



Programmatic Endangered Species Consultation and Revised Conditions for
Protected Species during Offshore Wind Data Collection Activities
Frequently Asked Questions

The Bureau of Ocean Energy Management (BOEM) has completed an informal programmatic consultation with the National Marine Fisheries Service (NMFS) under section 7 of the Endangered Species Act (ESA). On June 29, 2021, NMFS issued a Letter of Concurrence (LoC) that covers site characterization (high resolution geophysical (HRG) and geotechnical surveys) and site assessment/data collection (deployment, operation, and retrieval of meteorological and oceanographic data buoys) activities associated with Atlantic OCS leases.¹ As a result of this consultation, the mitigation, monitoring, and reporting conditions for those activities have been revised for threatened and endangered species associated with the activities covered in the consultation.² Similarly, BOEM has worked with NMFS to revise the mitigation, monitoring, and reporting conditions for non-ESA-listed marine mammals. BOEM is providing current Lessees an opportunity to voluntarily amend lease terms and conditions to adopt the new conditions to bring lease stipulations up to date with current best practices for protected species. BOEM also intends to require compliance with the Project Design Criteria (PDCs) and Best Management Practices (BMPs) outlined in the LoC in any new leases issued on the Atlantic OCS. This effort is meant to bring all lease conditions up to current practice, be consistent, and make reviews of survey plans more efficient. Consequently, BOEM will not be considering modifications and waivers of lease conditions as a necessary solution to address previous inconsistencies that have now been addressed.

The programmatic consultation provides PDCs and BMPs for ESA-listed species. What do these terms mean?

The informal programmatic consultation considers the effects of data collection activities carried out in compliance with a set of PDCs and BMPs that BOEM has developed with NMFS through the consultation process. PDCs are the general mitigation and monitoring for specific activities required to avoid or minimize effects to ESA listed species. BMPs are the more detailed conditions to implement each PDC. NOAA included these PDCs and BMPs in its analysis of impacts to ESA-listed species because as part of BOEM's proposed action. BOEM is including these conditions as part of its environmental program and allowed NMFS to conclude that all the activities analyzed in the programmatic consultation may affect but are not likely to adversely affect listed species or critical habitat. In other words, no take of ESA listed species or impacts to

¹ <https://www.boem.gov/renewable-energy/final-nlaa-osw-programmatic>

² <https://www.boem.gov/renewable-energy/orep-data-collection-ba-final>



critical habitat are expected as long as the lessee follows all the PDCs and BMPs as they are required by BOEM.

The conditions for conducting survey activities are set forth in Addendum C of my lease; how do the revised BOEM PDCs and BMPs apply to my lease?

If your existing lease is amended, the revised PDCs/BMPs would replace existing conditions of the lease that relate to listed species and that resulted from previous ESA consultations and biological opinions covering survey and Site Assessment Plan (SAP) activities. The revised PDCs/BMPs would amend by replacement, all the protected species conditions in Addendum C of the Lease.

What if I elect not to modify my lease?

You may elect to modify your lease to include the new conditions or comply with the existing lease conditions. If you elect not to modify your lease, you are required to comply with the existing lease conditions regarding protected species and the requirements of any accompanying ESA consultation that considered the effects of survey plans at the time the lease was issued. Modifications and waivers from these conditions are no longer considered a necessary solution for previous inconsistencies between consultations under the Marine Mammal Protection Act (MMPA) and those under the ESA. BOEM recommends the revised conditions be accepted as a prudent course of action to maintain consistency with current best practices agreed to be BOEM and NMFS to minimize and avoid impacts to protected species.

Do I still need Protected Species Observers (PSOs) while performing geotechnical surveys?

Under the terms and conditions of the LoC, PSOs are no longer required for geotechnical surveys. However, a lease modification is required to remove the existing geotechnical survey lease stipulations requiring the use of PSOs. We understand some companies may voluntarily deploy PSOs on geotechnical surveys. PSOs on geotechnical surveys will be considered by BOEM to be voluntary if the lease amendment is accepted. Otherwise, existing lease conditions are required as may be applicable. Please note, during geotechnical survey operations, you are still required to have a lookout for protected species as a vessel strike risk reduction measure under the new PDCs/BMPs.



