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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XG879

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Site Characterization Surveys off the Coast of New York

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; incidental harassment authorization; request for comments on proposed Renewal.

SUMMARY:

NMFS received a request from Equinor Wind US LLC (formerly Statoil Wind US LLC; Equinor) for the Renewal of their currently active incidental harassment authorization (IHA) to take marine mammals incidental to marine site characterization surveys off the coast of New York in the area of the Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS-A 0512) and coastal waters where cable route corridors will be established. These activities are identical to those covered in the current authorization. Pursuant to the Marine Mammal Protection Act (MMPA), prior to issuing the currently active IHA, NMFS requested comments on both the proposed IHA and the potential for renewing the initial authorization if certain requirements were satisfied. The Renewal requirements have been satisfied, and NMFS is now providing an additional 15-day comment period to allow for any additional comments on the proposed Renewal not previously provided

during the initial 30-day comment period. Any comments received on the potential Renewal, along with relevant comments on the initial IHA, have been considered in the development of this proposed IHA Renewal, and a summary of agency responses to applicable comments is included in this notice. NMFS will consider any additional public comments prior to making any final decision on the issuance of the requested Renewal, and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than *[INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]*.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.Carduner@noaa.gov*.

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.*, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Jordan Carduner, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the original application, Renewal

request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, 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 geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to here as “mitigation measures”). Monitoring and reporting of such takings are also required. The

meaning of key terms such as “take,” “harassment,” and “negligible impact” can be found in section 3 of the MMPA (16 U.S.C. 1362) and the agency’s regulations at 50 CFR 216.103.

NMFS’ regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods of time not to exceed one year for each reauthorization. In the notice of proposed IHA for the initial authorization, NMFS described the circumstances under which we would consider issuing a Renewal for this activity, and requested public comment on a potential Renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-year IHA Renewal when (1) another year of identical or nearly identical activities as described in the Specified Activities section is planned or (2) the activities would not be completed by the time the IHA expires and a second IHA would allow for completion of the activities beyond that described in the Dates and Duration section of the initial IHA. All of the following conditions must be met in order to issue a Renewal:

- A request for Renewal is received no later than 60 days prior to expiration of the current IHA.
- The request for Renewal must include the following:
 - (1) An explanation that the activities to be conducted beyond the initial dates either are identical to the previously analyzed activities or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, take estimates, or mitigation and monitoring requirements; and
 - (2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.
- Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures remain the same and appropriate, and the initial findings remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed Renewal. A description of the Renewal process may be found on our web site at: www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals.

The NDAA (Pub. L. 108–136) removed the “small numbers” and “specified geographical region” limitations indicated above and amended the definition of “harassment” as it applies to a “military readiness activity.”

National Environmental Policy Act

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), as implemented by the regulations published by the Council on Environmental Quality (40 CFR parts 1500-1508), NMFS prepared an Environmental Assessment (EA) to consider the direct, indirect and cumulative effects to the human environment resulting from the issuance of the initial IHA in 2018. NMFS made the EA available to the public for review and comment. Also in compliance with NEPA and the CEQ regulations, NMFS signed a Finding of No Significant Impact (FONSI) on April 24, 2018. The 2018 NEPA documents are available at: www.fisheries.noaa.gov/action/incidental-take-authorization-statoil-wind-site-characterization-surveys-offshore-new-york. We have reviewed Equinor’s application for a Renewal of the 2018 IHA and the 2018 monitoring report. Based on that review, we have determined that the proposed action follows closely the IHA issued and implemented in 2018 and does not present any substantial changes, or significant new circumstances or information relevant to environmental concerns which would require a supplement to the 2018 EA or preparation of a new NEPA document. Therefore, we have preliminarily determined that a new or supplemental

EA or Environmental Impact Statement is unnecessary, and will, after review of public comments determine whether or not to rely on the existing EA and FONSI.

History of Request

On April 24, 2018, NMFS issued an IHA to Statoil Wind US LLC, to take marine mammals incidental to marine site characterization surveys off the coast of New York in the area of the Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS-A 0512) and coastal waters where cable route corridors will be established, effective from April 24, 2018, through April 23, 2019 (83 FR 19532; May 3, 2018). On February 21, 2019, NMFS received an application for the Renewal of that IHA. As described in the application for Renewal, the activities authorized in the initial IHA would not be completed by the time that IHA expires and a second IHA would allow for completion of the activities beyond that described in the Dates and Duration section of the initial IHA. As required, the applicant also provided a preliminary monitoring report (available at www.fisheries.noaa.gov/action/incidental-take-authorization-statoil-wind-site-characterization-surveys-offshore-new-york) which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted. Since the initial IHA was issued, Statoil Wind US LLC has changed the name under which the company operates to Equinor Wind US LLC (Equinor).

