



## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RTID 0648-XA716**

### **Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys off of Coastal Virginia**

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

**ACTION:** Issuance of a modified incidental harassment authorization; request for comments.

#### **SUMMARY:**

In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA), as amended, notification is hereby given that NMFS has issued a modified incidental harassment authorization (IHA) to Dominion Energy Virginia (Dominion) to incidentally harass marine mammals incidental to marine site characterization surveys conducted in the areas of the Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS) Offshore Virginia (Lease No. OCS-A-0483) as well as in coastal waters where an export cable corridor will be established in support of the Coastal Virginia Offshore Wind Commercial (CVOW Commercial) Project.

**DATES:** This modified IHA is valid from the date of issuance through August 27, 2021.

**FOR FURTHER INFORMATION CONTACT:** Robert Pauline, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the original application 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:

<https://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 may be 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 in shorthand as “mitigation”); and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

### **History of Request**

On February 7, 2020, NMFS received a request from Dominion for an IHA to take marine mammals incidental to marine site characterization surveys in the areas of the Commercial Lease of Submerged Lands for Renewable Energy Development on the OCS Offshore Virginia (Lease No. OCS-A-0483) as well as in coastal waters where an export cable corridor will be established in support of the offshore wind project. Dominion's planned marine site characterization surveys include high-resolution geophysical (HRG) and geotechnical survey activities. Geophysical and shallow geotechnical survey activities are anticipated to be supported by up to four vessels. The vessels will transit a combined estimated total of 121.54 kilometers (km) of survey lines per day. Dominion's request was for incidental take of small numbers of nine marine mammal species by Level B harassment only. The application was deemed adequate and complete on May 12, 2020. We published a notice of proposed IHA and request for comments in the **Federal Register** on June 17, 2020 (85 FR 36562). We subsequently published the final notice of our issuance of the IHA in the **Federal Register** on September 8, 2020 (85 FR 55415), with effective dates from August 28, 2020, to August 27, 2021. The specified activities were expected to result in the take by Level B harassment of 9 species (10 stocks) of marine mammals including bottlenose dolphin (*Tursiops truncatus*), pilot whale (*Globicephala spp.*), common dolphin (*Delphinus delphis*), Atlantic white sided dolphin (*Lagenorhynchus acutus*), Atlantic spotted dolphin (*Stenella frontalis*), Risso's dolphin (*Grampus griseus*), harbor porpoise (*Phocoena phocoena*), harbor seal (*Phoca vitulina*), and gray seal (*Halichoerus grypus*),

On September 29, 2020, NMFS received a request from Dominion for a modification to the IHA that was issued on August 28, 2020 (85 FR 55415; September 8, 2020). Since the issuance of the initial IHA, Dominion has been recording large pods of Atlantic spotted dolphin within the Level B harassment zone such that they were approaching the authorized take limit for this species. Dominion determined that without

an increase in authorized take of spotted dolphins they would be forced to repeatedly shut down whenever animals entered into specified Level B harassment zones. This would likely prolong the duration of survey and add increased costs to the project.

Therefore, Dominion requested a modification of the IHA to increase authorized take of spotted dolphin by Level B harassment. NMFS published the notice of the proposed IHA modification in the **Federal Register** on November 12, 2020 (85 FR 71881). The mitigation, monitoring, and reporting measures remain the same as prescribed in the initial IHA and no additional take is authorized for species other than spotted dolphin. Moreover, the IHA would still expire on August 27, 2021.

### **Description of the Specified Activity and Anticipated Impacts**

The modified IHA includes the same HRG and geotechnical surveys in the same locations that were described in the initial IHA. The mitigation, monitoring, and reporting measures remain the same as prescribed in the initial IHA. NMFS refers the reader to the documents related to the initial IHA issued on August 28, 2020, for more detailed description of the project activities. These previous documents include the notice of proposed IHA and request for comments (85 FR 36562; June 17, 2020), notice of our issuance of the initial IHA in the **Federal Register** (85 FR 55415; September 8, 2020), and notice of proposed IHA modification in the **Federal Register** (85 FR 71881; November 12, 2020).

#### *Detailed Description of the Action*

A detailed description of the survey activities is found in these previous documents. The location, timing, and nature of the activities, including the types of HRG equipment planned for use, daily trackline distances and number of survey vessels (four) are identical to those described in the previous notices.

