

Dated: September 28, 2010.

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Antidumping and Countervailing Duty  
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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648-XW81**

#### Takes of Marine Mammals Incidental to Specified Activities; Installation of Meteorological Data Collection Facilities in the Mid-Atlantic Outer Continental Shelf

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

**ACTION:** Notice; issuance of incidental harassment authorization.

**SUMMARY:** In accordance with regulations implementing section the Marine Mammal Protection Act (MMPA), as amended, notification is hereby given that an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to pile driving associated with installation of two meteorological data collection facilities (MDCF's); one each off the coast of Delaware and New Jersey, has been issued to Bluewater Wind, LLC (Bluewater).

**DATES:** This authorization is effective from October 1- November 15, 2010.

**ADDRESSES:** A copy of the application, IHA, and a list of references used in this document may be obtained by writing to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225. A copy of the application may be obtained by writing to this address or by telephoning the contact listed here and is also available at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>.

**FOR FURTHER INFORMATION CONTACT:** Jaelyn Daly, Office of Protected Resources, NMFS, (301) 713-2289, ext 151.

#### 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.

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."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

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 5, 2010, NMFS received two applications from Bluewater for the taking, by Level B harassment, of marine mammals incidental to pile driving associated with installation of a MDCF in Federal waters approximately 16.5 miles off the coast of Delaware and one approximately 20 miles off the coast of New Jersey during October 2010. Bluewater provided supplemental information to NMFS on June 8, 2010, completing the applications. In

summary, to build each MDCF, Bluewater must drive, via an impact hammer, a single 3-meter pile into the seabed which will act as the foundation to elevate and support the data collection device. Pile driving has the potential to result in the take, by Level B harassment, of eight species marine mammals within the action area as it elevates underwater noise levels. Since pile driving has the potential to take marine mammals, a marine mammal take authorization under the MMPA is required.

##### Description of the Specified Activity

In November 2009, the Bureau of Ocean Energy Management (BOEM), formerly the Mineral Management Service, issued a lease to Bluewater for construction and operation of MDCF's designed to support future development of, among other companies, Bluewater's planned Delaware and New Jersey Offshore Wind Parks. The purpose of installing the MDCF's is to determine the feasibility of a commercial-scale offshore wind energy park at the proposed project site. Bluewater will collect and analyze at least one full year of meteorological data inclusive of wind speed and direction at multiple heights, information on other seasonal meteorological conditions (e.g., turbulence, temperature, pressure, and atmospheric stability), the marine environment (e.g., ocean currents, tides, and waves), and avian and bat activity (e.g., activity within the potential rotor swept area, flight altitude). The IHA authorizes the take, by Level B harassment only, of marine mammals incidental to pile driving the monopole foundation required to support the wind data collection devices, not future installation of wind turbines.

Bluewater will install a single 3-meter diameter pile foundation to elevate and stabilize a data collection device at two locations; one located in the Outer Continental Shelf (OCS) Official Protraction Diagram (OPD) lease block Salisbury, NJ 18-05 Lease Block 6325 (approximately 16 miles off Delaware) and one at OCS OPD lease block Wilmington, NJ 18-02 Block 6936 (approximately 20 miles off NJ). The mean lower low water depth (MLLW) at the Delaware and New Jersey site is approximately 69 feet (21 m) and 82 feet (25 m), respectively. Pile driving is scheduled to occur in October 2010; however, given unforeseen construction or weather related delays, NMFS has made the IHA effective until November 15, 2010.

To install the monopole foundation, Bluewater will use an IHC-S 900 Hydraulic Impact Hammer (or equal)

with a maximum rated impact force of 900 kilojoules (KJ). Bluewater anticipates it will take approximately 8 to 12 hours to mobilize and demobilize the construction vessels on site; however, only 3–8 of these hours will be spent pile driving. The two MDCF's will not be installed simultaneously; the Delaware MDCF will be installed first followed by the New Jersey MDCF approximately 1–2 weeks later. Because of physical parameters associated with this project (e.g., pile size, water depth), Bluewater has indicated a vibratory hammer cannot be used. Pile driving activities will be restricted to daylight hours between one-half hour after sunrise and one-half hour prior to sunset. A complete description of installation techniques and associated noise levels can be found in the proposed IHA notice for this action (75 FR 42698; July 22, 2010).

