

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration**

[RTID 0648–XC078]

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico

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

ACTION: Notice of issuance 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 Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico, notification is hereby given that a Letter of Authorization (LOA) has been issued to BHP Billiton Petroleum (GOM) Inc. for the take of marine mammals incidental to geophysical survey activity in the Gulf of Mexico.

DATES: The LOA is effective from the date of issuance through January 31, 2023.

ADDRESSES: The LOA, LOA request, and supporting documentation are available online at: www.fisheries.noaa.gov/action/incidental-take-authorization-oil-and-gas-industry-geophysical-survey-activity-gulf-mexico. In case of problems accessing these documents, please call the contact listed below (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Kim Corcoran, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:**Background**

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce 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 authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible

impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined “negligible impact” in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Except with respect to certain activities not pertinent here, the MMPA defines “harassment” as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) 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 (Level B harassment).

On January 19, 2021, we issued a final rule with regulations to govern the unintentional taking of marine mammals incidental to geophysical survey activities conducted by oil and gas industry operators, and those persons authorized to conduct activities on their behalf (collectively “industry operators”), in Federal waters of the U.S. Gulf of Mexico (GOM) over the course of 5 years (86 FR 5322; January 19, 2021). The rule was based on our findings that the total taking from the specified activities over the 5-year period will have a negligible impact on the affected species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of those species or stocks for subsistence uses. The rule became effective on April 19, 2021.

Our regulations at 50 CFR 217.180 *et seq.* allow for the issuance of LOAs to industry operators for the incidental take of marine mammals during geophysical survey activities and prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat (often referred to as mitigation), as well as requirements pertaining to the monitoring and reporting of such taking. Under 50 CFR 217.186(e), issuance of an LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations and a determination that the amount of take

authorized under the LOA is of no more than small numbers.

Summary of Request and Analysis

BHP plans to conduct zero offset vertical seismic profile (VSP) survey within Green Canyon Block 564. See Attachment 5 of BHP's application for a map. BHP plans to use a 6-element, 1,500 cubic inch (in³) airgun array. Please see BHP's application for additional detail.

Consistent with the preamble to the final rule, the survey effort proposed by BHP in its LOA request was used to develop LOA-specific take estimates based on the acoustic exposure modeling results described in the preamble (86 FR 5322, 5398; January 19, 2021). In order to generate the appropriate take number for authorization, the following information was considered: (1) survey type; (2) location (by modeling zone¹); (3) number of days; and (4) season.² The acoustic exposure modeling performed in support of the rule provides 24-hour exposure estimates for each species, specific to each modeled survey type in each zone and season.

No VSP surveys were included in the modeled survey types, and use of existing proxies (*i.e.*, 2D, 3D NAZ, 3D WAZ, Coil) is generally conservative for use in evaluation of these survey types. Summary descriptions of these modeled survey geometries are available in the preamble to the proposed rule (83 FR 29212, 29220; June 22, 2018). Coil was selected as the best available proxy survey type for BHP's survey because the spatial coverage of the planned surveys is most similar to the coil survey pattern. For the planned survey, the source will be hung off of the drilling rig above the well. Approximately 26 shot stations are expected beneath salt, and up to 28 additional stations from base of salt, resulting in 270 maximum shots fired. The source will be stationary and thus cover no area. The coil survey pattern in the model was assumed to cover approximately 144 kilometers squared (km²) per day (compared with approximately 795 km², 199 km², and 845 km² per day for the 2D, 3D NAZ, and 3D WAZ survey patterns, respectively). Among the different parameters of the modeled survey patterns (*e.g.*, area covered, line spacing, number of sources, shot interval, total simulated pulses), NMFS considers area

¹ For purposes of acoustic exposure modeling, the GOM was divided into seven zones. Zone 1 is not included in the geographic scope of the rule.