### **Public Comments**

A notice of proposed IHA modification was published in the **Federal Register** on November 12, 2020 (85 FR 71881). During the 15-day public comment period, NMFS received comments from the Southern Environmental Law Center (SELC), which submitted comments on behalf of the Conservation Law Foundation, Defenders of Wildlife, Natural Resources Defense Council, Whale and Dolphin Conservation, Sierra Club Virginia Chapter, Assateague Coastal Trust, Inland Ocean Coalition, the International Marine Mammal Project of Earth Island Institute, and NY4WHALES. NMFS has posted the comments online at: [www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable](http://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable). A summary of the comments as well as NMFS' responses are below.

*Comment 1:* SELC indicated that NMFS's interpretation of small numbers is contrary to the purpose of the MMPA and that the agency failed to consider the unique conservation status of individual populations. Instead of applying a 30% ceiling for all species, SELC recommended that NMFS revisit its small numbers interpretation to consider whether the specific take percentage for Atlantic spotted dolphin will ensure that population levels are maintained at or restored to healthy population numbers.

*Response:* SELC's suggestion would import biological considerations into the term "small numbers," which NMFS has determined are more properly considered in a "negligible impact" evaluation. Note that MMPA does not define "small numbers." NMFS's and the U.S. Fish and Wildlife Service's 1989 implementing regulations defined small numbers as a portion of a marine mammal species or stock whose taking would have a negligible impact on that species or stock. This definition was invalidated in *Natural Resources Defense Council v. Evans*, 279 F.Supp.2d 1129 (2003) (N.D. Cal. 2003), based on the court's determination that the regulatory definition of small numbers was improperly conflated with the regulatory definition of "negligible impact," which rendered the small numbers standard superfluous. As the court observed, "the plain

language indicates that small numbers is a separate requirement from negligible impact.” Since that time, NMFS has not applied the definition found in its regulations. Rather, consistent with Congress' pronouncement that small numbers is not a concept that can be expressed in absolute terms (House Committee on Merchant Marine and Fisheries Report No. 97-228 (September 16, 1981)), NMFS makes its small numbers findings based on an analysis of whether the number of individuals authorized to be taken annually from a specified activity is small relative to the stock or population size. The Ninth Circuit has upheld a similar approach. See *Center for Biological Diversity v. Salazar*, No. 10-35123, 2012 WL 3570667 (9th Cir. Aug. 21, 2012). However, we have not historically indicated what we believe the upper limit of small numbers is.

To maintain an interpretation of small numbers as a proportion of a species or stock that does not conflate with negligible impact, we use the following framework. A plain reading of “small” implies as corollary that there also could be “medium” or “large” numbers of animals from the species or stock taken. We therefore use a simple approach that establishes equal bins corresponding to small, medium, and large proportions of the population abundance.

NMFS's practice for making small numbers determinations is to compare the number of individuals estimated and authorized to be taken (often using estimates of total instances of take, without regard to whether individuals are exposed more than once) against the best available abundance estimate for that species or stock. We note, however, that although NMFS's implementing regulations require applications for incidental take to include an estimate of the marine mammals to be taken, there is nothing in section 101(a)(5)(D) (or the similar provision in section 101(a)(5)(A) that requires NMFS to quantify or estimate numbers of marine mammals to be taken for purposes of evaluating whether the number is small. (See *CBD v. Salazar*.) While it can be challenging to predict the numbers of individual marine mammals that will be taken by an activity

(again, many models calculate instances of take and are unable to account for repeated exposures of individuals), in some cases we are able to generate a reasonable estimate utilizing a combination of quantitative tools and qualitative information. When it is possible to predict with relative confidence the number of individual marine mammals of each species or stock that are likely to be taken, the small numbers determination should be based directly upon whether or not these estimates exceed one third of the stock abundance. In other words, consistent with past practice, when the estimated number of individual animals taken (which may or may not be assumed as equal to the total number of takes, depending on the available information) is up to, but not greater than, one third of the species or stock abundance, NMFS will determine that the numbers of marine mammals taken of a species or stock are small.

In contrast, a negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be taken through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.*, intensity, duration), the context of any responses (*e.g.*, critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status.

Given the definitions present above, establishment of a small numbers threshold based on a stock-specific context is unnecessarily duplicative of the required negligible impact finding.

*Comment 2:* SELC stated that NMFS' updated negligible impact analysis underestimates the potential impacts of HRG surveys on small cetaceans like the Atlantic spotted dolphin. The MMPA authorizes NMFS to issue an IHA only if the agency finds

that the authorized harassment caused by a “specified activity” will have a “negligible impact” on marine mammals. SELC stated that NMFS’ negligible impact analysis is inadequate given the increased level of take that the agency proposed. SELC referenced several scientific research papers which indicated that Atlantic spotted dolphin is a particularly acoustically sensitive species, has the potential to be displaced, shift their behavioral state and stop or alter in response to a variety of anthropogenic noises, with potentially adverse energetic effects even from minor changes.

