



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
GREATER ATLANTIC REGIONAL FISHERIES OFFICE
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Gloucester, MA 01930-2276

OCT - 7 2016

Ms. Yvette M. Fields
Director, Office of Deepwater Ports and Offshore Activities
US Department of Transportation
Marine Administration
1200 New Jersey Avenue, SE, W21-310
Washington, DC 20590

RE: Neptune LNG Project – Issuance of Incidental Take Statement

Dear Ms. Fields:

Enclosed is an Incidental Take Statement (ITS) to be appended to the biological opinion we issued to you on July 12, 2010. That Opinion considered the effects of the operation of the Neptune LNG port and associated pipeline, including potential maintenance and repair activities necessary to keep the port and pipeline in safe working condition, and the port's eventual decommissioning. In the Opinion, we concluded that maintenance and repair activities are likely to result in harassment of endangered North Atlantic right (*Eubalaena glacialis*), humpback (*Megaptera novaeaeangliae*), fin (*Balaenoptera physalus*), and sei (*Balaenoptera borealis*) whales, but are not likely to jeopardize the continued existence of these species. Since right, humpback, fin, and sei whales were protected under both the Marine Mammal Protection Act of 1972 (MMPA) and the Endangered Species Act (ESA) in 2010, it was necessary that any taking of these animals be authorized under both Acts. NMFS' Office of Protected Resources (OPR) has issued several incidental harassment authorizations for the take, by Level B harassment only, of marine mammals to Neptune. OPR issued a one-year IHA in June 2008 for the construction of the Deep Water Port (DWP), which expired on June 30, 2009. OPR issued a second one-year IHA to Neptune for the completion of construction and beginning of operations on June 26, 2009. OPR issued a third one-year IHA for ongoing operations followed by a five-year rulemaking and Letter of Authorization (LOA), which expired on July 10, 2016. In each case, an appropriate ITS was appended to our Opinion.

The ESA and regulations at 50 CFR § 402.14(i) state that an ITS for listed marine mammals will be provided if the taking is authorized pursuant to MMPA section 101(a)(5). Due to the expiration of Neptune's LOA and ITS on July 10, 2016, Neptune applied for a new IHA. OPR published a proposal in the *Federal Register* to issue a one-year IHA to Neptune (81 FR 58478; August 25, 2016). After a 30-day comment period, OPR concluded that this work will not result in more than the incidental harassment (as defined by the MMPA Amendments of 1994) of small numbers of certain species of marine mammals, will have no more than a negligible impact on these stocks, will not have an unmitigable adverse impact on the availability of these stocks for subsistence uses, and will result in the least practicable impact on these stocks. Thus, OPR has



determined the requirements of section 101(a)(5)(D) have been met and they are proposing to issue an IHA to Neptune that would become effective on October 7, 2016.

We consider the issuance of this IHA to be an interdependent action. That is, the issuance of the IHA has no independent utility apart from the action considered in the 2010 Opinion. We considered the effects of the activities to be carried out by Neptune in the 2010 Opinion. By this letter, we amend the 2010 Opinion to include our Office of Protected Resources as an action agency and incorporate it by reference.


The amended ITS exempts the take (harassment) of twelve fin, ten humpback, two sei whales and two right whales, and includes two Reasonable and Prudent Measures (RPM) and three implementing Terms and Conditions (T&Cs) to monitor incidental take for purposes of the ESA. These RPMs and T&Cs are consistent with the measures in previous ITSs appended to the 2010 Opinion. On September 8, 2016, we published a final rule de-listing the humpback whales present in the action area (West Indies Distinct Population Segment) under the ESA. Therefore, when the final rule becomes effective on October 11, 2016, the exemptions from section 9 of the ESA provided for humpback whales in the ITS will no longer be relevant. Because we do not know if any activities considered in the IHA will take place before the delisting of humpback whales becomes effective on October 11, 2016, we have included humpbacks in the ITS.

The new ITS is valid for one-year from October 7, 2016, to October 6, 2017. We recommend that the on-site environmental coordinator or project supervisor retain a copy of the ITS and IHA at all times while the authorized work is underway.