Do I still need to submit acoustic modeling with my survey plans?

You no longer need to include acoustic modeling with your submission of a proposed survey plan. The PDCs/BMPs are based upon a program-wide analysis that covers all expected equipment and scenarios under which HRG equipment will be used.

Are there any activities that are not covered by the LoC?

The LoC covers a wide range of data collection activities but note that the programmatic consultation does not cover or consider the effects of any survey activities that may result in physical interactions with ESA listed species, including fisheries surveys that involve the use of gear that could result in the entanglement or capture of sea turtles, ESA listed fish, or ESA listed whales - this includes, but is not limited to, trawls, gillnets, scallop dredges, and pot/trap gear. NMFS and BOEM are currently coordinating to determine the best approach for considering the effects of these types of surveys under the ESA.

Do I still need to submit NMFS' PSO approvals to BOEM before surveys begin?

Under the new PSO reporting requirements, you do not need to submit PSO approvals to BOEM before surveys begin. Instead, you may provide PSOs and approval status in monthly PSO data submissions and final reports submitted to BOEM. BOEM still requires all PSO requirements in the PDCs and BMPs to be followed and NMFS approvals to be obtained before PSOs are deployed. BOEM and BSEE will verify these PDCs and BMPs are followed through the information submitted by the Lessee in its PSO reports.

What happens when a site assessment plan or survey plan is submitted to BOEM for review?

When a plan is submitted to BOEM, a subject matter expert will review the plan is consistent with Section 7 of the Endangered Species Act. Under the programmatic framework requirements, NMFS requires BOEM ensure the plan is within the scope of consultation activities by providing NMFS with a brief summary of the proposed activity including the location and duration of the plan activities and a written determination that the proposed activity is consistent with the scope of activities considered in the consultation. BOEM will also confirm that all relevant PDCs and BMPs will be implemented. Lessees are encouraged to include this information in all plans submitted. If NMFS Greater Atlantic Regional Fisheries Office (GARFO) has any questions about the activity or determines it is not within the scope of this consultation, a written reply will be provided to BOEM by NMFS within 15 calendar days.



What is the process for considering survey equipment that is not specifically identified in the June 2021 consultation?

To provide flexibility while maintaining the intent of this programmatic consultation, if a developer proposes to use an equipment type different than described in the consultation, such as a different source type or different specific models/systems of types that were not considered, the plan must demonstrate that the acoustic characteristics are similar to the representative equipment described in Table A.2 of the LoC and BOEM's biological assessment. The plan should discuss that implementation of the PDCs will result in the same (or lesser) effects to ESA listed species considered in the LoC. BOEM can provide this to NMFS with its consistency determination transmitted to NMFS Greater Atlantic Regional Fisheries Office.

What if a survey is proposed that is not consistent with the activities considered in the consultation?

If an existing consultation (other than the programmatic) is in place that covers the proposed survey, review of the survey activities could occur consistent with that ESA consultation. Activities that are determined to not be within the scope of the June 29, 2021 consultation can be modified by BOEM to bring them within the scope of this consultation or BOEM can request a stand-alone ESA section 7 consultation outside of this programmatic consultation. If a new consultation is required, sufficient time must be incorporated into the planning process. The additional time required includes time to complete a biological assessment and consult with NMFS which may take an additional 60-135 days depending on whether it is an informal or formal consultation.

Can I request lease modifications that pertain to non-listed marine mammals?

A Lease amendment for non-listed marine mammals has been included in the PDCs/BMPs by BOEM. BOEM has developed PDC and BMPs for non-listed marine mammals that are similar to those for threatened and endangered species. These amendments are included in the attachment to the lease amendment letter. The amendment also clarifies that if an Incidental Harassment Authorization (IHA) under the MMPA is obtained by the Lessee from NMFS, the conditions of the IHA take precedent over the standard lease conditions.



