangered or threatened species’ critical habitat.

Any proposed geological and geophysical (G&G) activity on the Atlantic Outer Continental Shelf that may affect or take a listed species or designated critical habitat whether the effects are beneficial, adverse, direct, or indirect, will require consultation with NMFS and FWS. The Minerals Management Service (MMS) will initiate this consultation with a Biological Assessment, or similar document, containing a thorough analysis of potential effects to ESA-listed species and designated critical habitat, a review of the best available relevant information, and any details on measures meant to minimize or eliminate the potential for effects to occur. The NMFS and FWS will review this information, consult with MMS, and then issue a Biological Opinion on whether the proposed action is likely to adversely affect or jeopardize the continued existence of the species or adversely modify critical habitat. This opinion will also include (1) an analysis of cumulative effects; (2) reasonable and prudent alternatives (if a jeopardy conclusion is reached); (3) an Incidental Take Statement (ITS) authorizing, under specific conditions, the taking of ESA-listed species; and (4) any required or recommended measures to reduce the amount or potential for incidental take. The ITS will not be issued for ESA-listed marine mammals until an authorization is obtained under the Marine Mammal Protection Act (see below).

The Federal regulations implementing Section 7(a) are found at 50 CFR 402 (Interagency Cooperation – Endangered Species Act of 1973, as Amended). In addition, NMFS and FWS jointly issued an Endangered Species Consultation Handbook that addresses the major consultation processes, including informal, formal, emergency, and special consultations, and

conferences. A more in-depth description of this consultation process may be found at the following MMS website: <http://www.mms.gov/eppd/compliance/esa/consultations.htm>.

How would we comply with the Marine Mammal Protection Act?

Congress enacted the Marine Mammal Protection Act (MMPA) in 1972 (16 U.S.C. 1361-1407). The MMPA prohibits (with some exceptions) (1) the “taking” of marine mammals in U.S. waters and by any person under U.S. jurisdiction on the high seas and (2) importing marine mammals and marine mammal products into the U.S. “Take” is statutorily defined as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal.” The 1994 Amendments to the MMPA further define harass as “any act of pursuit, torment, or annoyance that has the potential to

- injure a marine mammal or marine mammal stock in the wild (Level A); or
- disturb a marine mammal or marine mammal stock in the wild by disrupting behavioral patterns (for example, migration breathing, nursing, breeding, feeding, or sheltering) (Level B).”

Section 101(a)(5) (A-D) of the MMPA, as amended (16 U.S.C. 1371(a)(5)), provides a mechanism for allowing, upon request, the “incidental,” but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographic region provided the takings would be (1) small in numbers, (2) have no more than a “negligible impact” on marine mammals, and (3) have no “unmitigable adverse impact” on subsistence harvests of these species. These “incidental take” authorizations, also known as Incidental Harassment Authorizations or Letters of Authorization, outline the following:

- permissible methods and the specified geographical region of taking;
- means of effecting the least practicable adverse impact on the species or stock and its habitat and on the availability of the species or stock for “subsistence” uses; and
- requirements for monitoring and reporting, including the independent peer review of proposed monitoring plans where the proposed activity may affect the availability of a species or stock for taking for subsistence uses.

As a matter of policy, MMS coordinates with NMFS and FWS to ensure that offshore operators comply with the MMPA and to identify mitigation and monitoring requirements, and other best practices that reduce the potential for take, for permits or approvals for G&G activities.

A descriptive summary of the MMPA compliance process may be found at the following MMS website: <http://www.mms.gov/eppd/compliance/mmpa/index.htm>.