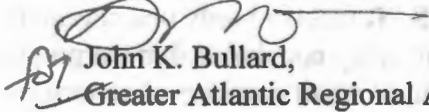




UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
GREATER ATLANTIC REGIONAL FISHERIES OFFICE
55 Great Republic Drive
Gloucester, MA 01930-2276

DEC 24 2014

MEMORANDUM FOR: Jolie Harrison,
Chief, Permits and Conservation Division
Office of Protected Resources

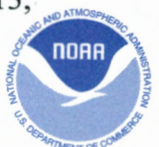
FROM:  John K. Bullard,
Greater Atlantic Regional Administrator

SUBJECT: Amendment to the Formal Endangered Species Act Consultation
for the Northeast Gateway Liquefied Natural Gas Port in
Massachusetts Bay

Attached is an amended incidental take statement (ITS) for NOAA's National Marine Fisheries Service's biological opinion issued to the NMFS Office of Protected Resources on November 21, 2014. The opinion analyzes the effects of the issuance of an incidental harassment authorization (IHA) for the proposed maintenance, repair, and operation of the Northeast Gateway Energy Bridge, L.P. (NEG) Liquefied Natural Gas Port and Algonquin Pipeline Lateral. The IHA was issued on December 22, 2014. The NEG Port is used for the import and regasification of liquefied natural gas (LNG) in Massachusetts Bay. This amended ITS exempts the incidental take caused by the proposed action from the take prohibitions of section 9 of the Endangered Species Act of 1973 (ESA), as amended. Although the IHA is only effective for one year, we anticipate that it will be renewed annually; accordingly, the incidental take exemption applies for the duration of the Deepwater Port permit (expires 2032), or until the amended ITS is revised.

Although NMFS PR is the lead action agency for this consultation for the issuance of the IHA, several other federal agencies, including the Maritime Administration/USCG, the Environmental Protection Agency, and the Federal Energy Regulatory Commission, undertook actions to authorize operation, maintenance, and repair of the NEG LNG Port as well as the Pipeline Lateral. These agencies have agreed to be co-action agencies on this consultation; therefore, their activities were considered as part of this opinion and any associated take is exempted by the attached ITS.

Our November 21, 2014 opinion did not include an incidental take exemption for right, humpback, fin, or sei whales because the incidental take of these ESA-listed species had not been authorized under section 101(a)(5) of the Marine Mammal Protection Act (MMPA). 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). On January 18, 2013,



NMFS PR received a request on behalf of NEG for a new IHA for the operation, maintenance, and repair of the NEG LNG Port and the associated Algonquin Pipeline Lateral in Massachusetts Bay. NMFS PR initiated formal consultation with us in a letter received on October 17, 2013 and issued the proposed IHA in the *Federal Register* on November 18, 2013. In February of 2014, NEG withdrew their IHA application in order to revise the acoustic monitoring plan that was included in the original IHA application. Following discussions with NMFS PR, Stellwagon Bank National Marine Sanctuary (SBNMS) and GARFO, NEG proposed a new monitoring plan, which necessitated the reissuance of the proposed IHA in the *Federal Register* on October 6, 2014 (79 FR 60142). During the 30-day public comment period for the notice published on November 18, 2013, NMFS PR received two comment letters: one from the Marine Mammal Commission (Commission) and one from the Whale and Dolphin Conservation and the Humane Society of the United States. During the 30-day public comment period for the *Federal Register* notice published on October 6, 2014, NMFS PR received only one comment letter from the Commission. After reviewing the comments, they concluded that the proposed actions will not result in more than the incidental harassment 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, NMFS PR has determined the requirements of section 101(a)(5)(D) have been met. NMFS PR issued the IHA for the NEG LNG on December 22, 2014. Since the IHA has been issued, we have amended the November 21, 2014 opinion to include an ITS accordingly, as described below.