² For purposes of acoustic exposure modeling, seasons include Winter (December–March) and Summer (April–November).

covered per day to be most influential on daily modeled exposures exceeding Level B harassment criteria. Because BHP's planned survey is expected to cover no additional area as a stationary source the coil proxy is most representative of the effort planned by BHP in terms of predicted Level B harassment.

In addition, all available acoustic exposure modeling results assume use of a 72-element, 8,000 in³ array. Thus, estimated take numbers for this LOA are considered conservative due to the differences in both the airgun array (6 elements, 1,500 in³), and in daily survey area planned by BHP (as mentioned above), as compared to those modeled for the rule.

The survey is planned to occur for a maximum of 2 days in Zone 5. The survey may occur in either season. Therefore, the take estimates for each species are based on the season that has the greater value for the species (*i.e.*, winter or summer).

In this case, use of the exposure modeling produces results that are smaller than average GOM group sizes for multiple species (Maze-Foley and Mullin, 2006). NMFS' typical practice in such a situation is to increase exposure estimates to the assumed average group size for a species in order to ensure that, if the species is encountered, exposures will not exceed the authorized take number. However, other relevant considerations here lead to a determination that increasing the estimated exposures to average group sizes would likely lead to an overestimate of actual potential take. In this circumstance, the very short survey duration (two days) and relatively small Level B harassment isopleths produced through use of the 6-element, 1,500 in³ airgun array (compared with the modeled 72-element, 8,000 in³ array) mean that it is unlikely that certain species would be encountered at all, much less that the encounter would result in exposure of a greater number of individuals than is estimated through use of the exposure modeling results. As a result, in this case NMFS has not increased the estimated exposure values to assumed average group sizes in authorizing take.

Additionally, for some species, take estimates based solely on the modeling yielded results that are not realistically likely to occur when considered in light of other relevant information available during the rulemaking process regarding marine mammal occurrence in the GOM. Thus, although the modeling conducted for the rule is a natural starting point for estimating take, our rule acknowledged that other

information could be considered (see, *e.g.*, 86 FR 5322, 5442 (January 19, 2021), discussing the need to provide flexibility and make efficient use of previous public and agency review of other information and identifying that additional public review is not necessary unless the model or inputs used differ substantively from those that were previously reviewed by NMFS and the public). For this survey, NMFS has other relevant information reviewed during the rulemaking that indicates use of the acoustic exposure modeling to generate a take estimate for certain marine mammal species produces results inconsistent with what is known regarding their occurrence in the GOM. Accordingly, we have adjusted the calculated take estimates for those species as described below.

Rice's whales (formerly known as GOM Bryde's whales)³ are generally found within a small area in the northeastern GOM in waters between 100–400 m depth along the continental shelf break (Rosel *et al.*, 2016). Whaling records suggest that Rice's whales historically had a broader distribution within similar habitat parameters throughout the GOM (Reeves *et al.*, 2011; Rosel and Wilcox, 2014), and a NOAA survey reported observation of a Rice's whale in the western GOM in 2017 (NMFS, 2018). Habitat-based density modeling identified similar habitat (*i.e.*, approximately 100–400 m water depths along the continental shelf break) as being potential Rice's whale habitat (Roberts *et al.*, 2016), although a “core habitat area” defined in the northeastern GOM (outside the scope of the rule) contained approximately 92 percent of the predicted abundance of Rice's whales. See discussion provided at, *e.g.*, 83 FR 29212, 29228, 29280 (June 22, 2018); 86 FR 5322, 5418 (January 19, 2021).

Although it is possible that Rice's whales may occur outside of their core habitat, NMFS expects that any such occurrence would be limited to the narrow band of suitable habitat described above (*i.e.*, 100–400 m). BHP's planned activities will occur in water depths of approximately 4,187 ft in the central GOM. Thus, NMFS does not expect there to be the reasonable potential for take of Rice's whale in association with this survey and, accordingly, does not authorize take of Rice's whale through this LOA.

