BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XE727

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Maintenance, Repair, and Decommissioning of a Liquefied Natural Gas Facility off Massachusetts

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

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: NMFS has issued, in response to a request from Neptune LNG LLC (Neptune), an authorization to take marine mammals, by harassment, incidental to maintenance, repair, and decommissioning activities at a liquefied natural gas (LNG) deepwater port (Port) off the coast of Massachusetts.

An electronic copy of the application, proposed IHA *Federal Register* notice (81 FR 58478; August 25, 2016), issued IHA, and a list of references used in this document may be obtained by visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

DATES: Effective October 7, 2016 through October 6, 2017.

FOR FURTHER INFORMATION CONTACT: Jaclyn Daly, 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).

Summary of Request

On May 28, 2016, NMFS received an application from Neptune for the taking of marine mammals incidental to maintenance, repair, and decommissioning of its Port, Massachusetts Bay. NMFS determined the application was adequate and complete on August 11, 2016.

Take of marine mammals may occur from the use of bow and stern thrusters on two types of dynamic positioning (DP) vessels while docking, undocking, and occasional weathervaning (turning of a vessel at anchor from one direction to another under the influence of wind or currents) during Port maintenance, repair, and decommissioning. Decommissioning will occur for up to 70 days between May 1 and November 30, 2017. Unscheduled maintenance and repair work may occur prior to decommissioning, if needed, and last up to 14 days. To facilitate maintenance, repair, and decommissioning work, DP vessels will operate bow and stern thrusters at Neptune's north and south buoy and hot tap. Take, by Level B harassment only, of individuals of fourteen species of marine mammals is anticipated from this specific activity (Table 1). Take of marine mammals from actual maintenance, repair and decommissioning work (*e.g.*, pipeline removal, valve repair or cut off, removal of seafloor position transponders) is not anticipated nor authorized.

NMFS has issued several incidental harassment authorizations for the take, by Level B harassment only, of marine mammals to Neptune. NMFS issued a one-year IHA in June 2008 for the construction of the Port (73 FR 33400; June 12, 2008). NMFS issued a second one-year IHA to Neptune for the completion of construction and beginning of Port operations on June 26, 2009 (74 FR 31926; July 6, 2009). NMFS issued a third 1-year IHA (75 FR 41440; July 16, 2010) for ongoing operations followed by a five-year rulemaking and Letters of Authorization (76 FR 34157; June 13, 2011) which expired on July 10, 2016. Although Neptune intended to operate the Port for over 25 years, changes in the natural gas market have resulted in the company halting production operations. During the period of this proposed IHA, Neptune intends to decommission the Port in its entirety and conduct any unscheduled maintenance and repairs, if needed, prior to decommissioning.

Description of the Specified Activity

Overview

The Port consists of two mooring and unloading buoys separated by approximately 2.1 mi (3.4 km) (also known as the north and south buoy) and a pipeline that was meant to receive natural gas from "shuttle and regasification vessels" (SRVs) through a flexible riser that connects to a 24-inch (in) subsea flowline and ultimately into a 24-in gas transmission line. A hot tap/transmission manifold valve (herein after "hot tap") unit used to control gas flow from the Algonquin pipeline to Neptune's gas transmission line is located inshore of the buoys. Neptune ceased operations of the Port prior to any commercial natural gas deliveries to the New England region and has decided to

decommission the Port; therefore, equipment must be removed or safely abandoned in place. To conduct this work (and any maintenance or repair that may be required prior to decommissioning), DP vessels would transit to and maintain position at the north and south buoys and hot tap.

Specified Geographic Region

The Port is located within Massachusetts Bay approximately 22 miles (mi) (35 kilometers [km]) northeast of Boston, Massachusetts. It is located west (*i.e.*, inshore) of the Stellwagen Bank National Marine Sanctuary (NMS). The DP-vessel would be operating north and south buoy are located 1.23 nautical miles (nm) (2.28 km) and 1.47 nm (2.72 km), respectively, from the western edge of the Sanctuary in Federal waters approximately 260 ft (79 m) in depth. The hot tap is well inshore of the buoys in water approximately 122 ft (37 m) in depth.