### Comments and Responses

A notice of receipt and request for public comment on the **Federal Register** notice of proposed authorization was published on July 22, 2010 (75 FR 42698). NMFS also made BOEM's EA available for comment during this time. During the 30-day public comment period, NMFS received comments from the Marine Mammal Commission (Commission) on the proposed IHA. No comments were received by any other members of the public and none were received on BOEM's EA.

*Comment 1:* The Commission recommended that, prior to issuance of the IHA, NMFS require that observations be made during all soft-starts of pile driving activities to gather data needed to analyze and report on its effectiveness as a mitigation measure.

*Response:* As described in the proposed IHA **Federal Register** notice, protected species observers (PSOs) will be stationed at the pile driving location and on two vessels before, during, and after all pile driving. This includes the time before and during soft starts of the pile hammer. Bluewater is not authorized to begin pile driving should any marine mammal be located within the Level A harassment zone or if any marine mammal listed as endangered or threatened under the Endangered Species Act (ESA) is located within approximately 7 km of the hammer. Therefore, data on reactions of marine mammals to soft starts very close to the hammer or any ESA marine mammal is not possible. However, if species authorized to be taken are within the Level B harassment zone during a soft start, data on behavioral reactions of those animals will be recorded and

reported to NMFS, as described in the proposed IHA notice.

### Description of Marine Mammals in the Area of the Specified Activity

Several species of marine mammals are known to traverse or occasionally inhabit the waters within the action area of project construction activities, including some species listed as threatened or endangered under the ESA. Thirty-four marine mammal species including 29 cetaceans, four pinnipeds, and one sirenian species have confirmed occurrences in the mid-Atlantic OCS. A list of these species may be found in the proposed IHA notice for this action.

Some marine mammals species are likely to occur within the action area more so than others; however, marine mammal occurrence within the action areas during the 3–8 hours of pile driving per site is expected to be minimal. Marine mammal aerial and vessel based surveys were conducted from January through December 2008 to better assess species present within the action area. In addition, multiple geophysical and geotechnical (G&G) surveys were conducted by three wind park developers off the coast of New Jersey, all of which had dedicated protected species observers onboard the survey vessel. Reports from all surveys were prepared and provided to NMFS to determine species abundance within the action area (Geo-Marine, 2008; RPS GeoCet, 2009; AIS, 2009; Geo-Marine, 2009). In general, sightings of marine mammals included large whale and delphinid species; however, sightings were uncommon. The proposed IHA notice for this action further describes these survey results.

Although ESA-listed whales may be present in OCS waters during the scheduled pile driving timeframe, Bluewater will implement mitigation measures such that no ESA-listed marine mammal, including North Atlantic right whales, will be exposed to sound levels at or above NMFS behavioral harassment threshold for impulsive noise (i.e., 160 dB re: 1 microPa). Therefore, NMFS has issued authorization to harass eight species of marine mammals incidental to MDCF installation off Delaware and New Jersey. These include bottlenose dolphins, spotted dolphins, common dolphins, Atlantic white-sided dolphins, Risso's dolphins, pilot whales, harbor porpoise, and harbor seals; none of these species are listed under the ESA. The western north Atlantic coastal stock of bottlenose dolphins is the only species listed as depleted under the MMPA. The action

area does not provide significant reproductive, migratory and feeding habitat for any marine mammal. Animals will likely be transiting through the area or opportunistically resting or foraging. A detailed description on species status, abundance, and ecology of the eight species of cetaceans and pinnipeds that may be taken from the specified activity are provided in the IHA application and proposed IHA notice for this action.

### Effects on Marine Mammals

NMFS has determined that open-water impact pile driving of the single monopole at each site, as outlined in the project description, has the potential to result in short term-behavioral harassment of marine mammals if they are present near the action area. Impacts would not exceed the duration of time animals are exposed to pile driving sound. At maximum, this would be 3–8 hours. However, the action area is located in habitat animals use for traveling; therefore, it is not expected that an animal would remain in the area for an extended duration of time. In addition, pile driving at the sites will not occur concurrently; therefore, no cumulative impacts from multiple pile driving activities would occur. Bluewater will implement mitigation and monitoring measures designed to eliminate potential for Level A (injurious) harassment of all marine mammals and also Level A or B harassment of ESA-listed marine mammals (see *Proposed Mitigation* section).