Killer whales are the most rarely encountered species in the GOM,

typically in deep waters of the central GOM (Roberts *et al.*, 2015; Maze-Foley and Mullin, 2006). The approach used in the acoustic exposure modeling, in which seven modeling zones were defined over the U.S. GOM, necessarily averages fine-scale information about marine mammal distribution over the large area of each modeling zone. NMFS has determined that the approach can result in unrealistic projections regarding the likelihood of encountering killer whales.

As discussed in the final rule, the density models produced by Roberts *et al.* (2016) provide the best available scientific information regarding predicted density patterns of cetaceans in the U.S. GOM. The predictions represent the output of models derived from multi-year observations and associated environmental parameters that incorporate corrections for detection bias. However, in the case of killer whales, the model is informed by few data, as indicated by the coefficient of variation associated with the abundance predicted by the model (0.41, the second-highest of any GOM species model; Roberts *et al.*, 2016). The model's authors noted the expected non-uniform distribution of this rarely-encountered species (as discussed above) and expressed that, due to the limited data available to inform the model, it “should be viewed cautiously” (Roberts *et al.*, 2015).

NOAA surveys in the GOM from 1992–2009 reported only 16 sightings of killer whales, with an additional three encounters during more recent survey effort from 2017–18 (Waring *et al.*, 2013; www.boem.gov/gommapps). Two other species were also observed on less than 20 occasions during the 1992–2009 NOAA surveys (Fraser's dolphin and false killer whale⁴). However, observational data collected by protected species observers (PSOs) on industry geophysical survey vessels from 2002–2015 distinguish the killer whale in terms of rarity. During this period, killer whales were encountered on only 10 occasions, whereas the next most rarely encountered species (Fraser's dolphin) was recorded on 69 occasions (Barkaszi and Kelly, 2019). The false killer whale and pygmy killer whale were the next most rarely encountered species, with 110 records each. The killer whale was the species with the lowest detection frequency during each period over which PSO data were synthesized (2002–2008 and 2009–2015). This information qualitatively

³ The final rule refers to the GOM Bryde's whale (*Balaenoptera edeni*). These whales were subsequently described as a new species, Rice's whale (*Balaenoptera ricei*) (Rosel *et al.*, 2021).

⁴ However, note that these species have been observed over a greater range of water depths in the GOM than have killer whales.

informed our rulemaking process, as discussed at 86 FR 5322, 5334 (January 19, 2021), and similarly informs our analysis here.

The rarity of encounter during seismic surveys is not likely to be the product of high bias on the probability of detection. Unlike certain cryptic species with high detection bias, such as *Kogia* spp. or beaked whales, or deep-diving species with high availability bias, such as beaked whales or sperm whales, killer whales are typically available for detection when present and are easily observed. Roberts *et al.*, (2015) stated that availability is not a major factor affecting detectability of killer whales from shipboard surveys, as they are not a particularly long-diving species. Baird *et al.*, (2005) reported that mean dive durations for 41 fish-eating killer whales for dives greater than or equal to 1 minute in duration was 2.3–2.4 minutes, and Hooker *et al.*, (2012) reported that killer whales spent 78 percent of their time at depths between 0–10 m. Similarly, Kvadsheim *et al.*, (2012) reported data from a study of four killer whales, noting that the whales performed 20 times as many dives to 1–30 m depth than to deeper waters, with an average depth during those most common dives of approximately 3 m.

In summary, killer whales are the most rarely encountered species in the GOM and typically occur only in particularly deep water. While this information is reflected through the density model informing the acoustic exposure modeling results, there is relatively high uncertainty associated with the model for this species, and the acoustic exposure modeling applies

mean distribution data over areas where the species is in fact less likely to occur. NMFS' determination in reflection of the data discussed above, which informed the final rule, is that use of the generic acoustic exposure modeling results for killer whales would result in high estimated take numbers that are inconsistent with the assumptions made in the rule regarding expected killer whale take (86 FR 5322, 5403; January 19, 2021).

