NATIONAL MARINE FISHERIES SERVICE
ENDANGERED SPECIES ACT SECTION 7 CONSULTATION
BIOLOGICAL OPINION

AGENCY: Bureau of Ocean Energy Management
Bureau of Safety and Environmental Enforcement
National Marine Fisheries Service, Office of Protected Resources
U.S. Army Corps of Engineers
U.S. Coast Guard
U.S. Environmental Protection Agency

ACTIVITY CONSIDERED: Construction, Operation, Maintenance, and Decommissioning of the Empire Wind Offshore Energy Project (Lease OCS-A 0512) and the Connected Action at South Brooklyn Marine Terminal
GARFO-2023-00454

CONDUCTED BY: National Marine Fisheries Service
Greater Atlantic Regional Fisheries Office

DATE ISSUED: September 8, 2023

APPROVED BY: ______________________
Michael Pentony
Regional Administrator

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1.0 INTRODUCTION

This constitutes NOAA's National Marine Fisheries Service's (NMFS) biological opinion (Opinion) issued to the Bureau of Ocean Energy Management (BOEM), as the lead federal agency, in accordance with section 7 of the Endangered Species Act of 1973 (ESA), as amended, on the effects of its approval with conditions of the Construction and Operation Plan (COP) authorizing the construction, operation, maintenance, and decommissioning of the Empire Wind Offshore Wind Project (Lease OCS-A 0512) under the Outer Continental Shelf Lands Act (OCSLA). The applicant, Empire Wind, LLC (Empire) is proposing to construct, operate, and eventually decommission a commercial-scale offshore wind energy facility within Lease Area OCS-A 0512 that would generate up to approximately 2,076 megawatts (MW) and consist of 147 wind turbine generators, 2 offshore substations, and associated inter-array cabling as well as export cabling to bring electricity to land. This Opinion also considers the effects of the Connected Action at the South Brooklyn Marine Terminal.

BOEM is the lead federal agency for purposes of section 7 consultation; the other action agencies include the Bureau of Safety and Environmental Enforcement (BSEE), the U.S. Army Corps of Engineers (USACE), the U.S. Coast Guard (USCG), the U.S. Environmental Protection Agency (EPA), and NMFS Office of Protected Resources[1] each of whom is taking action under their respective statutory and regulatory authorities related to approval of the COP and its conditions and therefore have corresponding ESA Section 7 consultation responsibilities. This Opinion considers effects of the proposed federal actions (collectively referred to in this opinion as the proposed action) on ESA-listed whales, sea turtles, fish, and designated critical habitat that occur in the action area (as defined in section 3.0 of this Opinion). A complete administrative record of this consultation will be kept on file at our Greater Atlantic Regional Fisheries Office.

1.1 Regulatory Authorities

The Energy Policy Act of 2005 (EPAct), Public Law 109-58, added section 8(p)(1)(c) to the Outer Continental Shelf Lands Act. This authorized the Secretary of Interior to issue leases, easements, and rights-of-way (ROW) in the Outer Continental Shelf (OCS) for renewable energy development, including wind energy. The Secretary delegated this authority to the former Minerals Management Service, and later to BOEM. Final regulations implementing this authority (30 CFR part 585) were promulgated on April 22, 2009 and amended in 2023. These regulations prescribe BOEM's responsibility for determining whether to approve, approve with modifications, or disapprove Empire's Construction and Operations Plan (COP). Empire filed their COP with BOEM on January 10, 2020, with subsequent revisions through April 14, 2021[2]. BOEM issued a Notice of Intent to prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) (42 USC § 4321 et seq.) on June 24, 2021, to assess the potential biological and physical environmental impacts of the Proposed Action and

[1] The NMFS Office of Protected Resources (OPR), located in NMFS' Silver Spring, MD, Headquarters (HQ) Office, is proposing to issue an Incidental Take Authorization under the MMPA and is thus an action agency responsible for consulting under Section 7 of the ESA, whereas NMFS's Gloucester, MA, Greater Atlantic Regional Fisheries Office (GAR) is the consulting agency, under ESA regulations at 50 C.F.R. part 402.
[2] COP is available online at: https://www.boem.gov/renewable-energy/state-activities/empire-wind
Last accessed July 13, 2023.

Alternatives (83 FR 13777) on the human environment. A draft EIS (DEIS) was published on November 18, 2022.[3]

BSEE's mission is to enforce safety, environmental, and conservation compliance with any associated legal and regulatory requirements during project construction and future operations. BSEE will be in charge of the review of Facility Design and Fabrication and Installation Reports, oversee inspections/enforcement actions as appropriate, oversee closeout verification efforts, oversee facility removal inspections/monitoring, and oversee bottom clearance confirmation. BSEE's approvals and activities are included as elements of the proposed action in this opinion.

USACE issued separate Public Notices (NAN-2022-00900-EMI, NAN-2022-00901-EMI, NAN-2022-00902-EMI [4]) describing its consideration of Empire's request for permits pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344) on November 4, 2022. In the notices, USACE notes that work regulated and proposed for permitting by USACE, through section 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act, will include port upgrades including construction of bulkhead improvements, new pile supported and floating platforms, new fenders for vessel mooring, and dredging at the South Brooklyn Marine Terminal (SBMT); as well as the construction of up to 147 wind turbine generators (WTGs), scour protection around the base of the WTGs, two offshore alternating current (AC) substations, array cables linking the individual turbines to the offshore substation(s) (OSS), offshore export cables, an onshore export cable system which includes underground cables, one onshore substation, and connections to the existing electrical grid in New York.

The USCG administers the permits for private aids to navigation (PATON) located on structures positioned in or near navigable waters of the United States. PATONS and federal aids to navigation (ATONS), including radar transponders, lights, sound signals, buoys, and lighthouses are located throughout the Project area. It is anticipated that USCG approval of additional PATONs during construction of the WTGs, OSS, and along the offshore export cable corridor may be required. These aids serve as a visual reference to support safe maritime navigation. . Federal regulations governing PATON are found within 33 CFR part 66 and address the basic requirements and responsibilities. USCG's proposal to permit installation of additional aids to navigation are included as elements of the proposed action in this opinion.

The Marine Mammal Protection Act of 1972 (MMPA) as amended, and its implementing regulations (50 CFR part 216) allow, upon request, the incidental take of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographic region assuming certain statutory and regulatory findings are made. To "take" is defined under the MMPA (50 CFR§ 216.3) as,

[3] The DEIS is available online at: https://www.boem.gov/renewable-energy/state-activities/empire-offshore-wind-deis-commercial-wind-lease-ocs-0512
Last accessed July 13, 2023.
[4] Public Notice is online at https://www.nan.usace.army.mil/Missions/Regulatory/Regulatory-Public-Notices/Article/3210504/nan-2022-00901-emi/
Last accessed July 13, 2023.

> to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill any marine mammal. This includes, without limitation, any of the following: The collection of dead animals, or parts thereof; the restraint or detention of a marine mammal, no matter how temporary; tagging a marine mammal; the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal; and feeding or attempting to feed a marine mammal in the wild.

"Incidental taking" means "an accidental taking. This does not mean that the taking is unexpected, but rather it includes those takings that are infrequent, unavoidable, or accidental." (50 C.F.R. §216.103). NMFS Office of Protected Resources (OPR) has received a request for Incidental Take Regulations (ITR) and associated Letter of Authorization (LOA) from Empire Offshore Wind, LLC (Empire), a 50/50 joint venture between Equinor and BP p.l.c., for the incidental take of small numbers of marine mammals during the construction of the Empire Wind project.[5] The requested ITR would govern the authorization of take, by both Level A and Level B harassment[6], of "small numbers" of marine mammals over a 5-year period incidental to construction-related pile driving activities (impact and vibratory), potential unexploded ordnances or munitions and explosives of concern detonation, and high-resolution geophysical (HRG) site characterization surveys conducted by Empire in Federal and State waters off New York for the Empire Wind offshore wind energy facility. A final ITR would allow for the issuance of a LOA to Empire for a 5-year period. NMFS OPR's issuance of an ITR and LOA is included as an element of the proposed action in this opinion.

Empire may choose to obtain a Letter of Acknowledgement from NMFS for certain fisheries survey activities. A Letter of Acknowledgement acknowledges, but does not authorize, certain activities as scientific research conducted from a scientific research vessel. (See 50 CFR §600.745(a)). Scientific research activities are activities that would meet the definition of fishing under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), but for the statutory exemption provided for scientific research. (16 USC § 1802(16)). Such activities are statutorily exempt from any and all regulations promulgated under the Magnuson-Stevens Act, provided they continue to meet the definition of scientific research activities conducted from a scientific research vessel. To meet the definition of a scientific research vessel, the vessel must be conducting a scientific research activity and be under the direction of one of the following: Foreign government agency; U.S. Government agency; U.S. state or territorial agency; University (or other educational institution accredited by a recognized national or international accreditation body); International treaty organization; or, Scientific institution. In order to meet this definition, vessel activity must be dedicated to the scientific research activity, and cannot include commercial fishing. Scientific research activity includes, but is not limited to, sampling, collecting, observing, or surveying the fish or fishery resources

[5] Application, Proposed Rule, and Supporting Materials are available online at: https://www.fisheries.noaa.gov/action/incidental-take-authorization-empire-offshore-wind-llc-construction-empire-wind-project-ew1
Last accessed July 13, 2023

[6] Level A harassment means any act of pursuit, torment, or annoyance that has the potential to injure a marine mammal or marine mammal stock in the wild. Level B harassment refers to acts that have the potential to disturb (but not injure) a marine mammal or marine mammal stock in the wild by disrupting behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.

within the Exclusive Economic Zone. Research topics include taxonomy, biology, physiology, behavior, disease, aging, growth, mortality, migration, recruitment, distribution, abundance, ecology, stock structure, bycatch or other collateral effects of fishing, conservation engineering, and catch estimation of fish species considered to be a component of the fishery resources. The issuance of a Magnuson-Stevens Act related Letter of Acknowledgment by NMFS is not a federal action subject to section 7 consultation, and it is not an authorization or permit to carry out an activity and the issuance of LOA's, should they be requested, is not considered an element of the proposed action in this opinion. However, as BOEM's action we are consulting on includes some surveys that may be carried out with a Magnuson-Stevens Act Letter of Acknowledgement, and these surveys' effects would not occur but for the Empire Wind project, it is appropriate to consider them in this Opinion as consequences of BOEM's proposed action and, to the extent the surveys may cause effects to listed species at a level resulting in the incidental take of ESA-listed species , address such take in this Opinion's Incidental Take Statement.

2.0 CONSULTATION HISTORY AND APPROACH TO THE ASSESSMENT

As explained above, BOEM is the lead federal agency for this section 7 consultation. BOEM submitted a draft Biological Assessment (BA) on August 12, 2022. The New York City Economic Development Corporation (NYCEDC) submitted a BA for the South Brooklyn Marine Terminal Port Infrastructure Improvement Project on October 25, 2022; this BA was prepared to support their application for permits from the USACE. BOEM submitted a revised BA and request for consultation to us on December 16, 2022, as the lead federal agency for the ESA consultation and on behalf of BSEE, USACE, EPA, and the USCG. In correspondence dated January 27, 2023, we notified BOEM that some of the information necessary to initiate ESA consultation was missing from the December 2022 BA. We requested that BOEM provide additional information for the BA by February 27 so that it could be reviewed before the March 13 ESA milestone date. On February 8th, BOEM notified us that they could not provide the information until after February 27 and requested that the ESA milestone date be moved back by 30 days to April 12, 2023. This revision was updated and published on the NMFS Permitting Dashboard on February 10, 2023. BOEM submitted a revised BA on March 13, 2023. On April 5, 2023, we received a draft *Notice of Proposed Incidental Take Regulations for the Taking of Marine Mammals Incidental to the Empire Wind* Energy Facility, from our Office of Protected Resources and an accompanying request for ESA section 7 consultation. At that time, we considered that we had received all of the information necessary to initiate consultation for the entire proposed action. As explained in our April 19, 2023 letter, consultation was formally initiated on April 12, 2023. However, on June 13, 2023, Equinor notified BOEM of proposed changes to the project design for the Empire Wind project. In correspondence dated June 14, 2023, we requested an addendum to the BA to explain the proposed changes and BOEM's determination of effects. NYCEDC submitted a revised BA for the SBMT project on June 1, 2023. BOEM submitted a BA addendum on July 12, 2023. Additional clarifying information was provided to us by BOEM staff throughout the consultation period. We provided the action agencies a copy of the draft Description of the Proposed Action section of this Opinion in July 2023. As a result of that review, we removed consideration of vessel traffic in the Gulf of Mexico as we learned that transport of project components from Texas was no longer proposed.

To harmonize various regulatory reviews, increase certainty among developers regarding anticipated regulatory timelines, and allow sufficient time for NMFS' production of a final biological opinion, BOEM and NMFS have agreed to a standardized ESA Section 7 consultation timeline under the offshore wind program that allocates 150 days for consultation and production of a biological opinion for each proposed offshore wind project, unless extended. Issuance of the Empire Wind biological opinion ultimately was scheduled for completion on or before September 8, 2023.

Consideration of Activities Addressed in Other ESA Section 7 Consultations

As described in section 3 below, some Empire Wind project vessels will transit to/from the Empire Project site from the Nexans Cable Plant in Goose Creek, Charleston, SC. NMFS Southeast Regional Office (SERO) completed an ESA section 7 consultation with the USACE for the construction and operation of Nexans facility. The May 4, 2020, Biological Opinion prepared by NMFS SERO considers the effects of the construction and use of the Nexans Plant (2020 Nexans Opinion) on shortnose sturgeon, Atlantic sturgeon, and critical habitat designated for the Carolina DPS of Atlantic sturgeon. The only adverse effects identified in the Opinion were from in-water work associated with the development of the facility which has been completed; in the Opinion, NMFS SERO determined that vessels utilizing the Nexans facility were extremely unlikely to strike a shortnose or Atlantic sturgeon and therefore, effects were discountable.

The Nexans Biological Opinion analyzed an overall amount of vessel transits, of which Empire Wind would contribute a small part. The effects analyzed in the completed Nexans Opinion are considered as part of the Environmental Baseline of this Opinion, given the definition of that term at 50 CFR §402.02. The effects specific to Empire Wind's vessel use of this facility will be discussed in the Effects of the Action section by referencing the analysis in the Nexans Opinion and determining whether the effects of Empire Wind's vessels transiting to and from this facility is consistent with the analysis or anticipated to cause additional effects. In the *Integration and Synthesis* section, if we determine any additional effects of Empire Wind's vessels will be caused by the proposed action, we will evaluate them in addition to the effects included in the *Environmental Baseline*, which already includes the effects of vessel transits analyzed in the Nexans Biological Opinion. By using this methodology, this Opinion ensures that all of the effects of Empire Wind's vessel transits to and from the ports analyzed in other Biological Opinions will be considered in the Integration and Synthesis section and reflected in this Opinion's final determination under ESA 7(a)(2). This methodology also ensures this Opinion does not "double-count" effects of Empire Wind's vessel transits to and from the Nexans facility–once in the Environmental Baseline and again in the *Effects of the Action* section. If our effects analysis reveals that vessel transit from the Nexans facility caused by the Empire Wind project is anticipated to cause incidental take of any listed species, the effects of such take will be evaluated and specified and minimized in this opinion's Incidental Take Statement.

Consideration of the 2019 ESA Regulations

On July 5, 2022, the U.S. District Court for the Northern District of California issued an order vacating the 2019 regulations that were revised or added to 50 CFR part 402 in 2019 ("2019 Regulations," see 84 FR 44976, August 27, 2019) without making a finding on the merits. On September 21, 2022, the U.S. Court of Appeals for the Ninth Circuit granted a temporary stay of the district court's July 5 order. On November 14, 2022, the Northern District of California issued an order granting the government's request for voluntary remand without vacating the 2019 regulations. The District Court issued a slightly amended order two days later on November 16, 2022. As a result, the 2019 regulations remain in effect, and we are applying the 2019 regulations here. For purposes of this consultation and in an abundance of caution, we considered whether the substantive analysis and conclusions articulated in this biological opinion and its incidental take statement would be any different under the pre-2019 regulations. We have determined that our analysis and conclusions would not be any different.

3.0 DESCRIPTION OF THE PROPOSED ACTION ON WHICH CONSULTATION WAS REQUESTED

In this section and throughout the Opinion we use a number of different terms to describe different geographic areas of interest. For clarity, we define those terms here. Wind Development Area (WDA) is the area within the action area consisting of the location of the wind turbine generators, offshore substations, interarray cables, and the cable corridors between the substations and the landfall sites in New York. The Wind Farm Area (WFA) is that portion of Empire's lease (OCS-A 0512) where the wind turbine generators and OSSs will be installed and operated (i.e., the offshore portion of the WDA minus the cable routes to shore); collectively, the EW1 and EW2 WFAs are co-extensive with the lease area and the terms WFA and lease area may be used interchangeably in this Opinion. The project area is the area within the action area consisting of the location of the wind turbine generators, offshore substations, interarray cables, and the cable corridors to shore, as well as all vessel transit routes to the ports in New York and South Carolina that have been identified in the BA as ports to be used to support the construction, operation/maintenance, and/or decommissioning of the project (i.e., the WDA plus these transit routes). We also refer to the SBMT project area to describe the areas at SBMT where in-water work will be carried out to support facility improvements. The action area is defined in section 3.4 below and encompasses all of these areas.

3.1 Overview of Proposed Federal Actions

BOEM is the lead federal agency for the project for purposes of this ESA consultation and coordination under NEPA and other statutes; BOEM requested consultation on its proposal to approve[7] a COP to authorize the construction, operation and maintenance, and eventual decommissioning of the Empire Wind Offshore Wind Farm Project (i.e., facilities, cables, pipelines, obstructions, and clear the seabed of obstructions created by the proposed project). The reorganization of the Renewable Energy Rules (30 CFR Parts 285, 585, and 586) enacted on January 31, 2023 reassigned existing regulations governing safety and environmental oversight and enforcement of OCS renewable energy activities from BOEM to BSEE. BSEE will provide and enforce safety, environmental, and conservation compliance with associated legal and regulatory requirements during project planning, construction operations, and decommissioning; oversee operations and inspections/enforcement actions, as appropriate; oversee closeout verification efforts; oversee facility removal and inspections/monitoring; and oversee bottom clearance confirmation. BSEE will also review the Facility Design Reports and the Fabrication and Installation Report for consistency with the approved COP and indicate if there are any objections. BOEM's December 16, 2022, request for consultation also included: EPA's proposal to issue an Outer Continental Shelf Air Permit; the USACE's proposal to issue three permits for

[7] BOEM's regulations state at 30 CFR § 585.628(f): "Upon completion of our technical and environmental reviews and other reviews required by Federal law (e.g., CZMA), BOEM may approve, disapprove, or approve with modifications your COP."

in-water work, structures, and fill under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act including authorization of dredging and associated activities[8]; USACE anticipates that a "Section 408 permission" will be required pursuant to Section 14 of the RHA (33 USC §408) for any proposed alterations that have the potential to alter, occupy, or use any federally authorized civil works projects (i.e., Federal navigation channels); and the USCG proposal to issue a Private Aids to Navigation (PATON) Authorization. BOEM addressed NMFS HQ OPR's proposal to issue a Marine Mammal Protection Act (MMPA) Incidental Take Authorization (ITA) in their request for consultation and NMFS OPR submitted a separate request for consultation on April 5, 2023. Through the provisions of the Clean Water Act, EPA has delegated authority to issue permits under the National Pollutant Discharge Elimination System (NPDES) to the New York Department of Environmental Conservation. Empire Offshore Wind, LLC (Empire) plans to apply for a New York State Pollutant Discharge Elimination System (NYSPDES) permit as necessary for discharges related to onshore construction activities. The issuance of State permits is not an action subject to ESA section 7 consultation; however, this consultation considers the effects of water quality impacts of all activities that would not occur but for the Empire Wind Project proposed actions that may affect listed species.

As described in the DEIS, vessels are required to adhere to state and federal regulations, including NPDES standards. Additionally, BOEM indicated it will require, through COP approval, all Project construction vessels to adhere to existing state and federal regulations related to ballast and bilge water discharge, including USCG ballast discharge regulations (33 CFR §151.2025) and EPA National Pollutant Discharge Elimination System Vessel General Permit standards.

3.2 Empire Wind Project

3.2.1 Overview

BOEM is proposing to authorize Empire Offshore Wind, LLC (Empire) to construct, operate, maintain, and eventually decommission the Empire Wind 1 and Empire Wind 2 offshore wind energy projects in Lease Area OCS-A 0512, located within the New York Wind Energy Area (NY WEA). The other Federal actions identified in Section 3.1 authorize various aspects of the proposed action including the incidental take of marine mammals caused by the project. The information presented here reflects the proposed action described by BOEM in their BA provided to NMFS GAR in March 2023. Here, for simplicity, we may refer to BOEM's authorization when that authorization may also include other Federal actions (e.g., construction of the wind turbines requires authorizations from BOEM, USACE, EPA, USCG, and NMFS OPR).

[8] The USACE is proposing to issue three permits – one for the construction of EW1 (Public Notice available at: https://www.nan.usace.army.mil/Portals/37/docs/regulatory/publicnotices/attachments/1-%20EW1%20PN%20-%20NAN-2022-00901-EMI.pdf?ver=-U4JA5pX4d_tBx0tSAtC0g%3d%3d); one for the construction of EW2 (Public Notice available at: https://www.nan.usace.army.mil/Portals/37/docs/regulatory/publicnotices/attachments/1%20-%20EW2%20PN%20-%20NAN-2022-00902-EMI.pdf?ver=HB5FDfWKMC3P8sq8EE4f9w%3d%3d); and one for upgrades at the South Brooklyn Marine Terminal (more information below).

Empire's Lease Area OCS-A-0512 is located approximately 14 miles (12 nautical miles) south of Long Island, New York. Water depths in the Wind Development Area (WDA) range from approximately 5.9-44 meters (m) (19.4-144 feet (ft.)). The project includes four main components:

1. The Empire Wind 1 (EW1) wind project, which consists of up to 57 wind turbine generators (WTGs) and their monopile foundations, an offshore substation (OSS) and its jacket foundation (12 pin piles), scour protection for foundations, and a submarine transmission cable network (inter-array cables) connecting the WTGs to the OSS;
2. The Empire Wind 2 (EW2) wind project, which consists of up to 90 WTGs and their monopile foundations, an OSS and its jacket foundation (12 pin piles), scour protection for foundations, and inter-array cables connecting the WTGs to the OSS;
3. Offshore export cables from the EW1 portion of the Lease Area to the landfall location; and
4. Offshore export cables from the EW2 portion of the Lease Area to the landfall location.

The total capacity of the project will be approximately 2,076 MW, considering both EW1 and EW2. The project's export cables include both offshore and onshore segments. The offshore export cables will be high voltage alternating current (HVAC) electric cables that will connect the project (i.e., EW1 and EW2) to separate points of interconnection (POIs) at onshore locations in Gowanus Substation in Brooklyn, New York and a POI in Oceanside, New York. The offshore export cables will be located in federal waters and New York State territorial waters. Two offshore export cables will be installed for EW1 and EW2, with a single export cable corridor for each project (i.e., two cables each in each of two export corridors) would be three-core HVAC cables, each with a maximum transmission capacity of 230 or 345 kV. For EW1, the offshore export cable will connect directly to the onshore substation, making an onshore export cable unnecessary. The interconnection cables will connect to the onshore substation at the South Brooklyn Marine Terminal (SBMT) to the Gowanus POI. For EW2, onshore export cable segments will traverse through either Long Beach or Lido Beach, New York, cross at Reynolds Channel, and then traverse through Island Park to the onshore substation in Oceanside, New York. The EW2 offshore export cables will connect with onshore export cables at transition joint bays (TJBs) with landfall sites located at up to two onshore cable routes.

The proposed action we are consulting on includes the above identified components of the Empire Wind project as well as upgrades at the South Brooklyn Marine Terminal (SBMT); the USACE is proposing to authorize those activities pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. Prior to Empire Wind construction and installation activities, SBMT is planned to undergo improvements in order to support staging and operations and maintenance (O&M) activities for EW1 and EW2. The New York City Economic Development Corporation has filed a joint permit application to USACE and the New York State Department of Environmental Conservation (NYSDEC) for planned improvements at SBMT (USACE #NAN-2022-00900[9]). Planned improvements include: dredging to allow vessels laden with WTG components access to piers; bulkhead improvements to support large cranes handling WTG components; additional wharves to allow mooring and

[9] Available at:
https://www.nan.usace.army.mil/Portals/37/docs/regulatory/publicnotices/attachments/1SBMT%20PN%20-%20NAN-2022-00900-EMI.pdf?ver=EWTfXNxwe3cSorO6C27ivA%3d%3d. Last accessed July 5, 2023.

berthing of barges, service operation vessels, and crew transport vessels; and construction of an O&M facility.

The Empire Wind project also includes a number of survey components including high-resolution geophysical surveys (HRG), use of buoys to collect metocean data, passive acoustic monitoring, benthic resource monitoring, and fisheries resource surveys and monitoring. These survey and monitoring activities will occur during the pre-construction, construction, O&M, and decommissioning phases of the project. Empire is also proposing to temporarily moor a metocean buoy within the Lease Area during construction and installation operations to provide real-time weather conditions following issuance of any required approvals from the USCG. The buoy will be similar to that approved in the Site Assessment Plan and will s be retrieved following installation activities.

Construction and installation of the EW1 and EW2 wind projects and offshore export cables is anticipated to occur over a period of approximately four and a quarter years, currently anticipated to occur between 2023 and 2027; with land-based components commencing as early as quarter four of 2023, followed by submarine export cable installation for EW1 in approximately quarter three of 2024. The proposed project is being developed and permitted using the Project Design Envelope (PDE) concept; this means that the "maximum impact scenario" (i.e., greatest number of piles, largest turbines, etc.) is proposed for authorization by BOEM and is being analyzed in accompanying review documents, including this Opinion. Further discussion of construction methods and schedule are provided in COP Volume 1, Section 3 (Empire Wind 2023) and summarized below. Additional relevant details of the proposed activities are also included in the *Effects of the Action* section of this Opinion.

3.2.2 Construction - Offshore Activities

Wind Turbine Generators

Empire would erect up to 147 WTGs (up to 57 WTGs for EW1 and up to 90 WTGs for EW2) extending up to 951 ft. (290 m) above highest astronomical tide (HAT) with a spacing between WTGs of approximately 0.65 nautical miles (nm) (1.2 km) in a southwest-northeast orientation within the 79,350-acre (321-square km[km^2] WFA. Each WTG would be mounted on a monopile foundation with a 36 ft. (11 m) base diameter, driven approximately 180 ft. (55 m) into the seabed. Empire would place scour protection around foundations to stabilize the seabed near the foundations as well as the foundations themselves, as detailed below. Each WTG would contain oils, greases, and fuels for lubrication, cooling, and hydraulic transmission (Table 3.2.1).

Table 3.2.1. Wind Turbine Oil/Grease/Fuel Maximum PDE Parameters

Turbine Selection/Spacing Parameters	EW1	EW2
WTG Size	18 MW	
Number of turbines	57	90
Upper blade tip height above HAT	951 ft. (290 m)	
Spacing	0.65 nm (1.2 km)	

Monopile Foundation Parameters		
Base diameter (each)	36 ft. (11 m)	

Total Seabed footprint with scour protection	135.2 ac (0.5 km^2)	
Oil/Grease/Fuel	**EW1**	**EW2**
Transformer Oil	2,378 gal (9,000 l)	
Main Bearing Grease	95 gal (360 l)	
Yaw Grease	32 gal (120 l)	
Yaw Gear Oil	95 gal (360 l)	
Hydraulic Oil	264 gal (1000 l)	
Cooling (Water/Glycerol)	872 gal (3,300 l)	
Pitch Lubrication (Grease)	53 gal (200 l)	
Pitch System Hydraulic Accumulators (Nitrogen)	17, 171 gal (65,000 l)	
Pitch Gearbox Oil	18 gal (70 l)	
Gearbox Oil (Gear Oil)	1,057 gal (4,000 l)	
Sulfur Hexafluoride (SF_6 Gas)	287 pounds (130 kg)	

Sources: Empire COP 2023; BOEM 2023

Interarray Cables and Offshore Substations (OSSs)

Interarray cables would connect the individual WTGs to a substation and would transfer power between the WTGs. Each individual OSS would be placed on a pin pile jacket foundation with three or four legs connected by cross bracing. Pile jacket foundations being considered for the OSSs would involve installation of up to three 2.5 meter (8 ft.) diameter pin piles per leg via impact hammer to an expected penetration depth of 197 ft. (60 m).

Empire's PDE includes a cable design that encompasses a range of parameters, detailed in Table 3.2.3 below. OSSs would include step-up transformers and other electrical equipment needed to connect the 66 kilovolt (kV) interarray cables to the offshore export cables. The maximum transmission capacities of the EW 1 and EW 2 offshore export cables would be 230 kV and 345 kV, respectively. The interarray cables contain three conductors, screens, insulators, fillers, sheathing, armor, and fiber optic communications cables. Between three and five WTGs would be connected through the interarray cable that would be buried to a target depth of 6 ft. (1.8 m) below the seabed where possible and then connected to the OSS. Additionally, Empire Wind would install a commissioning link cable, an approximately 0.9-mile (1.4-km) segment of interarray cable linking one interarray cable string on EW 1 to one interarray cable string on EW 2, for the purpose of energizing the EW 2 system for commissioning. This commissioning link cable would be permanently installed, but for temporary use only, using materials and methods identical to the remainder of the interarray cables. Cable protection may be placed on the seabed where sufficient burial depth cannot be achieved, or protection is required due the interarray cables crossing other cables or pipelines. Additional armoring and other cable protection methods may include rock placement, concrete mattresses, rock bags, and geotextile mattresses. The OSSs would serve as the interconnection points between the offshore and onshore components. The offshore substation will include transformers, switchgears, and reactors to optimize the power capture from the interarray cables and to control the flow through the export cable. The topside also will include auxiliary equipment and uninterruptible power supplies, the Supervisory Control and Data Acquisition (SCADA), telecommunication systems, numerous monitoring systems, together with facilities, safety, and rescue equipment for personnel. According to the PDE, the maximum base height above the water surface of each OSS would be 59 ft. (18 m) (Table 3.2.2).

Table 3.2.2. Summary of Offshore Substation Topside and Foundation Maximum PDE Parameters

Offshore Substation Topside Parameter	EW1	EW2
Voltage	230 kV	345kV
Width	230 ft. (70 m)	
Length	230 ft. (70 m)	
Height	92 ft. (28 m)	108 ft. (33m)
Base height above MSL (air gap)	72 ft. (33 m)	59 ft. (18m)
Piled Jacket Foundation Parameter		
Pile diameter	8 ft. (2.5 m)	
Seabed footprint (with scour protection)	4.3 ac (0.02 km^2)	

Sources: Empire COP 2023; BOEM 2023

WTGs and the OSSs would include lighting and marking that complies with Federal Aviation Administration (FAA) and USCG standards, and be consistent with BOEM best practices. A detailed description of OSSs and interarray cables is provided in COP Volume 1, Section 3.3.1.2, Section 3.3.1.3, and Section 3.3.15 (Empire Wind 2023).

WTG Installation

Empire would install foundations and WTGs using installations vessels, as well as support vessels and barges. The foundation installation vessels would be equipped with cranes, a motion compensated gripper frame, and a pile-driving hammer. Prior to commencing installation activities, high-resolution geophysical and geotechnical (HRG&G) surveys would be conducted in the WFA to document detailed seabed conditions and morphology. As necessary, significant debris, such as large boulders, would be moved outside this area. Excavation would be required where debris is buried or partially buried. Empire Wind is currently evaluating data to determine whether boulder removal is necessary. In the event that large boulders need to be relocated, Empire will use a tool similar to an "orange peel grab" to lift the identified boulder. Boulders will be moved as close to their original site as they can while moving them out of the way of construction.

Transportation vessels will be used to transport the monopiles and transition pieces to the installation site. The installation vessel will lift the monopile off the transportation vessel, upend the monopile, and install it into the gripper frame with the installation vessel’s cranes. After the monopile is placed onto the seabed and leveled, the crane will release the monopile and pick-up the hammer which would be placed on top of the monopile. Each monopile will be driven to its final penetration target depth using an impact hammer with a maximum rated capacity of 5,500 kilojoules (kJ).

Once the monopile is installed to the target depth, the impact hammer would be removed; the gripper frame would be released from the pile gripper. Following monopile installation, an anode cage would be installed on the monopile with the use of one crane followed by installation of the transition section. The transition section would be lifted from the installation vessel with one platform crane, placed on top of the monopile and grouted or bolted to the top of the monopile. A transition piece may include boat landing features, access ladders, or other ancillary features. There may be lag time between the installation of the monopile and the anode cage and/or transition piece.

Where required, scour protection would be placed around all foundations, and would consist of engineered rock placed around the base of each monopile in a 226 ft. (69 m) diameter circle. The scour protection would serve to stabilize the seabed near the foundations as well as the foundations themselves. A rock-dumping fall pipe vessel would be used to place scour protection. See COP Volume 1, Section 3.3.1.6 for detailed specifications of proposed scour protection (Empire Wind 2023).

Impact pile driving for WTGs and OSS foundations will not occur between January 1 and April 30. Impact pile-driving activities would therefore take place between May 1 and December 31, with impact pile driving planned for May- November in 2025 and 2026. Pile driving in December would only occur in unforeseen circumstances arise. Pile driving would occur during daylight hours, only extending into night if Empire Wind starts installing a pile 1.5 hours prior to civil sunset. Additional information on requirements for low visibility pile driving are addressed below and in the *Effects of the Action* section of this Opinion.

For WTG foundations, a single vertical hollow monopile would be installed for each location using an impact hammer with a maximum rated capacity of 5,500 kJ to an expected penetration depth of 180 ft. (55m). No more than two monopile foundations will be installed per day. Duration of impact pile-driving is anticipated to be approximately 3 hours per monopile. The installation of the WTG components (tower, nacelle, and blade) is expected to take 48 hours. This assumes a 24-hour work window (i.e., ability to carry out at least some construction and vessel activities at all hours of the day) and no delays due to weather, sea conditions, or other circumstances.

OSSs are generally installed in two phases: first, the foundation substructure is installed in a method similar to that described above for the WTGs; then, the topside structure is installed on the foundation structure. More information on installation can be found in COP Volume 1, Section 3.4.1.2 and Section 3.4.1.3 (Empire Wind 2023). Empire would construct two OSSs, one for EW1 and one for EW2 to collect the electricity generated by the offshore turbines. OSSs help stabilize and maximize the voltage of power generated offshore, reduce potential electrical losses, and transmit energy to shore. OSSs would consist of a topside structure with multiple deck levels on a piled jacket foundation. The piled jacket foundation would involve installing 12 8-foot (2.5 m) diameter piles as a foundation for each OSS foundation using an impact hammer with a maximum rated capacity of 4,000 kJ to an expected penetration depth of 197 ft. (60 m). A maximum of three pin piles would be installed per day. Each pin pile would take approximately 4.2 hours of pile driving to install.

Concurrent driving (i.e., the driving of more than one pile at the same time) is not proposed and is not analyzed in this Opinion. As detailed below, a number of measures to minimize and monitor effects of pile driving and other construction activities will be required and are considered part of the proposed action.

As stated above, Empire is proposing to install up to 147 monopile foundations for the WTGs and 2 pin pile jacket foundations for the 2 OSSs (12 pin piles each). Additional details on pile driving schedule are included in Section 7.1 of this Opinion.

Cable Laying

Cable burial operations will occur both offshore for the interarray cables and the offshore export cables and onshore at the sea to shore transition locations. Empire would bury array cables and offshore export cables by jetting, plowing, or trenching. Cable burial produces temporary and permanent disturbances to the seabed. Maximum seabed footprint is listed in Table 3.2.3. Prior to installation of the cables, a pre-lay grapnel run would be performed to locate and clear obstructions such as abandoned fishing gear and other marine debris. Following the pre-lay grapnel run, pre-sweeping activities in areas along the EW1 and EW2 export cable routes would occur to allow for effective cable laying through megaripples and sand waves. The primary pre-sweeping method would involve a mass flow excavator to smooth excess sediment on the seafloor along the footprint of the cable route. A suction hopper dredge may also be used for megaripple and sand wave clearance; however, this is only anticipated if use of the mass flow excavator is precluded by permit conditions. Empire anticipates that pre-sweeping will be required primarily along the nearshore portions of the export cable route and within New York State waters. The majority of dredging would occur on megaripples and large sand waves, which are mobile features. Megaripple and sand wave height vary depending on localized seabed and current characteristics. Empire anticipates that dredging would occur on these varied megaripples and sand waves within a corridor that is up to 164 ft. (50 m) wide. Megaripple and sand wave height vary depending on localized seabed and current characteristics. If mass flow excavation equipment is used for pre-sweeping, dredge material would be displaced. If a suction hopper dredge vessel is used, dredged material may either be sidecast near the site or placed in a barge and removed for disposal at an approved upland facility. Approximately 116,044 cubic yards (88,722 cubic meters) of sediment may be side-casted as a result of these pre-sweeping activities along the EW 1 submarine export cable route. Along the EW 2 submarine export cable route, approximately 58,465 cubic yards (44,700 cubic meters) may be side-casted.

In addition to pre-sweeping, pre-trenching activities in select locations along the EW1 and EW2 export cable routes would occur to allow for effective cable laying in areas where deeper burial depths may be required and/or seabed conditions are not suitable for traditional cable burial methods. Empire has not identified where along the cable routes pre-trenching may be required. Pre-trenching would involve running cable burial equipment over portions of the route in order to soften the seabed prior to cable burial and/or the use of a suction hopper dredge to excavate additional sediment.

At locations where the EW 1 export cable crosses other assets, local dredging may be needed to reduce the shoaling of the crossing design. Approximately 735 cubic yards (562 cubic meters) of material is anticipated to be removed by suction hopper dredge and/or mass flow excavation at each crossing. The final depth of the dredged area will be governed by the vertical distance between the natural seabed and the assets to be crossed and will need to be approved by the asset owners through a crossing agreement.

Local dredging may also be required to facilitate the required burial depth along the EW 1 export cable route within the Bay Ridge Channel and at South Brooklyn Marine Terminal. In the Bay Ridge Channel, dredging for cable installation may be required within an approximately 2.79-acre (0.01-square kilometer) area where the export cable makes its approach to South Brooklyn Marine Terminal. This area overlaps with the area proposed for maintenance dredging by the USACE in a Public Notice issued on March 11, 2021. Empire is currently consulting with the USACE on the anticipated channel maintenance activities and does not anticipate conducting additional dredging within these USACE-managed channel reaches prior to construction and installation activities.

In some areas, Empire is proposing to cut-away and remove existing, out-of-service cables and pipelines in order to install the submarine export cables. This removal would only be completed upon predetermined cables and pipelines in which written agreement is received from the owners and/or appropriate agencies. Should this be required, details of the cutting or removal would be agreed upon by all associated parties and would be consistent with sound engineering practices and relevant requirements. Using cable databases, Empire has identified OOS cables that run through the WFA. To allow for burial of the interarray cables, a section of the OSS cables at the crossing location will be removed. Cable removal would involve cutting and peeling back the OOS cables, in accordance with International Cable Protection Committee Recommendation no.1 “Management of Redundant and Out-of-Service Cables” (ICPC 2011). At locations where the EW1 export cables cross existing cables and pipelines or other assets that are in service, localized dredging would occur to reduce the shoaling of the cross design.

In the event that cables cannot achieve proper burial depths or where the proposed offshore export cable crosses existing infrastructure, Empire is proposing to use the following protection methods: (1) rock placement, (2) concrete mattress placement, (3) rock bags, or (4) geotextile mattresses. Empire conservatively estimates that up to 10 percent of the interarray and offshore export cables would require one of the protective measures.

Table 3.2.3. Summary of Interarray Cable and Offshore Export Cable Maximum PDE Parameters

Interarray Cable Parameters	**EW1**	**EW2**
Total Length	116 nm (214 km)	144 nm (267 km)
Voltage	66 kV	
Diameter	170 mm	
Target Burial Depth	6 ft. (1.8 m)	
Cable Protection	26 ac (0.1 km^2)	32 ac (0.1 km^2)
Disturbance Area	534 ac (2.2 km^2)	633 ac (2.6 km^2)
Operating Footprint	82 ac (0.3 km^2)	129 ac (0.5 km^2)
Submarine Export Cable Parameters		
Total Length	41 nm (76 km)	26 nm (48 km)
Voltage	230 kV	345 kV
Diameter (3 core cable)	300 mm	
Target Burial Depth	6 ft. (1.8 m)	
Cable Protection	33 ac (0.1 km^2)	32 ac (0.1 km^2)
Disturbance Area	368 ac (1.5 km^2)	239 ac (0.97 km^2)

Operating Footprint	37 ac (0.1 km^2)	24 ac (0.1 km^2)

Source: BOEM 2023

Once any necessary seabed preparations are completed, Empire would install the inter-array cables linking each of the WTGs to the OSS for each project and the offshore export cables that would link the EW 1 and EW 2 OSSs to a sea-to-shore transition at their respective landfalls. Inter-array and export cables would be brought to the appropriate section of the cable siting corridor on a deep-sea cable laying vessel or barge (see Section 3.1.2.4 for a description of the use of this vessel, and other construction vessels that would be used for cable installation). From there, the cables would be laid onto the seabed and either buried by the laying vessel or by a second vessel following the cable laying process. Cable burial would utilize one of the following methods:

- Jetting: Involves injecting pressurized water jets into the seabed, creating a trench. As the trench is created, the submarine export cable is able to sink into the seabed. The displaced sediment then resettles, naturally backfilling the trench. Jetting is considered the most efficient method of submarine cable installation. It would minimize the extent and duration of bottom disturbance along significant lengths of the submarine export cable routes.
- Plowing: As the cable plow is dragged along the seabed, a small trench is created. The submarine export cable is then placed in the trench and displaced sediment is either mechanically returned to the trench or backfills naturally under hydrodynamic forcing. Plowing is generally less efficient than jetting methods but may be used in limited site-specific conditions.
- Trenching (cutting): Used on seabed containing hard materials not suitable for plowing or jetting, as the trenching machine is able to cut through the material using a chain or wheel cutter fitted with picks. Once the cutter creates a trench, the submarine export cable is laid into it.

The equipment selected will depend on seabed conditions and the required burial depths, as well as the results of various cable burial studies. More than one installation and burial method may be selected per route and has the potential to be used pre-installation, during installation, and/or post-installation.

In shallow areas, specifically along the Rockaway sandbank in New York Harbor, the export cable may need to be floated into place for burial, as water depths along this stretch are too shallow for the cable lay vessel. Should this floating installation method be implemented, the cable lay vessel would be located approximately 1,312 feet (400 meters) from the burial location. The cable burial machine will then assist in lowering and burying the submarine export cable in place, as it moves along these shallower areas. The burial machine may also be run out of a separate construction vessel.

Burial of the inter-array and export cables would terminate before the OSSs, and J-tubes would be installed to protect the remaining portion of the cable. Depending on the final construction and installation schedule, it is possible that up to 3,000 feet (914 meters) of the submarine export cables will need to be wet-stored close to the OSS locations. This wet-storage concept would be required should the OSSs be installed after the export cables are buried along the cable route. In the event that this approach is taken, the submarine export cables would be cut, sealed, and fitted with corrosion resistant rigging. At the offshore substation location, the submarine export cables would be cut, sealed, and fitted with corrosion resistant rigging. The cables would then be laid and/or buried on the seafloor until they could be pulled into and installed in the OSSs.

More information on cable laying associated with the proposed Project is provided in COP Volume 1, Section 3.3.1 and Section 3.4.1 (Empire Wind 2023).

Unexploded Ordnance/Munitions and Explosives of Concern
Prior to seafloor preparation, cable routing, and micrositing of all assets, Empire will survey portions of the export cable routes and clear the routes of unexploded ordnance and munitions and explosives of concern (UXO/MEC). Avoidance is proposed as the preferred approach for UXO/MEC mitigation; however, there may be instances where confirmed UXO/MEC avoidance is not possible due to layout restrictions, presence of archaeological resources, or other factors that preclude micrositing.

BOEM describes in the BA that Empire completed a Project-specific study designed to identify the existence and risk of UXO in the WDA and determined that the risk level for UXO/MEC is relatively low for most installation activities in the WFA. Along the EW1 export cable route, Empire determined that the risk level for the area between the WFA and Ambrose Channel is medium. It is anticipated that portions of the submarine export cable route(s) will be surveyed and cleared for UXO which may include physical relocation of UXO (“lift and shift”). Where this is not feasible, the cable will be re-routed slightly within the surveyed corridor to avoid UXO. No detonation of any identified UXO/MEC is proposed; therefore, this consultation will not consider the effects of detonation of UXO/MEC and the analysis here will be limited to effects of “lift and shift” operations.

Construction-Related Vessel Activity
As described in the BA, the most intense period of vessel traffic would occur during the construction phase when wind turbine and OSS foundations, interarray and export cables, and OSS topside structures are installed in parallel. Empire estimates that construction of EW1 and EW2 would involve approximately 50 vessels of various classes for each of the projects (COP Volume 1, Section 3.4; Empire 2023). Many of these vessels could remain in the project area for days or weeks at a time, potentially making only infrequent trips to port for bunkering and provisioning, as needed. The maximum number of vessels involved in the proposed project at one time is highly dependent on the Project’s final schedule, the final design of the Project’s components, and the logistics solution to achieve compliance with the Jones Act. The Jones Act requires project components that move between U.S. ports to be transported on Jones Act compliant, U.S.-flagged vessels. The number of vessel trips from outside the U.S. and their ports of origin would not be fully known until contractors are selected and supply chains are established; however, BOEM has provided estimates in the BA based on the currently available information. This Opinion considers Empire and BOEM’s current determination that vessel trips would originate from South Brooklyn Marine Terminal, New York; Port of Coeymans, New York; Port of Albany, New York; and ports in Goose Creek, South Carolina. Additionally, heavy transport vessels may be utilized to transport project components from Asia, Europe, and Halifax, Nova Scotia, Canada; particular ports in Europe are unknown. Vessel trips from Asia

will originate from either Singapore or Indonesia. No other transits from foreign ports are described in the BA.

Probable vessel classes used to install WTGs and OSSs with their associated foundations include heavy lift and derrick barges, jack-up barges, material transport barges, a jack-up crane work vessel, fall pipe vessels, transport and anchor handling tugs, and safety vessels (Table 3.2.4a). Monopile supply vessels would be used to transport monopile foundations, wind turbine supply barges would be used to transport WTG components, and heavy transport vessels would be used to transport OSS topsides and monopile components. Heavy lift vessels would be used for installation of the WTG, OSS topsides and OSS foundations, wind turbine installation vessels would be used for installation of WTGs, and fall pipe vessels would be used for installation of scour protection. Additional barges, and accompanying tugboats, may be used for transporting other construction materials and supporting installation work. Crew transport vessels (CTVs) would be used to rotate construction crews to and from area ports, and small support vessels would be used for construction monitoring.

Probable vessel classes used to install the inter-array and export cables include cable lay vessels, grapnel run vessels, fall pipe vessels, transport and anchor handling tugs, installation barge and safety vessels (Tables 3.2.4a and 3.2.4b). Cable lay vessels would be used to install submarine cables, cable lay support vessels would be used to support cable lay operations, pre-lay grapnel run vessels would be used for seabed clearance along cable routes, and fall pipe vessels will be used for installation of cable protection. CTVs would be used to rotate construction crews to and from area ports, and small support vessels would be used for construction monitoring. Helicopters may also be used.

Table 3.2.4a. Anticipated Vessel Utilization for the Proposed Action

Vessel	Activity	Stage	Round Trips	Average Transit Duration (hr/trip)	Number of Operating Days
Heavy lift vessel	Installation of foundations	C	8	6	
WTG installation vessel	Installation of WTG components	C	2	6	600
WTG supply vessel[a]	Transport of WTG components				262
Heavy transport vessel	Transport of OSS topsides, monopile foundations	C	22	6	213
Cable lay vessel/barge	Installation of submarine cables	C	12	129	841
Cable lay support vessel	Support for cable lay operations	C	8	9	663
Pre-lay grapnel run vessel, pre-sweep dredger/tug, and pre-trenching tugs and barge	Seabed clearance along cable routes	C	15	15	364
Fall pipe vessel	Installation of scour protection	C	81	6	772

Anchor handling tug	Support for heavy lift vessel	C	28	6	262
Bubble curtain vessel	Noise suppression during foundation installation	C	8	9	232
Service operations vessel	General construction support	C	698	9	960
Crew transfer vessel	Transporting workers to and from offshore work area	C	330	9	2,362
Protected species observer vessel	Maintain watch during foundation installation	C	26	9	232
Support vessel	General construction support				
Tugboat	Transport/maneuvering of barges	C	246	15	2,010
Barge	Transport of construction materials	C	197	15	2,070
Safety vessel	Protection of construction areas	C	20	9	636
Jack-up vessel for OSS hookup/commissioning	Commissioning of OSS platforms	C	4	6	540

[a]The WTG supply vessel will only transit from Europe to SBMT and not the lease area, but has been included in the table for context.
Source: Pers. comm. to E. Land, Equinor, 2023.

Table 3.2.4b Anticipated Vessel Utilization for the Proposed Action (O&M)

Vessel	Activity	Stage	Round Trips (per year)	Average Transit Duration (hr/trip)	Number of Operating Days (per year)
Service operations vessel	General operations support	O&M	26	10.4	328.5
Crew transfer vessel	Transporting workers to and from offshore work area	O&M	480	9	963.6
Survey vessel	Annual survey	O&M	1	9	60
Heavy lift vessel	Maintenance work	O&M			
Tugboat	Transport/maneuvering of barges	O&M	4	15	118
Barge	Transport of maintenance materials	O&M	2	15	59
Cable lay vessel	Cable maintenance work	O&M	4	9	70

Source: Pers. comm. to E. Land, Equinor, 2023.

Materials for construction may be transported from ports outside the WDA, including Goose Creek, South Carolina and foreign ports in Asia, Canada, and Europe. Some vessels may transit directly to the WDA while others first travel to SBMT. The values provided in Tables 3.2.4a and b and 3.2.5 are based on Empire's current assumptions as reflected in BOEM's March 2023 BA. BOEM indicates that the following ports may be used to support fabrication, assembly, deployment, or decommissioning activities for the Empire Wind project: South Brooklyn Marine Terminal, New York; Port Coeymans, New York; and Port of Albany, New York; therefore, vessel transits from these ports may occur as a result of the Project (Table 3.2.5).

Table 3.2.5. Anticipated Vessel Trips for the Proposed Action

Project Phase	Port or Facility	Estimated Maximum Annual Round Trips
Construction	South Brooklyn Marine Terminal	950 (per year for 4 years)
Construction	Port of Albany	74 (per year for 2 years of WTG installation)
Construction	Port of Coeymans	8
Construction	Cable Facility in Goose Creek	4 (per year for 3 years of cable installation)
Construction	Asia (Singapore and Indonesia)	4
Construction	*Total*	*1,032 (maximum single year of construction)*
O&M	SBMT	517
Decommissioning	SBMT	954

[1] Estimated trips during decommissioning are assumed to be the same as those to South Brooklyn Marine Terminal during construction.
Source: BOEM 2023

3.2.3 Construction – Cable Landfall Activities

Installation of the EW 1 inter-array cables would occur from May through September 2025, installation of the EW 2 inter-array cables would occur from April through September 2026, installation of the EW 1 export cables would initially occur from July through September 2024 and be completed from April through July 2025, and installation of the EW 2 offshore export cables would occur from July through December 2025. During cable installation, activities would occur 24 hours a day.

For EW 1 cable installation and landfall, an area of approximately 2.8 acres would require dredging to facilitate access for the cable installation vessel within the existing piers approaching the landfall at SBMT. In addition, an area of approximately 0.1 acres (404 square meters) at the base of the cable landfall would require dredging. An estimated total of approximately 103,000 cubic yards (78,750 cubic meters) of sediment will be removed from the inter-pier area at SBMT for cable installation and landfall. Dredging would be completed using clamshell dredging, suction hopper dredging, and/or hydraulic dredging. Dredged material would be transferred by barge to an upland disposal facility and disposed of in accordance with EPA Guidelines and USACE Guidelines.

The transition of the export cables from offshore to onshore would be accomplished by trenchless methods (e.g., horizontal directional drilling (HDD) or Direct Pipe) or open-cut alternatives, which would bring the proposed cables beneath nearshore areas, the tidal zone, beach and adjoining coastal areas to the proposed landfall sites. For the landfall associated with EW 1, Empire has proposed the "through bulkhead" method. This particular open-cut alternative involves pulling the submarine export cables through angled steel conduits through the bulkhead along the shoreline at SBMT between the 35th Street and 29th Street Piers. The submarine export cables would then be installed in an open trench on the inclined seabed towards the shoreline. Empire will prepare a graded slope from the bulkhead outwards to the specified cable burial depth. Export cable installation will then commence by pulling the end of each cable from the cable-laying vessel/barge along the alignment and temporarily anchoring them on shore. The cables will be hauled in from the cable lay vessel/barge by a pull-in winch mounted upland. The cable will be floated into position with the aid of temporary attached buoyancy elements. Once the cable has been pulled ashore and anchored at the termination point, it will be lowered to the landfall slope and the pre-dredged trench outwards into the bay. Once the cable is in its final position it will be covered by competent fill material for the full length from the bulkhead and out to the pierhead line. For the near shore sloped section, a layer of scour protection would also be installed to protect the cable and restrict any exposure.

In support of the EW 1 cable landfall and onshore substation, Empire will demolish the existing relieving platform and construct a new pile-supported platform and bulkhead at the cable landfall after the export cable installation is completed. The new platform will extend towards and align with the marine structures to the south and north of the EW 1 landfall. The platform deck elevation will be the same as the bulkhead elevation to the north and the top elevation of the platform extending south of the combined sewer outlet structure.

For EW2, Empire has proposed HDD at four potential shoreline locations:

1. Landfall A – EW2 export cable will be installed within the City of Long Beach public right of way (ROW) at Riverside Boulevard;
2. Landfall B – EW2 export cable will be installed within the City of Long Beach public ROW at Monroe Boulevard;
3. Landfall C – EW2 export cable will be installed within an existing paved parking lot at the Lido West Town Park in Lido Beach, Town of Hempstead; and
4. Landfall E – EW2 export cable will be installed within the City of Long Beach public ROW at the corner of Laurelton Boulevard and West Broadway.

The HDD process will be supported by a marine spread, which includes vessels, barges, and divers. HDD installation involves an onshore rig that drills a horizontal borehole under the surface which exits onto the seafloor. The submarine cables would then be floated out to sea, then pulled back onshore within the drilled borehole. Onshore, the export cable would be routed into an underground transition junction bay (TJB) located in proximity to each specific landfall site. To facilitate management and control of drilling fluids, the offshore exit location would undergo seafloor preparation which may include the installation of a cofferdam or excavation (wet or dry).

In the event that HDD methods are not feasible at EW2 Landfall A, EW2 Landfall B, or EW2 Landfall E, Empire would use Direct Pipe as the trenchless installation method. The Direct Pipe method involves using a pipe thruster to grip and push a steel pipe with a microtunnel boring machine. Once the microtunnel boring machine exits onto the seafloor and is removed, the duct used to house the electrical can would be fabricated into a pipe string one joint at a time within the same onshore entry workspace area and pushed into the casing pipe previously installed using the Direct Pipe method (Empire Wind DEIS 2023).

Empire is proposing the installation and removal of cofferdams or goal posts at locations of export cable route to landfall transitions. Up to two cofferdams may be installed for EW1 and up to three cofferdams may be installed for EW2. Cofferdams would be installed using a vibratory hammer to drive 0.61-m (24-inch) steel sheet piles into the seafloor in a tight configuration around an area of up to 150 ft. by 150 ft. (46 m by 46 m). Assuming the use of sheet pile structures, cofferdam installation is anticipated to take approximately 1 hour to complete. Alternatively, a casing pipe through which the export cable would be pulled would be supported by 3 to 5 goal posts. Installation of nearshore goal posts for landfalls would involve using a hydraulic hammer to install two 12-inch steel piles for each goal post, for a total of 6 to 10 piles for each cable (or 18 to 30 piles for both EW1 and EW2). Assuming the use of goal posts, installation of each pile is anticipated to require approximately 2,000 strikes over a period of approximately 2 hours. In total, up to 36 hours (18 piles × 2 hours per pile) of impact pile driving to install three goal posts may occur.

Removal of the temporary sheet piles or goal posts will be accomplished using a vibratory extractor and is expected to take up to 1 hour per day for 6 days. Cofferdam installation/removal will take place only during daylight hours.

Onshore Facilities

Onshore infrastructure would consist of a buried onshore export cable system, substations, and a buried connection to the existing electrical grid at each point of interconnection (POI) via interconnection cables. As stated above, Empire is proposing to connect the EW1 export cable directly to the onshore substation at SBMT, making an onshore export cable unnecessary. From the onshore substation at SBMT, the interconnection cable route would travel northeast along an existing public roadway to the Gowanus POI. For EW2, Empire has proposed a total of nine onshore export cable route segments to traverse along existing roadways. After crossing the Reynolds Channel by HDD into Island Park, onshore cables would traverse Island Park to Onshore Substation A or the Oceanside POI parcel. Empire has proposed a total of eight cable route segments to connect cables from Reynolds Crossing to the Oceanside POI. The eight proposed cable route segments may be used for either onshore export cables or interconnection cables. These routes would travel along existing roadways or railroads. See Empire's DEIS for a detailed description of the proposed landfall sites and onshore export cable routes (Empire Wind DEIS 2023).

3.2.4 Construction – Onshore Substation C Marina Activities along inshore Long Island

Empire has also proposed marina activities along inshore Long Island on the Wreck Lead Channel to utilize this area for the onshore substation for EW2. Marina activities would include bulkhead repairs and removal of berthing piles. To repair the bulkhead, 24-inch (61-centimeter) Z-type steel sheet piles would be installed using a vibratory pile hammer. Twenty sheet piles would be installed per day over a 35-day installation period, with one hour of vibratory piling each day. Removal of berthing piles would be accomplished using a combination of a crane and vibratory pile hammer that would remove up to 130 12-inch (30-centimeter) timber berthing piles over a two-week period, with up to 15 piles removed per day.

3.2.5 Construction – Barnums Channel Cable Bridge

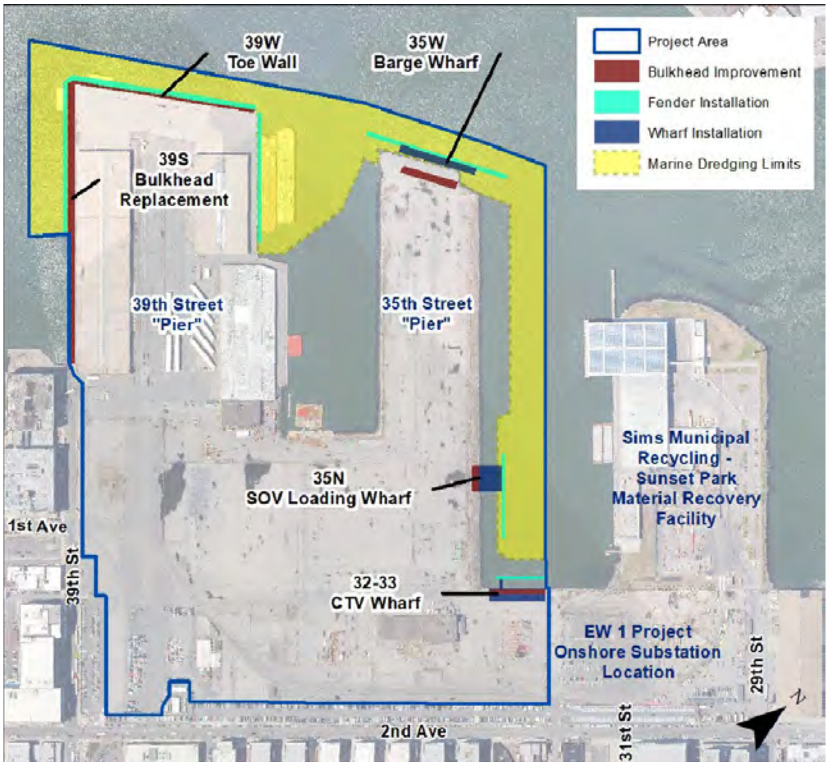
The IP-F cable segment that crosses Barnums Channel would consist of a 25-foot-wide by 200-foot-long cable bridge over the channel that would use up to five pile groupings within the channel to support the truss system that would hold the cables above the waters. These supports would include a total of approximately 22 2-foot (0.6-meter) diameter steel pipe piles in the waterway. The cable bridge superstructure would include two transition areas.
The location is in an inland waterway near the Barrett Generation Station in an industrialized section of the island, where water depths are only 1 meter.

3.2.6 Infrastructure Improvements at SBMT

The action we are consulting on includes proposed modifications at SBMT that will support staging and O&M activities necessary for EW1 and EW2. Port modifications for SBMT would involve dredging, shoreside construction, and pile driving.

As stated above, NYCEDC has filed a joint permit application to USACE and the New York State Department of Environmental Conservation (NYSDEC) for planned improvements at SBMT (USACE Application #NAN-2022-00900-EMI). These improvements will not be undertaken by Empire, but for purposes of the NEPA analysis are considered a Connected Action for the Proposed Action. This is because NYCEDC’s Environmental Assessment Form (Appendix P in the Empire DEIS) does not identify any other project besides Empire that will use the SBMT facilities. For purposes of Section 7 of the ESA and this consultation, we consider these activities to be activities caused by the proposed action: their effects are thus effects of the action. Planned improvements include dredging to allow vessels laden with WTG components access to piers; bulkhead improvements to support large cranes for handling WTG components; additional wharves to allow mooring and berthing of barges, service operation vessels, and CTVs; and construction of an O&M facility (Figure 3.2.1). For efficiency, these activities were included in BOEM’s BA and are addressed in this consultation as consequences and effects of the proposed action. The activities addressed in the above referenced USACE permit application are also described in the BA prepared for the SBMT Port Infrastructure Improvement Project and are summarized here (AECOM 2023).

Figure 3.2.1. Aerial Location Map with Approximate Location of Planned In-water work related to the Connected Action



Source: AECOM 2023

3.2.6.1 Port Modifications and In-water Work Activities

Dredging and Dredged Material Management

Port modifications as part of the Port Infrastructure Improvement Project would include dredging of the "interpier" channels and basins adjacent to the seaward bulkheads to allow passage of the drafts of vessels intended to utilize the SBMT facility. An area of up to approximately 14.2 acres (57,465 square meters) may require dredging for the port modifications. A clamshell dredge with an environmental bucket onboard a barge with a mounted crane would be used to dredge approximately 189,000 cubic yards of sediment for the Port Infrastructure Improvement Project. A turbidity curtain would be installed from the 35th Street "Pier" to the 39th Street "Pier" prior to dredging as available infrastructure and existing river currents allow. Dredged material would be deposited into scows, allowed to settle for 24 hours, and the transported to an appropriately permitted upland disposal site. Dredged material may be beneficially reused, depending on its suitability for such uses. Dredging operations for the Port Infrastructure Improvement Project would occur 24 hours a day for a total of 140 days and would occur during the in-water work window of June 1 to December 15. Dredging conducted during June, October, or November would be performed in accordance with a Sturgeon Avoidance and Monitoring Plan.

In the BA for the SBMT Port Infrastructure Improvement Project, NYCEDC identifies the potential for maintenance dredging during the 25-year life of the proposed project and connected action to remove accumulated sediment that could interfere with vessel access to berthing. NYCEDC anticipates that a single maintenance dredging event that will remove 60,000 to

70,000 cubic yards of accumulated sediments will be required during the first decade after port modifications are completed. NYCEDC expects the frequency of future maintenance dredging will be on an as-needed basis, based on regular monitoring of the bathymetry in the SBMT. While we recognize that there will be future maintenance dredging events that would not occur but for the issuance of NYCEDC's joint permit and the approval of Empire's COP, we cannot predict the need for future maintenance dredging aside from the 10-year post-construction maintenance dredging described in the BA for the SBMT Port Infrastructure Improvement Project. Though future maintenance dredging may be caused by the proposed action and connected action, without specific information including the timing, area, dredge type, and dredge volumes, we cannot predict that specific consequences of these activities on listed species are reasonably certain to occur, and they are therefore not considered effects of the proposed action (50 CFR 402.17 (a)-(b)). Therefore, the 10-year post-construction dredging event which is reasonably certain to occur is the only future dredging considered in the Opinion. In the event that additional dredging is proposed after the term of the currently proposed USACE permit, ESA section 7 consultation would be required if it was determined that the proposed action may affect any ESA listed species or designated critical habitat. The proposed dredging areas and volumes are summarized in Table 3.2.6 and described in detail in Section 2.1.1 of the BA for the SBMT Port Infrastructure Improvement Project.

Sediment Capping

Once dredging is completed, a one-foot clean sand cap would be placed in two locations along the north and west face of the 39th Street "Pier" where contaminant concentrations exceed their NYSDEC Technical & Operational Guidance Series 5.19, *In-Water and Riparian Management of Sediment and Dredged Material*, Class C threshold. In total, 9,033 cubic yards of clean sand will be installed over the post-dredge surface. Clean sand would be barged onsite and applied over an approximately 5.6-acre area using a clamshell dredger with a closed environmental bucket. Turbidity curtains will be utilized during sediment capping activities in the same manner as those installed for dredging activities. Capping operations would be conducted for 12 hours a day for a period of 14 days and would occur immediately following dredging of the respective areas. According to the BA for the SBMT Port Infrastructure Improvement Project, dredging and sediment capping operations would occur in the summer and fall of 2024 and fall of 2025, and would require 140 days to complete. More information sediment capping can be found in Section 2.1.2 of the Port Improvement Project BA.

Table 3.2.6. Approximate Proposed Dredging Areas and Volumes related to the Connected Action

Dredging Area	Location	Basin Area of Dredging	Volume to Design Depth	Volume Dredged for Capping	Volume in Over-depth	Depth of Over-depth	Total Dredged Material
Units	*n/a*	*AC*	*CY*	*CY*	*CY*	*FT*	*CY*
1.0	35N	2.9	10,300	0	8,000	2	18,300
2.1A	39W	2.2	28,300	16,200	3,500	1	48,000
2.1B	39W	0.6	5,700	0	2,400	2	8,100
2.2.1	39N	3.9	11,000	0	12,900	2	23,900
2.2.2	35W	1.3	4,100	0	3,700	2	7,800
2.3	39S	3.4	65,300	14,300	3,300	1	82,900
TOTAL	**n/a**	**14.2***	**124,700**	**30,500**	**33,800**	**n/a**	**189,000**

*Note: 14.2 acres is the final acreage quantity due to rounding. The acreage quantities in this column have been rounded and may not sum precisely to 14.2 acres.

Source: AECOM 2023

Bulkhead Replacements and Improvements

As described in the BA for the Port Infrastructure Improvement Project, the SBMT facility includes existing basins that extend to the federal channel between areas of bulkhead landfill that resemble and are referred to as "piers" (despite being landfill instead of pile-supported structures over water). Bulkheads would be replaced or improved on the south side of the Street Pier (39S), the west side of 39th Street Pier (39W), a portion of the bulkhead line between 32nd and 33rd Streets (32-33), and an upland bulkhead on the north side of the 35th Street Pier (35N). According to the Port Improvement Project BA, in-water bulkhead replacement/reinforcement would begin in summer 2024.

The 39S bulkhead replacement and installation of a new toe wall at the 39W bulkhead would involve installing 27.6 inch length sheet piles (468 AZ-46 and 302 AZ-38, respectively) from a crane-equipped construction barge using a vibratory hammer. The new bulkhead at 39S will be backfilled with clean fill (e.g., flowable fill or crushed stone) to approximately mean low water (MLW) before capping with concrete on the top of the new deck. The area between the new toe wall and the existing bulkhead at 39W will be filled with marine concrete via a tremie pipe to prevent exposure of the concrete to saltwater prior to curing. Replacement and reinforcement of the 32-33 bulkhead will involve removing the existing structure from land via removal of the pavement, excavation of the remaining soil fill, and removal of the lower concrete deck. The existing timber piles supporting the demolished relieving platform would be cut to the mudline and removed and a stone armor layer (i.e., stone mat) would be installed a part of the seabed slope up to the timber bulkhead to act as scour protection. Once removed, the existing platform structure will be replaced with a high-level relieving platform supported by unfilled 24-inch diameter steel pipe piles. Pipe piles will be installed to an approximate tip elevation of -130 ft. below mean high water (MHW) using a vibratory hammer for the majority of installation. An impact hammer will be used to drive the pipe piles during the final 10 to 15 ft. (3 to 4.5 m). There are no in-water activities associated with replacement of the 35N bulkhead. This is because construction activities for the bulkhead replacement will take place entirely in the upland area of the 35th Street Pier.

In-water work activities associated with bulkhead replacements and improvements are summarized in Table 3.2.7 and Table 3.2.8. More information on bulkhead replacements and improvements can be found in Section 2.1.3 of the Port Improvement Project BA.

Cofferdam Removal
At the western end of the 35th Street Pier (35W), an existing cofferdam would be removed. Before the cofferdam is removed, a new sheet pile wall will be installed landward of the area to be excavated to act as a bulkhead to provide support to the remaining "pier" structure. The sheet pile would be installed using a vibratory hammer. Five thousand (5,000) cubic yards of fill in the cofferdam cells will be internally excavated down to the existing adjacent mudline. After excavation, traditional underwater cutting methods would be applied to cut back the obsolete cofferdam cell structure. The exposed surface will be graded to a 2:1 (horizontal:vertical) slope and covered with a 1.5-ft. thick layer of bedding stone, followed by a layer of geotextile fabric, a 2.06-ft. layer of under-layer rock, and a 4.42-ft. layer of armor stone to stabilize the new shoreline.

In-water work activities associated with cofferdam removal are summarized in Table 3.2.7. More information on removal of the existing cofferdam at 35W can be found in Section 2.1.3.5 of the Port Improvement Project BA.

Pile-supported and Floating Platform Installations
Three new wharves will be installed to enable the SBMT to berth and onload/offload specialized and construction barges. One pile-supported platform would extend off the existing 35th Street Pier (35W) for transport and construction barges. Another pile-supported platform would accommodate berthing of service operation vessels, and one floating platform would accommodate berthing of CTVs.

<u>Construction Barge Wharf (35W):</u> The proposed barge loading wharf will extend from the new 35W sheet pile wall; this new sheet pile wall would be installed before removal of the existing cofferdam described above. Construction of the barge loading wharf will involve a total of 216 48-inch diameter hollow steel pipe piles installed to support a 321.5 ft. x 196.8 ft. platform plus two dolphins (17-ft. x 15-ft. each) and associated walkway (5-ft. width x 185-ft. length), for a total deck area of 64,500 sqft. Of the 216 pipe piles, 104 piles will be installed in marine habitat and 5 piles will be installed in tidal wetland habitat. The outermost pipe piles would be installed first, followed by piles located landward or inside of the existing cofferdam. Piles seaward of the cofferdam will be installed in the sediment without pre-installation excavation, whereas piles in the riprap slope will be installed after displacing stone to the side prior to exploratory excavation to ensure a timber revetment is not in the proposed location of the pile. After installation of each pile on the slope, previously displaced riprap will be replaced around the pile.
Pipe piles within the riprap slope and marine areas seaward of the existing cofferdam will be installed from a crane barge using a vibratory hammer for the majority of the length and then an impact hammer over the last 10 to 15 ft. After installation to design depth, piles will be topped

with a concrete cap and the deck surface will be installed upon the cap. Piles will remain unfilled below the cap.

In addition to the pile supported wharf, the platform will have two dolphins which each consist of four (4) pile clusters connected to the wharf by a grated metal access walkway. Dolphin piles will be installed in an identical manner to the platform piles using a vibratory hammer and an impact hammer.

<u>Service Operations Vessel Lading Wharf (35N):</u> A wharf for SOVs will be constructed at the new 35N bulkhead. Before the pile-supported wharf is installed, the slope would be reshaped to facilitate a stable foundation for the structure in an area adjacent to the required dredging footprint. An area of approximately 421 ft. long and 110 ft. wide will be excavated and regraded resulting in a total footprint of 46, 310 sqft. Approximately 14,841 cubic yards (CY) of existing riprap and fill will be excavated below MHW. The slope will be regraded at 2.5:1 (vertical:horizontal), and a 2.2-ft. depth of bedding stone will be laid throughout, followed by a 4.8-ft. depth of scour protection riprap (for a total depth of 6-ft. of stone). Regrading will disturb 0.74 acres of marine habitat and 0.50 acres of tidal wetland habitat, replacing it with similar material and surface. To the extent possible, all excavation, grading, and installation of material will be done via excavators upon barges. Dewatering procedures for riprap material will be identical to those described above for dredging activities. Riprap material would be dried, stored, and reused at the same location. If material cannot be reused, the material will be characterized for proper disposal offsite.

Construction of the SOV wharf would involve thirty-six (36), 36-inch diameter steel pipe piles to support the main deck. Before the support pipe piles are installed, select sections of riprap will be temporarily removed and dry-stored to allow piles to be driven. Sixteen (16) 36-inch diameter pipe piles will be installed to support four separate dolphins. Of the 52 total pipe piles, 46 will be installed in-water. Pipe piles will be installed from a crane barge using a vibratory hammer for the majority of the length and then an impact hammer over the last 10 to 15 ft. Piles will be left unfilled except for a concrete plug for the upper 5ft.

<u>Crew Transfer Vessel Wharf (32-33):</u> The CTV wharf will be a 15 ft. x 224 ft. floating concrete dock located off of the basin area between 32nd and 33rd Streets. The dock will occupy approximately 750 CY of the water column during all tidal phases. The floating structure will be manufactured off-site in subassemblies which will be interconnected on-site to form the dock. Once assembled, the dock will be moored to 14, 30-inch diameter hollow steel pipe spud piles. Spud piles will be installed from a crane barge using a vibratory hammer for the majority of the length and then an impact hammer will be used over the last 10 to 15 ft. The spud piles will not be filled, but will cumulatively prevent access to approximately 78 sqft of marine habitat. Access to the floating dock will be via a 5 ft. x 35.75 ft. tidal adjusted walkway supported and anchored to the adjacent installed platform. The walkway will shade approximately 174sqft of marine habitat.

In-water work activities associated with wharf installations are summarized in Table 3.2.7 and Table 3.2.8. More information on wharf installations can be found in Section 2.1.4 of the Port Improvement Project BA.