NMFS is in the process of developing guidelines for determining sound pressure level (SPL) thresholds for acoustic harassment based on the best available science. In the interim, NMFS generally considers 180 and 190 dB root mean square (rms) as the level at which cetaceans and pinnipeds, respectively, could be subjected to Level A (injurious) harassment. Level B (behavioral) harassment has the potential to occur if marine mammals are exposed to pulsed sounds (e.g. impact pile driving) at or above 160 dB rms, but below injurious thresholds. These thresholds are considered conservative.

Bluewater analyzed pile driving data collected during offshore wind farm construction in European waters to estimate the distances to NMFS' threshold levels during pile driving off Delaware and New Jersey (see sections 2.2 and 2.3 in Bluewater's IHA application). Table 1 below summarizes the estimated distances to NMFS' Level A and B harassment isopleths at each location based on Bluewater's modeling. Water depth is the main contributing

factor to any discrepancy between the two proposed sites.

TABLE 1. ESTIMATED DISTANCES TO NMFS' HARASSMENT THRESHOLDS FOR IMPACT PILE DRIVING OFF DELAWARE AND NEW JERSEY.

Site Location	190 dB re: 1 microPa (rms) <sup>1</sup>	180 dB re: 1 microPa (rms) <sup>2</sup>	160 dB re: 1 microPa (rms) <sup>3</sup>
OCS-Delaware	330 m	760 m	7,230 m
OCS-New Jersey	375 m	1,000 m	>6,600 m

<sup>1</sup> Level A harassment threshold for pinnipeds in water.

<sup>2</sup> Level A harassment threshold for cetaceans.

<sup>3</sup> Level B harassment thresholds for pinnipeds and cetaceans from impulsive noise.

### Hearing Impairment

Temporary or permanent hearing impairment is possible when marine mammals are exposed to very loud sounds. Hearing impairment is measured in two forms: temporary threshold shift (TTS) and permanent threshold shift (PTS). There are no empirical data for onset of PTS in any marine mammal; therefore, PTS-onset must be estimated from TTS-onset measurements and from the rate of TTS growth with increasing exposure levels above the level eliciting TTS-onset. PTS is presumed to be likely if the hearing threshold is reduced by  $\geq 40$  dB (i.e., 40 dB of TTS). Due to mitigation measures identified in Bluewater's application and the IHA, NMFS does not expect that marine mammals will be exposed to levels that could elicit PTS; therefore, it will not be discussed further.

#### Temporary Threshold Shift (TTS)

TTS is the mildest form of hearing impairment that can occur during exposure to a loud sound (Kryter, 1985). Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals. Because it is non-injurious, NMFS considers TTS as Level B harassment that is mediated by physiological effects on the auditory system; however, NMFS does not consider onset TTS to be the lowest level at which Level B harassment may occur.

Of all marine mammals which could be encountered during the very short pile driving period (3–8 hours), bottlenose and spotted dolphins are the species most likely to come within the action area as they are the most abundant. Bottlenose dolphins have been the subject for most TTS studies and can be considered a surrogate for other delphinids (e.g., spotted dolphins, common dolphins) that may be exposed to Bluewater's pile driving activity. For bottlenose dolphins, eight different captive individuals have been exposed to impulsive anthropogenic sound, with TTS being induced in five individuals

(Schlundt *et al.*, 2000; Nachtigall *et al.*, 2004; Finneran *et al.*, 2007; Mooney *et al.*, 2009). TTS onset occurred when animals were exposed to sound levels ranging from 182 to 203 dB re:  $1\mu\text{Pa}^2\text{-s}$  (SEL), with a median TTS onset level of 192.5 dB SEL. For pinnipeds, underwater TTS experiments involving exposure to pulse noise is limited to a single study. Finneran *et al.* (2003) found no measurable TTS when two California sea lions were exposed to sounds up to 183 dB re: 1 microPa (peak-to-peak). No TTS studies have been conducted on mysticetes; therefore, no data exist. However, if the pattern holds true as that for mid frequency cetaceans and pinnipeds, one can assume that TTS occurs in mysticetes at levels much higher than NMFS' Level B behavioral harassment threshold for impulsive noise (i.e., 160 dB rms) and likely above NMFS' Level A (injurious) harassment thresholds.