In past authorizations, NMFS has often addressed situations involving the low likelihood of encountering a rare species such as killer whales in the GOM through authorization of take of a single group of average size (*i.e.*, representing a single potential encounter). See 83 FR 63268, December 7, 2018. See also 86 FR 29090, May 28, 2021; 85 FR 55645, September 9, 2020. For BHP's survey, use of the exposure modeling produces an estimate of one killer whale exposure. Given the foregoing discussion, it is unlikely that even one killer whale would be encountered during this 2-day survey, and accordingly, no take of killer whales is authorized through the BHP LOA.

Based on the results of our analysis, NMFS has determined that the level of taking authorized through the LOA is consistent with the findings made for the total taking allowable under the regulations. See Table 1 in this notice and Table 9 of the rule (86 FR 5322; January 19, 2021).

Small Numbers Determination

Under the GOM rule, NMFS may not authorize incidental take of marine mammals in an LOA if it will exceed "small numbers." In short, when an

acceptable estimate of the individual marine mammals taken is available, if the estimated number of individual animals taken is up to, but not greater than, one-third of the best available abundance estimate, NMFS will determine that the numbers of marine mammals taken of a species or stock are small. For more information please see NMFS' discussion of the MMPA's small numbers requirement provided in the final rule (86 FR 5322, 5438; January 19, 2021).

The take numbers for authorization, which are determined as described above, are used by NMFS in making the necessary small numbers determinations, through comparison with the best available abundance estimates (see discussion at 86 FR 5322, 5391; January 19, 2021). For this comparison, NMFS' approach is to use the maximum theoretical population, determined through review of current stock assessment reports (SAR; www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments) and model-predicted abundance information (<https://seamap.env.duke.edu/models/Duke/GOM/>). For the latter, for taxa where a density surface model could be produced, we use the maximum mean seasonal (*i.e.*, 3-month) abundance prediction for purposes of comparison as a precautionary smoothing of month-to-month fluctuations and in consideration of a corresponding lack of data in the literature regarding seasonal distribution of marine mammals in the GOM. Information supporting the small numbers determinations is provided in Table 1.

TABLE 1—TAKE ANALYSIS

Species	Authorized take ¹	Abundance ²	Percent abundance
Rice's whale	0	51	n/a
Sperm whale	53	2,207	2.4
<i>Kogia</i> spp	³ 20	4,373	0.5
Beaked whales	232	3,768	6.2
Rough-toothed dolphin	40	4,853	0.8
Bottlenose dolphin	189	176,108	0.1
Clymene dolphin	112	11,895	0.9
Atlantic spotted dolphin	76	74,785	0.1
Pantropical spotted dolphin	510	102,361	0.5
Spinner dolphin	137	25,114	0.5
Striped dolphin	44	5,229	0.8
Fraser's dolphin	13	1,665	3.9
Risso's dolphin	33	3,764	0.9
Melon-headed whale	74	7,003	1.1
Pygmy killer whale	17	2,126	0.8
False killer whale	28	3,204	0.9
Killer whale	0	267	n/a
Short-finned pilot whale	21	1,981	1.1

¹ Scalar ratios were not applied in this case due to brief survey duration.

² Best abundance estimate. For most taxa, the best abundance estimate for purposes of comparison with take estimates is considered here to be the model-predicted abundance (Roberts *et al.*, 2016). For those taxa where a density surface model predicting abundance by month was produced, the maximum mean seasonal abundance was used. For those taxa where abundance is not predicted by month, only mean annual abundance is available. For the killer whale, the larger estimated SAR abundance estimate is used.

³ Includes 1 takes by Level A harassment and 19 takes by Level B harassment.

Based on the analysis contained herein of BHP's proposed survey activity described in its LOA application and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the affected species or stock sizes and therefore is of no more than small numbers.

Authorization

NMFS has determined that the level of taking for this LOA request is consistent with the findings made for the total taking allowable under the incidental take regulations and that the amount of take authorized under the LOA is of no more than small numbers. Accordingly, we have issued an LOA to BHP authorizing the take of marine mammals incidental to its geophysical survey activity, as described above.