Fender Installations
Prior to construction, existing rubber and pneumatic fenders on the 39th Street "Pier" will be removed. New fenders will be installed to protect wharves and bulkheads in areas where vessel berthing would occur. Fenders will be fastened to the new or existing bulkhead cap or edge beam to restrain movement. Fenders will be installed at an elevation above mean lower low water (MLLW) but within tidal elevation. Each fenders has typical dimensions of 14.0 ft. long x 5.2 ft. wide x 15.0 ft. deep. A total of 55 units of single elastomeric buckling fender will be installed over the reconstructed 39S bulkhead and the 39W "pier" bulkheads. Additionally, 15 cone fender units which consist of an ultra-high molecular weight polyethylene faced steel panel will be installed as part of the new 35W and 35N SOV wharf structures. As part of the new 32-33 CTV wharf, 14 units of foam fenders will be installed. Foam fenders consist of floating cylindrical sections of foam padding, 3.3 ft. (1 m) in diameter and 4.9 ft. (1.5 m) in length, lashed to the platform surface.

In-water work activities associated with fender installations are summarized in Table 3.2.7. More information on fender installations can be found in Section 2.1.5 of the Port Improvement Project BA.

Table 3.2.7. Components Installed In-water and Tidal Zone and Approximate Impact Measurements related to the Connect Action

Structure	New Fill Volume MLLW	New Fill Volume MHW	New Fill Volume MHWS	New Structure Volume MLLW	New Structure Volume MHW	New Structure Volume MHWS	Marine Habitat Loss	Marine Habitat Shading	Tidal Wetlands Loss	Tidal Wetlands Shading	Material in Water.	Number In-Water/ Dimension per unit	Permit Info Packet Section	Permit Info Packet Figure	Permit Drawing Sheet No.
Units	*CY*	*CY*	*CY*	*CY*	*CY*	*CY*	*AC*	*SQFT*	*AC*	*SQFT*	*n/a*	*Quantity / Measure Per*	*Section*	*Figure*	*DWG #*
Bulkhead 39S	2,930	3,867	4,035	0*	0*	0*	0.1477	0	0	0	AZ-46 Sheetpiles	468 / 27.6-in length	2.1.3.1	2-5, 2-6	6 to 10
Bulkhead 39W	638	638	638	0*	0*	0*	0.0791	0	0	0	AZ-38 Sheetpiles	302 / 27.6-in length	2.1.3.2	2-7	11 to 13
Bulkhead 32-33	266	(803)	(1,040)	0*	0*	0*	0	0	0.156	0	Pipe piles, Stone mat	23 / 24-in dia.	2.1.3.3	2-8, 2-9	22 to 25
Bulkhead 35N	0	0	0	0	0	0	0	0	0	0	0	0	2.1.3.4	n/a	21
Cofferdam 35W [removal]	(4,488)	(7,254)	(7,817)	0	0	0	(0.2334)	7,360'	(0.1755)	5,705'	Cofferdam & New Riprap	n/a	2.1.3.5	2-10, 2-11	14 to 18
Wharf 35W (Barge)	0**	0**	0**	0**	0**	0**	0.0285	13,471	0.0014	1,300	Piles & Platform	104 / 48-in dia.	2.1.4.1	2-12, 2-13	16 to 18
Wharf 35N (SOV Slope Demo)	(13,005)	(14,841)	(10,678)								Riprap Slope		2.1.4.2	2-14, 2-15	19 to 21
Wharf 35N (SOV)	12,868	14, 685	14,888	0*	0*	0*	0.0055	6,894	0.0019	2,785	Steel Pipe Piles	46 / 36-in dia.	2.1.4.2	2-14, 2-15	19 to 21
Pontoons 32-33 (CTV)	0	0	0	0***	0***	0***	0.0016	174	0	0	Spudpiles & Floating Platform	14 / 30-in dia.	2.1.4.3	2-16, 2-17	26, 27
Fender 39 (Cone)	0	0	0	0	90	110	0	0	0	0	Steel fender	55 / 14 ft x 75 ft x H	2.1.5.1	2-6, 2-7	6, 9
Fender 39 - Rem. (Pneumatic)	0	0	0	(64)	(64)	(64)	0	0	0	0	Foam fender	-8 / 2500mm OD x 4000mm L	2.1.5.1	n/a	n/a
Fender 35W Wharf	0	0	0	0	13	16	0	0	0	0	Steel fender	8/ 14 ft x 75 ft x H	2.1.5.1	2-12	16, 18
Fender 35N Wharf	0	0	0	0	11	14	0	0	0	0	Steel fender	7/ 14 ft x 75 ft x H	2.1.5.1	2-14	19, 21
Fender 32-33 Wharf	0	0	0	0	0	0	0	0	0	0	Foam fender	14 / 1000mm OD x 1500mm L	2.1.5.3	2-16	26, 27
TOTAL****	(791)	(3,708)	(4,343)	(64)	50	75	0.0291	27,899	(0.0164)	9,790	n/a	n/a	n/a	n/a	n/a

CY = Cubic Yard; AC = Acre; SQFT= square feet, in = inch; ft = feet; dia = diameter; L = length; W = width; H = height; <0.01 = Less than 0.01 SOV = Service Operations Vessel; CTV = Crew Transfer Vessel
MHW = Mean High Water; MHWS = Mean High Water Spring; AZ = Z-shape sheet pile; OD = outer diameter

**-In-water structures comprise only hollow pipe or sheet piles.*

***-Per NYSDEC guidance, bulkhead seaward expansion CY is calculated from the level of the existing preconstruction mudline; in the case of new overwater platforms only SQFT should be totaled to determine mitigation.*

****-Per NYSDEC guidance, in-water structures that do not constitute fill (such as floating barges) do not require mitigation.*

***** The total values have been confirmed. Due to rounding, the values for each structure may not add to the presented total volumes*

' Values indicate the amount of newly created habitat that will be shaded by the Wharf 35W, in addition to the existing habitat that will be shaded by the wharf, listed in the row labeled "Wharf 35W (Barge)".

Source: AECOM 2023

Table 3.2.8. Anticipated Periods for Pile Installation related to the Connected Action

Structure	Number / Type of Piles In-water	Period of Vibration (hr)	Period of Pile Driving (hr)	Time to Install Piles* (days)
39S Bulkhead	468 / 27.6" sheet pile	58.5	58.4	39.1
39W Bulkhead	302 / 27.6" sheet pile	37.0	36.9	25.2
32-33 Bulkhead	23 / 24" pipe pile	9.7	3.4	13.0
35W Wharf	104 / 48" pipe pile	17.4	182.0	34.6
35N Wharf	46 / 36" pipe pile3	21.3	86.6	28.7
32-33 CTV Wharf	14 / 30" pipe pile	3.5	10.5	4.7
TOTAL		**147.4**	**377.8**	**145.3**

**- time period includes vibration, driving, and time required to move and set pile for installation*

Source: AECOM 2023

Vessel Activity related to the Connected Action

During construction, only a small number of vessels will be used, including a barge with a mounted crane used to install pilings or dredge sediments, a barge to cap sediments with a directional tube, and tugs and barges used to transport materials or receive and transport dredged material. All vessels will have a large below-water envelope and will be operating at a slow pace. The nominal increase in vessel traffic (expected to average approximately 1.7 vessel visits a day, with a peak of 4.3 vessel visits per day).

3.2.6.2 Upland Work Activities related to the Connected Action

Upland work activities include demolition of existing structures and paving, excavation of fill in order to install support structures, and installation of new support structures, above-ground structures, utilities, and paving. The SBMT Port Infrastructure Improvement Project also includes the construction of an approximately 60,000 square feet (sqft) operations and maintenance (O&M) base containing approximately 22,000 sqft of office and support space; approximately 3,000 sqft of waiting area for employees deploying to off-shore work sites; and approximately 35,000 sqft of warehouse facilities and associated utility space with a maximum roof height of 32.8 ft. from grade. The outside areas around the buildings will be landscaped and will include associated parking.

More information on upland work activities associated with the connected action is provided in Section 2.2 of the BA for the SBMT Port Infrastructure Improvement Project.

3.2.7 Operations and Maintenance

Empire's lease with BOEM (Lease OCS-A-0512) has an operations term of 25 years that would commence on the date of COP approval. Empire would have to apply for an extension if it wished to operate the proposed Project for more than 25 years. This consultation considers operation of the proposed Project for the 35-year designed lifespan as this is the timeframe that BOEM requested consultation on as part of its proposed action. Empire would remotely monitor and operate the wind farm infrastructure and offshore export cables 24-hours a day, seven days a week from an onshore facility at the SBMT. Monitoring would include regular inspections, tests, and repairs, as well as periodic review of anomalies in cable charging current, power factor, and protection devices.

Regular maintenance typically consists of routine inspections and preventative activities. These activities would require the use of a variety of vessels to support operations and maintenance (O&M). Empire anticipates that in a year, the proposed Project would generate a maximum of 617 roundtrips to the SBMT. During the O&M phase a service operations vessel, a survey vessel, a heavy lift vessel, a cable laying vessel, CTVs, tugs, and a barge would use this port. Empire anticipates that an additional cable laying vessel would be needed during the O&M phase once every 10 years. This would increase the total estimated annual trips to the SBMT to 635 during O&M. Empire is also proposing the use of helicopters to transport crews to the WFA during the O&M phase.

As described in the BA, Empire is developing a cable monitoring and maintenance plan that will be included in the Facility Design Report and reviewed by the Certified Verification Agent. Additional operations and maintenance information can be found in COP Volume 1, Section 3.5 (Empire Wind 2023).

3.2.8 Decommissioning

Project components would be decommissioned when these facilities reach the end of their designed service life; here, we consider decommissioning following the 35-year operations period. Empire's COP (Empire Wind 2023) describes a conceptual decommissioning plan. The same types of vessels and equipment used during construction would be employed for decommissioning. According to 30 CFR § 285.902[10] and other BSEE requirements, Empire Wind would be required to remove or decommission all installations and clear the seabed of all obstructions (and marine debris) created by the proposed Project. All facilities would need to be removed 15 ft. (4.6 meters) below the mudline (BML; 30 CFR § 285.910(a)). Absent permission from BSEE, Empire Wind would have to complete decommissioning within two years of termination of the lease and either reuse, recycle, or responsibly dispose of all materials removed.

Offshore cables would be retired in place, removed, or a combination of both. Removal of the array cables and export cables would involve removal of J-tubes and disconnecting the cables from wind turbines and OSSs. Cables would then be lifted from the seabed and cut into pieces or reeled in onto barges for transport. In some places, Empire is proposing jet plowing to loosen sediment above the cable. Empire has stated that the dismantling and removal of OSS topside structures and WTG components (e.g., blades, nacelles, and towers) would be a "reverse installation" process subject to the same constraints as the original construction phase. A jack-up or heavy lift dynamic positioning vessel would be used to dismantle turbine components and OSS topside structures.

The decommissioning process for the WTGs and OSSs, with their associated foundations, is anticipated to be the reverse of installation, with Project components transported to an appropriate disposal and/or recycling facility. All foundations and other Project components would need to be removed 15 feet (4.6 meters) below the mudline. Submarine export and inter-

[10] On January 31, 2023, the Department of Interior published a final rule in the Federal Register (88 FR6376) reassigning regulations pertinent to safety and environmental oversight of OCS renewable energy activities from BOEM's oversight in the 30 CFR part 585 part to 30 CFR part 285. These include decommissioning facilities authorized within a lease (§285.900 et seq.)

array cables would be retired in place or removed in accordance with the BSEE-approved decommissioning plan. Empire would need to obtain separate and subsequent approval from BOEM to retire any portion of the Project in place. Project components will be decommissioned using a similar suite of vessels as used during construction. Foundation cutting would be accomplished using a mechanical cutting, high-pressure water jet, and/or cutting torches designed for underwater use. Scour protection placed around the base of each foundation would either be removed or left in place in consideration of marine life that may have established itself on the substrate.

A cable-laying vessel would be used to remove as much of the interarray and export transmission cables from the seabed as practicable to recover and recycle valuable materials. A material barge would transport components to a recycling yard where the components would be disassembled and prepared for re-use and/or recycling for scrap metal and other materials. Cable segments that cannot be easily recovered would be left buried below the seabed or rock armoring, contingent upon approval from BOEM and/or BSEE for abandonment-in-place (AIP). However, requests for AIP will require substantial justification/review and final disposition may include removal of all cable segments. Site clearance of the sea bottom will be required following removal of the structure pursuant to 30 C.F.R. 285.902(a) (2). Site clearance verification (SCV) procedures are expected to include side-scan or sector-scanning sonar and visual surveys using ROV camera surveys. All vessel strike avoidance measures would be required for vessel operations associated with decommissioning and SCV. Site-clearance verification using high-resolution side scan sonar equipment would most likely operate at frequencies above the hearing ranges of all listed species (greater than 180 kilohertz [kHz]). BOEM has estimated that in a year, the decommissioning phase would generate a maximum of 819 roundtrips to the SBMT (i.e., the same number of trips assumed necessary during the construction phase).

Decommissioning is intended to recover valuable recyclable materials, including steel piles, turbines and related control equipment, and the copper transmission lines, as well as remove debris and any other seafloor obstructions created by activities on the lease. The decommissioning process involves the same types of equipment and procedures used during the construction phase, aside from pile driving, and would have similar impacts on the environment. As detailed in 30 CFR §285.902(b), the lessee must submit an application and receive approval from BSEE before commencing with the decommissioning process. Final approval of this application is a separate process from approval of the conceptual decommissioning methodology in the COP. This process will include an opportunity for public comment and will include consultation with municipal, state, and federal management agencies. Empire would require separate and subsequent approval from BOEM to retire any portion of the project facilities in place. BSEE regulations[11] default to clearing the seafloor of all obstructions created by activities on the lease through the implementation of SCV requirements as part of decommission application conditions[12] to ensure that any items inadvertently lost and not retrieved during lease operations can be detected and retrieved to reduce conflicts with other OCS users and return the site to prelease conditions.

[11] 30 CFR 285.902(a)(2)

[12] 30 CFR 285.907(d)

3.2.9 Survey and Monitoring Activities

Empire is proposing to carry out or BOEM is proposing to require that Empire carry out a number of ecological surveys/monitoring activities as conditions of COP approval. These activities are described in the BA and are part of the proposed action that BOEM has requested consultation on and are summarized here.

3.2.9.1 High-Resolution Geophysical and Geotechnical Surveys

As described in the BA, high-resolution geophysical (HRG) surveys will be carried out before and after construction, operations, and decommissioning. Survey activities would include the use of subsea positioning/ultra-short baseline, a multi-beam echosounder, side scan sonar, a sub-bottom profiler, and obstacle avoidance sonar within the WFA and along the export cable routes. Although the final survey plans would not be completed until construction contracting commences, Empire anticipates that HRG surveys would be conducted prior to construction to support final engineering design for the Project. A full coverage as-built survey would be conducted after construction to provide baseline conditions for future surveys slated for the O&M phase. For the first three years post-construction, risk-based surveys of the interarray and export cables would be conducted annually. Following the third annual risk-based surveys, additional HRG surveys are anticipated for the remainder of the O&M phase and would occur every two years. Risk-based burial depth surveys are anticipated every five years, with coverage to be determined through the use of Distributed Temperature and Distributed Acoustic/Vibration Sensing (DAS/DVS) systems.

HRG equipment will either be deployed from ROVs or mounted to or towed behind the survey vessel. These surveys are expected to utilize active acoustic equipment including multibeam echosounders, side scan sonars, shallow penetration sub-bottom profilers (SBPs) (*e.g.*, Compressed High-Intensity Radiated Pulses (CHIRPs) non-parametric SBP), medium penetration sub-bottom profilers, ultra-short baseline positioning equipment, and marine magnetometers. BOEM has completed a programmatic ESA consultation with NMFS for HRG surveys and other types of survey and monitoring activities supporting offshore wind energy development (Site Assessment Survey Activities for Renewable Energy Development on the Atlantic Outer Continental Shelf, NMFS 2021a). As described in the Empire Wind BA, BOEM will require Empire Wind to comply with all relevant programmatic survey and monitoring PDCs and BMPs included in the 2021 programmatic ESA consultation. Therefore, while the effects of these HRG surveys are addressed in this opinion, the PDCs and BMPs included in the 2021 Programmatic ESA consultation are incorporated by reference and considered part of the proposed action for consultation in this opinion.

Survey vessels would have an average operational speed of 4 knots and move at an average speed of 7 knots when transiting the WFA. Up to three vessels may survey concurrently throughout the project area. The estimated daily vessel track for all vessels is approximately 177.792 km (110.475 mi) for 24-hour operations with a daily ensonified area of 17.8 km^2. The number of active survey vessel days ranges from 41 (in 2024) to 191 (in 2025). There would be an anticipated 483 survey days over the 5-year LOA period covering 85,872 km. Geotechnical surveys for further sediment testing at specific WTG locations to inform final selection and design of foundations would take place prior to construction. Pre-construction surveys would also include geotechnical surveys to inform the selection and placement of scour and cable protection.

3.2.9.2 Fisheries Resource Surveys and Monitoring

Empire Wind is proposing to implement their Fisheries Research Monitoring Plan (FRMP; Empire Wind and Inspire Environmental 2022[13]); in the BA, BOEM identified this as part of the Proposed Action for this ESA consultation. Following initiation of consultation, BOEM provided clarification on the scope of activities included in the FRMP that are part of the proposed action that they are requesting consultation on. Specifically, the FRMP describes an acoustic telemetry study that would target Atlantic sturgeon for capture and tagging. This activity is proposed to occur independent of the Empire Wind project and is authorized through ESA section 10 permit 20351 issued by NMFS to Stony Brook University (Keith Dunton, Principle Investigator). The only portion of that survey activity considered here is the deployment of acoustic receivers in the Empire Wind WDA.

Trawl Surveys

Empire will conduct trawl surveys targeting longfin squid (*Doryteuthis pealeii*) in the fall (September and October) during pre-construction, construction, and post-construction phases of the Project. Trawl surveys will occur aboard a contracted commercial fishing vessel in the Empire WDA and an adjacent control area. The surveys will be conducted using a Before-After-Control-Impact (BACI) design with two years of sampling throughout in the pre-construction period (beginning fall 2023), sampling throughout the construction period, and at least two years of sampling in the post-construction period. During a trawl survey event, four tows will be conducted in both the WFA and adjacent reference area twice each month. The reference area encompasses the same approximate area as the Empire Wind Lease Area (325 km^2), is approximately 30 km southwest of the Empire Wind Lease Area, 10 km from the Sunrise Wind export cable to the northeast, and is outside the major shipping lanes stemming from New York Harbor (Figure 1- 1 in Inspire 2022).This will result in a total of 32 tows per sampling year. Tows will be conducted during daylight hours (after sunrise and before sunset) for 20 minutes each at a target tow speed of 3 knots. The codend will be fitted with a 1-inch (2.5-centimeter) knotless codend liner to sample squid and other marine taxa across a broad range of size and age classes.

Baited Remote Underwater Video Surveys

Baited remote underwater video (BRUV) surveys will collect data on structure-oriented fish species in the WFA during the pre-construction and post-construction phases of the Project. A Before-After-Gradient (BAG) survey design will be used which will consist of two years of pre-construction sampling and two years of post-construction sampling. BRUV surveys will be conducted seasonally (i.e., four times per year). BRUVs will use a vertical line attached to a surface buoy that will hold a stereo-camera system in the water column for approximately 60 minutes. Four BRUVs will be deployed at eight turbine locations during each seasonal sampling period. This will result in a total of 128 samples per sampling period.

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[13] http://www.empirewind.com/wp-content/uploads/2023/01/Empire-Wind-Fisheries-and-Benthic-Monitoring-Plan_221004.pdf

eDNA Sampling

eDNA sampling will be conducted concurrently with the trawl and BRUV survey. eDNA sampling will involve collecting water samples using 1.2 Liter Kemerer bottles within 6.5 ft. (2 m) of the seafloor. A total of 64 samples (32 during trawl surveys and 32 during BRUV surveys) will be collected during each year of the two-year pre-construction monitoring, 32 samples would be collected during trawl surveys in each year of the construction monitoring period, and 64 samples would be collected during each year of the two-year post-construction monitoring period. Empire anticipates that additional surface samples would be collected at some of the sampling stations during each sampling event.

Acoustic Telemetry

Empire Wind is partnering with researchers from Monmouth University, Stony Brook University, INSPIRE Environmental, and the Anderson Cabot Center for Ocean Life (ACCOL) at the New England Aquarium to conduct acoustic telemetry monitoring at the Empire Wind Lease Area. The acoustic telemetry survey will be conducted in the Empire WDA aboard the R/V Heidi Lynn Sculthorpe which is homeported in Atlantic Highlands, NJ. To assess the movements, presence, and persistence of striped bass, black sea bass, summer flounder, winter flounder, and Atlantic sturgeon, acoustic telemetry surveys will use an array of 48 acoustic release omnidirectional receivers deployed within the WFA. Receivers will be deployed year-round and would be retrieved twice per year for data download. Each receiver will be equipped with a mooring recovery system that will utilize the receiver’s acoustic release mechanism to deploy a retrieval line once the receiver is recalled to allow for recovery of the mooring used to anchor the receiver in place. Acoustic receivers would be deployed in four main groups with 23 receivers monitoring offshore, 10 receivers along EW 1 export cable route (six within New York state waters and four within federal waters), five receivers along the EW 2 export cable route and 10 receivers which will bracket the EW 2 export cable landing within New York state waters.

Sea Scallop Plan View Camera Surveys

The sea scallop plan view (PV) camera surveys will collect data on sea scallop resources to document shifts in density and abundance during the pre-construction, construction, and post-construction phases of the Project. The surveys will take place in June of each year. The surveys will be conducted using a BACI design with two years of sampling in the pre-construction period that began in June 2023, sampling throughout the construction periods, and at least two years of sampling in the post-construction period. During each seasonal survey event, 60 stations will be sampled in the WFA and an adjacent reference area. This will result in a total of 120 samples per sampling year. PV camera surveys will involve a camera system that will be deployed from a survey vessel using an A-frame for approximately 5 minutes in each station in an effort to capture at least eight downward facing images of the seafloor at each sampling location. The camera system would be attached via a cable and raised and lowered to get the necessary replicate images.

3.2.9.3 Benthic Resource Monitoring

Novel Hard Bottom Monitoring

Monitoring of novel hard bottom habitats will focus on measuring changes in macrofaunal-attached communities (native vs. non-native species groups), percent cover, and physical

characteristics (rugosity, boulder density) as a proxy for changes in the complex food web.
A ROV video survey is planned to monitor novel hard bottom habitats associated with WTG foundations, WTG scour protection, cable protection, and OSS foundations. The ROV would be equipped with a downward-facing camera, and forward-facing camera, and a video camera. The ROV will move along the target structure to acquire video from as much of the structure as possible. The ROV will transit from the surface water to depth collecting imagery of the entire height of the selected foundation. The downward-facing camera would capture images of the seafloor surface. The forward-facing camera would collect images of vertical surfaces.
Novel hard bottom monitoring would be conducted in the late summer/early fall. The baseline survey would be conducted during the first late summer/early fall following construction. The survey would be repeated annually for the next three years and again after five years after construction (i.e., skipping the fourth year after construction). During each seasonal survey period, the eight turbine locations selected for the BRUV survey would be included in the sites selected for monitoring.

Structure Associated Organic Enrichment Monitoring
Monitoring of structure-associated enrichment would involve a BAG survey design to measure changes in the function of benthic habitats surrounding WTG and OSS foundations. Monitoring would be conducted in the late summer/early fall (August to October). The baseline survey would be conducted in the pre-construction phase. Post-construction surveys would be conducted during the first late summer/early fall following construction and repeated annually for the next three years and again five years after construction (i.e., skipping the fourth year after construction). During each seasonal survey period, the eight turbine locations selected for the BRUV survey and novel hard bottom would be surveyed.

Each survey would include sediment profile and plan view imagery, as well as sediment grabs for sediment grain size analysis and organic matter characterization. Imagery would be conducted at nine stations extending outward along two transects from each turbine location during the pre-construction phase, resulting in a total of 144 imagery stations during the baseline survey. In the post-construction phase, the number of stations sampled along each transect would be reduced to eight, resulting in a total of 128 imagery stations during each post-construction survey. Sediment grabs would be conducted at three stations along each imagery transect, resulting in a total of 48 sediment samples per survey year.

Monitoring of Cable-Associated Physical Disturbance of Soft Sediments
Monitoring of soft sediments associated with cable installation will focus on documenting the effects of the installation and operation of the offshore export cables on benthic habitat. A BAG survey design would be used in which the baseline survey would be conducted within six months prior to the initiation of construction and post-construction surveys would occur during the first year following construction and repeated annually for the next two years. During each survey, sediment profile and plan view imagery would be used to collect images at 16 stations along 3 triplicate transects within each of 3 habitat strata, resulting in a total of 144 samples per survey year.

3.2.9.4 Passive Acoustic Monitoring
Moored Passive Acoustic Monitoring (PAM) systems or mobile PAM platforms such as towed

PAM, autonomous surface vehicles, or autonomous underwater vehicles will be used periodically over the lifetime of the project. PAM will be used to record ambient noise and marine mammal vocalizations in the project area before, during, and after construction to monitor project impacts relating to vessel noise, pile driving noise, WTG operational noise, and to document whale detections in the WDA.

3.2.10 MMPA Incidental Take Authorization (ITA) Proposed for Issuance by NMFS

In response to their application, the NMFS Office of Protected Resources (OPR) has proposed to issue Empire an ITA for the take of small numbers of marine mammals incidental to construction of the project with a proposed duration of five years. More information on the proposed Incidental Take Regulation (ITR) and associated Letter of Authorization (LOA), including Empire's application is available online (https://www.fisheries.noaa.gov/action/incidental-take-authorization-empire-offshore-wind-llc-construction-empire-wind-project-ew1). As described in the Notice of Proposed Rule (88 FR 22696; April 13, 2023), Project activities likely to result in MMPA take of ESA listed species include impact pile driving for WTG and OSS foundations and site assessment surveys using high-resolution geophysical (HRG) equipment.

3.2.10.1 Amount of Take Proposed for Authorization

The proposed ITA would be effective for a period of five years, and, if issued as proposed, would authorize Level A and Level B harassment as the only type of take expected to result from activities during the construction phase of the project. Section 3(18) of the Marine Mammal Protection Act 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). It is important to note that the MMPA definition of harassment is not the same as the ESA definition. This issue is discussed in further detail in the *Effects of the Action* section of this Opinion. The only level A take of ESA listed species proposed for authorization under the MMPA is for two fin whales due to exposure to impact pile driving of WTG and OSS foundations.

Take Estimates

The methodology for estimating marine mammal exposure and incidental take is described fully in the Notice of Proposed ITA and discussed further in the *Effects of the Action*. For the purposes of the proposed ITA, NMFS OPR estimated the amount of take by considering: (1) acoustic thresholds above which NMFS OPR determined the best available scientific information indicates marine mammals will be behaviorally harassed (Level B) or incur some degree of permanent hearing impairment (Level A); (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. NMFS OPR is proposing to authorize MMPA take of ESA listed species due to noise exposure from impact pile driving for foundation installation and HRG surveys (see Table 3.2.9). We evaluate whether this anticipated exposure meets the ESA definitions of take in section 7 of this Opinion.

Table 3.2.9. MMPA Take of ESA Listed Species by Level A Harassment and Level B Harassment Proposed for Authorization through the MMPA ITA, inclusive of HRG Surveys*

Species	Total	
	Level A	Level B
Fin Whale	2	201
North Atlantic Right Whale	0	29
Sei Whale	0	9
Sperm Whale	0	6

*As described in the Effects of the Action section, no take, as defined by the ESA, is expected to occur incidental to HRG surveys (i.e. HRG surveys are not anticipated to cause incidental take for ESA purposes).

Installation of Monopiles with Impact Hammer

As described in the Notice of Proposed ITA, modeling has been completed to estimate the sound fields associated with a number of noise producing activities and to estimate the number of individuals likely to be exposed to noise above identified thresholds. Table 3.2.10 show the proposed Level A and Level B take to be authorized resulting from impact pile driving (147 monopiles for WTG foundations and 24 pin piles for OSS foundations) assuming 10 dB attenuation (as required by conditions of the proposed ITA).

Table 3.2.10. Take of ESA Listed Species by Level A and B Harassment Proposed for Authorization through the MMPA ITA Resulting from Impact Pile Driving of 147 Monopiles and 24 Pin Piles

Species	Level A Harassment	Level B Harassment
North Atlantic right whale	0	22
Fin whale	2	190
Sei whale	0	5

Sperm whale	0	6

HRG Surveys
The Notice of Proposed ITA includes a description of the modeling used to predict the amount of incidental take proposed for authorization under the MMPA. The amount of Level A and Level B harassment take proposed for authorization by NMFS OPR is illustrated in Table 3.2.11.

Table 3.2.11. MMPA Take of ESA Listed Species by Level B Harassment Proposed for Authorization through the MMPA ITA Resulting from High-Resolution Geophysical Surveys Over 5-years.

Marine Mammal Species	Level B Harassment
North Atlantic right whale	7
Fin whale	11
Sei whale	4
Sperm whale	0

NMFS OPR evaluated a number of other noise sources from project activities including vibratory installation and removal of piles and impact/pneumatic hammering to support cable installation activities and concluded that due to the location of the proposed activities in shallow nearshore waters and the small distances from the activity where noise would be above the relevant MMPA Level A or Level B threshold, no ESA listed whales would be exposed to noise above the MMPA Level A or Level B thresholds for those activities. As such, no MMPA take of ESA listed whales from those activities is proposed.

3.2.10.2 Mitigation Measures Included in the Proposed ITA
The proposed ITA includes a number of minimization and monitoring methods that are designed to ensure that the proposed project has the least practicable adverse impact upon the affected species or stocks and their habitat; Empire would be required to implement these measures. The proposed ITA, inclusive of the proposed mitigation requirements, has been published in the FR (88 FR 22696). The proposed mitigation measures generally include restrictions on pile driving, establishment of clearance zones for all activities, shutdown measures, soft start of pile driving, ramp up of HRG sources, noise mitigation for impact pile driving, and vessel strike avoidance measures. For the purposes of this section 7 consultation, all minimization and monitoring measures included in the ITA proposed by NMFS OPR are considered as part of the proposed action for this consultation. We note that some of the measures identified here overlap or are

duplicative with the measures described by BOEM in the BA as part of the proposed action (Appendix A as referenced above). The mitigation measures included in the April 2023 Proposed ITA are listed in Appendix B.

3.3 Minimization and Monitoring Measures that are part of the Proposed Action

There are a number of measures that Empire, through its COP, is proposing to take and/or BOEM is proposing to require as conditions of COP approval that are designed to avoid, minimize, or monitor effects of the action on ESA listed species. For the purpose of this consultation, the mitigation and monitoring measures proposed by BOEM and/or USACE and identified in the BA as part of the action that BOEM is requesting consultation on are considered as part of the proposed action. Additionally, NMFS OPR includes a number of measures to avoid, minimize, or monitor effects in the proposed MMPA ITA (see above); these are also considered as part of the proposed action for this consultation. The ITA only proposes mitigation and monitoring measures for marine mammals including the threatened and endangered whales considered in this Opinion. Although some measures also apply to and provide minimization of potential impacts to listed sea turtle and fish species (e.g., pile driving soft start minimize potential effects to all listed species), they do not completely cover all threatened and endangered species mitigation, monitoring, and reporting needs. The measures considered as part of the proposed action as described in Table 7 and 8 in BOEM's BA and for ease of reference, are copied into Appendix A of this Opinion. These are in addition to the conditions of the proposed ITA included in Appendix B. We note that the final MMPA ITA may contain measures that include requirements that may differ from the proposed rule; as explained in this Opinion's ITS, compliance with the conditions of the final MMPA ITA is necessary for the ESA take exemption to apply. After issuance of the final IHA, we will review the final mitigation measures to determine whether they are consistent with the measures set forth in Appendix B and the corresponding effects analysis in Section 7.

BOEM and NMFS OPR are proposing to require monitoring of clearance and shutdown zones before and during pile driving as well as clearance and shutdown zones for HRG surveys (for relevant survey equipment). More information is provided in the *Effects of the Action* section of this Opinion. These zones are summarized in Table 3.3.1. In addition to the clearance and shutdown zones, the proposed MMPA ITA identified a minimum visibility zone of 1,200 m for pile driving of WTG and OSS foundations; NMFS OPR communicated during the consultation period that this will be expanded to 1,500 m. This is the distance from the pile that the visual observers must be able to effectively monitor for marine mammals; that is, lighting, weather (e.g., rain, fog, etc.), and sea state must be sufficient for the observer to be able to detect a marine mammal within that distance from the pile. The clearance zone is the area around the pile that must be declared "clear" of marine mammals and sea turtles prior to the activity commencing. The size of the zone is measured as the radius with the impact activity (i.e., pile) at the center. For sea turtles, the area is "cleared" by visual observers determining that there have been no sightings of sea turtles in the identified area for a prescribed amount of time. For marine mammals, both visual observers and passive acoustic monitoring (PAM, which detects the sound of vocalizing marine mammals) will be used; the area is determined to be "cleared" when visual observers have determined there have been no sightings of marine mammals in the identified area for a prescribed amount of time and, for North Atlantic right whales in particular, if no right whales have been visually observed in any area beyond the minimum clearance zone that the visual observers can see. Further, the PAM operator will declare an area "clear" if they do not detect the sound of vocalizing right whales within the identified PAM clearance zone for the identified amount of time. PAM will also be used to monitor the clearance zone for other ESA listed whales. Pile driving detonation cannot commence until all of these clearances are made.

Once pile driving begins, the shutdown zone applies. If a marine mammal or sea turtle is observed by a visual PSO entering or within the respective shutdown zones after pile driving has commenced, an immediate shutdown of pile driving will be implemented unless Empire Wind and/or its contractor determines shutdown is not feasible due to an imminent risk of injury or loss of life to an individual; or risk of damage to a vessel that creates risk of injury or loss of life for individuals. For right whales, shutdown is also triggered by a detection by the PAM operator of a vocalizing right whale at a distance determined to be within the identified PAM shutdown zone. PAM will also be used to support monitoring of the shutdown zone for other ESA listed whales. If shutdown is called for but Empire Wind and/or its contractor determines shutdown is not feasible due to risk of injury or loss of life, reduced hammer energy must be implemented when the lead engineer determines it is practicable. Empire Wind has identified two scenarios, approaching pile refusal and pile instability, where this imminent risk could be a factor; however, Empire Wind anticipates a low likelihood of occurrence for the pile refusal/stuck pile or pile instability scenario as explained below.

Stuck Pile
If the pile driving sensors indicate the pile is approaching refusal, and a shut-down would lead to a stuck pile, shut down may be determined to be infeasible if the stuck pile is determined to pose an imminent risk of injury or loss of life to an individual, or risk of damage to a vessel that creates risk for individuals. This risk comes from the instability of a pile that has not reached a penetration depth where the pile would be considered stable. The pile could then fall and damage the vessel and/or personnel on board the vessel. Empire describes their mitigation of this risk as including: Specifically engineering each pile to manage the sediment conditions at the location at which it is to be driven, and therefore designed to avoid and minimize the potential for piling refusal; and, Using pre-installation engineering assessments and design together with real-time hammer log information during installation to track progress and continuously judge whether a stoppage would cause a risk of injury or loss of life.

Pile Instability
A pile may be deemed unstable and unable to stay standing if the piling vessel were to "let go." During these periods of instability, the lead engineer may determine a shut-down is not feasible because the shutdown combined with impending weather conditions may require the piling vessel to "let go" which then poses an imminent risk of injury or loss of life to an individual, or risk of damage to a vessel that creates risk for individuals from a falling pile. Empire describes their mitigation of this risk as including establishing weather conditions criteria that determine when a piling vessel would have to "let go" of a pile being installed for safety reasons. To reduce the risk that a requested shutdown would not be possible due to weather, Empire will actively assesses weather, using two independent forecasting systems. Initiation of piling also requires a Certificate of Approval by the Marine Warranty Supervisor. In addition to ensuring that current weather conditions are suitable for piling, this Certificate of Approval process considers forecasted weather for 6 hours out and will evaluate if conditions would limit the

ability to shut down and “let go” of the pile. If a shutdown is not feasible due to pile instability and weather, piling would continue only until a penetration depth sufficient to secure the pile is achieved. As piling instability is most likely to occur during the soft start period, and soft start cannot commence till the Marine Warranty Supervisor has issued a Certificate of Approval that signals there is a current weather window of at least 6 hours, the likelihood is low for the pile to not achieve stability within the 6-hour window inclusive of stops and starts.

Table 3.3.1. Proposed clearance and exclusion zones.
Note that these are in addition to a minimum visibility zone of 1,500 m for foundation pile driving to be required by the MMPA ITA.

Species	Clearance Zone (m)	Shutdown Zone (m)
Impact pile driving – WTG and OSS Foundations		
North Atlantic right whale – visual PSO	Minimum visibility zone (1,500 m) plus any additional distance observable by the visual PSOs	Minimum visibility zone (1,500 m) plus any additional distance observable by the visual PSOs
North Atlantic right whale – PAM	5,000	1,500
fin, sei, and sperm whale*	2,000	1,500
Sea Turtles	500	500
Sheet Pile Vibratory Driving and Impact/Pneumatic Hammering for Casing Pipes		
NARW, fin, and sei whale	1,600	1,600
Sea Turtles	300	300
HRG Surveys (Equipment with Operating Frequency less than 180 kHz)		
North Atlantic right whale	500	500
fin, sei, and sperm whale	500	100
Sea Turtles	100	100

*As described in Empire’s MMPA ITA Application, both PAM and visual observers will be used to monitor the clearance and shutdown zones for marine mammals.

3.4 Action Area

The action area is defined in 50 CFR 402.02 as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." Effects of the action "are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action."

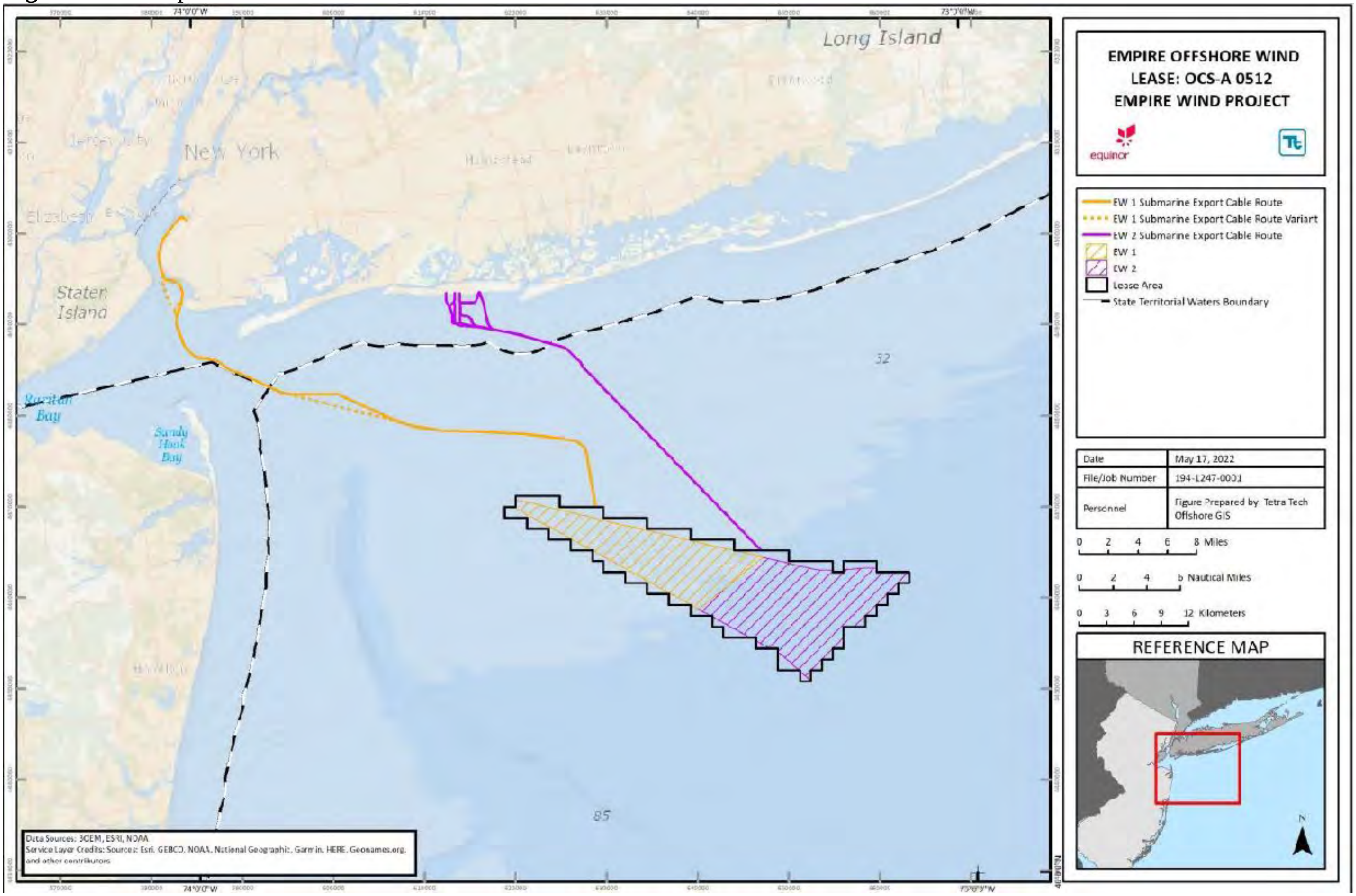
The action area includes SBMT and the WDA where construction, operations and maintenance, and decommissioning activities will occur and the surrounding areas ensonified by noise from project activities; the cable corridors; and the areas where HRG and biological resource surveys will take place. Additionally, the action area includes the vessel transit routes between the WDA (and SBMT) and ports in New York (Albany, Coeymans, South Brooklyn Marine Terminal, inclusive of the Hudson River) and the routes used by vessels transporting manufactured components from ports in Charleston, SC to the project site. The action area also includes the US EEZ along the Atlantic coast south of Long Island, New York to Charleston, South Carolina where project vessels may transit. As explained below, it does not include a portion of the vessel transit routes between the WDA and ports in eastern Canada, Europe, and/or Asia outside the US EEZ as we have determined that the effects of vessel transit from those ports are not effects of the proposed action as defined in 50 CFR 402.17.

BOEM and Empire have described vessel transits from ports in Eastern Canada, Europe, and Asia including up to 40 vessel transits originating from ports in Europe, an estimated 50 round trips to/from overseas ports in Halifax, Nova Scotia for the fall pipe vessel, and approximately four trips from Asia. These trips will occur at some time during the 2-year construction phase. The ports that these vessels will originate from in Europe and Asia and the vessel routes from those port facilities to the project site are unknown and will be variable and depend, on a trip-by-trip basis, on weather and sea-state conditions, other vessel traffic, and any maritime hazards. These vessels are expected to enter the U.S. EEZ along the Atlantic Coast and then travel along established traffic lanes and fairways until they approach the lease area. Because the ports of origin and vessel transit routes are unknown, we are not able to identify what areas outside the U.S. EEZ will be affected directly or indirectly by the Federal action; that is, while we recognize that there will be vessel trips outside of the U.S. EEZ that would not occur but for the approval of Empire Wind's COP, we cannot identify what areas vessel transits will occur as a result of BOEM's proposed approval of Empire Wind's COP. Though these vessel transits may be caused by the proposed action, without specific information including vessel types and size, the ports of origin, and, the location, timing and routes of vessel transit, we cannot predict that specific consequences of these activities on listed species[14] are reasonably certain to occur, and

[14] In an abundance of caution, we have considered the risk that these vessel trips may pose to ESA listed species that may occur outside the US EEZ. We have determined that these species fall into two categories: (1) species that are not known to be vulnerable to vessel strike and therefore, we would not expect a project vessel to strike an individual regardless of the location of the vessel; or (2) species that may generally be vulnerable to vessel strike but outside the US EEZ, co-occurrence of project vessels and individuals of those ESA listed species are expected to be extremely unlikely due to the seasonal distribution and dispersed nature of individuals in the open ocean, and intermittent presence of project vessels. These factors make it extremely unlikely that there would be any effects to ESA listed species from the operation of project vessels outside the EEZ.

they are therefore not considered effects of the proposed action. 50 CFR 402.17(a)-(b). Therefore, the action area is limited to the U.S. EEZ off the Atlantic coasts of the United States, south of Long Island Sound to Charleston, South Carolina.

Figure 3.2.2. Empire Wind WDA



Source: BOEM 2023

4.0 SPECIES AND CRITICAL HABITAT NOT CONSIDERED FURTHER IN THIS OPINION

In the BA, BOEM concludes that the proposed action is not likely to adversely affect blue whales, sei whales, Rice's whales (formerly Gulf of Mexico Bryde's whale), giant manta rays, hawksbill sea turtles, oceanic whitetip sharks, the Gulf of Maine DPS of Atlantic salmon, and shortnose sturgeon. BOEM also concludes that the proposed action is not likely to adversely affect critical habitat designated for North Atlantic right whales, Atlantic sturgeon, and the Northwest Atlantic DPS of loggerhead sea turtles. As explained below, we have determined that the project will have no effect on the Gulf of Maine DPS of Atlantic salmon, the Northeast Atlantic DPS of loggerhead sea turtles, or critical habitat designated for the North Atlantic right whale, the New York Bight and Carolina DPSs of Atlantic sturgeon, or the Northwest Atlantic DPS of loggerhead sea turtles. We concur with BOEM's determination that the proposed action is not likely to adversely affect blue whales, giant manta rays, hawksbill sea turtles, and oceanic whitetip sharks and also determined that the proposed action will have no effect on Rice's whales. Based on these determinations supported by the analysis below, the proposed action will not result in jeopardy of the foregoing species or result in the adverse modification or destruction of designated critical habitat. These species and designated critical habitat are thus not evaluated further in this opinion. Effects to sei whales and shortnose sturgeon are addressed in section 7.0 of this Opinion.

4.1. ESA Listed Species

Northeast Atlantic DPS of Loggerhead Sea Turtles (Caretta caretta) – Endangered

The Northeast Atlantic DPS of loggerhead sea turtles occurs in the Northeast Atlantic Ocean north of the equator, south of 60° N. Lat., and east of 40° W. Long., except in the vicinity of the Strait of Gibraltar where the eastern boundary is 5°36′ W. Long (76 FR 58867). The action area does not overlap with the distribution of the Northeast Atlantic DPS of loggerheads. The proposed action will have no effect on the Northeast Atlantic DPS of loggerheads.

Blue whales (Balaenoptera musculus) – Endangered

In the North Atlantic Ocean, the range of blue whales extends from the subtropics to the Greenland Sea. As described in Hayes et al. (2020; the most recent stock assessment report), blue whales have been detected and tracked acoustically in much of the North Atlantic with most of the acoustic detections around the Grand Banks area of Newfoundland and west of the British Isles. Photo-identification in eastern Canadian waters indicates that blue whales from the St. Lawrence, Newfoundland, Nova Scotia, New England, and Greenland all belong to the same stock, while blue whales photographed off Iceland and the Azores appear to be part of a separate population (CETAP 1982; Wenzel et al. 1988; Sears and Calambokidis 2002; Sears and Larsen 2002). The largest concentrations of blue whales are found in the lower St. Lawrence Estuary (LeSage et al. 2017, Comtois et al. 2010) which is outside of the action area. Blue whales do not regularly occur within the U.S. EEZ and typically occur further offshore in areas with depths of 100 m or more (Waring et al. 2010).

Migration patterns for blue whales in the eastern North Atlantic Ocean are poorly understood. However, blue whales have been documented in winter months off Mauritania in northwest

Africa (Baines & Reichelt 2014); in the Azores, where their arrival is linked to secondary production generated by the North Atlantic spring phytoplankton bloom (Visser et al. 2011); and traveling through deep-water areas near the shelf break west of the British Isles (Charif & Clark 2009). Blue whale calls have been detected in winter on hydrophones along the mid-Atlantic ridge south of the Azores (Nieukirk et al. 2004).

Blue whales have not been documented in the WDA[15] and are not expected to occur in the WDA. However, based on their distribution, blue whales could occur offshore of the WDA in portions of the U.S. EEZ that may be transited by vessels traveling between the WDA and ports in Europe.

Passive acoustic monitoring equipment in the WFA has detected blue whales from fall through the spring, though the calls were not localized to the WFA and were determined to be from whales located outside of the WFA (Empire 2022). This is because blue whale song can propagate more than 100 km from the calling individual (Payne and Webb 1971, Širović et al. 2007, Estabrook et al. 2021). A single blue whale was acoustically tracked by Muirhead et al. (2018) in the New York Bight, and shown to be on the edge of the continental shelf, well offshore of the WDA. During aerial line-transect surveys in the New York Bight from 2017 to 2020, Zoidis et al. (2021) observed blue whales 3 times: 2 groups totaling 4 individuals sighted in the plain zone in winter (in January and February) of Year 1, and a single individual in the fall (September) seen on the slope in Year 3. Estabrook et al (2021) reported results from three years of acoustic surveys of large whales in the New York Bight; blue whales were rarely detected and only on the furthest offshore acoustic receivers. The authors concluded that at least some of the detections were likely from whales located outside the New York Bight beyond the shelf edge. These results were consistent with a similar 2008-2009 survey (Muirhead et al. 2018, Davis et al. 2020). The small number of days with detections suggests blue whales do not spend much time in the offshore waters of the NY Bight, and instead are likely migrating through the area (Estabrook et al. 2021).

The rarity of observations in this area is consistent with the conclusion in Waring et al. (2010) that the blue whale is best considered as an occasional visitor in U.S. Atlantic EEZ waters and would be rare in the vicinity of the WDA. Therefore, based on the best available information cited herein, which supports a conclusion that blue whales are extremely unlikely to occur in the WDA, we conclude that blue whales are extremely unlikely to be exposed to any effects of project activities in the WDA (e.g., foundation and cable installation); therefore, effects of those activities, including construction, operations, and decommissioning, inclusive of associated surveys, are discountable. The only project activities that overlap with the area where blue whales are expected to occur are vessels operating in offshore portions of the U.S. EEZ as they travel between the WDA and ports in Europe. BOEM and Empire Wind anticipate that the heavy transport vessel described in the BA may bring project components to the project site from Europe; a total of up to 34 trips would occur over the construction period. Given the low numbers and dispersed nature of blue whales in the areas where vessels will transit and the small number of vessel trips, it is extremely unlikely that any blue whales will co-occur with project vessels. As such, effects to blue whales from vessel operations are also extremely unlikely to

[15] Available sightings data at: http://seamap.env.duke.edu/species/180528. Last accessed July 24, 2023.

occur and effects are discountable. No take is anticipated. As all effects of the proposed action will be discountable, the proposed action is not likely to adversely affect the blue whale.

Rice's whale (Balaenoptera ricei) – Endangered

On August 23, 2021, NMFS issued a direct final rule to revise the common and scientific name of the Gulf of Mexico Bryde's whale to Rice's whale, *Balaneoptera ricei*, and classification to species to reflect the scientifically accepted taxonomy and nomenclature of the whales (86 FR 47022). The distribution of Rice's whale is limited to the northeastern Gulf of Mexico, along the continental shelf break between 100 m and 400 m depths (Rosel et al. 2016). At the time the COP was submitted and the DEIS drafted, the OSS supplier had not been contracted and one of the suppliers that had been considered was located in Corpus Christi, TX. However, as this consultation was underway, the contract was signed with a supplier that will construct the OSS and its components in Asia. As a result, vessel routes for the Empire Wind project will not overlap with the distribution of Rice's whales and no effects to Rice's whales are anticipated.

Giant Manta Ray (Manta birostris) – Threatened

The giant manta ray inhabits temperate, tropical, and subtropical waters worldwide, between 35° N and 35° S latitudes. In the western Atlantic Ocean, this includes South Carolina south to Brazil and Bermuda. Off the U.S. Atlantic coast, nearshore distribution is limited to areas off the Florida coast; otherwise, distribution occurs in offshore waters at the shelf edge. Occasionally, manta rays are observed as far north as Long Island (Miller and Klimovich 2017, Farmer et al. 2021); however, these sightings are in offshore waters along the continental shelf edge and the species is considered rare in waters north of Cape Hatteras. Distribution of Giant manta rays is limited by their thermal tolerance (19-22°C off the U.S. Atlantic coast) and influenced by depth. As noted by Farmer et al. (2021), cold winter air and sea surface temperatures in the western North Atlantic Ocean likely create a physiological barrier to manta rays that restricts the northern boundary of their distribution. Giant manta rays frequently feed in waters at depths of 656 to 1,312 ft. (200 to 400 m) (NMFS 2019a); the only portion of the action area with these depths is along the vessel transit routes south and east of the WDA.

Giant Manta Rays are not anticipated to occur in the WDA. Farmer et al. (2021) summarized results of NYSERDA surveys carried out from nearshore to offshore marine environments of New York, with temporal coverage during the spring/summer of 2016–2019 and fall/winter of 2016–2018. Of the 21,539 rays identified in the surveys, 7 were manta rays. Farmer et al. (2021) reports that despite comprehensive coast to shelf survey coverage, manta ray sightings were exclusively in August on the continental shelf edge. Giant manta rays travel long distances during seasonal migrations and may be found in upwelling waters at the shelf break south of Long Island, where they could potentially occur within the waters of the U.S. EEZ. Manta rays may also occur in the action area along vessels routes between the project area and ports in or the Southeast United States.

Given the distribution of Giant manta rays, we have considered the potential for effects of project vessels. Giant manta rays can be frequently observed traveling just below the surface and will often approach or show little fear toward humans or vessels (Coles 1916), which may also make them vulnerable to vessel strikes (Deakos 2010); vessel strikes can injure or kill giant manta rays, decreasing fitness or contributing to non-natural mortality (Couturier et al. 2012; Deakos et al. 2011); however, vessel strikes are considered rare. Information about interactions between vessels and giant manta rays is limited. We have at least some reports of vessel strike, including a report of five giant manta rays struck by vessels from 2016 through 2018; individuals had injuries (i.e., fresh or healed dorsal surface propeller scars) consistent with a vessel strike. These interactions were observed by researchers conducting surveys from Boynton Beach to Jupiter, Florida (J. Pate, Florida Manta Project, pers. comm. to M. Miller, NMFS OPR, 2018) and it is unknown where the manta was at the time of the vessel strike. The geographic area considered to have the highest risk of vessel strikes for giant manta ray is nearshore coastal waters and inlets along the east coast of Florida where recreational vessel traffic is concentrated; this area does not overlap with the action area. Given the few instances of confirmed or suspected strandings of giant manta rays attributed to vessel strike injury, the risk of giant manta rays being struck vessels is considered low. This lack of documented mortalities could also be the result of other factors that influence carcass detection (i.e., wind, currents, scavenging, decomposition etc.); however, giant manta rays appear to be able to be fast and agile enough to avoid most moving vessels, as anecdotally evidenced by videos showing rays avoiding interactions with high-speed vessels (Barnette 2018).

The speed and maneuverability of giant manta rays, the slow operating speed of project vessels transiting through the portion of the action area where Giant manta rays occur, the dispersed nature of Giant manta ray distribution in the open ocean area where these vessels will operate, and the small number of potential vessel trips through the range of Giant manta rays (12 over the 3 year construction period[16]), make any effects of the proposed action extremely unlikely to occur. No take is anticipated. As all effects of the proposed action will be discountable the proposed action is not likely to adversely affect the giant manta ray.

Hawksbill sea turtle (Eretmochelys imbricate) – Endangered

The hawksbill sea turtle is typically found in tropical and subtropical regions of the Atlantic, Pacific, and Indian Oceans, including the coral reef habitats of the Caribbean and Central America. Hawksbill turtles generally do not migrate north of Florida and their presence north of Florida is rare (NMFS and USFWS 1993).

Given their rarity in waters north of Florida, hawksbill sea turtles are highly unlikely to occur in the WDA. As such, it is extremely unlikely that any hawksbill sea turtles will be exposed to any effects of the proposed action. No take is anticipated. The proposed action is not likely to adversely affect the hawksbill sea turtle.

Oceanic White Tip Shark (Carcharhinus longimanus) – Threatened

The oceanic whitetip shark is usually found offshore in the open ocean, on the outer continental shelf, or around oceanic islands in deep water greater than 184 m. As noted in Young et al. 2017, the species has a clear preference for open ocean waters between 10 N and 10 S, but can be found in decreasing numbers out to latitudes of 30°N and 35°S, with abundance decreasing with greater proximity to continental shelves. In the western Atlantic, oceanic whitetips occur from Maine to Argentina, including the Caribbean and Gulf of Mexico. In the central and

[16] Four round trips per year to the Nexans Facility for 3 years of cable installation = 12 total

eastern Atlantic, the species occurs from Madeira, Portugal south to the Gulf of Guinea, and possibly in the Mediterranean Sea.

The WDA is outside of the deep offshore areas where Oceanic white tip sharks occur; Oceanic white tip sharks are not known or expected to occur in the WDA. The only portion of the action area that overlaps with their distribution is the open ocean waters of the U.S. EEZ that may be transited by vessels traveling between the WDA and Europe. Vessel strikes are not identified as a threat in the status review (Young et al., 2017), listing determination (83 FR 4153) or the recovery outline (NMFS 2018). We have no information to suggest that vessels in the ocean have any effects on oceanic white tip sharks. Considering the lack of any reported vessel strikes, their swim speed and maneuverability (Papastamatiou et al. 2017), and the slow speed of ocean-going vessels, vessel strikes are extremely unlikely even if migrating individuals occur along the vessel transit routes. No take is anticipated. As all effects of the proposed action will be discountable, the proposed action is not likely to adversely affect the oceanic white tip shark.

Gulf of Maine DPS of Atlantic salmon (Salmo salar) – Endangered
The only remaining populations of Gulf of Maine DPS of Atlantic salmon are in Maine. Smolts migrate from their natal rivers in Maine north to foraging grounds in the Western North Atlantic off Canada and Greenland (Fay et al. 2006). After one or more winters at sea, adults return to their natal river to spawn. Atlantic salmon do not occur in the WDA. Any vessels transiting in the U.S. EEZ between the WDA and Europe are expected to travel south of the range of the Gulf of Maine DPS. Therefore, we do not anticipate any overlap between the action area and the range of the Gulf of Maine DPS of Atlantic salmon. There is no evidence of interactions between vessels and Atlantic salmon. Vessel strikes are not identified as a threat in the listing determination (74 FR 29344) or the recent recovery plan (NMFS and USFWS 2019). We have no information to suggest that vessels in the ocean have any effects on migrating Atlantic salmon and we do not expect there would be any due to Atlantic salmon migrating at depths below the draft of project vessels. Therefore, even if project vessels traveled within the range of the Gulf of Maine DPS we do not expect any effects to Atlantic salmon. The proposed action will therefore not affect Atlantic salmon.

4.2. Critical Habitat

Critical Habitat Designated for North Atlantic right whales
On January 27, 2016, NMFS issued a final rule designating critical habitat for North Atlantic right whales (81 FR 4837). Critical habitat includes two areas (Units) located in the Gulf of Maine and Georges Bank Region (Unit 1) and off the coast of North Carolina, South Carolina, Georgia and Florida (Unit 2). The action area does not overlap with Unit 1 and as explained below the proposed action will therefore not affect Unit 1. It is possible that some vessels traveling from ports in the South Atlantic may transit through Unit 2. No other effects of the project will extend Unit 2.

Consideration of Potential Effects to Unit 1
There are no project activities or effects of such activities that overlap with Unit 1. Here, we explain our consideration of whether any project activities located outside of Unit 1 may affect Unit 1. As identified in the final rule (81 FR 4837), the physical and biological features essential

to the conservation of the North Atlantic right whale that provide foraging area functions in Unit 1 are: The physical oceanographic conditions and structures of the Gulf of Maine and Georges Bank region that combine to distribute and aggregate *C. finmarchicus* for right whale foraging, namely prevailing currents and circulation patterns, bathymetric features (basins, banks, and channels), oceanic fronts, density gradients, and temperature regimes; low flow velocities in Jordan, Wilkinson, and Georges Basins that allow diapausing *C. finmarchicus* to aggregate passively below the convective layer so that the copepods are retained in the basins; late stage *C. finmarchicus* in dense aggregations in the Gulf of Maine and Georges Bank region; and diapausing *C. finmarchicus* in aggregations in the Gulf of Maine and Georges Bank region.

We have considered whether the proposed action would have any effects to right whale critical habitat. Copepods in critical habitat originate from Jordan, Wilkinson, and George's Basin. The effects of the proposed action do not extend to these areas, and we do not expect any effects to the generation of copepods in these areas that could be attributable to the proposed action. The proposed action will also not affect any of the physical or oceanographic conditions that serve to aggregate copepods in critical habitat. Offshore wind farms can reduce wind speed and wind stress which can lead to less mixing, lower current speeds, and higher surface water temperature (Afsharian et al. 2019), cause wakes that will result in detectable changes in vertical motion and/or structure in the water column (e.g. Christiansen & Hasager 2005, Broström 2008), as well as detectable wakes downstream from a wind farm by increased turbidity (Vanhellemont and Ruddick, 2014). However, there is no information to suggest that operational effects from the Empire Wind project would extend to Unit 1. The Empire Wind project is a significant distance from right whale critical habitat and, thus, it is not anticipated to affect the oceanographic features of critical habitat. Further, the Empire Wind project is not anticipated to cause changes to the physical or biological features of critical habitat by worsening climate change. Therefore, we have determined that the proposed action will have no effect on Unit 1 of right whale critical habitat.

Consideration of Potential Effects to Unit 2

As identified in the final rule (81 FR 4837), the physical and biological features essential to the conservation of the North Atlantic right whale, which provide calving area functions in Unit 2, are: (i) Sea surface conditions associated with Force 4 or less on the Beaufort Scale; (ii) Sea surface temperatures of 7 °C to 17 °C; and, (iii) Water depths of 6 to 28 meters, where these features simultaneously co-occur over contiguous areas of at least 231 nmi^2 of ocean waters during the months of November through April. When these features are available, they are selected by right whale cows and calves in dynamic combinations that are suitable for calving, nursing, and rearing, and which vary, within the ranges specified, depending on factors such as weather and age of the calves.

Vessel transits will have no effect on the features of Unit 2; this is because vessel operations do not affect sea surface state, water temperature, or water depth. Therefore, we have determined that the proposed action will have no effect on Unit 2 of right whale critical habitat.

Critical Habitat Designated for the New York Bight DPS of Atlantic sturgeon

Critical habitat has been designated for all five DPSs of Atlantic sturgeon (82 FR 39160; effective date September 18, 2017). The action area overlaps with a portion of the Hudson River critical habitat unit designated for the New York Bight DPS. The only project activity that may affect this critical habitat is the transit of project vessels to or from the Port of Coeymans in Ravena, NY (approximately RKM 185) or the Port of Albany in Albany, NY (approximately RKM 203); while in the Hudson River, these vessels will transit within critical habitat designated for the New York Bight DPS.

The critical habitat designation for the New York Bight DPS is for habitats that support successful Atlantic sturgeon reproduction and recruitment. The Hudson River critical habitat unit extends from the Federal Dam at Troy at approximately RKM 241 (RM 150) downstream to where the main stem river discharges at its mouth into New York City Harbor. In order to determine if the proposed action may affect critical habitat, we consider whether it would impact the habitat in a way that would affect its ability to support reproduction and recruitment. Specifically, we consider the effects of the action on the physical features of the critical habitat. The essential features identified in the final rule are:

(1) Hard bottom substrate (e.g., rock, cobble, gravel, limestone, boulder, etc.) in low salinity waters (i.e., 0.0 to 0.5 parts per thousand (ppt) range) for settlement of fertilized eggs, refuge, growth, and development of early life stages;

(2) Aquatic habitat with a gradual downstream salinity gradient of 0.5 up to as high as 30 ppt and soft substrate (e.g., sand, mud) between the river mouth and spawning sites for juvenile foraging and physiological development;

(3) Water of appropriate depth and absent physical barriers to passage (e.g., locks, dams, thermal plumes, turbidity, sound, reservoirs, gear, etc.) between the river mouth and spawning sites necessary to support: (i) Unimpeded movement of adults to and from spawning sites; (ii) Seasonal and physiologically dependent movement of juvenile Atlantic sturgeon to appropriate salinity zones within the river estuary; and, (iii) Staging, resting, or holding of subadults or spawning condition adults. Water depths in main river channels must also be deep enough (e.g., at least 1.2 m) to ensure continuous flow in the main channel at all times when any sturgeon life stage would be in the river.

(4) Water, between the river mouth and spawning sites, especially in the bottom meter of the water column, with the temperature, salinity, and oxygen values that, combined, support: (i) Spawning; (ii) Annual and interannual adult, subadult, larval, and juvenile survival; and, (iii) Larval, juvenile, and subadult growth, development, and recruitment (e.g., 13°C to 26 °C for spawning habitat and no more than 30°C for juvenile rearing habitat, and 6 milligrams per liter (mg/L) dissolved oxygen (DO) or greater for juvenile rearing habitat).

Feature One: Hard bottom substrate (e.g., rock, cobble, gravel, limestone, boulder, etc.) in low salinity waters (i.e., 0.0–0.5 ppt range) for settlement of fertilized eggs, refuge, growth, and development of early life stages

During average fresh water flow, the freshwater portion of the Hudson River (where salinity is within the 0.0-0.5 ppt range) extends upstream from approximately West Point RKM 80 (RM 50). During conditions of high fresh water runoff (usually in the spring), salt water intrusion can be pushed south, meaning that the freshwater reach would begin at RKM 24 (RM 15). However, those conditions are intermittent and it is the reach upstream of RKM 80 (RM 50) that typically is within the 0.0 – 0.5 ppt range. Atlantic sturgeon in the Hudson River range as far upstream as the Federal Dam at Troy RKM 241 (RM 150) meaning that Atlantic sturgeon have access to approximately 100 miles of freshwater. A number of mapping products for the Hudson River are available, with various levels of detail on bottom characteristics (see for example NYDEC's benthic mapper[17] and products from the Lamont Doherty Lab[18]). While the area just below the Troy Dam has a gravelly bottom, the rest of the freshwater reach is dominated by mud and a sand-mud mix. Hard bottom substrate for spawning is known to occur near RKM 134 (RM 83; Hyde Park) and RKM 112 (RM 70) (Bain et al. 2000). While there are over 100 miles of freshwater in the Hudson River critical habitat unit, the presence of PBF 1 is limited to the patchy areas where hard bottom substrate is present.

The vessel transit routes between the Empire WDA and the Port of Coeymans and the Port of Albany overlap with the portion of the Hudson River that contains PBF 1. However, project vessels will have no effect on this feature. This is because the project vessels will have no effect on salinity and will not interact with the bottom in this reach and therefore, there would be no impact to hard bottom habitat. The vessels will be loaded or unloaded at Coeymans or Albany by tying up at an existing berth and is not expected to set an anchor. Vessels will operate in the channel where there is adequate water depth to prevent bottoming out or otherwise scouring the riverbed. Vessel operations are not expected to affect the behavior of Atlantic sturgeon and therefore would not affect access to areas where PBF 1 are present. The vessels' operations will not preclude or delay the development of hard bottom habitat in the part of the river with salinity less than 0.5 ppt because it will not impact the river bottom in any way or change the salinity of portions of the river where hard bottom is found. Based on these considerations, the project will have no effect on PBF 1; that is, there will be no effect on how the PBF supports the conservation needs of Atlantic sturgeon in the action area.

Feature Two: Aquatic habitat with a gradual downstream salinity gradient of 0.5 up to as high as 30 ppt and soft substrate (e.g., sand, mud) between the river mouth and spawning sites for juvenile foraging and physiological development

In considering effects to PBF 2, we consider whether the proposed action will have any effect on areas of soft substrate within transitional salinity zones between the river mouth and spawning sites for juvenile foraging and physiological development; therefore, we consider effects of the action on soft substrate and salinity and any change in the value of this feature in the action area. The Hudson River Estuary is tidally influenced from the Battery to the federal dam at Troy; during average fresh water flow, salt water intrusion reaches West Point, about 50 miles from the Battery. During conditions of high fresh water runoff (usually in the spring), salt water intrusion can be pushed south, as far as 15 miles from the Battery. Salinity level varies throughout these areas seasonally and daily depending on tidal and fresh water inputs, with salinity generally increasing from West Point to the Battery. A number of mapping products for the Hudson River are available, with various levels of detail on bottom characteristics (see for example NYDEC's benthic mapper[19] and products from the Lamont Doherty Lab[20]). While the area just below the

[17] https://www.dec.ny.gov/pubs/42937.html

[18] https://www.ldeo.columbia.edu/edu/k12/snapshotday/Mapping.html

[19] https://www.dec.ny.gov/pubs/42937.html

[20] https://www.ldeo.columbia.edu/edu/k12/snapshotday/Mapping.html

Troy Dam has a gravelly bottom, the rest of the freshwater reach is dominated by mud and a sand-mud mix. The area between rkm 138 and rkm 43 is described as being largely silt (Coch and Bokuniewicz 1986). Simpson et al. (1986) examined benthic invertebrates at 16 stations in the lower Hudson River. Areas with relatively heterogeneous substrates (sands mixed with silts) contained the richest fauna in terms of abundance and variety. Fine, well-sorted sand had the lowest biomass and least variety. This study indicates that areas with fine sand may not support juvenile foraging as well as sandy-silt areas because they are not likely to have as high biomass or richness of benthic invertebrate resources. Haley et al. (1996) examined juvenile sturgeon use in the Hudson River and did not find a statistical difference in distribution based on substrate type; in this study, 80% of the stations sampled had silty substrate, 17.4% had sandy substrate and 2.3% had gravel substrate.

Project vessels will have no effect on this feature as they will not have any effect on salinity, and they will not interact with the river bottom in this reach of the river.

Feature Three: Water absent physical barriers to passage between the river mouth and spawning sites
In considering effects to PBF 3, we consider whether the proposed action will have any effect on water of appropriate depth and absent physical barriers to passage (e.g., locks, dams, thermal plumes, turbidity, sound, reservoirs, gear, etc.) between the river mouth and spawning sites necessary to support: unimpeded movements of adults to and from spawning sites; seasonal and physiologically dependent movement of juvenile Atlantic sturgeon to appropriate salinity zones within the river estuary, and; staging, resting, or holding of subadults or spawning condition adults. We also consider whether the proposed action will affect water depth or water flow, given water that is too shallow can be a barrier to sturgeon movements, and an alteration in water flow could similarly impact the movements of sturgeon in the river, particularly early life stages that are dependent on downstream drift. Therefore, we consider effects of the action on water depth and water flow and whether the action results in barriers to passage that impede the movements of Atlantic sturgeon.

Water of appropriate depth and absent physical barriers to passage between the river mouth and spawning sites necessary to support: (i) Unimpeded movement of adults to and from spawning sites; (ii) Seasonal and physiologically dependent movement of juvenile Atlantic sturgeon to appropriate salinity zones within the river estuary; and, (iii) Staging, resting, or holding of subadults or spawning condition adults, is present throughout the extent of critical habitat designated in the Hudson River. Water depths in the main river channels is also deep enough (*e.g.,* at least 1.2 m) to ensure continuous flow in the main channel at all times when any sturgeon life stage would be in the river.

Vessels transiting to or from the Empire Wind project site to the Port of Coeymans and the Port of Albany will travel through the portion of the Hudson River critical habitat unit containing PBF 3. Project vessels will have no effect on this feature as they will not have any effect on water depth or water flow and will not be physical barriers to passage for any life stage of Atlantic sturgeon that may occur in this portion of the action area. Therefore, there will be no effect on PBF 3.

Feature Four: Water with the temperature, salinity, and oxygen values that, combined, provide for dissolved oxygen values that support successful reproduction and recruitment and are within the temperature range that supports the habitat function
In considering effects to PBF 4, we consider whether the proposed action will have any effect on water, between the river mouth and spawning sites, especially in the bottom meter of the water column, with the temperature, salinity, and oxygen values that, combined, support: spawning; annual and interannual adult, subadult, larval, and juvenile survival; and larval, juvenile, and subadult growth, development, and recruitment. Therefore, we consider effects of the action on temperature, salinity and dissolved oxygen needs for Atlantic sturgeon spawning and recruitment. These water quality conditions are interactive and both temperature and salinity influence the dissolved oxygen saturation for a particular area. We also consider whether the action will have effects to access to this feature, temporarily or permanently and consider the effect of the action on the action area's ability to develop the feature over time.

Vessels transiting to or from the Empire Wind project site to the Port of Coeymans and the Port of Albany will travel through the portion of the Hudson River critical habitat unit containing PBF 4. Project vessels will have no effect on this feature as they will not have any effect on temperature, salinity or dissolved oxygen.

Summary of Effects to Critical Habitat
We have determined that the proposed action will have no effect on PBFs 1, 2, 3 and 4. Based on this conclusion and its supporting rationale, the action will have no effect on critical habitat designated for the New York Bight DPS of Atlantic sturgeon.

Critical Habitat Designated for the Carolina DPS of Atlantic sturgeon
The critical habitat designation for the Carolina DPS is for habitats that support successful Atlantic sturgeon reproduction and recruitment. Carolina Unit 7 includes the Santee River (below the Wilson Dam), the Rediversion Canal (below the St. Stephens Dam), the North Santee River, the South Santee River, and Tailrae Canal – West Branch Cooper River (below Pinopolis Dam) and the mainstem Cooper River.

On May 4, 2020, NMFS Southeast Regional Office issued a Biological Opinion to the USACE on the effects of construction and operation of the Nexans Cable Facility (NMFS SERO 2020). The subsea cable plant is located along the Cooper River in Charleston, South Carolina, within Unit 7 of the critical habitat designated for the Carolina DPS.

In the 2020 Nexans Biological Opinion, NMFS concluded that the construction and use by vessels of the Nexans Facility was likely to adversely affect but not likely to destroy or adversely modify critical habitat designated for the Carolina DPS of Atlantic sturgeon (NMFS SERO 2020). As explained in the 2020 Nexans Biological Opinion, NMFS determined that there would be temporary and permanent effects to the critical habitat in the Copper River as a result of dredging and riprap associated with the construction of the facility. No effects of vessel use on critical habitat were anticipated in the Opinion and we do not expect any will occur as a result of the Empire Wind project vessel's use of this facility.

Critical Habitat for the Northwest Atlantic Ocean DPS of Loggerhead Sea Turtles

Critical habitat for the Northwest Atlantic Ocean DPS of loggerhead sea turtles was designated in 2014 (79 FR 39855). Specific areas for designation include 38 occupied marine areas within the range of the Northwest Atlantic Ocean DPS. These areas contain one or a combination of habitat types: Nearshore reproductive habitat, winter area, breeding areas, constricted migratory corridors, and/or *Sargassum* habitat. There is no critical habitat designated in the lease area. The only project activities that may overlap with Northwest Atlantic loggerhead DPS critical habitat are vessels transiting to or from the project site from ports outside the Northeast U.S. As explained below, the proposed action will have no effect on this critical habitat.