*Response:* Most of the scientific papers referenced by SELC describe the responses of various cetacean species to underwater noise associated with the use of seismic airguns, which are among the loudest anthropogenic sounds introduced into the marine environment. The HRG equipment used by Dominion radiates out less energy than seismic airguns and also operates in smaller areas. Therefore, the size of the area impacted by sound is much smaller. None of the references cited by SELC investigated potential impacts of HRG equipment to cetaceans. It should not be assumed that potential impacts to marine mammals from seismic airguns and from HRG equipment are similar, given the differences between the devices.

Even with the increase in authorized take numbers, the impacts of these lower severity exposures associated with HRG equipment are not expected to accrue to the degree that the fitness of any individuals is impacted, and, therefore no impacts on annual rates of recruitment or survival will result. Furthermore, the authorized take amount of spotted dolphin would be of small numbers relative to the population size (less than 5 percent).

*Comment 3:* SELC reiterated that NMFS’s use of the 160 decibel (dB) threshold for behavioral harassment is not supported by the best available scientific information and results in an inaccurate negligible impact analysis. Note that NMFS addressed this

comment in the **Federal Register** notice of issue of the initial IHA (85 FR 55415; September 8, 2020).

*Response:* NMFS acknowledges that the 160-dB root mean-square (rms) step-function approach is simplistic, and that an approach reflecting a more complex probabilistic function may more effectively represent the known variation in responses at different levels due to differences in the receivers, the context of the exposure, and other factors. We recognize the potential for Level B harassment at exposures to received levels (RLs) below 160 dB rms, and conversely the potential that animals exposed to RLs above 160 dB rms will not respond in ways constituting behavioral harassment (*e.g.*, Malme *et al.*, 1983, 1984, 1985, 1988; McCauley *et al.*, 1998, 2000a, 2000b; Barkaszi *et al.*, 2012; Stone, 2015a; Gailey *et al.*, 2016; Barkaszi and Kelly, 2018). While in practice the 160-dB threshold works as a step-function, *i.e.*, animals exposed to RLs above the threshold are considered to be “taken” and those exposed to levels below the threshold are not, it represents a sort of mid-point of likely behavioral responses (which are extremely complex depending on many factors including species, noise source, individual experience, and behavioral context). What this means is that, conceptually, the function recognizes that some animals exposed to levels below the threshold will in fact react in ways that are appropriately considered take, while others that are exposed to levels above the threshold will not. Use of the 160-dB threshold allows for a simplistic quantitative estimate of take, while we can qualitatively address the variation in responses across different RLs in our discussion and analysis.

As behavioral responses to sound depend on the context in which an animal receives the sound, including the animal's behavioral mode when it hears sounds, prior experience, additional biological factors, and other contextual factors, defining sound levels that disrupt behavioral patterns is extremely difficult. Even experts have not previously been able to suggest specific new criteria due to these difficulties

(e.g., Southall *et al.* 2007; Gomez *et al.*, 2016). NMFS acknowledges the limitations of the current system and is in the process of developing an updated approach to more accurately predict under what circumstances take is likely to result from sound exposure.

*Comment 4:* SELC recommended that HRG surveys should commence, with ramp-up, during daylight hours only, to maximize the chance that marine mammals are detected and confirmed clear of the exclusion zone.

*Response:* NMFS acknowledges the limitations inherent in detection of marine mammals at night. However, no injury is expected to result even in the absence of mitigation, given the very small estimated Level A harassment zones. Any potential impacts to marine mammals authorized for take would be limited to short-term behavioral responses. Restricting surveys in the manner suggested by the commenters may reduce marine mammal exposures by some degree in the short term, but would not result in any significant reduction in either intensity or duration of noise exposure. The restrictions recommended by the commenters could result in the surveys spending increased time on the water, which may result in greater overall exposure to sound for marine mammals and increase the risk of a vessel strike; thus the commenters have not demonstrated that such a requirement would result in a net benefit. Restricting the applicant to ramp-up only during daylight hours would have the potential to result in lengthy shutdowns of the survey equipment, which could result in the applicant failing to collect the data they have determined is necessary and, subsequently, the need to conduct additional surveys the following year. This would result in significantly increased costs incurred by the applicant. Thus, the restriction suggested by the commenters would not be practicable for the applicant to implement. In consideration of potential effectiveness of the recommended measure and its practicability for the applicant, NMFS has determined that restricting survey start-ups to daylight hours when visibility is unimpeded is not warranted or practicable in this case. Note that NMFS addressed this

comment in the **Federal Register** notice of issue of the initial IHA (85 FR 55415; September 8, 2020).

