



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XE596]

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

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

ACTION: Notice; modification of letter of authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, its implementing regulations, and NMFS' MMPA Regulations for Taking Marine Mammals Incidental to Construction of the Empire Wind Offshore Wind Project Offshore of New York, notification is hereby given that upon request from Empire Wind, LLC (Empire Wind), NMFS has modified a Letter of Authorization (LOA) issued to Empire Wind for the take of marine mammals incidental to activities associated with construction of the Empire Wind Offshore Wind Energy Project (hereafter known as the "Project") in Federal and State waters offshore New York. Specifically, NMFS has modified the LOA Holder's name as well as mitigation and monitoring measures related to vessel strike avoidance, sound field verification reporting, and requirements for passive acoustic monitoring (PAM). NMFS has also made modifications to additional measures to improve clarify and better align with the Biological Opinion. NMFS has determined that these modifications do not change the findings made for the regulations and does not result in any change in the total estimated number of takes of marine mammals.

DATES: The modified LOA is valid through February 21, 2029.

ADDRESSES: The issued modified LOA may be obtained online at https://www.fisheries.noaa.gov/action/incidental-take-authorization-empire-offshore-wind-llc-construction-empire-wind-project-ew1?check_logged_in=1.

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 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.

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). If such findings are made, 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 as “mitigation”); and requirements pertaining to the monitoring and reporting of such takings.

NMFS promulgated a final rule in the **Federal Register** on February 14, 2024 (89 FR 11342), which governs the incidental take of marine mammals incidental to Empire Wind’s construction of the Project in Federal and State waters offshore New York,

specifically within 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 and along two export cable routes to sea-to-shore transition points. The rule became effective on February 22, 2024, and is valid through February 21, 2029. The regulations allow NMFS to approve requests for modification to the LOA’s specified activity or the mitigation, monitoring, or reporting measures if NMFS determines the requested change does not change the findings made for promulgation of the regulations and does not result in more than a minor change in the total estimated number of takes (see 50 CFR 217.287(b)).

NMFS issued a LOA to Empire Wind on February 22, 2024, and published a notice of issuance in the **Federal Register** on February 27, 2023 (89 FR 14442). The LOA authorized Empire Wind to take, by harassment, marine mammals incidental to specified construction activities, specifically impact pile driving of wind turbine generator and offshore substation jacket foundations, vibratory pile driving of cofferdams and goal posts, pneumatic hammering of casing pipes, and high-resolution geophysical vessel-based site characterization surveys, within the specified geographical region.

Summary of Request and Analysis

On December 4, 2024, NMFS received a request from Empire Wind to transfer the LOA to Empire Leaseholder LLC (Empire Leaseholder), an affiliate wholly owned by Empire Wind. To ensure safety during vessel transit, Empire Wind requested for NMFS to modify the LOA safety exemption language to include a provision for allowing deviations from the vessel strike avoidance requirements (LOA measure 3(b)) so Project vessels could maintain safe maneuvering speed when oceanographic, hydrographic, and/or meteorological conditions restrict vessel maneuverability. Empire Wind also requested revisions to the reporting timeline for bubble curtain performance and maintenance report for piles for which abbreviated sound field verification (SFV)

monitoring is performed. These provisions will be more practicable and align with the Project's Biological Opinion, issued on September 8, 2023. In addition, Empire Wind requested for NMFS to allow the Pile Driving Mitigation and Monitoring Plan (PDMMP) to specify the number and location of PAM operators and to allow the PAM Plan to specify PAM operator protocols during foundation pile driving, instead of these requirements being specified in the LOA. NMFS determined none of these changes will affect the amount, the type of take authorized, or our findings as described in the final rule. Therefore, we have modified the attached LOA, specifically measures 3(b), 3(c)(7)(v), and 4(c)(2), thus fulfilling Empire Wind's request.

In reviewing Empire Wind's request, NMFS also recognized the need to update additional measures to improve clarity and better align the LOA with the Biological Opinion. NMFS moved the safety exemption for foundation pile driving to the beginning of the foundation pile driving section (LOA measure 3 (c)) to clarify that this measure applies to all foundation pile driving activities. In addition, NMFS modified the language for the maximum hammer energies ((3)(c)(2)) and soft start requirements ((3)(c)(4)) to provide additional flexibility for application of these requirements in the field. NMFS made minor revisions to the language in the mitigation and monitoring sections to improve the clarity of the requirements. To better align with the Biological Opinion, NMFS made minor revisions to the language in the sound field verification (SFV) monitoring requirements (LOA measures 3(c)(13)). NMFS also clarified the Protected Species Observer (PSO) and PAM Operator experience qualification requirements in section 4(a) of the LOA for foundation installation, cable landfall construction/marina activities, and high-resolution geophysical (HRG) surveys. NMFS' evaluation of the requested and necessary additional LOA modifications indicated that these modifications would not change the amount or nature of anticipated impacts of activities on marine mammals. Specifically, none of the benefits of any of the mitigation or monitoring

measures that have been modified here were considered quantitatively in the analyses (*i.e.*, only the 10-decibel sound attenuation and seasonal restrictions were quantitatively considered such that take numbers were reduced). In consideration of the above, NMFS has determined that these modifications do not result in changes in the total estimated take numbers or otherwise change any of the findings made for the regulations.

Authorization

NMFS has issued a modified LOA to Empire Wind authorizing the take, by harassment, of small numbers of marine mammals incidental to specified construction activities associated with the Project, which includes the modified mitigation, monitoring, and reporting measures discussed herein.

Dated: January 16, 2025.

Kimberly Damon-Randall,

Director, Office of Protected Resources,

National Marine Fisheries Service.

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