Nearshore Reproductive

The PBF of nearshore reproductive habitat is described as a portion of the nearshore waters adjacent to nesting beaches that are used by hatchlings to egress to the open-water environment as well as by nesting females to transit between beach and open water during the nesting season. Primary Constituent Elements (PCEs) that support this habitat are the following: (1) Nearshore waters directly off the highest density nesting beaches and their adjacent beaches as identified in 50 CFR 17.95(c) to 1.6 km (1 mile) offshore; (2) Waters sufficiently free of obstructions or artificial lighting to allow transit through the surf zone and outward toward open water; and, (3) Waters with minimal manmade structures that could promote predators (i.e., nearshore predator concentration caused by submerged and emergent offshore structures), disrupt wave patterns necessary for orientation, and/or create excessive longshore currents.

The occasional project vessel transits that may occur within the designated nearshore reproductive habitat will have no effect on nearshore reproductive habitat for the following reasons: waters would remain free of obstructions or artificial lighting that would affect the transit of turtles through the surf zone and outward toward open water; and, vessel transits would not promote predators or disrupt wave patterns necessary for orientation or create excessive longshore currents.

Winter

The PBF of winter habitat is described as warm water habitat south of Cape Hatteras, North Carolina near the western edge of the Gulf Stream used by a high concentration of juveniles and adults during the winter months. PCEs that support this habitat are the following: (1) Water temperatures above 10° C from November through April; (2) Continental shelf waters in proximity to the western boundary of the Gulf Stream; and, (3) Water depths between 20 and 100 m.

The occasional project vessel transits that may occur within the designated winter habitat will have no effect on this habitat because they will not: affect or change water temperatures above 10° C from November through April; affect habitat in continental shelf waters in proximity to the western boundary of the Gulf Stream; or, affect or change water depths between 20 and 100 m.

Breeding

The PBFs of concentrated breeding habitat are sites with high densities of both male and female adult individuals during the breeding season. PCEs that support this habitat are the following:

(1) High densities of reproductive male and female loggerheads; (2) Proximity to primary Florida migratory corridor; and, (3) Proximity to Florida nesting grounds.
The occasional project vessel transits that may occur within the designated breeding habitat will have no effect on this habitat because they will not: affect the density of reproductive male or female loggerheads or result in any alterations of habitat in proximity to the primary Florida migratory corridor or Florida nesting grounds.

Constricted Migratory Corridors
The PBF of constricted migratory habitat is high use migratory corridors that are constricted (limited in width) by land on one side and the edge of the continental shelf and Gulf Stream on the other side. PCEs that support this habitat are the following: (1) Constricted continental shelf area relative to nearby continental shelf waters that concentrate migratory pathways; and, (2) Passage conditions to allow for migration to and from nesting, breeding, and/or foraging areas. The occasional project vessel transits that may occur within the designated winter habitat will have no effect on this habitat because they will not result in any alterations of habitat in the constricted continental shelf area and will not affect passage conditions in this area.

Sargassum
The PBF of loggerhead *Sargassum* habitat is developmental and foraging habitat for young loggerheads where surface waters form accumulations of floating material, especially Sargassum. PCEs that support this habitat are the following: (i) Convergence zones, surface-water downwelling areas, the margins of major boundary currents (Gulf Stream), and other locations where there are concentrated components of the Sargassum community in water temperatures suitable for the optimal growth of Sargassum and inhabitance of loggerheads; (ii) Sargassum in concentrations that support adequate prey abundance and cover; (iii) Available prey and other material associated with Sargassum habitat including, but not limited to, plants and cyanobacteria and animals native to the Sargassum community such as hydroids and copepods; and, (iv) Sufficient water depth and proximity to available currents to ensure offshore transport (out of the surf zone), and foraging and cover requirements by Sargassum for post-hatchling loggerheads, i.e., >10 m depth.

The occasional project vessel transits that may occur within the designated *Sargassum* habitat will have no effect on: conditions that result in convergence zones, surface-water downwelling areas, the margins of major boundary currents (Gulf Stream), and other locations where there are concentrated components of the Sargassum community in water temperatures suitable for the optimal growth of Sargassum and inhabitance of loggerheads; the concentration of Sargassum; the availability of prey within Sargassum; or the depth of water in any area.

Summary of Effects to Critical Habitat
We have determined that the proposed action will have no effect on any of the habitat features of the critical habitat designated for the Northwest Atlantic DPS of loggerhead sea turtles.

5.0 STATUS OF THE SPECIES

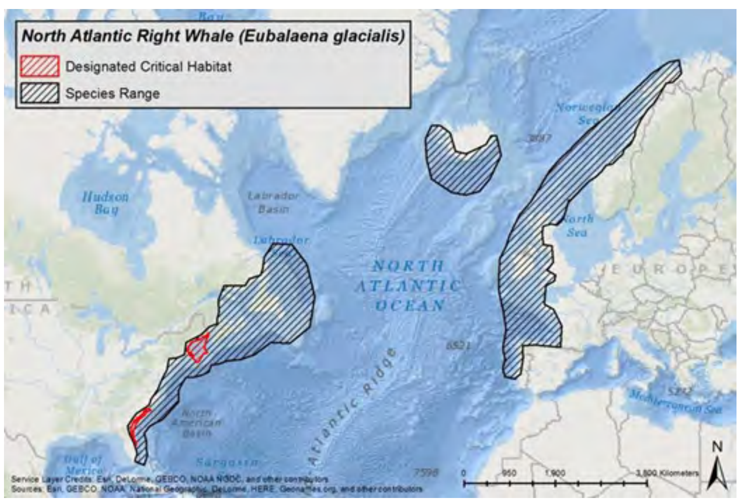
5.1 Marine Mammals

5.1.1 North Atlantic Right Whale (Eubalaena glacialis)

There are three species classified as right whales (genus *Eubalaena*): North Pacific (*E. japonica*), Southern (*E. australis*), and North Atlantic (*E. glacialis*). The North Atlantic right whale is the only species of right whale that occurs in the North Atlantic Ocean (Figure 5.1.1) and, therefore, is the only species of right whale that may occur in the action area.

North Atlantic right whales occur primarily in the western North Atlantic Ocean. However, there have been acoustic detections, reports, and/or sightings of North Atlantic right whales in waters off Greenland (east/southeast), Newfoundland, northern Norway, and Iceland, as well as within Labrador Basin (Hamilton et al. 1998, Jacobsen et al. 2004, Knowlton et al. 1992, Mellinger et al. 2011). These latter sightings/detections are consistent with historic records documenting North Atlantic right whales south of Greenland, in the Denmark straits, and in eastern North Atlantic waters (Kraus et al. 2007). There is also evidence of possible historic North Atlantic right whale calving grounds in the Mediterranean Sea (Rodrigues et al. 2018), an area not currently considered as part of this species' historical range.

Figure 5.1.1. Approximate historic range and currently designated U.S. critical habitat of the North Atlantic right whale



The North Atlantic right whale is distinguished by its stocky body and lack of a dorsal fin. The species was listed as endangered on December 2, 1970. We used information available in the most recent five-year review for North Atlantic right whales (NMFS 2022), the most recent stock assessment report (Hayes et al. 2022 and Hayes et al. 2023), and the scientific literature to summarize the status of the species, as follows.

Life History

The maximum lifespan of North Atlantic right whales is unknown, but one individual reached at least 70 years of age (Hamilton et al. 1998, Kenney 2009). Previous modeling efforts suggest that in 1980, females had a life expectancy of approximately 51.8 years of age, which was twice that of males at the time (Fujiwara and Caswell 2001); however, by 1995, female life expectancy was estimated to have declined to approximately 14.5 years (Fujiwara and Caswell 2001). Most recent estimates indicate that North Atlantic right whale females are only living to 45 and males to age 65 (https://www.fisheries.noaa.gov/species/north-atlantic-right-whale). Females, ages 5+, have reduced survival relative to males, ages 5+, resulting in a decrease in female abundance relative to male abundance (Pace et al. 2017). Specifically, state-space mark-recapture model estimates show that from 2010-2015, males declined just under 4.0%, and females declined approximately 7% (Pace et al. 2017).

Gestation is estimated to be between 12 and 14 months, after which calves typically nurse for around one year (Cole et al. 2013, Kenney 2009, Kraus and Hatch 2001, Lockyer 1984). After weaning a calf, females typically undergo a 'resting' period before becoming pregnant again, presumably because they need time to recover from the energy deficit experienced during lactation (Fortune et al. 2013, Fortune et al. 2012, Pettis et al. 2017a). From 1983 to 2005, annual average calving intervals ranged from 3 to 5.8 years (overall average of 4.23 years) (Kraus et al. 2007). Between 2006 and 2015, annual average calving intervals continued to vary within this range, but in 2016 and 2017 longer calving intervals were reported (6.3 to 6.6 years in 2016 and 10.2 years in 2017) (Hayes et al. 2018a, Pettis and Hamilton 2015, Pettis and Hamilton 2016, Pettis et al. 2018a, Pettis et al. 2018b, Pettis et al. 2020). There were no calves recorded in 2018. Annual average calving interval between 2019 and 2022 ranged from a low of 7 in 2019 to a high of 9.2 in 2021 (Pettis et al. 2022). The calving index is the annual percentage of reproductive females assumed alive and available to calve that was observed to produce a calf. This index averaged 47% from 2003 to 2010 but has dropped to an average of 17% since 2010 (Moore et al. 2021). The percentage of available females that had calves ranged from 11.9% to 30.5% from 2019-2022 (Pettis et al. 2022). Females have been known to give birth as young as five years old, but the mean age of a female first giving birth is 10.2 years old (n=76, range 5 to 23, SD 3.3) (Moore et al. 2021). Taken together, changes to inter-birth interval and age to first reproduction suggest that both parous (having given birth) and nulliparous (not having given birth) females are experiencing delays in calving. These calving delays correspond with the recent distribution shifts. The low reproductive rate of right whales is likely the result of several factors including nutrition (Fortune et al. 2013, Moore et al. 2021). Evidence also indicates that North Atlantic right whales are growing to shorter adult lengths than in earlier decades (Stewart et al. 2021) and are in poor body condition compared to southern right whales (Christiansen et al. 2020). As stated in Hayes et al. 2023, all these changes may result from a combination of documented regime shifts in primary feeding habitats (Meyer-Gutbrod and Greene 2014; Meyer-Gutbrod et al. 2021; Record et al. 2019), and increased energy expenditures related to non-lethal entanglements (Rolland et al. 2016; Pettis et al. 2017b; van der Hoop 2017). As noted in the 2022 Five-Year Review (NMFS 2022), poor body condition, arrested growth, and maternal body length have led to reduced reproductive success and are contributors to low birth rates for the population over the past decade (Christiansen et al. 2020; Reed et al. 2022; Stewart et al. 2021; Stewart et al. 2022).

Pregnant North Atlantic right whales migrate south, through the mid-Atlantic region of the U.S., to low latitudes during late fall where they overwinter and give birth in shallow, coastal waters (Kenney 2009, Krzystan et al. 2018). During spring, these females and new calves migrate to high latitude foraging grounds where they feed on large concentrations of copepods, primarily *C. finmarchicus* (Mayo et al. 2018, NMFS 2017). Some non-reproductive North Atlantic right whales (males, juveniles, non-reproducing females) also migrate south, although at more variable times throughout the winter. Others appear to not migrate south and remain in the northern feeding grounds year round or go elsewhere (Bort et al. 2015, Mayo et al. 2018, Morano et al. 2012, NMFS 2017, Stone et al. 2017). Nonetheless, calving females arrive to the southern calving grounds earlier and stay in the area more than twice as long as other demographics (Krzystan et al. 2018). Little is known about North Atlantic right whale habitat use in the mid-Atlantic, but recent acoustic data indicate near year round presence of at least some whales off the coasts of New Jersey, Virginia, and North Carolina (Davis et al. 2017, Hodge et al. 2015, Salisbury et al. 2016, Whitt et al. 2013). While it is generally not known where North Atlantic right whales mate, some evidence suggests that mating may occur in the northern feeding grounds (Cole et al. 2013, Matthews et al. 2014).

Population Dynamics
Today, North Atlantic right whales are primarily found in the western North Atlantic, from their calving grounds in lower latitudes off the coast of the southeastern United States to their feeding grounds in higher latitudes off the coast of New England and Nova Scotia (Hayes et al. 2018a). Beginning in 2010, a change in seasonal residency patterns has been documented through visual and acoustic monitoring with declines in presence in the Bay of Fundy, Gulf of Maine, and Great South Channel, and more animals being observed in Cape Cod Bay, the Gulf of Saint Lawrence, the mid-Atlantic, and south of Nantucket, Massachusetts (Daoust et al. 2018, Davies et al. 2019, Davis et al. 2017, Hayes et al. 2018a, Hayes et al. 2019, Meyer-Gutbrod et al. 2018, Moore et al. 2021, Pace et al. 2017, Quintana-Rizzo et al. 2021). Right whales have been observed nearly year round in the area south of Martha's Vineyard and Nantucket, with highest sightings rates between December and May (Leiter et al., 2017, Stone et al. 2017, Quintana-Rizzo et al. 2021, O'Brien et al. 2022). Increased detections of right whales in the Gulf of St. Lawrence have been documented from late spring through the fall (Cole et al. 2016, Simard et al. 2019, DFO 2020).

There are two recognized populations of North Atlantic right whales, an eastern, and a western population. Very few individuals likely make up the population in the eastern Atlantic, which is thought to be functionally extinct (Best et al. 2001). However, in recent years, a few known individuals from the western population have been seen in the eastern Atlantic, suggesting some individuals may have wider ranges than previously thought (Kenney 2009). Specifically, there have been acoustic detections, reports, and/or sightings of North Atlantic right whales in waters off Greenland (east/southeast), Newfoundland, northern Norway, and Iceland, as well as within Labrador Basin (Jacobsen et al. 2004, Knowlton et al. 1992, Mellinger et al. 2011). It is estimated that the North Atlantic historically (i.e., pre-whaling) supported between 9,000 and 21,000 right whales (Monsarrat et al. 2016). The western population may have numbered fewer than 100 individuals by 1935, when international protection for right whales came into effect (Kenney et al. 1995).

Genetic analyses, based upon mitochondrial and nuclear DNA analyses, have consistently revealed an extremely low level of genetic diversity in the North Atlantic right whale population (Hayes et al. 2018a, Malik et al. 2000, McLeod and White 2010, Schaeff et al. 1997). Waldick et al. (2002) concluded that the principal loss of genetic diversity occurred prior to the 18th

century, with more recent studies hypothesizing that the loss of genetic diversity may have occurred prior to the onset of Basque whaling during the 16th and 17th century (Mcleod et al. 2008, Rastogi et al. 2004, Reeves et al. 2007, Waldick et al. 2002). The persistence of low genetic diversity in the North Atlantic right whale population might indicate inbreeding; however, based on available data, no definitive conclusions can be reached at this time (Hayes et al. 2019, Radvan 2019, Schaeff et al. 1997). By combining 25 years of field data (1980-2005) with high-resolution genetic data, Frasier et al. (2013) found that North Atlantic right whale calves born between 1980 and 2005 had higher levels of microsatellite (nuclear) heterozygosity than would be expected from this species' gene pool. The authors concluded that this level of heterozygosity is due to postcopulatory selection of genetically dissimilar gametes and that this mechanism is a natural means to mitigate the loss of genetic diversity, over time, in small populations (Frasier et al. 2013).

In the western North Atlantic, North Atlantic right whale abundance was estimated to be 270 animals in 1990 (Pace et al. 2017). From 1990 to 2011, right whale abundance increased by approximately 2.8% per year, despite a decline in 1993 and no growth between 1997 and 2000 (Pace et al. 2017). However, since 2011, when the abundance peaked at 481 animals, the population has been in decline, with a 99.99% probability of a decline of just under 1% per year (Pace et al. 2017). Between 1990 and 2015, survival rates appeared relatively stable, but differed between the sexes, with males having higher survivorship than females (males: 0.985 ± 0.0038; females: 0.968 ± 0.0073) leading to a male-biased sex ratio (approximately 1.46 males per female) (Pace et al. 2017).

As reported in the most recent final SAR (Hayes et al. 2023), the western North Atlantic right whale stock size is estimated based on a published state-space model of the sighting histories of individual whales identified using photo-identification techniques (Pace et al. 2017; Pace 2021). Sightings histories were constructed from the photo-ID recapture database as it existed in December 2021, and included photographic information up through November 2020. Using a hierarchical, state-space Bayesian open population model of these histories produced a median abundance value (N_{est}) as of November 30, 2020 of 338 individuals (95% Credible Interval (CI): 325–350). The minimum population estimate is 332 (Hayes et al. 2023).

Each year, scientists at NMFS' Northeast Fisheries Science Center estimate the right whale population abundance and share that estimate at the North Atlantic Right Whale Consortium's annual meeting in a "Report Card." This estimate is considered preliminary and undergoes further review before being included in the draft North Atlantic Right Whale Stock Assessment Report. Each draft stock assessment report is peer-reviewed by one of three regional Scientific Review Groups, revised after a public comment period, and published. The 2022 "Report Card" (Pettis et al. 2022) data reports a preliminary population estimate for 2021 using data as of August 30, 2022 is 340 (+/- 7). Pettis et al. (2022) also report that fifteen mother calf pairs were sighted in 2022, down from 18 in 2021. There were no first time mothers sighted in 2022. Initial analyses detected at least 16 new entanglements in 2022: five whales seen with gear and 11 with new scarring from entanglements. Additionally, there was one non-fatal vessel strike detected. No carcasses were detected. Of the 15 calves born in 2022, one is known to have died and another is thought likely to have died. During the 2022-2023 season, there were 11 mothers with associated calves and one newborn documented alone that was later found dead.

In addition to finding an overall decline in the North Atlantic right whale population, Pace et al. (2017) also found that between 1990 and 2015, the survival of age 5+ females relative to 5+ males has been reduced; this has resulted in diverging trajectories for male and female abundance. Specifically, there was an estimated 142 males (95% CI=143-152) and 123 females (95% CI=116-128) in 1990; however, by 2015, model estimates show the species was comprised of 272 males (95% CI=261-282) and 186 females (95% CI=174-195; Pace et al. 2017). Calving rates also varied substantially between 1990 and 2015 (i.e., 0.3% to 9.5%), with low calving rates coinciding with three periods (1993-1995, 1998-2000, and 2012-2015) of decline or no growth (Pace et al. 2017). Using generalized linear models, Corkeron et al. (2018) found that between 1992 and 2016, North Atlantic right whale calf counts increased at a rate of 1.98% per year. Using the highest annual estimates of survival recorded over the time series from Pace et al. (2017), and an assumed calving interval of approximately four years, Corkeron et al. (2018) suggests that the North Atlantic right whale population could potentially increase at a rate of at least 4% per year if there was no anthropogenic mortality.[21] This rate is approximately twice that observed, and the analysis indicates that adult female mortality is the main factor influencing this rate (Corkeron et al. 2018). Right whale births remain significantly below what is expected and the average inter-birth interval remains high (Pettis et al. 2022). Additionally, there were no first-time mothers in 2022, underscoring recent research findings that fewer adult, nulliparous females are becoming reproductively active (Reed et al., 2022).

Status

The North Atlantic right whale is listed under the ESA as endangered. Anthropogenic mortality and sub-lethal stressors (i.e., entanglement) that affect reproductive success are currently affecting the ability of the species to recover (Corkeron et al. 2018, Stewart et al. 2021), currently, none of the species recovery goals (see below) have been met. With whaling now prohibited, the two major known human causes of mortality are vessel strikes and entanglement in fishing gear (Hayes et al. 2018a). Estimates of total annual anthropogenic mortality (i.e., ship strike and entanglement in fishing gear), as well as the number of undetected anthropogenic mortalities for North Atlantic right whales are presented in the annual stock assessment reports. These anthropogenic threats appear to be worsening (Hayes et al. 2018a).

On June 7, 2017, NMFS declared an Unusual Mortality Event (UME) for the North Atlantic right whale, as a result of 17 observed right whale mortalities in the U.S. and Canada. Under the Marine Mammal Protection Act, a UME is defined as "a stranding that is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response." As of July 26, 2023, there are 36 confirmed mortalities for the UME, 34 serious injuries, and 45 sublethal injuries or illness (for more information on UMEs, see https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-unusual-mortality-events). Mortalities are recorded as vessel strike (12), entanglement (9), perinatal (2), unknown/undetermined (3), or not examined (10).[22]

[21] Based on information in the North Atlantic Right Whale Catalog, the mean calving interval is 4.69 years (P. Hamilton 2018, unpublished, in Corkeron et al. 2018). Corkeron et al. (2018) assumed a 4 year calving interval as the approximate mid-point between the North Atlantic Right Whale Catalog calving interval and observed calving intervals for southern right whales (i.e., 3.16 years for South Africa, 3.42 years for Argentina, 3.31 years for Auckland Islands, and 3.3 years for Australia).

[22] https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2023-north-atlantic-right-whale-unusual-mortality-event; last accessed July 26, 2023

The North Atlantic right whale population continues to decline. As noted above, between 1990 to 2011, right whale abundance increased by approximately 2.8% per year; however, since 2011 the population has been in decline (Pace et al. 2017). The 2023 SAR reports an overall abundance decline between 2011 and 2020 of 23.5% (CI=21.4% to 26.0%) (Hayes et al. 2023). Recent modeling efforts indicate that low female survival, a male biased sex ratio, and low calving success are contributing to the population's current decline (Pace et al. 2017). For instance, five new calves were documented in 2017 calving season, zero in 2018, and seven in 2019 (Pettis et al. 2018a, Pettis et al. 2018b, Pettis et al. 2020), these numbers of births are well below the number needed to compensate for expected mortalities. More recently, there were 10 calves in the 2020 calving season, 18 calves in 2021, and 15 in 2022. Two of the 2020 calves and one of the 2021 calves died or were seriously injured due to vessel strikes. Two additional calves were reported in the 2021 season, but were not seen as a mother/calf pair. One animal stranded dead with no evidence of human interaction and initial results suggest the calf died during birth or shortly thereafter. The second animal was an anecdotal report of a calf off the Canary Islands. Two calves in 2022 are suspected to have died, with the causes of death unknown. As noted above, 11 mother-calf pairs were sighted in the 2022-2023 calving season[23].

Long-term photographic identification data indicate new calves rarely go undetected (Kraus et al. 2007, Pace et al. 2017). While there are likely a multitude of factors involved, low calving has been linked to poor female health (Rolland et al. 2016) and reduced prey availability (Devine et al. 2017, Johnson et al. 2017, Meyer-Gutbrod and Green 2014, Meyer-Gutbrod and Greene 2018, Meyer-Gutbrod et al. 2018). A recent study comparing North Atlantic right whales to other right whale species found that juvenile, adult, and lactating female North Atlantic right whales all had lower body condition scores compared to the southern right whale populations, with lactating females showing the largest difference; however, North Atlantic right whale calves were in good condition (Christiansen et al. 2020). While some of the difference could be the result of genetic isolation and adaptations to local environmental conditions, the authors suggest that the magnitude indicates that North Atlantic right whale females are in poor condition, which could be suppressing their growth, survival, age of sexual maturation and calving rates. In addition, they conclude that the observed differences are most likely a result of differences in the exposure to anthropogenic factors (Christiansen et al. 2020). Furthermore, entanglement in fishing gear appears to have substantial health and energetic costs that affect both survival and reproduction (Hayes et al. 2018a, Hunt et al. 2016, Lysiak et al. 2018, Pettis et al. 2017, Robbins et al. 2015, Rolland et al. 2017, van der Hoop et al. 2017).

Kenney et al. (2018) projected that if all other known or suspected impacts (e.g., vessel strikes, calving declines, climate change, resource limitation, sublethal entanglement effects, disease, predation, and ocean noise) on the population remained the same between 1990 and 2016, and none of the observed fishery related mortality and serious injury occurred, the projected population in 2016 would be 12.2% higher (506 individuals). Furthermore, if the actual mortality resulting from fishing gear is double the observed rate (as estimated in Pace et al. 2017), eliminating all mortalities (observed and unobserved) could have resulted in a 2016 population increase of 24.6% (562 individuals) and possibly over 600 in 2018 (Kenney 2018).

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[23] https://www.fisheries.noaa.gov/national/endangered-species-conservation/north-atlantic-right-whale-calving-season-2023

Given the above information, North Atlantic right whales' resilience to future perturbations affecting health, reproduction, and survival is expected to be very low (Hayes et al. 2018a). The observed (and clearly biased low) human-caused mortality and serious injury was 7.7 right whales per year from 2015 through 2019 (Hayes et al. 2022). Using the refined methods of Pace et al. (2021), the estimated annual rate of total mortality for the period 2014–2018 was 27.4, which is 3.4 times larger than the 8.15 total derived from reported mortality and serious injury for the same period (Hayes et al. 2022). The 2023 SAR reports the observed human-caused mortality and serious injury was 8.1 right whales per year from 2016 through 2020 (Hayes et al. 2023). Using the refined methods of Pace et al. (2021), the estimated annual rate of total mortality for the period 2015–2019 was 31.2, which is 4.1 times larger than the 7.7 total derived from reported mortality and serious injury for the same period. Using a matrix population projection model, it is estimated that by 2029 the population will decline from 160 females to the 1990 estimate of 123 females if the current rate of decline is not altered (Hayes et al. 2018a).

Climate change poses a significant threat to the recovery of North Atlantic right whales. The information presented here is summarized from a more complete description of this threat in the 2022 5-Year Review (NMFS 2022). The documented shift in North Atlantic right whale summer habitat from the Gulf of Maine to waters further north in the Gulf of St. Lawrence in the early 2010s is considered to be related to an oceanographic regime shift in Gulf of Maine waters linked to a northward shift of the Gulf Stream which caused the availability of the primary North Atlantic right whale prey, the copepod *Calanus finmarchicus*, to decline locally, forcing North Atlantic right whales to forage in areas further north (Meyer-Gutbrod et al. 2021; Record et al. 2019; Sorochan et al. 2019). The shift of North Atlantic right whale distribution into waters further north also created policy challenges for the Canadian government, which had to implement new regulations in areas that were not protected because they were not documented as right whale habitat in the past (Davies and Brillant 2019; Meyer-Gutbrod et al. 2018; Record et al. 2019).

When prey availability is low, North Atlantic right whale calving rates decline, a well-documented phenomenon through periods of low prey availability in the 1990s and the 2010s; without increased prey availability in the future, low population growth is predicted (Meyer-Gutbrod and Greene 2018). Prey densities in the Gulf of St. Lawrence have fluctuated irregularly in the past decade, limiting suitable foraging habitat for North Atlantic right whales in some years and further limiting reproductive rates (Bishop et al. 2022; Gavrilchuck et al. 2020; Gavrilchuck et al. 2021; Lehoux et al. 2020).

Recent studies have investigated the spatial and temporal role of oceanography on copepod availability and distribution and resulting effects on foraging North Atlantic right whales. Changes in seasonal current patterns have an effect on the density of *Calanus* species in the Gulf of St. Lawrence, which may lead to further temporal variations over time (Sorochan et al. 2021a). Brennan et al. (2019) developed a model to estimate seasonal fluctuations in C. finmarchicus availability in the Gulf of St. Lawrence, which is highest in summer and fall, aligning with North Atlantic right whale distribution during those seasons. Pendleton et al. (2022) found that the date of maximum occupancy of North Atlantic right whales in Cape Cod Bay shifted 18.1 days later between 1998 and 2018 and was inversely related to the spring thermal transition date, when the regional ocean temperature surpasses the mean annual temperature for that location, which has trended towards moving earlier each year as an effect of climate change. This inverse relationship may be due to a 'waiting room' effect, where North Atlantic right whales wait and forage on adequate prey in the waters of Cape Cod Bay while richer prey develops in the Gulf of St. Lawrence, and then migrate directly there rather than following migratory pathways used previously (Pendleton et al. 2022; Ganley et al. 2022). Although the date of maximum occupancy in Cape Cod Bay has shifted to later in the spring, initial sightings of individual North Atlantic right whales have started earlier, indicating that they may be using regional water temperature as a cue for migratory movements between habitats (Ganley et al. 2022).

North Atlantic right whales rely on late stage or diapause copepods, which are more energy-rich, for prey; diving behavior is highly reliant on where in the vertical strata *C. finmarchicus* is distributed (Baumgartner et al. 2017). There is evidence that *C. finmarchicus* are reaching the diapause phase at deeper depths to account for warming water on the Newfoundland Slope and Scotian Shelf, forcing North Atlantic right whales to forage deeper and further from shore (Krumhansl et al. 2018; Sorochan et al. 2021a).

Several studies have already used the link between *Calanus* distribution and North Atlantic right whale distribution to determine suitable habitat, both currently and in the future (Gavrilchuk et al. 2020; Pershing et al. 2021; Silber et al. 2017; Sorochan et al. 2021b). Plourde et al. (2019) used suitable habitat modeling using *Calanus* density to confirm new North Atlantic right whale hot spots for summer feeding in Roseway Basin and Grand Manan and identified other potential aggregation areas further out on the Scotian Shelf. Gavrilchuk et al. (2021) determined suitable habitat for reproductive females in the Gulf of St. Lawrence, finding declines in foraging habitat over a 12- year period and indicating that the prey biomass in the area may become insufficient to sustain successful reproduction over time. Ross et al. (2021) used suitable habitat modeling to predict that the Gulf of Maine habitat would continue to decline in suitability until 2050 under a range of climate change scenarios. Similarly, models of future copepod density in the Gulf of Maine have predicted declines of up to 50 percent under high greenhouse gas emission scenarios by 2080- 2100 (Grieve et al. 2017). It is clear that climate change does and will continue to have an impact on the availability, supply, aggregation, and distribution of *C. finmarchicus*, and North Atlantic right whale abundance and distribution will continue to vary based on those impacts; however, more research must be done to better understand these factors and associated impacts (Sorochan et al. 2021b). Climate change will likely have other secondary effects on North Atlantic right whales, such as an increase in harmful algal blooms of the toxic dinoflagellate *Alexandrium catenella* due to warming waters, increasing the risk of North Atlantic right whale exposure to neurotoxins (Boivin-Rioux et al. 2021; Pershing et al. 2021).

Factors Outside the Action Area Affecting the Status of the Right Whale: Fishery Interactions and Vessel Strikes in Canadian Waters

In Canada, right whales are protected under the Species at Risk Act (SARA) and the Fisheries Act. The right whale was considered a single species and designated as endangered in 1980. SARA includes provisions against the killing, harming, harassing, capturing, taking, possessing, collecting, buying, selling, or trading of individuals or its parts (SARA Section 32) and damage or destruction of its residence (SARA Section 33). In 2003, the species was split to allow separate designation of the North Atlantic right whale, which was listed as endangered under SARA in May 2003. All marine mammals are subject to the provisions of the marine mammal regulations under the Fisheries Act. These include requirements related to approach, disturbance, and reporting. In the St. Lawrence estuary and the Saguenay River, the maximum approach distance for threatened or endangered whales is 1,312 ft. (400 m).

North Atlantic right whales have died or been seriously injured in Canadian waters by vessel strikes and entanglement in fishing gear (DFO 2014). Serious injury and mortality events are rarely observed where the initial entanglement occurs. After an event, live whales or carcasses may travel hundreds of miles before ever being observed, including into U.S. waters given prevailing currents. It is unknown exactly how many serious injuries and mortalities have occurred in Canadian waters historically. However, at least 14 right whale carcasses and 20 injured right whales were sighted in Canadian waters between 1988 and 2014 (Davies and Brillant 2019); 25 right whale carcasses were first sighted in Canadian waters or attributed to Canadian fishing gear from 2015 through 2019. In the sections to follow, information is provided on the fishing and shipping industry in Canadian waters, as well as measures the Canadian government is taking (or will be taking) to reduce the level of serious injuries and mortalities to North Atlantic rights resulting from incidental entanglement in fishing gear or vessel strikes.

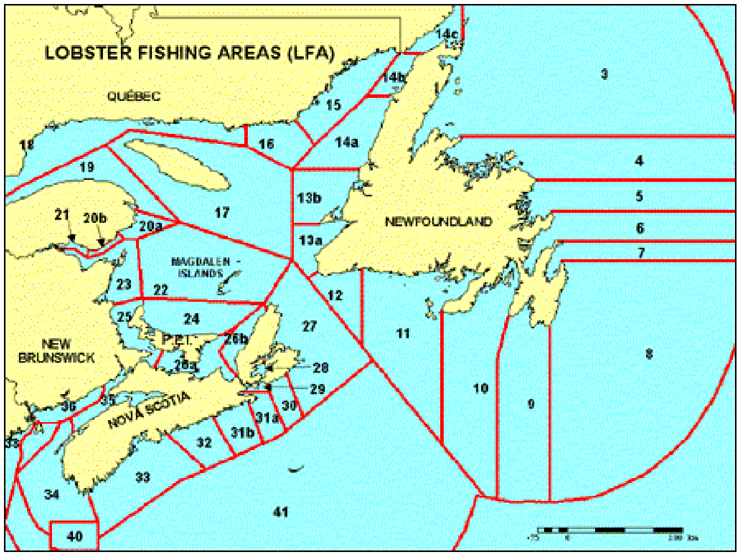
Fishery Interactions in Canadian Waters

There are numerous fisheries operating in Canadian waters. Rock and toad crab fisheries, as well as fixed gear fisheries for cod, Atlantic halibut, Greenland halibut, winter flounder, and herring have historically had few interactions. While these fisheries deploy gear that pose some risk, this analysis focuses on fisheries that have demonstrated interactions with ESA listed species (i.e., lobster, snow crab, mackerel, and whelk). Based on information provided by the Department of Fisheries and Oceans Canada (DFO), a brief summary of these fisheries is provided below.

The American lobster fishery is DFO's largest fishery, by landings. It is managed under regional management plans with 41 Lobster Fisheries Areas (Figure 5.1.2); in which 10,000 licensed harvesters across Atlantic Canada and Quebec participate.[24] In addition to the one permanent closure in Lobster Fishery Area 40 (Figure 5.1.2), fisheries are generally closed during the summer to protect molts. Lobster fishing is most active in the Gulf of Maine, Bay of Fundy, Southern Gulf of St. Lawrence, and coastal Nova Scotia. Most fisheries take place in shallow waters less than 130 ft. (40 m) deep and within 8 nmi (15 km) of shore, although some fisheries will fish much farther out and in waters up to 660 ft. (200 m) deep. Management measures are tailored to each Area and include limits on the number of licenses issued, limits on the number of traps, limited and staggered fishing seasons, limits on minimum and maximum carapace size (which differs depending on the Area), protection of egg-bearing females (females must be notched and released alive), and ongoing monitoring and enforcement of fishing regulations and license conditions. The Canadian lobster fisheries use trap/pot gear consistent with the gear used in the American lobster fishery in the U.S. While both Canada and the U.S. lobster fisheries employ similar gears, the two nations employ different management strategies that result in divergent prosecution of the fisheries.

[24] Of the 41 Lobster Fisheries Areas, one is for the offshore fishery, and one is closed for conservation.

Figure 5.1.2. Lobster fishing areas in Atlantic Canada (https://www.dfo-mpo.gc.ca/fisheries-peches/commercial-commerciale/atl-arc/lobster-homard-eng.html)



The snow crab fishery is DFO's second largest fishery, by landings. It is managed under regional management plans with approximately 60 Snow Crab Management Areas in Canada spanning four regions (Scotia-Fundy, Southern Gulf of St. Lawrence, Northern Gulf of St. Lawrence, and Newfoundland and Labrador). Approximately 4,000 crab fishery licenses are issued annually[25]. The management of the snow crab fishery is based on annual total allowable catch, individual quotas, trap and mesh restrictions, minimum legal size, mandatory release of female crabs, minimum mesh size of traps, limited seasons, and areas. Protocols are in place to close grids when a percentage of soft-shell crabs in catches is reached. Harvesters use baited conical traps and pots set on muddy or sand-mud bottoms usually at depths of 230-460 ft. (70-140 m). Annual permit conditions have been used since 2017 to minimize the impacts to North Atlantic right whales, as described below.

DFO manages the Atlantic mackerel fishery under one Atlantic management plan, established in 2007. Management measures include fishing seasons, total allowable catch, gear, Safety at Sea fishing areas, licensing, minimum size, fishing gear restrictions, and monitoring. The plan allows the use of the following gear: gillnet, handline, trap net, seine, and weir. When established, the DFO issued 17,182 licenses across four regions, with over 50% of these licenses using gillnet gear. In 2020, DFO issued 7,812 licenses; no gear information was available. Commercial harvest is timed with the migration of mackerel into and out of Canadian waters. In Nova Scotia, the gillnet and trap fisheries for mackerel take place primarily in June and July. Mackerel generally arrive in southwestern Nova Scotia in May and Cape Breton in June. Migration out of the Gulf of St. Lawrence begins in September, and the fishery can continue into October or early November. They may enter the Gulf of St. Lawrence, depending on temperature conditions. The gillnet fishery in the Gulf of St. Lawrence also occurs in June and

[25] https://www.dfo-mpo.gc.ca/stats/commercial/licences-permis/licences-permis-atl-eng.htm#Species; Last accessed February 12, 2023

July. Most nets are fixed, except for a drift fishery in Chaleurs Bay and the part of the Gulf between New Brunswick, Prince Edward Island, and the Magdalen Islands.

Conservation harvesting plans are used to manage waved whelk in Canadian waters, which are harvested in the Gulf of St. Lawrence, Quebec, Maritimes, and Newfoundland and Labrador regions. The fishery is managed using quotas, fishing gear requirements, dockside monitoring, traps limits, seasons, tagging, and area requirements. In 2017, there were 240 whelk license holders in Quebec; however, only 81 of them were active. Whelk traps are typically weighted at the bottom with cement or other means and a rope or other mechanism is positioned in the center of the trap to secure the bait. Between 50 and 175 traps are authorized per license. The total number of authorized traps for all licenses in each fishing area varies between 550 and 6,400 traps, while the number of used or active traps is lower, with 200 to 1,700 traps per fishing area. Since 2017, the Government of Canada has implemented measures to protect right whales from entanglement. These measures have included seasonal and dynamic closures for fixed gear fisheries, changes to the fishing season for snow crab, reductions in traps in the mid-shore fishery in Crab Fishing Area 12, and license conditions to reduce the amount of rope in the water. Measures to better track gear, require reporting of gear loss, require reporting of interactions with marine mammals, and increased surveillance for right whales have also been implemented. Measures to reduce interactions with fishing gear are adjusted annually. In 2021, mandatory closures for non-tended fixed gear fisheries, including lobster and crab, will be put in place for 15 days when right whales are sighted. If a whale is detected in days 9-15 of the closure, the closure will be extended. In the Bay of Fundy and the critical habitats in the Roseway and Grand Manan basins, this extension will be for an additional 15 days. If a right whale is detected in the Gulf of St. Lawrence, the closure will be season-long (until November 15, 2021). Outside the dynamic area, closures are considered on a case-by-case basis. There are also gear marking and reporting requirements for all fixed gear fisheries. The Government of Canada will also continue to support industry trials of innovative fishing technologies and methods to prevent and mitigate whale entanglement. This includes authorizing ropeless gear trials in closed areas in 2021. Measures to implement weak rope or weak-breaking points were delayed and will be implemented by 2024. Measures related to maximum rope diameters, sinking rope between traps and reductions in vertical and floating rope will be implemented after 2022. More information on these measures is available at https://www.dfo-mpo.gc.ca/fisheries-peches/commercial-commerciale/atl-arc/narw-bnan/management-gestion-eng.html.
In August 2016, NMFS published the MMPA Import Provisions Rule (81 FR 54389, August 15, 2016), which established criteria for evaluating a harvesting nation's regulatory program for reducing marine mammal bycatch and the procedures for obtaining authorization to import fish and fish products into the United States. Specifically, to continue in the international trade of seafood products with the United States, other nations must demonstrate that their marine mammal mitigation measures for commercial fisheries are, at a minimum, equivalent to those in place in the United States. A five-year exemption period (beginning January 1, 2017) was created in this process to allow foreign harvesting nations time to develop, as appropriate, regulatory programs comparable in effectiveness to U.S. programs at reducing marine mammal bycatch. To comply with its requirements, it is essential that these interactions are reported, documented, and quantified. To guarantee that fish products have access to the U.S. markets, DFO must implement procedures to reliably certify that the level of mortality caused by fisheries

does not exceed U.S. standards. DFO must also demonstrate that the regulations in place to reduce accidental death of marine mammals are comparable to those of the United States.

Vessel Strikes in Canadian Waters

Vessel strikes are a threat to right whales throughout their range. In Canadian waters where rights whales are present, vessels include recreational and commercial vessels, small and large vessels, and sail, and power vessels. Vessel categories include oil and gas exploration, fishing and aquaculture, cruise ships, offshore excursions (whale and bird watching), tug/tow, dredge, cargo, and military vessels. At the time of development of the Gulf of St. Lawrence management plan, approximately 6,400 commercial vessels transited the Cabot Strait and the Strait of Belle Isle annually. This represents a subset of the vessels in this area as it only includes commercial vessels (DFO 2013). To address vessel strikes in Canadian waters, the International Maritime Organization (IMO) amended the Traffic Separation Scheme in the Bay of Fundy to reroute vessels around high use areas. In 2007, IMO adopted and Canada implemented a voluntary seasonal Area to Be Avoided (ATBA) in Roseway Basin to further reduce the risk of vessel strike (DFO 2020). In addition, Canada has implemented seasonal speed restrictions and developed a proposed action plan to identify specific measures needed to address threats and achieve recovery (DFO 2020).

The Government of Canada has also implemented measures to mitigate vessel strikes in Canadian waters. Each year since August 2017, the Government has implemented seasonal speed restrictions (maximum 10 knots) for vessels 20 m or longer in the western Gulf of St. Lawrence. In 2019, the area was adjusted and the restriction was expanded to apply to vessels greater than 13 m. Smaller vessels are encouraged to respect the limit. Dynamic area management has also been used in recent years. Currently, there are two shipping lanes, south and north of Anticosti Island, where dynamic speed restrictions (mandatory slowdown to 10 knots) can be activated when right whales are present. In 2020 and 2021, the Government of Canada also implemented a trial voluntary speed restriction zone from Cabot Strait to the eastern edge of the dynamic shipping zone at the beginning and end of the season and a mandatory restricted area in or near Shediac Valley mid-season. More information is available at https://www.tc.gc.ca/en/services/marine/navigation-marine-conditions/protecting-north-atlantic-right-whales-collisions-ships-gulf-st-lawrence.html. Modifications to measures in 2021 include refining the size, location, and duration of the mandatory restricted area in and near Shediac Valley and expanding the speed limit exemption in waters less than 20 fathoms to all commercial fishing vessels. In 2022, a variety of measures were in place to reduce the risk of vessel strike including vessel speed limits and restricted access areas.

Critical Habitat

Critical habitat for North Atlantic right whales has been designated in U.S. waters as described in Section 4.0 of this Opinion.

Recovery Goals

Recovery is the process of restoring endangered and threatened species to the point where they no longer require the safeguards of the Endangered Species Act. A recovery plan serves as a road map for species recovery—the plan outlines the path and tasks required to restore and secure self-sustaining wild populations. It is a non-regulatory document that describes, justifies, and schedules the research and management actions necessary to support recovery of a species. The goal of the 2005 Recovery Plan for the North Atlantic right whale (NMFS, 2005) is to promote the recovery of North Atlantic right whales to a level sufficient to warrant their removal from the List of Endangered and Threatened Wildlife and Plants under the ESA. The intermediate recovery goal is to reclassify the species from endangered to threatened. The recovery strategy identified in the Recovery Plan focuses on reducing or eliminating deaths and injuries from anthropogenic activities, namely shipping and commercial fishing operations; developing demographically-based recovery criteria; the characterization, monitoring, and protection of important habitat; identification and monitoring of the status, trends, distribution and health of the species; conducting studies on the effects of other potential threats and ensuring that they are addressed, and conducting genetic studies to assess population structure and diversity. The plan also recognizes the need to work closely with State, other Federal, international and private entities to ensure that research and recovery efforts are coordinated. The recovery plan includes the following downlisting criteria, the achievement of which would demonstrate significant progress toward full recovery:

> North Atlantic right whales may be considered for reclassifying to threatened when all of the following have been met: 1) The population ecology (range, distribution, age structure, and gender ratios, etc.) and vital rates (age-specific survival, age-specific reproduction, and lifetime reproductive success) of right whales are indicative of an increasing population; 2) The population has increased for a period of 35 years at an average rate of increase equal to or greater than 2% per year; 3) None of the known threats to North Atlantic right whales (summarized in the five listing factors) are known to limit the population's growth rate; and 4) Given current and projected threats and environmental conditions, the right whale population has no more than a 1% chance of quasi-extinction in 100 years.

Specific criteria for delisting North Atlantic right whales are not included in the recovery plan; as described in the recovery plan, conditions related to delisting are too distant and hypothetical to realistically develop specific criteria. The current abundance of North Atlantic right whales is currently an order of magnitude less than an abundance at which NMFS would even consider delisting the species. The current dynamics indicate that the North Atlantic right whale population is in decline, rather than recovering, and decades of population growth at rates considered typical for large whales would be required before the population could attain an abundance that may suggest that delisting was appropriate to consider. Specific criteria for delisting North Atlantic right whales will be included in a future revision of the recovery plan well before the population is at a level when delisting becomes a reasonable decision (NMFS 2005).

The most recent five-year review for right whales was completed in 2022 (NMFS 2022). The recommendation in that plan was for the status to remain as endangered. As described in the report, the North Atlantic right whale faces continued threat of human-caused mortality due to lethal interactions with commercial fisheries and vessel traffic. As stated in the 5-Year Review, there is also uncertainty regarding the effect of long-term sublethal entanglements, emerging environmental stressors including climate change, and the compounding effects of multiple continuous stressors that may be limiting North Atlantic right whale calving and recovery. In addition, the North Atlantic right whale population has been in a state of decline since 2010. Management measures in the United States have been in place for an extended period of time and continued modifications are underway/anticipated, and measures in Canada since 2017 also suggest continued progress toward implementing conservation regulations. Despite these efforts to reduce the decline and promote recovery, progress toward right whale recovery has continued to regress.

5.1.2 Fin Whale (Balaenoptera physalus)

Globally there is one species of fin whale, *Balaenoptera physalus*. Fin whales occur in all major oceans of the Northern and Southern Hemispheres (NMFS 2010a) (Figure 5.1.3). Within this range, three subspecies of fin whales are recognized: *B. p. physalus* in the Northern Hemisphere, and *B. p. quoyi* and *B. p. patachonica* (a pygmy form) in the Southern Hemisphere (NMFS 2010a). For management purposes in the northern Hemisphere, the United States divides, *B. p. physalus,* into four stocks: Hawaii, California/Oregon/Washington, Alaska (Northeast Pacific), and Western North Atlantic (Hayes et al. 2019, NMFS 2010a).

Figure 5.1.3. Range of the fin whale

Fin whales are distinguishable from other whales by a sleek, streamlined body, with a V-shaped head, a tall hooked dorsal fin, and a distinctive color pattern of a black or dark brownish-gray body and sides with a white ventral surface. The lower jaw is gray or black on the left side and creamy white on the right side. The fin whale was listed as endangered on December 2, 1970 (35 FR 18319).

Information available from the recovery plan (NMFS 2010a), recent stock assessment reports (Carretta et al. 2019a, Hayes et al. 2022, Muto et al. 2019), the five-year status review (NMFS 2019b), as well as the recent International Union for the Conservation of Nature's (IUCN) fin whale assessment (Cooke 2018b) were used to summarize the life history, population dynamics and status of the species as follows.

Life History

Fin whales can live, on average, 80 to 90 years. They have a gestation period of less than one year, and calves nurse for six to seven months. Sexual maturity is reached between 6 and 10 years of age with an average calving interval of two to three years. They mostly inhabit deep, offshore waters of all major oceans. They winter at low latitudes, where they calve and nurse, and summer at high latitudes, where they feed, although some fin whales appear to be residential to certain areas.

Population Dynamics
The pre-exploitation estimate for the fin whale population in the entire North Atlantic was approximately 30,000-50,000 animals (NMFS 2010a), and for the entire North Pacific Ocean, approximately 42,000 to 45,000 animals (Ohsumi and Wada 1974). In the Southern Hemisphere, prior to exploitation, the fin whale population was approximately 40,000 whales (Mizroch et al. 1984b). In the North Atlantic Ocean, fin whales were heavily exploited from 1864 to the 1980s; over this timeframe, approximately 98,000 to 115,000 fin whales were killed (IWC 2017). Between 1910-1975, approximately 76,000 fin whales were recorded taken by modern whaling in the North Pacific; this number is likely higher as many whales killed were not identified to species or while killed, were not successfully landed (Allison 2017). Over 725,000 fin whales were killed in the Southern Hemisphere from 1905 to 1976 (Allison 2017).

In the North Atlantic Ocean, the IWC has defined seven management stocks of fin whales: (1) North Norway (2) East Greenland and West Iceland (EGI); (3) West Norway and the Faroes; (4) British Isles, Spain and Portugal; (5) West Greenland and (6) Nova Scotia, (7) Newfoundland and Labrador (Donovan 1991, NMFS 2010a). Based on three decades of survey data in various portions of the North Atlantic, the IWC estimates that there are approximately 79,000 fin whales in this region. Under the present IWC scheme, fin whales off the eastern United States, Nova Scotia and the southeastern coast of Newfoundland are believed to constitute a single stock; in U.S. waters, NMFS classifies these fin whales as the Western North Atlantic stock (Donovan 1991, Hayes et al. 2019, NMFS 2010a). NMFS' best estimate of abundance for the Western North Atlantic Stock of fin whales is 6,802 individuals (N_{min}=5,573); this estimate is the sum of the 2016 NOAA shipboard and aerial surveys and the 2016 Canadian Northwest Atlantic International Sightings Survey (Hayes et al. 2022). Currently, there is no population estimate for the entire fin whale population in the North Pacific (Cooke 2018b). However, abundance estimates for three stocks in U.S. Pacific Ocean waters do exist: Northeast Pacific (N= 3,168; N_{min}=2,554), Hawaii (N=154; N_{min}=75), and California/Oregon/Washington (N= 9,029; N_{min}=8,127) (Nadeem et al. 2016). Abundance data for the Southern Hemisphere stock remain highly uncertain; however, available information suggests a substantial increase in the population has occurred (Thomas et al. 2016).

In the North Atlantic, estimates of annual growth rate for the entire fin whale population in this region is not available (Cooke 2018b). However, in U.S. Atlantic waters NMFS has determined that until additional data are available, the cetacean maximum theoretical net productivity rate of 4.0% will be used for the Western North Atlantic stock (Hayes et al. 2019). In the North Pacific, estimates of annual growth rate for the entire fin whale population in this region is not available (Cooke 2018b). However, in U.S. Pacific waters, NMFS has determined that until additional data are available, the cetacean maximum theoretical net productivity rate of 4.0% will be used for the Northeast Pacific stock (Muto et al. 2019, NMFS 2016b). Overall population growth rates and total abundance estimates for the Hawaii stock of fin whales are not available at this time (Carretta et al. 2018). Based on line transect studies between 1991-2014, there was estimated a 7.5% increase in mean annual abundance in fin whales occurring in waters off California, Oregon, and Washington; to date, this represents the best available information on the current population trend for the overall California/Oregon/Washington stock of fin whales (Carretta et al. 2019a, Nadeem et al. 2016).[26] For Southern Hemisphere fin whales, as noted above, overall information suggests a substantial increase in the population; however, the rate of increase remains poorly quantified (Cooke 2018b).

Archer et al. (2013) examined the genetic structure and diversity of fin whales globally. Full sequencing of the mitochondrial DNA genome for 154 fin whales sampled in the North Atlantic Ocean, North Pacific Ocean, and Southern Hemisphere, resulted in 136 haplotypes, none of which were shared among ocean basins suggesting differentiation at least at this geographic scale. However, North Atlantic fin whales appear to be more closely related to the Southern Hemisphere population, as compared to fin whales in the North Pacific Ocean, which may indicate a revision of the subspecies delineations is warranted. Generally, haplotype diversity was found to be high both within and across ocean basins (Archer et al. 2013). Such high genetic diversity and lack of differentiation within ocean basins may indicate that despite some populations having small abundance estimates, the species may persist long-term and be somewhat protected from substantial environmental variance and catastrophes. Archer et al. 2019 suggests that within the Northern Hemisphere, populations in the North Pacific and North Atlantic oceans can be considered at least different subspecies, if not different species.

Status

The fin whale is endangered because of past commercial whaling. Prior to commercial whaling, hundreds of thousands of fin whales existed. Fin whales may be killed under “aboriginal subsistence whaling” in Greenland, under Japan’s scientific whaling program, and Iceland’s formal objection to the IWC’s ban on commercial whaling. Additional threats include vessel strikes, reduced prey availability due to overfishing or climate change, and sound. The species’ overall large population size may provide some resilience to current threats, but trends are largely unknown. The total annual estimated average human-caused mortality and serious injury for the western North Atlantic fin whale for the period 2015–2019 is 1.85 (1.45 incidental fishery interactions and 0.40 vessel collisions) (Henry et al. 2022). Hayes et al. 2022 notes that these represent a minimum estimate of human-caused mortality, which is, almost certainly biased low.

Critical Habitat

No critical habitat has been designated for the fin whale.

Recovery Goals

The goal of the 2010 Recovery Plan for the fin whale (NMFS 2010a) is to promote the recovery of fin whales to the point at which they can be downlisted from endangered to threatened status, and ultimately to remove them from the list of Endangered and Threatened Wildlife and Plants, under the provisions of the ESA. The intermediate goal is to reclassify the species from endangered to threatened. The recovery plan also includes downlisting and delisting criteria. Key elements for the recovery program for fin whales are:

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[26] Since 2005, the fin whale abundance increase has been driven by increases off northern California, Oregon, and Washington; numbers off Central and Southern California have remained stable (Carretta et al. 2020, Nadeem et al. 2016).

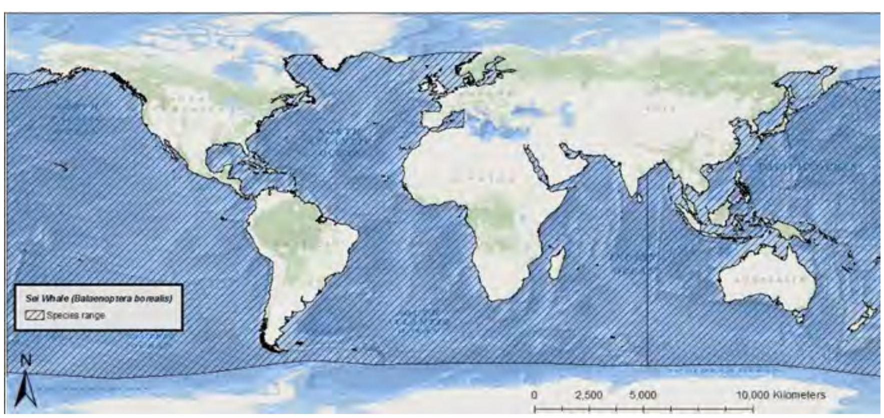
1. Coordinate state, federal, and international actions to implement recovery actions and maintain international regulation of whaling for fin whales;
2. Determine population discreteness and population structure of fin whales;
3. Develop and apply methods to estimate population size and monitor trends in abundance;
4. Conduct risk analysis;
5. Identify, characterize, protect, and monitor habitat important to fin whale populations in U.S. waters and elsewhere;
6. Investigate causes and reduce the frequency and severity of human-caused injury and mortality;
7. Determine and minimize any detrimental effects of anthropogenic noise in the oceans;
8. Maximize efforts to acquire scientific information from dead, stranded, and/or entrapped fin whales; and,
9. Develop post-delisting monitoring plan.

In February 2019, NMFS published a Five-Year Review for fin whales. This 5-year review indicates that, based on a review of the best available scientific and commercial information, that the fin whale should be downlisted from endangered to threatened. The review also recommended that NMFS consider whether listing at the subspecies or distinct population segment level is appropriate in terms of potential conservation benefits and the use of limited agency resources (NMFS 2019). To date, no changes to the listing for fin whales have been proposed.

5.1.3 Sei Whale (Balaenoptera borealis)

Globally there is one species of sei whale, *Balaenoptera borealis borealis*. Sei whales occur in subtropical, temperate, and subpolar marine waters across the Northern and Southern Hemispheres (Figure 5.1.4) (Cooke 2018a, NMFS 2011a). For management purposes, in the Northern Hemisphere, the United States recognizes four sei whale stocks: Hawaii, Eastern North Pacific, and Nova Scotia (NMFS 2011a).

Figure 5.1.4. Range of the sei whale



Sei whales are distinguishable from other whales by a long, sleek body that is dark bluish-gray to black in color and pale underneath, and a single ridge located on their rostrum. The sei whale was listed as endangered on December 2, 1970 (35 FR 18319).

Information available from the recovery plan (NMFS 2011a), recent stock assessment reports (Carretta et al. 2019a, Hayes et al. 2022, Hayes et al. 2017), 5-Year Review (NMFS 2021), as well as the recent IUCN sei whale assessment (Cooke 2018a) were used to summarize the life history, population dynamics and status of the species as follows.

Life History

Sei whales can live, on average, between 50 and 70 years. They have a gestation period of 10 to 12 months, and calves nurse for six to nine months. Sexual maturity is reached between 6 and 12 years of age with an average calving interval of two to three years. Sei whales mostly inhabit continental shelf and slope waters far from the coastline. They winter at low latitudes, where they calve and nurse, and summer at high latitudes, where they feed on a range of prey types, including: plankton (copepods and krill), small schooling fishes, and cephalopods.

Population Dynamics

There are no estimates of pre-exploitation sei whale abundance in the entire North Atlantic Ocean; however, approximately 17,000 sei whales were documented caught by modern whaling in the North Atlantic (Allison 2017). In the North Pacific, the pre-whaling sei abundance was estimated to be approximately 42,000 (Tillman 1977 as cited in (NMFS 2011a)). In the Southern Hemisphere, approximately 63,100 to 65,000 occurred in the Southern Hemisphere prior to exploitation (Mizroch et al. 1984a, NMFS 2011a).

In 1989, the entire North Atlantic sei whale population was estimated to be 10,300 whales (Cattanach et al. 1993 as cited in (NMFS 2011a). While other surveys have been completed in portions of the North Atlantic since 1989, the survey coverage levels in these studies are not as complete as those done in Cattanach et al. (1993) (Cooke 2018a). As a result, to date, updated abundance estimates for the entire North Atlantic population of sei whales are not available. However, in the western North Atlantic, Palka et al. (2017) has provided a recent abundance estimate for the Nova Scotia stock of sei whales. Based on survey data collected from Halifax, Nova Scotia, to Florida between 2010 and 2013, it is estimated that there are approximately 6,292 sei whales (N_{min}=3,098) (Palka et al. 2017); this estimate is considered the best available scientific information for the Nova Scotia stock (NMFS 2021). In the North Pacific, an abundance estimate for the entire North Pacific population of sei whales is not available. However, in the western North Pacific, it is estimated that there are 35,000 sei whales (Cooke 2018a). In the eastern North Pacific (considered east of longitude 180^{o}), two stocks of sei whales occur in U.S. waters: Hawaii and Eastern North Pacific. Abundance estimates for the Hawaii stock are 391 sei whales (N_{min}=204), and for Eastern North Pacific stock, 519 sei whales (N_{min}=374) (Carretta et al. 2019a). In the Southern Hemisphere, recent abundance of sei whales is estimated at 9,800 to 12,000 whales. Population growth rates for sei whales are not available at this time as there are little to no systematic survey efforts to study sei whales; however, in U.S. waters, NMFS has determined that until additional data is available, the cetacean maximum theoretical net productivity rate of 4.0% will be used for the Hawaii, Eastern North Pacific, and Hawaii stocks of sei whales (Hayes 2019).

Based on genetic analyses, there appears to be some differentiation between sei whale populations in different ocean basins. In an early analysis of genetic variation in sei whales, some differences between Southern Ocean and the North Pacific sei whales were detected (Wada and Numachi 1991). However, more recent analyses of mtDNA control region variation show no significant differentiation between Southern Ocean and the North Pacific sei whales, though both appear to be genetically distinct from sei whales in the North Atlantic (Huijser et al. 2018). Within each ocean basin, there appears to be intermediate to high genetic diversity and little genetic differentiation despite there being different managed stocks (Danielsdottir et al. 1991, Kanda et al. 2011, Kanda et al. 2006, Kanda et al. 2013, Kanda et al. 2015).

Status
The sei whale is endangered because of past commercial whaling. Now, only a few individuals are taken each year by Japan. Current threats include vessel strikes, fisheries interactions (including entanglement), climate change (habitat loss and reduced prey availability), and anthropogenic sound. Given the species' overall abundance, they may be somewhat resilient to current threats. However, trends are largely unknown, especially for individual stocks, many of which have relatively low abundance estimates. The most recent 5-year average human-caused mortality and serious injury rate for sei whales in the North Atlantic is 0.80 (0.4 incidental fishery interactions, 0.2 vessel collisions, 0.2 other human-caused mortality; Hayes et al. 2022). These represent a minimum estimate of human-caused mortality, which is almost certainly biased low.

Critical Habitat
No critical habitat has been designated for the sei whale.

Recovery Goals
The 2011 Recovery Plan for the sei whale (NMFS 2011b) indicates that, "because the current population status of sei whales is unknown, the primary purpose of this Recovery Plan is to provide a research strategy to obtain data necessary to estimate population abundance, trends, and structure and to identify factors that may be limiting sei whale recovery." The goal of the Recovery Plan is to promote the recovery of sei whales to the point at which they can be downlisted from Endangered to Threatened status, and ultimately to remove them from the list of Endangered and Threatened Wildlife and Plants, under the provisions of the ESA. The intermediate goal is to reclassify the species from endangered to threatened. The recovery plan incorporates an adaptive management strategy that divides recovery actions into three tiers. Tier I involves: 1) continued international regulation of whaling (i.e., a moratorium on commercial sei whaling); 2) determining population size, trends, and structure using opportunistic data collection in conjunction with passive acoustic monitoring, if determined to be feasible; and 3) continued stranding response and associated data collection.

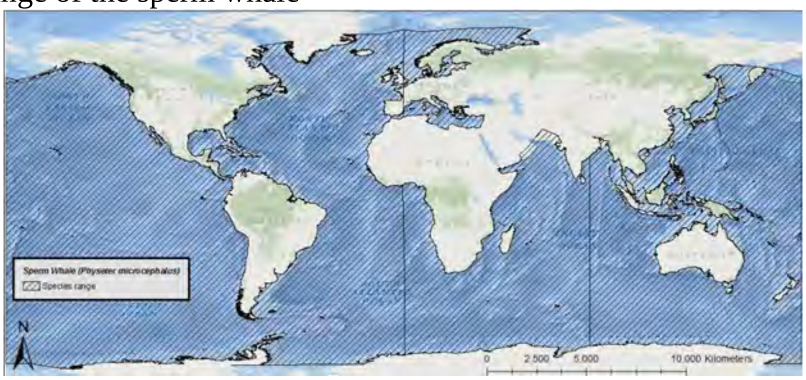
NMFS completed the most recent five-year review for sei whales in 2021 (NMFS 2021). In that review, NMFS concluded that the listing status should remain unchanged. They also concluded that recovery criteria outlined in the sei whale recovery plan (NMFS 2011b) do not reflect the best available and most up-to date information on the biology of the species. The 5-Year review states that currently, there is insufficient data to undertake an assessment of the sei whale's present status due to a number of uncertainties and unknowns for this species: (1) lack of scientifically reliable population estimates for the North Atlantic and Southern Hemisphere; (2) lack of comprehensive information on status and trends; (3) existence of critical knowledge gaps;

and (4) emergence of potential new threats. Thus, further research is needed to fill critical knowledge gaps.

5.1.4 Sperm Whale (Physter macrocephalus)

Globally there is one species of sperm whale, *Physeter macrocephalus*. Sperm whales occur in all major oceans of the Northern and Southern Hemispheres (NMFS 2010b)(Figure 5.1.5). For management purposes, in the Northern Hemisphere, the United States recognizes six sperm whale stocks: California/Oregon/Washington, Hawaii, North Pacific, North Atlantic, Northern Gulf of Mexico, and Puerto Rico and the U.S. Virgin Islands (NMFS 2010b); see NMFS Marine Mammal Stock Assessment Reports: https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-species-stock).

Figure 5.1.5. Range of the sperm whale



The sperm whale is the largest toothed whale and distinguishable from other whales by its extremely large head, which takes up 25 to 35% of its total body length and a single blowhole asymmetrically situated on the left side of the head near the tip. The sperm whale was originally listed as endangered on December 2, 1970 (35 FR 18319).

Information available from the recovery plan (NMFS 2010b), recent stock assessment reports (Carretta et al. 2018, Hayes et al. 2020, Muto et al. 2019), status review (NMFS 2015b), as well as the recent IUCN sperm whale assessment (Taylor et al. 2019) were used to summarize the life history, population dynamics and status of the species as follows.

Life History

The average lifespan of sperm whales is estimated to be at least 50 years (Whitehead 2009). They have a gestation period of one to one and a half years, and calves nurse for approximately two years, though they may begin to forage for themselves within the first year of life (Tønnesen et al. 2018). Sexual maturity is reached between 7 and 13 years of age for females with an average calving interval of four to six years. Male sperm whales reach full sexual maturity in their 20s. Sperm whales mostly inhabit areas with a water depth of 600 m or more, and are uncommon in waters less than 300 m deep. They winter at low latitudes, where they calve and nurse, and summer at high latitudes, where they feed primarily on squid; other prey includes octopus and demersal fish (including teleosts and elasmobranchs).

Population Dynamics

Pre-whaling, the global population of sperm whales was estimated to be approximately 1,100,000 animals (Taylor et al. 2019, Whitehead 2002). By 1880, due to whaling, the population was approximately 71% of its original level (Whitehead 2002). In 1999, ten years after the end of large-scale whaling, the population was estimated to be about 32% of its original level (Whitehead 2002).

The most recent global sperm whale population estimate is 360,000 whales (Whitehead 2009). There are no reliable estimates for sperm whale abundance across the entire (North and South) Atlantic Ocean. However, estimates are available for two of three U.S. stocks in the western North Atlantic Ocean; the Northern Gulf of Mexico stock is estimated to consist of 763 individuals (N_{min}=560) (Waring et al. 2016) and the North Atlantic stock is estimated to consist of 4,349 individuals (N_{min}=3,451) (Hayes 2019). There are insufficient data to estimate abundance for the Puerto Rico and U.S. Virgin Islands stock. Similar to the Atlantic Ocean, there are no reliable estimates for sperm whale abundance across the entire (North and South) Pacific Ocean. However, estimates are available for two of three U.S. stocks that occur in the eastern Pacific; the California/Oregon/ Washington stock is estimated to consist of 1,997 individuals (N_{min}=1,270; Carretta et al. 2019b), and the Hawaii stock is estimated to consist of 4,559 individuals (N_{min}=3,478) (Carretta et al. 2019a). We are aware of no reliable abundance estimates for sperm whales in other major oceans in the Northern and Southern Hemispheres. Although maximum net productivity rates for sperm whales have not been clearly defined, population growth rates for sperm whale populations are expected to be low (i.e., no more than 1.1% per year) (Whitehead 2002). In U.S. waters, NMFS determined that, until additional data is available, the cetacean maximum theoretical net productivity rate of 4.0% will be used for, among others, the North Atlantic, Northern Gulf of Mexico, and Puerto Rico and the U.S. Virgin Islands stocks of sperm whales (Carretta et al. 2019a, Carretta et al. 2019b, Hayes 2019, Muto et al. 2019, Waring et al. 2010, Waring et al. 2016).

Ocean-wide genetic studies indicate sperm whales have low genetic diversity, suggesting a recent bottleneck, but strong differentiation between matrilineally related groups (Lyrholm and Gyllensten 1998). Consistent with this, two studies of sperm whales in the Pacific Ocean indicate low genetic diversity (Mesnick et al. 2011, Rendell et al. 2012). Furthermore, sperm whales from the Gulf of Mexico, the western North Atlantic Ocean, the North Sea, and the Mediterranean Sea all have been shown to have low levels of genetic diversity (Engelhaupt et al. 2009). As none of the stocks for which data are available have high levels of genetic diversity, the species may be at some risk to inbreeding and 'allee' effects[27], although the extent to which is currently unknown. Sperm whales have a global distribution and can be found in relatively deep waters in all ocean basins. While both males and females can be found in latitudes less than 40 degrees, only adult males venture into the higher latitudes near the poles.

Status

The sperm whale is endangered as a result of past commercial whaling. Although the aggregate abundance worldwide is probably at least several hundred thousand individuals, the extent of depletion and degree of recovery of populations are uncertain. Commercial whaling is no longer allowed, however, illegal hunting may occur. Continued threats to sperm whale populations

[27] Allee effects are broadly characterized as a decline in individual fitness in populations with a small size or density.

include vessel strikes, entanglement in fishing gear, competition for resources due to overfishing, loss of prey and habitat due to climate change, and sound. The Deepwater Horizon Natural Resource Damage Assessment Trustees assessed effects of oil exposure on sea turtles and marine mammals. Sperm whales in the Gulf of Mexico were impacted by the oil spill with 3% of the stock estimated to have died (DWH NRDA Trustees 2016). The most recent SAR for sperm whales in the North Atlantic notes that there were no documented reports of fishery-related mortality or serious injury to the North Atlantic stock in the U.S. EEZ during 2013–2017 (Hayes et al. 2020); there are also no reports in NMFS records from 2018-2023. The species' large population size shows that it is somewhat resilient to current threats.

Critical Habitat
No critical habitat has been designated for the sperm whale.

Recovery Goals
The goal of the Recovery Plan is to promote recovery of sperm whales to a point at which they can be downlisted from endangered to threatened status, and ultimately to remove them from the list of Endangered and Threatened Wildlife and Plants, under the provisions of the ESA. The primary purpose of the Recovery Plan is to identify and take actions that will minimize or eliminate effects of human activities that are detrimental to the recovery of sperm whale populations. Immediate objectives are to identify factors that may be limiting abundance, recovery, and/or productivity, and cite actions necessary to allow the populations to increase. The Recovery Plan includes downlisting and delisting criteria (NMFS 2010b).

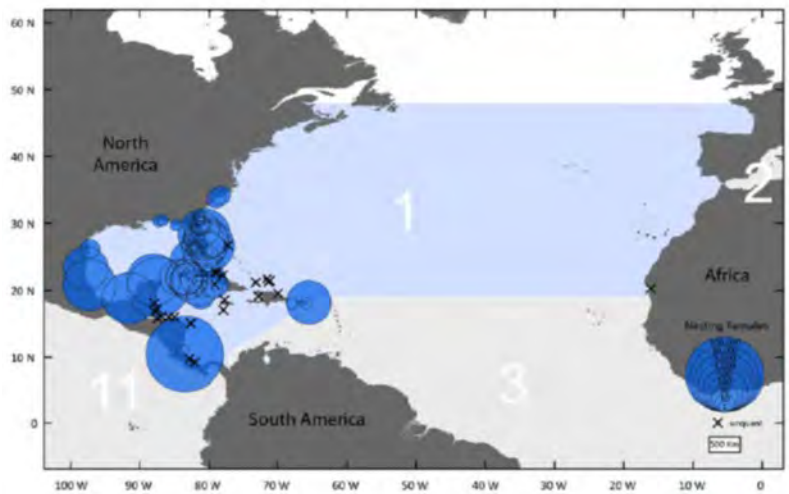
The most recent Five-Year Review for sperm whales was completed in 2015 (NMFS 2015). In that review, NMFS concluded that no change to the listing status was recommended.

5.2 Sea Turtles
Kemp's ridley and leatherback sea turtles are currently listed under the ESA at the species level; green and loggerhead sea turtles are listed at the DPS level. Therefore, we include information on the range-wide status of Kemp's ridley and leatherback sea turtles to provide the overall status of each species. Information on the status of loggerhead and green sea turtles is for the DPS affected by this action.

5.2.1 Green Sea Turtle (Chelonia mydas, North Atlantic DPS)
The green sea turtle has a circumglobal distribution, occurring throughout tropical, subtropical and, to a lesser extent, temperate waters. They commonly inhabit nearshore and inshore waters. It is the largest of the hardshell marine turtles, growing to a weight of approximately 350 lbs. (159 kg) and a straight carapace length of greater than 3.3 ft. (1 m). The species was listed under the ESA on July 28, 1978 (43 FR 32800) as endangered for breeding populations in Florida and the Pacific coast of Mexico and threatened in all other areas throughout its range. On April 6, 2016, NMFS listed 11 DPSs of green sea turtles as threatened or endangered under the ESA (81 FR 20057). The North Atlantic DPS of green turtle is found in the North Atlantic Ocean and Gulf of Mexico (Figure 5.2.1) and is listed as threatened. Green turtles from the North Atlantic DPS range from the boundary of South and Central America (7.5° N, 77° W) in the south, throughout the Caribbean, the Gulf of Mexico, and the U.S. Atlantic coast to New Brunswick,

Canada (48° N, 77° W) in the north. The range of the DPS then extends due east along latitudes 48° N and 19° N to the western coasts of Europe and Africa.

Figure 5.2.1. Range of the North Atlantic distinct population segment green turtle (1), with location and abundance of nesting females (Seminoff et al. 2015).



We used information available in the 2015 Status Review (Seminoff et al. 2015), relevant literature, and recent nesting data from the Florida Fish and Wildlife Conservation Commission's Fish and Wildlife Research Institute (FWRI) to summarize the life history, population dynamics and status of the species, as follows.

Life History

Costa Rica (Tortuguero), Mexico (Campeche, Yucatan, Quintana Roo), United States (Florida) and Cuba support nesting concentrations of particular interest in the North Atlantic DPS (Seminoff et al. 2015). The largest nesting site in the North Atlantic DPS is in Tortuguero, Costa Rica, which hosts 79% of nesting females for the DPS (Seminoff et al. 2015). In the southeastern United States, females generally nest between May and September (Seminoff et al. 2015, Witherington et al. 2006). Green sea turtles lay an average of three nests per season with an average of one hundred eggs per nest (Hirth 1997, Seminoff et al. 2015). The remigration interval (period between nesting seasons) is two to five years (Hirth 1997, Seminoff et al. 2015). Nesting occurs primarily on beaches with intact dune structure, native vegetation, and appropriate incubation temperatures during the summer months.

Sea turtles are long-lived animals. Size and age at sexual maturity have been estimated using several methods, including mark-recapture, skeletochronology, and marked known-aged individuals. Skeletochronology analyzes growth marks in bones to obtain growth rates and age at sexual maturity estimates. Estimates vary widely among studies and populations, and methods continue to be developed and refined (Avens and Snover 2013). Early mark-recapture studies in Florida estimated the age at sexual maturity 18-30 years (Frazer and Ehrhart 1985, Goshe et al. 2010, Mendonça 1981). More recent estimates of age at sexual maturity are as high as 35–50 years (Avens and Snover 2013, Goshe et al. 2010), with lower ranges reported from known age

(15–19 years) turtles from the Cayman Islands (Bell et al. 2005) and Caribbean Mexico (12–20 years) (Zurita et al. 2012). A study of green turtles that use waters of the southeastern United States as developmental habitat found the age at sexual maturity likely ranges from 30 to 44 years (Goshe et al. 2010). Green turtles in the Northwestern Atlantic mature at 2.8-33+ ft. (85–100+ cm) straight carapace lengths (SCL) (Avens and Snover 2013).