*Comment 5:* SELC recommended that a standard 500-meter exclusion zone be established for all marine mammal species around survey vessels.

*Response:* NMFS has determined that, with the exception of right whales, a 500-m exclusion zone is not warranted. The largest calculated Level B harassment distance for all marine mammals is calculated to be 100 m. We note that a 500-m exclusion zone would exceed the modeled distance to the largest Level B harassment isopleth distance (100 m) by a factor of five. Thus, NMFS is not requiring shutdown if marine mammals are sighted within 500 m of survey vessels. NMFS addressed this comment previously in the Federal Register notice of issue of the initial IHA (85 FR 55415; September 8, 2020).

*Comment 6:* SELC recommended that combination of visual monitoring—by four protected species observers adhering to “two-on/two-off” schedule—and passive acoustic monitoring (PAM) should be used at all times that survey work is underway, and, for efforts that continue into the nighttime, night vision or infrared technology should also be used.

*Response:* NMFS does not agree with the commenters that a minimum of four protected species observers (PSOs) should be required. The relatively small size of the exclusion means that that a single PSO stationed at the highest vantage point and engaged in general 360-degree scanning during daylight hours is able to effectively observe the necessary area. Additionally, PSOs must be on duty 30 minutes prior to and during nighttime ramp-ups for HRG surveys. Dominion has also committed to employing a minimum of two NMFS-approved PSOs when HRG equipment is in use at night.

There are several reasons why we do not agree that use of PAM is warranted for 24-hour HRG surveys. While NMFS agrees that PAM can be an important tool for augmenting detection capabilities in certain circumstances, its utility in further reducing

impact for Dominion's HRG survey activities is limited. First, for this activity, the area expected to be ensonified above the Level B harassment threshold is relatively small (a maximum of 100 m). This reflects the fact that the source level is comparatively low and the intensity of any resulting impacts would also be low. Further, inasmuch as PAM will only detect a portion of any animals exposed within a zone (see below), the overall probability of PAM detecting an animal in the harassment zone is low. Together these factors support the limited value of PAM for use in reducing take in small impact zones. PAM is only capable of detecting animals that are actively vocalizing, while many marine mammal species vocalize infrequently or during certain activities, which means that only a subset of the animals within the range of the PAM would be detected (and potentially have reduced impacts). Additionally, localization and range detection can be challenging under certain scenarios. For example, odontocetes are fast moving and often travel in large or dispersed groups which makes localization difficult. In addition, the ability of PAM to detect baleen whale vocalizations is further limited due to its deployment from the stern of a vessel, which puts the PAM hydrophones in proximity to propeller noise and low frequency engine noise, which can mask the low frequency sounds emitted by baleen whales, including North Atlantic right whales.

We also note that the effects to all marine mammals, including spotted dolphins, from the types of surveys authorized in this IHA are expected to be limited to low level behavioral harassment even in the absence of mitigation; no injury is expected or authorized. In consideration of the limited additional benefit anticipated by adding this detection method and the cost and impracticability of implementing a full-time PAM program, we have determined the current requirements for visual monitoring are sufficient to ensure the least practicable adverse impact on the affected species or stocks and their habitat. Note that the initial IHA contained a requirement, retained in the modified IHA, that night-vision equipment (*i.e.*, night-vision goggles and infrared

technology) must be available for use for PSOs. NMFS previously addressed this comment in the **Federal Register** notice of issue of the initial IHA (85 FR 55415; September 8, 2020).

*Comment 7:* SELC reiterated some of the recommendations they submitted in response to our initial Notice of proposed IHA published in **Federal Register** on June 17, 2020 (85 FR 36537) which focused on the need for stronger mitigation measures for North Atlantic right whale.

*Response:* Comments submitted by SELC pertaining to the North Atlantic right whale are outside the scope of this action, which only addresses increased take of dolphins and, further, were already addressed in previously in the **Federal Register** notice of issue of the initial IHA (85 FR 55415; September 8, 2020).

*Comment 8:* SELC recommended that all vessels traveling to and from the project area maintain a speed of 10 knots (18.5 km/hour) or less throughout the survey period.

