



United States Department of the Interior

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FISH AND WILDLIFE SERVICE

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In Reply Refer To:
FWS/R4/DH NRDAR

OCT 30 2015

Memorandum

To: Manatee Recovery Coordinator, North Florida Ecological Services Field Office

From: Deputy *Deepwater Horizon* Department of the Interior Natural Resource Damage
Assessment and Restoration (NRDAR), Case Manager *Debra L. McCall*

Subject: Compliance with Marine Mammal Protection Act

As you are no doubt aware, on or about April 20, 2010, the mobile offshore drilling unit *Deepwater Horizon* experienced an explosion, leading to a fire and its subsequent sinking in the Gulf of Mexico (the Gulf). These events resulted in the discharge of millions of barrels of oil into the Gulf over a period of 87 days. In addition, various response actions were undertaken in an attempt to minimize impacts from spilled oil. These events are hereafter collectively referred to as the Oil Spill.

The Department of the Interior (DOI), acting through the U.S. Fish and Wildlife Service (the Service) and other Bureaus, is a designated natural resource trustee agency authorized by the Oil Pollution Act of 1990 (OPA) and other applicable federal laws to assess and assert a natural resource damages claim for this Oil Spill. DOI is only one of several Trustees, so authorized. Consistent with their federal and state authorities, the Trustees are investigating the resource injuries and losses that occurred as a result of the Oil Spill and have initiated restoration planning to identify the actions that will be needed or appropriate to restore injured resources and to make the public whole for the injuries and losses that occurred. This process is known as a Natural Resource Damage Assessment (NRDA).

On April 20, 2011, DOI, National Oceanic and Atmospheric Administration, and the Trustees for the five Gulf states affected by the Oil Spill entered into an agreement with BP, a responsible party for the Oil Spill, under which BP agreed to provide up to \$1 billion for early restoration projects in the Gulf to address injuries to natural resources caused by the Oil Spill. Pursuant to this agreement, the Trustees have developed a Phase IV early restoration plan that, among other things, describes a number of early restoration projects for implementation. The plan was released for public comment and review on May 20, 2015. The Trustees have considered public comment, have ultimately selected all of the projects for implementation, and stipulated agreements have been reached with BP. Restoration projects will be implemented by the appropriate Trustee. DOI will be either an implementing Trustee or an affected Trustee for each project.

Some of the projects will involve in-water work in areas where West Indian manatee could be present and as such, consultations under Section 7 of the Endangered Species Act of 1973 (ESA), as amended (16 U.S.C. 1531 *et seq.*), were initiated (Table 1). Table 1 includes for each Phase IV project: its title, general description of the in-water work, conservation measures, effect determination, and field office concurrence date.

Because take of manatees, incidental or otherwise, is not presently authorized under the Marine Mammal Protection Act (MMPA) of 1972, as amended (16 U.S.C. 1461 *et seq.*), each consultation where manatees may be affected included conservation measures to ensure potential effects were avoided or minimized to an insignificant and discountable level. These consultations considered the likelihood of manatee presence and the potential adverse effects of the projects to the manatee. While manatees are not likely to be present at most of the project locations, they could be transiting the project areas. Therefore, conservation measures for manatee were incorporated into all of the consultations proposing in-water work where manatees could be present. In general, where in-water work will occur and manatees could be present, the Trustees will implement the Service's "Standard Manatee Conditions for In-Water Work" dated 2011. Other conservation measures are project specific and are listed in the attached table.

Based on the consultations, DOI has determined that each consultation resulted in either a No Effect or May Affect, Not Likely to Adversely Affect determination for the West Indian manatee. Each Service Field Office reviewed the proposed projects within their jurisdiction under Section 7 of the ESA and concurred with our determinations. As stated previously, each project title, general description of the in-water work, conservation measures, determination, and field office concurrence date are summarized in Table 1. A copy of each ESA consultation is available upon request.

DOI believes the procedures contained within these consultations constitute appropriate and responsible steps to promote compliance with MMPA prohibitions on take by requiring the activities to achieve a standard of No Effect or May Affect, Not Likely to Adversely Affect for manatees. As such, we do not anticipate any take, incidental or otherwise, under the ESA or MMPA for West Indian manatee due to implementation of any of the projects.

In addition, the National Marine Fisheries Service (NMFS) is also coordinating with all of the Trustees under MMPA in order to protect other species of marine mammals that could be present in project areas. NMFS may require additional avoidance measures to protect dolphins or other marine mammals at several of the project locations. These measures could include, but are not limited to: an on-site marine mammal monitor; use of bubble curtains, and other similar measures. While we have not attempted to catalogue avoidance and minimization measures from NMFS, we believe any additional measures they require will further avoid impacts to manatees should they be present at these action areas.

If modifications are made to any of the projects in a manner that may affect the manatee or its habitat; if additional information involving potential effects to the manatee or other listed species not previously considered becomes available; or if in the unlikely event that the take of a manatee occurs during the project, consultation will be reinitiated.

If you have any questions or concerns regarding this response, please immediately contact Ms. Ashley Mills at (812) 756-2712 or via email at ashley_mills@fws.gov.