Although Bluewater's pile driving will be both loud and continuous for 3–8 hours, NMFS anticipates that if TTS does occur, it will be short in duration as (1) pile driving will cease if animals come within the 190 or 180 dB isopleth for pinnipeds and cetaceans, respectively, and (2) marine mammals will likely not linger in areas with sound pressure levels high enough to induce long-term TTS.

#### Behavioral Impacts

NMFS has discussed behavioral impacts resulting from impact pile driving for various other projects which are relevant here (e.g., 73 FR 38180; 74 FR 18492; 74 FR 63724). Additionally, in 2009, the BOEM prepared an EA and associated Finding of No Significant Impact (FONSI) on the *Issuance of Leases for Wind Resource Data Collection on the Outer Continental Shelf Offshore Delaware and New Jersey* which analyzes the impacts of constructing, operating, and decommissioning MDCFs similar to ones proposed by Bluewater in their MMPA application. In summary, BOEM

found that noise from pile driving could disturb normal marine mammal behaviors (e.g., feeding, social interactions), mask calls from conspecifics, disrupt echolocation capabilities, and mask sounds generated by predators. Behavioral effects may be incurred at ranges of many miles, and hearing impairment may occur at close range (Madsen *et al.*, 2006). Behavioral reactions may include avoidance of, or flight from, the sound source and its immediate surroundings, disruption of feeding behavior, interruption of vocal activity, and modification of vocal patterns (Watkins and Scheville, 1975; Malme *et al.*, 1984; Bowles *et al.*, 1994; Mate *et al.*, 1994). These impacts are similar to those previous identified by NMFS during analysis of pile driving projects, including the specified activity. NMFS characterizes the potential effects described here as indicative of Level B (behavioral) harassment.

In addition to noise related impacts to marine mammals, NMFS, and BOEM in its EA, has considered the impacts from vessel traffic (i.e., ship strikes) and potential operational discharges from MDCF construction and operation. The marine mammals most vulnerable to vessel strikes are slow-moving and/or spend extended periods of time at the surface in order to restore oxygen levels within their tissues after deep dives (e.g., right whales, fin whales, sperm whales). Smaller marine mammals such as delphinids, are agile and move more quickly through the water, making them less susceptible to ship strikes. Vessels used for construction include crew boats and slow moving support vessels such as tugs and barges. To prevent ship strikes, crew aboard all vessels associated with the specified activity transiting to and from the construction site will actively watch for whales and other marine mammals and vessel operators will abide by NMFS' Northeast Marine Mammal Viewing Guidelines. As a result, NMFS does not anticipate a ship strike is likely to occur.

BOEM's EA also analyzed impacts from operational waste generated from vessels includes bilge and ballast waters, trash and debris, and sanitary and domestic wastes. These are described in the EA and in NMFS' proposed IHA notice related to this action. In summary, NMFS agrees with BOEM's analysis that the impacts to marine mammals from the discharge of waste materials or the accidental release of fuels are expected to be negligible.

#### **Effects on Habitat**

The footprint of the foundation and scour protection (if used) is approximately 0.06 acre (30-foot radius around the monopole foundation) at the MDCF site. Under the terms of the BOEM lease, within a period of one year after cancellation, expiration, relinquishment, or other termination of the lease, the lessee shall remove all devices, works and structures from the leased area and restore the leased area to its original condition before issuance of the lease (BOEM 2008). Bluewater's consultation with the NMFS under Section 7 of the ESA for the BOEM lease, completed May 14, 2009, concluded that all effects of the proposed project, including those to habitat, will be insignificant or discountable. Under the MMPA, the same determination on effects to marine mammal habitat applies based on the factors in the earlier consultation.

#### **Mitigation**

In order to issue an incidental take authorization (ITA) 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.