Dates and Duration

Any unscheduled maintenance and repair that may be required would occur prior to decommissioning and last up to two weeks. No maintenance or repair work is currently planned. Decommissioning will commence no earlier than May 1, 2017, and will take up to 70 days.

Detailed Description of Activities

The notice of proposed IHA (81 FR 58478; August 25, 2016) contains a detailed description of the proposed activities, including the type of DP vessels planned for use and associated thruster operation procedures. That information has not changed and is not repeated here.

Comments and Responses

A notice of Proposed IHA was published in the *Federal Register* on August 25, 2016 (81 FR 58478) for public comment. During the 30-day public comment period, NMFS received three comment letters from the following: Marine Mammal Commission (MMC), U.S. Fish and Wildlife Service (USFWS), and one private citizen.

All of the public comment letters received are available on the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*. Following is a summary of the public comments and NMFS' responses.

Comment 1: The MMC believes the method NMFS used to estimate the numbers of takes during the proposed activities, which summed fractions of takes for each species across days, does not account for and negates the intent of NMFS's 24-hour reset policy. As a solution, the MMC recommended NMFS (1) apply a 24-hour reset policy for enumerating the number of each species that could be taken during proposed activities, (2) apply standard rounding rules before summing the numbers of estimated takes across days, and (3) for species that have the potential to be taken but model-estimated or calculated takes round to zero, use group size to inform the take estimates.

Response: Calculating predicted take is not an exact science, and there are arguments for taking different mathematical approaches in different situations and for making qualitative adjustments in other situations. NMFS is currently engaged in developing a protocol to guide more consistent take calculation given certain circumstances. The method for estimating take incidental to this action considered duration of activities, marine mammal group size, and previous monitoring reports.

Therefore, we consider it appropriate. We do note there was a mathematical error when calculating gray seal take numbers and have decreased the authorized take number accordingly.

Comment 2: The USFWS service submitted comments indicating heavy workload precluded the agency from reviewing the subject project and providing comments; however, they recommended NMFS determine if the action may affect any ESA-listed species or critical habitat under USFWS jurisdiction.

Response: We searched the USFWS' Information for Planning and Conservation website (https://ecos.fws.gov/ipac/) and determined that no ESA-listed species under USFWS jurisdiction would be affected by the proposed action. Therefore, no further action was necessary.

Comment 3: One private citizen submitted a comment that no work should be permitted prior to May 1 and not after October l5.

Response: In accordance with the mitigation measures as a means of effecting the least practicable adverse impact on marine mammals, all planned work must occur between May 1 and November 1. This work window was developed through intense investigation into marine mammal abundance data and coordination with marine mammal experts in the region such as the Stellwagen Bank NMS and NMFS Greater Atlantic Regional Fisheries Office (GARFO). Unplanned maintenance and repair may occur any time of the year; however, this is to allow immediate response to emergency situations only.

Description of Marine Mammals in the Area of the Specified Activity

A description of marine mammal species authorized to be taken incidental to DP vessel thruster use, including brief introductions to the species, relevant stock status, distribution and local occurrence, and population trends and threats, was provided in the *Federal Register* notice for the proposed IHA (81 FR 58478; August 25, 2016). We are not aware of any changes to this information; therefore, those descriptions are not repeated here. In addition to the *Federal Register* notice, general species accounts can also be found on NMFS' Office of Protected Resources website (www.nmfs.noaa.gov/pr/species/mammals/). For convenience, Table 1 provides an overview of marine mammals NMFS authorized to be taken in the IHA, by Level B harassment only, during the specific activities.

Table 1. Species authorized to be taken in the IHA. (E= endangered, D= depleted, NL = not listed, ND= not depleted, unk = unknown).