The ITS exempts the take (harassment) of fin, humpback, right, and sei whales, and adds a new Reasonable and Prudent Measure (RPM) and three implementing Terms and Conditions (T&Cs) to monitor incidental take for purposes of the ESA. The RPM requires that NEG and Algonquin complete an annual monitoring and reporting program to confirm that they are complying with the minimization measures included in the proposed action, and reporting all project-related observations of listed species to NMFS Greater Atlantic Region.

According to the provisions of ESA Section 7(o)(2), any taking that is in compliance with the T&Cs of an ITS will not be considered to be a prohibited taking of the species concerned. Thus, it is very important for the action agency and the applicant to ensure compliance with the RPM and T &Cs outlined in the ITS. In addition, the listed species mitigation measures specified in the opinion as part of the proposed action must be implemented in order for this ITS to exempt incidental take associated with this action. 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 November 21, 2014 opinion, 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 that was not considered; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. If the

any of the criteria for reinitiation are satisfied, including if amount or extent of incidental take is exceeded, NMFS PR must immediately request reinitiation of formal consultation.

Updates since Publication of the Final Opinion

Incidental Harassment Authorization

As indicated above, an IHA was issued by NMFS PR on December 22, 2014. Prior to issuance of this IHA, NMFS PR consulted with us regarding the effects of issuing the IHA. The anticipated sources of acoustic harassment remain the same as those considered in the opinion, and the amount and type of incidental take of marine mammals authorized by the IHA were considered and analyzed in the opinion. As the issuance of the IHA does not amount to new information that reveals effects of the action that may not have been previously considered, reinitiation of consultation is not required.

The IHA indicates that it will be active from December 22, 2014 to December 21, 2015, rather than November 1, 2014 to October 31, 2015, which was proposed in the draft IHA and is what was contemplated in our opinion. This change does not alter any analysis or conclusions reached in our opinion.

Clean Water Act Permit

On December 4, 2014, the Environmental Protection Agency submitted a letter to us regarding the new National Pollutant Discharge Elimination System (NPDES) permit for the Northeast Gateway project. They informed us that they issued a notice of a draft permit for public review and comment on November 20, 2014. The permit is intended to replace the existing NPDES permit which expired on September 30, 2012, and has been administratively continued since that time. The new permit will authorize the intake and discharge of seawater to Massachusetts Bay at the Port for a new five year period. The issuance of the NPDES permit was part of the proposed action considered in our opinion. The draft permit authorizes seawater withdrawal of 6.9 billion gallons per year (BGY) by NEG vessels, rather than the 11 BGY considered in our opinion. As this is considerably less than what was analyzed, the effects of the withdrawal of the lesser amount are subsumed in the effects analyzed in the opinion. As the draft permit is otherwise consistent with what was considered in the opinion, EPA has made the determination that reinitiation of consultation is not necessary and we concur.

Clean Air Act Permit

On page 5 of our November 21, 2014 opinion, we used the following language to describe the air permit being issued by the Environmental Protection Agency:

In addition to the modification of the NPDES permit, the EPA is modifying the Outer Continental Shelf (OCS) Air Permit pursuant to the Clean Air Act that regulates the pollutants emitted from vessels during the maintenance, repair, and operation activities of the NEG Port facility. EPA conducted an analysis on NEG's modelling and found that despite the emissions increases, the emissions will not result in air quality exceeding

National Ambient Air Quality Standards (NAAQS). Therefore, EPA has determined that the emissions authorized under the modification will not affect any listed species, and as we do not have any information to contradict this determination, the OCS air permit will not be considered further in this opinion.

Whereas we cite the *Outer Continental Shelf (OCS) Air Permit* in our opinion, EPA has notified us that in fact they will be issuing the air permit pursuant to the Deepwater Port Act of 1974, and in accordance with the provisions of Title I of the Federal Clean Air Act. Additionally, the modelling for the proposed action indicated a decrease in emissions, rather than an increase. Despite the error in describing the proposed action, the determination made by the EPA that “the emissions authorized under the modification will not affect any listed species” does not change.