Bluewater will implement the following mitigation measures designed to eliminate the potential for serious injury/mortality and Level A (injurious) harassment and minimize Level B (behavioral) harassment to marine mammals:

##### *Establishment of Exclusion Zone*

Bluewater will establish and monitor a preliminary 1,000 m Level A harassment exclusion zone (EZ) around the pile driving site in order to eliminate the potential for injury (Level A harassment) of marine mammals. This zone is designed to include all areas where the underwater SPLs are

anticipated to equal or exceed 180 dB rms. If the acoustic survey (see Acoustic Monitoring section) determines that the area ensounded by sounds exceeding 180 dB extends beyond the preliminary 1,000-meter EZ, a new safety exclusion zone will be established. Otherwise, the 1,000-meter EZ will remain in place. Triggers and protocol for pile driving shut down for this zone are described below.

Bluewater will also establish a 7-km EZ at the Delaware site for ESA-listed marine mammals (i.e., large whales) to avoid Level B (behavioral) harassment to these species. Should acoustic monitoring at the Delaware site determine the estimated distance to the 160 dB isopleth (the Level B harassment threshold level) is not accurate, the large whale exclusion zone will be altered for the New Jersey site accordingly, after accounting for depth differences between the two sites.

##### *Pile Driving Shut-down and Delay Triggers and Procedures*

At least one protected species observer (PSO) stationed onboard the pile-driving vessel will monitor the established 1,000 m EZ for 30 minutes prior to the soft-start of pile driving. If the PSO observes a marine mammal within this zone during this time, the PSO will notify the Resident Engineer (or other authorized individual) who will then delay pile driving. Pile driving will not commence until the PSO confirms that animal has moved out of and on a path away from the EZ or a PSO has not sighted the animal within the EZ for 15 minutes. If a marine mammal approaches or enters the exclusion zone after pile driving has begun, pile driving will cease until the PSO confirms that the animal has moved out of and on a path away from the EZ or the PSO has not sighted the animal within the EZ for 15 min for species with shorter dive durations (small odontocetes) or 30 min for species with longer dive durations (mysticetes and large odontocetes, including sperm, pygmy sperm, dwarf sperm, killer, and beaked whales). If pile driving ceases for 30 minutes or more, the PSO will observe for an additional 30-minute period before he/she will notify the Resident Engineer (or other authorized individual) that none of the aforementioned situations are triggered and pile driving could commence.

On a separate vessel navigating at approximately 4–5 kms around the pile hammer, PSOs will monitor for large whales. Protocol for pile shut down and delay will follow the procedures described above for the 1,000 EZ.

##### *Soft-start Procedures*

A soft-start technique will be used at the beginning of pile driving in order to provide additional protection to marine mammals near the project area by allowing them time to vacate the area prior to the commencement of pile-driving activities. The soft-start requires an initial set of 3 strikes from the impact hammer at 40 percent energy with a one minute waiting period between subsequent 3-strike sets. The procedure will be repeated two additional times. If marine mammals are sighted within the exclusion zone prior to pile-driving, or during the soft start, the Resident Engineer (or other authorized individual) will delay pile driving until the animal has moved outside the exclusion zone and no marine mammals are sighted for 15 min for species with shorter dive durations (small odontocetes) or 30 min for species with longer dive durations (mysticetes and large odontocetes, including sperm, pygmy sperm, dwarf sperm, killer, and beaked whales).

##### *Use of Sound Attenuation Devices*

Bluewater has conducted a sound attenuation device feasibility study and has concluded that traditional devices (e.g., bubble curtain, wood cap, and sleeve) are not practical or feasible for the proposed activity for various reasons (see Bluewater's application). However, Bluewater will continue to explore other options and, if found, will implement a sound attenuation device during pile driving.

##### *Reduced Hammer Force*

Bluewater will not ramp-up to full power if, at decreased power, the pile can be driven to the desired depth. Recall that source levels are directly related to hammer force. The estimates to the Level A and Level B harassment thresholds are based on maximum hammer force (900 kJ); hence if less energy is used, noise levels will be less than anticipated.