Common Name	Scientific Name	Stock	Status	Estimated population (Waring et al., 2015)	Occurrence
North Atlantic right whale	*Eubalaena glacialis*	Western Atlantic	E, D	476	occasional
Fin whale	*Balaenoptera physalus*	Western North Atlantic	E,D	1,618	occasional
Humpback whale	*Megaptera novaeangliae*	Gulf of Maine	E,D	823	occasional
Minke whale	*Balaenoptera acutorostrata*	Canadian East Coast	NL, ND	20,741	occasional
Sei whale	*Balaenoptera borealis*	Novia Scotia	E,D	357	occasional
Atlantic white-sided dolphin	*Lagenorhynchus acutus*	Western North Atlantic	NL, ND	48,819	occasional
Long-finned pilot whale	*Globicephala melas*	Western North Atlantic	NL, ND	26,535	occasional
Harbor porpoise	*Phocoena phocoena*	Gulf of Maine / Bay of Fundy	NL, ND	79,883	not common

Common Name	Scientific Name	Stock	Status	Estimated population (Waring et al., 2015)	Occurrence
Bottlenose dolphin	*Tursiops truncatus*	Western North Offshore Atlantic	NL, ND	77,532	not common
Short beaked common dolphin	*Delphinus delphis*	Western North Atlantic	NL, ND	173,486	occasional
Risso's dolphin	*Grampus griseus*	Western North Atlantic	NL, ND	18,250	not common
Killer whale	*Orcinus orca*	Western North Atlantic	NL, ND	unk	not common
Harbor seal	*Phoca vitulina*	Western North Atlantic	NL, ND	75,834	occasional
Grey seal	*Halichoerus grypus*	Western North Atlantic	NL, ND	unk	occasional

Potential Effects of the Specified Activity on Marine Mammals

The *Federal Register* notice of proposed authorization (81 FR 58478; August 25, 2016) provides a background on sound characteristics generated from the specified activity, a description of marine mammal hearing, and the potential effects of the specified activity on marine mammals. In summary, no Level A (injury) is anticipated due to Port maintenance, repair and decommissioning nor are Level A takes authorized in the IHA. Marine mammals may experience Level B harassment in the form of masking or behavioral modifications (*e.g.*, avoidance, change in dive profiles); however, NMFS anticipates these impacts would be limited in duration and not result in impact to annual rates of recruitment or survival.

Anticipated Effects on Marine Mammal Habitat

NMFS concluded any impacts from Neptune's maintenance, repair, and decommissioning activities to marine mammal habitat are expected to be minor and not

cause significant or long-term consequences for individual marine mammals or populations. A description of effects on marine mammal habitat from the specific activity is described in detail in the *Federal Register* notice for the proposed IHA (81 FR 58478; August 25, 2016). In summary, the benthic community and turbidity levels at the buoys and hot tap during maintenance, repair, and decommissioning work may be impacted. However, the impacts are expected to be short-term, minor, and localized. No public comments were received regarding impacts to marine mammal habitat from Port maintenance, repair, and decommissioning. More specifically, because the Port is now located in North Atlantic right whale critical habitat (81 FR 4838; January 27, 2016), NMFS Office of Protected Resources (OPR) consulted with NMFS Greater Atlantic Regional Office (GARFO) on the effects of the specified activity on critical habitat under Section 7 of the Endangered Species Act (ESA). NMFS OPR made a "no effect" determination on North Atlantic right whale critical habitat. GARFO did not object to this determination and issued an incidental take statement (ITS) for the taking of marine mammals incidental to Neptune's Port maintenance, repair, and decommissioning (see **Endangered Species Act** section below). Finally, the Port is located within a biologically important area (BIA) for North Atlantic right whale foraging habitat from February through April, annually. Foraging BIAs are defined as areas and months within which a particular species or population selectively feeds. These may either be found consistently in space and time, or may be associated with ephemeral features that are less predictable but can be delineated and are generally located within a larger identifiable area. However, because decommissioning would be restricted from May-November, the

timing of the activity would not overlap in time with this BIA designation. While maintenance and repair activities may overlap temporally, the impact on foraging habitat is expected to be minor due to the short duration of the activity (no more than 14 days), nature of the continuous sound produced at relatively low received levels, and implementation of mitigation measures (*e.g.*, reduce thruster power if whales are observed within 500 m of a DP vessel).

Mitigation

In order to issue an incidental take authorization under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (where relevant).