Adult turtles exhibit site fidelity and migrate hundreds to thousands of kilometers from nesting beaches to foraging areas. Green sea turtles spend the majority of their lives in coastal foraging grounds, which include open coastlines and protected bays and lagoons. Adult green turtles feed primarily on seagrasses and algae, although they also eat other invertebrate prey (Seminoff et al. 2015).

Population Dynamics

The North Atlantic DPS has a globally unique haplotype, which was a factor in defining the discreteness of the DPS. Evidence from mitochondrial DNA studies indicates that there are at least four independent nesting subpopulations in Florida, Cuba, Mexico, and Costa Rica (Seminoff et al. 2015). More recent genetic analysis indicates that designating a new western Gulf of Mexico management unit might be appropriate (Shamblin et al. 2016).

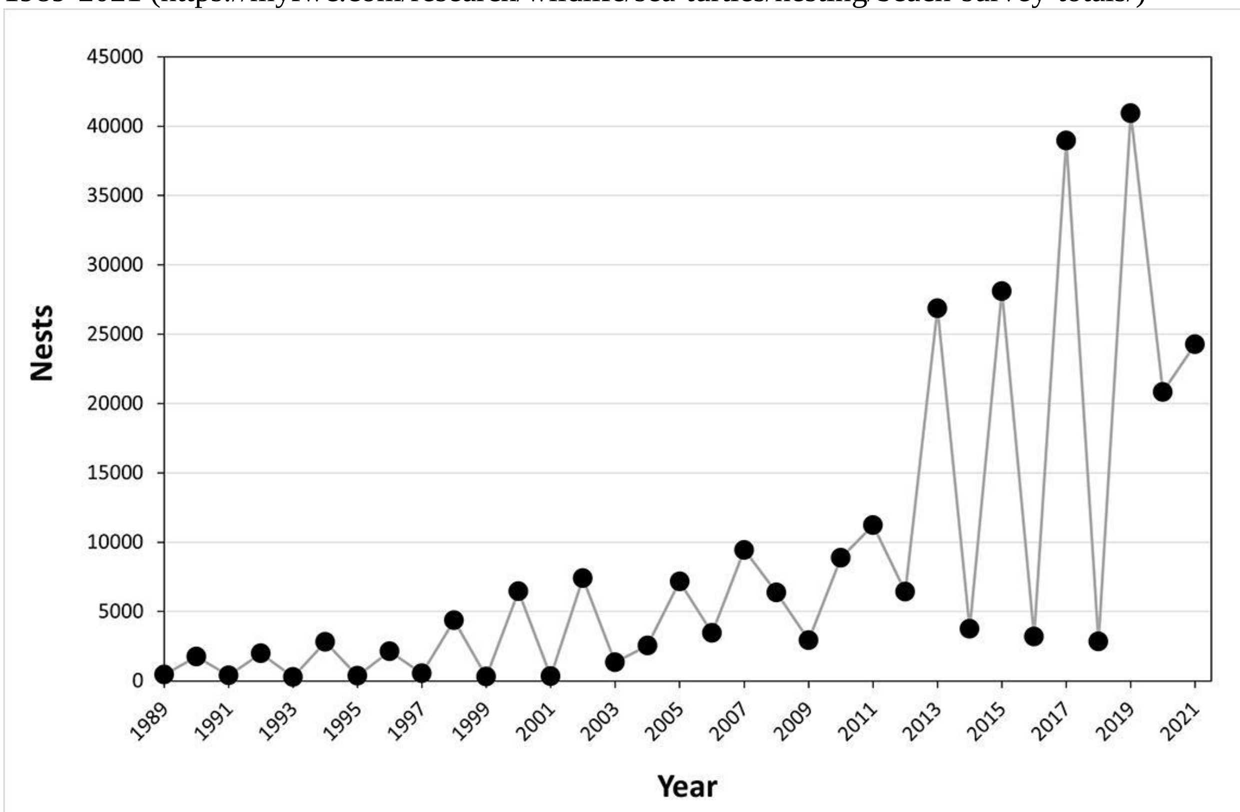
Compared to other DPSs, the North Atlantic DPS exhibits the highest nester abundance, with approximately 167,424 females at seventy-three nesting sites (using data through 2012), and available data indicated an increasing trend in nesting (Seminoff et al. 2015). Counts of nests and nesting females are commonly used as an index of abundance and population trends, even though there are doubts about the ability to estimate the overall population size.

There are no reliable estimates of population growth rate for the DPS as a whole, but estimates have been developed at a localized level. The status review for green sea turtles assessed population trends for seven nesting sites with more than10 years of data collection in the North Atlantic DPS. The results were variable with some sites showing no trend and others increasing. However, all major nesting populations (using data through 2011-2012) demonstrated increases in abundance (Seminoff et al. 2015)).

Recent data is available for the southeastern United States. The FWRI monitors sea turtle nesting through the Statewide Nesting Beach Survey (SNBS) and Index Nesting Beach Survey (INBS). Since 1979, the SNBS has surveyed approximately 215 beaches to collect information on the distribution, seasonality, and abundance of sea turtle nesting in Florida. Since 1989, the INBS has been conducted on a subset of SNBS beaches to monitor trends through consistent effort and specialized training of surveyors. The INBS data uses a standardized data-collection protocol to allow for comparisons between years and is presented for green, loggerhead, and leatherback sea turtles. The index counts represent 27 core index beaches and do not represent Florida's total annual nest counts because they are collected only on a subset of Florida's beaches (27 out of 224 beaches) and only during a 109-day time window (15 May through 31 August). The index nest counts represent approximately 67% of known green turtle nesting in Florida (https://myfwc.com/research/wildlife/sea-turtles/nesting/beach-survey-totals/).

Green turtle nest counts have increased eightyfold since standardized nest counts began in 1989. In 2021, green turtle nest counts on the 27-core index beaches reached more than 24,000 nests recorded. Nesting green turtles tend to follow a two-year reproductive cycle and, typically, there are wide year-to-year fluctuations in the number of nests recorded. Green turtles set record highs in 2011, 2013, 2015, 2017, and 2019. The nest count in 2021 did not set another record high but was only marginally higher than 2020, an unusually high "low year." FWRI reports that changes in the typical two-year cycle have been documented in the past as well (e.g., 2010-2011) and are not reason of concern.

Figure 5.2.2. Number of green sea turtle nests counted on core index beaches in Florida from 1989-2021 (https://myfwc.com/research/wildlife/sea-turtles/nesting/beach-survey-totals/)



Status
Historically, green sea turtles in the North Atlantic DPS were hunted for food, which was the principal cause of the population's decline. Apparent increases in nester abundance for the North Atlantic DPS in recent years are encouraging but must be viewed cautiously, as the datasets represent a fraction of a green sea turtle generation, which is between 30 and 40 years (Seminoff et al. 2015). While the threats of pollution, habitat loss through coastal development, beachfront lighting, and fisheries bycatch continue, the North Atlantic DPS appears to be somewhat resilient to future perturbations.

Critical Habitat
Critical habitat for the North Atlantic DPS of green sea turtles surrounds Culebra Island, Puerto Rico (66 FR 20058, April 6, 2016), which is outside the action area. On July 19, 2023, NMFS

published a proposed rule to designate specific areas in the marine environment as critical habitat for six DPSs of the green sea turtle, including the North Atlantic DPS. A portion of the proposed critical habitat overlaps with the action area; however, we have not identified any effects of the action on the proposed critical habitat.

Recovery Goals
The most recent Recovery Plan for the U.S. population of green sea turtles in the Atlantic was published in 1991. The goal of the 1991 Recovery Plan is to delist the species once the recovery criteria are met (NMFS and U.S.FWS 1991). The recovery plan includes criteria for delisting related to nesting activity, nesting habitat protection, and reduction in mortality.

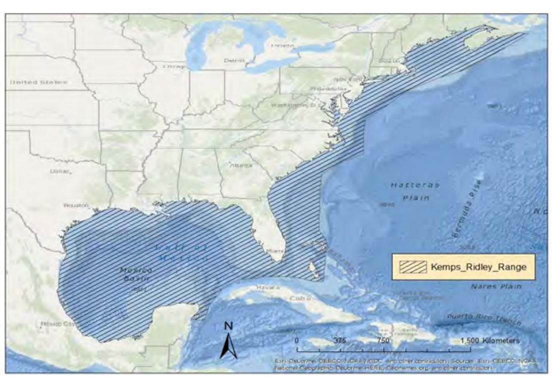
Priority actions to meet the recovery goals include:

1. Providing long-term protection to important nesting beaches.
2. Ensuring at least a 60% hatch rate success on major nesting beaches.
3. Implementing effective lighting ordinances/plans on nesting beaches.
4. Determining distribution and seasonal movements of all life stages in the marine environment.
5. Minimizing commercial fishing mortality.
6. Reducing threat to the population and foraging habitat from marine pollution.

5.2.2 Kemp's Ridley Sea Turtle (Lepidochelys kempii)
The range of Kemp's ridley sea turtles extends from the Gulf of Mexico to the Atlantic coast (Figure 5.2.3). They have occasionally been found in the Mediterranean Sea, which may be due to migration expansion or increased hatchling production (Tomás and Raga 2008). They are the smallest of all sea turtle species, with a nearly circular top shell and a pale yellowish bottom shell. The species was first listed under the Endangered Species Conservation Act (35 FR 18319, December 2, 1970) in 1970. The species has been listed as endangered under the ESA since 1973.

We used information available in the revised recovery plan (NMFS et al. 2011), the five-year review (NMFS and USFWS 2015), and published literature to summarize the life history, population dynamics and status of the species, as follows.

Figure 5.2.3. Range of the Kemp's ridley sea turtle



Life History
Kemp’s ridley nesting is essentially limited to the western Gulf of Mexico. Approximately 97% of the global population’s nesting activity occurs on a 90-mile (146-km) stretch of beach that includes Rancho Nuevo in Mexico (Wibbels and Bevan 2019). In the United States, nesting occurs primarily in Texas and occasionally in Florida, Alabama, Georgia, South Carolina, and North Carolina (NMFS and USFWS 2015). Nesting occurs from April to July in large arribadas (synchronized large-scale nesting). The average remigration interval is two years, although intervals of 1 and 3 years are not uncommon (NMFS et al. 2011, TEWG 1998, 2000). Females lay an average of 2.5 clutches per season (NMFS et al. 2011). The annual average clutch size is 95 to 112 eggs per nest (NMFS and USFWS 2015). The nesting location may be particularly important because hatchlings can more easily migrate to foraging grounds in deeper oceanic waters, where they remain for approximately two years before returning to nearshore coastal habitats (Epperly et al. 2013, NMFS and USFWS 2015, Snover et al. 2007). Modeling indicates that oceanic-stage Kemp’s ridley turtles are likely distributed throughout the Gulf of Mexico into the northwestern Atlantic (Putman et al. 2013). Kemp’s ridley nearing the age when recruitment to nearshore waters occurs are more likely to be distributed in the northern Gulf of Mexico, eastern Gulf of Mexico, and the western Atlantic (Putman et al. 2013).

Several studies, including those of captive turtles, recaptured turtles of known age, mark-recapture data, and skeletochronology, have estimated the average age at sexual maturity for Kemp’s ridleys between 5 to 12 years (captive only) (Bjorndal et al. 2014), 10 to 16 years (Chaloupka and Zug 1997, Schmid and Witzell 1997, Schmid and Woodhead 2000, Zug et al. 1997), 9.9 to 16.7 years (Snover et al. 2007), 10 and 18 years (Shaver and Wibbels 2007), 6.8 to 21.8 years (mean 12.9 years) (Avens et al. 2017).

During spring and summer, juvenile Kemp’s ridleys generally occur in the shallow coastal waters of the northern Gulf of Mexico from south Texas to north Florida and along the U.S. Atlantic coast from southern Florida to the Mid-Atlantic and New England. The NEFSC caught a juvenile Kemp’s ridley during a research project in deep water south of Georges Bank (NEFSC, unpublished data). In the fall, most Kemp’s ridleys migrate to deeper or more southern, warmer waters and remain there through the winter. As adults, many turtles remain in the Gulf of Mexico, with only occasional occurrence in the Atlantic Ocean (NMFS et al. 2011). Adult habitat largely consists of sandy and muddy areas in shallow, nearshore waters less than 120 ft (37 m) deep (Seney and Landry 2008, Shaver et al. 2005, Shaver and Rubio 2008), although they can also be found in deeper offshore waters. As larger juveniles and adults, Kemp’s ridleys forage on swimming crabs, fish, mollusks, and tunicates (NMFS et al. 2011).

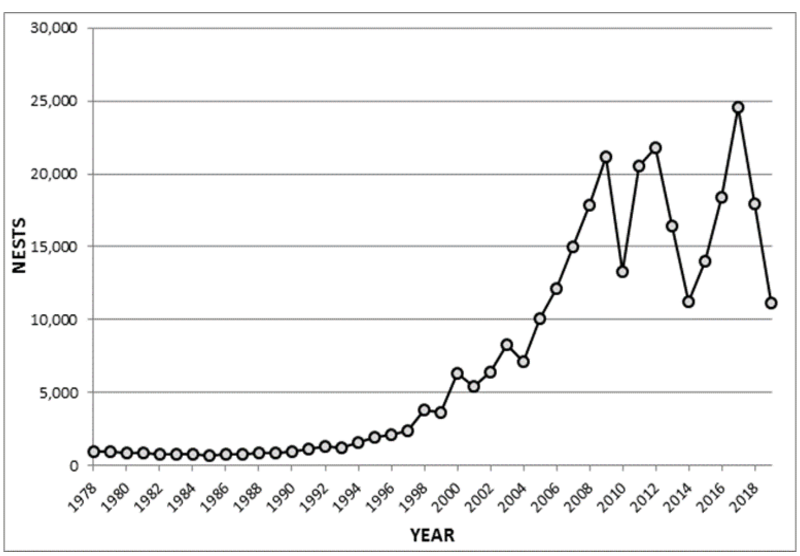
Population Dynamics
Of the sea turtles species in the world, the Kemp's ridley has declined to the lowest population level. Nesting aggregations at a single location (Rancho Nuevo, Mexico) were estimated at 40,000 females in 1947. By the mid-1980s, the population had declined to an estimated 300 nesting females. From 1980 to 2003, the number of nests at three primary nesting beaches (Rancho Nuevo, Tepehuajes, and Playa Dos) increased at 15% annually (Heppell et al. 2005). However, due to recent declines in nest counts, decreased survival of immature and adult sea turtles, and updated population modeling, this rate is not expected to continue and the overall trend is unclear (Caillouet et al. 2018, NMFS and USFWS 2015). In 2019, there were 11,090

nests, a 37.61% decrease from 2018, and a 54.89% decrease from 2017, which had the highest number (24,587) of nests (Figure 5.2.4; unpublished data). The reason for this recent decline is uncertain. In 2021, 198 Kemp's ridley nests were found in Texas – the largest number recorded in Texas since 1978 was in 2017, when 353 nests were documented.

Using the standard IUCN protocol for sea turtle assessments, the number of mature individuals was recently estimated at 22,341 (Wibbels and Bevan 2019). The calculation took into account the average annual nests from 2016-2018 (21,156), a clutch frequency of 2.5 per year, a remigration interval of 2 years, and a sex ratio of 3.17 females: 1 male. Based on the data in their analysis, the assessment concluded the current population trend is unknown (Wibbels and Bevan 2019). Genetic variability in Kemp's ridley turtles is considered to be high, as measured by nuclear DNA analyses (i.e., microsatellites) (NMFS et al. 2011). If this holds true, rapid increases in population over one or two generations would likely prevent any negative consequences in the genetic variability of the species (NMFS et al. 2011). Additional analysis of the mtDNA taken from samples of Kemp's ridley turtles at Padre Island, Texas, showed six distinct haplotypes, with one found at both Padre Island and Rancho Nuevo (Dutton et al. 2006).

Status
The Kemp's ridley was listed as endangered in response to a severe population decline, primarily the result of egg collection. In 1973, legal ordinances in Mexico prohibited the harvest of sea turtles from May to August, and in 1990, the harvest of all sea turtles was prohibited by presidential decree. In 2002, Rancho Nuevo was declared a Sanctuary. Nesting beaches in Texas have been re-established. Fishery interactions are the main threat to the species. Other threats include habitat destruction, oil spills, dredging, disease, cold stunning, and climate change. The current population trend is uncertain. While the population has increased, recent nesting numbers have been variable. In addition, the species' limited range and low global abundance make it vulnerable to new sources of mortality as well as demographic and environmental randomness, all of which are often difficult to predict with any certainty. Therefore, its resilience to future perturbation affecting survival and nesting success is low.

Figure 5.2.4. Kemp's ridley nest totals from Mexican beaches (Gladys Porter Zoo nesting database 2019)



Critical Habitat
Critical habitat has not been designated for Kemp's ridley sea turtles.

Recovery Goals
As with other recovery plans, the goal of the 2011 Kemp's ridley recovery plan (NMFS, USFWS, and SEMARNAT 2011) is to conserve and protect the species so that the listing is no longer necessary. The recovery criteria relate to the number of nesting females, hatchling recruitment, habitat protection, social and/or economic initiatives compatible with conservation, reduction of predation, TED or other protective measures in trawl gear, and improved information available to ensure recovery. In 2015, the bi-national recovery team published a number of recommendations including four critical actions (NMFS and USFWS 2015). These include: (a) continue funding by the major funding institutions at a level of support needed to run the successful turtle camps in the State of Tamaulipas, Mexico, in order to continue the high level of hatchling production and nesting female protection; (b) increase turtle excluder device (TED) compliance in U.S. and MX shrimp fisheries; 3 (c) require TEDs in U.S. skimmer trawl fisheries and other trawl fisheries in coastal waters where fishing overlaps with the distribution of Kemp's ridleys; (d) assess bycatch in gillnets in the Northern Gulf of Mexico and State of Tamaulipas, Mexico, to determine whether modifications to gear or fishing practices are needed.

The most recent Five-Year Review was completed in 2015 (NMFS and USFWS 2015) with a recommendation that the status of Kemp's ridley sea turtles should remain as endangered. In the Plan, the Services recommend that efforts continue towards achieving the major recovery actions in the 2015 plan with a priority for actions to address recent declines in the annual number of nests.

5.2.3 Loggerhead Sea Turtle (Caretta caretta, Northwest Atlantic Ocean DPS)
Loggerhead sea turtles are circumglobal and are found in the temperate and tropical regions of the Indian, Pacific, and Atlantic Oceans. The loggerhead sea turtle is distinguished from other turtles by its reddish-brown carapace, large head and powerful jaws. The species was first listed as threatened under the Endangered Species Act in 1978 (43 FR 32800, July 28, 1978). On September 22, 2011, the NMFS and USFWS designated nine distinct population segments of loggerhead sea turtles, with the Northwest Atlantic Ocean DPS listed as threatened (76 FR 58868). The Northwest Atlantic Ocean DPS of loggerheads is found along eastern North America, Central America, and northern South America (Figure 5.2.5).

Figure 5.2.5. Range of the Northwest Atlantic Ocean DPS of loggerhead sea turtles

We used information available in the 2009 Status Review (Conant et al. 2009), the final listing rule (76 FR 58868, September 22, 2011), the relevant literature, and recent nesting data from the FWRI to summarize the life history, population dynamics and status of the species, as follows.

Life History

Nesting occurs on beaches where warm, humid sand temperatures incubate the eggs. Northwest Atlantic females lay an average of five clutches per year. The annual average clutch size is 115 eggs per nest. Females do not nest every year. The average remigration interval is three years. There is a 54% emergence success rate (Conant et al. 2009). As with other sea turtles, temperature determines the sex of the turtle during the middle of the incubation period. Turtles spend the post-hatchling stage in pelagic waters. The juvenile stage is spent first in the oceanic zone and later in coastal waters. Some juveniles may periodically move between the oceanic zone and coastal waters (Bolten 2003, Conant et al. 2009, Mansfield 2006, Morreale and Standora 2005, Witzell 2002). Coastal waters provide important foraging, inter-nesting, and migratory habitats for adult loggerheads. In both the oceanic zone and coastal waters, loggerheads are primarily carnivorous, although they do consume some plant matter as well (Conant et al. 2009). Loggerheads have been documented to feed on crustaceans, mollusks, jellyfish and salps, and algae (Bjorndal 1997, Donaton et al. 2019, Seney and Musick 2007). Avens et al. (2015) used three approaches to estimate age at maturation. Mean age predictions associated with minimum and mean maturation straight carapace lengths were 22.5-25 and 36-38 years for females and 26-28 and 37-42 years for males. Male and female sea turtles have similar post-maturation longevity, ranging from 4 to 46 (mean 19) years (Avens et al. 2015).

Loggerhead hatchlings from the western Atlantic disperse widely, most likely using the Gulf Stream to drift throughout the Atlantic Ocean. MtDNA evidence demonstrates that juvenile loggerheads from southern Florida nesting beaches comprise the vast majority (71%-88%) of individuals found in foraging grounds throughout the western and eastern Atlantic: Nicaragua, Panama, Azores and Madeira, Canary Islands and Andalusia, Gulf of Mexico, and Brazil (Masuda 2010). LaCasalla et al. (2013) found that loggerheads, primarily juveniles, caught within the Northeast Distant (NED) waters of the North Atlantic mostly originated from nesting populations in the southeast United States and, in particular, Florida. They found that nearly all loggerheads caught in the NED came from the Northwest Atlantic DPS (mean = 99.2%), primarily from the large eastern Florida rookeries. There was little evidence of contributions from the South Atlantic, Northeast Atlantic, or Mediterranean DPSs (LaCasella et al. 2013). A more recent analysis assessed sea turtles captured in fisheries in the Northwest Atlantic and included samples from 850 (including 24 turtles caught during fisheries research) turtles caught from 2000-2013 in coastal and oceanic habitats (Stewart et al. 2019). The turtles were primarily captured in pelagic longline and bottom otter trawls. Other gears included bottom longline, hook and line, gillnet, dredge, and dip net. Turtles were identified from 19 distinct management units; the western Atlantic nesting populations were the main contributors with little representation from the Northeast Atlantic, Mediterranean, or South Atlantic DPSs (Stewart et al. 2019). There was a significant split in the distribution of small (≤ 2 ft. (63 cm) SCL) and large (> 2 ft. (63 cm) SCL) loggerheads north and south of Cape Hatteras, North Carolina. North of Cape Hatteras, large turtles came mainly from southeast Florida (44%±15%) and the northern United States management units (33%±16%); small turtles came from central east Florida (64%±14%). South of Cape Hatteras, large turtles came mainly from central east Florida (52%±20%) and southeast Florida (41%±20%); small turtles came from southeast Florida (56%±25%). The authors concluded that bycatch in the western North Atlantic would affect the Northwest Atlantic DPS almost exclusively (Stewart et al. 2019).

Population Dynamics

A number of stock assessments and similar reviews (Conant et al. 2009, Heppell et al. 2005, NMFS SEFSC 2001, 2009, Richards et al. 2011, TEWG 1998, 2000, 2009) have examined the stock status of loggerheads in the Atlantic Ocean, but none has been able to develop a reliable estimate of absolute population size. As with other species, counts of nests and nesting females are commonly used as an index of abundance and population trends, even though there are doubts about the ability to estimate the overall population size.

Based on genetic analysis of nesting subpopulations, the Northwest Atlantic Ocean DPS is divided into five recovery units: Northern, Peninsular Florida, Dry Tortugas, Northern Gulf of Mexico, and Greater Caribbean (Conant et al. 2009). A more recent analysis using expanded mtDNA sequences revealed that rookeries from the Gulf and Atlantic coasts of Florida are genetically distinct (Shamblin et al. 2014). The recent genetic analyses suggest that the Northwest Atlantic Ocean DPS should be considered as ten management units: (1) South Carolina and Georgia, (2) central eastern Florida, (3) southeastern Florida, (4) Cay Sal, Bahamas, (5) Dry Tortugas, Florida, (6) southwestern Cuba, (7) Quintana Roo, Mexico, (8) southwestern Florida, (9) central western Florida, and (10) northwestern Florida (Shamblin et al. 2012). The Northwest Atlantic Ocean's loggerhead nesting aggregation is considered the largest in the world (Casale and Tucker 2017). Using data from 2004-2008, the adult female population size of the DPS was estimated at 20,000 to 40,000 females (NMFS SEFSC 2009). More recently, Ceriani and Meylan (2017) reported a 5-year average (2009-2013) of more than 83,717 nests per year in the southeast United States and Mexico (excluding Cancun (Quintana Roo, Mexico). These estimates included sites without long-term (≥10 years) datasets. When they used data from 86 index sites (representing 63.4% of the estimated nests for the whole DPS with long-term datasets, they reported 53,043 nests per year. Trends at the different index nesting beaches ranged from negative to positive. In a trend analysis of the 86 index sites, the overall trend for the Northwest Atlantic DPS was positive (+2%) (Ceriani and Meylan 2017). Uncertainties in this analysis include, among others, using nesting females as proxies for overall population abundance and trends, demographic parameters, monitoring methodologies, and evaluation methods involving simple comparisons of early and later 5-year average annual nest counts. However, the authors concluded that the subpopulation is well monitored and the data evaluated represents 63.4 % of the total estimated annual nests of the subpopulation and, therefore, are representative of the overall trend (Ceriani and Meylan 2017).

About 80% of loggerhead nesting in the southeast United States occurs in six Florida counties (NMFS and USFWS 2008). The Peninsula Florida Recovery Unit and the Northern Recovery Unit represent approximately 87% and 10%, respectively of all nesting effort in the Northwest Atlantic DPS (Ceriani and Meylan 2017, NMFS and USFWS 2008). As described above, FWRI's INBS collects standardized nesting data. The index nest counts for loggerheads represent approximately 53% of known nesting in Florida. There have been three distinct intervals observed: increasing (1989-1998), decreasing (1998-2007), and increasing (2007-2021). At core index beaches in Florida, nesting totaled a minimum of 28,876 nests in 2007 and a maximum of 65,807 nests in 2016 (https://myfwc.com/research/wildlife/sea-turtles/nesting/beach-survey-totals/). In 2019, more than 53,000 nests were documented. In 2020, loggerhead turtles had another successful nesting season with more than 49,100 nests documented. The nest counts in Figure 5.2.6 represent peninsular Florida and do not include an additional set of beaches in the Florida Panhandle and southwest coast that were added to the program in 1997. Nest counts at these Florida Panhandle index beaches have an upward trend since 2010 (Figure 5.2.7).

Figure 5.2.6. Annual nest counts of loggerhead sea turtles on Florida core index beaches in peninsular Florida, 1989-2021 (https://myfwc.com/research/wildlife/sea-turtles/nesting/beach-survey-totals/)

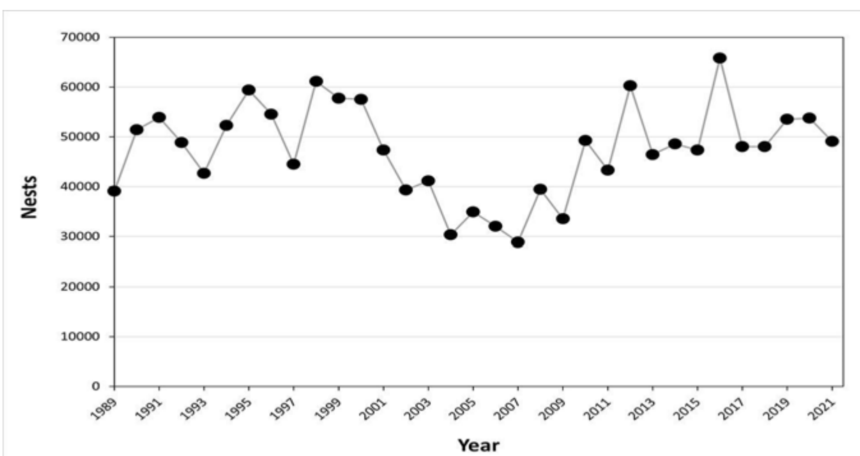
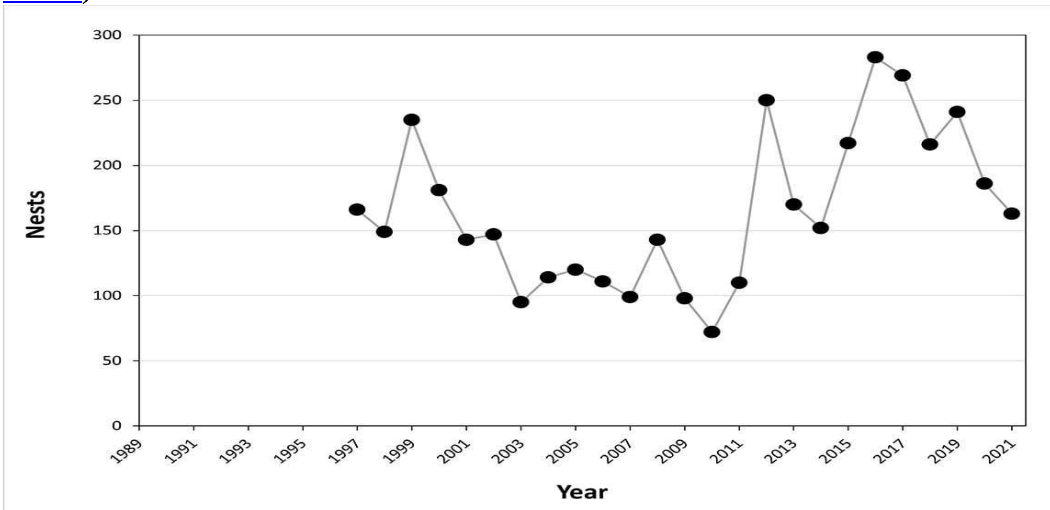


Figure 5.2.7. Annual nest counts of loggerhead sea turtles on index beaches in the Florida Panhandle, 1997-2021 (https://myfwc.com/research/wildlife/sea-turtles/nesting/beach-survey-totals/)



The annual nest counts on Florida's index beaches fluctuate widely, and we do not fully understand what drives these fluctuations. In assessing the population, Ceriani and Meylan (2017) and Bolten et al. (2019) looked at trends by recovery unit. Trends by recovery unit were variable.

The Peninsular Florida Recovery Unit extends from the Georgia-Florida border south and then north (excluding the islands west of Key West, Florida) through Pinellas County on the west coast of Florida. Annual nest counts from 1989 to 2018 ranged from a low of 28,876 in 2007 to a high of 65,807 in 1998 (Bolten et al. 2019). More recently (2008-2018), counts have ranged from 33,532 in 2009 to 65,807 in 2016 (Bolten et al. 2019). Nest counts taken at index beaches in Peninsular Florida showed a significant decline in loggerhead nesting from 1989 to 2007, most likely attributed to mortality of oceanic-stage loggerheads caused by fisheries bycatch (Witherington et al. 2009). Trend analyses have been completed for various periods. From 2009 through 2013, a 2% decrease for this recovery unit was reported (Ceriani and Meylan 2017). Using a longer time series from 1989-2018, there was no significant change in the number of annual nests (Bolten et al. 2019). It is important to recognize that an increase in the number of nests has been observed since 2007. The recovery team cautions that using short term trends in nesting abundance can be misleading and trends should be considered in the context of one generation (50 years for loggerheads) (Bolten et al. 2019).

The Northern Recovery Unit, ranging from the Florida-Georgia border through southern Virginia, is the second largest nesting aggregation in the DPS. Annual nest totals for this recovery unit from 1983 to 2019 have ranged from a low of 520 in 2004 to a high of 5,555 in 2019 (Bolten et al. 2019). From 2008 to 2019, counts have ranged from 1,289 nests in 2014 to 5,555 nests in 2019 (Bolten et al. 2019). Nest counts at loggerhead nesting beaches in North Carolina, South Carolina, and Georgia declined at 1.9% annually from 1983 to 2005 (NMFS and USFWS 2008). Recently, the trend has been increasing. Ceriani and Meylan (2017) reported a

35% increase for this recovery unit from 2009 through 2013. A longer-term trend analysis based on data from 1983 to 2019 indicates that the annual rate of increase is 1.3% (Bolten et al. 2019). The Dry Tortugas Recovery Unit includes all islands west of Key West, Florida. A census on Key West from 1995 to 2004 (excluding 2002) estimated a mean of 246 nests per year, or about 60 nesting females (NMFS and USFWS 2008). No trend analysis is available because there was not an adequate time series to evaluate the Dry Tortugas recovery unit (Ceriani et al. 2019, Ceriani and Meylan 2017), which accounts for less than 1% of the Northwest Atlantic DPS (Ceriani and Meylan 2017).

The Northern Gulf of Mexico Recovery Unit is defined as loggerheads originating from beaches in Franklin County on the northwest Gulf coast of Florida through Texas. From 1995 to 2007, there were an average of 906 nests per year on approximately 300 km of beach in Alabama and Florida, which equates to about 221 females nesting per year (NMFS and USFWS 2008). Annual nest totals for this recovery unit from 1997-2018 have ranged from a low of 72 in 2010 to a high of 283 in 2016 (Bolten et al. 2019). Evaluation of long-term nesting trends for the Northern Gulf of Mexico Recovery Unit is difficult because of changed and expanded beach coverage. However, there are now over 20 years of Florida index nesting beach survey data. A number of trend analyses have been conducted. From 1995 to 2005, the recovery unit exhibited a significant declining trend (Conant et al. 2009, NMFS, and USFWS 2008). Nest numbers have increased in recent years (Bolten et al. 2019) (see https://myfwc.com/research/wildlife/sea-turtles/nesting/beach-survey-totals/). In the 2009-2013 trend analysis by Ceriani and Meylan (2017), a 1% decrease for this recovery unit was reported, likely due to diminished nesting on beaches in Alabama, Mississippi, Louisiana, and Texas. A longer-term analysis from 1997-2018 found that there has been a non-significant increase of 1.7% (Bolten et al. 2019).

The Greater Caribbean Recovery Unit encompasses nesting subpopulations in Mexico to French Guiana, the Bahamas, and the lesser and Greater Antilles. The majority of nesting for this recovery unit occurs on the Yucatán Peninsula, in Quintana Roo, Mexico, with 903 to 2,331 nests annually (Zurita et al. 2003). Other significant nesting sites are found throughout the Caribbean, including Cuba, with approximately 250 to 300 nests annually (Ehrhart et al. 2003), and over 100 nests annually in Cay Sal in the Bahamas (NMFS and USFWS 2008). In the trend analysis by Ceriani and Meylan (2017), a 53% increase for this Recovery Unit was reported from 2009 through 2013.

Status

Fisheries bycatch is the highest threat to the Northwest Atlantic DPS of loggerhead sea turtles (Conant et al. 2009). Other threats include boat strikes, marine debris, coastal development, habitat loss, contaminants, disease, and climate change. Nesting trends for each of the loggerhead sea turtle recovery units in the Northwest Atlantic Ocean DPS are variable. Overall, short-term trends have shown increases, however, over the long-term the DPS is considered stable.

Critical Habitat

Critical habitat for the Northwest Atlantic DPS was designated in 2014 (see Section 4).

Recovery Goals
The recovery goal for the Northwest Atlantic loggerhead is to ensure that each recovery unit meets its recovery criteria, alleviating threats to the species so that protection under the ESA is not needed. The recovery criteria relate to the number of nests and nesting females, trends in abundance on the foraging grounds, and trends in neritic strandings relative to in-water abundance. The 2008 Final Recovery Plan for the Northwest Atlantic Population of Loggerheads includes the complete downlisting/delisting criteria (NMFS and U.S. FWS 2008). The recovery objectives to meet these goals include:

1. Ensure that the number of nests in each recovery unit is increasing and that this increase corresponds to an increase in the number of nesting females.
2. Ensure the in-water abundance of juveniles in both neritic and oceanic habitats is increasing and is increasing at a greater rate than strandings of similar age classes.
3. Manage sufficient nesting beach habitat to ensure successful nesting.
4. Manage sufficient feeding, migratory and internesting marine habitats to ensure successful growth and reproduction.
5. Eliminate legal harvest.
6. Implement scientifically based nest management plans.
7. Minimize nest predation.
8. Recognize and respond to mass/unusual mortality or disease events appropriately.
9. Develop and implement local, state, federal and international legislation to ensure long-term protection of loggerheads and their terrestrial and marine habitats.
10. Minimize bycatch in domestic and international commercial and artisanal fisheries.
11. Minimize trophic changes from fishery harvest and habitat alteration.
12. Minimize marine debris ingestion and entanglement.
13. Minimize vessel strike mortality.

5.2.4 Leatherback Sea Turtle (Deromchelys coriacea)
The leatherback sea turtle is unique among sea turtles for its large size, wide distribution (due to thermoregulatory systems and behavior), and lack of a hard, bony carapace. It ranges from tropical to subpolar latitudes, worldwide (Figure 5.2.8).

Figure 5.2.8. Range of the leatherback sea turtle

Leatherbacks are the largest living turtle, reaching lengths of six feet long, and weighing up to one ton. Leatherback sea turtles have a distinct black leathery skin covering their carapace with pinkish white skin on their plastron. The species was first listed under the Endangered Species Conservation Act (35 FR 8491, June 2, 1970) and has been listed as endangered under the ESA since 1973. In 2020, seven leatherback populations that met the discreteness and significance criteria of the distinct population segment policy were identified (NMFS and USFWS 2020). The population found within the action area is the Northwest Atlantic population segment (NW Atlantic) (Figure 5.2.9). NMFS and USFWS concluded that the seven populations, which met the criteria for DPSs, all met the definition of an endangered species. However, NMFS and USFWS determined that the listing of DPSs was not warranted; leatherbacks continue to be listed at the global level (85 FR 48332, August 10, 2020). Therefore, information is presented on the range-wide status. We used information available in the five-year review (NMFS and USFWS 2013), the critical habitat designation (44 FR 17710, March 23, 1979), the most recent status review (NMFS and USFWS 2020), relevant literature, and recent nesting data from the Florida FWRI to summarize the life history, population dynamics and status of the species, as follows.

Figure 5.2.9. Leatherback sea turtle DPSs and nesting beaches (NMFS and USFWS 2020)

Life History

Leatherbacks are a long-lived species. Preferred nesting grounds are in the tropics; though, nests span latitudes from 34 °S in western Cape, South Africa to 38 °N in Maryland (Eckert et al. 2012, Eckert et al. 2015). Females lay an average of five to seven clutches (range: 1-14 clutches) per season, with 20 to over 100 eggs per clutch (Eckert et al. 2012, Reina et al. 2002, Wallace et al. 2007). The average clutch frequency for the NW Atlantic population segment is 5.5 clutches per season (NMFS and USFWS 2020). In the western Atlantic, leatherbacks lay about 82 eggs per clutch (Sotherland et al. 2015). Remigration intervals are 2-4 years for most populations (range 1-11 years) (Eckert et al. 2015, NMFS and USFWS 2020); the remigration interval for the NW Atlantic population segment is approximately 3 years (NMFS and USFWS 2020). The number of leatherback hatchlings that make it out of the nest on to the beach (i.e., emergence success) is approximately 50% worldwide (Eckert et al. 2012).

Age at sexual maturity has been challenging to obtain given the species physiology and habitat use (Avens et al. 2019). Past estimates ranged from 5-29 years (Avens et al. 2009, Spotila et al. 1996). More recently, Avens et al. (2020) used refined skeletochronology to assess the age at sexual maturity for leatherback sea turtles in the Atlantic and the Pacific. In the Atlantic, the mean age at sexual maturity was 19 years (range 13-28) and the mean size at sexual maturity was 4.2 ft. (129.2 cm) CCL (range (3.7-5 ft. (112.8-153.8 cm)). In the Pacific, the mean age at sexual maturity was 17 years (range 12-28) and the mean size at sexual maturity was 4.2 ft. (129.3 cm) CCL (range 3.6- 5 ft. (110.7-152.3 cm)) (Avens et al. 2019).

Leatherbacks have a greater tolerance for colder waters compared to all other sea turtle species due to their thermoregulatory capabilities (Paladino et al. 1990, Shoop and Kenney 1992, Wallace and Jones 2008). Evidence from tag returns, satellite telemetry, and strandings in the western Atlantic suggests that adult leatherback sea turtles engage in routine migrations between temperate/boreal and tropical waters (Bond and James 2017, Dodge et al. 2015, Eckert et al. 2006, Fossette et al. 2014, James et al. 2005a, James et al. 2005b, James et al. 2005c, NMFS and USFWS 1992). Tagging studies collectively show a clear separation of leatherback movements between the North and South Atlantic Oceans (NMFS and USFWS 2020).

Leatherback sea turtles migrate long, transoceanic distances between their tropical nesting beaches and the highly productive temperate waters where they forage, primarily on jellyfish and tunicates. These gelatinous prey are relatively nutrient-poor, such that leatherbacks must consume large quantities to support their body weight. Leatherbacks weigh about 33% more on their foraging grounds than at nesting, indicating that they probably catabolize fat reserves to fuel migration and subsequent reproduction (James et al. 2005c, Wallace et al. 2006). Studies on the foraging ecology of leatherbacks in the North Atlantic show that leatherbacks off Massachusetts primarily consumed lion’s mane, sea nettles, and ctenophores (Dodge et al. 2011). Juvenile and small sub-adult leatherbacks may spend more time in oligotrophic (relatively low plant nutrient usually accompanied by high dissolved oxygen) open ocean waters where prey is more difficult to find (Dodge et al. 2011). Sea turtles must meet an energy threshold before returning to nesting beaches. Therefore, their remigration intervals are dependent upon foraging success and duration (Hays 2000, Price et al. 2004).

Population Dynamics
The distribution is global, with nesting beaches in the Pacific, Atlantic, and Indian Oceans. Leatherbacks occur throughout marine waters, from nearshore habitats to oceanic environments (NMFS and USFWS 2020, Shoop and Kenney 1992). Movements are largely dependent upon reproductive and feeding cycles and the oceanographic features that concentrate prey, such as frontal systems, eddy features, current boundaries, and coastal retention areas (Benson et al. 2011).

Analyses of mtDNA from leatherback sea turtles indicates a low level of genetic diversity (Dutton et al. 1999). Further analysis of samples taken from individuals from rookeries in the Atlantic and Indian Oceans suggest that each of the rookeries represent demographically independent populations (NMFS and USFWS 2013). Using genetic data,, combined with nesting, tagging, and tracking data, researchers identified seven global regional management units (RMU) or subpopulations: Northwest Atlantic, Southeast Atlantic, Southwest Atlantic, Northwest Indian, Southwest Indian, East Pacific, and West Pacific (Wallace et al. 2010). The status review concluded that the RMUs identified by Wallace et al. (2010) are discrete populations and, then, evaluated whether any other populations exhibit this level of genetic discontinuity (NMFS and USFWS 2020).

To evaluate the RMUs and fine-scale structure in the Atlantic, Dutton et al. (2013) conducted a comprehensive genetic re-analysis of rookery stock structure. Samples from eight nesting sites in the Atlantic and one in the southwest Indian Ocean identified seven management units in the Atlantic and revealed fine scale genetic differentiation among neighboring populations. The mtDNA analysis failed to find significant differentiation between Florida and Costa Rica or between Trinidad and French Guiana/Suriname (Dutton et al. 2013). While Dutton et al. (2013) identified fine-scale genetic partitioning in the Atlantic Ocean, the differences did not rise to the level of marked separation or discreteness (NMFS and USFWS 2020). Other genetic analyses corroborate the conclusions of Dutton et al. (2013). These studies analyzed nesting sites in French Guiana (Molfetti et al. 2013), nesting and foraging areas in Brazil (Vargas et al. 2019), and nesting beaches in the Caribbean (Carreras et al. 2013). These studies all support three discrete populations in the Atlantic (NMFS and USFWS 2020). While these studies detected fine-scale genetic differentiation in the NW, SW, and SE Atlantic populations, the status review team determined that none indicated that the genetic differences were sufficient to be considered marked separation (NMFS and USFWS 2020).

Population growth rates for leatherback sea turtles vary by ocean basin. An assessment of leatherback populations through 2010 found a global decline overall (Wallace et al. 2013). Using datasets with abundance data series that are 10 years or greater, they estimated that leatherback populations have declined from 90,599 nests per year to 54,262 nests per year over three generations ending in 2010 (Wallace et al. 2013).

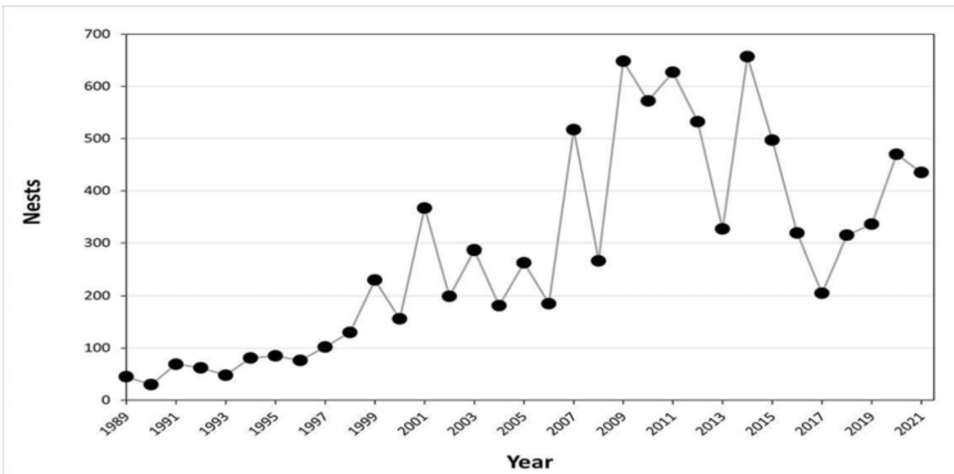
Several more recent assessments have been conducted. The Northwest Atlantic Leatherback Working Group was formed to compile nesting abundance data, analyze regional trends, and provide conservation recommendations. The most recent, published IUCN Red List assessment for the NW Atlantic Ocean subpopulation estimated 20,000 mature individuals and approximately 23,000 nests per year (estimate to 2017) (Northwest Atlantic Leatherback Working Group 2019). Annual nest counts show high inter-annual variability within and across nesting sites (Northwest Atlantic Leatherback Working Group 2018). Using data from 24 nesting sites in 10 nations within the NW Atlantic population segment, the leatherback status review estimated that the total index of nesting female abundance for the NW Atlantic population segment is 20,659 females (NMFS and USFWS 2020). This estimate only includes nesting data from recently and consistently monitored nesting beaches. An index (rather than a census) was developed given that the estimate is based on the number of nests on main nesting beaches with recent and consistent data and assumes a 3-year remigration interval. This index provides a minimum estimate of nesting female abundance (NMFS and USFWS 2020). This index of nesting female abundance is similar to other estimates. The TEWG estimated approximately 18,700 (range 10,000 to 31,000) adult females using nesting data from 2004 and 2005 (TEWG 2007). As described above, the IUCN Red List Assessment estimated 20,000 mature individuals (male and female). The estimate in the status review is higher than the estimate for the IUCN Red List assessment, likely due to a different remigration interval, which has been increasing in recent years (NMFS and USFWS 2020).

Previous assessments of leatherbacks concluded that the Northwest Atlantic population was stable or increasing (TEWG 2007, Tiwari et al. 2013b). However, based on more recent analyses, leatherback nesting in the Northwest Atlantic is showing an overall negative trend, with the most notable decrease occurring during the most recent period of 2008-2017 (Northwest Atlantic Leatherback Working Group 2018). The analyses for the IUCN Red List assessment indicate that the overall regional, abundance-weighted trends are negative (Northwest Atlantic Leatherback Working Group 2018, 2019). The dataset for trend analyses included 23 sites across 14 countries/territories. Three periods were used for the trend analysis: long-term (1990-2017), intermediate (1998-2017), and recent (2008-2017) trends. Overall, regional, abundance-weighted trends were negative across the periods and became more negative as the time-series became shorter. At the stock level, the Working Group evaluated the NW Atlantic – Guianas-Trinidad, Florida, Northern Caribbean, and the Western Caribbean. The NW Atlantic – Guianas-Trinidad stock is the largest stock and declined significantly across all periods, which was attributed to an exponential decline in abundance at Awala-Yalimapo, French Guiana as well as declines in Guyana, Suriname, Cayenne, and Matura. Declines in Awala-Yalimapo were attributed, in part, due to beach erosion and a loss of nesting habitat (Northwest Atlantic Leatherback Working Group 2018). The Florida stock increased significantly over the long-term, but declined from 2008-2017. The Northern Caribbean and Western Caribbean stocks also declined over all three periods. The Working Group report also includes trends at the site-level, which varied depending on the site and time period, but were generally negative especially in the recent time period. The Working Group identified anthropogenic sources (fishery bycatch, vessel strikes), habitat loss, and changes in life history parameters as possible drivers of nesting abundance declines (Northwest Atlantic Leatherback Working Group 2018). Fisheries bycatch is a well-documented threat to leatherback turtles. The Working Group discussed entanglement in vertical line fisheries off New England and Canada as potentially important mortality sinks. They also noted that vessel strikes result in mortality annually in feeding habitats off New England. Off nesting beaches in Trinidad and the Guianas, net fisheries take leatherbacks in high numbers (~3,000/yr.) (Eckert 2013, Lum 2006, Northwest Atlantic Leatherback Working Group 2018).

Similarly, the leatherback status review concluded that the NW Atlantic population segment exhibits decreasing nest trends at nesting aggregations with the greatest indices of nesting female abundance. Significant declines have been observed at nesting beaches with the greatest historical or current nesting female abundance, most notably in Trinidad and Tobago, Suriname, and French Guiana. Though some nesting aggregations (see status review document for information on specific nesting aggregations) indicated increasing trends, most of the largest ones are declining. The declining trend is considered to be representative of the population segment (NMFS and USFWS 2020). The status review found that fisheries bycatch is the primary threat to the NW Atlantic population (NMFS and USFWS 2020).

Leatherback sea turtles nest in the southeastern United States. From 1989-2019, leatherback nests at core index beaches in Florida have varied from a minimum of 30 nests in 1990 to a maximum of 657 in 2014 (https://myfwc.com/research/wildlife/sea-turtles/nesting/beach-survey-totals/). Leatherback nest numbers reached a peak in 2014 followed by a steep decline (2015-2017) and a promising increase (2018-2021) (https://myfwc.com/research/wildlife/sea-turtles/nesting/beach-survey-totals/) (Figure 5.2.10). The status review found that the median trend for Florida from 2008-2017 was a decrease of 2.1% annually (NMFS and USFWS 2020). Surveyors counted 435 leatherback nests on the 27 core index beaches in 2021. These counts do not include leatherback nesting at the beginning of the season (before May 15), nor do they represent all the beaches in Florida where leatherbacks nest; however, the index provided by these counts remains a representative reflection of trends. However, while green turtle nest numbers on Florida's index beaches continue to rise, Florida hosts only a few hundred nests annually and leatherbacks can lay as many as 11 clutches during a nesting season. Thus, fluctuations in nest count may be the result of a small change in number of females. More years of standardized nest counts are needed to understand whether the fluctuation is natural or warrants concern.

Figure 5.2.10. Number of leatherback sea turtle nests on core index beaches in Florida from 1989-2021 (https://myfwc.com/research/wildlife/sea-turtles/nesting/)



For the SW Atlantic population segment, the status review estimates the total index of nesting female abundance at approximately 27 females (NMFS and USFWS 2020). This is similar to the IUCN Red List assessment that estimated 35 mature individuals (male and female) using nesting data since 2010. Nesting has increased since 2010 overall, though the 2014-2017 estimates were lower than the previous three years. The trend is increasing, though variable (NMFS and USFWS 2020). The SE Atlantic population segment has an index of nesting female abundance of 9,198 females and demonstrates a declining nest trend at the largest nesting aggregation (NMFS and USFWS 2020). The SE population segment exhibits a declining nest trend (NMFS and USFWS 2020).

Populations in the Pacific have shown dramatic declines at many nesting sites (Mazaris et al. 2017, Santidrián Tomillo et al. 2017, Santidrián Tomillo et al. 2007, Sarti Martínez et al. 2007, Tapilatu et al. 2013). For an IUCN Red List evaluation, datasets for nesting at all index beaches for the West Pacific population were compiled (Tiwari et al. 2013a). This assessment estimated the number of total mature individuals (males and females) at Jamursba-Medi and Wermon beaches to be 1,438 turtles (Tiwari et al. 2013a). Counts of leatherbacks at nesting beaches in the western Pacific indicate that the subpopulation declined at a rate of almost 6% per year from 1984 to 2011 (Tapilatu et al. 2013). More recently, the leatherback status review estimated the total index of nesting female abundance of the West Pacific population segment at 1,277 females, and the population exhibits low hatchling success (NMFS and USFWS 2020). The total index of nesting female abundance for the East Pacific population segment is 755 nesting females. It has exhibited a decreasing trend since monitoring began with a 97.4% decline since the 1980s or 1990s, depending on nesting beach (Wallace et al. 2013). The low productivity parameters, drastic reductions in nesting female abundance, and current declines in nesting place the population segment at risk (NMFS and USFWS 2020).

Population abundance in the Indian Ocean is difficult to assess due to lack of data and inconsistent reporting. Available data from southern Mozambique show that approximately 10 females nest per year from 1994 to 2004, and about 296 nests per year were counted in South Africa (NMFS and USFWS 2013). A 5-year status review in 2013 found that, in the southwest Indian Ocean, populations in South Africa are stable (NMFS and USFWS 2013). More recently, the 2020 status review estimated that the total index of nesting female abundance for the SW Indian population segment is 149 females and that the population is exhibiting a slight decreasing nest trend (NMFS and USFWS 2020). While data on nesting in the NE Indian Ocean populations segment is limited, the population is estimated at 109 females. This population has exhibited a drastic population decline with extirpation of the largest nesting aggregation in Malaysia (NMFS and USFWS 2020).

Status

The leatherback sea turtle is an endangered species whose once large nesting populations have experienced steep declines in recent decades. There has been a global decline overall. For all population segments, including the NW Atlantic population, fisheries bycatch is the primary threat to the species (NMFS and USFWS 2020). Leatherback turtle nesting in the Northwest Atlantic showed an overall negative trend through 2017, with the most notable decrease occurring during the most recent time frame of 2008 to 2017 (Northwest Atlantic Leatherback Working Group 2018). Though some nesting aggregations indicated increasing trends, most of the largest ones are declining. Therefore, the leatherback status review in 2020 concluded that the NW Atlantic population exhibits an overall decreasing trend in annual nesting activity (NMFS and USFWS 2020). Threats to leatherback sea turtles include loss of nesting habitat, fisheries bycatch, vessel strikes, harvest of eggs, and marine debris, among others (Northwest Atlantic Leatherback Working Group 2018). Because of the threats, once large nesting areas in the Indian and Pacific Oceans are now functionally extinct (Tiwari et al. 2013a) and there have been range-wide reductions in population abundance. The species' resilience to additional perturbation both within the NW Atlantic and worldwide is low.

Critical Habitat

Critical habitat has been designated for leatherback sea turtles in the waters adjacent to Sandy Point, St. Croix, U.S. Virgin Islands (44 FR 17710, March 23, 1979) and along the U.S. West Coast (77 FR 4170, January 26, 2012), both of which are outside the action area.

Recovery Goals

There are separate recovery plans for the U.S. Caribbean, Gulf of Mexico, and Atlantic (NMFS and USFWS 1992) and the U.S. Pacific (NMFS and USFWS 1998) populations of leatherback sea turtles. Neither plan has been recently updated. As with other sea turtle species, the recovery plans for leatherbacks include criteria for considering delisting. These criteria relate to increases in the populations, nesting trends, nesting beach and habitat protection, and implementation of priority actions. Criteria for delisting in the recovery plan for the U.S. Caribbean, Gulf of Mexico, and Atlantic are described here.

Delisting criteria

1. Adult female population increases for 25 years after publication of the recovery plan, as evidenced by a statistically significant trend in nest numbers at Culebra, Puerto Rico; St. Croix, U.S. Virgin Islands; and the east coast of Florida.
2. Nesting habitat encompassing at least 75% of nesting activity in the U.S. Virgin Islands, Puerto Rico, and Florida is in public ownership.
3. All priority-one tasks have been successfully implemented (see the recovery plan for a list of priority one tasks).

Major recovery actions in the U.S. Caribbean, Gulf of Mexico, and Atlantic include actions to:

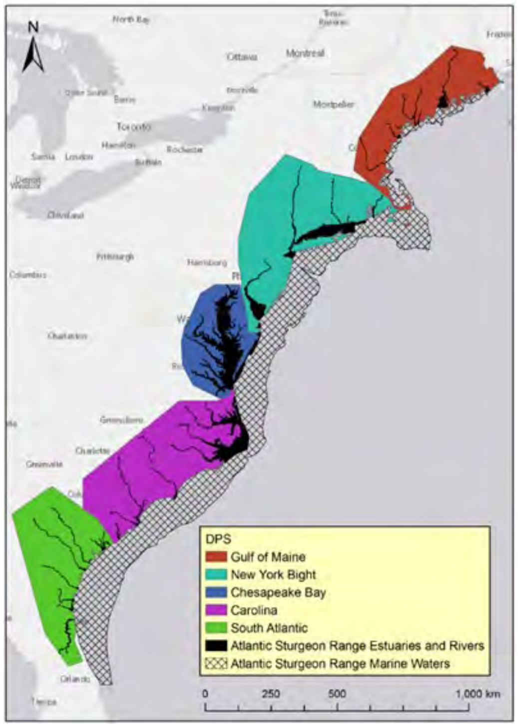
1. Protect and manage terrestrial and marine habitats.
2. Protect and manage the population.
3. Inform and educate the public.
4. Develop and implement international agreements.

The 2013 Five-Year Review (NMFS and USFWS 2013) concluded that the leatherback turtle should not be delisted or reclassified and notes that the 1991 and 1998 recovery plans are dated and do not address the major, emerging threat of climate change.

5.3 Atlantic Sturgeon (*Acipenser oxyrinchus oxyrinchus*)

An estuarine-dependent anadromous species, Atlantic sturgeon occupy ocean and estuarine waters, including sounds, bays, and tidal-affected rivers from Hamilton Inlet, Labrador, Canada, to Cape Canaveral, Florida (ASSRT 2007) (Figure 5.3.1). On February 6, 2012, NMFS listed five DPSs of Atlantic sturgeon under the ESA: Gulf of Maine (GOM), New York Bight (NYB), Chesapeake Bay (CB), Carolina, and South Atlantic (77 FR 5880 and 77 FR 5914). The Gulf of Maine DPS is listed as threatened, and the New York Bight, Chesapeake Bay, Carolina, and South Atlantic DPSs are listed as endangered.

Figure 5.3.1. U.S. range of Atlantic sturgeon DPSs



Information available from the 2007 Atlantic sturgeon status review (ASSRT 2007), 2017 ASMFC benchmark stock assessment (ASMFC 2017), final listing rules (77 FR 5880 and 77 FR 5914; February 6, 2012), material supporting the designation of Atlantic sturgeon critical habitat (NMFS 2017a), and Five-Year Reviews completed for the Gulf of Maine, New York Bight, and Chesapeake Bay DPSs (NMFS 2022a, b, c) were used to summarize the life history, population dynamics, and status of the species.

Critical Habitat
Critical habitat has been designated for the five DPSs of Atlantic sturgeon (82 FR 39160, August 17, 2017) in rivers of the eastern United States. Critical habitat designated in the Hudson River for the New York Bight DPS of Atlantic sturgeon and designated in the Cooper River for the Carolina DPS is the only critical habitat that is within the action area; as explained in Section 4.0, we have determined that the proposed action will have no effect on this designated critical habitat.

Life History
Atlantic sturgeon are a late maturing, anadromous species (ASSRT 2007, Balazik et al. 2010, Hilton et al. 2016, Sulak and Randall 2002). Sexual maturity is reached between the ages of 5 to 34 years. Sturgeon originating from rivers in lower latitudes (e.g., South Carolina rivers) mature faster than those originating from rivers located in higher latitudes (e.g., Saint Lawrence River) (NMFS 2017a).

Atlantic sturgeon spawn in freshwater (ASSRT 2007, NMFS 2017b) at sites with flowing water and hard bottom substrate (Bain et al. 2000, Balazik et al. 2012b, Gilbert 1989, Greene et al. 2009, Hatin et al. 2002, Mohler 2003, Smith and Clugston 1997, Vladykov and Greeley 1963). Water depths of spawning sites are highly variable, but may be up to 88.5 ft. (27 m) (Bain et al. 2000, Crance 1987, Leland 1968, Scott and Crossman 1973). Based on tagging records, Atlantic sturgeon return to their natal rivers to spawn (ASSRT 2007), with spawning intervals ranging from one to five years in males (Caron et al. 2002, Collins et al. 2000b, Smith 1985) and two to five years in females (Stevenson and Secor 1999, Van Eenennaam et al. 1996, Vladykov and Greeley 1963). Some Atlantic sturgeon river populations may have up to two spawning seasons comprised of different spawning adults (Balazik and Musick 2015, Collins et al. 2000b), although the majority likely have just one, either in the spring or fall.[28] There is evidence of spring and fall spawning for the South Atlantic DPS (77 FR 5914, February 6, 2012, Collins et al. 2000b, NMFS and USFWS 1998b) (Collins et al. 2000b, NMFS and USFWS 1998), spring spawning for the Gulf of Maine and New York Bight DPSs (NMFS 2017a), and fall spawning for the Chesapeake and Carolina DPSs (Balazik et al. 2012a, Smith et al. 1984). While spawning has not been confirmed in the James River (Chesapeake Bay DPS), telemetry and empirical data suggest that there may be two potential spawning runs: a spring run from late March to early May and a fall run around September after an extended staging period in the lower river (Balazik et al. 2012a, Balazik and Musick 2015).

Following spawning, males move downriver to the lower estuary and remain there until outmigration in the fall (Bain 1997, Bain et al. 2000, Balazik et al. 2012a, Breece et al. 2013, Dovel and Berggren 1983a, Greene et al. 2009, Hatin et al. 2002, Ingram et al. 2019, Smith 1985, Smith et al. 1982). Females move downriver and may leave the estuary and travel to other coastal estuaries until outmigration to marine waters in the fall (Bain 1997, Bain et al. 2000, Balazik et al. 2012a, Breece et al. 2013, Dovel and Berggren 1983a, Greene et al. 2009, Hatin et al. 2002, NMFS 2017a, Smith 1985, Smith et al. 1982). Atlantic sturgeon deposit eggs on hard bottom substrate. They hatch into the yolk sac larval stage approximately 94 to 140 hours after deposition (Mohler 2003, Murawski and Pacheco 1977, Smith et al. 1980, Van Den Avyle 1984, Vladykov and Greeley 1963). Once the yolk sac is absorbed (eight to twelve days post-hatching), sturgeon are larvae. Shortly after, they become young of year and then juveniles. The juvenile stage can last months to years in the brackish waters of the natal estuary (ASSRT 2007, Calvo et al. 2010, Collins et al. 2000a, Dadswell 2006, Dovel and Berggren 1983b, Greene et al. 2009, Hatin et al. 2007, Holland and Yelverton 1973, Kynard and Horgan 2002, Mohler 2003, Schueller and Peterson 2010, Secor et al. 2000, Waldman et al. 1996). Size and age that individuals leave their natal river for the marine environment is variable at the individual and geographic level; age and size of maturity is similarly variable. Upon reaching the sub-adult phase, individuals enter the marine environment, mixing with adults and sub-adults from other river systems (Bain 1997, Dovel and Berggren 1983a, Hatin et al. 2007, McCord et al. 2007) (NMFS 2017a). Once sub-adult Atlantic sturgeon have reached maturity/the adult stage, they will remain in marine or estuarine waters, only returning far upstream to the spawning areas when they are ready to spawn (ASSRT 2007, Bain 1997, Breece et al. 2016, Dunton et al. 2012, Dunton et al. 2015, Savoy and Pacileo 2003).

[28] Although referred to as spring spawning and fall spawning, the actual time of Atlantic sturgeon spawning may not occur during the astronomical spring or fall season (Balazik and Musick 2015).

The life history of Atlantic sturgeon can be divided up into seven general categories as described in Table 5.3.1 below (adapted from ASSRT 2007). Note that the size and duration information presented in the table below should be considered a generalization and there is individual and geographic variation.

Table 5.3.1. Descriptions of Atlantic sturgeon life history stages

Age Class	Typical Size	General Duration	Description
Egg	~2 mm – 3 mm diameter (Van Eenennaam et al. 1996)(p. 773)	Hatching occurs ~3-6 days after egg deposition and fertilization (ASSRT 2007)(p. 4))	Fertilized or unfertilized
Yolk-sac larvae (YSL)	~6mm – 14 mm (Bath et al. 1981)(pp. 714-715))	8-12 days post hatch (ASSRT 2007)(p. 4))	Negative photo-taxic, nourished by yolk sac
Post yolk-sac larvae (PYSL)	~14mm – 37mm (Bath et al. 1981)(pp. 714-715))	12-40 days post hatch	Free swimming; feeding; Silt/sand bottom, deep channel; fresh water
Young of Year (YOY)	0.3 grams <410mm TL	From 40 days to 1 year	Fish that are > 40 days and < one year; capable of capturing and consuming live food
Juveniles	>410mm and <760mm TL	1 year to time at which first coastal migration is made	Fish that are at least age 1 and are not sexually mature and do not make coastal migrations.
Subadults	>760 mm and <1500 mm TL	From first coastal migration to sexual maturity	Fish that are not sexually mature but make coastal migrations
Adults	>1500 mm TL	Post-maturation	Sexually mature fish

Population Dynamics
A population estimate was derived from the NEAMAP trawl surveys.[29] For this Opinion, we are relying on the population estimates derived from the NEAMAP swept area biomass assuming a 50% catchability (i.e., net efficiency x availability) rate. We consider that the NEAMAP surveys sample an area utilized by Atlantic sturgeon but do not sample all the locations and times where Atlantic sturgeon are present. We also consider that the trawl net captures some, but likely not all, of the Atlantic sturgeon present in the sampling area. Therefore, we assume that net efficiency and the fraction of the population exposed to the NEAMAP surveys in combination result in a 50% catchability (NMFS 2013). The 50% catchability assumption reasonably accounts for the robust, yet not complete, sampling of the Atlantic sturgeon oceanic temporal and spatial ranges and the documented high rates of encounter with NEAMAP survey gear. As these estimates are derived directly from empirical data with fewer assumptions than have been required to model Atlantic sturgeon populations to date, we believe these estimates continue to serve as the best available information. Based on the above approach, the overall abundance of Atlantic sturgeon in U.S. Atlantic waters is estimated to be 67,776 fish (see table16 in Kocik et al. 2013). Based on genetic frequencies of occurrence in the sampled area, this overall population estimate was subsequently partitioned by DPS (Table 5.3.2). Given the proportion of adults to sub-adults in the NMFS NEFSC observer data (approximate ratio of 1:3), we have also estimated the number of adults and sub-adults originating from each DPS. However, this cannot be considered an estimate of the total number of sub-adults because it only considers those sub-adults that are of a size that are present and vulnerable to capture in commercial trawl and gillnet gear in the marine environment.

It is important to note, the NEAMAP-based estimates do not include young-of-the-year (YOY) fish and juveniles in the rivers; therefore, the NEAMAP-based estimates underestimate the total population size as they do not account for multiple year classes of Atlantic sturgeon that do not occur in the marine environment where the NEAMAP surveys take place. The NEAMAP surveys are conducted in waters that include the preferred depth ranges of sub-adult and adult Atlantic sturgeon and take place during seasons that coincide with known Atlantic sturgeon coastal migration patterns in the ocean. However, the estimated number of sub-adults in marine waters is a minimum count because it only considers those sub-adults that are captured in a portion of the action area and are present in the marine environment, which is only a fraction of the total number of sub-adults. In regards to adult Atlantic sturgeon, the estimated population in marine waters is also a minimum count as the NEAMAP surveys sample only a portion of the action area, and therefore a portion of the Atlantic sturgeon's range.

[29] Since fall 2007, NEAMAP trawl surveys (spring and fall) have been conducted from Cape Cod, Massachusetts to Cape Hatteras, North Carolina in nearshore waters at depths up to 60 ft. (18.3 m). Each survey employs a spatially stratified random design with a total of 35 strata and 150 stations.

Table 5.3.2. Calculated population estimates based upon the NEAMAP survey swept area model, assuming 50% efficiency

DPS	Estimated Ocean Population Abundance	Estimated Ocean Population of Adults	Estimated Ocean Population of Sub-adults (of size vulnerable to capture in fisheries)
GOM	7,455	1,864	5,591
NYB	34,566	8,642	25,925
CB	8,811	2,203	6,608
Carolina	1,356	339	1,017
SA	14,911	3,728	11,183
Canada	678	170	509

Precise estimates of population growth rate (intrinsic rates) are unknown for the five listed DPSs of Atlantic sturgeon due to a lack of long-term abundance data. The Commission's 2017 stock assessment referenced a population viability assessment (PVA) that was done to determine population growth rates for the five DPSs based on a few long-term survey programs, but most results were statistically insignificant or utilized a model for which the available did not or poorly fit. In any event, the population growth rates reported from that PVA ranged from -1.8% to 4.9% (ASMFC 2017).

The genetic diversity of Atlantic sturgeon throughout its range has been well-documented (ASSRT 2007, Bowen and Avise 1990, O'Leary et al. 2014, Ong et al. 1996, Waldman et al. 1996, Waldman and Wirgin 1998). Overall, these studies have consistently found populations to be genetically diverse, and the majority can be readily differentiated. Relatively low rates of gene flow reported in population genetic studies (Fritts et al. 2016, Savoy et al. 2017, Wirgin et al. 2002) indicate that Atlantic sturgeon return to their natal river to spawn, despite extensive mixing in coastal waters.

The marine range of U.S. Atlantic sturgeon extends from Labrador, Canada, to Cape Canaveral, Florida. As Atlantic sturgeon travel long distances in these waters, all five DPSs of Atlantic sturgeon have the potential to be anywhere in this marine range. Based on a recent genetic mixed stock analysis (Kazyak et al. 2021; the Ocean Wind project area falls within the "MID Offshore" area described in that paper.), we expect Atlantic sturgeon in the portions of the action area north of Cape Hatteras to originate from the five DPSs at the following frequencies: New York Bight (55.3%), Chesapeake (22.9%), South Atlantic (13.6%), Carolina (5.8%), Gulf of Maine (1.6%), and Gulf of Maine (1.6%) DPSs. It is possible that a small fraction (0.7%) of Atlantic sturgeon in the area may be Canadian origin (Kazyak et al. 2021); Canadian-origin Atlantic sturgeon are not listed under the ESA. This represents the best available information on the likely genetic makeup of individuals occurring in the lease area, the cable routes and vessel transit routes north of Cape Hatteras. The portion of the action area south of Cape Hatteras falls with the "SOUTH" region described in Kazyak et al. 2021; Atlantic sturgeon in this portion of the action area are expected to be nearly all from the South Atlantic DPS (91.2%) and the Carolina DPS (6.2%), with few individuals from the Chesapeake Bay and New York Bight

DPSs.

Based on fishery-independent, fishery dependent, tracking, and tagging data, Atlantic sturgeon appear to primarily occur inshore of the 164 ft. (50 m) depth contour (Dunton et al. 2012, Dunton et al. 2010, Erickson et al. 2011, Laney et al. 2007, O'Leary et al. 2014, Stein et al. 2004a, b, Waldman et al. 2013, Wirgin et al. 2015a, Wirgin et al. 2015b). However, they are not restricted to these depths and excursions into deeper (e.g., 250 ft. (75 m)) continental shelf waters have been documented (Colette and Klein-MacPhee 2002, Collins and Smith 1997, Erickson et al. 2011, Stein et al. 2004b, Timoshkin 1968). Data from fishery-independent surveys and tagging and tracking studies also indicate that some Atlantic sturgeon may undertake seasonal movements along the coast (Dunton et al. 2010, Erickson et al. 2011, Hilton et al. 2016, Oliver et al. 2013, Post et al. 2014, Wippelhauser 2012). For instance, studies found that satellite-tagged adult sturgeon from the Hudson River concentrated in the southern part of the Mid-Atlantic Bight, at depths greater than 66 ft. (20 m), during winter and spring; while, in the summer and fall, Atlantic sturgeon concentrations shifted to the northern portion of the Mid-Atlantic Bight at depths less than 66 ft. (20 m) (Erickson et al. 2011).

In the marine range, several marine aggregation areas occur adjacent to estuaries and/or coastal features formed by bay mouths and inlets along the U.S. eastern seaboard (i.e., waters off North Carolina; Chesapeake Bay; Delaware Bay; New York Bight; Massachusetts Bay; Long Island Sound; and Connecticut and Kennebec River Estuaries). Depths in these areas are generally no greater than 82 ft. (25 m) (Bain et al. 2000, Dunton et al. 2010, Erickson et al. 2011, Laney et al. 2007, O'Leary et al. 2014, Oliver et al. 2013, Savoy and Pacileo 2003, Stein et al. 2004b, Waldman et al. 2013, Wippelhauser 2012, Wippelhauser and Squiers 2015). Although additional studies are still needed to clarify why Atlantic sturgeon aggregate at these sites, there is some indication that they may serve as thermal refugia, wintering sites, or marine foraging areas (Dunton et al. 2010, Erickson et al. 2011, Stein et al. 2004b).

Status

Atlantic sturgeon were once present in 38 river systems and, of these, spawned in 35 (ASSRT 2007). They are currently present in 36 rivers and are probably present in additional rivers that provide sufficient forage base, depth, and access (ASSRT 2007). The benchmark stock assessment evaluated evidence for spawning tributaries and sub-populations of U.S. Atlantic sturgeon in 39 rivers. They confirmed (eggs, embryo, larvae, or YOY observed) spawning in ten rivers, considered spawning highly likely (adults expressing gametes, discrete genetic composition) in nine rivers, and suspected (adults observed in upper reaches of tributaries, historical accounts, presence of resident juveniles) spawning in six rivers. Spawning in the remaining rivers was unknown (ten) or suspected historical (four) (ASMFC 2017). The decline in abundance of Atlantic sturgeon has been attributed primarily to the large U.S. commercial fishery, which existed for the Atlantic sturgeon through the mid-1990s. Based on management recommendations in the ISFMP, adopted by the Commission in 1990, commercial harvest in Atlantic coastal states was severely restricted and ultimately eliminated from most coastal states (ASMFC 1998a). In 1998, the Commission placed a 20-40 year moratorium on all Atlantic sturgeon fisheries until the spawning stocked could be restored to a level where 20 subsequent year classes of adult females were protected (ASMFC 1998a, b). In 1999, NMFS closed the U.S. EEZ to Atlantic sturgeon retention, pursuant to the ACA (64 FR 9449; February 26, 1999).

However, many state fisheries for sturgeon were closed prior to this.