##### *Time-of-Day and Weather Restrictions*

Pile-driving will be limited to day light hours between one-half hour after sunrise and one-half hour prior to sunset. If detection capability of a marine mammal within the EZ is obscured by foul weather (e.g., rough seas, fog), Bluewater will delay or suspend pile driving operations until the EZ is clear.

##### *Vessel Transiting and Operation Watch*

Crew aboard all vessels associated with the specified activity transiting to and from the construction site will actively watch for whales and other

marine mammals. Vessel operators will abide by NMFS' Northeast Marine Mammal Viewing Guidelines ([http://www.nero.noaa.gov/prot\\_res/mmv/](http://www.nero.noaa.gov/prot_res/mmv/)) should a marine mammal be observed close to or on a path towards the vessel.

NMFS has carefully evaluated the aforementioned mitigation measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse 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, including consideration of personnel safety, and practicality of implementation. In conclusion, NMFS has determined that the mitigation measures proposed by Bluewater and incorporated into the IHA provide the means of effecting the least practicable adverse impacts 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 IHAs 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.

#### Visual Monitoring

Bluewater will conduct both visual and acoustic monitoring to better understand impacts to marine mammals from pile driving and estimate take. At least one PSO will be stationed at the pile hammer to monitor, and implement mitigation if necessary, the preliminary 1,000 m EZ and notify the Resident Engineer (or other authorized person) if shut down is necessary. In addition, at least one PSO, in a dedicated visual monitoring vessel circumnavigating the pile hammer at a distance of 4–5 kms, will monitor the Level B harassment

zone (i.e., those waters estimated to carry sound levels at or above 160 dB) to determine take numbers for non-listed marine mammals located at a distance to the pile hammer and call for pile driving shut down should a large whale enter this zone. PSOs will be stationed at the highest vantage point possible aboard support vessels (the higher the platform, the greater distance seen). In addition, a visual monitor will be aboard the acoustic monitoring vessel to observe for marine mammals. All PSOs will be in contact with each other and the hammer operator at all times.

#### Acoustic Monitoring

Bluewater will carry out an acoustic study as described in the application (Attachment 1- Underwater Noise Survey Protocol). The plan includes the use of hydrophone array deployed by vessel within the near field (i.e., within 1,000m) which provides data in real time and two autonomous recorders in the far field (2km and 5km from the hammer) which will archive sound data until they are retrieved and downloaded. The plan is designed to (1) empirically verify the marine mammal exclusion and harassment zones; (2) estimate site specific underwater sound transmission loss decay rates in the action area; (3) provide a digital sound recording of acoustic measurements completed during pile driving; and (4) investigate background noise levels in absence of pile driving. As stated previously, the acoustic models contained within the application are likely an overestimate of sound levels; however, by how much cannot be determined at this time. Empirical data collection will help refine these numbers. Based on the data collected at the each site, the EZ will be adjusted accordingly (but not less than 1,000 m) and from the autonomous recorders at the Delaware site, estimates to the Level B isopleths may be refined for the New Jersey site after adjustment for water depth differences.

#### Reporting

Bluewater will submit a Final Technical Report, which will incorporate PSO sightings and acoustic survey results, to NMFS within 120 days after the expiration of the IHA. After re-establishment of an exclusion zone, if it occurs, a report detailing the field verification measurements will be submitted to NMFS within 7 days of construction. PSOs will report on operation and sighting data collected during the period of pile driving at each site location. Data will include, but is not limited to: date, time and weather condition during sighting; number of

marine mammals observed, by species and age class (if possible); behavior of marine mammal at time of sighting, including direction with respect to hammer location; any observable changes in behavior, including overt reactions (e.g. tail slapping, breaching, distinct change in direction) during sighting; initial and closest distance of marine mammal to hammer; and construction activities occurring at time of sighting, specifically noting if pile driving was ramping up or at full power and, if hammering, how long hammering was occurring before sighting. The acoustic survey results will be presented in the final report and should include, but is not limited to, the following: a detailed account of the methodology employed to collect data (e.g., equipment used, location of vessel in relation to pile during data collection, if the vessel was stationary or drifting, etc.); hammer operation details (i.e., was data collected during ramp-up, upon onset of pile driving, etc.); the levels, durations, and spectral characteristics of the impact pile driving sounds; and the peak, rms, and energy levels of the sound pulses and their durations as a function of distance, water depth, and tidal cycle.