*Response:* NMFS does not concur with this measure. NMFS has analyzed the potential for ship strike resulting from Dominion's activity and has determined that the mitigation measures specific to ship strike avoidance are sufficient to avoid the potential for ship strike. These include: a requirement that all vessel operators comply with 10 knot (18.5 km/hour) or less speed restrictions in any established dynamic management area (DMA) or seasonal management area (SMA); a requirement that all vessel operators reduce vessel speed to 10 knots (18.5 km/hour) or less when any large whale, any mother/calf pairs, pods, or large assemblages of non-delphinoid cetaceans are observed within 100 m of an underway vessel; a requirement that all survey vessels maintain a separation distance of 500-m or greater from any sighted North Atlantic right whale; a requirement that, if underway, vessels must steer a course away from any sighted North Atlantic right whale at 10 knots or less until the 500-m minimum separation distance has been established; and a requirement that, if a North Atlantic right whale is sighted in a

vessel's path, or within 500 m of an underway vessel, the underway vessel must reduce speed and shift the engine to neutral. We have determined that the ship strike avoidance measures are sufficient to ensure the least practicable adverse impact on species or stocks and their habitat. Furthermore, no documented vessel strikes have occurred for any HRG surveys which were issued IHAs from NMFS. NMFS addressed this comment previously in the **Federal Register** notice of issue of the initial IHA (85 FR 55415; September 8, 2020).

*Comment 10:* SELC recommended that NMFS consider activating Dynamic Management Areas (DMAs) whenever a single North Atlantic right whale is sighted or acoustically detected near the project area, not just an aggregation of three or more whales.

*Response:* DMAs are a component of the 2008 NOAA Ship Strike Rule to minimize lethal ship strikes of North Atlantic right whales. Note that the trigger of three or more whales is taken from a NOAA Northeast Fisheries Science Center (NEFSC) analysis of sightings data from Cape Cod Bay and Stellwagen Bank from 1980 to 1996 (Clapham & Pace 2001). This analysis found that an initial sighting of three or more North Atlantic right whales was a reasonably good indicator that whales would persist in the area, and the average duration of the whale's presence based on these sightings data was two weeks.

### **Description of Marine Mammals**

A description of the marine mammals in the area of the activities is found in these previous documents, which remains applicable to this modified IHA as well. In addition, NMFS has reviewed recent Stock Assessment Reports, information on relevant Unusual Mortality Events, and recent scientific literature, and determined that no new information affects our original analysis of impacts under the initial IHA.

### **Potential Effects of Specified Activities on Marine Mammals and their Habitat**

A description of the potential effects of the specified activities on marine mammals and their habitat may be found in the documents supporting the initial IHA, which remains applicable to the issuance of this modified IHA. There is no new information on potential effects.

### **Estimated Take**

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the notice of IHA for the initial authorization (85 FR 55415; September 8, 2020). 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. The number of authorized takes is also identical with the exception of spotted dolphin.

During the one month period from the effective date of the initial IHA (August 28, 2020) through September 29, 2020, a total of 19 spotted dolphins had been observed within the Level B harassment zone distances and recorded as takes. This was largely due to a single pod of 15 dolphins sighted in the zone. Another 24 dolphins were observed over three survey days but they were not located in the Level B harassment zone. Prior to the issuance of the initial IHA, Dominion operated only during daylight hours under a Letter of Concurrence (LoC) issued by NMFS. As such, Dominion committed to shutting down whenever a marine mammal approached or entered a Level B harassment zone in order to avoid all incidental take. In the weeks prior to the issuance of the initial IHA, Dominion had observed pods containing up to 17 individuals in the Level B harassment zone. However, these pods were not recorded as incidental takes since mitigation measures were employed, *i.e.*, the acoustic source was shut down and the animals were not exposed to source levels associated with harassment. The estimated take in the initial IHA was based on the best available density data from Roberts *et al.* (2016, 2017, 2018),

however, the multiple occurrences of the large pod in the vicinity of the survey was unexpected and not reflected in the take estimate. Table 1 shows spotted dolphin detection events when Dominion was operating under both the LoC (before August 28, 2020) as well as during the initial IHA (on or after August 28, 2020).

**Table 1—Atlantic Spotted Dolphin Observations during Dominion Energy HRG Survey Activities**

Vessel Name	Date of Detection	Number of animals observed in the group	Level B Takes Accumulated
Sarah Bordelon	9/16/2020	15	15
Marcelle Bordelon	9/9/2020	4	4
Marcelle Bordelon	9/7/2020	6	-
Sarah Bordelon	9/4/2020	7	-
Sarah Bordelon	9/4/2020	11	-
Marcelle Bordelon	8/23/2020	5	-
Sarah Bordelon	8/17/2020	17	-