The most significant threats to Atlantic sturgeon are incidental catch, dams that block access to spawning habitat in southern rivers, poor water quality, dredging of spawning areas, water withdrawals from rivers, and vessel strikes. Climate change related impacts on water quality (e.g., temperature, salinity, dissolved oxygen, contaminants) also have the potential to affect Atlantic sturgeon populations using impacted river systems.

The Atlantic States Marine Fisheries Commission released a new benchmark stock assessment for Atlantic sturgeon in October 2017 (ASMFC 2017). Based on historic removals and estimated effective population size, the 2017 stock assessment concluded that all five Atlantic sturgeon DPSs are depleted relative to historical levels. However, the 2017 stock assessment does provide some evidence of population recovery at the coastwide scale, and mixed population recovery at the DPS scale (ASMFC 2017). The 2017 stock assessment also concluded that a variety of factors (i.e., bycatch, habitat loss, and ship strikes) continue to impede the recovery rate of Atlantic sturgeon (ASMFC 2017).

Despite the depleted status, the Commission's assessment did include signs that the coastwide index is above the 1998 value (95% probability). Total mortality from the tagging model was very low at the coastwide level. Small sample sizes made mortality estimates at the DPS level more difficult. By DPS, the assessment concluded that there was a 51% probability that the Gulf of Maine DPS abundance has increased since 1998 but a 74% probability that mortality for this DPS exceeds the mortality threshold used for the assessment. There is a relatively high (75%) probability that the New York Bight DPS abundance has increased since 1998, and a 31% probability that mortality exceeds the mortality threshold used for the assessment. There is also a relatively high (67%) probability that the Carolina DPS abundance has increased since 1998, and a relatively high probability (75%) that mortality for this DPS exceeds the mortality threshold used in the assessment. However, the index from the Chesapeake Bay DPS (highlighted red) only had a 36% chance of being above the 1998 value and a 30% probability that the mortality for this DPS exceeds the mortality threshold for the assessment. There was not enough information available to assess the abundance for the South Atlantic DPS relative to the 1998 moratorium, but the assessment did conclude that there was 40% probability that the mortality for this DPS exceeds the mortality threshold used in the assessment (ASMFC 2017).

5.3.1 Gulf of Maine DPS

The Gulf of Maine DPS includes the following: all anadromous Atlantic sturgeons that are spawned in the watersheds from the Maine/Canadian border and, extending southward, all watersheds draining into the Gulf of Maine as far south as Chatham, MA. Within this range, Atlantic sturgeon historically spawned in the Androscoggin, Kennebec, Merrimack, Penobscot, and Sheepscot Rivers (ASSRT, 2007). Spawning occurs in the Kennebec River. The capture of a larval Atlantic sturgeon in the Androscoggin River below the Brunswick Dam in the spring of 2011 indicates spawning may also occur in that river. Despite the presence of suitable spawning habitat in a number of other rivers, there is no evidence of recent spawning in the remaining rivers. Atlantic sturgeons that are spawned elsewhere continue to use habitats within all of these rivers as part of their overall marine range (ASSRT, 2007). The movement of subadult and adult sturgeon between rivers, including to and from the Kennebec River and the Penobscot River, demonstrates that coastal and marine migrations are key elements of Atlantic sturgeon life history for the Gulf of Maine DPS (ASSRT, 2007; Fernandes, *et al.*, 2010).

The current status of the Gulf of Maine DPS is affected by historical and modern fisheries dating as far back as the 1800s (Squiers *et al.*, 1979; Stein *et al.*, 2004; ASMFC 2007). Incidental capture of Atlantic sturgeon in state and Federal fisheries continues today. As explained above, we have estimates of the number of subadults and adults that are killed as a result of bycatch in fisheries authorized under Northeast Fishery Management Plans. At this time, we are not able to quantify the impacts from other threats or estimate the number of individuals killed as a result of other anthropogenic threats. Habitat disturbance and direct mortality from anthropogenic sources are the primary concerns.

Some of the impacts from the threats that contributed to the decline of the Gulf of Maine DPS have been removed (e.g., directed fishing), or reduced as a result of improvements in water quality and removal of dams (e.g., the Edwards Dam on the Kennebec River in 1999, the Veazie Dam on the Penobscot River). There are strict regulations on the use of fishing gear in Maine state waters that incidentally catch sturgeon. In addition, there have been reductions in fishing effort in state and federal waters, which most likely would result in a reduction in bycatch mortality of Atlantic sturgeon. A significant amount of fishing in the Gulf of Maine is conducted using trawl gear, which is known to have a much lower mortality rate for Atlantic sturgeon caught in the gear compared to sink gillnet gear (ASMFC, 2007). Atlantic sturgeon from the GOM DPS are not commonly taken as bycatch in areas south of Chatham, MA, with only 8% (e.g., 7 of the 84 fish) of interactions observed in the Mid Atlantic/Carolina region being assigned to the Gulf of Maine DPS (Wirgin and King, 2011). Tagging results also indicate that Gulf of Maine DPS fish tend to remain within the waters of the Gulf of Maine and only occasionally venture to points south. However, data on Atlantic sturgeon incidentally caught in trawls and intertidal fish weirs fished in the Minas Basin area of the Bay of Fundy (Canada) indicate that approximately 35 percent originated from the Gulf of Maine DPS (Wirgin *et al.*, 2012).

As noted previously, studies have shown that in order to rebuild, Atlantic sturgeon can only sustain low levels of bycatch and other anthropogenic mortality (Boreman, 1997; ASMFC, 2007; Kahnle *et al.*, 2007; Brown and Murphy, 2010). NMFS has determined that the Gulf of Maine DPS is at risk of becoming endangered in the foreseeable future throughout all of its range (i.e., is a threatened species) based on the following: (1) significant declines in population sizes and the protracted period during which sturgeon populations have been depressed; (2) the limited amount of current spawning; and, (3) the impacts and threats that have and will continue to affect recovery.

In 2018, we announced the initiation of a 5-year review for the Gulf of Maine DPS. We reviewed and considered new information for the Gulf of Maine DPS that has become available since this DPS was listed as threatened in February 2012. We completed the 5-year review for the Gulf of Maine DPS in February 2022 (NMFS 2022a). Based on the best scientific and commercial data available at the time of the review, we concluded that no change to the listing status is warranted.

5.3.2 New York Bight DPS

The New York Bight DPS includes the following: all anadromous Atlantic sturgeon spawned in the watersheds that drain into coastal waters from Chatham, MA to the Delaware-Maryland border on Fenwick Island. Within this range, Atlantic sturgeon historically spawned in the Connecticut, Delaware, Hudson, and Taunton Rivers (Murawski and Pacheco, 1977; Secor, 2002; ASSRT, 2007). Spawning still occurs in the Delaware and Hudson Rivers. There is no recent evidence (within the last 15 years) of spawning in the Taunton River (ASSRT, 2007). Atlantic sturgeon that are spawned elsewhere continue to use habitats within the Connecticut and Taunton Rivers as part of their overall marine range (ASSRT, 2007; Savoy, 2007; Wirgin and King, 2011).

In 2014, several presumed age-0 Atlantic sturgeon were captured in the Connecticut River; the available information indicates that successful spawning took place in 2013 by a small number of adults. Genetic analysis of the juveniles indicates that the adults were likely migrants from the South Atlantic DPS (Savoy et al. 2017). As noted by the authors, this conclusion is counter to prevailing information regarding straying of adult Atlantic sturgeon. As these captures represent the only contemporary records of possible natal Atlantic sturgeon in the Connecticut River and the genetic analysis is unexpected, more information is needed to establish the frequency of spawning in the Connecticut River and whether there is a unique Connecticut River population of Atlantic sturgeon.

The abundance of the Hudson River Atlantic sturgeon riverine population prior to the onset of expanded exploitation in the 1800s is unknown but has been conservatively estimated at 10,000 adult females (Secor, 2002). Current abundance is likely at least one order of magnitude smaller than historical levels (Secor, 2002; ASSRT, 2007; Kahnle *et al.*, 2007). As described above, an estimate of the mean annual number of mature adults (863 total; 596 males and 267 females) was calculated for the Hudson River riverine population based on fishery-dependent data collected from 1985-1995 (Kahnle *et al.*, 2007). Kahnle *et al.* (1998; 2007) also showed that the level of fishing mortality from the Hudson River Atlantic sturgeon fishery during the period of 1985-1995 exceeded the estimated sustainable level of fishing mortality for the riverine population and may have led to reduced recruitment. A decline in the abundance of young Atlantic sturgeon appeared to occur in the mid to late 1970s followed by a secondary drop in the late 1980s (Kahnle *et al.*, 1998; Sweka *et al.*, 2007; ASMFC, 2010). At the time of listing, catch-per-unit-effort (CPUE) data suggested that recruitment remained depressed relative to catches of juvenile Atlantic sturgeon in the estuary during the mid-late 1980s (Sweka *et al.*, 2007; ASMFC, 2010). In examining the CPUE data from 1985-2007, there are significant fluctuations during this time. There appears to be a decline in the number of juveniles between the late 1980s and early 1990s while the CPUE is generally higher in the 2000s as compared to the 1990s. Given the significant annual fluctuation, it is difficult to discern any trend. Despite the CPUEs from 2000-2007 being generally higher than those from 1990-1999, they are low compared to the late 1980s. Standardized mean catch per net set from the NYSDEC juvenile Atlantic sturgeon survey have had a general increasing trend from 2006 – 2015, with the exception of a dip in 2013.

In addition to capture in fisheries operating in Federal waters, bycatch and mortality also occur in state fisheries; however, the primary fishery (shad) that impacted juvenile sturgeon in the Hudson River, has now been closed and there is no indication that it will reopen soon. In the

Hudson River, sources of potential mortality include vessel strikes and entrainment in dredges. Impingement at water intakes, including the Danskammer, Roseton, and Indian Point power plants has been documented in the past; all three of these facilities have recently shut down. Recent information from surveys of juveniles (see above) indicates that the number of young Atlantic sturgeon in the Hudson River is increasing compared to recent years, but is still low compared to the 1970s. There is currently not enough information regarding any life stage to establish a trend for the entire Hudson River population.

There is no abundance estimate for the Delaware River population of Atlantic sturgeon. Harvest records from the 1800s indicate that this was historically a large population with an estimated 180,000 adult females prior to 1890 (Secor and Waldman, 1999; Secor, 2002). Sampling in 2009 to target young-of- the year (YOY) Atlantic sturgeon in the Delaware River (i.e., natal sturgeon) resulted in the capture of 34 YOY, ranging in size from 178 to 349 mm TL (Fisher, 2009) and the collection of 32 YOY Atlantic sturgeon in a separate study (Brundage and O'Herron in Calvo *et al.*, 2010). Genetics information collected from 33 of the 2009-year class YOY indicates that at least three females successfully contributed to the 2009-year class (Fisher, 2011). Therefore, while the capture of YOY in 2009 provides evidence that successful spawning is still occurring in the Delaware River, the relatively low numbers suggest the existing riverine population is limited in size.

Some of the impact from the threats that contributed to the decline of the New York Bight DPS have been removed (e.g., directed fishing) or reduced as a result of improvements in water quality since passage of the Clean Water Act (CWA). In addition, there have been reductions in fishing effort in state and federal waters, which may result in a reduction in bycatch mortality of Atlantic sturgeon. Nevertheless, areas with persistent, degraded water quality, habitat impacts from dredging, continued bycatch in state and federally managed fisheries, and vessel strikes remain significant threats to the New York Bight DPS.

In the marine range, New York Bight DPS Atlantic sturgeon are incidentally captured in federal and state managed fisheries, reducing survivorship of subadult and adult Atlantic sturgeon (Stein *et al.*, 2004; ASMFC 2007). As explained above, currently available estimates indicate that at least 4% of adults may be killed as a result of bycatch in fisheries authorized under federal Northeast FMPs. Based on mixed stock analysis results presented by Wirgin and King (2011), over 40 percent of the Atlantic sturgeon bycatch interactions in the Mid Atlantic Bight region were sturgeon from the New York Bight DPS. Individual-based assignment and mixed stock analysis of samples collected from sturgeon captured in Canadian fisheries in the Bay of Fundy indicated that approximately 1-2% were from the New York Bight DPS. At this time, we are not able to quantify the impacts from other threats or estimate the number of individuals killed as a result of other anthropogenic threats.

Riverine habitat may be impacted by dredging and other in-water activities, disturbing spawning habitat, and altering the benthic forage base. Both the Hudson and Delaware rivers have navigation channels that are maintained by dredging. Dredging is also used to maintain channels in the nearshore marine environment. Dredging outside of Federal channels and in-water construction occurs throughout the New York Bight region. While some dredging projects operate with observers present to document fish mortalities many do not. We have reports of one Atlantic sturgeon entrained during hopper dredging operations in Ambrose Channel, New Jersey, and a number of Atlantic sturgeon have been killed during Delaware River channel maintenance and deepening activities.

In the Hudson and Delaware Rivers, dams do not block access to historical habitat. The Holyoke Dam on the Connecticut River blocks further upstream passage; however, the extent that Atlantic sturgeon would historically have used habitat upstream of Holyoke is unknown. Connectivity may be disrupted by the presence of dams on several smaller rivers in the New York Bight region. Because no Atlantic sturgeon occur upstream of any hydroelectric projects in the New York Bight region, passage over hydroelectric dams or through hydroelectric turbines is not a source of injury or mortality in this area.

New York Bight DPS Atlantic sturgeon may also be affected by degraded water quality. In general, water quality has improved in the Hudson and Delaware over the past decades (Lichter *et al.* 2006; EPA, 2008). Both the Hudson and Delaware rivers, as well as other rivers in the New York Bight region, were heavily polluted in the past from industrial and sanitary sewer discharges. While water quality has improved and most discharges are limited through regulations, many pollutants persist in the benthic environment. This can be particularly problematic if pollutants are present on spawning and nursery grounds as developing eggs and larvae are particularly susceptible to exposure to contaminants.

Vessel strikes occur in the Delaware and Hudson rivers. Delaware State University (DSU) collaborated with the Delaware Division of Fish and Wildlife (DDFW) in an effort to document vessel strikes in 2005. Approximately 200 reported carcasses with over half being attributed to vessel strikes based on a gross examination of wounds have been documented through 2019 (DiJohnson 2019). Information from carcass studies indicates that only a small percentage of carcasses in the Delaware River are documented and reported (Fox et al. 2020). One hundred thirty-eight (138) sturgeon carcasses were observed on the Hudson River and reported to the NYSDEC between 2007 and 2015. Of these, 69 are suspected of having been killed by vessel strike. Genetic analysis has not been completed on any of these individuals to date, given that the majority of Atlantic sturgeon in the Hudson River belong to the New York Bight DPS; we assume that the majority of the dead sturgeon reported to NYSDEC belonged to the New York Bight DPS. Given the time of year in which the fish were observed (predominantly May through July), it is likely that many of the adults were migrating through the river to the spawning grounds.

Studies have shown that to rebuild, Atlantic sturgeon can only sustain low levels of anthropogenic mortality (Boreman, 1997; ASMFC, 2007; Kahnle *et al.*, 2007; Brown and Murphy, 2010). There are no empirical abundance estimates of the number of Atlantic sturgeon in the New York Bight DPS. We determined that the New York Bight DPS is currently at risk of extinction due to: (1) precipitous declines in population sizes and the protracted period in which sturgeon populations have been depressed; (2) the limited amount of current spawning; and (3) the impacts and threats that have and will continue to affect population recovery.

In 2018, we announced the initiation of a 5-year review for the New York Bight DPS. We reviewed and considered new information for the New York Bight DPS that has become available since this DPS was listed as endangered in February 2012. We completed the 5-year review for the DPS in February 2022 (NMFS 2022b). Based on the best scientific and commercial data available at the time of the review, we concluded that no change to the listing status is warranted.

5.3.3 Chesapeake Bay DPS

The Chesapeake Bay (CB) DPS includes the following: all anadromous Atlantic sturgeon that spawn or are spawned in the watersheds that drain into the Chesapeake Bay and into coastal waters from the Delaware-Maryland border on Fenwick Island to Cape Henry, Virginia. The marine range of Atlantic sturgeon from the CB DPS extends from Hamilton Inlet, Labrador, Canada, to Cape Canaveral, Florida. The riverine range of the CB DPS and the adjacent portion of the marine range are shown in Figure 5.3.1. Within this range, Atlantic sturgeon historically spawned in the Susquehanna, Potomac, James, York, Rappahannock, and Nottoway Rivers (ASSRT 2007). Based on the review by Oakley (2003), 100% of Atlantic sturgeon habitat is currently accessible in these rivers since most of the barriers to passage (i.e., dams) are located upriver of where spawning is expected to have historically occurred (ASSRT 2007).

At the time of listing, the James River was the only known spawning river for the Chesapeake Bay DPS (ASSRT, 2007; Hager, 2011; Balazik et al., 2012). Since the listing, evidence has been provided of both spring and fall spawning populations for the James River, as well as fall spawning in the Pamunkey River, a tributary of the York River, and fall spawning in Marshyhope Creek, a tributary of the Nanticoke River (Hager et al., 2014; Kahn et al., 2014; Balazik and Musick, 2015; Richardson and Secor, 2016). Detections of acoustically-tagged adult Atlantic sturgeon along with historical evidence suggests that Atlantic sturgeon belonging to the Chesapeake Bay DPS may be spawning in the Mattaponi and Rappahannock rivers as well (Hilton et al. 2016; ASMFC 2017a; Kahn et al. 2019). However, information for these populations is limited and the research is ongoing.

Several threats play a role in shaping the current status of CB DPS Atlantic sturgeon. Historical records provide evidence of the large-scale commercial exploitation of Atlantic sturgeon from the James River and Chesapeake Bay in the 19th century (Hildebrand and Schroeder 1928; Vladykov and Greeley 1963; ASMFC 1998b; Secor 2002; Bushnoe *et al.* 2005; ASSRT 2007) as well as subsistence fishing and attempts at commercial fisheries as early as the 17th century (Secor 2002; Bushnoe *et al.* 2005; ASSRT 2007; Balazik *et al.* 2010). Habitat disturbance caused by in-river work, such as dredging for navigational purposes, is thought to have reduced available spawning habitat in the James River (Holton and Walsh 1995; Bushnoe *et al.* 2005; ASSRT 2007). At this time, we do not have information to quantify this loss of spawning habitat.

Decreased water quality also threatens Atlantic sturgeon of the CB DPS, especially since the Chesapeake Bay system is vulnerable to the effects of nutrient enrichment due to a relatively low tidal exchange and flushing rate, large surface-to-volume ratio, and strong stratification during the spring and summer months (Pyzik *et al.* 2004; ASMFC 1998a; ASSRT 2007; EPA 2008). These conditions contribute to reductions in dissolved oxygen levels throughout the Bay. The availability of nursery habitat, in particular, may be limited given the recurrent hypoxia (low dissolved oxygen) conditions within the Bay (Niklitschek and Secor 2005, 2010). Heavy industrial development during the 20^{th} century in rivers inhabited by sturgeon impaired water quality and impeded these species' recovery.

Although there have been improvements in some areas of the Bay's health, the ecosystem remains in poor condition. At this time, we do not have sufficient information to quantify the extent that degraded water quality affects habitat or individuals in the Chesapeake Bay watershed.

More than 100 Atlantic sturgeon carcasses have been salvaged in the James River since 2007 and additional carcasses were reported but could not be salvaged (Greenlee et al. 2019). Many of the salvaged carcasses had evidence of a fatal vessel strike. In addition, vessel struck Atlantic sturgeon have been found in other parts of the Chesapeake Bay DPS's range including in the York and Nanticoke river estuaries, within Chesapeake Bay, and near the mouth of the Bay since the DPS was listed as endangered (NMFS Sturgeon Salvage Permit Reporting; Secor et al. 2021).

In the marine and coastal range of the CB DPS from Canada to Florida, fisheries bycatch in federally and state-managed fisheries poses a threat to the DPS, reducing survivorship of subadults and adults and potentially causing an overall reduction in the spawning population (Stein *et al.* 2004b; ASMFC TC 2007; ASSRT 2007).

Areas with persistent, degraded water quality, habitat impacts from dredging, continued bycatch in U.S. state and federally managed fisheries, Canadian fisheries, and vessel strikes remain significant threats to the CB DPS of Atlantic sturgeon. Of the 35% of Atlantic sturgeon incidentally caught in the Bay of Fundy, about 1% were CB DPS fish (Wirgin *et al.* 2012). Studies have shown that Atlantic sturgeon can only sustain low levels of bycatch mortality (Boreman 1997; ASMFC TC 2007; Kahnle *et al.* 2007). The CB DPS is currently at risk of extinction given (1) precipitous declines in population sizes and the protracted period in which sturgeon populations have been depressed; (2) the limited amount of current spawning; and, (3) the impacts and threats that have and will continue to affect the potential for population recovery.

In 2018, we announced the initiation of a 5-year review for the Chesapeake Bay DPS. We reviewed and considered new information for the Chesapeake Bay DPS that has become available since this DPS was listed as endangered in February 2012. We completed the 5-year review for the Chesapeake Bay DPS in February 2022 (NMFS 2022c). Based on the best scientific and commercial data available at the time of the review, we concluded that no change to the listing status is warranted.

5.3.4 Carolina DPS

The Carolina DPS includes all Atlantic sturgeon that spawn or are spawned in the watersheds (including all rivers and tributaries) from Albemarle Sound southward along the southern Virginia, North Carolina, and South Carolina coastal areas to Charleston Harbor. The marine range of Atlantic sturgeon from the Carolina DPS extends from the Hamilton Inlet, Labrador, Canada, to Cape Canaveral, Florida.

Rivers in the Carolina DPS considered to be spawning rivers include the Neuse, Roanoke, Tar-Pamlico, Cape Fear, and Northeast Cape Fear rivers, and the Santee-Cooper and Pee Dee river (Waccamaw and Pee Dee rivers) systems. Historically, both the Sampit and Ashley Rivers were documented to have spawning populations at one time. However, the spawning population in the Sampit River is believed to be extirpated and the current status of the spawning population in the Ashley River is unknown. We have no information, current or historical, of Atlantic sturgeon using the Chowan and New Rivers in North Carolina. Recent telemetry work by Post et al. (2014) indicates that Atlantic sturgeon do not use the Sampit, Ashley, Ashepoo, and Broad-Coosawhatchie Rivers in South Carolina. These rivers are short, coastal plains rivers that most likely do not contain suitable habitat for Atlantic sturgeon. Fish from the Carolina DPS likely use other river systems than those listed here for their specific life functions.

Historical landings data indicate that between 7,000 and 10,500 adult female Atlantic sturgeon were present in North Carolina prior to 1890 (Armstrong and Hightower 2002, Secor 2002). Secor (2002) estimates that 8,000 adult females were present in South Carolina during that same period. Reductions from the commercial fishery and ongoing threats have drastically reduced the numbers of Atlantic sturgeon within the Carolina DPS. Currently, the Atlantic sturgeon spawning population in at least one river system within the Carolina DPS has been extirpated, with a potential extirpation in an additional system. The ASSRT estimated the remaining river populations within the DPS to have fewer than 300 spawning adults; this is thought to be a small fraction of historic population sizes (ASSRT 2007).

The Carolina DPS was listed as endangered under the ESA as a result of a combination of habitat curtailment and modification, overutilization (i.e., being taken as bycatch) in commercial fisheries, and the inadequacy of regulatory mechanisms in ameliorating these impacts and threats.

The modification and curtailment of Atlantic sturgeon habitat resulting from dams, dredging, and degraded water quality is contributing to the status of the Carolina DPS. Dams have curtailed Atlantic sturgeon spawning and juvenile developmental habitat by blocking over 60 percent of the historical sturgeon habitat upstream of the dams in the Cape Fear and Santee-Cooper River systems. Water quality (velocity, temperature, and dissolved oxygen (DO)) downstream of these dams, as well as on the Roanoke River, has been reduced, which modifies and curtails the extent of spawning and nursery habitat for the Carolina DPS. Dredging in spawning and nursery grounds modifies the quality of the habitat and is further curtailing the extent of available habitat in the Cape Fear and Cooper Rivers, where Atlantic sturgeon habitat has already been modified and curtailed by the presence of dams. Reductions in water quality from terrestrial activities have modified habitat utilized by the Carolina DPS. In the Pamlico and Neuse systems, nutrient-loading and seasonal anoxia are occurring, associated in part with concentrated animal feeding operations (CAFOs). Heavy industrial development and CAFOs have degraded water quality in the Cape Fear River. Water quality in the Waccamaw and Pee Dee rivers have been affected by industrialization and riverine sediment samples contain high levels of various toxins, including dioxins. Additional stressors arising from water allocation and climate change threaten to exacerbate water quality problems that are already present throughout the range of the Carolina DPS. The removal of large amounts of water from the system will alter flows, temperature, and DO. Existing water allocation issues will likely be compounded by population growth and potentially, by climate change. Climate change is also predicted to elevate water temperatures and exacerbate nutrient-loading, pollution inputs, and lower DO, all of which are current stressors to the Carolina DPS.

Overutilization of Atlantic sturgeon from directed fishing caused initial severe declines in Atlantic sturgeon populations in the Southeast, from which they have never rebounded. Further, continued overutilization of Atlantic sturgeon as bycatch in commercial fisheries is an ongoing impact to the Carolina DPS. Little data exists on bycatch in the Southeast and high levels of bycatch underreporting are suspected. Stress or injury to Atlantic sturgeon taken as bycatch but released alive may result in increased susceptibility to other threats, such as poor water quality (e.g., exposure to toxins and low DO). This may result in reduced ability to perform major life functions, such as foraging and spawning, or even post-capture mortality.

As a wide-ranging anadromous species, Carolina DPS Atlantic sturgeon are subject to numerous Federal (U.S. and Canadian), state and provincial, and inter-jurisdictional laws, regulations, and agency activities. While these mechanisms have addressed impacts to Atlantic sturgeon through directed fisheries, there are currently no mechanisms in place to address the significant risk posed to Atlantic sturgeon from commercial bycatch. Though statutory and regulatory mechanisms exist that authorize reducing the impact of dams on riverine and anadromous species, such as Atlantic sturgeon, and their habitat, these mechanisms have proven inadequate for preventing dams from blocking access to habitat upstream and degrading habitat downstream. Further, water quality continues to be a problem in the Carolina DPS, even with existing controls on some pollution sources. Current regulatory regimes are not necessarily effective in controlling water allocation issues (e.g., no restrictions on interbasin water transfers in South Carolina, the lack of ability to regulate non-point source pollution, etc.)

5.3.5 South Atlantic DPS

The South Atlantic DPS includes all Atlantic sturgeon that spawn or are spawned in the watersheds (including all rivers and tributaries) of the Ashepoo, Combahee, and Edisto Rivers (ACE) Basin southward along the South Carolina, Georgia, and Florida coastal areas to the St. Johns River, Florida.

Rivers known to have current spawning populations within the range of the South Atlantic DPS include the Combahee, Edisto, Savannah, Ogeechee, Altamaha, St. Marys, and Satilla Rivers. Recent telemetry work by Post et al. (2014) indicates that Atlantic sturgeon do not use the Sampit, Ashley, Ashepoo, and Broad-Coosawhatchie Rivers in South Carolina. These rivers are short, coastal plains rivers that most likely do not contain suitable habitat for Atlantic sturgeon. Post et al. (2014) also found Atlantic sturgeon only use the portion of the Waccamaw River downstream of Bull Creek. Due to manmade structures and alterations, spawning areas in the St. Johns River are not accessible and therefore do not support a reproducing population.

Secor (2002) estimates that 8,000 adult females were present in South Carolina prior to 1890. Prior to the collapse of the fishery in the late 1800s, the sturgeon fishery was the third largest fishery in Georgia. Secor (2002) estimated from U.S. Fish Commission landing reports that approximately 11,000 spawning females were likely present in the state prior to 1890. Reductions from the commercial fishery and ongoing threats have drastically reduced the numbers of Atlantic sturgeon within the South Atlantic DPS. Currently, the Atlantic sturgeon spawning population in at least one river system within the South Atlantic DPS has been extirpated. The Altamaha River population of Atlantic sturgeon, with an estimated 343 adults spawning annually, is believed to be the largest population in the Southeast, yet is estimated to be only 6 percent of its historical population size. The ASSRT estimated the abundances of the remaining river populations within the DPS, each estimated to have fewer than 300 spawning adults, to be less than 1 percent of what they were historically (ASSRT 2007).

The South Atlantic DPS was listed as endangered under the ESA as a result of a combination of habitat curtailment and modification, overutilization (i.e., being taken as bycatch) in commercial fisheries, and the inadequacy of regulatory mechanisms in ameliorating these impacts and threats.

The modification and curtailment of Atlantic sturgeon habitat resulting from dredging and degraded water quality is contributing to the status of the South Atlantic DPS. Maintenance dredging is currently modifying Atlantic sturgeon nursery habitat in the Savannah River and modeling indicates that the proposed deepening of the navigation channel will result in reduced DO and upriver movement of the salt wedge, curtailing spawning habitat. Dredging is also modifying nursery and foraging habitat in the St. Johns River. Reductions in water quality from terrestrial activities have modified habitat utilized by the South Atlantic DPS Non-point source inputs are causing low DO in the Ogeechee River and in the St. Marys River, which completely eliminates juvenile nursery habitat in summer. Low DO has also been observed in the St. Johns River in the summer. Sturgeon are more sensitive to low DO and the negative (metabolic, growth, and feeding) effects caused by low DO increase when water temperatures are concurrently high, as they are within the range of the South Atlantic DPS. Additional stressors arising from water allocation and climate change threaten to exacerbate water quality problems that are already present throughout the range of the South Atlantic DPS. Large withdrawals of over 240 million gallons per day (mgd) of water occur in the Savannah River for power generation and municipal uses. However, users withdrawing less than 100,000 gallons per day (gpd) are not required to get permits, so actual water withdrawals from the Savannah and other rivers within the range of the South Atlantic DPS are likely much higher. The removal of large amounts of water from the system will alter flows, temperature, and DO. Water shortages and “water wars” are already occurring in the rivers occupied by the South Atlantic DPS and will likely be compounded in the future by population growth and potentially by climate change. Climate change is also predicted to elevate water temperatures and exacerbate nutrient-loading, pollution inputs, and lower DO, all of which are current stressors to the South Atlantic DPS.

Overutilization of Atlantic sturgeon from directed fishing caused initial severe declines in Atlantic sturgeon populations in the Southeast, from which they have never rebounded. Further, continued overutilization of Atlantic sturgeon as bycatch in commercial fisheries is an ongoing impact to the South Atlantic DPS. The loss of large subadults and adults as a result of bycatch impacts Atlantic sturgeon populations because they are a long-lived species, have an older age at maturity, have lower maximum fecundity values, and a large percentage of egg production occurs later in life. Little data exist on bycatch in the Southeast and high levels of bycatch underreporting are suspected. Further, a total population abundance for the DPS is not available, and it is therefore not possible to calculate the percentage of the DPS subject to bycatch mortality based on the available bycatch mortality rates for individual fisheries. However, fisheries known to incidentally catch Atlantic sturgeon occur throughout the marine range of the species and in some riverine waters as well. Because Atlantic sturgeon mix extensively in marine waters and may access multiple river systems, they are subject to being caught in multiple fisheries throughout their range. In addition, stress or injury to Atlantic sturgeon taken as bycatch but released alive may result in increased susceptibility to other threats, such as poor water quality (e.g., exposure to toxins and low DO). This may result in reduced ability to perform major life functions, such as foraging and spawning, or even post-capture mortality.

As a wide-ranging anadromous species, Atlantic sturgeon are subject to numerous Federal (U.S. and Canadian), state and provincial, and inter-jurisdictional laws, regulations, and agency activities. While these mechanisms have addressed impacts to Atlantic sturgeon through directed fisheries, there are currently no mechanisms in place to address the significant risk posed to Atlantic sturgeon from commercial bycatch. Though statutory and regulatory mechanisms exist that authorize reducing the impact of dams on riverine and anadromous species, such as Atlantic sturgeon, and their habitat, these mechanisms have proven inadequate for preventing dams from blocking access to habitat upstream and degrading habitat downstream. Further, water quality continues to be a problem in the South Atlantic DPS, even with existing controls on some pollution sources. Current regulatory regimes are not necessarily effective in controlling water allocation issues (e.g., no permit requirements for water withdrawals under 100,000 gpd in Georgia, no restrictions on interbasin water transfers in South Carolina, the lack of ability to regulate non-point source pollution.)

Recovery Goals

A Recovery Plan has not been completed for any DPS of Atlantic sturgeon. In 2018, NMFS published a Recovery Outline[30] to serve as an initial recovery-planning document. In this, the recovery vision is stated, "Subpopulations of all five Atlantic sturgeon DPSs must be present across the historical range. These subpopulations must be of sufficient size and genetic diversity to support successful reproduction and recovery from mortality events. The recruitment of juveniles to the sub-adult and adult life stages must also increase and that increased recruitment must be maintained over many years. Recovery of these DPSs will require conservation of the riverine and marine habitats used for spawning, development, foraging, and growth by abating threats to ensure a high probability of survival into the future." The Outline also includes steps that are expected to serve as an initial recovery action plan. These include protecting extant subpopulations and the species' habitat through reduction of threats; gathering information through research and monitoring on current distribution and abundance; and addressing vessel strikes in rivers, the effects of climate change and bycatch.

5.4 Shortnose Sturgeon (*Acipenser brevirostrum*)

The only activity considered in this Opinion that may adversely affect shortnose sturgeon is vessel traffic in the Hudson River. Shortnose sturgeon are fish that occur in rivers and estuaries along the East Coast of the U.S. and Canada (SSSRT, 2010). They have a head covered in bony plates, as well as protective armor called scutes extending from the base of the skull to the caudal peduncle. Other distinctive features include a subterminal, protractile tube-like mouth and

[30] https://media.fisheries.noaa.gov/dam-migration/ats_recovery_outline.pdf; last accessed March 26, 2023.

chemosensory barbels for benthic foraging (SSSRT, 2010). Sturgeon have been present in North America since the Upper Cretaceous period, more than 66 million years ago. The information below is a summary of available information on the species. More thorough discussions can be found in the cited references as well as the Shortnose Sturgeon Status Review Team's (SSSRT) Biological Assessment (2010).

Life History and General Habitat Use

There are differences in life history, behavior, and habitat use across the range of the species. Current research indicates that these differences are adaptations to unique features of the rivers where these populations occur. For example, there are differences in larval dispersal patterns in the Connecticut River (MA) and Savannah River (GA) (Parker, 2007). There are also morphological and behavioral differences. Growth and maturation occurs more quickly in southern rivers but fish in northern rivers grow larger and live longer. We provide general life history attributes in Table 5.4.1.

Table 5.4.1. Shortnose sturgeon general life history for the species throughout its range

Stage	Size (mm)	Duration	Behaviors/Habitat Used
Egg	3-4	13 days postspawn	stationary on bottom; Cobble and rock, fresh, fast flowing water (0.4-0.8 m/s)
Yolk Sac Larvae	7-15	8-12 days post hatch	Photonegative; swim up and drift behavior; form aggregations with other YSL; Cobble and rock, stay at bottom near spawning site
Post Yolk Sac Larvae	15 - 57	12-40 days post hatch	Free swimming; feeding; Silt bottom, deep channel; fresh water
Young of Year	57 – 140 (north); 57-300 (south)	From 40 days post-hatch to one year	Deep, muddy areas upstream of the salt wedge
Juvenile	140 to 450-550 (north); 300 to 450-550 (south)	1 year to maturation	Increasing salinity tolerance with age; same habitat patterns as adults
Adult	450-1100 average; (max recorded 1400)	Post-maturation	Freshwater to estuary with some individuals making nearshore coastal migrations

Shortnose sturgeon live on average for 30-40 years (Dadswell et al., 1984). Males mature at approximately 5-10 years and females mature between age 7 and 13, with later maturation occurring in more northern populations (Dadswell et al., 1984). Females typically spawn for the first time 5 years post-maturation (age 12-18; Dadswell, 1979; Dadswell et al., 1984) and then spawn every 3-5 years (Dadswell, 1979; Dadswell et al., 1984;). Males spawn for the first time approximately 1-2 years after maturity with spawning typically occurring every 1-2 years (Kieffer and Kynard, 1996; NMFS, 1998; Dadswell et al., 1984). Shortnose sturgeon are iteroparous (spawning more than once during their life) and females release eggs in multiple "batches" during a 24 to 36-hour period (total of 30,000-200,000 eggs). Multiple males are likely to fertilize the eggs of a single female.

Cues for spawning are thought to include water temperature, day length and river flow (Kynard et al, 2012, Kynard et al. 2016). Shortnose sturgeon spawn in freshwater reaches of their natal rivers when water temperatures reach 9–15°C in the spring (Dadswell, 1979; Taubert, 1980a and b; Kynard, 1997). Spawning occurs over gravel, rubble, and/or cobble substrate (Dadswell, 1979, Taubert, 1980a and b; Buckley and Kynard, 1985b; Kynard, 1997) in areas with average bottom velocities between 0.4 and 0.8 m/s. Depths at spawning sites are variable, ranging from 1.2 - 27 m (multiple references in SSSRT (2010)). Eggs are small and demersal and stick to the rocky substrate where spawning occurs.

Shortnose sturgeon occur in waters between 0-34°C (Dadswell et al., 1984; Heidt & Gilbert, 1978); with temperatures above 28°C considered to be stressful. Depths used are highly variable, ranging from shallow mudflats while foraging to deep channels up to 30 m (Dadswell et al., 1984; Dadswell, 1979). Salinity tolerance increases with age; while young of the year must remain in freshwater, adults have been documented in the ocean with salinities of up 30 parts-per-thousand (ppt) (Holland and Yeverton, 1973; Saunders and Smith, 1978). Dissolved oxygen affects distribution, with preference for DO levels at or above 5mg/l and adverse effects anticipated for prolonged exposure to DO less than 3.2mg/L (Secor and Niklitschek 2001).

Shortnose sturgeon feed on benthic insects, crustaceans, mollusks, and polychaetes (Dadswell et al., 1984). Both juvenile and adult shortnose sturgeon primarily forage over sandy-mud bottoms, which support benthic invertebrates (Carlson and Simpson, 1987; Kynard, 1997). Shortnose sturgeon have also been observed feeding off plant surfaces (Dadswell et al., 1984).

Following spawning, adult shortnose sturgeon disperse quickly down river to summer foraging grounds areas and remain in areas downstream of their spawning grounds throughout the remainder of the year (Buckley and Kynard, 1985a, Dadswell et al., 1984; Buckley and Kynard, 1985b; O'Herron et al., 1993).

In northern rivers, shortnose aggregate during the winter months in discrete, deep (3-10m) freshwater areas with minimal movement and foraging (Kynard et al., 2012; Buckley and Kynard, 1985a; Dadswell, 1979, Li et al., 2007; Dovel et al., 1992; Bain et al., 1998a and b). In the winter, adults in southern rivers spend much of their time in the slower moving waters downstream near the salt-wedge and forage widely throughout the estuary (Collins and Smith, 1993, Weber et al., 1998). Prespawning sturgeon in some northern and southern systems migrate into an area in the upper tidal portion of the river in the fall and complete their migration in the spring (Rogers and Weber, 1995). Older juveniles typically occur in the same overwintering areas as adults while young of the year remain in freshwater (Jenkins et al., 1993; Jarvis et al. 2001).

Listing History

Shortnose sturgeon were listed as endangered in 1967 (32 FR 4001), and the species remained on the endangered species list with the enactment of the ESA in 1973. Shortnose sturgeon are thought to have been abundant in nearly every large East Coast river prior to the 1880s (see McDonald, 1887; Smith and Clugston, 1997). Pollution and overfishing, including bycatch in the shad fishery, were listed as principal reasons for the species' decline. The species remains listed as endangered throughout its range. While the 1998 Recovery Plan refers to Distinct Population Segments (DPS), the process to designate DPSs for this species has not been undertaken. The SSSRT published a Biological Assessment for shortnose sturgeon in 2010. The report summarized the status of shortnose sturgeon within each river and identified stressors that continue to affect the abundance and stability of these populations.

Current Status

There is no current total population estimate for shortnose sturgeon rangewide. Information on populations and metapopulations is presented below. In general, populations in the Northeast are larger and more stable than those in the Southeast (SSSRT, 2010). Population size throughout the species' range is considered to be stable; however, most riverine populations are below the historic population sizes and most likely are below the carrying capacity of the river (Kynard, 1996).

Population Structure

There are 19 documented populations of shortnose sturgeon ranging from the St. Johns River, Florida (possibly extirpated from this system) to the Saint John River in New Brunswick, Canada. There is a large gap in the middle of the species range with individuals present in the Chesapeake Bay separated from populations in the Carolinas by a distance of more than 400 km. Currently, there are significantly more shortnose sturgeon in the northern portion of the range.

Developments in genetic research as well as differences in life history support the grouping of shortnose sturgeon into five genetically distinct groups, all of which have unique geographic adaptations (see Grunwald et al., 2008; Grunwald et al., 2002; King et al., 2001; Waldman et al., 2002b; Walsh et al., 2001; Wirgin et al., 2009; Wirgin et al., 2002; SSSRT, 2010). These groups are: 1) Gulf of Maine; 2) Connecticut and Housatonic Rivers; 3) Hudson River; 4) Delaware River and Chesapeake Bay; and 5) Southeast. The Gulf of Maine, Delaware/Chesapeake Bay and Southeast groups function as metapopulations[31]. The other two groups (Connecticut/Housatonic and the Hudson River) function as independent populations.

While there is migration within each metapopulation (i.e., between rivers in the Gulf of Maine and between rivers in the Southeast) and occasional migration between populations (e.g., Connecticut and Hudson), interbreeding between river populations is limited to very few individuals per generation; this results in morphological and genetic variation between most river populations (see Walsh et al., 2001; Grunwald et al., 2002; Waldman et al., 2002; Wirgin et al., 2005). Indirect gene flow estimates from mtDNA indicate an effective migration rate of less than two individuals per generation. This means that while individual shortnose sturgeon may move between rivers, very few sturgeon are spawning outside their natal river; it is important to remember that the result of physical movement of individuals is rarely genetic exchange.

[31] A metapopulation is a group of populations in which distinct populations occupy separate patches of habitat separated by unoccupied areas (Levins 1969). Low rates of connectivity through dispersal, with little to no effective movement, allow individual populations to remain distinct as the rate of migration between local populations is low enough not to have an impact on local dynamics or evolutionary lineages (Hastings and Harrison 1994). This interbreeding between populations, while limited, is consistent, and distinguishes metapopulations from other patchy populations.

Summary of Status of Northeast Rivers

In NMFS' Greater Atlantic Region, shortnose sturgeon are known to spawn in the Kennebec, Androscoggin, Merrimack, Connecticut, Hudson, and Delaware Rivers. Shortnose sturgeon are also known to occur in the Penobscot and Potomac Rivers; although it is unclear if spawning is currently occurring in those systems.

Gulf of Maine Metapopulation

Tagging and telemetry studies indicate that shortnose sturgeon are present in the Penobscot, Kennebec, Androscoggin, Sheepscot, and Saco Rivers. Individuals have also been documented in smaller coastal rivers; however, the duration of presence has been limited to hours or days and the smaller coastal rivers are thought to be only used occasionally (Zydlewski et al., 2011).

Since the removal of the Veazie and Great Works Dams (2013 and 2012, respectively), in the Penobscot River, shortnose sturgeon range from the Bay to the Milford Dam. Shortnose sturgeon now are presumed to have access to their full historical range. Adult and large juvenile sturgeon have been documented to use the river. While potential spawning sites have been identified, no spawning has been documented. Foraging and overwintering are known to occur in the river. Nearly all prespawn females and males detected in the Penobscot River have been documented to return to the Kennebec or Androscoggin Rivers. Robust design analysis with closed periods in the summer and late fall estimated seasonal adult abundance ranging from 636-1285 (weighted mean), with a low estimate of 602 (95% CI: 409.6-910.8) and a high of 1306 (95% CI: 795.6-2176.4) (Fernandes, 2008; Fernandes et al., 2010; Dionne, 2010 in Maine DMR (2010)).

Delaware River-Chesapeake Bay Metapopulation

Shortnose sturgeon range from Delaware Bay up to at least Scudders Falls (river kilometer 223); there are no dams within the species' range on this river. The population is considered stable (comparing 1981-1984 to 1999-2003) at around 12,000 adults (Hastings et al., 1987 and ERC, 2006b). Spawning occurs primarily between Scudders Falls and the Trenton rapids. Overwintering and foraging also occur in the river. Shortnose sturgeon have been documented to use the Chesapeake-Delaware Canal to move from the Chesapeake Bay to the Delaware River. In Chesapeake Bay, shortnose sturgeon have most often been found in Maryland waters of the mainstem bay and tidal tributaries such as the Susquehanna, Potomac, and Rappahannock Rivers (Kynard et al., 2016; SSSRT, 2010). Spells (1998), Skjeveland et al. (2000), and Welsh et al. (2002) all reported one capture each of adult shortnose sturgeon in the Rappahannock River. Recent documented use of Virginia waters of Chesapeake Bay is currently limited to two individual shortnose sturgeon: one captured in 2016 (Balazik, 2017) and a second sturgeon (a confirmed gravid female) caught in 2018 in the James River (Balazik, pers. comm. 2018). Spawning has not been documented in any tributary to the Bay although suitable spawning habitat and two prespawn females with late stage eggs have been documented in the Potomac River. Current information indicates that shortnose sturgeon are present year round in the Potomac River with foraging and overwintering taking place there. Shortnose sturgeon captured in the Chesapeake Bay are not genetically distinct from the Delaware River population.

Southeast Metapopulation

There are no shortnose sturgeon between Maryland waters of the Chesapeake Bay and the Carolinas. Shortnose sturgeon are only thought to occur in the Cape Fear River and Yadkin-Pee Dee River in North Carolina and are thought to be present in very small numbers.

The Altamaha River supports the largest known population in the Southeast with successful self-sustaining recruitment. The most recent population estimate for this river was 6,320 individuals (95% CI = 4,387-9,249; DeVries, 2006). The population contains more juveniles than expected. Comparisons to previous population estimates suggest that the population is increasing; however, there is high mortality between the juvenile and adult stages in this river. This mortality is thought to result from incidental capture in the shad fishery, which occurs at the same time as the spawning period (DeVries, 2006).

The only available estimate for the Cooper River is of 300 spawning adults at the Pinoplis Dam spawning site (based on 1996-1998 sampling; Cooke et al., 2004). This is likely an underestimate of the total number of adults as it would not include non-spawning adults. Estimates for the Ogeechee River were 266 (95%CI=236-300) in 1993 (Weber, 1996; Weber et al., 1998); a more recent estimate (sampling from 1999-2004; Fleming et al., 2003) indicates a population size of 147 (95% CI = 104-249). While the more recent estimate is lower, it is not significantly different from the previous estimate. Available information indicates the Ogeechee River population may be experiencing juvenile mortality rates greater than other southeastern rivers.

Spawning is also occurring in the Savannah River, the Congaree River, and the Yadkin-Pee Dee River. There are no population estimates available for these rivers. Occurrence in other southern rivers is limited, with capture in most other rivers limited to fewer than five individuals. They are thought to be extremely rare or possibly extirpated from the St. Johns River in Florida as only a single specimen was found by the Florida Fish and Wildlife Conservation Commission during extensive sampling of the river in 2002/2003. In these river systems, shortnose sturgeon occur in nearshore marine, estuarine, and riverine habitat.

Threats

Because sturgeon are long-lived and slow growing, stock productivity is relatively low; this can make the species vulnerable to rapid decline and slow recovery (Musick, 1999). In well studied rivers (e.g., Hudson, upper Connecticut), researchers have documented significant year to year recruitment variability (up to 10 fold over 20 years in the Hudson and years with no recruitment in the CT). However, this pattern is not unexpected given the life history characteristics of the species and natural variability in hydrogeologic cues relied on for spawning.

The small amount of effective movement between populations means recolonization of currently extirpated river populations is expected to be very slow and any future recolonization of any rivers that experience significant losses of individuals would also be expected to be very slow. Despite the significant decline in population sizes over the last century, gene diversity in shortnose sturgeon is moderately high in both mtDNA (Quattro et al., 2002; Wirgin et al., 2005; Wirgin et al., 2000) and nDNA (King et al., 2001) genomes.

A population of sturgeon can go extinct as a consequence of demographic stochasticity (fluctuations in population size due to random demographic events); the smaller the metapopulation (or population), the more prone it is to extinction. Anthropogenic impacts acting on top of demographic stochasticity further increase the risk of extinction.

All shortnose sturgeon populations are highly sensitive to increases in juvenile mortality that would result in reductions in the number of adult spawners (Anders et al., 2002; Gross et al., 2002; Secor, 2002). Populations of shortnose sturgeon that do not have reliable natural recruitment are at increased risk of experiencing population decline leading to extinction (Secor et al., 2002). Elasticity studies of shortnose sturgeon indicate that the highest potential for increased population size and stability comes from YOY and juveniles as compared to adults (Gross et al., 2002); that is, increasing the number of YOY and juveniles has a more significant long term impact to the population than does increasing the number of adults or the fecundity of adults.

The Shortnose Sturgeon Recovery Plan (NMFS, 1998) and the Shortnose Sturgeon Status Review Team's Biological Assessment of shortnose sturgeon (2010) identify habitat degradation or loss and direct mortality as principal threats to the species' survival. Natural and anthropogenic factors continue to threaten the recovery of shortnose sturgeon and include: poaching, bycatch in riverine fisheries, habitat alteration resulting from the presence of dams, in-water and shoreline construction, including dredging; degraded water quality which can impact habitat suitability and result in physiological effects to individuals including impacts on reproductive success; direct mortality resulting from dredging as well as impingement and entrainment at water intakes; and, loss of historical range due to the presence of dams. Shortnose sturgeon are also occasionally killed as a result of research activities. The total number of sturgeon affected by these various threats is not known. Climate change, particularly shifts in seasonal temperature regimes and changes in the location of the salt wedge, may impact shortnose sturgeon in the future (more information on Climate Change is presented in Section 5.0). More information on threats experienced in the action area is presented in the Environmental Baseline Section of this Opinion.

Recovery Plan

The 1998 Recovery Plan (NMFS, 1998) outlines the steps necessary for recovery and indicates that each population may be a candidate for downlisting (i.e., to threatened) when it reaches a minimum population size that is large enough to prevent extinction and will make the loss of genetic diversity unlikely; the minimum population size for each population has not yet been determined. The Recovery Outline contains three major tasks: (1) establish delisting criteria; (2) protect shortnose sturgeon populations and habitats; and, (3) rehabilitate habitats and population segments. We know that in general, to recover, a listed species must have a sustained positive trend of increasing population over time. To allow that to happen for sturgeon, individuals must have access to enough habitat in suitable condition for foraging, resting and spawning. In many rivers, particularly in the Southeast, habitat is compromised and continues to impact the ability of sturgeon populations to recover. Conditions must be suitable for the successful development of early life stages. Mortality rates must be low enough to allow for recruitment to all age classes so that successful spawning can continue over time and over generations. There must be enough suitable habitat for spawning, foraging, resting and migrations of all individuals. Habitat connectivity must also be maintained so that individuals can migrate between important habitats without delays that impact their fitness. The loss of any population or metapopulation would result in the loss of biodiversity and would create (or widen) a gap in the species' range.

6.0 ENVIRONMENTAL BASELINE

The "environmental baseline" refers to the condition of ESA-listed species and designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action: it includes the past and present impacts of all federal, state, or private activities and other human activities in the action area; the anticipated impacts of all proposed federal actions that have already undergone Section 7 consultation; and, the impacts of state or private actions that are contemporaneous with the proposed project (50 C.F.R. §402.02). The consequences to ESA-listed species and designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline.

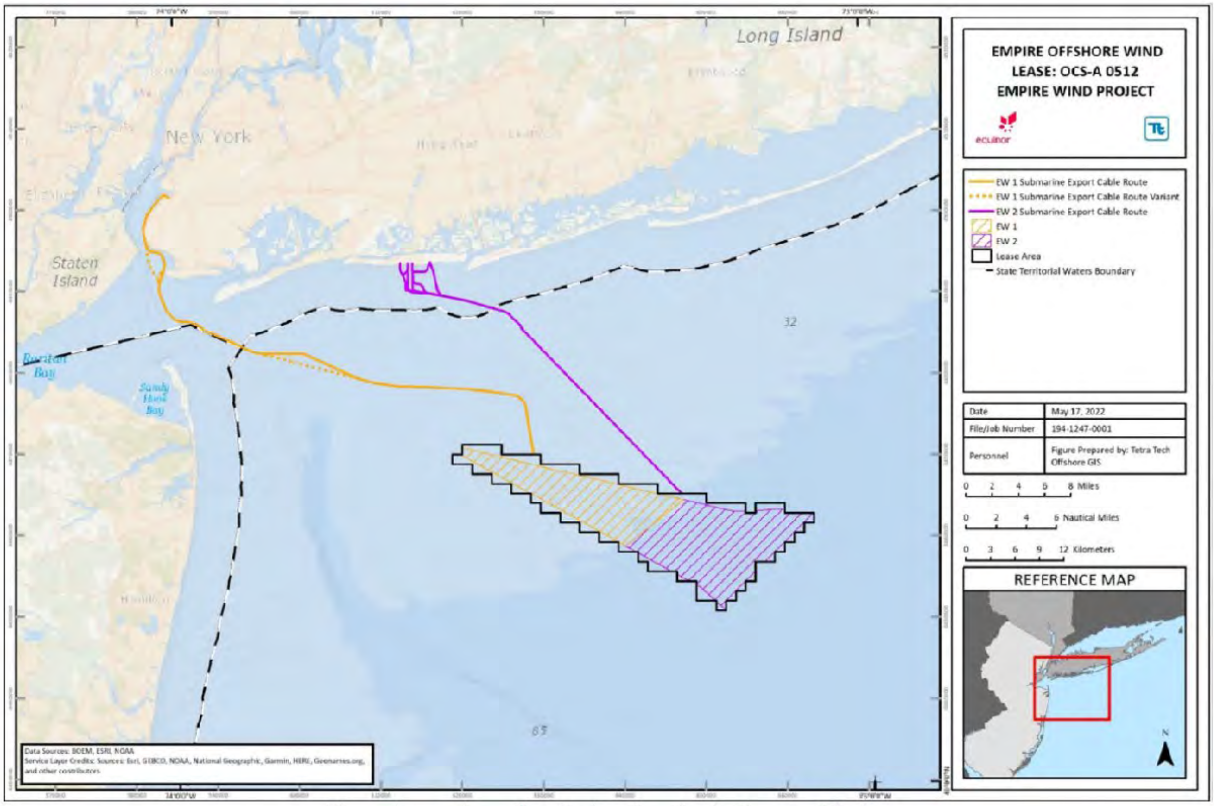
There are a number of existing activities that regularly occur in various portions of the action area, including operation of vessels and federal and state authorized fisheries. Other activities that occur occasionally or intermittently include scientific research, military activities, and geophysical and geotechnical surveys. There are also environmental conditions caused or exacerbated by human activities (i.e., water quality and noise) that may affect listed species in the action area. Some of these stressors result in mortality or serious injury to individual animals (e.g., vessel strike, fisheries), whereas others result in non-lethal impacts or impacts that are indirect. For all of the listed species considered here, the status of the species in the action area is the same as the rangewide status presented in the *Status of the Species* section of this Opinion, given their extensive movements in and out of the action area and throughout their range as well as the similarities of stressors throughout the action area and other parts of their range. Below, we describe the conditions of the action area, present a summary of the best available information on the use of the action area by listed species, and address the impacts to listed species of federal, state, and private activities in the action area that meet the definition of "environmental baseline." Consistent with that definition, future offshore windfarms, as well as activities caused by aspects of their development and operation, that are not the subjects of a completed ESA section 7 consultation are not in the Environmental Baseline for the Empire Wind project. Rather, as a Section 7 consultation is completed on a windfarm, the effects of the action associated with that project would be considered in the Environmental Baseline for the next one in line for consultation.

As described above in Section 3.4, the action area includes the WDA (i.e., the EW1 and EW2 WFAs and the two offshore export cable route corridors), the project area for the Connected Action, project-related vessel routes in the identified portion of the U.S. EEZ along the Atlantic and Gulf coasts, and the geographic extent of effects caused by project-related activities in those areas. The Empire Wind project area is located within multiple defined marine areas. The broadest area, the U.S. Northeast Shelf Large Marine Ecosystem (LME), extends from the Gulf of Maine to Cape Hatteras, North Carolina (Kaplan 2011). The WFA and export cable routes are located within the Mid-Atlantic Bight subregion of the LME. A number of biogeographic classifications further divide the Mid-Atlantic Bight into the southern New England and southern Mid-Atlantic Bight subregions based on distinct bathymetry and circulation (Cook and Auster 2007). Based on considerable overlap among the dominant species in the two ecoregions, with dominant species from both ecoregions either resident in or transient through the WDA (Guida et al. 2017), for the purposes of this Opinion, we consider the Empire WDA to be situated in the Mid-Atlantic Bight subregion (Guida et al. 2017). More precisely, the Empire WDA is located in the New York Bight (NYB), an offshore area within the Mid-Atlantic Bight which extends northeast from Cape May in New Jersey to Montauk Point on the eastern tip of Long Island, NY. The physical oceanography of this region is influenced by the seafloor, freshwater input from multiple rivers and estuaries, large-scale weather patterns, and tropical or winter coastal storm events. Weather-driven surface currents, tidal mixing, and estuarine outflow all contribute to driving water movement through the area (Kaplan 2011).

The Empire WFA forms a narrow wedge oriented just east of the Hudson Shelf Valley, lying between approximately 12 and 26 nm south of Long Island's south shore and between approximately 16 and 42 nm east of the northern New Jersey shoreline (Figure 6.1, which also includes the two cable routes). Water temperatures in the WFA range from approximately 43°F (6°C) to 75°F (24°C) (NOAA 2013). The warmest temperatures occur from July through September, when temperatures range from 48°F (9°C) to 75°F (24°C), depending on depth.[32] The coldest temperatures occur from February through April, when temperatures range from 41°F (5°C) to 45°F (7°C), depending on depth (BOEM 2023). Seasonally, the Mid-Atlantic region experiences one of the largest transitions in stratification in any part of the ocean around the world, from the cold, well-mixed conditions in winter months to one of the largest top-to-bottom temperature differences in the summer (Castelao et al. 2010, Houghton et al. 1982, Miles et al. 2021). From spring through early summer, a strong thermocline develops across the length of the Mid-Atlantic Bight, isolating a continuous mid-shelf "cold pool" of water that extends from Nantucket to Cape Hatteras (Houghton et al. 1982, Kaplan 2011, Miles 2021). Through summer, the thermocline strengthens and the cold pool becomes more stable as a result of surface heating and freshwater runoff (Castelao et al. 2010). The stable summer cold pool is a relatively slow-moving feature which moves back and forth between the coast and shelf in response to surface wind forcing during periods of upwelling and downwelling. During the fall, more frequent strong wind events and decreasing surface heat over increasingly shorter daily daylight hours shifts the balance between heat input and vertical mixing. This results in reduced stratification, which ultimately breaks down the cold pool (Bigelow 1933, Castelao et al 2010, Gong et al 2010, Lentz 2017, Lentz et al 2003, Miles et al 2021). These cold pool "seasons" of spring setup, summer stability, and fall breakdown are associated with and drivers of important biological and ecological processes, such as foraging and migration amongst marine vertebrates (Scales et al 2014).

[32] Empire analyzed water temperatures to a maximum depth of 131 ft. (40 m) (Empire 2022).

Figure 6.1. Empire Wind WDA illustrating the WFA and cable corridors



Source: Figure 1 in BOEM's BA

Shelf currents in the offshore portion of the project area are considered moderate. The mean rate of currents has been estimated to range from 0.67 to 1.1 miles per hour (0.3 to 0.5 m/s) and are considered to be neither strong nor consistent (Oceanweather, Inc. 2018; UKHO 2009; Empire 2022). Prominent bottom features of the WDA include a series of ridges and troughs that are composed of mainly soft sediments. Current geological conditions underlying the WFA are generally flat and slope gradient across the WFA is typically less than 1°. Geophysical surveys in the northwestern portion of the WFA characterized the seafloor as undulating. The eastern portion of the WFA is characterized by slightly gravelly sand that is present in depressions and pockets located between bedforms. This portion of the WFA is also characterized by megaripples with a typical height of less than 3.2 ft. (1 m) (Guida et al. 2017; Empire 2022).

Along the EW1 export cable route, geological conditions trend with shoaling towards the shore, and with more significant variation in the bathymetry closer to shore, where dredging patterns influence the seabed (Empire 2022). Several natural and man-made channels exist along the submarine export cable route. Generally, the slope gradient is less than 1° but may reach 5° along nearshore portions of the EW1 export cable route. Site-specific benthic surveys conducted along the EW1 export cable route describe sediments that are comprised primarily of sand with accumulations of slightly gravelly sand in bathymetric lows between bedforms and small depressions. Megaripples with heights of up to 1.6 ft. (0.5 m) and wavelengths of 13 to 49 ft. (4 to 15 m) are typically associated with these slightly gravelly areas. Closer to shore, there are isolated outcroppings of glacial till with boulders that are between 3.3 and 7.2 ft. (1 and 2.2 m) in height. Additionally, bathymetry modifying local bottom currents and erosion of finer sediments sourced from the glacial till have resulted in mobile bedforms near outcroppings.

Along the EW2 export cable, shoaling also increases approaching the shore (Empire 2022). The maximum slope along the EW2 export cable route is 1°. Site-specific benthic surveys conducted along the EW2 export cable route describe sediments that are comprised of sand with accumulations of slightly gravelly sand in bathymetric lows between bedforms and in areas of small depressions. Megaripples are generally observed in these areas containing slightly gravelly topographic lows.

Water depths range from 78 to 144 ft. (24 to 44 m), with deeper water depths in the southeast portion of the WFA. Along the EW1 export cable route, water depths vary between 19.4 and 104 ft. (5.9 and 31.7 m). Along the EW2 export cable route, water depths vary between 70 and 116 ft. (21.5 and 35.5 m) (NAVD88; Empire 2022).

As described above in Section 3.2.6.1, port modifications at SBMT planned as part of the Connected Action will occur along the "interpier" basins and adjacent waters of Upper New York Bay. These areas are classified as subtidal estuarine waters with unconsolidated bottoms. Physical evidence shows that the entire project area for the Connected Action has been subject to previous development. Bathymetric maps show that the bottom is relatively gently sloping away from the bulkhead and towards the open channel. There are no known reef structures or other fish aggregating objects on the bottom. Site-specific benthic surveys suggest the "interpier" areas have been accumulating sediment over the last couple of decades (AECOM 2023). The exposed benthic substrate is predominantly black silt sediment with occasional anthropogenic debris (including pieces of concrete) in areas adjacent to the "piers." Reduced rates of tidal exchange and mixing, as well as proximity to wastewater outflows have resulted in suboptimal[33] dissolved oxygen (DO) levels in the "interpier" basins. Water quality samples in the project area for the Connected Action reported DO levels ranging from approximately 74% in open water to 54-32% in the "interpier" basins (AECOM 2023). The project area for the Connected Action is also characterized by brackish water with salinity of approximately 24 parts per thousand (ppt).

6.1 Summary of Information on Listed Large Whale Presence in the Action Area

North Atlantic right whale (Eubalaena glacialis)
North Atlantic right whale presence and behavior in the action area is best understood in the context of their range. North Atlantic right whales occur in the Northwest Atlantic Ocean from calving grounds in coastal waters of the southeastern United States to feeding grounds in New England waters into Canadian waters and the Canadian Bay of Fundy, Scotian Shelf, and Gulf of St. Lawrence extending to the waters of Greenland and Iceland (Hayes et al. 2022; 81 FR 4837). The few published sightings of right whales in the Gulf of Mexico (Moore and Clark 1963, Schmidly and Melcher 1974, Ward Geiger et al. 2011) represent either geographic anomalies or a more extensive historic range beyond the sole known calving and wintering ground in the waters of the southeastern U.S. (Waring et al. 2009; 81 FR 4837). The Gulf of Mexico is not considered part of the species range (NMFS 2015; 81 FR 4837).

[33] DO levels below 57 percent (4.8 milligrams per liter [mg/L] in 24 degrees Celsius water) are considered below optimal (NYSDEC, 2008).

In the late fall, pregnant female right whales move south to their calving grounds off South Carolina, Georgia and northeastern Florida, while the majority of the population likely remains on the feeding grounds or disperses along the eastern seaboard. There is at least one case of a calf apparently being born in the Gulf of Maine (Patrician et al. 2009), and another newborn was detected in Cape Cod Bay in 2013 (CCS, unpublished data, as cited in Hayes et al. 2020) however, calving outside of the southeastern U.S. is considered to be extremely rare. A review of visual and passive acoustic monitoring data in the western North Atlantic demonstrated nearly continuous year-round presence across their entire habitat range (for at least some individuals), including in waters previously thought to be used only seasonally by individuals migrating along the coast (e.g., off New Jersey and Virginia). This suggests that not all of the population undergoes a consistent annual migration (Bort et al. 2015, Cole et al. 2013, Davis et al. 2017,

Hayes et al. 2020, Leiter et al. 2017, Morano et al. 2012, Whitt et al. 2013). Surveys have demonstrated several areas where North Atlantic right whales congregate seasonally, including the coastal waters of the southeastern U.S.; the Great South Channel; Jordan Basin; Georges Basin along the northeastern edge of Georges Bank; Cape Cod; Massachusetts Bay; and the continental shelf south of New England (Brown et al. 2002, Cole et al. 2013, Hayes et al. 2020, Leiter et al. 2017). Several recent studies (Meyer-Gutbrod et al. 2015, 2021, Davis et al. 2017, Davies et al. 2019, Gowan et al. 2019, Simard et al. 2019) suggest spatiotemporal habitat-use patterns are in flux both with regards to a shift northward (Meyer-Gutbrod et al. 2021), changing migration patterns (Gowan et al. 2019), as well as changing numbers in existing known high-use areas e.g., Davis et al. (2017, 2019, 2020) suggest increased distribution in waters of the mid-Atlantic.

North Atlantic right whales feed on extremely dense patches of certain copepod species, primarily the late juvenile developmental stage of *C. finmarchicus*. These dense patches can be found throughout the water column depending on time of day and season. They are known to undergo daily vertical migration where they are found within the surface waters at night and at depth during daytime to avoid visual predators. North Atlantic right whales' diving behavior is strongly correlated to the vertical distribution of *C. finmarchicus*. Baumgartner et al. (2017) investigated North Atlantic right whale foraging ecology by tagging 55 whales in six regions of the Gulf of Maine and southwestern Scotian Shelf in late winter to late fall from 2000 to 2010. Results indicated that on average North Atlantic right whales spent 72 percent of their time in the upper 33 feet (10 meters) of water and 15 of 55 whales (27 percent) dove to within 16.5 feet (5 meters) of the seafloor, spending as much as 45 percent of the total tagged time at this depth.

The distribution of right whales is linked to the distribution of their principal zooplankton prey, calanoid copepods (Baumgartner and Mate 2005, NMFS 2005, Waring et al. 2012, Winn et al. 1986). New England waters are important feeding habitats for right whales (Hayes et al. 2020). Right whale calls have been detected by autonomous passive acoustic sensors deployed between 2005 and 2010 at three sites (Massachusetts Bay, Stellwagen Bank, and Jeffreys Ledge) in the southern Gulf of Maine (Morano et al. 2012, Mussoline et al. 2012). Comparisons between detections from passive acoustic recorders and observations from aerial surveys in Cape Cod Bay between 2001 and 2005 demonstrated that aerial surveys found whales on approximately two-thirds of the days during which acoustic monitoring detected whales (Clark et al. 2010).

Recent changes in right whale distribution (Kraus et al. 2016) are driven by warming of deep waters in the Gulf of Maine (Record et al. 2019). Prior to 2010, right whale movements followed the seasonal occurrence of the late stage, lipid-rich copepod *C. finmarchicus* from the western Gulf of Maine in winter and spring to the eastern Gulf of Maine and Scotian Shelf in the summer and autumn (Beardsley et al. 1996, Mayo and Marx 1990, Murison and Gaskin 1989, Pendleton et al. 2009, Pendleton et al. 2012). Recent surveys (2012 to 2015) have detected fewer individuals in the Great South Channel and the Bay of Fundy, and additional sighting records indicate that at least some right whales are shifting to other habitats, suggesting that existing habitat use patterns may be changing (Weinrich et al. 2000; Cole et al. 2007, 2013; Whitt et al. 2013; Khan et al. 2014). Warming in the Gulf of Maine has resulted in changes in the seasonal abundance of late-stage *C. finmarchicus*, with record high abundances in the western Gulf of Maine in spring and significantly lower abundances in the eastern Gulf of Maine in late summer and fall (Record et al. 2019). Baumgartner et al. (2017) discuss that ongoing and future environmental and ecosystem changes may displace *C. finmarchicus* from the Gulf of Maine and Scotian Shelf. The authors also suggest that North Atlantic right whales are dependent on the high lipid content of calanoid copepods from the Calanidae family (i.e., *C. finmarchicus, C. glacialis, C. hyperboreus*), and would not likely survive year-round only on the ingestion of small, less nutritious copepods in the area (i.e., *Pseudocalanus* spp., *Centropages* spp., *Acartia* spp., *Metridia* spp.). It is also possible that even if *C. finmarchicus* remained in the Gulf of Maine, changes to the water column structure from climate change may disrupt the mechanism that causes the very dense vertically compressed patches that North Atlantic right whales depend on (Baumgartner et al. 2017). One of the consequences of these environmental changes has been a shift of right whales out of habitats such as the Great South Channel and the Bay of Fundy, and into areas such as the Gulf of St. Lawrence in the summer and waters of southern New England primarily in the winter and spring, however, right whales have been observed there in all seasons. (NMFS NEFSC, unpublished data, Kraus et al. 2016b, Leiter et al. 2017, Stone et al. 2017, Quintana-Rizzo et al. 2021, Estabrook et al. 2022, O'Brien et al. 2022), with observations of foraging in both areas.

<u>North Atlantic right whale Presence in the Empire Wind WDA and Surrounding Waters</u>
North Atlantic right whales have been observed in or near state and federal waters off New York during all four seasons; however, they are most common in spring when they are migrating north and in fall during their southbound migration (Roberts et al. 2016, Muirhead et al. 2018, Estabrook et al. 2021, Zoidis et al. 2021). In Muirhead et al. (2018), passive acoustic monitoring equipment located near the entrance to New York Harbor and along a linear transect extending from Long Island to the continental shelf edge detected right whales sporadically during every month, but they were most often detected at near-shore recorders between late February and mid-May. Estabrook et al. (2021) reported results from three years of acoustic surveys of large whales in the New York Bight; right whales were most frequently detected in the New York Bight from fall through spring, with presence >5 days/week for most of this period. Digital aerial surveys conducted by New York State Energy Research and Development Authority (NYSERDA) in winter and spring 2016-2017 documented right whales in New York's offshore waters (APEM and Normandeau Associates 2018). Another aerial survey from 2017-2019 reported peak right whale sighting rates in New York waters in early spring, with no sightings in summer 2018 and summer and fall 2019 (Tetra Tech and SES 2018, Tetra Tech and LGL 2019 and 2020). These seasonal occurrence observations are aligned with past findings from Whitt et

al. (2013, 2015) in the United States' first Ecological Baseline Study (EBS) specific to offshore wind planning in New Jersey waters, which are adjacent to the New York Bight region. Whitt et al. (2013, 2015) sighted right whales in winter, spring, and fall with peak detection days in March through June.

Permanent buoys deployed in the New York Bight by Wood Hole Oceanographic Institution (WHOI) and the Wildlife Conservation Society (WCS) detected right whales between December and January and again in March and had occasional detections in July (WHOI 2018). The WCS/WHOI SE buoy is located 15.7 nm (29 km) beyond the right whale U.S. Seasonal Management Area (SMA) border, and primarily detected right whales when the SMA was in effect (November-April). Right whales were also detected sporadically other times of year (WCS Ocean Giants 2020). Neither AOSS (2019) nor, A.I.S. (2019) visual and acoustic ship-board surveys reported sightings or detections of right whales during their survey period in the Empire WFA.

Zoidis et al. (2021) presents more recent findings from aerial survey data collected between 2017-2020, where North Atlantic right whales were seen in state and federal waters off New York (up to 120 nm from the coast) during all seasons except summer. Over the three survey years, Zoidis et al. (2021) recorded 15 sightings of 24 North Atlantic right whales. With respect to spatial distribution, no right whales were seen on the slope, sightings occurred in the nearshore, shelf zone, and plain habitats with the highest occurrence in the shelf zone followed by the nearshore habitat. In May 2019, Zoidis et al. (2021) reported behavior for a single right whale that was exhibiting skim-feeding behavior at the shelf break, further offshore than is typical. The authors suggest that this observation provides support for recent analysis (e.g., Meyer-Gutbrod et al. 2021) that shows how climate-driven oceanographic changes have altered the foraging environment and therefore habitat use of right whales.

As described in the COP, BA, and Notice of Proposed ITA, the best available information regarding marine mammal densities in the WDA and surrounding waters is provided by habitat-based density models produced by the Duke University Marine Geospatial Ecology Laboratory (Roberts et al., 2016a, 2016b, 2017, 2018, 2021a, 2021b, 2022)(see Table 6.1.1). The updated North Atlantic right whale density model are summarized over three eras, 2003-2018, 2003-2009, and 2010-2018, to reflect the apparent shift in North Atlantic right whale distribution. This data was used to develop mean monthly density estimates for North Atlantic right whales in different parts of the action area; the mean density for each month was determined by calculating the unweighted mean of all 5- by 5-km grid cells partially or fully within the analysis polygon (Küsel et al. 2022).

Table 6.1.1. Mean Monthly Density Estimates for North Atlantic right whales within a 50 km Buffer around the Lease Area

Species	Monthly Densities (animals per 100 km^2)												Annual Mean Density
	Jan	Feb	Mar	Apr	May	Jun	July	Aug	Sept	Oct	Nov	Dec	
North Atlantic right whale	0.479	0.548	0.645	0.726	0.122	0.007	0.002	0.002	0.002	0.005	0.031	0.230	0.233

Sources: Roberts et al. 2016a, 2016b, 2017, 2018, 2021a, 2021b

In the area within 50 km of the WDA, density estimates indicate that April is the month with the highest density of right whales in the WDA and that overall, North Atlantic right whales are most likely to occur in and around the lease area from December through May, with the highest probability of occurrence extending from February through April and the lowest densities in July - September.