Description of the Specified Activities and Anticipated Impacts

Equinor proposes to continue their marine site characterization surveys in the approximately 79,350-acre Lease Area located approximately 11.5 nautical miles (nm) from Jones Beach, New York and along cable route corridors between the Lease Area and New York.

Water depths across the Lease Area range from approximately 22 to 41 meters (m) (72 to 135 feet (ft)) while the cable route corridors extend to shallow water areas near landfall locations. The specified activities described for this renewal are an identical subset of the activities covered by the initial 2018 IHA. The purpose of the surveys are to support the siting, design, and deployment of up to three meteorological data buoy deployment areas and to obtain a baseline assessment of seabed/sub-surface soil conditions in the Lease Area and cable route corridors to support the siting of a proposed offshore wind farm. NMFS previously published notices of proposed IHA (83 FR 7655; February 22, 2018) and issued IHA (83 FR 19532; May 3, 2018). These documents, as well as Equinor's initial IHA application and the preliminary monitoring report for the previously issued IHA, are available at: www.fisheries.noaa.gov/action/incidental-take-authorization-statoil-wind-site-characterization-surveys-offshore-new-york.

Similarly, the anticipated impacts are identical to those described in the initial IHA. Specifically, we anticipate the take of 11 marine mammal stocks (including nine cetacean and two pinniped stocks), by Level B harassment only, incidental to the site characterization surveys due to exposure to noise resulting from high resolution geophysical (HRG) survey equipment. Equinor was not able to complete the site characterization surveys analyzed in the initial IHA by the date that IHA is set to expire and anticipates the need for an additional 56 operational survey days to complete the survey campaign in 2019.

The following documents are referenced in this notice and include important supporting information, and may be found at the indicated location:

- Initial Proposed IHA: Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Site Characterization Surveys off of New York (83 FR 7655; February 22, 2018). Available at: www.fisheries.noaa.gov/action/incidental-take-authorization-statoil-wind-site-characterization-surveys-offshore-new-york;

- Initial Final IHA. Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Site Characterization Surveys off of New York (83 FR 19532; May 3, 2018). Available at: www.fisheries.noaa.gov/action/incidental-take-authorization-statoil-wind-site-characterization-surveys-offshore-new-york;
- Preliminary Monitoring Report from Initial IHA. Available at: www.fisheries.noaa.gov/action/incidental-take-authorization-statoil-wind-site-characterization-surveys-offshore-new-york; and
- Environmental Assessment (EA). Issuance of an Incidental Harassment Authorization to Statoil Wind U.S. LLC for Site Characterization Surveys off the Coast of New York. Available at: www.fisheries.noaa.gov/action/incidental-take-authorization-statoil-wind-site-characterization-surveys-offshore-new-york.

Detailed Description of the Activity

As described above, Equinor was not able to complete the surveys analyzed in the initial IHA by the date that IHA is set to expire (April 23, 2019). As such, the surveys Equinor proposes to conduct in 2019 would be a continuation of the surveys as described in the initial 2018 IHA and would be identical to the activities analyzed in the initial IHA (same location, equipment, methods, and seasonality). The initial IHA analyzed the potential impacts to marine mammals from a total of 142 survey days. Equinor completed a total of 86 operational survey days in 2018, and anticipates a total of 56 operational survey days will be required to complete the survey campaign in 2019 following issuance of the IHA Renewal, if renewed. Thus the total duration of the surveys conducted in 2018 and 2019 combined would not exceed the total duration described and analyzed in the previously issued IHA (142 days total). The proposed Renewal would be effective for a period of one year from the date of issuance.

Description of Marine Mammals

A description of the marine mammals in the area of the activities for which authorization

of take is proposed here, including information on abundance, status, distribution, and hearing, may be found in the Notice of issued IHA (83 FR 19532; May 3, 2018) for the initial authorization. NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects which species or stocks have the potential to be affected or the pertinent information in the Description of the Marine Mammals in the Area of Specified Activities contained in the supporting documents for the initial IHA.