Given that large pods of spotted dolphin were recorded on multiple occasions, Dominion became concerned that the authorized number of takes by Level B harassment would be exceeded, necessitating the frequent shutdown of HRG survey equipment to avoid additional take of this species. On October 3, 2020, Dominion reached the authorized take amount for spotted dolphins. Since that time, they have been shutting down whenever spotted dolphins are sighted approaching or entering the harassment zone. Dominion requested and NMFS has authorized additional take of this species to conservatively allow 20 authorized takes per day. NMFS concurs that this take amount is reasonable in case observed dolphin pods are larger than what has been recorded to date. While NMFS does not expect that larger spotted dolphin pods would occur every day, it cannot be ruled out. With approximately 120 survey days remaining, NMFS has authorized increased take by Level B harassment from 27 to 2,427 ((20 animals/day \* 120 survey days) + initial 27 authorized takes). This represents 4.38 percent of the western North Atlantic stock of spotted dolphin. Take by Level A harassment was not

requested, and has not been authorized by NMFS (or anticipated).

The total numbers of incidental takes by Level B harassment, including the authorized update in spotted dolphin takes, and as a percentage of population, is shown in Table 2 below.

**Table 2 —Total Numbers of Authorized Takes by Level B Harassment and as a Percentage of Population**

Species	Totals	
	Take Authorization (No.)	Instances of Take as Percentage of Population <sup>1</sup>
Short-finned pilot whale	12	0.06
Bottlenose dolphin (Offshore)	511	0.81
Bottlenose dolphin (Southern Migratory Coastal)	224	6.5
Common dolphin	68	0.08
Atlantic white-sided dolphin	44	0.12
Spotted dolphin (adjusted)	2,427	4.38
Risso's dolphin	6	0.08
Harbor porpoise	39	0.09
Harbor seal <sup>2</sup>	35	0.02
Gray Seal <sup>2</sup>		0.06

<sup>1</sup> Calculations of percentage of stock taken are based on the best available abundance estimate as shown in Table 2 in **Federal Register** final notice of issuance of the IHA (85 FR 55415; September 8, 2020). In most cases the best available abundance estimate is provided by Roberts *et al.* (2016, 2017, 2018), when available, to maintain consistency with density estimates derived from Roberts *et al.* (2016, 2017, 2018). For bottlenose dolphins, Roberts *et al.* (2016, 2017, 2018) provides only a single abundance estimate and does not provide abundance estimates at the stock or species level (respectively), so abundance estimates used to estimate percentage of stock taken for bottlenose dolphins are derived from NMFS SARs (Hayes *et al.* 2019).

<sup>2</sup> Pinniped density values reported as "seals" and not species-specific.

### **Description of Mitigation, Monitoring and Reporting Measures**

The mitigation, monitoring, and reporting measures included in this modified IHA are identical to those included in the **Federal Register** notice announcing the initial IHA and the discussion of the least practicable adverse impact included in that document remains accurate (85 FR 55415; September 8, 2020).

*Establishment of Exclusion Zones (EZs)* — Marine mammal EZs must be established around the HRG survey equipment and monitored by protected species observers (PSOs) during HRG surveys as follows:

- 500-m EZ is required for North Atlantic right whales;
- During use of the GeoMarine Dual 400 Sparker 800J, a 100-m EZ is required for all other marine mammals except delphinid(s) from the genera *Delphinus*, *Lagenorhynchus*, *Stenella* or *Tursiops* and seals; and
- When only the Triple Plate Boomer 1000J is in use, a 25-m EZ is required for all other marine mammals except delphinid(s) from the genera *Delphinus*, *Lagenorhynchus*, *Stenella* or *Tursiops* and seals; a 200-m buffer zone is required for all marine mammals except those species otherwise excluded (*i.e.* North Atlantic right whale).

If a marine mammal is detected approaching or entering the EZs during the survey, the vessel operator must adhere to the shutdown procedures described below. In addition to the EZs described above, PSOs must visually monitor a 200-m buffer zone for the purposes of pre-clearance. During use of acoustic sources with the potential to result in marine mammal harassment (*i.e.*, anytime the acoustic source is active, including ramp-up), occurrences of marine mammals within the monitoring zone (but outside the EZs) must be communicated to the vessel operator to prepare for potential shutdown of the acoustic source. The buffer zone is not applicable when the EZ is greater than 100 m. PSOs are also required to observe a 500-m monitoring zone and record the presence of all marine mammals within this zone.