#### 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].

As discussed in the Effects on Marine Mammals section above, marine mammals exposed to certain levels of pile driving noise may be taken by Level B harassment. Monitoring and mitigation measures will prevent animals from being exposed to levels which could induce Level A (injury) harassment. Responses to the specified activity may include avoidance, altered patterns in foraging, traveling, and resting patterns, masking, and stress hormone production. Many of these effects are difficult to quantify; therefore, NMFS has established threshold criteria which indicate the levels at which any of these effects may occur and a take is possible. Hence these levels are conservative and currently are being refined to better reflect the best scientific data available.

Consistent with Bluewater's application, NMFS has determined that eight species of marine mammals have the potential to be taken, by Level B harassment only, incidental to pile driving. The number of animals authorized to be taken for the Delaware

and New Jersey site, respectively, are provided in Table 2 below. These numbers are based on density estimates for potentially encountered non-ESA listed marine mammals which are described in the proposed IHA notice prepared for this action. No ESA-listed

species are authorized to be taken by harassment under the IHA. For all species, the requested take is less than 1% of the population; therefore, take numbers can be considered small relative to the population size.

TABLE 2: THE NUMBER OF MARINE MAMMALS, BY SPECIES AND LOCATION, AUTHORIZED TO BE TAKEN BY LEVEL B HARASSMENT.

Species	No. of Animals Delaware	No. of Animals New Jersey
Bottlenose dolphin	15	15
Spotted dolphin	35	35
Common dolphin	20	20
Atlantic White-sided dolphin	15	15
Risso's dolphin	15	15
Pilot whale	10	10
Harbor porpoise	15	10
Harbor seal	35	30

Bluewater will operate support vessels (e.g., small vessels, barges, tugs) to deliver and install equipment at the MDCF site; however, operation of these vessels is not anticipated to result in takes of marine mammals. Vessels will transit to the site slowly and operators will follow NMFS' Northeast Regional marine mammal viewing guidelines. Vessel transit speed is similar to that in NMFS' final rule concerning right whale vessel collision reduction strategy which established operational measures for the shipping industry to reduce the potential for large vessel collisions with North Atlantic right whales while transiting to and from mid-Atlantic ports during right whale migratory periods (73 FR 60173; October 10, 2008). For these reasons (slow transit, viewing guideline adherence) NMFS does not anticipate take of marine mammals incidental to support vessel operation.

#### Negligible Impact and Small Numbers Analysis and Determination

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." In making a negligible impact determination, NMFS considers the following: number of anticipated mortalities; number and nature of anticipated injuries; number, nature,

intensity, and duration of Level B harassment; is the nature of the anticipated takes such that we will expect it to actually impact rates of recruitment or survival; and context in which the takes occur- that is will the takes occur in areas (and/or times) of significance for marine mammals (e.g., feeding or resting areas, reproductive areas, rookeries, critical habitat, etc.).

Due to the implementation of mitigation measures, no ESA-listed species will be exposed to sound levels exceeding those established by NMFS as indicative of harassment. Therefore, no take of ESA-listed marine mammals are anticipated not authorized in the IHA. Non-ESA listed marine mammals may be exposed temporarily to pile driving noise; however, at each location, pile driving will occur for only 3–8 hours in total. The waters in the mid-Atlantic OCS are not designated as critical habitat for ESA-listed marine mammals, nor do they provide significant habitat for any marine mammal species (i.e., no significant foraging or reproductive areas are known to be in this area). Animals within the action area are likely to be traveling, resting, socializing or opportunistically foraging. Noise from pile driving may temporarily disturb animals in these behavioral states and induce mild TTS; however, no significant or long-term impacts are anticipated given the implementation of mitigation measures, short duration of pile driving and the anticipation that individuals are not expected to linger

within the action area. While pile driving noise may affect more than one individual, population level effects are not anticipated as impacts are anticipated to be limited to short term behavioral changes in individuals (e.g., avoidance, cessation of activity at time of noise exposure, change in vocalization patterns) and potential masking effects. These effects will not alter fitness or reproductive success. Bluewater will not conduct pile driving at both sites simultaneously; therefore, no cumulative impacts which could arise from exposure to noise from multiple pile hammers are expected. Finally, the project footprint is extremely small, and each MDCF will be removed after 1–2 years. Therefore, no long term impacts to marine mammal habitat are anticipated.