Potential Effects on Marine Mammals and their Habitat

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which take is proposed here may be found in the Notice of issued IHA for the initial authorization. NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects our initial analysis of impacts on marine mammals and their habitat.

Estimated Take

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the Notices of issued IHA for the initial authorization. The HRG equipment that may result in take, as well as the source levels, marine mammal stocks taken, marine mammal density data and the methods of take estimation applicable to this authorization remain unchanged from the previously issued IHA.

As described above, Equinor completed 86 survey days in 2018 and anticipates the need for an additional 56 survey days in 2019 to complete their survey. As the number of survey days

remaining is less than the number of survey days analyzed in the previous IHA, the number of takes estimated to occur in 2019, and proposed for authorization, has changed from the number of takes authorized in the initial IHA (Table 7 in the initial IHA).

Equinor has already completed 60.5 percent of the planned total survey days that were analyzed in the initial IHA (*i.e.*, 86 of a total of 142 total survey days). Thus 39.5 percent of the total survey days analyzed in the previous IHA remain to be completed in 2019 (*i.e.*, 56 of a total of 142 total survey days). We therefore anticipate that the number of takes that may occur as a result of the remaining survey days in 2019 will represent 39.5 percent of the total take that was expected to occur during the entire duration of the survey (total 142 days) and was authorized in the initial IHA. The number of takes expected to occur during the remaining 56 survey days in 2019, and proposed for authorization, are shown in Table 1.

Table 1: Number of takes expected to occur and proposed for authorization during the remaining 56 survey days in 2019, and proposed for authorization.

Species	Level B Takes	Total Takes
North Atlantic right whale	7	7
Humpback whale	9	9
Fin whale	38	38
Sperm whale	2	2
Minke whale	15	15
Bottlenose dolphin	615	615
Common dolphin	668	668

Atlantic white-sided dolphin	169	169
Harbor porpoise	892	892
Harbor seal	1144	1144
Gray seal	1144	1144

Description of Proposed Mitigation, Monitoring and Reporting Measures

The proposed mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the Notice announcing the issuance of the initial IHA, and the discussion of the least practicable adverse impact included in that document remains accurate. The following measures are proposed for this renewal:

Marine Mammal Exclusion and Watch Zones

As required in the BOEM lease, marine mammal exclusion zones (EZ) will be established around the HRG survey equipment and monitored by protected species observers (PSO) during HRG surveys as follows:

- 50 m EZ for pinnipeds and delphinids (except harbor porpoises);
- 100 m EZ for large whales including sperm whales and mysticetes (except North Atlantic right whales) and harbor porpoises;
- 500 m EZ for North Atlantic right whales.

In addition, PSOs will visually monitor for all marine mammals to the extent of a 500 m “Watch Zone” or as far as possible if the extent of the Watch Zone is not fully visible.

Visual Monitoring

As per the BOEM lease, visual and acoustic monitoring of the established exclusion and monitoring zones will be performed by qualified and NMFS-approved PSOs. It will be the responsibility of the Lead PSO on duty to communicate the presence of marine mammals as well as to communicate and enforce the action(s) that are necessary to ensure mitigation and monitoring requirements are implemented as appropriate. PSOs will be equipped with binoculars and have the ability to estimate distances to marine mammals located in proximity to the vessel and/or exclusion zone using range finders. Reticulated binoculars will also be available to PSOs for use as appropriate based on conditions and visibility to support the siting and monitoring of marine species. Digital single-lens reflex camera equipment will be used to record sightings and verify species identification. During surveys conducted at night, night-vision equipment and infrared technology will be available for PSO use, and PAM (described below) will be used.

Pre-Clearance of the Exclusion Zone

For all HRG survey activities, Statoil will implement a 30-minute pre-clearance period of the relevant EZs prior to the initiation of HRG survey equipment. During this period the EZs will be monitored by PSOs, using the appropriate visual technology for a 30-minute period. HRG survey equipment will not be initiated if marine mammals are observed within or approaching the relevant EZs during this pre-clearance period. If a marine mammal is observed within or approaching the relevant EZ during the pre-clearance period, ramp-up will not begin until the animal(s) has been observed exiting the EZ or until an additional time period has elapsed with no further sighting of the animal (15 minutes for small delphinoid cetaceans and pinnipeds and 30 minutes for all other species). This pre-clearance requirement will include small delphinoids that approach the vessel (*e.g.*, bow ride). PSOs will also continue to monitor the zone for 30 minutes after survey equipment is shut down or survey activity has concluded.