Attachment

Table 1. Summary of projects in *Deepwater Horizon* Early Restoration Phase IV, ESA determination for West Indian manatee, ESA concurrence date, and Conservation Measures to protect manatee. No project will proceed with implementation until concurrence under ESA (and other relevant laws) is received. The two Gulfwide projects, Sea Turtle Early Restoration and Pelagic Longline Bycatch Reduction, have been the subject of a number of existing consultations or permitting actions and it was determined that re-initiation with FWS was not necessary. N/A = Not Applicable; NE = No Effect; NLAA = May Affect, Not Likely to Adversely Affect; S = Standard Manatee Conditions for In-Water Work dated 2011.

State	Project Title	In-Water Work	ESA Determination for Manatee	Conservation Measures for Manatee	Date of FO Concurrence
AL	Bon Secour National Wildlife Refuge Trail Enhancement Project, Alabama	None	N/A	N/A	April 10, 2015
AL	Osprey Restoration in Coastal Alabama	None	N/A	N/A	July 10, 2015
AL	Point aux Pins Living Shoreline	Placement of nearshore intertidal living shoreline materials using shallow draft barge	NLAA	S	July 9, 2015
AL	Shell Belt and Coden Belt Roads Living Shoreline	Placement of nearshore intertidal living shoreline materials using either truck, track-hoe or marsh buggy from land or shallow draft barge	NLAA	S	July 9, 2015
FL	Seagrass Recovery Project at Gulf Islands National Seashore, Florida District	Harvest and placement of seagrasses and possible placement of bird stakes; vessel use	NLAA	S	May 21, 2015
MS	Bike and Pedestrian Use Enhancements at Davis Bayou, Mississippi District, Gulf Islands National Seashore	Possible construction of replacement boardwalks over portions of Stark Bayou, using cantilevers and pilings, or fill and culverts; replacement of existing culvert bridge on Park Rd over east Stark Bayou with larger bottomless box culvert or small bridge; possible elimination of the existing cantilevered pedestrian/bike boardwalk on the west side of the road	NE	N/A	June 1, 2015
MS	Restoring Living Shorelines and Reefs in Mississippi Estuaries	Placement of living shoreline and artificial reef material; vessel use	NLAA	S	August 24, 2015

State	Title	In-Water Work	ESA Determination for Manatee	Conservation Measures for Manatee	Date of FO Concurrence
TX	Texas Rookery Islands	<p>This project has multiple components:</p> <p>Smith Point: enlarge island using earthen fill, add/enhance armored protective features such as breakwaters or shoreline armoring, vegetate with desirable scrub-shrub plants, and enhance existing emergent reef island component;</p> <p>Rollover Bay: enlarge island using earthen fill, add/enhance armored protective features such as breakwaters or shoreline armoring, and vegetate with desirable scrub-shrub plants;</p> <p>Dressing Point: raise elevation and expand foot print of the island by placing earthen fill, plant native scrub-shrub vegetation, place shell material on existing shell substrate to expand shell knoll</p> <p>Dickinson Bay II: create an island on existing submerged lands using earthen fill protected by armored shorelines, and vegetate with desirable scrub-shrub plants.</p>	NLAA	<p>All construction personnel will be notified of the potential presence of manatee in the water and reminded of criminal and civil penalties associated with harassing, injuring, or killing manatees. All workers will be educated that there could be manatees in the water and advised to look for manatees and, if observed, wait until manatees leave the area to put equipment in water. Care will be taken when using equipment in water to ensure that no harm is caused to any manatee that may be nearby. Should a manatee come within 50 foot of the project area during construction activities, work would immediately cease until the manatee has moved away from the project area on its own. Construction noise will be kept to the minimum feasible.</p>	October 6, 2015
Gulfwide	Sea Turtle Early Restoration	<p>The in-water portions of this project consist of: courtesy dock-side and at-sea Turtle Excluder Device (TED) inspections to enhance compliance with TED regulations; placing trained observers on shrimping vessels in the Gulf of Mexico to monitor sea turtle bycatch; and enhancing the existing Sea Turtle Stranding and Salvage Network (STSSN) to provide a more rapid response to unusual turtle stranding events and increase the STSSN's capacity for response during emergency events.</p>	NE	<p>This project builds on several existing and well-established programs that are operated by federal and state agencies. It was not necessary to add conservation measures for manatee to the existing consultations or permits.</p>	This project is covered under existing consultation and permits.
			ESA		

State	Title	In-Water Work	Determination for Manatee	Conservation Measures for Manatee	Date of FO Concurrence
Gulfwide	Pelagic Longline Bycatch Reduction Project	This project consists of a voluntary annual 6 month PLL fishing repose in the Gulf of Mexico and provision of two alternative fishing gear types (green stick and buoy gear) to PLL fishermen.	NE	The reduction of PLL gear sets in the GOM will eliminate PLL bycatch of regulatory and economic discards of pelagic finfish as well as marine mammals from those vessels for 6 months of the year. It was not necessary to add conservation measures for manatee to the existing consultations and permits.	This project is covered under existing consultations and permits.