*Visual Monitoring* — Monitoring must be conducted by qualified protected PSOs who are trained biologists, with minimum qualifications described in the **Federal Register** notice of the issuance of the initial IHA (85 FR 55415; September 8, 2020). Dominion must have one PSO on duty during the day and has committed that a minimum

of two NMFS-approved PSOs must be on duty and conducting visual observations when HRG equipment is in use at night. Visual monitoring must begin no less than 30 minutes prior to ramp-up of HRG equipment and continue until 30 minutes after use of the acoustic source. PSOs must establish and monitor the applicable EZs, Buffer Zone and Monitoring Zone as described above. PSOs must coordinate to ensure 360° visual coverage around the vessel from the most appropriate observation posts, and must conduct observations while free from distractions and in a consistent, systematic, and diligent manner. PSOs are required to estimate distances to observed marine mammals. It is the responsibility of the Lead PSO on duty to communicate the presence of marine mammals as well as to communicate action(s) that are necessary to ensure mitigation and monitoring requirements are implemented as appropriate.

*Pre-Clearance of the Exclusion Zones* — Prior to initiating HRG survey activities, Dominion must implement a 30-minute pre-clearance period. During pre-clearance monitoring (*i.e.*, before ramp-up of HRG equipment begins), the Buffer Zone also acts as an extension of the 100-m EZ in that observations of marine mammals within the 200-m Buffer Zone would also preclude HRG operations from beginning. During this period, PSOs must ensure that no marine mammals are observed within 200 m of the survey equipment (500 m in the case of North Atlantic right whales). HRG equipment must not start up until this 200-m zone (or, 500-m zone in the case of North Atlantic right whales) is clear of marine mammals for at least 30 minutes. The vessel operator must notify a designated PSO of the proposed start of HRG survey equipment as agreed upon with the lead PSO; the notification time must not be less than 30 minutes prior to the planned initiation of HRG equipment in order to allow the PSOs time to monitor the EZs and Buffer Zone for the 30 minutes of pre-clearance.

If a marine mammal is observed within the relevant EZs or Buffer Zone during the pre-clearance period, initiation of HRG survey equipment must not begin until the

animal(s) has been observed exiting the respective EZ or Buffer Zone, or, until an additional time period has elapsed with no further sighting (*i.e.*, minimum 15 minutes for porpoises, and 30 minutes for all other species). The pre-clearance requirement includes small delphinoids. PSOs must also continue to monitor the zone for 30 minutes after survey equipment is shut down or survey activity has concluded.

*Ramp-Up of Survey Equipment* — When technically feasible, a ramp-up procedure must be used for geophysical survey equipment capable of adjusting energy levels at the start or re-start of survey activities. The ramp-up procedure must 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 detect the presence of the survey and vacate the area prior to the commencement of survey equipment operation at full power. Ramp-up of the survey equipment must not begin until the relevant EZs and Buffer Zone has been cleared by the PSOs, as described above. HRG equipment must be initiated at their lowest power output and would be incrementally increased to full power. If any marine mammals are detected within the EZs or Buffer Zone prior to or during ramp-up, the HRG equipment must be shut down (as described below).

*Shutdown Procedures* — If an HRG source is active and a marine mammal is observed within or entering a relevant EZ (as described above) an immediate shutdown of the HRG survey equipment is required. When shutdown is called for by a PSO, the acoustic source must be immediately deactivated and any dispute resolved only following deactivation. Any PSO on duty has the authority to delay the start of survey operations or to call for shutdown of the acoustic source if a marine mammal is detected within the applicable EZ. The vessel operator must establish and maintain clear lines of communication directly between PSOs on duty and crew controlling the HRG source(s) to ensure that shutdown commands are conveyed swiftly while allowing PSOs to maintain watch. Subsequent restart of the HRG equipment must only occur after the

marine mammal has either been observed exiting the relevant EZ, or, until an additional time period has elapsed with no further sighting of the animal within the relevant EZ.

Upon implementation of shutdown, the HRG source may be reactivated after the marine mammal that triggered the shutdown has been observed exiting the applicable EZ (*i.e.*, the animal is not required to fully exit the Buffer Zone where applicable) or, following a clearance period of 15 minutes for small odontocetes and seals and 30 minutes for all other species with no further observation of the marine mammal(s) within the relevant EZ. If the HRG equipment shuts down for brief periods (*i.e.*, less than 30 minutes) for reasons other than mitigation (*e.g.*, mechanical or electronic failure) the equipment may be re-activated as soon as is practicable at full operational level, without 30 minutes of pre-clearance, only if PSOs have maintained constant visual observation during the shutdown and no visual detections of marine mammals occurred within the applicable EZs and Buffer Zone during that time. For a shutdown of 30 minutes or longer, or if visual observation was not continued diligently during the pause, pre-clearance observation is required, as described above.