Passive Acoustic Monitoring

As required in the BOEM lease, PAM will be required during HRG surveys conducted at night. In addition, PAM systems would be employed during daylight hours as needed to support system calibration and PSO and PAM team coordination, as well as in support of efforts to evaluate the effectiveness of the various mitigation techniques (*i.e.*, visual observations during day and night, compared to the PAM detections/operations). PAM operators will also be on call as necessary during daytime operations should visual observations become impaired. BOEM's lease stipulations require the use of PAM during nighttime operations. However, these requirements do not require that any mitigation action be taken upon acoustic detection of marine mammals. Given the range of species that could occur in the survey area, the PAM system will consist of an array of hydrophones with both broadband (sampling mid-range frequencies of 2 kHz to 200 kHz) and at least one low-frequency hydrophone (sampling range frequencies of 75 Hz to 30 kHz). The PAM operator would monitor the hydrophone signals in real time both aurally (using headphones) and visually (via the monitor screen displays). The PAM operator would communicate detections to the Lead PSO on duty who will ensure the implementation of the appropriate mitigation procedures. A mitigation and monitoring communications flow diagram has been included as Appendix C of the IHA application.

Ramp-Up of Survey Equipment

As required in the BOEM lease, where technically feasible, a ramp-up procedure will be used for HRG survey equipment capable of adjusting energy levels at the start or re-start of HRG survey activities. The ramp-up procedure will be used at the beginning of HRG survey activities in order to provide additional protection to marine mammals near the survey area by allowing them to vacate the area prior to the commencement of survey equipment use at full energy. A

ramp-up will begin with the power of the smallest acoustic equipment at its lowest practical power output appropriate for the survey. When technically feasible the power will then be gradually turned up and other acoustic sources added in a way such that the source level would increase gradually.

Shutdown Procedures

As required in the BOEM lease, if a marine mammal is observed within or approaching the relevant EZ (as described above) an immediate shutdown of the survey equipment is required. Subsequent restart of the survey equipment may only occur after the animal(s) has either been observed exiting the relevant EZ or until an additional time period has elapsed with no further sighting of the animal (*e.g.*, 15 minutes for delphinoid cetaceans and pinnipeds and 30 minutes for all other species). HRG survey equipment may continue operating if small delphinids voluntarily approach the vessel (*e.g.*, to bow ride) when HRG survey equipment is operating.

As required in the BOEM lease, if the HRG equipment shuts down for reasons other than mitigation (*i.e.*, mechanical or electronic failure) resulting in the cessation of the survey equipment for a period greater than 20 minutes, a 30 minute pre-clearance period (as described above) will precede the restart of the HRG survey equipment. If the pause is less than 20 minutes, the equipment may be restarted as soon as practicable at its full operational level only if visual surveys were continued diligently throughout the silent period and the EZs remained clear of marine mammals during that entire period. If visual surveys were not continued diligently during the pause of 20 minutes or less, a 30-minute pre-clearance period (as described above) will precede the re-start of the HRG survey equipment. Following a shutdown, HRG survey equipment may be restarted following pre-clearance of the zones as described above.

Vessel Strike Avoidance

Statoil will ensure that vessel operators and crew maintain a vigilant watch for cetaceans and pinnipeds by slowing down or stopping the vessel to avoid striking marine mammals. Survey vessel crew members responsible for navigation duties will receive site-specific training on marine mammal sighting/reporting and vessel strike avoidance measures. Vessel strike avoidance measures will include, but are not limited to, the following, as required in the BOEM lease, except under circumstances when complying with these requirements would put the safety of the vessel or crew at risk:

- All vessel operators and crew will maintain vigilant watch for cetaceans and pinnipeds, and slow down or stop their vessel to avoid striking these protected species;
- All vessel operators will comply with 10 knot (18.5 kilometers (km)/hr) or less speed restrictions in any SMA per NOAA guidance. This applies to all vessels operating at any time of year;
- All vessel operators will reduce vessel speed to 10 knots (18.5 km/hr) or less when any large whale, any mother/calf pairs, pods, or large assemblages of non-delphinoid cetaceans are observed near (within 100 m (330 ft)) an underway vessel;
- All survey vessels will maintain a separation distance of 500 m (1640 ft) or greater from any sighted North Atlantic right whale;
- If underway, vessels must steer a course away from any sighted North Atlantic right whale at 10 knots (18.5 km/hr) or less until the 500 m (1640 ft) minimum separation distance has been established. If a North Atlantic right whale is sighted in a vessel's path, or within 100 m (330 ft) to an underway vessel, the underway vessel must reduce speed and shift the engine to neutral. Engines will not be engaged until the North Atlantic right

whale has moved outside of the vessel's path and beyond 100 m. If stationary, the vessel must not engage engines until the North Atlantic right whale has moved beyond 100 m;