If you have any questions regarding this ITS, please contact Dan Tierney at 207-866-3755 or Dan.Tierney@noaa.gov.

Attachment

Cc:

Shane Guan-NMFS OPR
Leila Hatch, Craig MacDonald-SBNMS
Joanne Wachholder-FERC
Mel Cote, Danielle Gaito, Mark Stein, Phil Colarusso-EPA
Yvette Fields, Linden Houston-MARAD
Roddy Bachman-USCG

File Code: Sec 7 NEG LNG
PCTS: NER-2013-10537

11.0 INCIDENTAL TAKE STATEMENT-AMENDED DECEMBER 22, 2014

Section 9 of the ESA prohibits the take of endangered species of fish and wildlife. "Fish and wildlife" is defined in the ESA "as any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, non-migratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof" 16 U.S.C. 1532(8). "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 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. "Otherwise lawful activities" are those actions that meet all State and Federal legal requirements except for the prohibition against taking in ESA Section 9 (51 FR 19936, June 3, 1986), which would include any State endangered species laws or regulations. Section 9(g) makes it unlawful for any person "to attempt to commit, solicit another to commit, or cause to be committed, any offense defined [in the ESA.]" 16 U.S.C. 1538(g). A "person" is defined in part as any entity subject to the jurisdiction of the United States, including an individual, corporation, officer, employee, department or instrument of the Federal government (see 16 U.S.C. 1532(13)). Under the terms of section 7(b)(4) and section 7(o)(2), taking that results from, but is not the purpose of the agency action carrying out an otherwise lawful activity, is not considered to be prohibited under the ESA provided that such taking is in compliance with the terms and conditions of this Incidental Take Statement (ITS). In issuing ITSs, NMFS takes no position on whether an action is an "otherwise lawful activity."

The measures described below are non-discretionary, and must be undertaken by NMFS PR, Northeast Gateway (NEG), and Algonquin for the exemption in section 7(o)(2) to apply. NMFS PR has a continuing duty to regulate the activity covered by this Incidental Take Statement (ITS). If NMFS PR (1) fails to assume and implement the terms and conditions consistent with its authority or (2) fails to require NEG and Algonquin to adhere to the terms and conditions of the ITS, the protective coverage of section 7(o)(2) may lapse. In order to monitor the impact of incidental take, the NMFS PR must report the progress of the actions and their impact on the species to us as specified in the Incidental Take Statement [50 CFR §402.14(i)(3)] (See U.S. Fish and Wildlife Service and National Marine Fisheries Service's Joint Endangered Species Act Section 7 Consultation Handbook (1998) at 4-49).

11.1 Anticipated Amount or Extent of Incidental Take

We have concluded that the operation, maintenance, and repair of the Northeast Gateway LNG Port and associated Algonquin Pipeline Lateral is likely to result in incidental take of North Atlantic right (*Eubalaena glacialis*), humpback (*Megaptera novaeangliae*), fin (*Balaenoptera physalus*), and sei (*Balaenoptera borealis*) whales in the form of acoustic harassment. The exposure to underwater noise in excess of 120 dB re 1 μ Pa RMS resulting from the operation, maintenance, and repair activities may cause behavioral effects, such as disruption of feeding, resting, or other activities or alterations in breathing, vocalizing, or diving rates. The project-related acoustic effects will be temporary, short-term, and geographically limited to a very small portion of the overall species' range.

We have also concluded that the proposed action is not likely to adversely affect blue or sperm whales; hawksbill, green, Kemp's ridley, leatherback and loggerhead sea turtles; or Atlantic sturgeon. Therefore, no take of these species is anticipated or exempted.