Mitigation Measures

The IHA contains a number of mitigation measures designed to minimize the risk of marine mammal vessel interaction and exposure to elevated noise levels. These measures resulted from extensive coordination between Neptune, NMFS OPR, and the Stellwagen Bank NMS during issuance of previous incidental take authorizations. The mitigation measures include, but are not limited to, reducing vessel speed to four knots and delaying departures from the buoys or hot tap when a whale is visibly observed within 1,000 m or acoustically detected on the two closest passive acoustic monitoring buoys; ceasing vessel movement or idling and reducing thruster power to minimal safe

operating power when a whale is observed within 500 m of the vessel; ceasing vessel movement or idling and reducing thruster power to minimal safe operating power when a non-whale species is observed within 100 m of the vessel; not transiting from shore to the project site during nighttime or when visibility is reduced below 1,000 m; and abiding by all reporting and vessel operation requirements contained with the North Atlantic right whale ship strike rule (73 FR 60173; October 10, 2008). A complete list of the mitigation measures can be found within the IHA posted on NMFS website *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*.

Mitigation Conclusions

NMFS has carefully evaluated the applicant's mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has determined the mitigation measures included in the IHA provide the means of effecting the least practicable impact on marine

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

Monitoring and Reporting

In order to issue an ITA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must set forth, "requirements pertaining to the monitoring and reporting of such taking." The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area.

Monitoring measures prescribed by NMFS should accomplish one or more of the following general goals:

1. An increase in the probability of detecting marine mammals, both within the mitigation zone (thus allowing for more effective implementation of the mitigation) and in general to generate more data to contribute to the analyses mentioned below;
2. An increase in our understanding of how many marine mammals are likely to be exposed to levels of continuous noise from use of a DP vessel thruster that we associate with specific adverse effects, such as behavioral harassment, TTS, or PTS;
3. An increase in our understanding of how marine mammals respond to stimuli expected to result in take and how anticipated adverse effects on individuals (in

different ways and to varying degrees) may impact the population, species, or stock (specifically through effects on annual rates of recruitment or survival) through any of the following methods:

- Behavioral observations in the presence of stimuli compared to observations in the absence of stimuli (need to be able to accurately predict received level, distance from source, and other pertinent information);
- Physiological measurements in the presence of stimuli compared to observations in the absence of stimuli (need to be able to accurately predict received level, distance from source, and other pertinent information);
- Distribution and/or abundance comparisons in times or areas with concentrated stimuli versus times or areas without stimuli;

4. An increased knowledge of the affected species; and
5. An increase in our understanding of the effectiveness of certain mitigation and monitoring measures.

Monitoring Measures

The proposed *Federal Register* notice (81 FR 58478; August 25, 2016) includes a number of visual and acoustic monitoring measured designed to effectively detect marine mammals within the Level B harassment zone and determine if the required mitigation measures are triggered. The final measures included in the IHA have not been altered from the proposed IHA and are not repeated here. In summary, three protected species

observers (PSO) will be stationed aboard all DP vessels and an acoustic array consisting of four autonomous recording units (ARUs) will be deployed around the north and south buoys to assist in the detection of marine mammals outside of visual sighting range; the ARUs are capable of detecting North Atlantic right whale calls to approximately 6-8 kms. These monitoring measures will ensure the specific activity has the least practicable adverse impact on marine mammals through visual and acoustic monitoring.

Reporting Measures

As part of the IHA, Neptune is required to submit an annual report to NMFS containing information on marine mammal takes and behavior and any mitigation actions taken. Neptune must submit a draft report on all monitoring conducted under the IHA within ninety calendar days of the completion of marine mammal and acoustic monitoring or sixty days prior to the issuance of any subsequent IHA for this project, whichever comes first. A final report shall be prepared and submitted within thirty days following resolution of comments on the draft report from NMFS. The information required in the report is provided in the *Federal Register* notice (81 FR 58478; August 25, 2016) for the proposed IHA and is not repeated here.

Estimated Take by Incidental Harassment

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).

When Neptune's mitigation is considered in combination with the fact that marine mammals would not be expected to remain around the stationary DP vessel for the duration needed to be exposed to sound levels that reach or exceed Level A harassment thresholds, NMFS believes that injury is unlikely.