Vessels transiting south of the WDA to and from ports in Goose Creek, South Carolina may also overlap with the range of North Atlantic right whales. Data from multiple non-systematic and opportunistic surveys have described numerous calving right whale sightings along the Mid-Atlantic coast between Georgia and North Carolina during winter months (Knowlton et al. 2002). During systematic aerial surveys off the coast of North Carolina conducted in December–February 2002, several mother-calf pairs were observed during winter months (W. McLellan, University of North Carolina at Wilmington, unpublished results). Systematic surveys conducted off the coast of South Carolina during the winter of 2005 also observed calving right whales (Garrison 2007). While more recent studies (e.g., Meyer-Gutbrod et al. 2022) continue to document the use of the Southeastern United States by calving right whales, it is unlikely that North Atlantic right whales occur in the region from South Carolina to North Carolina at the same density and consistency of the use in the Florida/Georgia region (Garrison 2007). Based on the information presented here, we expect North Atlantic right whales to be present in the late fall and winter months in the offshore portions of the vessel routes in U.S. Atlantic waters between the WDA and ports in South Carolina.
In summary, we anticipate individual North Atlantic right whales to occur year round in the action area in both coastal, shallower waters as well as offshore, deeper waters. We expect these individuals to be moving throughout this portion of the action area, making seasonal migrations, and possibly foraging when copepod patches of sufficient density to trigger feeding behavior are present. Calving North Atlantic right whales are anticipated to occur along the vessel transit routes to and from port in South Carolina primarily in the late fall and winter months.

Nova Scotia Stock of Sei whale (Balaenoptera borealis)
In the action area, sei whales are expected to be present in the WDA, most likely in the deeper areas furthest from the coast, and may also be present along the oceanic portions of all potential vessel transit routes. The presence and behavior of sei whales in the action area is best understood in the context of their range in the Atlantic, which extends from southern Europe/northwestern Africa to Norway in the east, and from the southeastern United States (or occasionally the Gulf of Mexico and Caribbean Sea; Mead 1977) to West Greenland in the west (Gambell 1977; Gambell 1985b; Horwood 1987). The southern portion of the species' range

during spring and summer includes the northern portions of the U.S. EEZ, the Gulf of Maine, Georges Bank, and south of New England (Halpin et al. 2009, Hayes et al. 2017, Hayes et al. 2020). Sei whales are very rare in the Gulf of Mexico with recent sightings limited to stranded individuals in the northern Gulf of Mexico (NMFS 2011).

Sei whales occurring in the Mid-Atlantic Bight belong to the Nova Scotia stock (Hayes et al. 2020). Sei whales can be found in deeper waters of the continental shelf edge waters of the northeastern United States and northeastward to south of Newfoundland (Hain et al. 1985, Prieto et al., 2014). Sei whale sightings in U.S. Atlantic waters are typically centered on mid-shelf and the shelf edge and slope (Olsen et al. 2009). In the New York Bight, Zoidis et al. (2021) recorded a lone individual in the shelf zone (54 m water depth) and a group of 6 individuals in the slope zone (380 m water depth). AMAPPS acoustic data (NEFSC and SEFSC, 2019) similarly reported most detections in shelf waters. Sei whales occasionally occur in shallower waters during certain years when oceanographic conditions force planktonic prey to shelf and inshore waters (Payne et al. 1990, Schilling et al. 1993, Waring et al. 2004).

Documented sei whale sightings along the U.S. Atlantic Coast south of Cape Cod are relatively uncommon compared to other baleen whales (CETAP 1982; Lagueux et al. 2010; Hayes et al. 2020).Within the Mid-Atlantic Region, sei whales are infrequently sighted in the New York Bight. No sei whales were sighted in the New York Bight during the AMAPPS II 2018 or 2019 aerial surveys (NEFSC and SEFSC, 2019, 2020). However, Estabrook et al. (2019, 2020) detected sei whales acoustically every month except July when detections from both years were combined. There have been no recorded strandings of sei whales in New York and none in New Jersey since 2008 (Henry et al. 2020); however, in the summer of 2017, a sei whale carcass was found on the bow of a ship in the Hudson River, Newark, New Jersey (Hayes et al. 2020).
As noted above, sei whales often occur along the shelf edge to feed, but also use shallower shelf waters. Although known to eat fish in other oceans, sei whales off the northeastern U.S. are largely planktivorous, feeding primarily on euphausiids and copepods (Flinn et al. 2002, Hayes et al. 2017). These aggregations of prey are largely influenced by the dynamic oceanographic processes in the region. While LaBrecque et al. (2015) defined a Biologically Important Area (BIA) for May to November feeding for sei whales that extends from the 82-foot (25-m) contour off coastal Maine and Massachusetts east to the 656-foot (200-m) contour in the central Gulf of Maine, foraging activity has been reported as far south as the New York Bight (USDOI FWS 1997, Kaplan 2011). The BIA does not overlap with the WDA.

Sei whales may be present in the general vicinity of the WDA year-round but are most commonly present in the spring and summer (Hayes et al. 2020). Sei whales have not been observed in the WFA (Empire 2022), but they were observed on the shelf and slope in the spring during aerial line-transect surveys in the New York Bight from 2017 to 2020 (Zoidis et al. 2021). No sei whales were recorded during EBS surveys, but a fin or sei whale (could not be identified to species) was documented in the waters off New Jersey within a survey area that spanned from the coastline to approximately the 2,000 m depth contour during the summer 2016 and 2017 AMAPPS surveys (NJDEP 2010; NEFSC and SEFSC 2016, 2018). This data from nearby areas informs our consideration of the presence of sei whales in the WDA.

Mean monthly density estimates of sei whales in and around the WDA were derived using the Duke University Marine Geospatial Ecology Laboratory model results (Roberts et al. 2016a, 2016b, 2017, 2018, 2021a, 2021b, 2022). Model results indicate that sei whale density in the lease area plus a 50 km buffer in all directions is generally low, peaking in April and May at densities ranging from 0.018 to 0.021 individuals per 100 km^2 (Empire 2022). Based on the information presented here, we expect sei whales to be at least occasionally present in the deeper water portions of the WDA and in the offshore portions of vessel routes between the WDA and ports in South Carolina.

In summary, we anticipate individual or small groups of sei whales to occur in the offshore portions of the action area year round, with presence in more shallow, inshore waters and shelf portions of the action area, including the lease area, cable corridors, and vessel transit routes primarily in the spring and summer months. We expect individuals in the action area to be making seasonal migrations, and to be foraging when krill are present.

Sperm whale (Physeter macrocephalus)
In the action area, sperm whales are present in the more offshore portion of the WDA and may also be present along the oceanic portions of all potential vessel transit routes. Sperm whales in the action area belong to the North Atlantic stock. Sperm whale presence and behavior in the action area is best understood in the context of their range. Sperm whales are widely distributed throughout the deep waters of the North Atlantic, primarily along the continental shelf edge, over the continental slope, and into mid-ocean regions (Hayes et al., 2020). This offshore distribution is more commonly associated with the Gulf Stream edge and other features (Waring et al. 1993, Waring et al. 2001). Calving for the species occurs in low latitude waters outside of the action area. Most sperm whales that are seen at higher latitudes are solitary males, with females generally remaining further south.

North Atlantic Stock
In the U.S. Atlantic EEZ waters, there appears to be a distinct seasonal distribution pattern (CETAP 1982, Scott and Sadove 1997). In spring, the center of distribution shifts northward to east of Delaware and Virginia and is widespread throughout the central portion of the Mid-Atlantic Bight and the southern portion of Georges Bank. In summer, the distribution of sperm whales includes the area east and north of Georges Bank and into the Northeast Channel region, as well as the continental shelf (inshore of the 100-m isobath) south of New England. In the fall, sperm whale occurrence south of New England on the continental shelf is at its highest level. In winter, sperm whales are concentrated east and northeast of Cape Hatteras.

The average depth of sperm whale sightings observed during the CeTAP surveys was 5,880 ft. (1,792 m) (CETAP 1982). This is consistent with the findings in Zoidis et al. (2021) as authors observed 72 individual sperm whales during 32 sightings in the plain zone (>1,000 m water depth). Female sperm whales and young males usually inhabit waters deeper than 3,280 ft. (1,000 m) and at latitudes less than 40° N (Whitehead 2002). Sperm whales feed on larger organisms that inhabit the deeper ocean regions including large- and medium-sized squid, octopus, and medium-and large-sized demersal fish, such as rays, sharks, and many teleosts (NMFS 2018; Whitehead 2002).

Although primarily a deep-water species, sperm whales are known to visit shallow coastal regions when there are sharp increases in bottom depth where upwelling occurs resulting in areas of high planktonic biomass (Clarke 1956, Best 1969, Clarke et al. 1978, Jaquet 1996). As such, sperm whales may be present in the general vicinity of the WDA. Nevertheless, sperm whales have not be observed in the WFA (Empire 2022) and this species is considered an uncommon year-round visitor near the Empire WDA with occurrence most likely in the furthest offshore portions of the WDA. During the summer 2017 AMAPPS aerial survey, a sperm whale was documented in adjacent federal waters off New Jersey, in the deeper portion of the shelf edge (NEFSC and SEFSC 2018). During the Northern leg of the 2021 AMAPPS shipboard survey, sperm whales were among the most common large whale species detected during acoustic monitoring efforts in the survey area which ranged from south of Massachusetts to east of Virginia in waters beyond the 100 m depth contour.

Until recently, there had been no recorded strandings of sperm whales in New York since 2008 (Henry et al. 2020). There were four sperm whale strandings along the New Jersey/New York coastline in 2022, three of which occurred in December (MMSC 2023). No evidence of human interactions was detected for these strandings.

Mean monthly density estimates of sperm whales in the WDA were derived using the Duke University Marine Geospatial Ecology Laboratory model results (Roberts et al. 2016a, 2016b, 2017, 2018, 2021a, 2021b, 2022). Model results indicate that sperm whale density in and around the WDA is generally low, peaking from June through September at densities ranging from 0.027 to 0.042 individuals per 100 km^2.

In summary, individual adult sperm whales are anticipated to occur infrequently in deeper, offshore waters of the Mid-Atlantic Bight portion of the action area primarily in summer and fall months, with a small number of individuals potentially present year round. These individuals are expected to be moving in or near the offshore portions of the WDA as they make seasonal migrations, and to be foraging along the shelf break. As sperm whales typically forage at deep depths (500-1,000 m) (NMFS 2018) well beyond that of the WDA, foraging is not expected to occur in the WFA or along the cable corridor. Sperm whales may occur along in offshore waters of the U.S. EEZ that overlap with vessel transit routes used by project vessels transiting to and from ports in South Carolina year round.

Western North Atlantic stock of fin whales (Balaenoptera physalus)
In the action area, fin whales are present in the WDA and may also be present along the oceanic portions of a majority of vessel transit routes. Fin whale presence and behavior in the action area is best understood in the context of their range. Fin whale presence in the North Atlantic is limited to waters north of Cape Hatteras, NC. In general, fin whales in the central and eastern Atlantic tend to occur most abundantly over the continental slope and on the shelf seaward of the 200-m isobath (Rørvik et al. 1976 in NMFS 2010). In contrast, off the eastern United States they are centered along the 100-m isobath but with sightings well spread out over shallower and deeper water, including submarine canyons along the shelf break (Kenney and Winn 1987; Hain et al. 1992).

Fin whales occurring in the Mid-Atlantic belong to the western North Atlantic stock (Hayes et al. 2019). They are typically found along the 328-foot (100-meter) isobath but also in shallower and deeper water, including submarine canyons along the shelf break (Kenney and Winn 1986). Fin whales are migratory, moving seasonally into and out of feeding areas, but the overall migration pattern is complex and specific routes are unknown (NMFS 2018a). Fin whales are believed to use the North Atlantic water primarily for feeding and more southern waters for calving. Movement of fin whales from the Labrador/Newfoundland region south into the West Indies during the fall have been reported (Clark 1995). Neonate strandings along the U.S. Mid-Atlantic coast from October through January indicate a possible offshore calving area (Hain et al. 1992). The species occur year-round in a wide range of latitudes and longitudes, but the density of individuals in any one area changes seasonally. Thus, their movements overall are patterned and consistent, but distribution of individuals in a given year may vary according to their energetic and reproductive condition, and climatic factors (NMFS 2010).

The northern Mid-Atlantic Bight represents a major feeding ground for fin whales as the physical and biological oceanographic structure of the area aggregates prey. This feeding area extends in a zone east from Montauk, Long Island, New York, to south of Nantucket (LaBrecque et al. 2015, Kenney and Vigness-Raposa 2010; NMFS 2010a) and is a location where fin whales congregate in dense aggregations and sightings frequently occur (Kenney and Vigness-Raposa 2010); this BIA does not overlap with the Empire WDA. Fin whales in this area feed on krill (*Meganyctiphanes norvegica* and *Thysanoessa inermis*) and schooling fish such as capelin (*Mallotus villosus*), herring (*Clupea harengus*), and sand lance (*Ammodytes* spp.) (Borobia et al. 1995) by skimming the water or lunge feeding. This area is used extensively by feeding fin whales from March to October. Several studies suggest that distribution and movements of fin whales along the east coast of the United States is influenced by the availability of sand lance (Kenney and Winn 1986, Payne 1990).

Acoustic studies in Estabrook et al. (2019, 2020) detected fin whales in the New York Bight every month of the year in their study period from 2017 to 2019. The results of these acoustic studies are consistent with the observations in Zoidis et al. (2021) where fin whales were sighted at least once in each month of the calendar year across the 3 years and in each survey season, throughout the study area across all habitat zones. From 2005 to 2019, two fin whales are reported to be confirmed vessel strike related mortalities. In adjacent waters along the New Jersey coast, ten fin whales are reported to have stranded from 2008 to 2017 (Hayes et al. 2020; Henry et al. 2020). Of these, nine were determined to be the result of vessel strikes and one ruled an entanglement.

Aerial survey data in state and federal waters off New York indicate that fin whales are common in and near the WDA during all seasons. Fin whales sightings accounted for 28 percent of large whale species in the WDA (Empire 2022). AMAPPS surveys also detected fin whales in the Wind Energy Areas in the fall 2012 aerial, spring 2013 aerial, spring 2014 aerial, spring and summer 2017 aerial, winter 2018 aerial, and summer 2016 shipboard surveys (NEFSC and SEFSC 2012, 2013, 2014, 2016, 2018, 2019, 2022).

Mean monthly density estimates of fin whales in the project area were derived using the Duke University Marine Geospatial Ecology Laboratory model results (Roberts et al. 2016a, 2016b, 2017, 2018, 2021a, 2021b, 2022). Model results indicate that fin whale density in the lease area is considerably variable between months with peaks in May through June with densities ranging from 0.084 to 0.258 individuals per 100 km^2 throughout the year.

In summary, we anticipate individual fin whales to occur in the WDA year-round, with the possibility that monthly density peaks will vary inter-annually. We expect these individuals to be making seasonal coastal migrations, and to be foraging during spring and summer months. Fin whales occur year-round in a wide range of latitudes and longitudes, thus they may be present along the vessel transit routes north of Cape Hatteras, NC year round.

6.2 Summary of Information on Listed Sea Turtles in the Action Area

Four ESA-listed species of sea turtles (Leatherback sea turtles, North Atlantic DPS of green sea turtles, Northwest Atlantic Ocean DPS of loggerhead sea turtles, Kemp's ridley sea turtles) make seasonal migrations into the U.S. Mid-Atlantic. Individuals from all four species are seasonally present in the WDA, typically from late spring/early summer through the fall; these species are also seasonally present in the coastal and oceanic waters that may be transited by project vessels traveling to ports in New York. Sea turtles are present year round in the South Atlantic and their range overlaps with the coastal and oceanic waters that may be transited by project vessels traveling to/from the Nexans cable facility (SC).

The four species of sea turtles considered here are highly migratory. One of the main factors influencing sea turtle presence in mid-Atlantic waters and north is seasonal temperature patterns (Ruben and Morreale 1999) as waters in these areas are not warm enough to support sea turtle presence year round. In general, sea turtles move up the U.S. Atlantic coast from southern wintering areas to foraging grounds as water temperatures warm in the spring. The trend is reversed in the fall as water temperatures cool. By December, sea turtles have passed Cape Hatteras, returning to more southern waters for the winter (Braun-McNeill and Epperly 2002, Ceriani et al. 2012, Griffin et al. 2013, James et al. 2005b, Mansfield et al. 2009, Morreale and Standora 2005, Morreale and Standora 1998, NEFSC and SEFSC 2011, Shoop and Kenney 1992, TEWG 2009, Winton et al. 2018). Water temperatures too low or too high may affect feeding rates and physiological functioning (Milton and Lutz 2003); metabolic rates may be suppressed when a sea turtle is exposed for a prolonged period to temperatures below 8-10° C (George 1997, Milton and Lutz 2003, Morreale et al. 1992). That said, loggerhead sea turtles have been found in waters as low as 7.1-8 ° C (Braun-McNeill et al. 2008, Smolowitz et al. 2015, Weeks et al. 2010). However, in assessing critical habitat for loggerhead sea turtles, the review team considered the water-temperature habitat range for loggerheads to be above 10° C (NMFS 2013). Sea turtles are most likely to occur in the action area when water temperatures are above this temperature, although depending on seasonal weather patterns and prey availability, they could be also present in months when water temperatures are cooler (as evidenced by fall and winter cold stunning records as well as year round stranding records). Given the warmer water temperatures, sea turtles are present in waters off the U.S. South Atlantic year round.

AMAPPS aerial abundance surveys in summer 2021 indicate that loggerhead and leatherback turtles are relatively common in waters of the Mid-Atlantic Bight while Kemp's ridley turtles and green turtles are less common (NEFSC and SEFSC 2022). Sea turtle nesting does not occur in New York, and there are no nesting beaches in the vicinity of the WDA (GARFO 2021). For this reason, sea turtles in the WDA are adults or juveniles; due to the distance from any nesting beaches, no hatchlings occur in the WDA.

Sea turtles feed on a variety of both pelagic and benthic prey, and change diets through different life stages. Adult loggerhead and Kemp's ridley sea turtles are carnivores that feed on crustaceans, mollusks, and occasionally fish, green sea turtles are herbivores and feed primarily on algae, seagrass, and seaweed, and leatherback sea turtles are pelagic feeders that forage throughout the water column primarily on gelatinivores. As juveniles, loggerhead and green sea turtles are omnivores (Wallace et al. 2009, Dodge et al. 2011, BA - Eckert et al. 2012, https://www.seeturtles.org/sea-turtle-diet, Murray et al 2013, Patel et al. 2016). The distribution of pelagic and benthic prey resources is primarily associated with dynamic oceanographic processes, which ultimately affect where sea turtles forage (Polovina et al. 2006). During late-spring, summer, and early-fall months when water temperatures are suitable, the physical and biological structure of both the pelagic and benthic environment in the lease area and cable corridor provide habitat for both the four species of sea turtles in the region as well as their prey.

Additional species-specific information is presented below. It is important to note that most of these data sources report sightings data that is not corrected for the percentage of sea turtles that were unobservable due to being under the surface. As such, many of these sources represent a minimum estimate of sea turtles in the area.

Leatherback sea turtles

Leatherbacks are a predominantly pelagic species that ranges into cooler waters at higher latitudes than other sea turtles, and their large body size makes the species easier to observe in aerial and shipboard surveys. The CETAP regularly documented leatherback sea turtles on the OCS between Cape Hatteras and Nova Scotia during summer months in aerial and shipboard surveys conducted from 1978 through 1988. The greatest concentrations were observed between Long Island and the Gulf of Maine (Shoop and Kenney 1992).

Key foraging destinations include, among others, the eastern coast of the United States (Eckert et al. 1998, 2012). Satellite tagging studies provide information on leatherback sea turtle behavior and movement in the action area. These studies show that leatherback sea turtles move throughout most of the North Atlantic from the equator to high latitudes. Based on tracking data for leatherbacks tagged off North Carolina (n=21), many of the tagged leatherbacks spent time in shelf waters from North Carolina, up the Mid-Atlantic shelf and into southern New England and the Gulf of Maine. After coastal residency, some leatherbacks undertook long migrations while tagged. Some migrated far offshore of the Mid-Atlantic, past Bermuda, even as far as the Mid-Atlantic Trench region. Others went towards Florida, the Caribbean, or Central America (Palka et al. 2021). This data indicates that leatherbacks are present throughout the action area at all depths of the water column and may be present along the vessel transit routes from the South Atlantic.

Sasso et al. (2021) presents information on the use of the Gulf of Mexico by leatherbacks. Individuals are present year round with highest abundance during the summer and early autumn as post-nesting turtles enter the Gulf from Caribbean nesting beaches during the summer and move to the Caribbean in the late fall. The summer and early fall period coincides with the period of greatest abundance of the leatherback's preferred jellyfish prey. The northeastern Gulf of Mexico off the Florida Panhandle and the southeastern Gulf of Mexico in the Bay of Campeche off the state of Tabasco, Mexico have been identified as primary foraging areas. AMAPPS surveys conducted from 2010 through 2021 routinely documented leatherbacks in the New York Bight and surrounding areas during summer months (NEFSC and SEFSC 2018, 2022; Palka 2021). Leatherback sea turtles were most commonly observed in the WDA as they were migrating during the mid-summer months for feeding (Hofstra 2017). Aerial survey data documented 48 leatherback sea turtles in New York waters: 1 in the WFA 2.5 mi (4 km) buffer, 1 nearshore, and 46 offshore. PSO data from Empire-collected visual shipboard surveys specific to the WFA had two sightings (one in the WFA and one in the WFA 2.5 mi (4 km) buffer) (Empire 2022). Leatherbacks in the WDA are most likely to be juveniles and adults (NJDEP 2006). Tetra Tech and SES (2018) and Tetra Tech and LGL (2019, 2020) surveys sighted leatherback sea turtles in the spring, summer, and fall in the WDA. Seasonal densities for leatherback sea turtles were derived from NYSERDA annual reports (Normandeau and APEM 2018, 2019a, 2019b, 2019c, 2020). Leatherback sea turtles are most abundant in the WDA during summer (0.331 animals per km^2) and fall (0.789 animals per km^2).

Based on the information presented here, we anticipate leatherback sea turtles to occur in the WDA (i.e., the lease area and cable corridors) during the warmer months, typically between May and November. Leatherbacks are also expected along the vessel transit routes used by project vessels transiting to and from ports in New York and the South Atlantic with seasonal presence dependent on latitude.

Northwest Atlantic DPS of Loggerhead sea turtles

The loggerhead sea turtle is commonly found throughout the North Atlantic including the Gulf of Mexico, the northern Caribbean, The Bahamas archipelago (Dow et al. 2007), and eastward to West Africa, the western Mediterranean, and the west coast of Europe (NMFS and USFWS 2008). The range of the Northwest Atlantic DPS is the Northwest Atlantic Ocean north of the equator, south of 60° N. Lat., and west of 40° W. Long. Northwest Atlantic DPS loggerheads occur in the oceanic portions of the action area west of 40°W, inclusive of the Gulf of Mexico.

Extensive tagging results suggest that tagged loggerheads occur on the continental shelf along the United States Atlantic from Florida to North Carolina year-round but also highlight the importance of summer foraging areas on the Mid-Atlantic shelf which includes the WDA (Winton et al. 2018). In the shelf waters off of New York, loggerhead sea turtles can be found seasonally, primarily in the summer and autumn months when surface temperatures range from 44.6ºF to 86ºF (7ºC to 30ºC) (Kenney and Vigness-Raposa 2010; Shoop and Kenney 1992).

During the CETAP surveys, one of the largest observed aggregations of loggerheads was documented in shallow shelf waters northeast of Long Island (Shoop and Kenney 1992). Loggerheads were most frequently observed in areas ranging from 72 to 160 feet (22 and 49 m) deep. Over 80% of all sightings were in waters less than 262 feet (80 m), suggesting a preference for relatively shallow OCS habitats (Shoop and Kenney 1992). Juvenile loggerheads are prevalent in the nearshore waters of Long Island from July through mid-October (Morreale et al. 1992; Morreale and Standora 1998), accounting for more than 50% of live strandings and incidental captures (Morreale and Standora 1998).

In the summer of 2010, as part of the AMAPPS project, the NEFSC and SEFSC estimated the abundance of juvenile and adult loggerhead sea turtles in the portion of the northwestern Atlantic continental shelf between Cape Canaveral, Florida and the mouth of the Gulf of St. Lawrence, Canada (NMFS 2011b). The abundance estimates were based on data collected from an aerial line-transect sighting survey as well as satellite tagged loggerheads. The preliminary regional abundance estimate was about 588,000 individuals (approximate inter-quartile range of 382,000-817,000) based on only the positively identified loggerhead sightings, and about 801,000 individuals (approximate inter-quartile range of 521,000-1,111,000) when based on the positively identified loggerheads and a portion of the unidentified sea turtle sightings (NMFS 2011b). The loggerhead was the most frequently observed sea turtle species in 2010 to 2017 AMAPPS aerial surveys of the Atlantic continental shelf. Large concentrations were regularly observed in proximity to the NYB WEA (Palka et al. 2021).

Barco et al. (2018) estimated loggerhead sea turtle abundance and density in the southern portion of the Mid-Atlantic Bight and Chesapeake Bay using data from 2011-2012. During aerial surveys off Virginia and Maryland, loggerhead sea turtles were the most common turtle species detected, followed by greens and leatherbacks, with few Kemp’s ridleys documented. Density varied both spatially and temporally. Loggerhead abundance and density estimates in the ocean were higher in the spring (May-June) than the summer (July-August) or fall (September-October). Ocean abundance estimates of loggerheads ranged from highs of 27,508-80,503 in the spring months of May-June to lows of 3,005-17,962 in the fall months of September-October (Barco et al. 2018).

AMAPPS data, along with other sources, have been used in recent modelling studies. Winton et al. (2018) modelled the spatial distribution of satellite-tagged loggerhead sea turtles in the Western North Atlantic. The Mid-Atlantic Bight was identified as an important summer foraging area and the results suggest that the area may support a larger proportion of the population, over 50% of the predicted relative density of loggerheads north of Cape Hatteras from June to October (NMFS 2019a, Winton et al. 2018). Using satellite telemetry observations from 271 large juvenile and adult sea turtles collected from 2004 to 2016, the models predicted that overall densities were greatest in the shelf waters of the U.S. Atlantic coast from Florida to North Carolina. Tagged loggerheads primarily occupied the continental shelf from Long Island, New York to Florida, with some moving offshore. Monthly variation in the Mid-Atlantic Bight indicated migration north to the foraging grounds from March to May and migration south from November to December. In late spring and summer, predicted densities were highest in the shelf waters from Maryland to New Jersey. In the cooler months, the predicted densities in the Mid-Atlantic Bight were higher offshore (Winton et al. 2018). South of Cape Hatteras, there was less seasonal variability and predicted densities were high in all months. Many of the individuals tagged in this area remained in the general vicinity of the tagging location. The authors did caution that the model was driven, at least in part, by the weighting scheme chosen, is reflective only of the tagged population, and has biases associated with the non-random tag deployment. Most loggerheads tagged in the Mid-Atlantic Bight were tagged in offshore shelf waters north of Chesapeake Bay in the spring. Thus, loggerheads in the nearshore areas of the Mid-Atlantic Bight may have been under-represented (Winton et al. 2018).

To better understand loggerhead behavior on the Mid-Atlantic foraging grounds, Patel et al. (2016) used a remotely operated vehicle (ROV) to document the feeding habitats (and prey availability), buoyancy control, and water column use of 73 loggerheads recorded from 2008-2014. When the mouth and face were in view, loggerheads spent 13% of the time feeding on non-gelatinous prey and 2% feeding on gelatinous prey. Feeding on gelatinous prey occurred near the surface to depths of 52.5 ft. (16 m). Non-gelatinous prey were consumed on the bottom. Turtles spent approximately 7% of their time on the surface (associated with breathing), 42% in the near surface region, 44% in the water column, 0.4% near bottom, and 6% on bottom. When diving to depth, turtles displayed negative buoyancy, making staying at the bottom easier (Patel et al. 2016).

Patel et al. (2018) evaluated temperature-depth data from 162 satellite tags deployed on loggerhead sea turtles from 2009 to 2017 when the water column is highly stratified (June 1 – October 4). Turtles arrived in the Mid-Atlantic Bight in late May as the Cold Pool formed and departed in early October when the Cold Pool started to dissipate. The Cold Pool is an oceanographic feature that forms annually in late May. During the highly stratified season, tagged turtles were documented throughout the water column from June through September. Fewer bottom dives occurred north of Hudson Canyon early (June) and late (September) in the foraging season (Patel et al. 2018).

According to aerial surveys, Loggerhead sea turtles are the most abundant sea turtle species in the action area. Loggerheads were sighted in the WFA and 2.5 mi (4 km) buffer, along the submarine export cable siting corridors, and in the nearshore and offshore areas. The largest numbers (over 1,400) were documented offshore, in significantly higher numbers than in any of the other areas. PSO data from Empire-collected visual shipboard surveys specific to the WDA had 14 sightings (five in the WFA; two in the WFA 2.5 mi (4 km) buffer; six along the submarine export cable routes; and one offshore) (Empire 2022). Seasonal densities for loggerhead sea turtles were derived from NYSERDA annual reports (Normandeau and APEM 2018, 2019a, 2019b, 2019c, 2020). Loggerhead sea turtles are most abundant in the WDA during summer (26.779 animals per km^2) and occur in very low abundance the rest of the year. Based on the information presented here, we anticipate loggerheads from the Northwest Atlantic DPS to occur in the WDA (i.e., the lease area and cable corridors) during the warmer months, typically between May and November. Loggerheads are also expected along the vessel transit routes used by project vessels transiting to and from ports in New York and the South Atlantic with seasonal presence dependent on latitude.

Kemp's ridley sea turtles

Kemp's ridleys are distributed throughout the Gulf of Mexico and U.S. Atlantic coastal waters, from Florida to New England. A few records exist for Kemp's ridleys near the Azores, waters off Morocco, and within the Mediterranean Sea and they are occasionally found in other areas around the Atlantic Basin. As adults, many turtles remain in the Gulf of Mexico, with only occasional occurrence in the Atlantic Ocean (NMFS, USFWS and SEAMARNAT 2011). Adult habitat largely consists of sandy and muddy areas in shallow, nearshore waters less than 120 feet (37 m) deep (Landry and Seney 2008; Shaver et al. 2005; Shaver and Rubio 2008), although they can also be found in deeper offshore waters.

Juvenile and subadult Kemp's ridley sea turtles are known to travel as far north as Long Island Sound and Cape Cod Bay during summer and autumn foraging (NMFS, USFWS and SEAMARNAT 2011); the range of these migrating turtles would overlap with the action area. Visual sighting data are limited because this small species is difficult to observe using aerial survey methods (Kraus et al. 2016), and most surveys do not cover its preferred shallow bay and estuary habitats. Nevertheless, aerial survey data documented 73 Kemp's ridley sea turtles in New York waters (6 in the WFA; 6 in the WFA 2.5 mi (4 km) buffer; 2 in the nearshore area, and 59 in the offshore area); the largest numbers were documented offshore. PSO data from Empire-collected visual shipboard surveys specific to the WDA had three sightings (two in the WFA and one along the submarine export cable siting corridor) (Empire 2022). Seasonal densities for Kemp's ridley sea turtles were derived from NYSERDA annual reports (Normandeau and APEM 2018, 2019a, 2019b, 2019c, 2020). Kemp's ridley sea turtles are most abundant in the WDA during summer (0.991 animals per km^2) and are less abundant in other seasons.

Based on the information presented here, we anticipate Kemp's ridley turtles to occur in the WDA (i.e., the WFA and cable corridors) during the warmer months, typically between May and November. Kemp's ridleys are also expected along the vessel transit routes used by project vessels transiting to and from ports in New York and the South Atlantic, with seasonal presence dependent on latitude.

North Atlantic DPS of Green sea turtles

Most green turtles spend the majority of their lives in coastal foraging grounds. These areas include fairly shallow waters both open coastline and protected bays and lagoons. In addition to coastal foraging areas, oceanic habitats are used by oceanic-stage juveniles, migrating adults, and, on some occasions, by green turtles that reside in the oceanic zone for foraging. Seasonal distribution is governed by water temperatures (NMFS 2018b). As temperatures warm in the spring, green sea turtles migrate into mid-Atlantic waters. This seasonal movement is reversed as water temperatures cool in the fall and green sea turtles migrate to warm waters further south. Green sea turtles are present year round in the Gulf of Mexico and nesting occurs at some Gulf of Mexico beaches (NMFS and USFWS 2007).

Five green turtle sightings were recorded off the Long Island shoreline in aerial surveys conducted from 2010 to 2013 (NEFSC and SEFSC 2018). Green sea turtles were also positively identified in 2010 to 2017 AMAPPS aerial surveys of the Atlantic continental shelf. Large concentrations were regularly observed in proximity to the NYB WEA, with most sightings occurring during summer between North Carolina and New York, along the continental shelf (Palka et al. 2021). Compared to other sea turtle species, green sea turtles have been sighted in the vicinity of the WDA in relatively low numbers. Green sea turtles are most commonly observed migrating through the WDA during the mid-summer months for feeding (Hofstra 2017). Aerial survey data documented one green sea turtle in New York waters in the offshore area. PSO data from Empire-collected visual shipboard surveys specific to the WDA had six sightings (three in the WFA; two in the WFA 2.5 mi (4 km) buffer; and one nearshore) (Empire 2022). Seasonal densities for green sea turtles were derived from NYSERDA annual reports (Normandeau and APEM 2018, 2019a, 2019b, 2019c, 2020). Green sea turtles have a seasonal density of 0.038 animals per km^2 in the WDA during summer and seasonal densities of 0.000

animals per km^2 during the rest of the year.

Based on the information presented here, we anticipate green sea turtles to occur in the WDA (i.e., the lease area and cable corridors) during the warmer months, typically between May and November. Green sea turtles are also expected along the vessel transit routes used by project vessels transiting to and from ports in New York and the South Atlantic, with seasonal presence dependent on latitude.

6.3 Summary of Information on Listed Marine Fish Presence in the Action Area

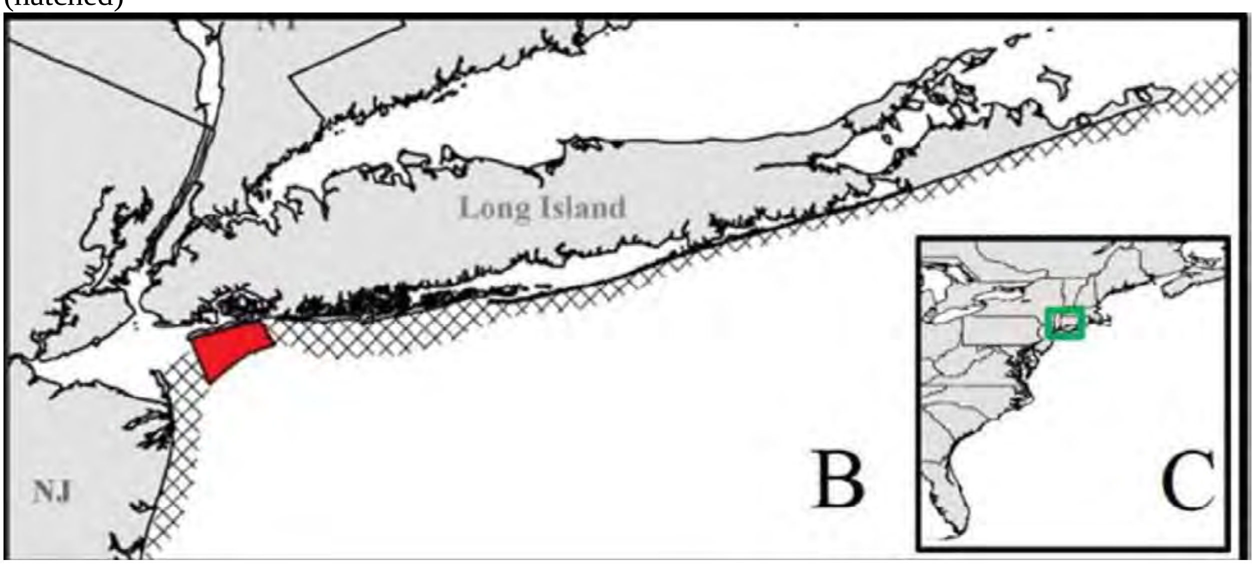
Atlantic sturgeon (Acipenser oxyrinchus oxyrinchus)
Adult and subadult (less than 150cm in total length, not sexually mature, but have left their natal rivers) Atlantic sturgeon from all five DPSs undertake seasonal, nearshore (i.e., typically depths less than 50 meters), coastal marine migrations along the United States eastern coastline including in waters of southern New England (Dunton et al. 2010, Erickson et al. 2011). Given their anticipated distribution in depths primarily 50 m and less, Atlantic sturgeon are not expected to occur in the deep, open-ocean portion of the action area that may be transited by project vessels transiting between the WDA and distant ports. As detailed below, Atlantic sturgeon are known to occur in the WDA. Additionally, Atlantic sturgeon occur in the area to be transited by vessels traveling between the WDA and the South Brooklyn Marine Terminal, the Port of Coeymans, the Port of Albany, and the Nexans facility at the Port of Charleston (SC) (transiting lower portions of the Cooper River).

Atlantic sturgeon demonstrate strong spawning habitat fidelity and extensive migratory behavior (Savoy et al. 2017). Adults and subadults migrate extensively along the Atlantic coastal shelf (Erickson et al. 2011; Savoy et al. 2017), and use the coastal nearshore zone to migrate between river systems (ASSRT 2007; Eyler et al. 2004). Erickson et al. (2011) found that adults remain in nearshore and shelf habitats ranging from 6 to 125 feet (2 to 38 m) in depth, preferring shallower waters in the summer and autumn and deeper waters in the winter and spring. Data from capture records, tagging studies, and other research efforts (Damon-Randall et al. 2013; Dunton et al. 2010; Stein et al. 2004a, 2004b; Zollett 2009) indicate the potential for occurrence in the action area during all months of the year. Individuals from every Atlantic sturgeon DPS have been captured in the Virginian marine ecoregion (Cook and Auster 2007; Wirgin et al. 2015a, 2015b), which extends from Cape Cod, Massachusetts, to Cape Lookout, North Carolina.

Based on tag data, sturgeon migrate to southern waters (e.g. off the coast of North Carolina and Virginia) during the fall, and migrate to more northern waters (e.g. off the coast of New York, southern New England, as far north as the Bay of Fundy) during the spring (Dunton et al. 2010, Erickson et al. 2011, Wippelhauser et al. 2017). In areas with gravel, sand and/or silt bottom habitats and relatively shallow depths (primarily <50 meters), sturgeon may also be foraging during these trips on prey including mollusks, gastropods, amphipods, annelids, decapods, isopods, and fish such as sand lance (Stein et al. 2004b, Dadswell 2006, Dunton et al. 2010, Erickson et al. 2011).

Atlantic sturgeon aggregate in several distinct areas along the Mid-Atlantic coastline; Atlantic sturgeon are most likely to occur in areas adjacent to estuaries and/or coastal features formed by bay mouths and inlets (Stein *et al.* 2004a; Laney *et. al* 2007; Erickson *et al*. 2011; Dunton *et al*. 2010). These aggregation areas are located within the coastal waters off North Carolina; waters between the Chesapeake Bay and Delaware Bay; the southern New Jersey coast near the mouth of Delaware Bay; and the southwest shores of Long Island (Figure 6.3.1) (Laney *et. al* 2007; Erickson *et al*. 2011; Dunton *et al*. 2010). With the exception of the area off Long Island (which is outside the action area), these waters are in the action area but are further inshore than the routes that will be transited by project vessels moving between U.S. ports and the WDA. Atlantic sturgeon aggregations are generally restricted to shallow depths (<20 m) in New York waters, following a seasonal pattern with peak abundance during the spring and fall (Dunton *et al.* 2015). In a study by Dunton *et al.* (2015), catches of Atlantic sturgeon were an order of magnitude higher than in other areas and months of the year during the peak aggregation months of May, June, September, and October. These aggregation areas are believed to be where Atlantic sturgeon overwinter and/or forage (Laney *et. al* 2007; Erickson *et al*. 2011; Dunton *et al*. 2010). Areas between the aggregation sites are used by sturgeon migrating to and from these areas, as well as to spawning grounds found within natal rivers. Adult sturgeon return to their natal river to spawn in the spring. The nearest river to the WDA that is known to regularly support Atlantic sturgeon spawning is the Hudson River. The nearest river to the vessel transit route to and from ports in the South Atlantic that is known to regularly support Atlantic sturgeon spawning is the Cooper River.

Figure 6.3.1. Atlantic sturgeon aggregation area (red area) and their migration corridors (hatched)



Source: Dunton et al. 2015

Migratory adults and sub-adults have been collected in shallow nearshore areas of the continental shelf (32.9–164 feet [10–50 m]) on any variety of bottom types (silt, sand, gravel, or clay). Evidence suggests that Atlantic sturgeon orient to specific coastal features that provide foraging opportunities linked to depth-specific concentrations of fauna. Concentration areas of Atlantic sturgeon near Chesapeake Bay and North Carolina were strongly correlated with the coastal features formed by the bay mouth, inlets, and the physical and biological features produced by outflow plumes (Kingsford and Suthers 1994, as cited in Stein et al. 2004a). They are also known to commonly aggregate in areas that presumably provide optimal foraging opportunities, such as the Bay of Fundy, Massachusetts Bay, Rhode Island, New Jersey, and Delaware Bay (Dovel and Berggren 1983; Johnson et al. 1997; Rochard et al. 1997; Kynard et al. 2000; Eyler et al. 2004; Stein et al. 2004a; Dadswell 2006, as cited in ASSRT 2007).

Stein et al. (2004a, 2004b) reviewed 21 years of sturgeon bycatch records in the Mid-Atlantic OCS to identify regional patterns of habitat use and association with specific habitat types. Atlantic sturgeon were routinely captured in waters within and in immediate proximity to the action area, most commonly in waters ranging from 33 to 164 feet (10–50 m) deep. Sturgeon in this area were most frequently associated with coarse gravel substrates within a narrow depth range, presumably associated with depth-specific concentrations of preferred prey fauna.

Information on Atlantic sturgeon presence in the WDA

Dunton et al. (2015) carried out studies to document Atlantic sturgeon habitat use along the coast of Long Island. The authors reported on results from stratified random sampling and targeted bottom trawl surveys to identify the temporal and spatial use of marine habitat in NY waters by Atlantic sturgeon. The survey area does not overlap the Empire WFA but the westernmost survey strata are adjacent to the WFA and portions of the cable routes overlap with other survey strata (see Figure 1 in Dunton et al. 2015 for the area surveyed).

Dunton et al. (2015) also compiles data on Atlantic sturgeon bycatch in fisheries occurring in the NY Bight and off the coast of Long Island. In the stratified random trawling, CPUE was highest along western Long Island, with the highest weighted CPUEs in May, followed by October, November, September, and June; the lowest weighted CPUEs were observed in January, March, and August, with no fish captured in April. All captures were in depths less than 20 m. Targeted trawling along western Long Island in spring and fall had the highest CPUEs in May. Commercial recaptures of tagged Atlantic sturgeon were largely concentrated off of Highlands, New Jersey, and Jones Beach, New York; it is not clear to what extent this is influenced by location of fisheries effort vs. distribution of Atlantic sturgeon. Similar patterns were evident in trawl bycatch data reported through the NEFOP program; with peak catches in April – June and 90% of all Atlantic sturgeon bycatch occurring in waters less than 20 m. The paper confirms the presence of Atlantic sturgeon throughout the study area and supports the determination that Atlantic sturgeon are seasonally present in at least some portions of the WDA with highest numbers and most likely occurrence in depths less than 30 m. The paper also confirms a seasonal aggregation of Atlantic sturgeon at the Rockaways, in nearshore waters off western Long Island.

Ingram et al. (2019) studied Atlantic sturgeon distribution in the New York Wind Energy Area (which is co-extensive with the Empire Wind lease area) by monitoring the movements of tagged Atlantic sturgeon from November 2016 through February 2018 on an array of 24 acoustic receivers (see Figure 1 in Ingram et al. 2019 for acoustic receiver locations). Total confirmed detections for Atlantic Sturgeon ranged from 1 to 310 detections per individual, with a total of 5,490 valid detections of 181 unique individuals. Detections of 181 unique Atlantic sturgeon were documented with detections being highly seasonal peaking from November through January, with tagged individuals uncommon (less than 2 individuals detected) or absent in July, August, and September. As described in the paper, Atlantic Sturgeon were detected on all transceivers in the array including the most offshore receiver, located 44.3 km offshore (21 total detections of 5 unique fish). Total counts and detections of unique fish were highest at the receivers nearer to shore and appeared to decrease with distance from shore. Counts at each station ranged between 21–909 total detections and 4–59 unique detections of Atlantic sturgeon. Fifty-five individuals were documented in multiple years. The authors reported that the transition from coastal to offshore areas, predictably associated with photoperiod and river temperature, typically occurred in the autumn and winter months. During this time, individual Atlantic sturgeon were actively moving throughout the area. Residence events, defined in the paper as "a minimum of two successive detections of an individual at a single transceiver station over a minimum period of two hours. Residence events are completed by either a detection of the individual on another transceiver station or a period of 12 hours without detection." Residence events were uncommon (only 22 events over the study period) and of short duration (mean of 10 hours) and were generally limited to receivers with depths of less than 30 m. The authors indicate that the movement patterns may be suggestive of foraging but could not draw any conclusions. By assuming the maximum observed rate of movement of 0.86 m/s and maximum straight-line distance of 40.6 km between stations from the transceiver-distance matrix, the minimum transit time for an Atlantic Sturgeon through the NY WEA at its longest point was estimated to be 13.1 hrs. As described by the authors, the absence of Atlantic Sturgeon in the NY WEA during the summer months, particularly from June through September, suggests a putative shift to nearshore habitat and corresponds with periods of known-residence in shallow, coastal waters that are associated with juvenile and sub-adult aggregations as well as adult spawning migrations.

In addition to the studies outlined above, a number of surveys occur regularly in the action area, including areas that overlap with the WDA, that are designed to characterize the fish community and use sampling gear that is expected to collect Atlantic sturgeon if they were present in the area. One such survey is the Northeast Area Monitoring and Assessment Program (NEAMAP), which samples from Cape Cod, MA south to Cape Hatteras, NC and targets both juvenile and adult fishes; NEAMAP samples near shore water to a depth of 60 feet and includes the sounds to 120 feet. Atlantic sturgeon are regularly captured in this survey including in the portion of the survey area that overlaps the WDA. The area is also sampled in the NEFSC bottom trawl survey, which surveys from Cape Hatteras to the Western Scotian Shelf; Atlantic sturgeon have been captured in the WDA.

While the WDA does not directly overlap any area identified in the scientific literature as a "hot spot" or an identified aggregation area for Atlantic sturgeon (see above), the cable corridors are directly adjacent to the Rockaways aggregation area and Atlantic sturgeon use of the WDA has been fairly well documented (see Ingram et al. 2019) with highest abundance in winter (November through January).

Only adults and subadults are present in the WDA; the available information indicates that Atlantic sturgeon are likely to be transient within the area and not remain in any one location for an extended period of time (i.e., more than 10 hours). Spawning, juvenile growth and development, and overwintering are not known to occur in the WDA. Adult, subadult, and juvenile sturgeon left the WFA to aggregate in inshore coastal waters in spring, as adults prepared to enter the river to spawn. As described in Ingram et al. (2019), Atlantic sturgeon were virtually absent from the WFA from July to September.

Atlantic sturgeon in the Hudson River and New York Harbor

Use of the Hudson River by Atlantic sturgeon has been described by several authors. The area around Hyde Park (approximately rkm134) has consistently been identified as a spawning area through scientific studies and historical records of the Hudson River sturgeon fishery (Dovel and Berggren, 1983; Van Eenennaam *et al.*, 1996; Kahnle *et al.*, 1998; Bain *et al.*, 2000). Habitat conditions at the Hyde Park site are described as freshwater year- round with bedrock, silt, and clay substrates and waters depths of 12-24 m (Bain *et al.*, 2000). Bain *et al.* (2000) also identified a spawning site at rkm 112 based on tracking data. The rkm 112 site, located to one side of the river, has clay, silt and sand substrates, and is approximately 21-27 m deep (Bain *et al.*, 2000).

Young-of-year (YOY) have been recorded in the Hudson River between rkm 60 and rkm 148, which includes some brackish waters; however, larvae must remain upstream of the salt wedge because of their low salinity tolerance (Dovel and Berggren, 1983; Kahnle *et al.*, 1998; Bain *et al.*, 2000). Catches of immature sturgeon (age 1 and older) suggest that juveniles utilize the estuary from the Tappan Zee Bridge through Kingston (rkm 43- rkm 148) (Dovel and Berggren, 1983; Bain *et al.*, 2000). Seasonal movements are apparent with juveniles occupying waters from rkm 60 to rkm 107 during summer months and then moving downstream as water temperatures decline in the fall, primarily occupying waters from rkm 19 to rkm 74 (Dovel and Berggren, 1983; Bain *et al.*, 2000). Based on river-bottom sediment maps (Coch, 1986) most juvenile sturgeon habitats in the Hudson River have clay, sand, and silt substrates (Bain *et al.*, 2000). Newburgh and Haverstraw Bays in the Hudson River are areas of known juvenile sturgeon concentrations (Sweka *et al.*, 2007). Sampling in spring and fall revealed that highest catches of juvenile Atlantic sturgeon occurred during spring in soft-deep areas of Haverstraw Bay even though this habitat type comprised only 25% of the available habitat in the Bay (Sweka *et al.*, 2007). Overall, 90% of the total 562 individual juvenile Atlantic sturgeon captured during the course of this study (14 were captured more than once) came from Haverstraw Bay (Sweka *et al.*, 2007). At around 3 years of age, Hudson River juveniles exceeding 70 cm total length begin to migrate to marine waters (Bain *et al.*, 2000). New ageing analyses of fin spines from 520 Atlantic sturgeon captured in Sweka et al. (2007) reaffirms the use of Newburgh and Haverstraw bays by New York Bight DPS juveniles and, likely, subadults as well. Sturgeon as young as one-year old and as old as eight years were present in the bays in the spring and the fall. Four-year-old sturgeon were the most prevalent age group (Kehler et al. 2018). The presence of fish from age-one through age-eight across multiple seasons confirms that Newburgh and Haverstraw bays are important juvenile habitat for the New York Bight DPS and for the Hudson River spawning population, in particular.

Atlantic sturgeon adults are likely to migrate through the Hudson River portion of the action area in the spring as they move from oceanic overwintering sites to upstream spawning sites and then migrate back through the area as they move to lower reaches of the estuary or oceanic areas in the late spring and early summer. Atlantic sturgeon adults are most likely to occur in the action area from May – September. Tracking data from tagged juvenile Atlantic sturgeon indicates that during the spring and summer individuals are most likely to occur within rkm 60-170. During the winter months, juvenile Atlantic sturgeon are most likely to occur between rkm 19 and 74. This seasonal change in distribution may be associated with seasonal movements of the saltwedge and differential seasonal use of habitats.

Based on the available data, Atlantic sturgeon may be present in the Hudson River portion of the action area year-round. Atlantic sturgeon in this portion of the action area likely originated from the New York Bight DPS, Chesapeake Bay DPS, and Gulf of Maine DPS, with the majority of individuals originating from the New York Bight DPS, and the majority of those individuals originating from the Hudson River.

Atlantic sturgeon in the Cooper River
Atlantic sturgeon use of the portion of the lower Cooper River that would be transited by project vessels from the Nexans facility is described in section 4.1 of NMFS 2020 Nexans Biological Opinion and incorporated here by reference.

Summary of Atlantic sturgeon distribution in the action area
In summary, Atlantic sturgeon occur in most of the action area; with the exception being the offshore waters transited by project vessels with depths greater than 50m. This means that in addition to the WDA and riverine/estuarine portions of the action area that will be transited by project vessels identified above, Atlantic sturgeon will only be present in the nearshore (less than 50 m depth) portion of the vessel transit routes and will not be present in the open ocean areas transited by vessels moving between the WDA and identified ports. In the portion of the action area including the WFA and along the cable corridors, the majority of individuals will be from the New York Bight DPS. Along vessel transit routes to and from ports in the South Atlantic, the majority of individuals will be from the Carolina DPS (Kazyak et al. 2021). Considering the action area as a whole, individuals from all 5 DPSs may be present.

Shortnose sturgeon (Acipenser brevirostrum)
The only portions of the WDA that overlap with the distribution of shortnose sturgeon are in the New York Bay at the landfall site for the EW1 export cable, along the EW1 export cable route within state waters. Shortnose sturgeon also occur along vessel transit routes to/from New York ports (transiting New York Bay and the Hudson River) and to/from the Nexans cable facility (transiting Charleston Harbor and the lower Cooper River).

<u>Shortnose sturgeon in the Hudson River:</u> Historically, shortnose sturgeon have been documented in the Hudson River from upper Staten Island (RM -3(rkm -4.8)) to the Troy Dam (RM 155 (rkm 249.5); for reference, the project area for infrastructure improvements at SBMT is located at RM -3.5 (rkm -5.6)) (Bain et al. 2000, ASA 1980-2002). Prior to the construction of the Troy Dam in 1825, shortnose sturgeon are thought to have used the entire freshwater portion of the Hudson River (NYHS 1809). Spawning fish congregated at the base of Cohoes Falls where the Mohawk River emptied into the Hudson. Since 1999, shortnose sturgeon have been documented below the Tappan Zee Bridge from June through December (ASA 1999-2002; Dynegy 2003). While shortnose sturgeon presence below the Tappan Zee Bridge had previously been thought to be rare (Bain et al. 2000), increasing numbers of shortnose sturgeon have been documented in this area (ASA 1999-2002; Dynegy 2003) suggesting that the range of shortnose sturgeon is extending downstream. Shortnose sturgeon were documented as far south as the Manhattan/Staten Island area in June, November, and December 2003 (Dynegy 2003). While there are a few records of shortnose sturgeon in Upper New York Bay, shortnose sturgeon were recently captured near Liberty Island (approximately 3 km up bay of SBMT) (NMFS, 2022). From late fall to early spring, adult shortnose sturgeon concentrate in a few overwintering areas.

Reproductive activity the following spring determines overwintering behavior. The largest overwintering area is just south of Kingston, NY, near Esopus Meadows (RM 86-94, rkm 139-152) (Dovel et al. 1992). The fish overwintering at Esopus Meadows are mainly spawning adults. Capture data suggests that these areas may be expanding (Hudson River 1999-2002, Dynegy 2003). Captures of shortnose sturgeon during the fall and winter from Saugerties to Hyde Park (greater Kingston reach), indicate that additional smaller overwintering areas may be present (Geoghegan et al. 1992). Both Geoghegan et al. (1992) and Dovel et al. (1992) also confirmed an overwintering site in the Croton-Haverstraw Bay area (RM 33.5 – 38, rkm 54-61). The SBMT is located approximately 59.6 km (37 miles) south of the southern extent of this overwintering area, which is near rkm 54 (RM 33.5). Fish overwintering in areas below Esopus Meadows are mainly thought to be pre-spawning adults. Typically, movements during overwintering periods are localized and fairly sedentary.

In the Hudson River, males usually spawn at approximately 3-5 years of age while females spawn at approximately 6-10 years of age (Dadswell et al. 1984; Bain et al. 1998). Males may spawn annually once mature and females typically spawn every 3 years (Dovel et al. 1992). Mature males feed only sporadically prior to the spawning migration, while females do not feed at all in the months prior to spawning.

In approximately late March through mid-April, when water temperatures are sustained at 8º-9° C (46.4-48.2°F) for several days[34], reproductively active adults begin their migration upstream to the spawning grounds that extend from below the Federal Dam at Troy to about Coeymans, NY (rkm 245-212 (RM 152-131) (Dovel et al. 1992); located more than 169 km (104 miles) upstream from the Tappan Zee Bridge). Spawning typically occurs at water temperatures between 10 and 18°C (50-64.4°F) (generally late April-May) after which adults disperse quickly down river into their summer range. Dovel et al. (1992) reported that spawning fish tagged at Troy were recaptured in Haverstraw Bay in early June. The broad summer range occupied by adult shortnose sturgeon extends from approximately rkm 38 to rkm 177 (RM 23.5-110). The Tappan Zee Bridge (at rkm 43) is located within the broad summer range.

There is scant data on actual collection of early life stages of shortnose sturgeon in the Hudson River. During a mark recapture study conducted from 1976-1978, Dovel et al. (1979) captured larvae near Hudson, NY (rkm 188, RM 117) and young of the year were captured further south near Germantown (RM 106, rkm 171). Between 1996 and 2004, approximately 10 small shortnose sturgeon were collected each year as part of the Falls Shoals Survey (FSS) (ASA 2007). Based upon basic life history information for shortnose sturgeon it is known that eggs adhere to solid objects on the river bottom (Buckley and Kynard 1981; Taubert 1980) and that eggs and larvae are expected to be present within the vicinity of the spawning grounds (rkm 245-212, RM 152-131) for approximately four weeks post spawning (i.e., at latest through mid-June). Shortnose sturgeon larvae in the Hudson River generally range in size from 15 to 18 mm (0.6-0.7 inches) TL at hatching (Pekovitch 1979). Larvae gradually disperse downstream after hatching,

[34] Based on information from the USGS gage in Albany (gage no. 01359139), in 2002 mean water temperatures reached 8ºC on April 10 and 15ºC on April 20; 2003 - 8ºC on April 14 and 15ºC on May 19; 2004 - 8ºC on April 17 and 15ºC on May 11. In 2011, water temperatures reached 8°C on April 11 and reached 15°C on May 19. In 2012, water temperatures reached 8°C on March 20 and reached 15°C on May 13.

entering the tidal river (Hoff et al. 1988). Larvae or fry are free swimming and typically concentrate in deep channel habitat (Taubert and Dadswell 1980; Bath et al. 1981; Kieffer and Kynard 1993). Given that fry are free swimming and foraging, they typically disperse downstream of spawning/rearing areas. Larvae can be found upstream of the salt wedge in the Hudson River estuary and are most commonly found in deep waters with strong currents, typically in the channel (Hoff et al. 1988; Dovel et al. 1992). Larvae are not tolerant of saltwater and their occurrence within the estuary is limited to freshwater areas. The transition from the larval to juvenile stage generally occurs in the first summer of life when the fish grows to approximately 2 cm (0.8 in) TL and is marked by fully developed external characteristics (Pekovitch 1979).

Similar to non-spawning adults, most juveniles occupy the broad region of Haverstraw Bay (rkm 55-64.4) RM 34-40; Indian Point is located near the northern edge of the bay) (Dovel et al. 1992; Geoghegan et al. 1992) by late fall and early winter. Migrations from the summer foraging areas to the overwintering grounds are triggered when water temperatures fall to 8°C (46.4°F) (NMFS 1998), typically in late November[35]. Juveniles are distributed throughout the mid-river region during the summer and move back into the Haverstraw Bay region during the late fall (Bain et al. 1998; Geoghegan et al. 1992; Haley 1998).

The Hudson River population of shortnose sturgeon is almost exclusively confined to the river, unlike other populations that use coastal marine waters to move between rivers (Pendleton et al. 2019; Kynard et al. 2016). Telemetry data from the Gulf of Maine indicate shortnose sturgeon in this region undertake significant coastal migrations between larger river systems and utilize smaller coastal river systems during these interbasin movements (Fernandes 2008; UMaine unpublished data). Some outmigration has been documented in the Hudson River, albeit at low levels in comparison to coastal movement documented in the Gulf of Maine and Southeast rivers. Two individuals tagged in 1995 in the overwintering area near Kingston, NY were later recaptured in the Connecticut River. One of these fish was at large for over two years and the other 8 years prior to recapture. As such, it is reasonable to expect some level of movement out of the Hudson into adjacent river systems; however, based on available information it is not possible to predict what percentage of adult shortnose sturgeon originating from the Hudson River may participate in coastal migrations. As described above, shortnose sturgeon overwinter in the rivers, so the time of year for coastal migrations would be roughly from April 1 to November 30, when they may occur within the 40.80°N, longitude -72.87°W 50-m (165-ft) depth contour (Zydlewski, et al. 2011).

Shortnose sturgeon in the Cooper River: Shortnose sturgeon may occur along vessel transit routes to/from the Nexans cable facility (transiting Charleston Harbor and the lower Cooper River). The May 4, 2020 Biological Opinion for dredging, rip-rap installation, and wharf construction at the Nexans Plant in Goose Creek, South Carolina discusses the status of shortnose sturgeon in the Cooper River in section 4.1.1 and is incorporated here by reference.

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[35] In 2002, water temperatures at the USGS gage at Hastings-on-Hudson (No. 01376304; the farthest downstream gage on the river) fell to 8°C on November 23. In 2003, water temperatures at this gage fell to 8°C on November 29. In 2010, water temperatures at the USGS gage at West Point, NY (No. 01374019; currently the farthest downstream gage on the river) fell to 8°C on November 23. In 2011, water temperatures at the USGS gage at West Point, NY (No. 01374019) fell to 8°C on November 24. This gage ceased operations on March 1, 2012.

Based on the information presented here, we anticipate that shortnose sturgeon will transit through the EW1 landfall site and submarine export cable route within state waters, typically between April and November. Shortnose sturgeon are also expected along the vessel transit routes used by project vessels transiting to and from the SBMT. We do not expect shortnose sturgeon to occur in the WFA nor along the EW 2 submarine export cable route.

6.4 Consideration of Federal, State, and Private Activities in the Action Area

Activities in the Coastal and Riverine Portions of the Action Area

In addition to fishing activity and vessel traffic, portions of these areas have navigation channels that are maintained by dredging, and are affected by routine in-water construction activities such as dock, pier, and wharf maintenance and construction.

Loggerhead, Kemp's ridley, and green sea turtles and Atlantic sturgeon are vulnerable to serious injury and mortality in hopper dredges that are used to maintain federal navigation channels in the action area, including channels in New York Harbor, the Hudson River, and Charleston Harbor. NMFS has completed ESA section 7 consultations on these actions; measures are in place to avoid and minimize take and in all cases, NMFS has determined that the proposed actions are not likely to jeopardize the continued existence of any listed species. We expect that mortality of sturgeon and sea turtles as a result of maintenance dredging will continue in the action area over the life of the Empire Wind project.

Dredging of the Ambrose Federal Channel in New York Bay

Maintenance dredging occurs in the action area, in Ambrose Channel, as part of the New York/New Jersey (NY/NJ) Harbor Deepening Project (HDP) to maintain navigational channels at safe depths. These activities are authorized by the U.S. Army Corps of Engineers and the State of New York. Dredging in the Ambrose Channel occurs with a hydraulic hopper dredge, and the material is placed at permitted sites that are already covered under ESA consultation or where an ESA consultation is not necessary (*i.e.*, upland) (NMFS 2020). Dredging results in the removal of bottom sediments and as such results in a temporary disruption of benthic resources; however, the dredged areas are expected to be recolonized from nearby undredged areas resulting in only a temporary reduction in the availability of potential sea turtle and sturgeon prey. The effects of these occasional, temporary reductions in the amount of prey in the action area are likely to be so small that they cannot be meaningfully measured, evaluated, or detected. NMFS and USACE have undergone consultation regarding the HDP several times. The October 13, 2000 Opinion included an Incidental Take Statement (ITS) exempting the incidental taking of two loggerhead, one green, one Kemp's ridley, or one leatherback sea turtle for the duration (*i.e.*, three years) of the deepening, via a hopper dredge, of the Ambrose Channel (NMFS 2000). Consultation was reinitiated in 2012 and an Opinion was issued on October 25, 2012 (NMFS 2012). The Opinion included an ITS exempting the incidental taking of one Kemp's ridley, or one leatherback, and one Atlantic sturgeon (any DPS) for the duration of the deepening, via a hopper dredge, of the Ambrose Channel. The project was completed in 2016. On September 16, 2012, USACE informed NMFS that the anterior portion of an Atlantic sturgeon was found within the inflow screening of the hopper dredge operating within the Ambrose Channel-Contract B. The sturgeon part was moderately decomposed. It is believed that the animal had died by some other cause(s) and thus, was not attributed as an entrainment incident related to or as a result of the Ambrose Channel deepening. Consultation was reinitiated again in 2021, following a recommendation under the New York and New Jersey Harbor Deepening Channel Improvements, Navigation Feasibility Study (HDCI) to "investigate and determine if there is a Federal interest in continuing the project with the preparation of cost-shared feasibility report for analyzing alternatives to address the identified problems though possible modifications of the project." The Opinion issued on January 26, 2022 included an ITS exempting the incidental taking of six loggerhead or five loggerhead and one Kemp's ridley sea turtle, and up to three lethal takes of Atlantic sturgeon (any DPS) for the duration of the deepening, via a hopper dredge, of the Ambrose Channel. There have been no reported interactions with sea turtles or Atlantic sturgeon during dredging in the Ambrose channel since the incident in 2012.

Fishing Activity in the Action Area
Commercial and recreational fishing occurs throughout the action area. The lease area and cable corridor occupies a portion of NMFS statistical area 612. The transit routes to ports, including those in New York and South Carolina overlap with a number of other statistical areas (see, https://www.fisheries.noaa.gov/resource/map/greater-atlantic-region-statistical-areas). Commercial fishing in the U.S. EEZ portion of the action area is authorized by the individual states or by NMFS under the Magnuson-Stevens Fishery Conservation and Management Act. Fisheries that operate pursuant to the MSFCMA have undergone consultation pursuant to section 7 of the ESA. These biological opinions are available online (available at: https://www.fisheries.noaa.gov/new-england-mid-atlantic/consultations/section-7-biological-opinions-greater-atlantic-region).

Given that fisheries occurring in the action area are known to interact with large whales, the past and ongoing risk of entanglement in the action area is considered here. The degree of risk in the future may change in association with fishing practices and accompanying regulations. It is important to note that in nearly all cases, the location where a whale first encountered entangling gear is unknown and the location reported is the location where the entangled whale was first sighted. The risk of entanglement in fishing gear to fin, sei, blue, and sperm whales in the lease area appears to be low given the low interaction rates in the U.S. EEZ as a whole. We have reviewed the most recent data available on reported entanglements for the ESA listed whale stocks that occur in the action area (Hayes et al. 2022 and 2020 and Henry et al. 2022). As reported in Hayes et al. 2022, for the most recent 5-year period of review (2015-2019) in the U.S. Atlantic, the minimum rate of serious injury or mortality resulting from fishery interactions as 5.7/year for right whales, 1.45/year for fin whales, 0.4 for sei whales. The most recent SAR for blue whales and sperm whales in the North Atlantic is Hayes et al. 2020, the minimum rate of serious injury or mortality resulting from fishery interaction is 0 for blue and sperm whales. In all cases, the authors note that this is a minimum estimate of the amount of entanglement and resultant serious injury or mortality. These data represent only known mortalities and serious injuries; more, undocumented mortalities and serious injuries have likely occurred and gone undetected due to the offshore habitats where large whales occur. Hayes et al. (2020) notes that no confirmed fishery-related mortalities or serious injuries of sei whales have been reported in the NMFS Sea Sampling bycatch database and that a review of the records of stranded, floating, or injured sei whales for the period 2015 through 2019 on file at NMFS found 3 records with substantial evidence of fishery interaction causing serious injury or mortality, which results in the annual serious injury and mortality rate from fishery interactions noted above. Hayes et al. (2020), reports that sperm whales have not been documented as bycatch in the observed U.S.

Atlantic commercial fisheries. No confirmed fishery-related mortalities or serious injuries of fin whales have been reported in the NMFS Sea Sampling bycatch database and a review of the records of stranded, floating, or injured fin whales for the period 2015 through 2019 with substantial evidence of fishery interactions causing injury or mortality are captured in the total observed incidental fishery interaction rate reported above (Hayes et al. 2022).

We also reviewed available data that post-dates the information presented in the most recent stock assessment reports. As explained in the Status of the Species section of this Opinion, there is an active UME for North Atlantic right whales[36]. Of the 114 right whales in the UME as of July 25, 2023, 9 mortalities are attributed to entanglement as well as 30 serious injuries and 36 sublethal injuries. None of the whales recorded as part of the UME were first documented in the lease area or along the cable routes[37]. We reviewed information on serious injury and mortalities reported in Henry et al. 2022. Two live right whales were first documented as entangled in waters off the coast of New Jersey; right whale 3405 was documented as entangled in netting on December 4, 2016 approximately 3.5 nm east of Sandy Hook, right whale 4680 was documented as entangled in unknown gear on October 11, 2020 approximately 2.7 nm east of Sea Bright, NJ. It is unknown where either of these entanglements actually occurred. Henry et al. 2022 includes no records of entangled fin, sei, blue, or sperm whales first reported in waters off of New York.

Given the co-occurrence of fisheries and large whales in the action area, it is assumed that there have been entanglements in the action area in the past and that this risk will persist at some level throughout the life of the project. However, it is important to note that several significant actions have been taken to reduce the risk of entanglement in fisheries that operate in the action area including ongoing implementation of the Atlantic Large Whale Take Reduction Plan. The goal of the ALWTRP is to reduce injuries and deaths of large whales due to incidental entanglement in fishing gear. The ALWTRP is an evolving plan that changes as NMFS learns more about why whales become entangled and how fishing practices might be modified to reduce the risk of entanglement. It has several components including restrictions on where and how gear can be set; research into whale populations and whale behavior, as well as fishing gear interactions and modifications; outreach to inform and collaborate with fishermen and other stakeholders; and a large whale disentanglement program that seeks to safely remove entangling gear from large whales whenever possible. While there have been delays to implementation of some recently developed ALWTRP measures, the risk of entanglement within the action area is expected to decrease over the life of the action due to compliance of state and federal fisheries with ALWTRP measures. All states that regulate fisheries in the U.S. portion of the action area codify the ALWTRP measures into their state fishery regulations.

Atlantic sturgeon are captured as bycatch in trawl and gillnet fisheries. An analysis of the NEFOP/ASM bycatch data from 2000-2015 (ASMFC 2017) found that most trips that encountered Atlantic sturgeon were in depths less than 20 meters and water temperatures between 45-60°F. Average mortality in bottom otter trawls was 4% and mortality averaged 30%

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[36] Information in this paragraph related to the UME is available at: *https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2021-north-atlantic-right-whale-unusual-mortality-event*; last accessed on July 25, 2023

[37] https://noaa.maps.arcgis.com/apps/webappviewer/index.html?id=e502f7daf4af43ffa9776c17c2aff3ea; last accessed February 13, 2023

in gillnets (ASMFC 2017). The most recent five years of data in the NMFS NEFOP and ASM database (2018-2022) were queried for the number of reports of Atlantic sturgeon bycatch in the statistical area that overlaps with the lease area and cable routes (612[38]). The NEFOP program samples a percentage of trips from the Gulf of Maine to Cape Hatteras while the ASM program provides additive coverage for the New England ground fish fisheries, extending from Maine to New York. For the most recent five-year period that data are available (2018-2022), a total of 191 Atlantic sturgeon were reported as bycatch in statistical area 612, this represents approximately 22% of the total bycatch of Atlantic sturgeon in the Maine to Cape Hatteras area where the NEFOP, and Maine to New York area where the ASM program, operates (n=868). Incidental capture of Atlantic sturgeon is expected to continue in the action area at a similar rate over the life of the proposed action. While the rate of encounter is low and survival is relatively high (96% in otter trawls and 70% in gillnets), bycatch is expected to be the primary source of mortality of Atlantic sturgeon in the Atlantic Ocean portion of the action area.
Sea turtles are vulnerable to capture in trawls as well as entanglement in gillnets and vertical lines. Using the same data source as for Atlantic sturgeon, from 2013-2022 there were a total of 14 incidents of observed sea turtle bycatch in fisheries in area 612, seven in gillnet (1 loggerhead, 5 Kemp's ridley, 1 leatherback) and seven in otter trawls (5 loggerheads, 1 Kemp's ridley, 1 green). Leatherback sea turtles are particularly vulnerable to entanglement in vertical lines.

In response to high numbers of leatherback sea turtles found entangled in the vertical lines of fixed gear in the Northeast Region, NMFS established the Northeast Atlantic Coast Sea Turtle Disentanglement Network (STDN). Formally established in 2002, the STDN is an important component of the National Sea Turtle Stranding and Salvage Network. The STDN works to reduce serious injuries and mortalities caused by entanglements and is active throughout the action area responding to reports of entanglements. Where possible, turtles are disentangled and may be brought back to rehabilitation facilities for treatment and recovery. This helps to reduce the rate of death from entanglement. The Southeast STDN provides similar services in the South Atlantic and Gulf of Mexico. Sea turtles are also captured in fisheries operating in offshore areas where pelagic fisheries such as the Atlantic Highly Migratory Species (HMS) fishery occurs. Sea turtles are also vulnerable to interactions with fisheries occurring off the U.S. South Atlantic coast including the Atlantic shrimp trawl fishery. For all fisheries for which there is a fishery management plan (FMP) or for which any federal action is taken to manage that fishery in the action area, the impacts have been evaluated via section 7 consultation. Past consultations have addressed the effects of federally permitted fisheries on ESA-listed species in the action area, sought to minimize the adverse impacts of the action on ESA-listed species, and, when appropriate, have authorized the incidental taking of these species. Incidental capture and entanglement of sea turtles is expected to continue in the action area at a similar rate over the life of the proposed action. Safe release and disentanglement protocols help to reduce the severity of impacts of these interactions and these efforts are also expected to continue over the life of the project.

Vessel Operations
The action area is used by a variety of vessels ranging from small recreational fishing vessels to

[38] Map available at: https://www.fisheries.noaa.gov/resource/map/greater-atlantic-region-statistical-areas

large commercial cargo ships. Commercial vessel traffic in the action area includes research, tug/barge, liquid tankers, cargo, military and search-and-rescue vessels, and commercial fishing vessels.

Vessel Traffic surrounding the waterways of SBMT
The South Brooklyn Marine Terminal (SBMT) facility is located on the waterfront adjoining Upper New York Bay and Gowanus Bay in Sunset Park, Brooklyn. The Gowanus Bay is regularly used for commercial navigation of primarily petroleum products, gravel, waste, and scrap transported by tug/barge. An overview of vessel trip data from the 2018 USACE Waterborne Commerce Statistics Center (WCSC) for the Upper Bay, Bay Ridge and Red Hook Channels, and New York Harbor Lower Entrance Channels is provided in Table 6.4.1.

Table 6.4.1. USACE WCSC Upper Bay, Bay Ridge and Red Hook Channels, and New York Harbor Lower Entrance Channels Trips 2018

Vessel Type	Number of Upper Bay Trips (2018)	Number of Red Hook and Bay Ridge Channel Trips (2018)	Number of New York Harbor Lower Entrance Channels Trips
Dry Cargo Barge	5,758	54	537
Liquid Barge	1,315	0	1,101
Other	2	0	18
Self-Propelled Dry Barge	50,340	5	12,310
Tanker	519	0	1,951
Towboat	10,303	455	424
Total	**68,237**	**514**	**16,341**

Source: COP Appendix DD, Attachment H; Empire 2022.