- All vessels will maintain a separation distance of 100 m (330 ft) or greater from any sighted non-delphinoid cetacean. If sighted, the vessel underway must reduce speed and shift the engine to neutral, and must not engage the engines until the non-delphinoid cetacean has moved outside of the vessel's path and beyond 100 m. If a survey vessel is stationary, the vessel will not engage engines until the non-delphinoid cetacean has moved out of the vessel's path and beyond 100 m;
- All vessels will maintain a separation distance of 50 m (164 ft) or greater from any sighted delphinoid cetacean. Any vessel underway will remain parallel to a sighted delphinoid cetacean's course whenever possible, and avoid excessive speed or abrupt changes in direction. Any vessel underway will reduce vessel speed to 10 knots (18.5 km/hr) or less when pods (including mother/calf pairs) or large assemblages of delphinoid cetaceans are observed. Vessels may not adjust course and speed until the delphinoid cetaceans have moved beyond 50 m and/or the abeam of the underway vessel;
- All vessels underway will not divert or alter course in order to approach any whale, delphinoid cetacean, or pinniped. Any vessel underway will avoid excessive speed or abrupt changes in direction to avoid injury to the sighted cetacean or pinniped; and
- All vessels will maintain a separation distance of 50 m (164 ft) or greater from any sighted pinniped.

Confirmation of the training and understanding of the requirements will be documented on a training course log sheet. Signing the log sheet will certify that the crew members understand and will comply with the necessary requirements throughout the survey event.

Seasonal Operating Requirements

Between watch shifts, members of the monitoring team will consult NMFS' North Atlantic right whale reporting systems for the presence of North Atlantic right whales throughout survey operations. However, the survey activities will occur outside of the SMA located off the coasts of New Jersey and New York. Members of the monitoring team will monitor the NMFS North Atlantic right whale reporting systems for the establishment of a Dynamic Management Area (DMA). If NMFS should establish a DMA in the survey area, within 24 hours of the establishment of the DMA Statoil will work with NMFS to shut down and/or alter the survey activities to avoid the DMA.

The mitigation measures are designed to avoid the already low potential for injury in addition to some Level B harassment, and to minimize the potential for vessel strikes. There are no known marine mammal feeding areas, rookeries, or mating grounds in the survey area that would otherwise potentially warrant increased mitigation measures for marine mammals or their habitat (or both). The survey will occur in an area that has been identified as a biologically important area for migration for North Atlantic right whales. However, given the small spatial extent of the survey area relative to the substantially larger spatial extent of the right whale migratory area, the survey is not expected to appreciably reduce migratory habitat nor to negatively impact the migration of North Atlantic right whales, thus mitigation to address the survey's occurrence in North Atlantic right whale migratory habitat is not warranted. Further, we believe the mitigation measures are practicable for the applicant to implement.

Based on our evaluation of the applicant's proposed measures, NMFS has determined that the mitigation measures provide the means of effecting the least practicable impact on the

affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Public Comments

As noted previously, NMFS published a notice of proposed IHA (83 FR 7655; February 22, 2018) and solicited public comments on both our proposal to issue the initial IHA and on the potential for a Renewal, should certain requirements be met. All public comments were addressed in the notice announcing the issuance of the initial IHA. Below, we describe how we have addressed, with updated information where appropriate, any comments received that specifically pertain to the Renewal of the 2018 IHA.

Comment: The Marine Mammal Commission (Commission) requested clarification of certain issues associated with NMFS's notice that one-year Renewals can be issued in certain limited circumstances and expressed concern that the process would bypass the public notice and comment requirements. The Commission also suggested that NMFS should discuss the possibility of Renewals through a more general route, such as a rulemaking, instead of notice in a specific authorization. The Commission further recommended that if NMFS did not pursue a more general route, that the agency provide the Commission and the public with a legal analysis supporting our conclusion that this process is consistent with the requirements of section 101(a)(5)(D) of the MMPA.