Amount of Take Authorized

As described in the proposed IHA *Federal Register* notice (81 FR 58478; August 25, 2016), Neptune proposed, and NMFS issued, take, by Level B harassment, of marine mammals based on marine mammals stock density, the extent of the largest ZOI (37.4 km^2), and the maximum number of days Neptune would operate DP vessel thrusters to facilitate maintenance and repair (14 days) and decommissioning (70 days). For continuous sounds, such as those produced by DP vessel thrusters, NMFS used a received level of 120 dB re 1 μPa (rms) to indicate the onset of potential for Level B harassment. Table 2 includes the authorized amount of take of marine mammals, by species, incidental to the specified activity.

Table 2. Authorized take of marine mammals, by species, incidental to the specified activity. Unk = unknown.

Species	Estimated population (Waring *et al.*, 2015)	Density	Estimated Takes	% Population
North Atlantic right whale (*Eubalaena glacialis*)	476	0.000017	2	0.21
Fin whale (*Balaenoptera physalus*)	1,618	0.0034	12	0.12
Humpback whale (*Megaptera novaeangliae*)	823	0.0032	10	0.22
Minke whale (*Balaenoptera acutorostrata*)	20,741	0.0033	11	0.009

Species	Estimated population (Waring *et al.*, 2015)	Density	Estimated Takes	% Population
Sei whale (*Balaenoptera borealis*)	357	0.000036	2	0.28
Atlantic white-sided dolphin (*Lagenorhynchus acutus*)	48,819	0.039	124	0.043
Long-finned pilot whale (*Globicephala melas*)	26,535	0.0019	8	0.035
Harbor porpoise (*Phocoena phocoena*)	79,883	0.104	328	0.068
Bottlenose dolphin (*Tursiops truncatus*)	77,532	0.003	10	0.002
Short beaked common dolphin (*Delphinus delphis)*	173,486	0.0071	270*	0.002
Risso's dolphin (*Grampus griseus*)	18,250	0.000044	2	0.005
Killer whale (*Orcinus orca*)	unk	0.0000089	2	unk
Harbor seal (*Phoca vitulina*)	75,834	0.097	305	0.067
Gray sea (*Halichoerus grypus*)	unk	0.027	86	unk

*Although the method used to calculate take results in an estimated take of 23 common dolphins, this species travels in large aggregations. Therefore, NMFS is proposing to authorize take based on two encounters of a group size documented within the ZOI in Neptune's monitoring reports (*i.e.*, 135 x 2).

Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing

In August 2016, NMFS released its Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing, which established new thresholds for predicting auditory injury, which equates to Level A harassment under the MMPA. In the August 4, 2016, *Federal Register* notice announcing the Guidance (81 FR 51694), NMFS explained the approach it would take during a transition period, wherein we balance the need to consider this new best available science with the fact that some applicants have already committed time and resources to the development of acoustic analyses based on our previous thresholds and have constraints that preclude the recalculation of take estimates, as well as consideration of where the agency is in the

decision-making pipeline. In the *Federal Register* notice, we also included a non-exhaustive list of factors that would inform the most appropriate approach for considering the Guidance, including: how far in the MMPA process the applicant has progressed; the scope of the effects; when the authorization is needed; the cost and complexity of the analysis; and the degree to which the Guidance is expected to affect our analysis.

In the Guidance, acoustic thresholds are presented as cumulative sound exposure levels (SEL_{cum}) for non-impulsive sound such as that from DP vessel thrusters. This metric considers both the received level (dB) and duration of exposure. To account for the fact that marine mammals potentially taken by the specified activity fall into one of four hearing group categories (low-frequency, mid-frequency, and high-frequency cetaceans and phocid pinnipeds), the Guidance incorporates auditory weighting functions. NMFS considered the DP vessel sound source level (177dB rms), frequency, and potential exposure duration to assess potential for Level A take. When Neptune's mitigation is considered in combination with the fact that many marine mammals would be expected to avoid making close approaches to the DP vessel (a stationary acoustic source), we believe that injury is unlikely. In summary, we have considered the new Guidance and believe that the likelihood of injury is adequately addressed in the analysis and appropriate protective measures are in place in the IHA.