The NMFS PR (Permits and Conservation Division) has issued an Incidental Harassment Authorization (IHA) for the harassment of a small number of marine mammals incidental to the operation, maintenance, and repair of the NEG LNG Port and Algonquin Pipeline in Massachusetts Bay. The IHA for the NEG Port was issued on December 22, 2014 and is effective December 22, 2014 through December 21, 2015. The IHA is effective for a period of one year, during which the maximum take exempted for the facility is 29 right whales, 42 humpback whales, 35 fin whales, and 30 sei whales. Each of these exposures will be considered a take by harassment. Although the IHA is only effective for one year, we anticipate that it will be renewed annually; accordingly the incidental take exemption applies for the duration of the Deepwater Port permit (expires 2032), or until the ITS is revised, provided a marine mammal take authorization is in effect. Therefore, the exempted take described above is the maximum amount of take anticipated annually (December 22 through December 21) between 2014 and 2032.

The amount of exempted take will be exceeded if any right, humpback, fin, or sei whales are harmed, injured, or killed as a result of the operation, maintenance, and repair of the Port and Pipeline, or if the number of such whales taken by acoustic harassment as defined above exceeds the estimate of 29 right whales, 42 humpback whales, 35 fin whales, and 30 sei whales per year.

11.2 Reasonable and Prudent Measures

Reasonable and prudent measures (RPMs) are those measures necessary and appropriate to minimize and monitor incidental take of a listed species. Section 2.3 of this Opinion identifies a number of mitigation measures included in the project description which are designed to avoid and minimize impacts to listed species. These measures are required of the applicant and they have been incorporated into the IHA that has been issued by NMFS PR. The most significant potential impacts from this project are harassment from noise and vessel strike. The requirements of the IHA (speed restrictions, noise limits, and marine mammal observer requirements) reduce

the potential of exposure to stressors that could otherwise cause injury. These measures are an important project component and the amount and type of take is minimized as a result. The reasonable and prudent measures below are in addition to the measures established by NMFS PR and Northeast Gateway and that will be adhered to throughout all phases of the project.

Failure to implement the listed species mitigation measures that were considered part of the proposed action would trigger reinitiation of consultation under 50 CFR § 402.16, and this ITS would not apply given that the action would be different than the action for which it exempts take. The listed species mitigation measures outlined as part of this proposed action must be implemented in order for this ITS to exempt incidental take. We believe the following reasonable and prudent measure is necessary and appropriate to minimize and monitor impacts of incidental take of fin, humpback, North Atlantic right, and sei whales. As noted above, this is in addition to the measures already being implemented as part of the proposed action.

1. Northeast Gateway and Algonquin must complete an annual monitoring and reporting program to confirm that they are complying with the minimization measures included in the proposed action, and report all project-related observations of listed species to NMFS Greater Atlantic Region.

11.3 Terms and Conditions

In order to be exempt from prohibitions of section 9 of the ESA, NMFS PR, Northeast Gateway, and Algonquin must comply with the following terms and conditions, which implement the reasonable and prudent measure described above. These terms and conditions are non-discretionary.

1. To implement RPM #1, any whale taken in a manner not authorized by the Incidental Harassment Authorization issued December 22, 2014 (e.g., injury, serious injury, or mortality) must be reported immediately to NMFS Greater Atlantic Region (978-281-9328) and via email to incidental.take@noaa.gov.
2. To implement RPM #1, an annual take report must be submitted to the NMFS Greater Atlantic Region that documents the level of Port activity (number and duration of EBRV visits, number and nature of any planned or unplanned repair and maintenance activities, and a description of any monitoring that was conducted, as well as results of that monitoring) from the previous year. This report should also include a detailed description of any takes of right, humpback, fin, and/or sei whales that occurred during the previous year.
3. To implement RPM #1 the requirements of the Incidental Harassment Authorization (December 22, 2014) issued under section 101(a)(5)(A) of the MMPA are incorporated by reference herein.

RPM #1, and Terms and Conditions #1, #2 and #3, are necessary and appropriate to ensure the proper documentation and reporting of any interactions with listed species. This is essential for monitoring the level of incidental take associated with the proposed action.

These RPMs and Terms and Conditions represent only minor changes as compliance will not result in any increased cost, delay of the project (unless unanticipated take occurs), or decrease in the efficiency of any activity.