As stated in the July 12, 2010 BiOp, and as provided in 50 CFR 402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) the amount or extent of taking specified in the incidental take statement is exceeded; (2) new information reveals effects of the action that may not have been previously considered; (3) the identified action is subsequently modified in a manner that causes an effect to listed species; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. In instances where the amount or extent of incidental take is exceeded, you should immediately request reinitiation of formal consultation.

If you have any questions regarding this ITS, please contact Brian D. Hopper at (410)-573-4592 or brian.d.hopper@noaa.gov.

Sincerely,



Kimberly Damon-Randall
Assistant Regional Administrator
for Protected Resources

Enclosure

EC: Crocker, NMFS/GARFO
Dan McPherson, Neptune
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Ben-David, GCF
MacDonald, NOS-SBNMS
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INCIDENTAL TAKE STATEMENT

Section 9 of the Endangered Species Act of 1973 (ESA), as amended, and Federal regulations pursuant to section 4(d) of the ESA prohibit the take of endangered and threatened species, respectively without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. Harm is further defined by NOAA's National Marine Fisheries Service (NMFS) to include any act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation that actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns including breeding, spawning, rearing, migrating, feeding, or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), when a proposed agency action is found to be consistent with section 7(a)(2) of the ESA, taking that is incidental to and not intended as part of the agency action is not considered to be prohibited provided that such taking is in compliance with the terms and conditions of an Incidental Take Statement (ITS).

A marine mammal species or population stock which is listed as threatened or endangered under the ESA is, by definition, also considered depleted under the Marine Mammal Protection Act (MMPA). The ESA allows takings of threatened and endangered marine mammals only if authorized by section 101(a)(5) of the MMPA. Our July 12, 2010 biological opinion did not authorize the taking of listed marine mammals since the proposed taking had not been authorized under the MMPA. Because NMFS has now authorized the taking of listed marine mammals associated with the repair, maintenance, and decommissioning of the Neptune LNG deepwater port under section 101(a)(5)(D) of the MMPA, the incidental taking of marine mammals described in this ITS are also exempt from the taking prohibition of section 9(a), pursuant to section 7(o) of the ESA. We note that on September 8, 2016, we published a final rule de-listing the humpback whales present in the action area (West Indies Distinct Population Segment) under the ESA. Therefore, when the final rule becomes effective on October 11, 2016, the exemptions from section 9 of the ESA provided for humpback whales in the ITS will no longer be relevant. However, as none of the RPMs or Terms and Conditions are specific only to humpback whales, they will all remain in place.

The measures described below are nondiscretionary, and must be undertaken by the Office of Protected Resources (OPR), MARAD, and Neptune, so that they become binding conditions of any grant or permit issued to Neptune LNG, as appropriate, for the exemption in section 7(o)(2) to apply. OPR and MARAD have a continuing duty to regulate the activity covered by this ITS. If OPR and MARAD (1) fail to assume and implement the terms and conditions, or (2) fail to require Neptune to adhere to the terms and conditions of the ITS through enforceable terms that are added to the permit or grant document, the protective coverage of section 7(o)(2) may lapse. In order to monitor the impact of incidental take, OPR and MARAD must monitor the progress of the action and its impact on the species as specified in the ITS [50 CFR §402.14(i)(3)].

Amount or Extent of Take

We have concluded that the issuance of an IHA to Neptune LNG for take of North Atlantic right (*Eubalaena glacialis*), fin (*Balaenoptera physalus*), humpback (*Megaptera novaeaeangliae*), and

activities in the form of harassment, where habitat conditions (i.e., received sound levels above the 120 dB threshold for continuous noise used to determine harassment under the MMPA) will temporarily impair normal behavior patterns. This harassment will occur in the form of avoidance or displacement from preferred habitat and behavioral and/or metabolic compensations to deal with short-term masking or stress. While whales may experience temporary impairment of behavior patterns, no significant impairment resulting in injury (i.e., "harm") is likely due to: the moderate sound output of project components (i.e., sound levels below the thresholds for injury), the ability of whales to easily move to areas beyond the impact zone that also provide suitable prey, and the limited exposure time to disturbing levels of sound.

We do not expect any whales to be injured or killed by these activities. However, planned monitoring and mitigation measures are designed to avoid sudden onsets of potentially disturbing noise, to detect marine mammals occurring near the activities, and to avoid exposing them to sound sources that may cause hearing impairment.