Analysis and Determinations

Negligible Impact

Negligible impact is "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'' (50 CFR 216.103). The lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population level effects) forms the basis of a negligible impact finding. Thus, 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 behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, etc.), the context of any responses (critical reproductive time or location, migration, etc.), as well as the number and nature of estimated Level A harassment takes, the number of estimated mortalities, effects on habitat, and the status of the species.

To avoid repetition, except where otherwise identified, the discussion of our analyses applies to all the species listed in Table 2 given that the anticipated effects of this project on marine mammals are expected to be relatively similar in nature. Where there is information about specific impacts to, or about the size, status, or structure of, any species or stock that would lead to a different analysis for this activity, species-specific factors are identified and analyzed.

In making a negligible impact determination, NMFS considers:

- The number of anticipated injuries, serious injuries, or mortalities;
- The number, nature, and intensity, and duration of Level B harassment; and
- The context in which the takes occur (*e.g.*, impacts to areas of significance, impacts to local populations, and cumulative impacts when taking into account successive/contemporaneous actions when added to baseline data);

- The status of stock or species of marine mammals (*i.e.*, depleted, not depleted, decreasing, increasing, stable, impact relative to the size of the population);
- Impacts on habitat affecting rates of recruitment/survival; and
- The effectiveness of monitoring and mitigation measures to reduce the number or severity of incidental take.

The following provides a summary of NMFS' assessment of these items. NMFS does not anticipate, nor does the IHA authorize, injury, serious injury or mortality of marine mammals incidental to the specified activity. For reasons detailed in the *Federal Register* notice for the proposed IHA (81 FR 58478; August 25, 2016), NMFS has determined the effects of the specified activity on marine mammals will be limited to short-term behavioral modifications such as avoidance of the area where DP vessels are operating thrusters and changes in swim speeds and dive profiles. In addition, some masking could occur. The mitigation measures, such as restricting decommissioning work until peak North Atlantic right whale season is over and reducing thruster power when marine mammals are within 500 m of the vessel, are designed to further minimize the intensity of the anticipated effects. With respect to stock status, three of the fourteen species authorized to be taken are listed under the ESA. On September 8, 2016, humpback whales present in the action area (West Indies distinct population segment) were delisted under the ESA (81 FR 62260); no MMPA designation (depleted or not depleted) has been assigned to this stock. With respect to habitat, the Port is within North Atlantic right whale critical habitat while Massachusetts Bay, including the Port, is a designated biological important area (BIA) for North Atlantic right whale foraging from

February through April. However, as described in the proposed IHA *Federal Register* notice (81 FR 58478; August 25, 2016) and the Impacts to Marine Mammal Habitat section in this document, adverse impacts to habitat, including prey availability, is anticipated to be short-term and minor, if any, due to temporal restrictions on decommissioning activities (limited to May- November), nature of sound produced at relatively low received levels, and implementation of mitigation measures (*e.g.*, reduce thruster power if whales are observed within 500 m of a DP vessel). Finally, the IHA contains a number of mitigation measures designed to reduce impacts to marine mammals. Monitoring for marine mammals to trigger these mitigation measures is greatly improved from the requirements to employ two daylight and one nighttime protected marine observers and carry out passive acoustic monitoring.

In summary, the taking of marine mammals is anticipated to produce short-term mild behavioral reactions in marine mammals exposed to elevated noise levels and is not reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival. Therefore, NMFS has determined the specified activity would have a negligible impact on the affected marine mammal species and stocks.

Small Numbers Analysis

The authorized takes represent less than one percent of all populations or stocks for which NMFS was able to quantify the estimated percentage, and we have determined that a small fraction of affected killer whales and grey seal stocks will be taken based on our qualitative assessments (see Table 2 in this document). As such, we find the numbers

of marine mammals estimated to be taken are small proportions of the total populations of the affected species or stocks.