Bluewater has conducted a conservative analysis of estimated sound levels and used these estimates to determine take. Hence, the number of animals potentially taken is likely an overestimate as it is not anticipated that all species listed in Table 2 will be encountered during the short duration of pile driving. The number of animals requested to be taken is considered small (less than 1 percent) when compared to the estimated stock size for each species. Again, no ESA-listed species will be taken based on implementation of the proposed mitigation and monitoring measures and no Level A (injurious) harassment, serious injury, or mortality is

anticipated nor will any be authorized in the proposed IHA.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS found that pile driving conducted by Bluewater during MDCF installation will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from will have a negligible impact on the affected species or stocks. Therefore, issuance of an IHA to Bluewater was warranted.

#### Impact on Availability of Affected Species for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action.

#### Endangered Species Act (ESA)

NMFS Protected Resources determined that, based on the implementation of the monitoring and mitigation plan developed by Bluewater, in consultation with NMFS, is not likely to adversely affect listed marine mammal species. NMFS Northeast Region provided concurrence with this determination on September 14, 2010.

#### National Environmental Policy Act (NEPA)

On June 2, 2009, the BOEM issued an EA and associated Finding of No Significant Impact (FONSI) on the *Issuance of Leases for Wind Resource Data Collection on the Outer Continental Shelf Offshore Delaware and New Jersey*. The EA evaluates the impacts to the human environment, including those to marine mammals, from issuing seven leases in the Atlantic OCS for purposes of constructing, operating, and decommissioning a MDCF in each lease block. The MDCF's proposed by Bluewater are included in that analysis. BOEM concluded that the proposed action would not have a significant adverse impact on the human environment. Therefore, preparation of an EIS was not necessary. After independently reviewing BOEM's EA, NMFS determined the EA adequately evaluated impacts to marine mammals anticipated from issuance of the IHA. Accordingly, NMFS adopted BOEM's EA and issued a FONSI. Therefore, the preparation of another EA by NMFS for issuance of an IHA to Bluewater for the specified activity was not warranted.

Dated: September 29, 2010.

**Helen M. Golde,**

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

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#### DEPARTMENT OF COMMERCE

#### National Oceanic and Atmospheric Administration

**RIN 0648-XY30**

#### Takes of Marine Mammals Incidental to Specified Activities; Construction of the Parsons Slough Sill Project

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

**ACTION:** Notice; proposed incidental harassment authorization; request for comments.

**SUMMARY:** NMFS has received an application from the NOAA Restoration Center, Southwest Region, for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to the Parsons Slough Sill Project. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to the NOAA Restoration Center, Southwest Region, to take, by Level B Harassment only, small numbers of harbor seals (*Phoca vitulina richardsi*) during the specified activity.

**DATES:** Comments and information must be received no later than November 4, 2010.

**ADDRESSES:** Comments on the application should be addressed to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. The mailbox address for providing e-mail comments is *PR1.0648-XY30@noaa.gov*. NMFS is not responsible for e-mail comments sent to addresses other than the one provided here. Comments sent via e-mail, including all attachments, must not exceed a 10-megabyte file size.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.nmfs.noaa.gov/pr/permits/incidental.htm> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business

Information or otherwise sensitive or protected information.

A copy of the application containing a list of the references used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (*see FOR FURTHER INFORMATION CONTACT*), or visiting the internet at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>. Documents cited in this notice may also be viewed, by appointment, during regular business hours, at the aforementioned address.

**FOR FURTHER INFORMATION CONTACT:** Brian D. Hopper or Candace Nachman, Office of Protected Resources, NMFS, (301) 713-2289, or Monica DeAngelis, NMFS Southwest Region, (562) 980-3232.

#### 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.

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."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorization published in the **Federal Register** for the incidental harassment of marine mammals. Within 45 days of the