Vessel Traffic in the Hudson River
The Hudson River is navigable from the New York Harbor to north of Albany and serves both recreational and commercial boaters. A wide variety of materials are shipped via the Hudson River. Several large ports and marine terminals exist along the river, including those in Albany, Coeymans, Newburgh, Yonkers, and Red Hook. In 2018, the USACE WCSC counted a total of 292,748 trips up and down the Hudson River (Table 6.4.2). Vessel traffic consists of domestic and international vessels inclusive of self-propelled dry cargo, self-propelled tanker, self-propelled towboat, nonself- propelled dry cargo, and non-self-propelled liquid tanker barge. Vessel drafts range from 0-38 feet with the vast majority in the 6-9 foot range.

Table 6.4.2. USACE WCSC Hudson River Trips 2018

Vessel Type	Number of Hudson River Trips (2018)
Dry Cargo Barge	8,859
Liquid Barge	3,823
Other	3
Self-Propelled Dry Barge	277,904
Tanker	172
Towboat	1,987
Total	**292,748**

Source: COP Appendix DD, Attachment H; Empire 2022.

The Port of Albany is Upstate New York's largest public port, handling bulk, break bulk, and special project cargo. The facility is Port of entry and includes land on both sides of the Hudson River, approximately 4,200 linear square feet of wharf on the Albany (west) side, and 1,200 feet of wharf on the Rensselaer (east) side of the Hudson River (Port of Albany 2019). AIS data show that the types of vessels regularly calling at the Port of Albany are pleasure crafts (66%), bulk carriers (8%), sailing vessels (6%), oil/chemical tankers (5%), and tugs (1%) (MarineTraffic 2023).

The Port of Coeymans is a full-service, deep-water inland marine terminal located 10 miles south of Albany. Existing activities at the facility include transport and storage of bulk materials such as road salt, gypsum, bauxite, clinker, sand/gravel, construction and demolition materials, and scrap recycling. As such, the types of vessels regularly calling at the Port of Coeymans are bulk carriers with a maximum draft of approximately 29.5 feet (MarineTraffic 2023).

Vessel Traffic between the Lease Area and the Nexans Cable Facility (Goose Creek, SC)
Vessel traffic along the southern U.S. coast mainly consists of tug and barge, fishing vessels, tankers, container ships, and passenger vessels; military vessels also transit the area conducting training and operations. Vessels typically travel offshore before entering a traffic separation scheme heading into port. Traffic generally travels in a north to south or south to north direction. Throughout the Mid-Atlantic, commercial vessel traffic is significant throughout the year with a number of major U.S. ports located along the coast. These ports include ones in the Chesapeake Bay/Norfolk, VA, the Delaware Bay, and Charleston, SC. Vessel traffic is heaviest in the nearshore waters, near major ports, in the shipping lanes. Recreational vessel traffic is high throughout these areas but is generally close to shore compared to commercial vessel travel.
Vessel Traffic between the Lease Area and Ports in the Gulf of Mexico (Corpus Christi, TX)
The Port of Corpus Christi is one of the largest ports in the U.S. in total tonnage and a leader in U.S. Crude Oil exports. Approximately 6,200 commercial vessel movements are recorded each year in the Corpus Christi and La Quinta Ship Channels. Vessel traffic consists of deep draft vessels and barges, both ocean going and inland, with the majority of the traffic coming from inland liquid barges. Recreational vessels and commercial fishing vessels use the waterway but are restricted from entering the Inner Harbor because of a permanently established security zone. There is also a permanently established safety zone around loaded liquefied petroleum gas vessels transiting the Corpus Christi and La Quinta Ship Channels. It has been noted that the area

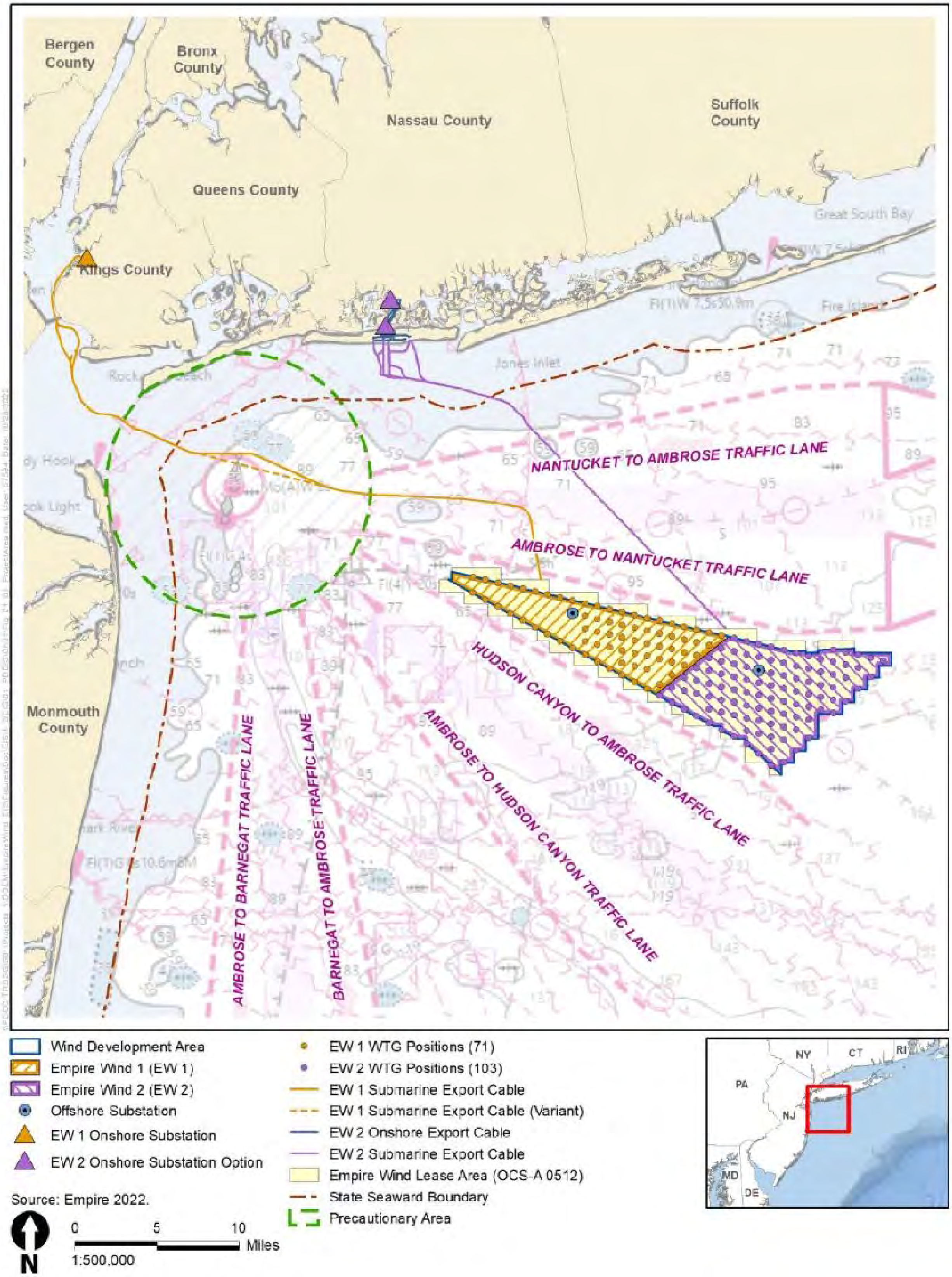
of the Harbor Island intersection and the La Quinta junction are the most hazardous areas for vessel traffic (POCCA 2019). Approximately 6,200 commercial vessel movements are recorded each year in the Corpus Christi and La Quinta Ship Channels. Vessel traffic consists of deep draft vessels and barges, both ocean going and inland, with the majority of the traffic coming from inland liquid barges. Recreational vessels and commercial fishing vessels use the waterway but are restricted from entering the Inner Harbor because of a permanently established security zone. There is also a permanently established safety zone around loaded liquefied petroleum gas vessels transiting the Corpus Christi and La Quinta Ship Channels. It has been noted that the area of the Harbor Island intersection and the La Quinta junction are the most hazardous areas for vessel traffic. (POCCA 2019).

Vessel Traffic in the Lease Area and Surrounding Waters

To help ships avoid navigational hazards in the vicinity of the project area, vessel traffic in and out of the approach to the Port of New York and New Jersey and its navigation channels is regulated by three Traffic Separation Schemes (TSS) with Separation Zones between each unidirectional traffic lane, all of which converge on a central and circular Precautionary Area (33 CFR 167.151–167.155). The three TSSs as shown in Figure 6.4.1 are:

- Nantucket to Ambrose and Ambrose to Nantucket traffic lanes
- Hudson Canyon to Ambrose and Ambrose to Hudson Canyon traffic lanes
- Barnegat to Ambrose and Ambrose to Barnegat traffic lanes
- The Lease Area is bordered by two of the six traffic lanes (Ambrose to Nantucket and Hudson Canyon to Ambrose) guiding large vessel traffic into and from the Port of New York and New Jersey. The TSS lanes adjacent to the Lease Area range in width from 1.8 to 5 nm (3.3 to 9.3 km).

Figure 6.4.1. Traffic Separation Schemes in the Vicinity of the Lease Area



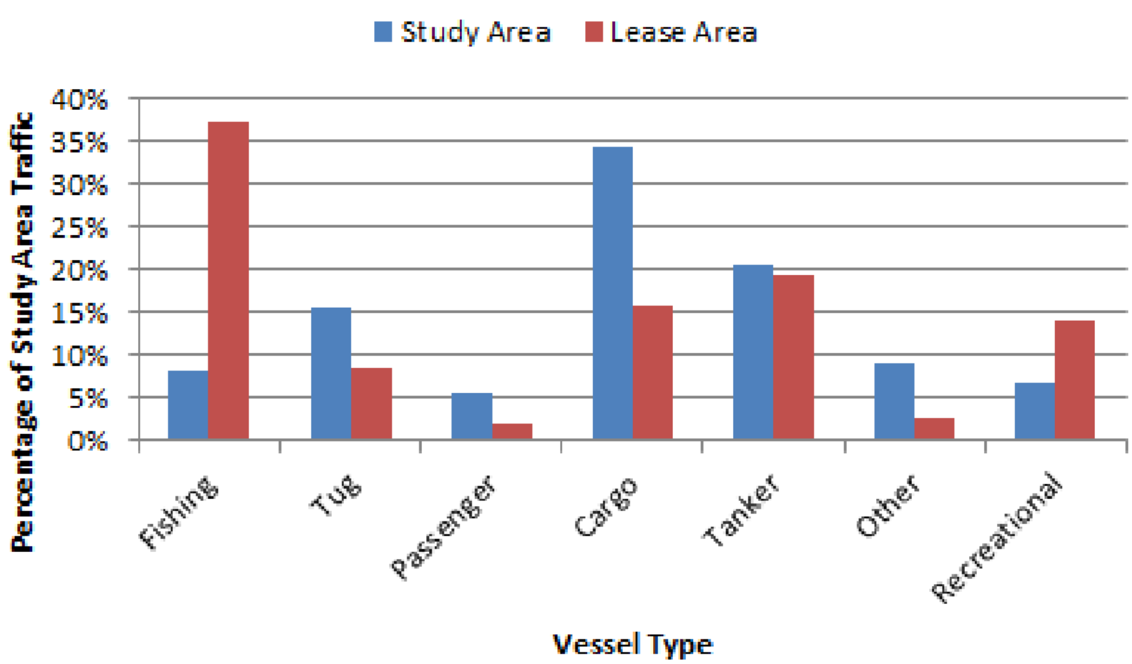
Information from a number of sources including the DEIS, data collected through visual observations and radar from project survey vessels working in the lease area, the Navigational Safety Risk Assessment (NSRA) prepared to support the COP, and the USCG's Port Access Route Study for the Northern New York Bight (NNYBPARS) helps to establish the baseline vessel traffic in the WDA (i.e., the portion of the lease area where WTGs will be placed and the two cable corridors) and surrounding area. USCG's NNYBPARS analyzed approaches to the Port of New York and New Jersey , as well as a broad area within the Mid-Atlantic Bight which extends approximately 150 nm seaward and covers approximately 25,000 nm^2 including the offshore area of New Jersey and New York. Section 7 of the NSRA characterizes the baseline vessel traffic within a study area that is within 15 nm (27.8 km) of the lease area. The NSRA also characterizes vessel traffic along the EW1 and EW2 export cable routes within an area constituting an approximate 2 nm (3.7 km) buffer of the export cables. The NSRA describes baseline conditions according to identified vessel types, their characteristics, operating areas/routes, separation zones, traffic density, and seasonal traffic variability using AIS data for one year (August 2017 – July 2018), visual observation data, 2015 – 2016 VMS data, Vessel Trip Report data, the NNYBPARS, and marine transportation/traffic Nationwide AIS data.
The NSRA identifies seven vessel classes within the study area: cargo/carrier, fishing, other and unidentified, passenger, recreational, tanker, and tug and service. The 'other' vessels category in the NSRA study area included those vessel types recorded in insufficient numbers to warrant their own category. For example, offshore supply vessels, military vessels, and dredgers (COP Appendix DD, Empire 2022). AIS is required only for vessels 65' or larger and is optional for smaller vessels. Most of the AIS-identified regular routed vessel traffic transiting within the New York Bight utilizes the pre-established International Maritime Organization (IMO) routing measures and, therefore, does not transit through the Lease Area. Most of the traffic utilizes the center of the TSS lanes, although as the lanes reduce in width (converging on the Precautionary Area), the full width of the lanes is more typically used (COP Appendix DD, Empire 2022).
According to AIS data, the most frequently recorded vessel types within the NSRA study area were cargo vessels (representing 34% of all recorded traffic), followed by tankers (20%). This corresponds to approximately 18 unique cargo vessels per day, and 11 tankers (Table 6.4.3).
When considering only those vessel tracks intersecting the lease area, fishing vessels were the most frequently recorded vessel type (37% of all vessel traffic within the Study Area) followed by tankers (19%) and cargo vessels (16%) (Figure 6.4.2) (COP Appendix DD, Empire 2022).

Table 6.4.3. Vessel Counts (NSRA Study Area) and Transit Frequencies (Lease Area) over a 12-month Period, AIS Data

Vessel Type	Average Number of Unique Vessels per Day in NSRA Study Area	Frequency of Vessel Transits Intersecting the Lease Area	Percentage of Vessel Type in NSRA Study Area[1]	Percentage of Vessel Type in Lease Area[1]
Cargo Vessels	18	1 every 11 days	34	16
Tankers	11	1 every 9 days	20	20
Passenger Vessels	3-4	5 total during the year	6	2
Push/Tow	8	Less than 2 per month	15	8
Fishing Vessels	5	1 every 6 days	8	37
Recreational Vessels[2]	3-4	35 total during the year	7	14
Other[3]	Not available	Not available	9	2

Source: COP Appendix DD, Section 7.4; Empire 2022.
[1] Percentages do not exactly total 100 due to rounding.
[2] Numbers represent a minority of recreational vessels operating in the region. Additional visual information is provided in COP Appendix DD, Section 7.2.8, including Figure 7.29.
[3] Vessel types recorded in insufficient numbers to warrant a separate category. Examples are offshore supply vessels, military vessels, and dredgers.

Figure 6.4.2. Main Vessel Types Distribution



Source: COP Appendix DD, Section 7.4; Empire 2022.

Cargo vessels accounted for approximately 34% of traffic within the study area and 16% of traffic within the lease area over a 12-month period. The majority of commercial (cargo or tanker) vessels associated with the Port of New York and New Jersey utilized the TSS lanes when exiting or entering the precautionary area. For that reason, the majority of cargo vessel traffic avoided the lease area. The majority of those cargo vessels that did intersect the lease area were seeking access to the uncharted anchorage area to the north of the lease area. Throughout the survey period, an average of 18 unique cargo vessels per day was recorded within the study area, and one every 11 days within the lease area.

During the survey period, an average of 11 unique tankers per day were recorded within the study area, and one every nine days within the lease area. As with cargo vessels, the majority of tankers recorded were transiting routes through the TSS lanes in the approaches to the precautionary area, and therefore tanker traffic intersecting the lease area was limited. An average of three to four unique passenger vessels per day was recorded within the study area, and a total of five passenger vessels within the lease area. The majority of passenger vessels recorded utilizing the TSS lanes were observed to be large cruise ships, with vessels on coastal transits being smaller, day-trip vessels.

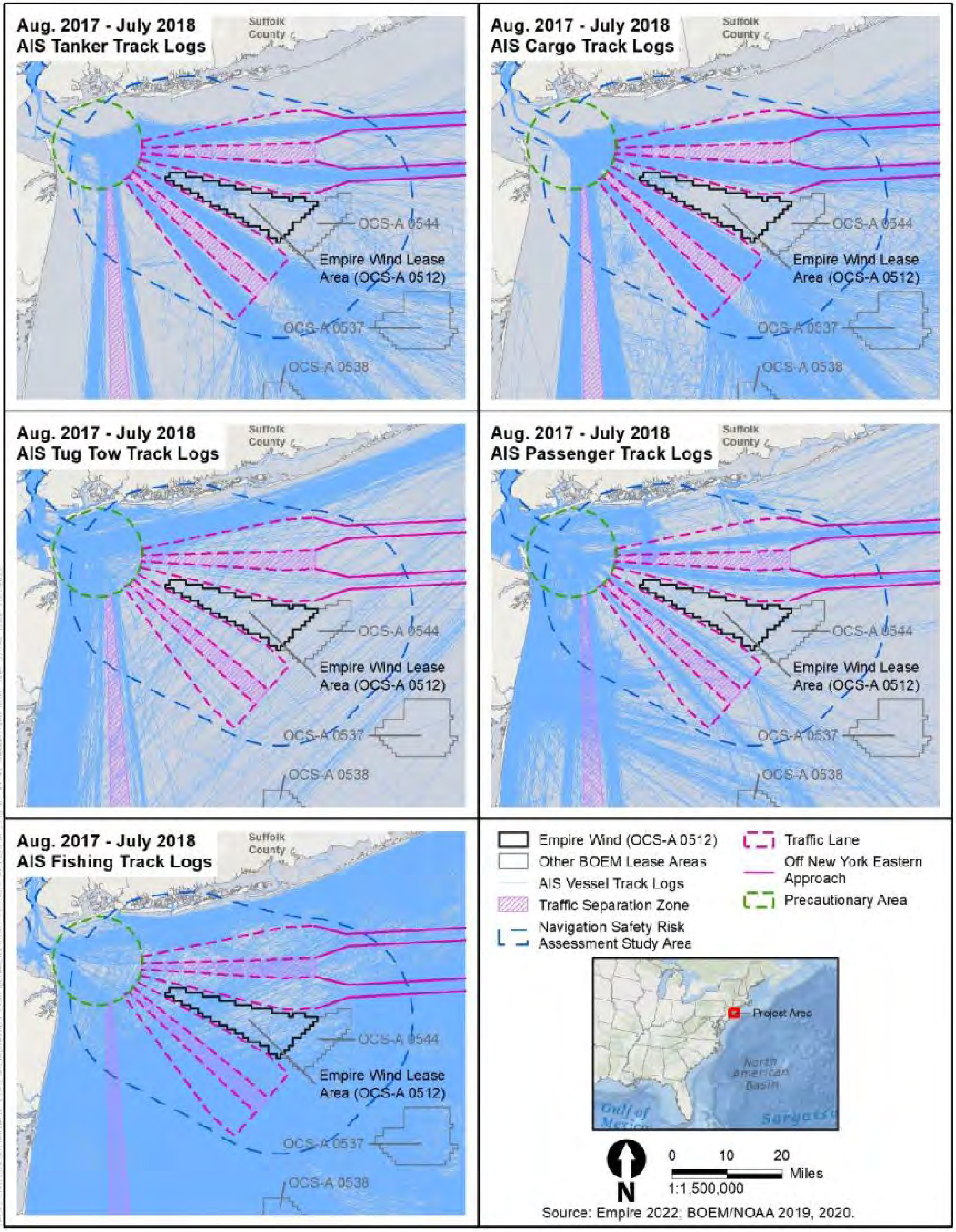
Tug (push/pull) vessels accounted for approximately 15% of overall traffic levels within the study area throughout the survey period. Commercial tug traffic was observed to remain largely coastal. An average of eight unique tug vessels were recorded within the study area per day, falling to less than two per month within the lease area. The majority of tugs were observed to be associated with the Port of New York and New Jersey and hence were mostly recorded on transits close to the coastline. However, limited levels of transits further offshore were also recorded.

Fishing vessels accounted for approximately 8% of AIS traffic throughout the 12-month survey period. Fishing vessel frequency averaged to one fishing vessel every 6 days within the lease area (approximately 3% of fishing vessel tracks recorded intersected the lease area). The maximum number of fishing vessels within the lease area on a single day was five. Based upon the nature of the vessel tracks and the average speeds, fishing vessels were observed to be mostly transiting through the lease area (as opposed to fishing within the lease area) (COP Appendix DD, Empire 2022). To enhance the fishing vessel baseline established by the AIS data, the NSRA assessed additional VMS collected by the NEODP during 2015-16 for multispecies of groundfish, monkfish, scallop, surfclam / ocean quahog, and pelagic species (squid, mackerel, herring) (NEODP, 2018). VMS data described notable levels of pelagic, scallop and surfclam / ocean quahog fishing activity within the lease area.

Recreational vessels accounted for approximately 7% of the AIS data recorded within the study area and 14% of traffic within the lease area over a 12-month period. A total of 35 recreational vessels were recorded via AIS within the Lease Area during the year of data studied. The majority of these were small (average length of 76 ft. (23.2 m)) privately owned sailing vessels or yachts. Higher levels of recreational traffic passed farther offshore to the east of the lease area, and within the Barnegat/Ambrose TSS. Recreational vessel levels in the other TSS lanes were limited in comparison. An average of three to four unique recreational vessels per day was recorded within the study area during the period studied, with the majority of this traffic being coastal.

Because non-AIS commercial and recreational vessels navigate through the lease area, AIS track counts for fishing and pleasure vessels may underrepresent these vessel types. Visual observation data of non-AIS targets within the vicinity of the lease area was used to supplement the other data sources considered (e.g., AIS, VMS) in the NSRA. During June 2018, both fishing vessels and recreational vessels were recorded within the lease area and surrounding TSS lanes. These vessels formed the significant majority of the non-AIS traffic in the area (70% recreational, 27% fishing). The observed recreational vessels included small yachts, sports fishing, and motor boats.

Figure 6.4.3. Vessel Traffic in the Vicinity of the Lease Area

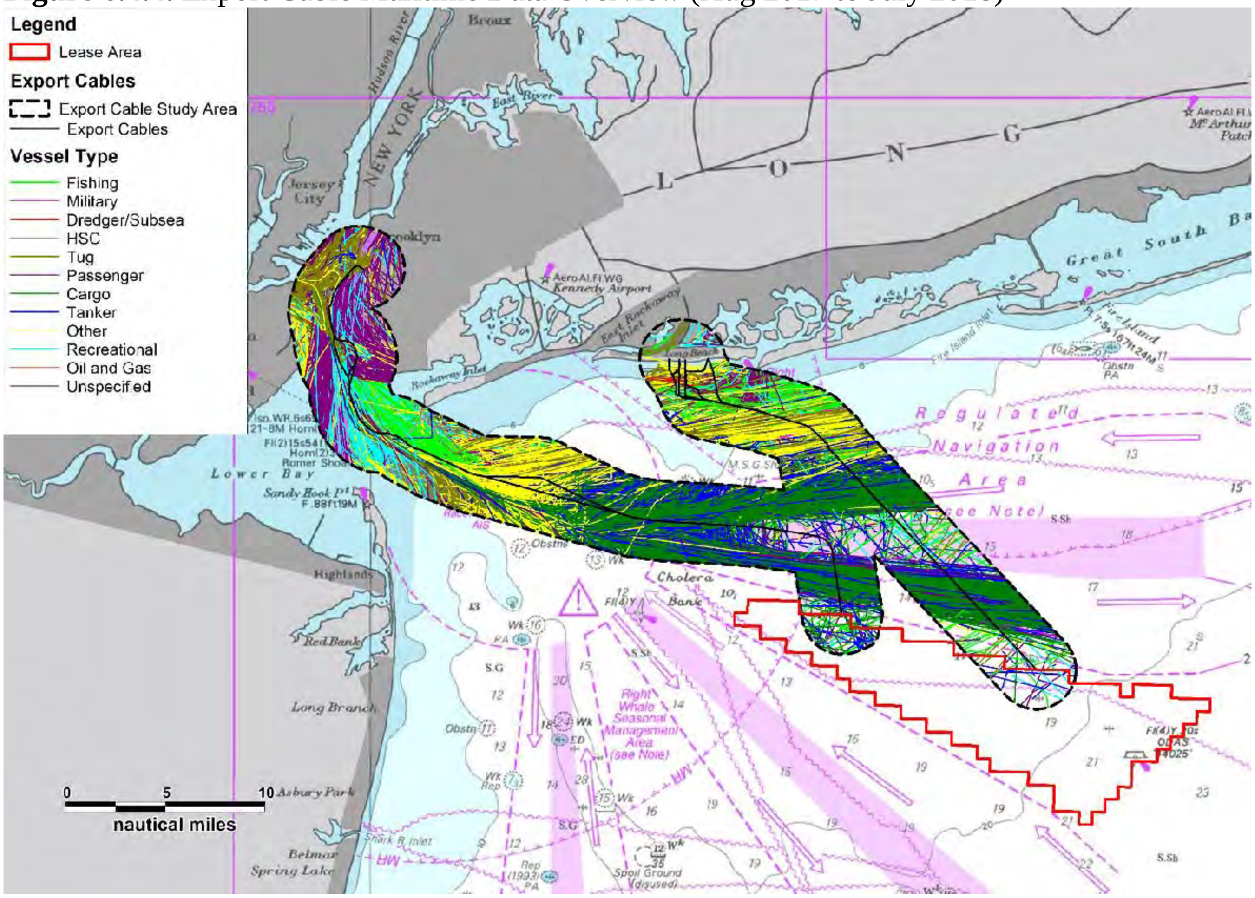


Note: AIS track counts for fishing and pleasure vessels underrepresent these vessel types, as not all of these vessel types are required to have AIS on board per USCG regulations.

Source: COP Appendix DD, Section 7.4; Empire 2022.

Along the EW1 and EW2 export cable routes, the significant majority of vessel traffic was associated with vessels within the inshore areas of the Ambrose and associated channels (Figure 6.4.4). AIS data show that an average of 227 unique vessels per day were recorded within the export cable study area (COP Appendix DD, Empire 2022).

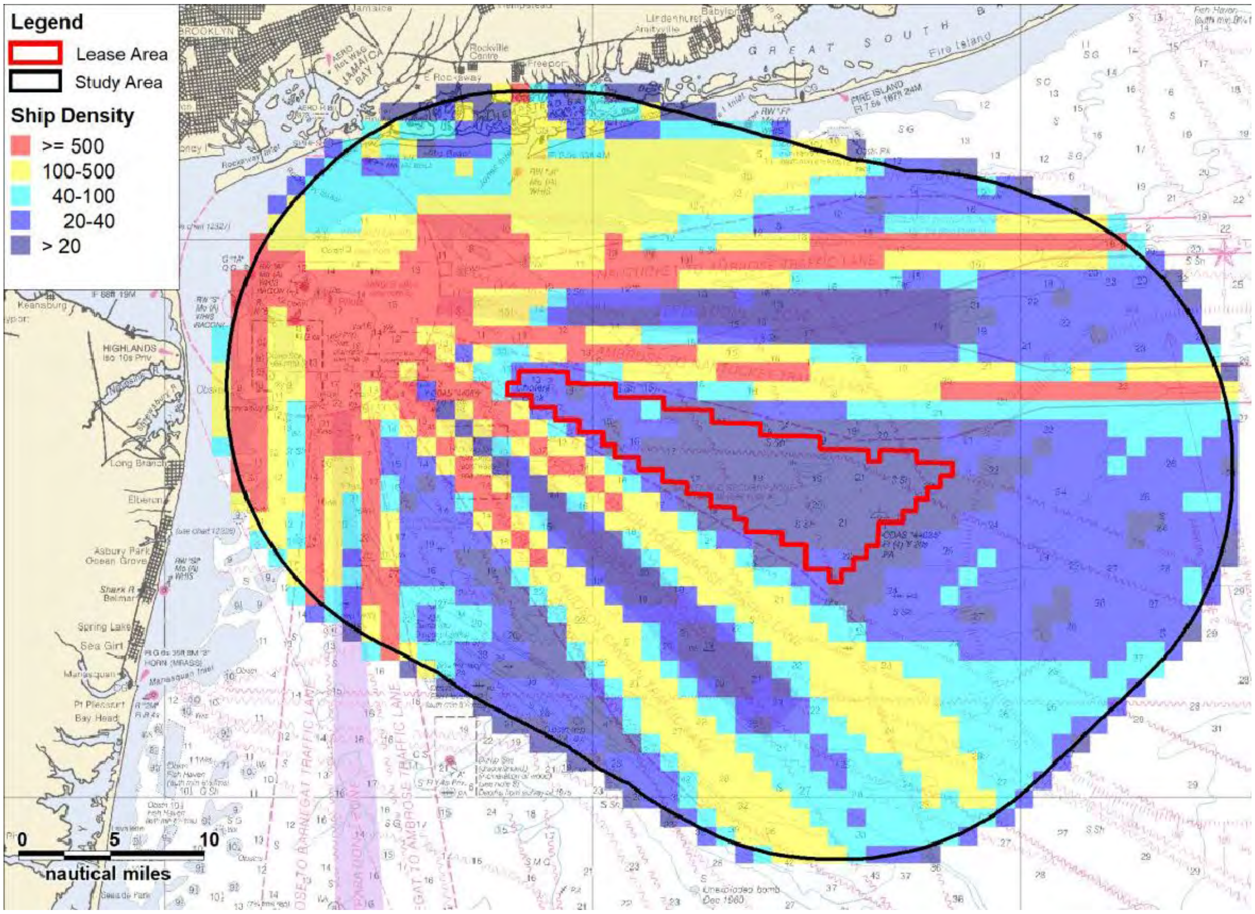
Figure 6.4.4. Export Cable Maritime Data Overview (Aug 2017 to July 2018)



Source: COP Appendix DD, Section 7.4; Empire 2022.

Based on AIS density heat maps within the study area, over the 12-month study period, the areas of highest vessel density occurred where the TSS lanes converged at the precautionary area, and within the precautionary area (Figure 6.4.5). High density was also observed off the coast of New Jersey. The majority from tug (push/pull) vessels. Relative to the surrounding areas, the lease area was of low density (COP Appendix DD, Empire 2022).

Figure 6.4.5. AIS density heat map within Study Area (12 months August 2017 to July 2018)- 1x1 nm (1.9 x 1.9 km) Cell Resolution



Source: COP Appendix DD, Section 7.4; Empire 2022.

Besides the TSS lanes described above, there are several other routing measures that regulate vessel traffic to help ships avoid navigational hazards in the vicinity of the project area. There is a speed-restricted area for NARW seasonal management within the Project area (50 CFR 224.105). To comply with the Ship Strike Reduction Rule (50 CFR 224.105), all vessels greater than or equal to 65 ft. (19.8 m) in overall length and subject to the jurisdiction of the United States and all vessels greater than or equal to 65 ft. in overall length entering or departing a port or place subject to the jurisdiction of the United States must slow to speeds of 10 knots or less in seasonal management areas (SMA) from November 1 – April 30 each year (the period when right whale abundance is greatest). Mandatory speed restrictions of 10 knots or less are required in all of the SMAs along the U.S. East Coast during times when right whales are likely to be present; a number of these SMAs overlap with the portion of the action area that may be used by project vessels. The purpose of this regulation is to reduce the likelihood of deaths and serious injuries to these endangered whales that result from collisions with ships. On August 1, 2022, NMFS published proposed amendments to the North Atlantic vessel strike reduction rule (87 FR 46921). The proposed rule would: (1) modify the spatial and temporal boundaries of current speed restriction areas referred to as Seasonal Management Areas (SMAs), (2) include most vessels greater than or equal to 35 ft. (10.7 m) and less than 65 ft. (19.8 m) in length in the size class subject to speed restriction, (3) create a Dynamic Speed Zone framework to implement mandatory speed restrictions when whales are known to be present outside active SMAs, and (4) update the speed rule's safety deviation provision. Changes to the speed regulations are proposed to reduce vessel strike risk based on a coast-wide collision mortality risk assessment and updated information on right whale distribution, vessel traffic patterns, and vessel strike mortality and serious injury events. To date, the rule has not been finalized. Excluding those vessels not broadcasting a valid speed (generally fishing vessels and recreational vessels), the average speed recorded within the NSRA study area was 5.6 knots. AIS data used to characterize vessel speed in the study area includes anchored vessels, which typically have very low speeds (less than 1 knot). With anchored vessels excluded, the average speed recorded within the study area rose to 8.6 knots. When considering only those vessel tracks intersecting the lease area, the average speed of vessels was 7.2 knots (COP Appendix DD, Empire 2022).

Restrictions are in place on how close vessels can approach right whales to reduce vessel-related impacts, including disturbance. NMFS rulemaking (62 FR 6729, February 13, 1997) restricts vessel approach to right whales to a distance of 500 yards. This rule is expected to reduce the potential for vessel collisions and other adverse vessel-related effects in the environmental baseline. The Mandatory Ship Reporting System (MSR) requires ships entering the northeast and southeast MSR boundaries to report the vessel identity, date, time, course, speed, destination, and other relevant information. In return, the vessel receives an automated reply with the most recent right whale sightings or management areas and information on precautionary measures to take while in the vicinity of right whales.

SMAs are supplemented by Dynamic Management Areas (DMAs) that are implemented for 15-day periods in areas in which right whales are sighted outside of SMA boundaries (73 FR 60173; October 10, 2008). DMAs can be designated anywhere along the U.S. eastern seaboard, including the action area, when NOAA aerial surveys or other reliable sources report aggregations of three or more right whales in a density that indicates the whales are likely to persist in the area. DMAs are put in place for two weeks in an area that encompass an area commensurate to the number of whales present. Mariners are notified of DMAs via email, the internet, Broadcast Notice to Mariners (BNM), NOAA Weather Radio, and the Mandatory Ship Reporting system (MSR). NOAA requests that mariners navigate around these zones or transit through them at 10 knots or less. In 2021, NMFS supplemented the DMA program with a new Slow Zone program which identifies areas for recommended 10 knot speed reductions based on acoustic detection of right whales. Together, these zones are established around areas where right whales have been recently seen or heard, and the program provides maps and coordinates to vessel operators indicating areas where they have been detected. Compliance with these zones is voluntary.

Atlantic sturgeon, sea turtles, and ESA listed whales are all vulnerable to vessel strike, although the risk factors and areas of concern are different. Vessels have the potential to affect animals through strikes, sound, and disturbance by their physical presence.

As reported in Hayes et al. 2022, for the most recent 5-year period of review (2015-2019) in the North Atlantic, the minimum rate of serious injury or mortality resulting from vessel interactions is 2.0/year for right whales, 0.40/year for fin whales, 0.2 for sei whales. No vessel strikes for blue or sperm whales have been documented (Hayes et al. 2020). A review of available data on serious injury and mortality determinations for sei, fin, sperm, and right whales for 2000-2020 (Henry et al. 2022, UME website as cited above), includes one fin whale documented on the bow of a ship in Elberon, NJ (June 2020) and one sei whale documented on the bow of a ship in Newark, NJ (July 2016). While both individuals were reported as fresh dead there is no indication of where the whales were actually hit. Hayes et al. (2021) reports three vessel struck sei whales first documented in the U.S. Northeast – all three were discovered on the bow of vessels entering port (two in the Hudson River and one in the Delaware River); no information on where the whales were hit is available. Hayes et al. (2020) reports only four recorded ship strikes of sperm whales. In May 1994 a ship-struck sperm whale was observed south of Nova Scotia (Reeves and Whitehead 1997), in May 2000 a merchant ship reported a strike in Block Canyon, and in 2001 the U.S. Navy reported a ship strike within the EEZ (NMFS, unpublished data). In 2006, a sperm whale was found dead from ship-strike wounds off Portland, Maine. A similar rate of strike is expected to continue in the action area over the life of the project and we expect vessel strike will continue to be a source of mortality for right, sei, fin, and sperm whales in the action area. As outlined above, there are a number of measures that are in place to reduce the risk of vessel strikes to large whales that apply to vessels that operate in the action area. NMFS' Sea Turtle Stranding and Salvage Network (STSSN) database provides information on records of stranded sea turtles in the region. The STSSN database was queried for records of stranded sea turtles with evidence of vessel strike throughout the waters of New York and New Jersey to overlap with the area where the majority of project vessel traffic will occur. Out of the 376 recovered stranded sea turtles in New York/New Jersey waters from 2013 through 2022 (10 years), there were 143 definitively recorded sea turtle vessel strikes and 32 recorded blunt force traumas which are likely vessel strikes, primarily between the months of August and November. The majority of strikes and blunt force traumas were of loggerheads with a smaller number of leatherbacks, Kemp's ridleys, and green turtles. A similar rate of strike is expected to continue in the action area over the life of the project and that vessel strike will continue to be a source of mortality for sea turtles in the action area.

Atlantic and shortnose sturgeon are struck and killed by vessels in at least some portions of their range. There are no records of vessel strike in the Atlantic Ocean. Atlantic sturgeon are known to be struck and killed in portions of the action area that will be transited by project vessels including New York Bay and the Hudson River. Risk is thought to be highest in areas with reduced opportunity for escape and from vessels operating at a high rate of speed or with propellers large enough to entrain sturgeon. Shortnose sturgeon appear to be less vulnerable to vessel strike than Atlantic sturgeon. NMFS has only minimum counts of the number of Atlantic sturgeon that are struck and killed by vessels because only sturgeon that are found dead with evidence of a vessel strike are counted. New research, including a study that intentionally placed Atlantic sturgeon carcasses along the Delaware River in areas used by the public, suggests that most Atlantic sturgeon carcasses are not found and, when found, many are not reported to NMFS or to our sturgeon salvage co-investigators (Balazik et al. 2012b, Balazik, pers. comm. in ASMFC 2017; Fox et al. 2020).

With the exception of monitoring required by our Biological Opinions, the approach to monitoring for dead sturgeon in the Hudson River has been opportunistic, and has not involved a systematic strategy for surveying and recording occurrences. Prior to 2011, there was minimal awareness that vessel strike constituted a threat to sturgeon. According to the NYSDEC, record keeping became more intensive around 2011-2012 as a result of the recognition that Atlantic sturgeon on the Delaware River were being struck by large commercial vessels. From 2007-2011, the NYSDEC recorded four specific types of information when a sturgeon mortality was reported, i.e., date, observer contact, location of the sturgeon, and condition of the sturgeon. Sturgeon species was not specifically recorded, nor was the suspected cause of death. Beginning in 2012, a more comprehensive record keeping program was initiated by NYSDEC to document sturgeon mortalities in the Hudson River. At this point, they began recording approximately 12 specific types of information for each reported mortality, including sturgeon ID number, species, date, contact information, location, photo-documentation, body length, condition, disposition following the sighting, possible vessel strike, if the sturgeon was scanned for ID tags and painted, and other relevant comments.

As observations have largely been opportunistic, monitoring effort has not been consistent year to year or from place to place. It can be assumed that the listing of Atlantic sturgeon under the ESA in 2012 and the publicity associated with the construction of the new Tappan Zee Bridge led to increased public awareness of possible threats to the species. Additionally, Hudson Riverkeeper posted information on its website in 2012 and again in 2013 and the Thruway Authority distributed pamphlets and posted signage in 2014 to encourage public reporting. These public outreach efforts have likely contributed to the increased number of reports since in-water activities began in 2012. A focused monitoring effort by the NYSTA and TZC in the vicinity of the bridge also contributes to the number of sturgeon mortalities reported after 2012. Several of the conditions of the environmental permits for the Project, related to monitoring for dead or injured sturgeon in the project area, including vessel transects with observers.

As mentioned above, any sample of sturgeon mortalities in the Hudson River is not going to indicate the actual number of affected sturgeon, rather it will represent the minimum number killed, and without a standardized sampling effort it is not possible to develop a reliable estimate of the total number of dead sturgeon in the river, or to compare one river reach to another. A summary of information from the NYSDEC database for 2013-2017 is presented in the table below.

Table 6.4.4. A summary of the number of dead sturgeon observed in the Hudson River from 2013-2017 based on data in the NYDEC database.

	Total Mortalities	Assumed Vessel Mortalities
Atlantic Sturgeon		
2013	17	10
2014	24	18
2015	35	24
2016	13	4
2017	19	15
2013-2017	**108**	**71**
Shortnose Sturgeon		
2013	6	1
2014	8	0
2015	9	3
2016	9	2
2017	3	3
2013-2017	**35**	**9**
Unidentified Sturgeon		
2013	2	0
2014	9	3
2015	5	0
2016	5	0
2017	1	0
2013-2017	**22**	**3**
Total	**165**	**83**

As indicated above, although the information derived from the NYSDEC database is informative, it is only a sample of the sturgeon that died in the Hudson River over this time period and does not represent the total number because of the opportunistic nature of reporting and the likelihood that some sturgeon died but were not observed and reported. Additionally, the monitoring effort likely correlates spatially with human population density and boating activity, whereby the more populous areas in the lower river undergo higher levels of monitoring effort than the more sparsely populated areas upriver. For these reasons, the database should only be considered to represent the absolute minimum number of sturgeon that were killed in the Hudson River.

From 2013 to 2020, NYSDEC reported 13 Atlantic sturgeon carcasses in New York Bay that had some evidence of a possible vessel strike. These carcasses were not examined and we do not have an estimate of the total number of vessel strikes in this area annually.
We expect that Atlantic and shortnose sturgeon will continue to be struck and killed in the Hudson River portion of the action area, inclusive of New York Bay, over the life of the proposed action.

Offshore Wind Development
The action area includes a number of areas that have been leased by BOEM for offshore wind development or that are being considered for lease issuance; additionally, the action area overlaps with the action area identified in a number of Biological Opinions issued for offshore wind projects. As noted above, in the *Environmental Baseline* section of an Opinion, we consider the past and present impacts of all federal, state, or private activities and the anticipated impacts of all proposed federal actions that have already undergone Section 7 consultation. In the context of offshore wind development, past and present impacts in the action area include the effects of pre-construction surveys to support site characterization, site assessment, and data collection to support the development of Construction and Operations Plans (COPs) as well as ongoing effects of construction of the South Fork and Vineyard Wind 1 projects. To date, we have completed section 7 consultation to consider the effects of construction, operation, and decommissioning of multiple commercial scale offshore wind project in the action area (Vineyard Wind 1, South Fork Wind, Revolution Wind, Ocean Wind 1), and to date, construction has only started for South Fork Wind and Vineyard Wind 1. We have also completed ESA section 7 consultation on two smaller scale offshore wind projects that occur in the action area, the Block Island project, and Dominion's Coastal Virginia Offshore Wind Demonstration Project; these projects are in the operations and maintenance phase. The Revolution Wind, Vineyard Wind 1, and South Fork WDAs are outside of the Empire Wind action area; however vessels operating to support those projects are expected to transit through the Empire Wind action area. Similarly, Empire Wind vessels may transit near the Ocean Wind 1 WDA.

Site Assessment, Site Characterization, and Surveys
A number of geotechnical and geophysical surveys to support wind farm siting have occurred and will continue to occur in the action area. Additionally, data collection buoys have been installed. Effects of these activities on ESA listed species in the action area are related to potential exposure to noise associated with survey equipment, survey vessels, and habitat impacts. NMFS GARFO completed a programmatic informal consultation with BOEM in June 2021 that considered the effects of geotechnical and geophysical surveys and buoy deployments (NMFS GAR 2021, Appendix C to this Opinion). The consultation includes a number of best management practices and project design criteria designed to minimize the potential effects of these activities on ESA listed species. In the consultation, we concluded that these activities are not likely to adversely affect any ESA listed species if implemented in accordance with applicable BMPs and PDCs. Given the characteristics of the noise associated with survey equipment and the use of best management practices to limit exposure of listed species,

including protected species observers, effects of survey noise on listed species have been determined to be extremely unlikely or insignificant. There is no information that indicates that the noise sources used for these surveys has the potential to result in injury, including hearing impairment, or mortality of any ESA listed species in the action area. Similarly, we have not anticipated any adverse effects to habitats or prey and do not anticipate any ESA listed species to be struck by survey vessels; risk is reduced by the slow speeds that survey vessels operate at, the use of lookouts, and incorporation of vessel strike avoidance measures.

Surveys to obtain data on fisheries resources are planned in the action area, including surveys for the Ocean Wind 1 project. In the Biological Opinion prepared for the Ocean Wind 1 project, we concluded that effects of benthic monitoring would be insignificant, and that effects to ESA listed species from PAM monitoring and SAV monitoring would be extremely unlikely to occur. For bottom trawl surveys, we determined that it would be extremely unlikely that any large whale would interact with trawl survey gear, but for any sea turtles or sturgeon captured in trawl gear, we anticipated that no mortality would occur. In our assessment of risk of interactions with structure-associated fish surveys, clam surveys, and pelagic fish surveys, we concluded that any effects to ESA listed species because of these survey activities would be extremely unlikely to occur. Additionally, we determined that there would be no effects to ESA listed species as a result of acoustic telemetry surveys or oceanography surveys. Fisheries resource surveys being carried out for the Revolution Wind, South Fork, and Vineyard Wind 1 project are outside of the action area.

Consideration of Construction, Operation, and Decommissioning of Other OSW Projects
As noted above, we have completed ESA consultation for a number of OSW projects to date. Complete information on the assessment of effects of these three projects is found in their respective Biological Opinions (Revolution Wind- NMFS 2023a, Ocean Wind 1 - NMFS 2023, South Fork Wind - NMFS 2021a, Vineyard Wind 1 - NMFS 2021b, CVOW - NMFS 2016, and Block Island -NMFS 2014). The Block Island and CVOW projects have been constructed and turbines are operational. Construction of the Vineyard Wind 1 and South Fork projects is expected to be complete prior to the beginning of construction of the Empire Wind project. Foundation installation for the Revolution Wind project is expected to be completed prior to the start of foundation installation for the Empire Wind Project. In the Biological Opinions prepared for the South Fork, Vineyard Wind 1, Revolution Wind, and Ocean Wind 1 projects, we anticipated short term behavioral disturbance of ESA listed sea turtles and whales exposed to pile driving noise. In these Opinions, we concluded that effects of operational noise would be insignificant. With the exception of the gillnet interactions noted above, the only mortality anticipated is a small number of sea turtles and Atlantic sturgeon expected to be struck and injured or killed by vessels associated with the Vineyard Wind 1, Ocean Wind 1, Revolution Wind, and South Fork projects.

Other Activities and Stressors in the Action Area
Other activities that occur in the action area that may affect listed species include scientific research and geophysical and geotechnical surveys. Military operations in the action area are expected to be restricted to vessel transits, the effects of which are subsumed in the discussion of vessel strikes above.

Scientific Surveys

Numerous scientific surveys, including fisheries and ecosystem surveys carried out by NMFS operate in the action area. Regulations issued to implement section 10(a) (1)(A) of the ESA allow issuance of permits authorizing take of ESA-listed species for the purposes of scientific research. Prior to the issuance of such a permit, an ESA section 7 consultation must take place. No permit can be issued unless the proposed research is determined to be not likely to jeopardize the continued existence of any listed species. Scientific research permits are issued by NMFS for ESA listed whales and Atlantic sturgeon; the U.S. Fish and Wildlife Service is the permitting authority for ESA listed sea turtles.

Marine mammals, sea turtles, and Atlantic sturgeon have been the subject of field studies for decades. The primary objective of most of these field studies has generally been monitoring populations or gathering data for behavioral and ecological studies. Research on ESA listed whales, sea turtles, and Atlantic sturgeon has occurred in the action area in the past and is expected to continue over the life of the proposed action. Authorized research on ESA-listed whales includes close vessel and aerial approaches, photographic identification, photogrammetry, biopsy sampling, tagging, ultrasound, exposure to acoustic activities, breath sampling, behavioral observations, passive acoustic recording, and underwater observation. No lethal interactions are anticipated in association with any of the permitted research. ESA-listed sea turtle research includes approach, capture, handling, restraint, tagging, biopsy, blood or tissue sampling, lavage, ultrasound, imaging, antibiotic (tetracycline) injections, laparoscopy, and captive experiments. Most authorized take is sub-lethal with limited amounts of incidental mortality authorized in some permits (i.e., no more than one or two incidents per permit and only a few individuals overall). Authorized research for Atlantic sturgeon includes capture, collection, handling, restraint, internal and external tagging, blood or tissue sampling, gastric lavage, and collection of morphometric information. Most authorized take of Atlantic sturgeon for research activities is sub-lethal with small amounts of incidental mortality authorized (i.e., no more than one or two incidents per permit and only a few individuals overall).

Noise

The ESA-listed species that occur in the action area are regularly exposed to several sources of anthropogenic sounds in the action area. The major source of anthropogenic noise in the action area are vessels. Other sources are minor and temporary including short-term dredging, construction, and research activities. As described in the DEIS, typically, military training exercises occur in offshore waters in the vicinity of the lease area and transit of military vessels may occur throughout the area; therefore, military operations can be a significant source of underwater noise in the action area. ESA-listed species may be impacted by either increased levels of anthropogenic-induced background sound or high intensity, short- term anthropogenic sounds.

The Empire Wind WDA lies within a dynamic ambient noise environment, with natural background noise contributed by natural wind and wave action, a diverse community of vocalizing cetaceans, and other organisms. Anthropogenic noise sources, including commercial shipping traffic in high-use shipping lanes in proximity to the action area, also contribute ambient sound. A study contracted by the New York State Department of Environmental Conservation to conduct passive acoustic monitoring within the New York Bight to assess marine mammal occurrence and patterns of ambient noise in the region was completed from October 2017 to July 2018 (Estabrook et al. 2019). For this study, 15 archival autonomous recording devices were deployed along two lines paralleling the major shipping lanes of the New York Bight to record ambient noise and marine mammal vocalizations for six whale species. Estabrook et al. (2019) generated long-term spectrograms to visually represent ambient noise variation across time and frequency. In addition of biological sound, long-term spectrograms can depict environmental acoustic events (e.g., wave action from storms and tidal sounds) and anthropogenic sounds (e.g., from vessels, underwater construction, seismic airgun explosions, etc.). Spectograms showed that there was a noticeable decrease in noise across sample sites from June through August in 2018 and in 2019, showing seasonal noise trends which were likely related to lower wind speed in the New York Bight during the summer months (e.g., Piggott 1964, Snyder and Orlin 2007, Reeder et al. 2011). Noise at the sample site located at the convergence of the shipping lanes near NY Harbor was noticeably higher than other sites sampled in Estabrook et al. (2019).

Short term increases in noise in the action area associated with vessel traffic and other activities, including geotechnical and geophysical surveys that have taken place in the past and will continue in the future in the portions of the action area that overlap with other offshore wind lease areas and/or potential cable routes. Exposure to these noise sources can result in temporary masking or temporary behavioral disturbance; however, in all cases, these effects are expected to be temporary and short term (e.g., the seconds to minutes it takes for a vessel to pass by) and not result in any injury or mortality in the action area. No acoustic surveys using seismic equipment or airguns have been proposed in the action area and none are anticipated to take place in the future, as that equipment is not necessary to support siting of future offshore wind development that is anticipated to occur in the action area.

Other Factors

Whales, sea turtles, and Atlantic sturgeon are exposed to a number of other stressors in the action area that are widespread and not unique to the action area which makes it difficult to determine to what extent these species may be affected by past, present, and future exposure within the action area. These stressors include water quality and marine debris. Marine debris in some form is present in nearly all parts of the world's oceans, including the action area. While the action area is not known to aggregate marine debris as occurs in some parts of the world (e.g., The Great Pacific garbage patch, also described as the Pacific trash vortex, a gyre of marine debris particles in the north central Pacific Ocean), marine debris, including plastics that can be ingested and cause health problems in whales and sea turtles is expected to occur in the action area.

The Empire Wind WFA and offshore export cables are located in offshore marine waters where available water quality data are limited. Broadly speaking, ambient water quality in these areas is expected to be generally representative of the regional ocean environment and subject to constant oceanic circulation that disperses, dilutes, and biodegrades anthropogenic pollutants from upland and shoreline sources (BOEM 2013). Hence, areas closer to shore experience a greater range and frequency of variation in a number of water quality parameters whereas areas farther offshore experience the more stable and less variable conditions of the oceanic water volume. Areas with poor water quality are generally close to large population densities or industrial activity (Empire

2022). Overall, water quality in the New York Bight immediately offshore is generally classified as “fair” by USEPA due to a varying range of water quality metrics. Some metrics are within recommended water quality limits and represent good water quality, while others represent impaired water quality with metrics that are greater than recommended limits. Most water quality pollutants in the New York Bight originate from inshore areas, specifically the Hudson River, which drains to New York Bay. Water contaminants originating in the Atlantic Ocean, which is the dominant source of water in the New York Bight, are limited to discharges from ships, including bilge and ballast water and sanitary waste.

Ocean waters beyond 3 miles (4.8 km) offshore typically have low concentrations of suspended particles and low turbidity. Waters along the Northeast Coast average 5.6 milligrams per liter (mg/L) of TSS, which is considered low. There are notable exceptions, including estuaries, that average 27.4 mg/L. While most ocean waters had TSS concentrations under 10 mg/L, which is the 90th percentile of all measured values, most estuarine waters (65.7% of the Northeast Coast area) had TSS concentrations above this level. Ambient suspended sediment concentrations in the New York Bight, New York Bay, and New York Harbor ranged from 1.78 mg/L to 7.85 mg/L (Empire 2022).

States also assess a variety of other water quality parameters as part of state requirements to evaluate and list state waters as impaired under CWA requirements. Other water quality parameters assessed typically include, but are not limited to, concentrations of metals, pathogens, bacteria, pesticides, biotoxins, PCBs, and other chemicals. Waterbodies that do not meet the New York State Water Quality Standards (promulgated under 6 New York Codes, Rules and Regulations Part 703) are considered to be impaired for at least one use classification. NYSDEC maintains the Waterbody Inventory and Priority Waterbodies List, a database that contains information on water quality, the ability of waters to support their use classifications, and known or suspected sources of contamination or impairment. Water use classifications for waters in the WDA include shell fishing, general recreation, and public bathing. The EW 1 submarine export cable route would intersect several impaired waterways, while the EW 2 onshore export cable route would intersect two (Table 6.4.5) (Empire 2022).

Table 6.4.5. Water Quality of Coastal Waters in the Geographic Analysis Area around EW 1 and EW 2

NYSDEC Segment	Best Usage per 6 NYCRR 701	Impairment	Impairment Source
EW1			
Upper New York Bay (1701-0022)	Public bathing and general recreation use	PCBs, dioxin, floatable debris, pathogens	Toxic/contaminated sediment, CSOs, urban/storm runoff, migratory species, municipal discharge
Lower New York Bay/Gravesend Bay (1701-0179)	Public bathing and general recreation use	PCBs, pathogens, floatable debris	Toxic/contaminated sediment, CSOs, urban/storm runoff, migratory species, municipal discharges
Lower New York Bay (1701-0179)	General recreation use	PCBs, pathogens, floatable debris	Toxic/contaminated sediment, CSOs, urban/storm runoff, municipal discharges
EW2			
Reynolds Channel West (1701-0216)	General recreation use	Nitrogen	Municipal
Hog Island Channel (Barnums Channel; 1701-0220)	General recreation use	Nitrogen	Municipal

CSO = combined sewer overflow; NYCRR = New York Codes, Rules, and Regulations
Source: COP Volume 2a; Empire 2022

The areas offshore Long Island are monitored for bacteria due to safety concerning swimming and bathing, although the areas are considered lower risk due to their proximity to the Atlantic Ocean (Empire 2022 citing Suffolk County 2019). Bacteria samples collected at Kismet Beach, approximately 23 miles (37 kilometers) to the east of the EW 2 export cable landfall, were below the 104 colony-forming unit per 100 milliliters Enterococci bathing standard over the last 10 years (Empire 2022).

The Hudson River provides the primary source of pollutants, dissolved nutrients, and freshwater inflow; other smaller waterbodies that contribute freshwater inflows include the Passaic River, Hackensack River, and Raritan River. The Port of Albany and Port of Coeymans are both on a segment of the Hudson River that is listed as 303(d) impaired for fish consumption use; the cause of impairment is PCBs with contaminated sediments being the suspected source (NYSDEC 2020). The Gowanus Canal Superfund Site is just over 0.5 mile upstream of the SBMT. Cleanup is ongoing and consists of removing contaminated sediment from the bottom of the canal via dredging and capping the dredged areas. The proposed action would not affect this Superfund site.

Overall, concentrations of contaminants, bacteria, nutrients, and metals in New York Harbor have been decreasing due to the implementation and enforcement of regulations under the CWA over 45 years ago. Despite improvements in water quality, legacy chemicals in the sediments, including mercury, PCBs, dichlorodiphenyltrichloroethane, and dioxin, still exceed acceptable levels, and these contaminants can be resuspended in the water column during major storm events or from activities such as dredging. Bacterial trend data show that most areas within New York Harbor remain below the best use primary contact standards, which, for most waterbodies, is a monthly geometric mean of 200 colonies per 100 milliliters. The fecal coliform geometric mean in areas of the harbor outside the proposed EW 1 submarine export cable route has been above the water quality standard. Over the last several decades, summer geometric means of bacteria have decreased from more than 2,000 colonies per 100 milliliters to around 20 colonies per 100 milliliters (Empire 2022 citing NYCEP 2009). In 2017, the fecal coliform concentrations in lower New York Bay were some of the lowest in the area, and summer geometric means were below the New York State Standard of 200 colonies per 100 milliliters. However, sampling for the latest Waterbody Inventory and Priority Waterbodies List reports still showed elevated bacteria concentrations, specifically following rain events, which allow storm water and combined sewer overflow discharge to enter the harbor.

7.0 EFFECTS OF THE ACTION

This section of the biological opinion assesses the effects of the proposed action on threatened or endangered species. Effects of the action are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action (50 CFR §402.02 and § 402.17).

The main proposed action is BOEM's proposed COP approval with conditions, the effects of which will be analyzed in this section. The effects of the issuance of other permits and authorizations that are consequences of BOEM's proposed action are also evaluated in this section. For example, the ITA proposed by NMFS OPR to authorize incidental take of ESA-listed marine mammals under the MMPA and other permits proposed to be issued by USACE and EPA are considered effects of the action as they are consequences of BOEM's proposal to approve Empire Wind's COP with conditions. In addition, the ITA proposed by NMFS OPR, as well as permits proposed by USACE and EPA, are also Federal actions that may affect ESA-listed species; therefore, they require Section 7 consultation in their own right. In this consultation, we have worked with NMFS OPR as the action agency proposing to authorize marine mammal takes under the MMPA through the ITA, as well as with other Federal action agencies aside from BOEM that are proposing to issue permits or other approvals, and we have analyzed the effects of those actions along with the effects of BOEM's proposed action to approve the COP with conditions. We also consider the effects of the "Connected Action" involving the rehabilitation at SBMT which the USACE is proposing to permit. All effects of these collective actions on ESA-listed species and designated critical habitat are, therefore, comprehensively analyzed in this Opinion.[39]

The purpose of the Empire Wind project is to generate electricity. Electricity will travel from the WTGs to the OSSs and then by submarine cable to on-land cables in New York. As described in the COP, from this point, electricity generated at the WTGs would be distributed to the New York State transmission system operated by the New York Independent System Operator at ConEdison's Gowanus Substation (Empire Wind 1) and the Oceanside Substation (Empire Wind 2). Even if we assume the Empire Wind project will increase overall supply of electricity, we are not aware of any new actions demanding electricity that would not be developed but for the Empire Wind project specifically. Because the electricity generated by Empire Wind will be pooled with that of other sources in the power grid, we are unable to trace any particular new use of electricity to Empire Wind's contribution to the grid and, therefore, we cannot identify any impacts, positive or negative, that would occur because of the Empire Wind project's supply of electricity to the grid. As a result, there are no identifiable consequences of the proposed action analyzed in this Opinion that would not occur but for Empire Wind's production of electricity and are reasonably certain to occur.

Here, we examine the activities associated with the proposed action and determine what the consequences of the proposed action are to listed species or critical habitat. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. In analyzing effects, we evaluate whether a source of impacts is "likely to adversely affect" listed species/critical habitat or "not likely to adversely affect" listed species/critical habitat. A "not likely to adversely affect" determination is appropriate when an effect is expected to be discountable, insignificant, or completely beneficial. As discussed in the FWS-NMFS Joint Section 7 Consultation Handbook (1998), "[b]eneficial effects are contemporaneous positive effects without any adverse effects to the species. Insignificant effects relate to the size of the impact and should never reach the scale where take occurs. Discountable effects are those extremely unlikely to occur. Based on best judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur. If an effect is beneficial, discountable, or insignificant it is not considered adverse and thus cannot cause "take" of any listed species. "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct" (ESA §3(19)).

7.1 Underwater Noise

In this section, we provide background information on underwater noise and how it affects listed species, establish the underwater noise that listed species are likely to be exposed to, and then

[39] The term "proposed action" or "action" may be used to refer to all action agencies' actions related to the Empire Wind 1 project, unless specific context reveals otherwise.

establish the expected response of the individuals exposed to that noise. This analysis considers all phases of the proposed action inclusive of construction, operations, and decommissioning.

7.1.1 Background on Noise

This section contains a brief technical background on sound, the characteristics of certain sound types, and metrics used in this consultation inasmuch as the information is relevant to the specified activity and to consideration of the potential effects of the specified activity on listed species found later in this document.

Sound travels in waves, the basic components of which are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in hertz (Hz) or cycles per second. Wavelength is the distance between two peaks or corresponding points of a sound wave (length of one cycle). Higher frequency sounds have shorter wavelengths than lower frequency sounds, and typically attenuate (decrease) more rapidly, except in certain cases in shallower water. Amplitude is the height of the sound pressure wave or the "loudness" of a sound and is typically described using the relative unit of the decibel (dB). A sound pressure level (SPL) in dB is described as the ratio between a measured pressure and a reference pressure (for underwater sound, this is 1 microPascal (μPa)), and is a logarithmic unit that accounts for large variations in amplitude; therefore, a relatively small change in dB corresponds to large changes in sound pressure. The source level (SL) typically represents the SPL referenced at a distance of 1 m from the source, while the received level is the SPL at the listener's position (referenced to 1 μPa).

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Root mean square is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick, 1983). Root mean square accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper, 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

Sound exposure level (SEL; represented as dB re 1 μPa^2-s) represents the total energy in a stated frequency band over a stated time interval or event, and considers both intensity and duration of exposure. The per-pulse SEL is calculated over the time window containing the entire pulse (*i.e.*, 100 percent of the acoustic energy). SEL is a cumulative metric; it can be accumulated over a single pulse, or calculated over periods containing multiple pulses. Cumulative SEL represents the total energy accumulated by a receiver over a defined time window or during an event. Peak sound pressure (also referred to as zero-to-peak sound pressure or 0-pk) is the maximum instantaneous sound pressure measurable in the water at a specified distance from the source, and is represented in the same units as the rms sound pressure.

When underwater objects vibrate or activity occurs, sound-pressure waves are created. These waves alternately compress and decompress the water as the sound wave travels. Underwater sound waves radiate in a manner similar to ripples on the surface of a pond and may be either directed in a beam or beams or may radiate in all directions (omnidirectional sources), as is the case for sound produced by the pile driving activity considered here. The compressions and decompressions associated with sound waves are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound, which is defined as environmental background sound levels lacking a single source or point (Richardson *et al*., 1995). The sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.*, wind and waves, earthquakes, ice, atmospheric sound), biological (*e.g.*, sounds produced by marine mammals, fish, and invertebrates), and anthropogenic (*e.g.*, vessels, dredging, construction) sound. A number of sources contribute to ambient sound, including wind and waves, which are a main source of naturally occurring ambient sound for frequencies between 200 hertz (Hz) and 50 kilohertz (kHz) (Mitson, 1995). In general, ambient sound levels tend to increase with increasing wind speed and wave height. Precipitation can become an important component of total sound at frequencies above 500 Hz, and possibly down to 100 Hz during quiet times. Marine mammals can contribute significantly to ambient sound levels, as can some fish and snapping shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz. Sources of ambient sound related to human activity include transportation (surface vessels), dredging and construction, oil and gas drilling and production, geophysical surveys, sonar, and explosions. Vessel noise typically dominates the total ambient sound for frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz and, if higher frequency sound levels are created, they attenuate rapidly.

The sum of the various natural and anthropogenic sound sources that comprise ambient sound at any given location and time depends not only on the source levels (as determined by current weather conditions and levels of biological and human activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10-20 decibels (dB) from day to day (Richardson *et al*., 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect a particular species. As described in the BA, the WDA lies within a dynamic ambient noise environment, with natural background noise contributed by natural wind and wave action, a diverse community of vocalizing cetaceans, and other organisms. Anthropogenic noise sources, including commercial shipping traffic in high-use shipping lanes in proximity to the WDA, also contribute ambient sound; these sources are described in the *Environmental Baseline*.

Sounds are often considered to fall into one of two general types: pulsed and non-pulsed. The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.*, Ward, 1997 in Southall *et al.*, 2007). Non-impulsive sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or intermittent (ANSI, 1995; NIOSH, 1998).

Pulsed sound sources (*e.g.*, impact pile driving) produce signals that are brief (typically considered to be less than one second), broadband, atonal transients (ANSI, 1986, 2005; Harris, 1998; NIOSH, 1998; ISO, 2003) and occur either as isolated events or repeated in some succession. Pulsed sounds are all characterized by a relatively rapid rise from ambient pressure to a maximal pressure value followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures, and generally have an increased capacity to induce physical injury as compared with sounds that lack these features.

Non-pulsed sounds can be tonal, narrowband, or broadband, brief or prolonged, and may be either continuous or intermittent (ANSI, 1995; NIOSH, 1998). Some of these non-pulsed sounds can be transient signals of short duration but without the essential properties of pulses (*e.g.*, rapid rise time). Examples of non-pulsed sounds include those produced by vessels, aircraft, drilling or dredging, and vibratory pile driving.

Specific to pile driving, the impulsive sound generated by impact hammers is characterized by rapid rise times and high peak levels. Vibratory hammers produce non-impulsive, continuous noise at levels significantly lower than those produced by impact hammers. Rise time is slower, reducing the probability and severity of injury, and sound energy is distributed over a greater amount of time (e.g., Nedwell and Edwards, 2002; Carlson et al., 2005).

7.1.2 Summary of Available Information on Sources of Increased Underwater Noise

During the construction phase of the project, sources of increased underwater noise include pile driving, vessel operations, and other underwater construction activities (cable laying, placement of scour protection) as well as HRG surveys. During the operations and maintenance phase of the project, sources of increased underwater noise are limited to WTG operations, vessel operations, and maintenance activities including occasional HRG surveys. During decommissioning, sources of increased underwater noise include removal of project components and associated surveys, as well as vessel operations. Here, we present a summary of available information on these noise sources. More detailed information is presented in the acoustic reports produced for the project (Küsel et al. 2022 (Appendix M to the COP); Empire Wind's Application for an ITA (inclusive of Appendix A, Küsel et al. 2022), Revised Application, and Application Addendum[40], the Proposed Rule prepared for the ITA (88 FR 22696; April 13, 2023), and BOEM's BA.

Impact Pile Driving for WTG and OSS Foundations

As described in section 3, up to 147 monopiles and two pin-pile foundations will be installed to support the up to 147 WTGs and 2 OSSs. As described in the Notice of Proposed ITA, Empire Wind modeled four construction scenarios: one monopile/two pin piles per day, one monopile/three pin piles per day, two monopiles/two pin piles per day, and two monopiles/three pin piles per day. Each of these included installation of two pin-pile foundations for the two OSSs and all monopiles for the WTG foundations, inclusive of 9.6-m WTG foundation (typical), 9.6-m WTG foundation (difficult-to-drive), and 11-m WTG foundation. For each scenario, Empire Wind assumed various hammer energy schedules, including the hammer energies and

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[40] Available at: https://www.fisheries.noaa.gov/action/incidental-take-authorization-empire-offshore-wind-llc-construction-empire-wind-project-ew1

number of strikes predicted at various penetration depths during the pile driving process and different soil conditions. Typical monopile foundation locations are those where the standard hammer energy would be sufficient to complete installation of the foundation to the target penetration depth. Difficult-to-drive foundation locations would require higher hammer energies and/or additional hammer strikes to complete foundation installation to the target penetration depth. Difficult-to-drive scenarios would only utilize 9.6-m piles as the larger 11-m piles could not be driven to target penetration depth in the soil conditions associated with difficult-to-drive turbine positions. Empire Wind estimates that a maximum of 17 total foundations may be difficult-to-drive (including as many as 7 difficult-to-drive foundations for EW 1 and as many as 10 difficult-to-drive foundations for EW 2). The actual number of difficult-to-drive piles will be informed by additional analysis of geotechnical data and other studies that will occur prior to construction but would not be greater than 17 foundations. For installation of both the WTG and OSS monopile foundations, installation of more than one pile at a time (i.e., concurrent pile driving) is not planned or anticipated to occur. Therefore, the effects of concurrent pile driving are outside the scope of this Opinion. Reinitiation of consultation due to either a change in the action or new information may be appropriate if concurrent pile driving is considered in the future.

The amount of sound generated during pile driving varies with the energy required to drive piles to a desired depth and depends on the sediment resistance encountered. Sediment types with greater resistance require hammers that deliver higher energy strikes and/or an increased number of strikes relative to installations in softer sediment. Maximum sound levels usually occur during the last stage of impact pile driving where the greatest resistance is encountered (Betke, 2008). Empire Wind developed hammer energy schedules typical and difficult-to-drive 9.6-m piles and for three different seabed penetration depths for the 11-m diameter piles to represent the various soil conditions that may be encountered in the Lease Area (*i.e*., normal soil conditions (identified as “T1”), harder soil conditions (identified as “R3”), and outlier softer soil conditions (identified as “U3”). The maximum penetration depths for typical and difficult-to-drive 9.6-m piles (38 m); typical 11-m piles (55 m) and pin piles (56 m) were all carried forward as part of the modeling analysis. Installation of the OSS foundations were modeled at two locations (representing locations in EW 1 and EW 2) resulting in two hammer schedules. Empire Wind anticipates the different locations will require different hammer schedules depending on site-specific soil conditions.

Key modeling assumptions for the WTG monopiles and OSS foundation pin piles are listed in Table 7.1.1 (additional modeling details and input parameters can be found in Küsel *et al*. (2022)). Hammer energy schedules for WTG monopiles (9.6 m and 11 m) and OSS foundation pin piles are provided in Table 7.1.2, Table 7.1.3, and Table 7.1.4 respectively.

Table 7.1.1 Key Piling Assumptions Used In the Source Modeling

Foundation Type	Modeled maximum impact hammer energy (kJ)	Pile length (m)	Pile wall thickness (mm)	Seabed penetration (m)	Number of piles per day

9.6 m Monopile	2,300/5,500[4]	78.5	73–101	38	1–2
11 m Monopile R3[1]	2,000	75.3	8.5	35	1 –2
11 m Monopile T1[2]	2,500	84.1	8.5	40	1–2
11 m Monopile U3[3]	1,300	97.5	85	55	1–2
Jacket (2.5 m pin pile)	3,200	57–66	50	47–56	2–3

1- R3 = harder soil conditions
2 - T1 - normal soil conditions
3 - U3 = softer soil conditions
4 - Typical 2.300; difficult to drive 5,500
Source: Table 8, Notice of Proposed MMPA ITA

Table 7.1.2 Hammer Energy Schedules for Monopiles for the Typical and Difficult to Drive Scenarios (9.6-m Diameter Pile; IHC S-5500 hammer)

"Typical" Pile Driving Scenario (9.6-m Diameter Pile)			"Difficult-to-Drive" Pile Driving Scenario (9.6-m Diameter Pile)		
Energy Level (kJ)	Strike Count	Pile Penetration Depth (m)	Energy Level (kJ)	Strike Count	Pile Penetration Depth (m)
Initial sink depth	0	2	Initial sink depth	0	2
450	1,607	12	450	1,607	12
800	731	5	800	731	5
1,400	690	4	1,400	690	4
1,700	1,050	6	1,700	1,050	6
2,300	1,419	9	2,300	1,087	4
5,500	0	0	5,500	2,000	5

Total	5,497	38	Total	7,615	38
Strike rate (strikes/ min)	30		Strike rate (strikes/ min)	30	

Source: Table 9, Notice of Proposed MMPA ITA

Table 7.1.3 Hammer Energy Schedule and Number of Strikes per pile for three Pile Driving Scenarios (11 m Diameter Pile; IHC S-5500 hammer)

Energy Level (kJ)	R3-Harder Soil Conditions		T1-normal soil conditions		U3-softer soil conditions	
	Strike Count	Penetration Depth	Strike Count	Penetration Depth	Strike Count	Penetration Depth
Initial Sink Depth	–	1	–	3	–	5
450	–	–	–	–	622	6
500	1168	14	1339	14	–	-
750	433	3	857	6	2781	20
1000	–	–	632	4	1913	12
1100	265	2	–	–	–	–
1300	–	–	–	–	2019	12
1500	–	–	1109	7	–	–
2000	2159	15	326	2	–	–
2500	–	–	656	4	–	–
Totals	4025	35	4919	40	7335	55

Source: Table 10, Notice of Proposed MMPA ITA

Table 7.1.4 Hammer Energy Schedules for Pin Piles Supporting the Jacket Foundation Located at OSS 1 and OSS 2, with an IHC S-4000 Hammer

OSS 1 Location	OSS 2 Location

Energy level (kJ)	Strike count	Pile penetration depth (m)	Energy level (kJ)	Strike count	Pile penetration depth (m)
Initial sink depth	0	8	Initial sink depth	0	5
500	1,799	30	500	1,206	22
750	1,469	12	750	1,153	9
2,000	577	4	1,100	790	7
3,200	495	2	3,200	562	4
Total	4,340	56	Total	3,711	47
Strike rate (strikes/min)	30		Strike rate (strikes/min)	30	

Source: Table 11, Notice of Proposed MMPA ITA

Sounds produced by installation of the 9.6- and 11-m monopiles were modeled at nine representative locations as shown in Figure 2 in Küsel *et al*. (2022). Sound fields from pin piles were modeled at the two planned jacket foundation locations, OSS 1 and OSS 2. Modeling locations are shown in Figure 8 in Küsel *et al*. (2022). The modeling locations were selected as they represent the range of soil conditions and water depths in the lease area. Modeling for the monopiles was for vertical orientation and driven to a maximum expected penetration depth of 38 m (125 ft.) for 9.6-m piles and 55 m (180 ft.) for 11-m piles. Modeling for jacket pin piles was for vertical orientation and driven to a maximum expected penetration depth of 56 m (184 ft.). As described in the proposed MMPA ITA, to estimate sound propagation, JASCO's used the FWRAM (Küsel *et al.*, 2022, Appendix E.4) propagation model for foundation installation to combine the outputs of the source model with spatial and temporal environmental factors (*e.g.*, location, oceanographic conditions, and seabed type) to get time-domain representations of the sound signals in the environment and estimate sound field levels. FWRAM is based on the wide-angle parabolic equation (PE) algorithm (Collins 1993). Because the foundation pile is represented as a linear array and FWRAM employs the array starter method to accurately model sound propagation from a spatially distributed source (MacGillivray and Chapman, 2012), using FWRAM ensures accurate characterization of vertical directivity effects in the near-field zone (1 km). Due to seasonal changes in the water column, sound propagation is likely to differ at different times of the year. The speed of sound in seawater depends on the temperature T (degree Celsius), salinity S (parts per thousand (ppt)), and depth D (m) and can be described using sound speed profiles. Oftentimes, a homogeneous or mixed layer of constant velocity is present in the first few meters. It corresponds to the mixing of surface water through surface agitation. There can also be other features, such as a surface channel, which corresponds to sound velocity increasing from the surface down. This channel is often due to a shallow isothermal layer appearing in winter conditions, but can also be caused by water that is very cold at the surface. In a negative sound gradient, the sound speed decreases with depth, which results in sound refracting downwards which may result in increased bottom losses with distance from the source. In a positive sound gradient, as is predominantly present in the winter season, sound speed increases with depth and the sound is, therefore, refracted upwards, which can aid in long distance sound propagation. To capture this variability, acoustic modeling was conducted using an average sound speed profile for a "summer" period including the months of May through November, and a "winter" period including December through April. FWRAM computes pressure waveforms via Fourier synthesis of the modeled acoustic transfer function in closely spaced frequency bands. Examples of decidecade spectral levels for each foundation pile type, hammer energy, and modeled location, using average summer sound speed profile are provided in Küsel *et al*. (2022).