The shutdown requirement is waived for certain genera of small delphinids (*i.e.*, *Delphinus*, *Lagenorhynchus*, *Stenella* (which includes Atlantic spotted dolphins), or *Tursiops*) under certain circumstances. If a delphinid(s) from these genera is visually detected within the EZ shutdown would not be required. If there is uncertainty regarding identification of a marine mammal species (*i.e.*, whether the observed marine mammal(s) belongs to one of the delphinid genera for which shutdown is waived), PSOs must use best professional judgment in making the decision to call for a shutdown.

If a species for which authorization has not been granted, or a species for which authorization has been granted but the authorized number of takes have been met, approaches or is observed within the area encompassing the Level B harassment isopleth (100 m or 25 m), shutdown must occur.

*Vessel Strike Avoidance* — Dominion must comply with vessel strike avoidance measures as described in the **Federal Register** notice of the issuance of the initial IHA (85 FR 55415; September 8, 2020).

*Seasonal Operating Requirements* — Dominion will conduct HRG survey activities in the vicinity of the North Atlantic right whale Mid-Atlantic SMA near Norfolk and the mouth of the Chesapeake Bay. Activities conducted prior to May 1 must comply with the seasonal mandatory speed restriction period for this SMA (November 1 through April 30) for any survey work or transit within this area.

Throughout all phases of the survey activities, Dominion must monitor NOAA Fisheries North Atlantic right whale reporting systems for the establishment of a DMA. If NMFS establishes a DMA in the Lease Area or cable route corridor being surveyed, within 24 hours of the establishment of the DMA, Dominion is required to work with NMFS to shut down and/or alter activities to avoid the DMA.

*Training* — Project-specific training is required for all vessel crew prior to the start of survey activities. Confirmation of the training and understanding of the requirements must 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 activities.

*Reporting* — PSOs must record specific information on the sighting forms as described in the **Federal Register** notice of the issuance of the initial IHA (85 FR 55415; September 8, 2020). Within 90 days after completion of survey activities, Dominion must provide NMFS with a monitoring report which includes summaries of recorded takes and estimates of the number of marine mammals that may have been harassed.

In the event of a ship strike or discovery of an injured or dead marine mammal, Dominion must report the incident to the Office of Protected Resources, NMFS and to the New England/Mid-Atlantic Regional Stranding Coordinator as soon as feasible. The

report must include the information listed in the **Federal Register** notice of the issuance of the initial IHA (85 FR 55415; September 8, 2020).

Based on our evaluation of the applicant's measures in consideration of the increased estimated take for spotted dolphins, NMFS has re-affirmed the determination that the required mitigation measures provide the means effecting the least practicable impact on spotted dolphins and their habitat.

### **Determinations**

Dominion's HRG survey activities and the mitigation, monitoring, and reporting requirements are unchanged from those covered in the initial IHA. The effects of the activity, taking into consideration the mitigation and related monitoring measures, remain unchanged from those stated in the initial IHA, notwithstanding the increase to the authorized amount of spotted dolphin take. Specifically, the Level B harassment authorized for spotted dolphins is expected to be of low severity, predominantly in the form of avoidance of the sound source and potential occasional interruption of foraging. With approximately 120 survey days remaining, NMFS has increased authorized spotted dolphin take by Level B harassment to 2,427. Even in consideration of the increased estimated numbers of take by Level B harassment, the impacts of these lower severity exposures are not expected to accrue to the degree that the fitness of any individuals is impacted, and, therefore no impacts on annual rates of recruitment or survival will result. Further, and separately, the authorized take amount of spotted dolphin would be of small numbers of spotted dolphins relative to the population size (less than 5 percent), as take that is less than one third of the species or stock abundance is considered by NMFS to be small numbers. In conclusion, there is no new information suggesting that our effects analysis or negligible impact finding for Atlantic spotted dolphins should change.

Based on the information contained here and in the referenced documents, NMFS has reaffirmed 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) Dominion'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 (ESA)**

No incidental take of ESA-listed species is authorized or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

### **National Environmental Policy Act**

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must review our proposed action (*i.e.*, the modification of an IHA) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of the modified IHA qualifies to be categorically excluded from further NEPA review.

### **Authorization**

NMFS has issued a modified IHA to Dominion for conducting marine site characterization surveys in the areas of the Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf Offshore Virginia (Lease No. OCS-A-0483) as well as in coastal waters where an export cable corridor will be established in support of the CVOW Commercial Project effective from the date of issuance until August 27, 2021.

Dated: December 14, 2020.

---

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

[FR Doc. 2020-27761 Filed: 12/16/2020 8:45 am; Publication Date: 12/17/2020]