Response: The notice of the proposed initial IHA expressly notified and invited comment from the public on the possibility that under certain, limited conditions the applicant could seek a Renewal IHA for an additional year. The notice described the conditions under which such a Renewal request could be considered and expressly sought public comment in the event such a Renewal were sought. Further, since issuance of the initial IHA NMFS has modified the

Renewal process to provide notice through the **Federal Register** and an additional 15-day public comment period at the time the Renewal IHA is requested. NMFS also will provide direct notice of the proposed Renewal to those who commented on the initial IHA, to provide an opportunity to submit any additional comments.

We appreciate the Commission's suggestion that NMFS discuss the potential for IHA Renewals through a more general route, such as a rulemaking. However, utilizing the public comment process associated with IHAs is more efficient for the agency, while still providing for appropriate public input into NMFS' decision-making. Further, NMFS' recent modification to the Renewal process (i.e., soliciting additional public comment at the time of a Renewal request) should alleviate the Commission's concern about the lack of additional public comment and need for a more general rulemaking.

For more information, NMFS has published a description of the Renewal process on our web site at: www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals.

Preliminary Determinations

Equinor's proposed activity is identical to the activity analyzed in our previously issued notices of proposed IHA (83 FR 7655; February 22, 2018) and issued IHA (83 FR 19532; May 3, 2018) (with the exception of the duration of the survey, which is less than the duration analyzed in those documents). We concluded that the initial IHA would have a negligible impact on all marine mammal stocks and species and that the taking would be small relative to population sizes. The marine mammal information, potential effects, and the mitigation and monitoring measures remain the same as those analyzed in the previously issued notices of

proposed IHA and issued IHA, therefore the extensive analysis, as well as the associated findings, included in the prior documents remain applicable.

The only differences between the initial IHA and this proposed Renewal is that the duration of the survey and the numbers of incidental marine mammal take expected to occur are lower than the numbers analyzed and authorized in the previously issued IHA. As both the duration of the survey and the number of takes expected to occur, and proposed to be authorized, are lower than in the initial IHA, we have concluded that the effects of the proposed Renewal would be the same or less than those that were analyzed in the notices of the initial proposed IHA and issued IHA.

NMFS has preliminarily concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) Equinor's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and; (5) appropriate monitoring and reporting requirements are included.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the

destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally, in this case with the NMFS Greater Atlantic Regional Fisheries Office (GARFO), whenever we propose to authorize take for endangered or threatened species.

The NMFS Office of Protected Resources is proposing to authorize the incidental take of three species of marine mammals which are listed under the ESA: the North Atlantic right, fin, and sperm whale. BOEM consulted with NMFS GARFO under section 7 of the ESA on commercial wind lease issuance and site assessment activities on the Atlantic Outer Continental Shelf in Massachusetts, Rhode Island, New York and New Jersey Wind Energy Areas. NMFS GARFO issued a programmatic Biological Opinion in 2013 concluding that these activities may adversely affect but are not likely to jeopardize the continued existence of the North Atlantic right, fin, and sperm whale. The Biological Opinion was later amended to include the Office of Protected Resources as an action agency. The Biological Opinion can be found online at: www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable. The programmatic consultation established a procedure for reviewing future actions to determine if they and their effects fell within the scope of the Biological Opinion, and noted that for future MMPA authorizations for such activities, the Biological Opinion's incidental take statement (ITS) could be amended to exempt the take of ESA listed marine mammals. In April 2018, NMFS GARFO amended the ITS to exempt the take of right, sperm and fin whales as a result of the site characterization surveys authorized via the previously issued IHA.

NMFS GARFO has determined that the 2013 Biological Opinion remains valid and that the proposed MMPA authorization provides no new information about the effects of the action,

nor does it change the extent of effects of the action, or any other basis to require reinitiation of the opinion. The Biological Opinion meets the requirements of section 7(a)(2) of the ESA and implementing regulations at 50 CFR 402 for our proposed issuance of an IHA under the MMPA, and no further consultation is required. NMFS GARFO will issue an amended ITS and append it to the 2013 Biological Opinion.

Proposed Renewal and Request for Public Comment

As a result of these preliminary determinations, NMFS proposes to issue an IHA Renewal to Equinor for conducting marine site characterization surveys off the coast of New York and coastal waters where cable route corridors will be established, provided the previously described mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. We request comment on our analyses, the proposed Renewal, and any other aspect of this Notice. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: April 1, 2019.

Donna S. Wieting,
Director, Office of Protected Resources,
National Marine Fisheries Service.

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