Does the programmatic consultation apply to surveys conducted under an approved COP?

The effects analysis in the LoC is based on the type of activities being conducted and the PDCs and BMPs are applicable to those activities (e.g., data collection devices, HRG surveys, and vessel operation) regardless of the stage of lease development. However, the consultation on submitted COPs must be comprehensive and consider all potential activities within the project design envelope. Therefore, the consultation on COP approval will consider any HRG or geotechnical work proposed after COP approval. In ESA consultations on COPs, BOEM plans to incorporate these PDCs and BMPs into the description of the proposed action and NMFS anticipates that the review of post-COP approval HRG and geotechnical surveys would be streamlined within the Biological Opinion issued for BOEM's proposed COP approval. In other words, BOEM intends to require compliance with the PDCs and BMPs as conditions of any COP approval.

The programmatic consultation concludes that HRG surveys may affect but are not likely to adversely affect endangered marine mammals. Am I still required to obtain an IHA for ESA-listed whales?

The programmatic consultation concludes that no take of listed whales is expected under the ESA as a result of these activities and, thus, an IHA is not required to authorize take under the ESA consultation as long as you follow the PDCs and BMPs described in the programmatic consultation

Do I need an IHA under the MMPA for surveys if they are covered under the programmatic consultation?

The ESA consultations related to ESA-listed marine mammals only. In most cases, during a survey, you will encounter non-listed marine mammals. Implementation of the PDCs for ESA-listed marine mammal species is expected to avoid the potential for take of these species, as defined under the MMPA. Similarly, if a developer elects to apply the PDCs (or other measures agreed-to by BOEM through the aforementioned process to modify current lease requirements) to non-listed marine mammal species, take would not be expected and an IHA is not likely to be necessary. However, if the developer is uncertain regarding the potential for MMPA take of any marine mammal, they may consult with NMFS OPR to determine if an IHA is necessary.



What will be BOEM's policy going forward regarding documentation of the need for an IHA for marine mammals?

BOEM expects that the standard lease PDCs/BMPs in the Lease amendment will be followed. BOEM believes the implementation of these conditions are based on the best available information and demonstrates that the distances around a vessel in which impacts could occur is limited to a small area around a vessel. Consequently, the standard PDCs/BMPs of the Lease, if implemented, will avoid impacts and minimize potential impacts to discountable levels. However, it is still the project proponents responsibility to determine if an IHA is required based on future survey activities that may be planned.

If an IHA application is submitted, is ESA consistency required?

NMFS action of issuing an IHA is a federal action subject to the ESA. An IHA application and resulting proposed IHA must be consistent with the scope of activities considered in the June 2021 programmatic consultation, including consideration of the PDCs and BMPs. NMFS OPR will provide a brief summary of the proposed activity to NMFS GARFO, including location and duration, and the agency's determination that the proposed activity is consistent with the scope of activities considered in the consultation. NMFS OPR will also confirm in writing that all relevant PDCs and BMPs will be implemented. If NMFS GARFO has any questions about the activity or determines it is not within the scope of this consultation, a written reply will be provided to the action agency within 15 calendar days.

Can I request different mitigation measures from NMFS through an MMPA IHA Application?

Changes from the BOEM's BMPs for non-ESA-listed marine mammals may be requested in an IHA application. BOEM does not intend to approve any waivers for non-ESA-listed marine mammal lease conditions unless an IHA is obtained from NMFS. However, changes to the PDCs and BMPs for ESA-listed marine mammals are not encouraged and may trigger additional review and consultation requirements. If the IHA application contains measures for ESA-listed species that are inconsistent with the PCDs and BMPs, NMFS OPR must consult with NMFS GARFO. Similarly, BOEM must also make a similar consistency determination under the ESA, thus changes are not encouraged and result in unnecessary delays.