Dated: June 16, 2022.

Catherine Marzin,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XC088]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Exempted Fishing Permit

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

ACTION: Notice of receipt of an application for exempted fishing permit; request for comments.

SUMMARY: NMFS announces the receipt of an application for an exempted fishing permit (EFP) from the Sustainable Seas Technology, LLC. If granted, the EFP would authorize the applicant to deploy modified black sea bass pots with Subsea Buoy Retrieval Systems (SBRs) in South Atlantic Federal waters off North Carolina, South Carolina, Georgia, and Florida. The project would continue to examine the potential usefulness of SBRs for use in the black sea bass pot component for the commercial sector of the snapper-

grouper fishery in minimizing impacts to protected species.

DATES: Written comments must be received on or before July 8, 2022.

ADDRESSES: You may submit comments on the application, identified by "NOAA-NMFS-2022-0059" by any of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <https://www.regulations.gov> and enter "NOAA-NMFS-2022-0059" in the Search box. Click the "Comment" icon, complete the required fields, and enter or attach your comments.

- **Mail:** Frank Helies, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

Electronic copies of the application and may be obtained from the Southeast Regional Office website at <https://www.fisheries.noaa.gov/black-sea-bass-pot-experimental-retrieval-project-exempted-fishing-permit-application-revision/>.

FOR FURTHER INFORMATION CONTACT: Frank Helies, 727-824-5305; email: frank.helies@noaa.gov.

SUPPLEMENTARY INFORMATION: The EFP is requested under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C 1801 *et seq.*), and regulations at 50 CFR 600.745(b) concerning exempted fishing.

Currently, vertical end lines and buoys, such as those utilized with black sea bass pots in the South Atlantic, present an entanglement risk to the North Atlantic right whale, a species that is listed as endangered under the Endangered Species Act (ESA). Each fall, some right whales travel from their

feeding areas in the waters off New England and Canada to the shallow, coastal waters of North Carolina, South Carolina, Georgia, and northeastern Florida. SBRs are a type of fishing gear that allows fish traps, including black sea bass pots, buoys, and their retrieval devices to be stored at depth until triggered for retrieval at the surface. These gear systems allow for trap and pot buoys and vertical lines to exist in the water column for minutes instead of hours or days, as they are activated via acoustic or timed release only when fishers are present. As described in the application, the applicant believes that adaptation of SBRs or "ropeless" systems for black sea bass pot fishing in the South Atlantic could reduce the risk to these whales and other marine animals that are subject to entanglements from vertical lines and buoys.

The project seeks to build upon previous research and continue to examine the potential usefulness of the modified black sea bass pot gear in minimizing impacts to protected species. This would be the third EFP authorizing this applicant to conduct this type of proposed research. NMFS approved the applicant's first EFP (August 24, 2020, through October 20, 2020) for the pilot research that allowed gear testing outside the black sea bass pot closed season (85 FR 42831; July 15, 2020). NMFS approved a second EFP on February 2, 2022, to be effective through August 31, 2024, that was similar to the first EFP but it allowed testing during the black sea bass pot closed season (87 FR 2595; January 22, 2022). Those EFPs allowed gear testing in offshore Federal waters of North Carolina, South Carolina, Georgia, and Florida.

If granted, this EFP would allow similar gear testing throughout the year, as discussed below. The EFP would exempt limited fishing gear testing activities from certain regulations for the black sea bass pot component for the commercial sector of the South Atlantic snapper-grouper fishery, specifically gear identification at 50 CFR 622.177(a)(4), area and seasonal closures at 50 CFR 622.183 (622.183(a)(1)(ii)(E), 622.183(a)(2)(vii)(E), and 622.183(b)(6)), black sea bass pot configuration restrictions and requirements at 50 CFR 622.189 (622.189(b), 622.189(e)(1), and 622.189(g)) and Atlantic large whale gear marking requirements at 50 CFR