Impact on Availability of Affected Species for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, we have determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act

On January 12, 2007, NMFS concluded consultation with Maritime Administration (MARAD) and U.S. Coast Guard (USCG) under section 7 of the ESA on the proposed construction and operation of the Neptune LNG facility and issued a Biological Opinion. The finding of that consultation was the construction and operation of the Neptune LNG terminal may adversely affect, but is not likely to jeopardize the continued existence of, North Atlantic right, humpback, and fin whales, and is not likely to adversely affect sperm, sei, or blue whales and Kemp's ridley, loggerhead, green, or leatherback sea turtles. The Biological Opinion concluded decommissioning activities would not likely adversely affect marine mammals; however, the analysis was limited to actual work (*e.g.*, removing the pipeline). The use of DP vessel thrusters was not included in that analysis.

On March 2, 2010, MARAD and USCG sent a letter to NMFS requesting reinitiation of section 7 consultation because MARAD and USCG determined that certain routine planned operations and maintenance activities, inspections, surveys, and

unplanned repair work on the Port pipelines and flowlines, as well as any other Port component (including buoys, risers/umbilicals, mooring systems, and sub-sea manifolds), may constitute a modification not previously considered in the 2007 Biological Opinion. On July 12, 2010, NMFS' Northeast Regional Office (now GARFO) issued a Biological Opinion, which concludes the operation, maintenance, and repair of the Port is likely to adversely affect, but is not likely to jeopardize the continued existence of, North Atlantic right, humpback, fin, and sei whales. NMFS reached this conclusion after reviewing the best available information on the status of endangered and threatened species under NMFS jurisdiction, the environmental baseline for the action area, the effects of the action, and the cumulative effects in the action area. The Biological Opinion also considered the effects of incidental take authorizations issued by NMFS to Neptune under the MMPA for the take of marine mammals incidental to Port operation, maintenance, repairs. Again, the Biological Opinion concluded decommissioning activities would not likely adversely affect marine mammals; however, the analysis was limited to actual work (*e.g.*, removing the pipeline). That is, the use of DP vessel thrusters was not included in the decommissioning analysis, only for operation, maintenance, and repair. As such, NMFS requested consultation under Section 7 of the ESA with GARFO on the issuance of an IHA to Neptune for take of marine mammals incidental to decommissioning. GARFO concluded there would not be effects beyond those previously considered because the take of marine mammal incidental to thruster use was fully considered in the 2010 Biological Opinion. As a result, GARFO concluded that re-

initiation of section 7 consultation was not necessary and subsequently issued an Incidental Take Statement.

National Environmental Policy Act (NEPA)

MARAD and the USCG released a Final EIS/Environmental Impact Report (EIR) for the Port, publishing a notice of availability of the Final EIS/EIR on November 2, 2006 (71 FR 64606). The Final EIS/EIR provides detailed information on the proposed project facilities, construction, operation, and decommissioning activities, and analysis of potential impacts on marine mammals.

NMFS was a cooperating agency in the preparation of the Draft and Final EIS based on a Memorandum of Understanding related to the Licensing of Deepwater Ports entered into by the U.S. Department of Commerce along with 10 other government agencies. On June 3, 2008, NMFS adopted the USCG and MARAD FEIS and issued a separate Record of Decision for previous issuance of authorizations pursuant to sections 101(a)(5)(A) and (D) of the MMPA for the construction and operation of the Neptune LNG Port facility. For the subject IHA, NMFS reviewed the FEIS to ensure that the analysis contained in that document accurately describes and analyzes the impacts to the human environment of NMFS' action of issuing an MMPA authorization for the maintenance, repair, and decommissioning of the Neptune Port. NMFS has determined that the FEIS sufficiently covers the activities considered in the subject IHA. NMFS issued an amended Record of Decision for issuance of authorizations pursuant to sections 101(a)(5)(D) of the MMPA specific to maintenance, repair, and decommissioning.

Authorization

NMFS has issued an IHA to Neptune for the potential harassment of small numbers of 14 marine mammal species incidental to maintenance, repair, and decommissioning of their Port in Massachusetts Bay], which includes required mitigation, monitoring and reporting measures.

Dated: October 7, 2016.

_____

Donna S. Wieting,

Director, Office of Protected Resources,

National Marine Fisheries Service.

[FR Doc. 2016-24850 Filed: 10/13/2016 8:45 am; Publication Date: 10/14/2016]