



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD740]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Empire Wind Project, Offshore of New York

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

ACTION: Notice; issuance of Letter of Authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) as amended, and implementing regulations, notification is hereby given that a Letter of Authorization (LOA) has been issued to Empire Offshore Wind, LLC (Empire Wind) for the taking of marine mammals incidental to the construction of the Empire Wind Project (hereafter known as the “Project”).

DATES: The LOA is effective from February 22, 2024 through February 21, 2029.

ADDRESSES: The LOA and supporting documentation are available 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 below.

FOR FURTHER INFORMATION CONTACT: Jessica Taylor, Office of Protected Resources, NMFS, (301) 427-8401.

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, regulations are promulgated (when applicable), and public notice and an opportunity for public comment are provided.

An authorization for incidental taking 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). If such findings are made, NMFS must prescribe the permissible methods of taking; “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 the species or stocks for taking for certain subsistence uses (referred to as “mitigation”); and requirements pertaining to the monitoring and reporting of such takings. The MMPA defines “take” to mean harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal (16 U.S.C. 1362(13); 50 CFR 216.103). Level A harassment is defined as any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild (16 U.S.C. 1362(18); 50 CFR 216.3). Level B harassment is defined as any act of pursuit, torment, or annoyance which has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (16 U.S.C. 1362(18); 50 CFR 216.3). Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I authorize NMFS to propose and, if appropriate, promulgate regulations and issue an associated LOA(s). NMFS promulgated regulations on February 14, 2024 (89 FR 11342) for the taking of marine mammals incidental to the construction of the Empire Wind Project offshore of New York. The LOA authorizes Empire Wind and those

persons it authorizes or funds to conduct activities on its behalf to take marine mammals incidental to specified activities during the construction of the Project and requires them to implement mitigation, monitoring, and reporting requirements.

On February 14, 2024, NMFS promulgated a final rule (89 FR 11342) responding to a request from Empire Wind for authorization to take small numbers of marine mammals (17 species comprising 18 stocks) by Level B harassment (all 17 stocks) and by Level A harassment (2 of the 17 stocks) incidental to construction activities occurring in Federal and State waters off of New York, specifically within and around the Bureau of Ocean Energy Management (BOEM) Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS) Lease Area OCS-A 0512 (Lease Area) and along 2 export cable routes to sea-to-shore transition points (collectively referred to as the “Project Area”), over the course of 5 years (February 22, 2024 through February 21, 2029). The activities covered under the final rule include the installation of 147 wind turbine generators (WTGs) on monopile foundations and 2 offshore substations (OSSs) on jacket foundations using pin piles by impact pile driving; nearshore cable landfall work comprising of the installation and subsequent removal of nearshore temporary cofferdams by vibratory pile driving or the installation and subsequent removal of casing pipes supported by goal posts by impact pile driving at the sea-to-shore transition points located on Long Island and Brooklyn, New York; removal of berthing piles and installation of marine bulkheads inshore of Long Island, New York; high-resolution geophysical (HRG) marine site characterization surveys using active acoustic sources; fishery and ecological monitoring surveys; the placement of scour protection; the installation of the export cable route from OSSs to shore-based converter stations and inter-array cables between turbines by trenching, laying, and burial activities; vessel transit within the specified geographical region to transport crew, supplies, and materials; and WTG operation.

Marine mammals exposed to elevated noise levels during foundation pile driving, may be taken by Level A harassment (limited to fin whales and minke whale), and marine mammals exposed to elevated noise levels during impact and vibratory pile driving during cable landfall and marina construction activities and/or site characterization surveys may be taken by Level B harassment. No mortality or serious injury of any marine mammal is anticipated to occur or has been authorized.

Authorization

In accordance with the final rule (89 FR 11342, February 14, 2024, see 50 CFR 217.286), we have issued a LOA to Empire Wind authorizing the take, by harassment, of marine mammals incidental to specified construction activities within the specified geographical region. As previously stated, no mortality or serious injury of any marine mammal species is anticipated to occur or has been authorized. The incidental takes authorized herein are the same as those analyzed and authorized in the final rule (89 FR 11342, February 14, 2024). Takes of marine mammals will be minimized through the following planned mitigation and monitoring measures, as applicable for each specified activity: (1) implementation of spatio-temporal seasonal/time of day work restrictions; (2) use of multiple NMFS-approved Protected Species Observers (PSOs) to visually observe for marine mammals (with any detection within specifically designated zones triggering a delay or shutdown, as applicable); (3) use of NMFS-approved passive acoustic monitoring (PAM) operators to acoustically detect marine mammals, with a focus on detecting baleen whales (with any detection within designated zones triggering a delay or shutdown, as applicable); (4) implementation of clearance and shutdown zones; (5) use of soft-start prior to the start of foundation pile driving; (6) use of noise attenuation technology during foundation pile driving; (7) use of situational awareness monitoring for marine mammal presence; (8) use of sound field verification monitoring; (9) use of ramp-up acoustic sources during HRG surveys; (10) implementation of vessel separation

zones between marine mammals and project vessels; (11) use of PAM within the vessel transit corridor for Project vessels to travel over 10 knots (11.5 miles per hour); and (12) implementation of additional Vessel Strike Avoidance measures to reduce the risk of a vessel collision with a marine mammal. Additionally, NMFS may modify the LOA's mitigation, monitoring, or reporting measures, based on new information, when appropriate (see also 50 CFR 217.287(c)). Empire Wind is also required to submit reports, as specified in the final rule.

Based on the findings and information discussed in the preamble of the final rule, the take authorized in the LOA will have a negligible impact on marine mammal stocks, will not have an unmitigable adverse impact on the availability of the affected marine mammal stock for subsistence uses, and the mitigation measures provide a means of affecting the least practicable adverse impact on the affected stocks and their habitat.

Dated: February 21, 2024.

Kimberly Damon-Randall,

Director, Office of Protected Resources,

National Marine Fisheries Service.

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