In its IHA application, Neptune provided estimates of the number of whales which may be taken based on the potential "exposures" to received sound levels greater than 120 dB re 1 μ Pa (rms). As the IHA is effective for a period of one year (October 7, 2016-October 6, 2017), annually, the maximum number of such exposures is estimated to be 2 North Atlantic right whales, 12 fin whales, 10 humpback whales and 2 sei whales during maintenance, repair, and decommissioning activities. Each of these exposures would be considered a take by harassment; however, not all whales would be expected to react at the same level, and some may not react at all.

The amount of take will have been exceeded if any right, fin, humpback or sei whales are harmed, injured, or killed as a result of the maintenance, repair, and decommissioning of the Neptune port and associated pipeline, or if the number of whales taken by acoustic harassment as defined above exceeds the estimate of 2 North Atlantic right whales, 12 fin whales, 10 humpback whales and 2 sei whales. This ITS is only valid from October 7, 2016, through October 6, 2017; for humpbacks, it is only valid from October 7 through October 11, 2016 as after October 11, humpbacks in the action area will no longer be listed under the ESA.

Effect of the Take

Our July 12, 2010, biological opinion concluded that the project activities were not likely to result in jeopardy to the North Atlantic right, fin, humpback or sei whale. Exposure to maintenance/repair and decommissioning noise has the potential to harass right, fin, humpback and sei whales, although such takes are expected to be temporary and not to affect the reproduction, survival, or recovery of this species.

Reasonable and Prudent Measures

Reasonable and prudent measures (RPMs) are actions that we consider necessary and appropriate to minimize the impacts of incidental take on listed species. OPR, MARAD, and Neptune have worked with us to develop a comprehensive mitigation program to minimize the impacts of the proposed activities on endangered right, fin, humpback and sei whales as part of the project description for this action. We believe this mitigation program minimizes incidental take to the extent that is technologically feasible. Therefore, the RPMs included with this ITS are limited to monitoring and reporting activities.

1. Neptune must implement a NMFS approved program to monitor the incidental harassment of marine mammals due to the operation of the Neptune LNG deepwater port and associated pipeline.
2. OPR, MARAD, and Neptune must cooperate with NMFS to facilitate adaptive management of the impacts of Neptune project activities on listed species in the action area through proper reporting of project activities, marine mammal observations, and interactions with listed species.

Terms and Conditions

In order to be exempt from the prohibitions of section 9 of the ESA, OPR and MARAD must comply with and ensure Neptune complies with, the following terms and conditions, which implement the reasonable and prudent measures described above and outline reporting/monitoring requirements. These terms and conditions are non-discretionary.

1. To implement RPM #1 and RPM #2, the requirements of the IHA (attached) issued under section 101(a)(5)(A) of the MMPA are incorporated herein.
2. To implement RPM #2, Neptune must suspend any activities immediately if a dead or injured marine mammal is found in the action area and, based on the information available, we, in coordination with the regional stranding network, determines that the death or injury of the animal could be attributable to the Neptune LNG facility maintenance/repairs or decommissioning. NMFS Greater Atlantic Region (978-281-9328 and via email at incidental.take@noaa.gov) must be notified within 24 hours of the observation.
3. To implement RPM #2, OPR, MARAD, or Neptune must notify NMFS Greater Atlantic Regional Fisheries Office (GARFO) when the take level of any species reaches 50% of the total authorized for that species in this ITS. At that time, OPR, MARAD, and NMFS GARFO will determine if additional measures are needed to minimize acoustic harassment due to project activities.

The reasonable and prudent measures, with their implementing terms and conditions, are designed to minimize the potential for and impact of incidental take that might otherwise result from the proposed action. If, during the course of the action, the level of incidental take is exceeded, reinitiation of consultation and review of the reasonable and prudent measures are required. OPR and MARAD must immediately provide an explanation of the causes of the taking and review with us the need for possible modification of the reasonable and prudent measures. Reinitiation of formal consultation is required where discretionary federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) the amount or extent of taking specified in the incidental take statement is exceeded; (2) new information reveals effects of the action that may not have been previously considered; (3) the identified action is subsequently modified in a manner that causes an effect to listed species; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. In instances where the amount or extent of incidental take is *exceeded*, section 7 consultation must be reinitiated immediately.