Empire Wind is proposing to use noise abatement systems, also known as noise mitigation systems (NMS) or noise attenuation systems, during all impact pile driving for WTG and OSS foundations to reduce the sound pressure levels that are transmitted through the water in an effort to reduce ranges to acoustic thresholds and minimize any acoustic impacts resulting from pile driving. Empire Wind is proposing, and BOEM proposes to require through conditions of COP approval, the use of a noise attenuation system designed to minimize the sound radiated from piles by 10 dB. This requirement will be in place for all foundation piles to be installed (WTG and OSS). Consistent with the requirements of the proposed MMPA ITA, the noise attenuation system would be either a big double bubble curtain or a single bubble curtain paired with another noise abatement device such as a hydro-sound damper (HSD), or an AdBm Helmholz resonator. The noise attenuation system ultimately selected for the Project would be tailored to and optimized for site-specific conditions and reflect the requirements of the proposed MMPA ITA. As described in the proposed ITA, the noise attenuation system used would be required to attenuate pile driving noise such that measured ranges to isopleth distances corresponding to relevant marine mammal harassment thresholds are consistent with those modeled based on 10 dB attenuation, determined via sound field verification. Sound field verification will be required through BOEM's conditions of COP approval and NMFS OPR's proposed MMPA ITA. SFV involves monitoring underwater noise levels during pile driving to determine the actual distances to isopleths of concern (e.g., the distances to the noise levels equated to Level A and Level B harassment for marine mammals and injury and behavioral disturbance of sea turtles and Atlantic sturgeon). Requirements will be in place through the MMPA ITA and BOEM's conditions of COP approval to implement adjustments to pile driving and/or additional or alternative sound attenuation measures for subsequent piles if any distances to any thresholds are exceeded. The goal of the SFV and associated requirements is to ensure that the distances do not exceed those modeled assuming 10 dB of sound attenuation as those are the noise levels/distances that are the foundation of the effects analysis carried out in this Opinion and the exposure analysis and take estimates in the proposed MMPA ITA. Failure to demonstrate that distances to these thresholds of concern can be met through SFV could lead to the need for reinitiation of consultation.

Bubbles create a local impedance change that acts as a barrier to sound transmission. The size of the bubbles determines their effective frequency band, with larger bubbles needed for lower frequencies. There are a variety of bubble curtain systems, confined or unconfined bubbles, and some with encapsulated bubbles or panels. Attenuation levels also vary by type of system, frequency band, and location. As described in the proposed ITA, Empire would be required to maintain the following operational parameters for bubble curtains (single or double): The bubble curtain(s) must distribute air bubbles using a target air flow rate of at least 0.5 m^3 /(min*m), and must distribute bubbles around 100 percent of the piling perimeter for the full depth of the water column. The lowest bubble ring must be in contact with the seafloor for the full circumference of the ring, and the weights attached to the bottom ring must ensure 100-percent seafloor contact; no parts of the ring or other objects should prevent full seafloor contact. Empire Wind must require that construction contractors train personnel in the proper balancing of airflow to the bubble ring, and must require that construction contractors submit an inspection/performance report for approval by Empire Wind within 72 hours following the performance test. Corrections to the attenuation device to meet the performance standards must occur prior to impact driving of monopiles. If Empire Wind uses a noise mitigation device in addition to a BBC, similar quality control measures will be required.

As described in the BA, BOEM considers an attenuation level of 10 dB achievable using a joint mitigation approach of a bubble curtain and another noise abatement system or a double bubble curtain. Based on our independent review of the available information, we agree with that determination and note that this presumption will be verified through the required SFV. It is also consistent with the findings in the Notice of Proposed ITA. Bellmann et al. (2020) found three noise abatement systems to have proven effectiveness and be offshore suitable: 1) the near-to-pile noise abatement systems - noise mitigation screen (IHC-NMS); 2) the near-to-pile hydro sound damper (HSD); and 3) for a far-from-pile noise abatement system, the single and double big bubble curtain (BBC and dBBC). With the IHC-NMS or the BBC, noise reductions of approximately 15 to 17 dB in depths of 82 to 131 feet (25 to 40 meters) could be achieved. The HSD system, independent of the water depth, demonstrated noise reductions of 10 dB with an optimum system design. The achieved broadband noise reduction with a BBC or dBBC was dependent on the technical-constructive system configuration. *In situ* measurements during installation of large monopiles (approximately 8 m) for more than 150 WTGs in comparable water depths (greater than 25 m) and conditions in Europe indicate that attenuation levels of 10 dB are readily achieved (Bellmann, 2019; Bellmann *et al.*, 2020) using single BBCs as a noise abatement system. The Coastal Virginia Offshore Wind (CVOW) pilot project systematically measured noise resulting from the impact driven installation of two 7.8 m monopiles, one with a noise abatement system (double big bubble curtain (dBBC)) and one without (CVOW, unpublished data). Although many factors contributed to variability in received levels throughout the installation of the piles (*e.g.*, hammer energy, technical challenges during operation of the dBBC), reduction in broadband SEL using the dBBC (comparing measurements derived from the mitigated and the unmitigated monopiles) ranged from approximately 9 to 15 dB. The effectiveness of the dBBC as a noise mitigation measure was found to be frequency dependent, reaching a maximum around 1 kHz; this finding is consistent with other studies (*e.g.*, Bellman, 2014; Bellman *et al*., 2020). As of the writing of this Opinion, we have received interim sound field verification reports for monopiles installed for the South Fork project; these results indicate that the required sound attenuation systems are capable of reducing noise levels to the distances predicted by modeling assuming 10 dB attenuation. We note that South Fork deployed a double bubble curtain and a near field noise attenuation device. We have also received interim SFV reports for the first 9 monopiles and the jacket foundation for the Vineyard Wind project; these results also indicate that a double bubble curtain and near field sound attenuation device are capable of reducing noise levels to the distances predicted by modeling (note that the Vineyard Wind modeling assumed 6 dB attenuation). Results from both projects have indicated the importance of proper deployment and maintenance of the bubble curtains in obtaining expected sound attenuation results.

As described in section 3.0 of this Opinion, in addition to seasonal restrictions on impact pile driving and requirements for use of a noise attenuation system, there are a number of other measures included as part of the proposed action that are designed to avoid or minimize exposure of ESA listed species to underwater noise. These measures are discussed in detail in the effects analysis below but generally include requirements for clearance and shutdown zones and ensuring adequate visibility for monitoring. Empire Wind is not proposing to start pile driving after dark. At this time, BOEM is only proposing to authorize pile driving, and NMFS OPR is only proposing to authorize marine mammal takes from pile driving, that is initiated no more than 1 hour before civil sunrise and no later than 1.5 hours before civil sunset. These time of day restrictions are to ensure that there is adequate daylight to allow for PSOs to visually monitor the clearance and shutdown zones. BOEM is proposing to condition the COP approval such that pile driving could be initiated outside of this window only if Empire Wind can demonstrate through a nighttime/low visibility monitoring plan that their planned set up of night vision devices (e.g., mounted thermal/IR camera systems, hand-held or wearable night vision devices (NVDs), infrared (IR) spotlights) are able to reliably detect sea turtles and marine mammals to the full extent of the established clearance and shutdown zones. NMFS OPR includes a similar condition in the proposed ITA. If the plan does not include a full description of the proposed technology, monitoring methodology, and data supporting a determination that sea turtles and marine mammals can be reliably and effectively detected within the clearance and shutdown zones before and during impact pile driving, then nighttime pile driving will not be allowed (unless a pile was initiated 1.5 hours prior to civil sunset). The monitoring plan will need to identify the efficacy of the technology at detecting sea turtles and marine mammals in the clearance and shutdowns under all the various conditions anticipated during construction, including varying weather conditions, sea states, and in consideration of the use of artificial lighting. The proposed conditions of COP approval and the MMPA ITA require both BOEM and NMFS approval of the AMP before any pile driving could be carried out outside the time of day requirements outlined here. Based on the requirement that the monitoring plan will need to demonstrate the ability to detect sea turtles and large whales to the full extent of the established clearance and shutdown zones, we expect that it will need to demonstrate an ability for visual PSOs to reliably detect sea turtles at a distance of 500 m from the pile to be installed and for visual PSOs to reliably detect large whales throughout the minimum visibility zone (i.e., 1,500 m from the pile being driven).

Results of the modeling for ESA listed whales, sea turtles, and fish are included in the species group analyses below where we describe anticipated pile driving noise in more detail and assess the effects on those species.

Cable Landfall and Associated Marina Activities

As described in section 3.0 of this Opinion, impact and vibratory pile driving may be required to support the cable landfall. The proposed action described in the BA includes installation of cofferdams at the exit points of the long-distance HDDs as part of landfall and installation of goal post piles for use during HDD activities to support casing pipe installation as part of landfall (with one of these methodologies to be selected); and, removal of berthing piles and performing marina bulkhead work at Substation C along the Wreck Channel on Long Island.

Acoustic modeling of vibratory driving associated with cofferdam installation and removal, impact pile driving associated with goal post installation, and vibratory pile driving associated with berthing pile removal and bulkhead work at the marina at Onshore Substation C location was carried out by Empire Wind (Küsel et al. 2022). For estimating source levels and frequency spectra, the vibratory pile driver was estimated assuming a 1,800 kilonewton (kN) vibratory force. Modeling was accomplished using adjusted one-third-octave band vibratory pile driving source levels cited for similar vibratory pile driving activities conducted during cofferdam installation for the Block Island Wind Farm (Tetra Tech 2012; Schultz-von Glahn et al. 2006, as cited in Küsel et al. 2022). Modeling of goal post pile driving and marina activities, berthing pile and the bulkhead, was conducted using the NMFS User Spreadsheet. The Level B harassment distance was calculated using a simple spread calculation to estimate the horizontal distance to the 160 dB re 1 μPa isopleth: $\mathrm{SPL}(r)=\mathrm{S}L-PL(r)$ (2) Where: SPL = sound pressure level (dB re 1 μPa), r = range (m), SL = source level (dB re 1 μPa m), and PL = propagation loss as a function of distance. Propagation loss is calculated using: $PL(r)=20\mathrm{Log}10(r)+\alpha(f)\cdot r/1000$ Note the calculation methodologies do not allow for inclusion of site-specific environmental parameters The assumed sound source level for vibratory pile driving corresponded to 195 dB SEL re 1 μPa. The anticipated duration is 1 hour of active pile driving per day.

Connected Action – South Brooklyn Marine Terminal Improvements
In addition to the work at SBMT associated with EW1 cable landfall (cofferdam or goal post), work to be carried out the South Brooklyn Marine Terminal would include installation of 36-inch (0.9-meter) steel pipe piles and steel sheet piles. Pipe piles would be installed using a vibratory hammer for the majority of installation. An impact hammer would be used to drive the pile during the final 10 to 15 feet (3 to 4.5 meters). Sheet piles will be installed entirely using a vibratory hammer. Mitigation measures for pile driving associated with the SBMT modifications include soft start and use of a bubble curtain, as well as a time of year restriction limiting in-water work to June 1 to December 15 (AECOM 2021).

Vessel Noise
Vessel noise is considered a continuous noise source that will occur intermittently. Vessels transmit noise through water primarily through propeller cavitation, although other ancillary noises may be produced. The intensity of noise from vessels is roughly related to ship size and speed. Large ships tend to be noisier than small ones, and ships underway with a full load (or towing or pushing a load) produce more noise than unladen vessels. Radiated noise from ships varies depending on the nature, size, and speed of the ship. McKenna et al. (2012b) determined that container ships produced broadband source levels around 177 to 188 dB re 1 μPa and a typical fishing vessel radiates noise at a source level of about 158 dB re 1 μPa (Mintz and Filadelfo 2011c; Richardson et al. 1995b; Urick 1983b). Noise levels generated by larger construction and installation and O&M would have an approximate *L*rms source level of 170 dB

re 1 μPa-m (Denes et al. 2020). Smaller construction and installation and O&M vessels, such as CTVs, are expected to have source levels of approximately 160 dB re 1 μPa-m, based on observed noise levels generated by working commercial vessels of similar size and class (Kipple and Gabriele 2003; Takahashi et al. 2019).

Typical large vessel ship-radiated noise is dominated by tonals related to blade and shaft sources at frequencies below about 50 Hz and by broadband components related to cavitation and flow noise at higher frequencies (approximately around the one-third octave band centered at 100 Hz) (Mintz and Filadelfo 2011c; Richardson et al. 1995b; Urick 1983b). The acoustic signature produced by a vessel varies based on the type of vessel (e.g., tanker, bulk carrier, tug, container ship) and vessel characteristics (e.g., engine specifications, propeller dimensions and number, length, draft, hull shape, gross tonnage, speed). Bulk carrier noise is predominantly near 100 Hz while container ship and tanker noise is predominantly below 40 Hz (McKenna et al. 2012b). Small craft types will emit higher-frequency noise (between 1 kHz and 50 kHz) than larger ships (below 1 kHz). Large shipping vessels and tankers produce lower frequency noise with a primary energy near 40 Hz and underwater SLs for these commercial vessels generally range from 177 to 188 decibels referenced to 1 micropascal at 1 meter (dB re 1 µPa m) (McKenna et al., 2012). Smaller vessels typically produce higher frequency sound (1,000 to 5,000 Hz) at SLs of 150 to 180 dB re 1 µPa m (Kipple and Gabriele, 2003; Kipple and Gabriele, 2004).

As part of various construction related activities, including cable laying and construction material delivery, dynamic positioning thrusters may be utilized to hold vessels in position or move slowly. Sound produced through use of dynamic positioning thrusters is similar to that produced by transiting vessels, and dynamic positioning thrusters are typically operated either in a similarly predictable manner or used for short durations around stationary activities. Dynamically positioned (DP) vessels use thrusters to maneuver and maintain station, and generate substantial underwater noise with apparent SLs ranging from SPL 150 to 180 dB re 1 µPa depending on operations and thruster use (BOEM 2014, McPherson et al., 2016). Acoustic propagation modeling calculations for DP vessel operations were completed by JASCO Applied Sciences, Inc. for two representative locations for pile foundation construction at the South Fork Wind Farm SFWF based on a 107 m DP vessel equipped with six thrusters (Denes et al., 2021a). Unweighted root-mean square sound pressure levels (SPLrms) ranged from 166 dB re one μPa at 50 m from the vessel (CSA 2021). Noise from vessels used for the Empire Wind project are expected to be similar in frequency and source level.

Cable Installation

Noise produced during cable laying includes dynamic positioning (DP) thruster use. Nedwell et al. (2003) reports a sound source level for cable trenching operations in the marine environment of 178 dB re 1μPa at a distance of 1m from the source. Hale (2018) reports on unpublished information for cable jetting operations indicating a comparable sound source level, concentrated in the frequency range of 1 kHz to 15 kHz and notes that the sounds of cable burial were attributed to cavitation bubbles as the water jets passed through the leading edge of the burial plow.

WTG Operations

As described in BOEM's BA, once operational, offshore wind turbines produce continuous, non-impulsive underwater noise, primarily in the lower-frequency bands (below 1 kHz; Thomsen et al. 2006); vibrations from the WTG drivetrain and power generator would be transmitted into the steel monopile foundation generating underwater noise. Most of the currently available information on operational noise from turbines is based on monitoring of existing windfarms in Europe. Although useful for characterizing the general range of WTG operational noise effects, this information is drawn from studies of older generation WTGs that operate with gearboxes and is not necessarily representative of current generation direct-drive systems (Elliot et al. 2019; Tougaard et al. 2020). Studies indicate that the typical noise levels produced by older-generation WTGs with gearboxes range from 110 to 130 dB RMS with 1/3-octave bands in the 12.5- to 500-Hz range, sometimes louder under extreme operating conditions such as higher wind conditions (Betke et al. 2004; Jansen and de Jong 2016; Madsen et al. 2006; Marmo et al. 2013; Nedwell and Howell 2004; Tougaard et al. 2009). Operational noise increases concurrently with ambient noise (from wind and waves), meaning that noise levels usually remain indistinguishable from background within a short distance from the source under typical operating conditions.

Tougaard et al. (2020) concluded that operational noise from multiple WTGs could elevate noise levels within a few kilometers of large windfarm operations under very low ambient noise conditions. Tougaard et al. (2020) caution that their analysis is based on monitoring data for older generation WTG designs that are not necessarily representative of the noise levels produced by modern direct-drive systems, which are considerably quieter. However, even with these louder systems, Tougaard further stated that the operational noise produced from WTGs is static in nature and is lower than noise produced from passing ships; operational noise levels are likely lower than those ambient levels already present in active shipping lanes, meaning that any operational noise levels would likely only be detected at a very close proximity to the WTG (Thomsen et al., 2006; Tougaard et al., 2020).

Stober and Thomsen (2021) summarized data on operational noise from offshore wind farms with 0.45 – 6.15 MW turbines based on published measurements and simulations from gray literature then used modeling to predict underwater operational noise levels associated with a theoretical 10 MW turbine. Using generic transmission loss calculations, they then predicted distances to various noise levels including 120 dB re 1uPa RMS. The authors note that there is unresolved uncertainty in their methods because the measurements were carried out at different water depths and using different methods that might have an effect on the recorded sound levels. Given this uncertainty, it is questionable how reliably this model predicts actual underwater noise levels for any operating wind turbines. The authors did not do any in-field measurements to validate their predictions. Additionally, the authors noted that all impact ranges (i.e., the predicted distance to thresholds) come with very high uncertainties. Using this methodology, they used the sound levels reported for the Block Island Wind Farm turbines in Elliot et al. 2019 and estimated the noise that would be produced by a theoretical 10 MW direct-drive WTG would be above the 120 dB re 1uPa RMS at a distance of up to 1.4 km from the turbine. However, it is important to note that this desktop calculation, using values reported from different windfarms under different conditions, is not based on in situ evaluation of underwater noise of a 10 MW direct-drive turbine. Further, we note that context is critical to the reported noise levels evaluated in this study as well as for any resulting predictions. Without information on soundscape, water depth, sediment type, wind speed, and other factors, it is not possible to determine the reliability of any predictions from the Stober and Thomsen paper to the Empire Wind project up to 15 MW direct drive turbines) or any other 10 MW turbine. Further, as noted by Tougaard et al. (2020), as the turbines also become higher with larger capacity, the distance from the noise source in the nacelle to the water becomes larger too, and with the mechanical resonances of the tower and foundation likely to change with size as well, it is not straightforward to predict changes to the noise with increasing sizes of the turbines. Therefore, for the reasons provided above, Stober and Thomsen (2021) is not considered the best available scientific information. We also note that Tougaard et al. (2020) and Stober and Thomsen (2021) both note that operational noise is less than shipping noise; this suggests that in areas with consistent vessel traffic, such as the Empire Wind lease area, operational noise may not be detectable above ambient noise.

Elliot et al. (2019) summarized findings from hydroacoustic monitoring of operational noise from the Block Island Wind Farm (BIWF). The BIWF is composed of five GE Haliade 150 6-MW direct-drive WTGs on jacketed foundations located approximately 200 km northeast of the proposed Empire Wind WFA. We note that Tougaard (2020) reported that in situ assessments have not revealed any systematic differences between noise from turbines with different foundation types (Madsen et al., 2006); thus, the difference in foundation type is not expected to influence underwater noise from operations. Underwater noise monitoring took place from December 20, 2016 – January 7, 2017 and July 15 – November 3, 2017. Elliot et al. (2019) also presents measurements comparing underwater noise associated with operations of the direct-drive turbines at the BIWF to underwater noise reported at wind farms in Europe using older WTGs with gearboxes and conclude that absent the noise from the gears, the direct-drive models are quieter.

The WTGs proposed for Empire Wind will use the newer, direct-drive technology. Elliot et al. (2019) is the only available data on in-situ measurements of underwater noise from operational direct-drive turbines. As such, and given the issues with modeled predictions outlined above, it represents the best available data on operational noise that can be expected from the operation of the Empire Wind turbines. We acknowledge that as the Empire Wind turbines will have a greater capacity (up to 15 MW) than the turbines at Block Island there is some uncertainty in operational noise levels. However, we note that even the papers that predict greater operational noise note that operational noise is less than shipping noise; this suggests that in areas with consistent vessel traffic, such as the Empire Wind lease area, operational noise may not be detectable above ambient noise and, therefore, would be unlikely to result in any behavioral response by any whale, sea turtle, or sturgeon.

Elliot et al. (2019) presented a representative high operational noise scenario at an observed wind speed of 15 m/s (approximately 54 km/h, which is 1.5 to three times the average annual wind speed in the Empire Wind WFA (COP section 4.2.4.1)), which is summarized in Table 7.1.5 below. As shown, the BIWF WTGs produced frequency weighted instantaneous noise levels of 103 and 79 dB SEL for the LFC and MFC marine mammal hearing groups in the 10-Hz to 8-kHz frequency band, respectively. Frequency weighted noise levels for the LFC and MFC hearing groups were higher for the 10-Hz to 20-kHz frequency band at 122.5- and 123.3-dB SEL, respectively.

Table 7.1.5. Frequency weighted underwater noise levels, based on NMFS 2018, at 50 m from an operational 6-MW WTG at the Block Island Wind Farm

Species Hearing Group	Instantaneous dB SEL*		Cumulative dB SEL†	
	10 Hz to 8 kHz	10 Hz to 20 kHz	10 Hz to 8 kHz	10 Hz to 20 kHz
Unweighted	121.2	127.1	170.6	176.5
LFC (North Atlantic right whale, fin whale, sei whale)	103.0	122.5	152.4	171.9
MFC (sperm whale)	79.0	123.3	128.4	172.7

Source: Elliot et al. (2019)
* 1-second SEL re 1 µPaS2 at 15 m/s (33 mph) wind speed. 1sec SEL = RMS
† Cumulative SEL re 1 µPaS2 assuming continuous 24 exposure at 50 m from WTG foundation operating at 15 m/s.

Elliot et al. (2019) also summarizes sound levels sampled over the full survey duration. These averages used data sampled between 10 PM and 10 AM each day to reduce the risk of sound contamination from passing vessels. The loudest noise recorded was 126 dB re 1uPa at 50 m from the turbine when wind speeds exceeded 56 km/h; at wind speeds of 43.2 km/h and less, measured noise did not exceed 120 dB re 1uPa at 50 m from the turbine. As summarized in the COP, average wind speeds in the lease area are between 11.2 and 26 km/h (COP section 4.1.1.1). As indicated by data from the nearby Ambrose Buoy maintained by NOAA's National Data Buoy Center (November 2008 – February 2023), instances of wind speeds exceeding 56 km/h in the lease area are expected to be rare, with wind speeds exceeding 40 km/h less than 3% of the time across a year[41].

Table 7.1.6. Summary of unweighted SPL RMS average sound levels (10 Hz to 8 kHz) measured at 50 m (164 ft.) from WTG 5

Wind speed (Km/h)	Overall average sound level, dB re 1 µPa
7.2	112.2
14.4	113.1
21.6	114
28.8	115.1
36	116.7
43.2	119.5
46.8	120.6
Average over survey duration	119
Background sound levels in calm conditions	107.4 [30 km from turbine]

[41] https://www.windfinder.com/windstatistics/ambrose_buoy. and https://www.ndbc.noaa.gov/station_page.php?station=44065; last accessed August 4, 2023

	110.2 [50 m from turbine]

Reproduced from Elliot et al. (2019); wind speeds reported as m/s converted to km/h for ease of reference

High-Resolution Geophysical Surveys

As part of the proposed action for consultation in this opinion described in Section 3, Empire Wind plans to conduct HRG surveys in the WDA, including along the export cable routes to landfall locations in New York intermittently through the construction and operation periods. Equipment planned for use includes side-scan sonar, multibeam echosounder, magenetomers, and gradiometers, parametric sub-bottom profiler (SBP), and compressed high-intensity radiated pulses (CHIRP) SBP. No boomers, sparkers, or air guns are proposed for use. During the first five-years following COP approval, Empire Wind anticipates a total of 483 survey days covering 85,872 km. After this period, surveys will be more intermittent and carried out to survey foundations, scour and scour protection, and cable burial; as described in the BA, HRG surveys are anticipated over the life of the project.

As noted in Section 3.5, BOEM has completed a programmatic informal ESA consultation with NMFS for HRG surveys and other types of survey and monitoring activities supporting offshore wind energy development (NMFS 2021a; Appendix C to this Opinion). A number of measures to minimize effects to ESA listed species during HRG operations are proposed to be required by BOEM as conditions of COP approval and by NMFS OPR as conditions of the proposed MMPA ITA (see section 3.0 and Appendix A and B). As described in the Empire Wind BA, BOEM will require Empire Wind to comply with all relevant programmatic survey and monitoring PDCs and BMPs included in the 2021 programmatic ESA consultation; these measures are detailed in Appendix B of the programmatic consultation). HRG surveys related to the approval of the Empire Wind COP are considered part of the proposed action evaluated in this Opinion and the applicable survey and monitoring PDCs and BMPs included in the 2021 informal programmatic ESA consultation are incorporated by reference. They are thus also considered components of the proposed action evaluated in this Opinion.

All noise producing survey equipment is secured to the survey vessel or towed behind a survey vessel and is only turned on when the vessel is traveling along survey transects; thus, the area ensonified is constantly moving, making survey noise transient and intermittent. The maximum anticipated distances from the HRG sound sources to noise thresholds of concern are presented in the tables below. The information on these noise sources is consistent with the information and effects analysis contained in the above referenced programmatic consultation.

Consistent with conclusions made by BOEM, and by NMFS OPR in the Notice of Proposed ITA, operation of some survey equipment types is not reasonably expected to result in any effects to ESA listed species in the area. Parametric sub-bottom profilers (SBP), also called sediment echosounders, generate short, very narrow-beam (1° to 3.5°) signals at high frequencies (generally around 85-100 kHz). The narrow beamwidth significantly reduces the potential that an individual animal could be exposed to the signal, while the high frequency of operation means that the signal is rapidly attenuated in seawater. Ultra-Short Baseline (USBL) positioning systems produce extremely small acoustic propagation distances in their typical operating configuration. The single beam and Multibeam Echosounders (MBES), side-scan sonar, and the magnetometer/gradiometer that may be used in these surveys all have operating frequencies

>180 kilohertz (kHz) and are therefore outside the general hearing range of ESA listed species that may occur in the survey area. This is consistent with the conclusions made in the above referenced programmatic consultation. Table 2 of the MMPA ITA identifies all the representative survey equipment that operate below 180 kHz (*i.e.*, at frequencies that are audible to marine mammals) that may be used in support of planned geophysical survey activities. Empire Wind is not proposing to use boomers or sparkers during HRG surveys.

Empire Wind's proposed HRG survey activity includes the use of non-impulsive sources (*i.e.*, CHIRP SBPs) that NMFS OPR determined have the potential to result in exposure of marine mammals to noise above the MMPA Level B harassment threshold (i.e., 160 dB re uPa RMS). As described in the Notice of Proposed ITA, authorized takes would be by Level B harassment only in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to noise from certain HRG acoustic sources. Based primarily on the characteristics of the signals produced by the acoustic sources planned for use, Level A harassment is neither anticipated, even absent mitigation, nor proposed to be authorized. Specific to HRG surveys, in order to better consider the narrower and directional beams of the sources, NMFS has developed a tool for determining the sound pressure level (SPLrms) at the 160 dB isopleth for the purposes of estimating the extent of Level B harassment isopleths associated with HRG survey equipment (NMFS, 2020). This methodology incorporates frequency-dependent absorption and some directionality to refine estimated ensonified zones. Empire Wind used NMFS' methodology with additional modifications to incorporate a seawater absorption formula and account for energy emitted outside of the primary beam of the source. For sources that operate with different beamwidths, the maximum beam width was used, and the lowest frequency of the source was used when calculating the frequency-dependent absorption coefficient.

The isopleth distances corresponding to the Level B harassment threshold for each type of HRG equipment with the potential to result in harassment of marine mammals were calculated per NMFS' Interim Recommendation for Sound Source Level and Propagation Analysis for HRG Sources. The distances to the 160 dB RMS re 1 µPa isopleth for Level B harassment are presented in Table 7.1.7 (see also Table 31 in the proposed MMPA ITA). Section 6.3.2 of the LOA application contains a full description of the methodology and formulas used to calculate distances to the Level B harassment threshold.

Table 7.1.7 Isopleth Distances Corresponding to the MMPA Level B Harassment Threshold for HRG Equipment

HRG Survey Equipment	Source Level (SL_{RMS}) (dB re 1µPa)	Lateral Distance (m) to Level B Harassment Threshold
Edgetech DW106	194	50.00
Edgetech 424	180	8.75
Teledyne Benthos Chirp III- TTV 170	219	50.05

Source: Table 31, Notice of Proposed ITA

The basis for the take estimate is the number of marine mammals that would be exposed to sound levels in excess of the Level B harassment threshold (160 dB). Typically, this is determined by estimating an ensonified area for the activity, by calculating the area associated with the isopleth distance corresponding to the Level B harassment threshold. This area is then multiplied by marine mammal density estimates in the project area and then corrected for seasonal use by marine mammals, seasonal duration of Project-specific noise-generating activities, and estimated duration of individual activities when the maximum noise-generating activities are intermittent or occasional. More information on the density estimates and calculations used are presented in the Notice of Proposed ITA.

Table 7.1.8 presents the amount of take (MMPA Level B harassment) proposed for authorization by NMFS OPR for the 5-years of HRG surveys considered in the proposed LOA.

Table 7.1.8. Amount of MMPA Take by Level B Harassment Proposed for Authorization in the MMPA ITA for 5-years of HRG Surveys

Species	Level B harassment
Fin Whale	11
North Atlantic Right Whale	7
Sei Whale	4
Sperm Whale	0

In support of the programmatic consultation noted above, BOEM completed a desktop analysis of nineteen HRG sources in Crocker and Fratantonio (2016) to evaluate the distance to thresholds of concern for listed species. Equipment types or frequency settings that would not be used for the survey purposes by the offshore wind industry were not included in this analysis. To provide the maximum impact scenario for these calculations, the highest power levels and most sensitive frequency setting for each hearing group were used when the equipment had the option for multiple user settings. All sources were analyzed at a tow speed of 2.315 m/s (4.5 knots), which is the expected speed vessels will travel while towing equipment. BOEM has used the highest power levels for each sound source reported in Crocker and Fratantonio (2016). The modeling approach used does not consider the tow depth and directionality of the sources; therefore, these are likely overestimates of actual disturbance distances but still within reason. Distances to potential onset of injury and behavioral disturbance thresholds were determined for sea turtles and Atlantic sturgeon, as presented in Table 7.1.9 and Table 7.1.10 below. Because boomers, bubble guns, and sparkers are not proposed for the Empire Wind surveys, those sources are not included in these tables.

Table 7.1.9. Largest Distances to Injury Thresholds from mobile HRG Sources at Speeds of 4.5 knots – Fish and Sea Turtles

HRG SOURCE	DISTANCE (m)				
	Highest Source Level (dB re 1 μPa)	Sea Turtles		Fish[b]	
Mobile, Impulsive, Intermittent Sources					
		Peak	***SEL***	***Peak***	***SEL***
Chirp Sub-Bottom Profilers	193 dB SEL 209 dB RMS 214 PEAK	NA	NA	NA	NA
Mobile, Non-impulsive, Intermittent Sources					
Multi-beam echosounder (100 kHz)	185 dB SEL 224 dB RMS 228 PEAK	NA	NA	NA	NA
Multi-beam echosounder (>200 kHz) (mobile, non-impulsive, intermittent)	182 dB SEL 218 dB RMS 223 PEAK	NA	NA	NA	NA
Side-scan sonar (>200 kHz) (mobile, non-impulsive, intermittent)	184 dB SEL 220 dB RMS 226 PEAK	NA	NA	NA	NA

[a] Sea turtle PTS distances were calculated for 203 cSEL and 230 dB peak criteria from Navy (2017).
[b] Fisheries Hydroacoustic Working Group (2008).
[c] PTS injury distances for listed marine mammals were calculated with NOAA's sound exposure spreadsheet tool using sound source characteristics for HRG sources in Crocker and Fratantonio (2016)
NA = not applicable due to the sound source being out of the hearing range for the group.

Table 7.1.10. Largest distances to disturbance thresholds by equipment type – Fish and Sea Turtles

HRG SOURCE		DISTANCE (m)	
	Highest Source Level (dB re 1uPa)	Sea Turtles (175 dB re 1uPa rms)	Fish (150 dB re 1uPa rms)
Chirp Sub-Bottom Profilers	193 dB LE,24h 209 dB RMS 214 Lpk	2	32

Multi-beam Echosounder (100 kHz)	185 dB LE,24h 224 dB Lrms 228 Lpk	NA	NA
Multi-beam Echosounder (>200 kHz)	182 dB LE,24h 218 dB Lrms 223 Lpk	NA	NA
Side-scan Sonar (>200 kHz)	184 dB LE,24h 220 dB Lrms 226 Lpk	NA	NA

NA = not applicable due to the sound source being out of the hearing range for the group.

Of the equipment proposed for use, only the CHIRP operates in a frequency within the hearing range for sea turtles and Atlantic sturgeon. As noted in the table above, the distance to the behavioral disturbance threshold is very small (less than 50 m) and there is no potential for exposure to noise above the injury thresholds for either species.

7.1.3 Effects of Project Noise on ESA-Listed Whales

Background Information – Acoustics and Whales

The *Federal Register* notice prepared for the Proposed ITA (88 FR 22696; April 13, 2023) presents extensive information on the potential effects of underwater sound on marine mammals. Rather than repeat that information, that information is incorporated by reference here. As explained in detail in the *Federal Register* notice, anthropogenic sounds cover a broad range of frequencies and sound levels and can have a range of highly variable impacts on marine life, from none or minor to potentially severe behavioral responses, depending on received levels, duration of exposure, behavioral context, and various other factors. Underwater sound from active acoustic sources can have one or more of the following effects: temporary or permanent hearing impairment, non-auditory physical or physiological effects (including injury), behavioral disturbance, stress, and masking (Richardson et al., 1995; Gordon et al., 2004; Nowacek et al., 2007; Southall et al., 2007; Götz et al., 2009). The degree of effect is intrinsically related to the signal characteristics, received level, distance from the source, and duration of the sound exposure. In general, sudden, high level sounds can cause hearing loss, as can longer exposures to lower level sounds. Temporary or permanent loss of hearing (i.e. temporary (TTS) or permanent threshold shift (PTS) respectively) will occur almost exclusively for noise within an animal's hearing range.

Richardson et al. (1995) described zones of increasing intensity of effect that might be expected to occur, in relation to distance from a source and assuming that the signal is within an animal's hearing range. First is the area within which the acoustic signal would be audible (potentially perceived) to the animal but not strong enough to elicit any overt behavioral or physiological response. The next zone corresponds with the area where the signal is audible to the animal and of sufficient intensity to elicit behavioral or physiological responsiveness. Third is a zone within which, for signals of high intensity, the received level is sufficient to potentially cause discomfort or tissue damage to auditory or other systems. Overlaying these zones to a certain extent is the area within which masking may occur. Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (e.g., snapping shrimp, wind, waves, precipitation) or anthropogenic (e.g., shipping, sonar, seismic exploration) in origin. Masking is when a sound interferes with or masks the ability of an animal to detect a signal of interest that is above the absolute hearing threshold. The masking zone may be highly variable in size. Masking can lead to behavioral changes in an attempt to compensate for noise levels or because sounds that would typically have triggered a behavior were not detected.

In general, the expected responses to pile driving noise may include threshold shift, behavioral effects, stress response, and auditory masking. Threshold shift is the loss of hearing sensitivity at certain frequency ranges (Finneran 2015). It can be permanent (PTS), in which case the loss of hearing sensitivity is not fully recoverable, or temporary (TTS), in which case the animal's hearing threshold would recover over time (Southall et al., 2007). PTS is an auditory injury, which may vary in degree from minor to significant. Behavioral disturbance may include a variety of effects, including subtle changes in behavior (e.g., minor or brief avoidance of an area or changes in vocalizations), more conspicuous changes in similar behavioral activities, and more sustained and/or potentially severe reactions, such as displacement from or abandonment of high-quality habitat. Not all behavioral disturbance would have meaningful consequences to an individual. The duration of the disturbance and the activity that is impacted are considered when evaluating the potential for a behavioral disturbance to significantly disrupt normal behavioral patterns. An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (e.g., Seyle, 1950; Moberg, 2000). In many cases, an animal's first and sometimes most economical response in terms of energetic costs is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness.

Criteria Used for Assessing Effects of Noise Exposure to Fin, Right, Sei, and Sperm Whales

NMFS *Technical Guidance for Assessing the Effects of Anthropogenic Noise on Marine Mammal Hearing* compiles, interprets, and synthesizes scientific literature to produce updated acoustic thresholds to assess how anthropogenic, or human-caused, sound affects the hearing of all marine mammals under NMFS jurisdiction (NMFS 2018[42]). Specifically, it identifies the received levels, or thresholds, at which individual marine mammals are predicted to experience temporary or permanent changes in their hearing sensitivity for acute, incidental exposure to underwater anthropogenic sound sources. As explained in the document, these thresholds represent the best available scientific information. These acoustic thresholds cover the onset of

[42] See www.nmfs.noaa.gov/pr/acoustics/guidelines.htm for more information.

both temporary (TTS) and permanent hearing threshold shifts (PTS). We consider the NMFS technical guidance the best scientific information available for assessing the effects of anthropogenic noise on marine mammals.

Table 7.1.11. Impulsive acoustic thresholds identifying the onset of permanent threshold shift and temporary threshold shift for the marine mammal species groups considered in this opinion (NMFS 2018)

Hearing Group	Generalized Hearing Range[43]	Permanent Threshold Shift Onset[44]	Temporary Threshold Shift Onset
Low-Frequency Cetaceans (LF: baleen whales – blue, fin, right, sei)	7 Hz to 35 kHz	*L*pk,flat: 219 dB *L*E,LF,24h: 183 dB	*L*pk,flat: 213 dB *L*E,LF,24h: 168 dB
Mid-Frequency Cetaceans (MF: sperm whales)	150 Hz to 160 kHz	*L*pk,flat: 230 dB *L*E,MF,24h: 185 dB	*L*pk,flat: 224 dB *L*E,MF,24h: 170 dB

Note: Peak sound pressure level (Lp,0-pk) has a reference value of 1 µPa, and weighted cumulative sound exposure level (LE,p) has a reference value of 1µPa2 s. In this Table, thresholds are abbreviated to be more reflective of International Organization for Standardization standards (ISO 2017). The subscript "flat" is being included to indicate peak sound pressure are flat weighted or unweighted within the generalized hearing range of marine mammals (i.e., 7 Hz to 160 kHz). The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans) and that the recommended accumulation period is 24 hours. The weighted cumulative sound exposure level thresholds could be exceeded in a multitude of ways (i.e., varying exposure levels and durations, duty cycle).

These thresholds are a dual metric for impulsive sounds, with one threshold based on peak sound pressure level (0-pk SPL) that does not incorporate the duration of exposure, and another based on cumulative sound exposure level (SEL_{cum}) that does incorporate exposure duration. Cumulative SEL represents the total energy accumulated by a receiver over a defined time window or during an event. Peak sound pressure (also referred to as zero-to-peak sound pressure or 0-pk) is the maximum instantaneous sound pressure measurable in the water at a specified distance from the source, The cumulative sound exposure criteria incorporate auditory weighting functions, which estimate a species group's hearing sensitivity, and thus susceptibility to TTS and PTS, over the exposed frequency range, whereas peak sound exposure level criteria do not incorporate any frequency dependent auditory weighting functions.

In using these thresholds to estimate the number of individuals that may experience auditory effects in the context of the MMPA, NMFS classifies any exposure equal to or above the

[43] Represents the generalized hearing range for the entire group as a composite (i.e., all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on approximately 65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall et al. 2007).
[44] *L*pk,flat: unweighted ($_{flat}$) peak sound pressure level (L_{pk}) with a reference value of 1 µPa; *L*E,$_{XF,24h}$: weighted (by species group; $_{LF}$: Low Frequency, or $_{MF}$: Mid-Frequency) cumulative sound exposure level (L_E) with a reference value of 1 µPa^2-s and a recommended accumulation period of 24 hours ($_{24h}$)

threshold for the onset of PTS as auditory injury (and thus MMPA Level A harassment). As defined under the MMPA, Level A harassment means any act of pursuit, torment, or annoyance that has the potential to injure a marine mammal or marine mammal stock in the wild. NMFS considers exposure to impulsive noise greater than 160 dB re 1uPa rms to result in MMPA Level B harassment. As defined under the MMPA, Level B harassment refers to acts that have the potential to disturb (but not injure) a marine mammal or marine mammal stock in the wild by disrupting behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering. As defined in the MMPA, Level B harassment does not include an act that has the potential to injure a marine mammal or marine mammal stock in the wild. Among Level B exposures, NMFS OPR does not distinguish between those individuals that are expected to experience TTS and those that would only exhibit a behavioral response. The 160 dB re 1uPa rms threshold is based on observations of behavioral responses of mysticetes (Malme et al. 1983; Malme et al. 1984; Richardson et al. 1986; Richardson et al. 1990), but is used for all marine mammal species.

As explained below, given the differences in the definitions of "harassment" under the MMPA and ESA, it is possible that some activities could result in harassment, as defined under the MMPA, but not meet the definition of harassment used by NMFS to determine whether ESA harassment is likely to occur. Under the ESA, take is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." Harm is defined by regulation (50 C.F.R. §222.102) as "an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding, or sheltering." NMFS does not have a regulatory definition of "harass." However, on December 21, 2016, NMFS issued interim guidance[45] on the term "harass," under the ESA, defining it as to "create the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering." The NMFS interim ESA definition of "harass" is not equivalent to MMPA Level B harassment. Due to the differences in the definition of "harass" under the MMPA and ESA, there may be activities that result in effects to a marine mammal that would meet the threshold for harassment under both the MMPA and the ESA, while other activities may result in effects that would meet the threshold for harassment under the MMPA but not under the ESA. This issue is addressed further in the sections that follow.

For this consultation, we considered NMFS' interim guidance on the term "harass" under the ESA when evaluating whether the proposed activities are likely to harass ESA-listed species, and we considered the available scientific evidence to determine the likely nature of the behavioral responses and their potential fitness consequences.

7.1.3.1 Effects of Project Noise on ESA-Listed Whales

Fin, sei, sperm, and right whales may be exposed to increased underwater noise from a variety of sources during construction, operation, and/or decommissioning of the Empire Wind project. As explained in section 3, NMFS OPR is proposing to authorize MMPA Level B harassment take of

[45] NMFS Policy Directive 02-110-19; available at *https://media.fisheries.noaa.gov/dam-migration/02-110-19.pdf*; last accessed March 10, 2023.

a number of fin, sei, sperm, and right whales as a result of exposure to noise from foundation pile driving and HRG surveys and to authorize MMPA Level A take of fin whales as a result of exposure to noise from foundation pile driving. Empire Wind did not apply for an ITA to authorize MMPA take of ESA listed species for any other noise sources, and OPR is not proposing to authorize MMPA take of any ESA listed whale species for any noise sources other than pile driving and HRG surveys. No serious injury or mortality is expected to result from exposure to any project noise sources and none is proposed to be authorized through the MMPA ITA. As described below, NMFS GARFO has carried out our own independent analysis of these noise sources and has determined that the only noise sources expected to result in ESA take of ESA-listed whales are impact pile driving of WTG and OSS foundations which will result in ESA harassment of fin, right, sei, and sperm whales, and auditory injury of fin whales.

Here, we consider the effects of exposure and response to underwater noise during construction, operations, and decommissioning in the context of the ESA. Information on the relevant acoustic thresholds and a summary of the best available information on likely responses of whales to underwater noise is presented above.

Pile Driving
In their ITA application and Addendum[46], Empire Wind estimated exposure of marine mammals (including ESA listed fin, right, sei, and sperm whales) known to occur in the lease area and along the cable corridors to a number of noise sources above the Level A and Level B harassment thresholds. As part of the response to the MMPA ITA application, OPR conducted their own review of the model reports and determined they were based on the best available information. OPR relied on the model results to develop the proposed ITA.

For the purposes of this ESA section 7 consultation, we evaluated the applicants' and OPR's exposure estimates of the number of ESA-listed marine mammals that would be "taken" relative to the definition of MMPA Level A and Level B harassment and considered this expected MMPA take in light of the ESA definition of take including the NMFS definition of harm (64 FR 60727; November 8, 1999) and NMFS interim guidance on the definition of harass (see NMFS policy directive 02-110-19[47]). We have independently evaluated and adopted OPR's analysis of the number of fin, right, sei, and sperm whales expected to be exposed to pile driving noise because, after our independent review we determined it utilized the best available information and methods to evaluate exposure of these whale species to such noise. BOEM's BA is consistent with the analysis and exposure estimates presented in the Notice of Proposed ITA with the exception of the modifications to the amount of Level A take of fin whales OPR is proposing to authorize as this change was made following publication of the proposed ITA and submission of the BA. Below we describe Empire Wind and NMFS OPR's exposure analyses for these species.

[46]https://www.fisheries.noaa.gov/s3/2023-04/EquinorEmpireWind-2024LOA-TakeAddendum-OPR1.pdf; last accessed 8/10/23
[47] Available at: https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy-directives. Last accessed August 26, 2023.

Acoustic Modeling

The Notice of Proposed ITA and BOEM's BA provide extensive information on the acoustic modeling prepared for the project (Küsel et al. 2022; COP Appendix M2). That information is summarized here. As addressed above, BOEM and NMFS OPR will require use of a noise abatement system to achieve 10 dB noise attenuation; thus, modeling and exposure estimates incorporated 10 dB noise attenuation. Effectively achieving 10 dB noise attenuation is thus a critical element of modeling and this opinion's effects analysis predicting exposure and the resultant number and type of take for each listed whale species. As described in the Notice of Proposed ITA, sounds produced by installation of the 9.6- and 11-m monopiles were modeled at nine representative locations as shown in Figure 2 in Küsel *et al*. (2022). Sound fields from pin piles were modeled at the two planned jacket foundation locations, OSS 1 and OSS 2. Modeling locations are shown in Figure 8 in Küsel *et al*. (2022). The modeling locations were selected as they represent the range of soil conditions and water depths in the lease area. The monopiles were assumed to be vertical and driven to a maximum expected penetration depth of 38 m (125 ft.) for 9.6-m piles and 55 m (180 ft.) for 11-m piles. Jacket pin piles were assumed to be vertical and driven to a maximum expected penetration depth of 56 m (184 ft.). In addition to bathymetric and seabed geoacoustic data specific to the specific locations within the WFA, acoustic propagation modeling was conducted using an average sound speed profile for a "summer" period including the months of May through November, and a "winter" period including December through April to account for variations in the acoustic propagation conditions between summer and winter. Note that pile driving for WTG and OSS foundations is only proposed from May 1 through December 31 and pile driving is not planned for December. Pile driving will only occur in December if delays have prevented pile driving being completed before December 1.

As noted above, the updated acoustic thresholds for impulsive sounds (such as impact pile driving) contained in the Technical Guidance (NMFS, 2018) are dual metric acoustic thresholds using both SEL_{cum} and peak sound pressure level metrics (Table 7.1.11). As dual metrics, NMFS considers onset of PTS (MMPA Level A harassment) to have occurred when either one of the two metrics is exceeded. The SEL_{cum} metric considers both level and duration of exposure, as well as auditory weighting functions by marine mammal hearing group. For example, the distance from the source to the peak Level A threshold marks the outer bound of the area within which an animal needs to be located in order to be exposed to enough noise to experience Level A harassment from a single pile strike. Considering acoustic range, the distance from the source to the cumulative Level A threshold marks the outer bound of the area within which an animal needs to stay for the entire duration of the activity considered (e.g., the entire 3.2 hours of pile driving to install a monopile).

As part of the MMPA ITA application, modeling was also carried out to estimate distances to Level A and Level B thresholds for installation of casing pipes and sheet piles (Küsel et al., 2022) to support cable installation (at the HDD exit pits for each cable landfall). No ESA listed whales are expected to occur at SBMT; therefore, no ESA listed whales are expected to be exposed to pile driving noise associated with the EW1 landfall or any of the pile driving planned as part of the Connected Action to improve SBMT to support Empire Wind vessels during project operations and maintenance. No MMPA take of ESA listed whales was requested and NMFS OPR is not proposing to authorize any MMPA take of ESA listed whales for any activities at SBMT. Water depths at the potential HDD exit pit locations for EW2 cable landfall are 3-4 m. Given the area where this work will occur and that the ensonified area is not expected to extend beyond the 20 m isobath it is extremely unlikely that any ESA listed whales will be exposed to pile driving noise associated with the EW2 cable landfall. No MMPA take of ESA listed whales was requested and NMFS OPR is not proposing to authorize any MMPA take of ESA listed whales for any pile driving associated with the EW2 cable landfall. Given the inshore location and very shallow depths (1 m or less) no ESA listed whales occur in the area where work will take place in association with Substation C (i.e., bulkhead repair and timber pile removal). No MMPA take of ESA listed whales was requested and NMFS OPR is not proposing to authorize any MMPA take of ESA listed whales for any activities at Substation C. We have reviewed the analysis and agree that the best available science supports the conclusion that exposure of any ESA listed whale to noise above the Level A or Level B thresholds for any pile driving activities to support EW1 or EW2 cable landfall, or other pile driving activities at SBMT or Substation C is extremely unlikely to occur. As such, effects of noise from activities at SBMT and Substation C on ESA listed marine mammals are discountable. No ESA take is anticipated to result from these activities.

We note that conditions of the proposed MMPA ITA include the use of PSOs to monitor clearance and shutdown zones for installation of sheet piles and casing pipe piles. For marine mammals, an area extending 1,600 m from the pile being installed will be monitored prior to pile driving and no pile driving will occur if a large whale is observed in this area. Similarly, pile driving will be shutdown if a large whale enters that area during active pile driving. The use of PSOs to monitor these areas and implement clearance and shutdown procedures further reduces the already extremely low potential for exposure of ESA listed whales to noise from these activities.

To estimate the probability of exposure of animals to sound above NMFS' harassment thresholds during foundation installation, JASCO's Animal Simulation Model Including Noise Exposure (JASMINE) was used to integrate the sound fields generated from the source and propagation models described above with species-typical behavioral parameters (*e.g.*, dive patterns). Sound exposure models such as JASMINE use simulated animals (animats) to sample the predicted 3-D sound fields with movement rules derived from animal observations. Animats that exceed NMFS' acoustic thresholds are identified and the range for the exceedances determined. The output of the simulation is the exposure history for each animat within the simulation. An individual animat's sound exposure levels are summed over a specific duration, (24 hrs), to determine its total received acoustic energy (SEL) and maximum received PK and SPL. These received levels are then compared to the threshold criteria within each analysis period. The combined history of all animats gives a probability density function of exposure during the project. The number of animals expected to exceed the regulatory thresholds is determined by scaling the number of predicted animat exposures by the species-specific density of animals in the area. By programming animats to behave like marine species that may be present near the Empire Wind Lease Area, the sound fields are sampled in a manner similar to that expected for real animals. The parameters used for forecasting realistic behaviors (*e.g.*, diving, foraging, and surface times) were determined and interpreted from marine species studies (*e.g.*, tagging studies) where available, or reasonably extrapolated from related species (Küsel *et al*., 2022). Note that animal aversion was not incorporated into the JASMINE model runs that were the basis for the take estimate for any species; that is, the models do not incorporate any animal movements or avoidance behavior that would be expected to result from exposure to underwater noise.

As described in Section 2.6 of JASCO's acoustic modeling report for Empire Wind (Küsel *et al*., 2022), for modeled animals that have received enough acoustic energy to exceed a given harassment threshold, the exposure range for each animal is defined as the closest point of approach (CPA) to the source made by that animal while it moved throughout the modeled sound field, accumulating received acoustic energy. OPR only used exposure ranges in the context of estimating exposure to noise above the cumulative Level A harassment threshold. The CPA for each of the species-specific animats during a simulation is recorded and then the CPA distance that accounts for 95 percent of the animats that exceed an acoustic impact threshold is determined. The $ER_{95\%}$ (95 percent exposure radial distance) is the horizontal distance that includes 95 percent of the CPAs of animats exceeding a given impact threshold. The $ER_{95\%}$ ranges are species-specific rather than categorized only by any functional hearing group, which allows for the incorporation of more species-specific biological parameters (*e.g.*, dive durations, swim speeds, etc.) for assessing the impact ranges into the model.

Empire Wind also calculated acoustic ranges which represent the distance to a harassment threshold based on sound propagation through the environment (*i.e.*, independent of any receiver). As described in the proposed MMPA ITA, NMFS OPR considers acoustic ranges ($R_{95\%}$) to the Level A harassment SELcum metric thresholds overly conservative as the accumulation of acoustic energy does not account for animal movement and behavior and therefore assumes that animals are essentially stationary at that distance for the entire duration of the pile installation, a scenario that does not reflect realistic animal behavior. Because NMFS Level A peak and Level B harassment thresholds are an instantaneous exposure, acoustic ranges are more relevant to the analysis.

In the proposed MMPA ITA, NMFS OPR presents exposure ranges to Level A harassment and Level B harassment thresholds, acoustic ranges to Level A peak and Level B harassment thresholds, densities, exposure estimates and take estimates from Empire Wind's WTG and OSS foundation installation considering the proposed construction schedule. As noted above, NMFS OPR used acoustic ranges to calculate exposure above the Level A peak and Level B harassment thresholds and species specific exposure ranges are used to calculate exposure above the Level A cumulative threshold. Table 7.1.12 and Table 7.13 provide exposure ranges to the cumulative Level A harassment threshold for the 9.6-m monopile (typical and difficult-to-drive), 11-m monopile (normal soil conditions), and OSS foundation pin piles, respectively, assuming 10 dB attenuation for summer and winter. Tables 16 and 17 in the proposed MMPA ITA provide exposure ranges for the 11m piles installed in soft and softer soil conditions in summer and winter, assuming 10 dB attenuation. Table 21 in the proposed MMPA ITA provides relevant acoustic ranges (Level A peak and Level B harassment); see table 7.1.14 below.

Table 7.1.12. Exposure ranges ($ER_{95\%}$) in km to the cumulative Level A harassment threshold for 9.6-m monopile (typical and difficult-to-drive) and 11-m monopile (normal soil conditions) assuming 10 dB attenuation for summer and winter.

Species		9.6 m diameter								11 m (normal soil conditions)			
		Typical (summer)		Typical (winter		Difficult to drive (summer)		Difficult to drive (winter)		Summer		winter	
		One pile per day	Two piles per day	One pile per day	Two piles per day	One pile per day	Two piles per day	One pile per day	Two piles per day	One pile per day	Two piles per day	One pile per day	Two piles per day
LF	Fin Whale	0.86	0.94	0.88	1.01	1.35	1.84	1.8	1.95	0.87	0.83	0.87	0.82
	North Atlantic Right Whale	0.33	0.47	0.43	0.47	1.09	1.13	1.13	1.19	0.2	0.44	0.2	0.44
	Sei Whale	0.43	0.54	0.43	0.58	1.04	1.21	1.24	1.29	0.44	0.27	0.44	0.41
MF	Sperm Whale	0	0	0	0	0	0	0	0	0	0	0	0

source: 88 FR 22696

As shown in the tables above, modeling results indicated that exposure ranges associated with the 9.6-m diameter typical monopile scenario were predominantly greater than for the 11-m diameter monopile scenarios. While larger diameter monopiles can be associated with greater resulting sound fields than smaller diameter piles, in this case, the 11-m diameter monopile scenarios resulted in smaller modeled acoustic ranges than the 9.6-m diameter monopile scenarios likely because the 11-m monopile would only be installed in softer sediments which would require less hammer energy and/or number of hammer strikes for installation than the 9.6-m diameter pile in harder sediments.

Table 7.1.13 -- Exposure Ranges ($ER_{95\%}$ in km) to cumulative Level A Harassment threshold for Impact Pile Driving of 2.5-m Diameter OSS Foundations (Summer and Winter), Assuming 10 dB Attenuation

Species		**OSS 1 Foundation (in km)**				**OSS 2 Foundation (in km)**			
		Two pin piles per day		**Three pin piles per day**		**Two pin piles per day**		**Three pin piles per day**	
		summer	**Winter**	**summer**	**winter**	**summer**	**winter**	**summer**	**winter**
LF	Fin Whale	0	0	0	0.18	0	0	0	0
	North Atlantic Right Whale	0	0	0	0	0	0	0	0
	Sei Whale	<0.01	0	<0.01	<0.01	0	0	0	0
MF	Sperm Whale	0	0	0	0	0	0	0	0

Note: LF = low-frequency cetaceans; MF = mid-frequency cetaceans;
source: 88 FR 22696

Table 7.1.14 Maximum Acoustic Ranges ($R_{95\%}$) to peak Level A Harassment and Level B Harassment Thresholds (160 dB SPL) for 9.6-m WTG monopile (typical and difficult to drive scenarios), 11-m WTG monopile, and 2.5-m OSS pin piles (summer and winter), Assuming 10-dB Attenuation

Foundation Type	Marine Mammal Group	Level A harassment Pk (in km)		Level B harassment 160 dB SPL (in km)	
		$R_{95\%}$ (Summer)	$R_{95\%}$ (Winter)	$R_{95\%}$ (Summer)	R_{95} (Winter)
WTG - 9.6-m monopile: typical (difficult)	LF	–[b] (–[b])	–[b] (–[b])	3.51 (5.05)	3.77 (5.49)
	MF	–[b] (–[b])	–[b] (–[b])		
WTG - 11-m monopiles	LF	–[b]	–[b]	3.64	3.92
	MF	–[b]	–[b]		
OSS - 2.5-m pin pile [a]	LF	–[b]	–[b]	1.19	1.17
	MF	–[b]	–[b]		

LF = low-frequency cetaceans; MF = mid-frequency cetaceans;
a - Assumes a 2dB post-piling shift.
b - A dash (-) indicates that the threshold was not exceeded..

source: 88 FR 22696

As illustrated in the Table above, modeling indicates that noise above the peak Level A harassment threshold is not exceeded for any pile driving scenarios in summer or winter with 10 dB attenuation. As such, no noise above the Level A peak thresholds is anticipated.

As noted above, all possible construction scenarios were modeled (i.e., one monopile/two pin piles per day, one monopile/three pin piles per day, two monopiles/two pin piles per day, two monopiles/three pin piles per day). In their application, Empire explains that the resulting exposure estimates for Level A harassment were very similar across all modeled construction scenarios. Exposure estimates for Level B harassment were greater for the schedules that had more days of pile driving. As such, to ensure that take was not underestimated, the construction scenario with one monopile and two pin piles installed per day was carried forward for purposes of the exposure analysis presented in the application. To estimate the number of fin, right, sei, and sperm whales exposed to noise above the Level A cumulative and Level B harassment thresholds, construction schedule 1 was used.

Exposure estimates were calculated for marine mammals based on proposed construction schedules and resulting density calculations. Empire Wind applied densities within grid cells within the lease area and extending 10 km beyond the lease area. The resulting monthly densities used are provided in Table 22 in the proposed MMPA ITA (a portion of which is replicated in Table 7.15 below).

Table 7.1.15 Mean Monthly Marine Mammal Density Estimates within a 10 km Buffer around OCS-A 0512 Lease Area

Species	Monthly densities (animals/100 km^2)[1]					
	Jun	Jul	Aug	Sep	Oct	Nov
Fin whale	0.171	0.157	0.1	0.055	0.04	0.038
North Atlantic right whale	0.006	0.003	0.003	0.004	0.008	0.016
Sei whale	0.011	0.002	0.002	0.005	0.013	0.037
Sperm whale	0.011	0.011	0.015	0.003	0	0.008

1 - Density estimates are from habitat-based density modeling of the entire Atlantic Exclusive Economic Zone (Roberts and Halpin, 2022). source: 88 FR 22696

Empire Wind has developed a construction schedule that was used in the take estimates for the MMPA ITA. Empire Wind assumed that a maximum of 24 monopiles could be installed per month, with a maximum of 96 WTG monopiles and two OSS foundations installed in the first year and the remaining 51 WTG monopile foundations installed in year 2. In Year 1, Empire Wind assumed that 24 monopiles would be installed in the four highest density months for each species during the May to December period and the two OSSs would be installed in the highest and second highest density months. Empire Wind also assumed that all 17 difficult-to-drive piles would be installed in the first year but the distribution would be spread relatively evenly among the four highest months (*i.e*., four piles per month except the highest density month which assumed 5 difficult-to-drive piles for a total of 17 piles). In the second year, 24 monopiles would be installed in the two highest density months and the remaining 3 monopiles would be installed in the third highest density month. This approach is reflected in Table 7.1.16 (see also Table 23 in the proposed MMPA ITA). This results in take calculations where each species was presumed to be exposed to the maximum amount of pile driving based on their monthly densities.

Table 7.1.16 Construction Schedule Used for Estimating Level B Harassment (One Monopile per Day/Two Pin Piles per Day)[1] for the MMPA ITA

Foundation Type	**Year 1**				**Year 2**			
	Monthly Density				**Monthly Density**			
	Highest	**Second**	**Third**	**Fourth**	**Highest**	**Second**	**Third**	**Fourth**
WTG monopile – typical	19	20	20	20	24	24	3	0
WTG monopile - difficult	5	4	4	4	0	0	0	0
OSS 1 pin pile	0	6	0	0	0	0	0	0
OSS 2 pin pile	6	0	0	0	0	0	0	0
Total # of piles	30	30	24	24	24	24	3	0

1-Maximum number of piles to be driven per month for each foundation type in each of the four highest density months for each species during May to December pile driving period.
Source: Table 23 in the proposed MMPA ITA

Empire Wind conducted exposure modeling to estimate potential exposures by Level A harassment and Level B harassment incidental to installation of WTG and OSS foundations.

Tables 7.1.17 and 7.1.18 show calculated exposures for Year 1 and Year 2 respectively based on the methodologies and assumptions described above.

Table 7.1.17 Calculated Exposures and Requested Take by Level A Harassment and Level B Harassment Resulting from Monopile and OSS Foundation Installation for Year 1 of Impact Pile Driving

Hearing Group	Species	Calculated Exposure		Calculated Exposure	Requested Take	Requested Take
		Level A harassment		Level B harassment	Level A harassment	Level B harassment
		LE	LpK	Lp		
LF	Fin	1.15	0	8.78	1	133 [a]
	North Atlantic Right Whale	0.01	0	2.36	0	11[c]
	Sei	0.27	<0.01	2.78	0	3
MF	Sperm whale	0	0	0.56	0	3 [b]

Note: LF = low-frequency cetaceans; MF = mid-frequency cetaceans;
a - Requested take adjusted based on PSO sighting data from 2018-2021 (A.I.S., 2019; Alpine Ocean Seismic Survey, 2018; Gardline, 2021a,b; Geoquip Marine, 2021; Marine Ventures International, 2021; RPS, 2021; Smultea Environmental Sciences, 2019, 2020, 2021); 1.11 fin whales per day
b - Requested take adjusted based on 1 group size per year as follows: 3 sperm whales (Barkaszi *et al*., 2019)
c - Requested take adjusted by 1 (monthly density < 0.01) or 2 (monthly density > 0.01) of North Atlantic right whales (Roberts and Halpin, 2022).
Source: Table 24 in the Proposed MMPA ITA

Table 7.1.18 Calculated Exposures and Requested Take by Level A and Level B Harassment Resulting from Monopile and OSS Foundation Installation for Year 2 of Impact Pile Driving

Hearing Group	Species	Calculated Take		Calculated Take	Requested Take	Requested Take
		Level A harassment		Level B harassment	Level A harassment	Level B harassment
		LE	LpK	Lp		
LF	Fin	0.52	0	4.00	1	57[a]
	North Atlantic Right Whale	0.05	0	1.57	0[g]	11 [c]

	Sei	0.16	0	1.66	0	2
MF	Sperm whale	0	0	0.29	0	3[b]

Note: LF = low-frequency cetaceans; MF = mid-frequency cetaceans;
a - Requested take adjusted based on PSO sighting data from 2018-2021 (A.I.S., 2019; Alpine Ocean Seismic Survey, 2018; Gardline, 2021a,b; Geoquip Marine, 2021; Marine Ventures International, 2021; RPS, 2021; Smultea Environmental Sciences, 2019, 2020, 2021); 1.11 fin whales per day
b - Requested take adjusted based on 1 group size per year as follows: 3 sperm whales (Barkaszi *et al*., 2019)
c - Requested take adjusted by 1 (monthly density < 0.01) or 2 (monthly density > 0.01) of North Atlantic right whales (Roberts and Halpin, 2022).
Source: Table 24 in the Proposed MMPA ITA

In the proposed MMPA ITA, OPR explains that review of Empire Wind's PSO sightings data ranging from 2018–2021 for the Project Area indicated that exposure estimates based on the exposure modeling methodology above were likely an underestimate for fin whales (A.I.S. 2019; Alpine Ocean Seismic Survey 2018; Gardline 2021a,b; Geoquip Marine 2021; Marine Ventures International 2021; RPS 2021; Smultea Environmental Sciences 2019, 2020, 2021). PSO sightings data were analyzed to determine the average number of each species sighted per day during high-resolution geophysical (HRG) surveys in the Project Area. Results indicated that the highest average sightings-per-day rate among PSO reports from 2018-2021 was 1.11 fin whales (Alpine Ocean Seismic Survey 2018) sighted per day. These highest daily averages per day were then multiplied by the maximum potential number of days of pile driving associated with wind turbine and offshore substation foundation installation for these species. In the event that one monopile or one pin pile is installed per day, up to 120 days of pile driving (*i.e.*, 96 days of monopile installation and 24 days of pin pile installation) could occur in year 1 and up to 51 days of pile driving (*i.e.*, 51 days of monopile installation) could occur in year 2.

At a rate of 1.11 fin whales per day, 120 days of pile driving in year 1 resulted in an estimated 133 takes by level B harassment in that year, and 51 days of pile driving in year 2 resulted in an estimated 56.6 (rounded to 57) takes by level B harassment in that year. Since these alternate estimates of take by Level B harassment for fin whales are higher than numbers calculated based on the exposure analysis method described above, Empire Wind has requested, and NMFS is proposing to authorize, take by Level B harassment for fin whales (133 in year 1of pile driving; 57 in year 2 of pile driving) based on this alternate take calculation method.

Calculated take by Level B harassment for North Atlantic right whales was adjusted to one group size per month. A group size of 1 animal was used for months with mean monthly densities less than 0.01, while a group size of 2 animals, reflective of the potential for a mother and calf, was used for months with mean monthly densities greater than 0.01 based on the Roberts and Halpin 2022 predictive densities. For the months when pile driving activities may occur (May through December), those criteria result in a group size of 1 animal for the months of June through October and 2 animals for the months of May, November, and December. Based on consideration of group size, Empire Wind requested and NMFS is proposing to authorize 11 takes of North Atlantic right whale by Level B harassment per year of foundation pile driving (22 total).

Following publication of the proposed MMPA ITA, NMFS OPR determined that given the available information on fin whales in the area, inclusive of consideration of the PSO sightings data above, group size, and the nearby fin whale BIA, it would be appropriate to revise the amount of fin whale take during foundation installation from 1 to 4 fin whales in year 1 and 1 to 2 fin whales in year 2.

Table 7.1.19 Total Take Proposed for Authorization by Level A and Level B Harassment in the MMPA ITA Resulting from Monopile and OSS Foundation Installation Impact Pile Driving (Two Years of Pile Driving)

Hearing Group	**Species**	**Level A harassment**	**Level B harassment**
LF	Fin	6*	190
	North Atlantic Right Whale	0	22
	Sei	0	5
MF	Sperm whale	0	6

*fin whales takes were adjusted after the proposed rule was published

7.1.3.1 Consideration of Proposed Measures to Minimize Exposure of ESA Listed Whales to Pile Driving Noise

Here, we consider the measures that are part of the overall proposed action, either because they are proposed by Empire Wind in the COP, by BOEM as described in the BA regarding potential COP approval conditions, or by NMFS OPR as requirements of the proposed ITA. We also consider how those measures may serve to minimize exposure of ESA listed whales to pile driving noise. Details of these proposed measures are included in section 3 above.

Seasonal Restriction on Impact Pile Driving of Foundations

No impact pile driving activities would occur between January 1 and April 30 to avoid the time of year with the highest densities of right whales in the WDA. This seasonal restriction is factored into the acoustic modeling that supported the development of the amount of take proposed in the ITA. That is, the modeling does not consider any impact pile driving in the January 1 – April 30 period. Thus, the take estimates do not need to be adjusted to account for this seasonal restriction. While pile driving is not planned in December it may occur if delays have prevented completion of all pile driving before December 1. As pile driving may occur in December, December was not excluded from the analysis.

Sound Attenuation Devices and Sound Field Verification

For all impact pile driving, Empire Wind would implement sound attenuation technology that would target at least a 10 dB reduction in pile driving noise; BOEM is requiring that the noise mitigation device(s) perform such that measured ranges to the Level A and Level B harassment thresholds are consistent with (i.e., no larger than) those modeled assuming 10 dB attenuation, determined via sound source verification. This requirement is also proposed in the MMPA ITA. Together, the purpose of the requirements to utilize sound attenuation devices (also referred to as noise or sound mitigation measures) and sound field verification (i.e, in situ noise monitoring during pile driving) are to ensure that Empire Wind does not exceed the distances to the Level A and Level B harassment thresholds for ESA listed marine mammals (modeled assuming 10 dB attenuation). The sound field verification related measures are based on the expectation that Empire's initial pile driving methodology and sound attenuation measures will result in noise levels that do not exceed the identified distances (as modeled assuming 10dB attenuation) but, if that is not the case, provide a step-wise approach for modifying or adding sound attenuation measures that can reasonably be expected to achieve those metrics prior to the next pile being driven.

The 10 dB attenuation was incorporated into the take estimate calculations presented above. Thus, the take estimates do not need to be adjusted to account for the use of sound attenuation. If a reduction greater than 10 dB is achieved, the actual amount or extent of take could be lower as a result of resulting smaller distances to thresholds of concern. In section 7.1.2, we provided an explanation for why it is reasonable to expect that 10 dB of sound attenuation for impact pile driving can be achieved.

Through conditions of the proposed ITA and conditions of the proposed COP approval, Empire Wind will conduct sound field verification for at least the first three monopiles. Empire Wind is also required to conduct sound field verification of any additional monopiles in locations that are not represented by the previous locations where sound field verification was carried out. Details of the required sound field verification are included in the proposed MMPA ITA.

The required sound field verification will provide information necessary to confirm that the sound source characteristics predicted by the modeling are reflective of actual sound source characteristics in the field. As described in the proposed MMPA ITA, if sound field verification measurements on any of the first three monopiles, or the first jacket foundation for the OSS, indicate that the ranges to Level A harassment and Level B harassment isopleths are larger than those modeled, assuming 10-dB attenuation, Empire Wind must modify and/or apply additional or alternative noise attenuation measures or modify operations (e.g., improve efficiency of bubble curtain(s), modify the piling schedule to reduce the source sound, install an additional noise attenuation device) before the next pile is installed. Until sound field verification confirms the ranges to Level A harassment and Level B harassment isopleths are less than or equal to those modeled, assuming 10-dB attenuation, the shutdown and clearance zones must be expanded such that the clearance and shutdown zones are at least as large as the relevant Level A harassment zones, considering peak and cumulative thresholds. If the application/use of additional noise attenuation measures still does not achieve ranges less than or equal to those modeled, assuming 10-dB attenuation, and no other actions can further reduce sound levels, Empire Wind must expand the clearance and shutdown zones according to those identified through sound field verification, in coordination with NMFS OPR. In the event that noise attenuation measures and/or adjustments to pile driving cannot reduce the distances to less than or equal to those modeled, this may be considered new information that reveals effects of the action that may affect listed species in a manner or to an extent not previously considered and reinitiation of this consultation is expected to be necessary, consistent with 50 CFR 402.16.

Clearance and Shutdown Zones
As described in Section 3, Empire Wind proposed as part of the COP and BOEM and NMFS OPR are proposing to require monitoring of clearance and shutdown zones before and during impact pile driving. In addition to the clearance and shutdown zones, the MMPA ITA identifies minimum visibility zones (1,500 m) for pile driving of WTG and OSS foundations. This is the distance from the pile that the visual observers must be able to effectively monitor for marine mammals; that is, lighting, weather (e.g., rain, fog, etc.), and sea state must be sufficient for the observer to be able to detect a marine mammal within that distance from the pile. The clearance zone is the area around the pile that must be declared "clear" of marine mammals and sea turtles prior to the activity commencing. The size of the zone is measured as the radius with the impact activity (i.e., pile) at the center. For marine mammals, both visual observers and passive acoustic monitoring (PAM, which detects the sound of vocalizing marine mammals) will be used; the area is determined to be "cleared" when visual observers have determined there have been no sightings of marine mammals in the identified area for a prescribed amount of time and, for North Atlantic right whales in particular, if no right whales have been visually observed in any area beyond the minimum clearance zone that the visual observers can see. Further, the PAM operator will declare an area "clear" if they do not detect the sound of vocalizing right whales within the identified PAM clearance zone for the identified amount of time. Pile driving cannot commence until all of these clearances are made.

Once pile driving begins, the shutdown zone applies. If a marine mammal is observed by a visual PSO entering or within the respective shutdown zones after pile driving has commenced, an immediate shutdown of pile driving will be implemented unless Empire Wind and/or its contractor determines shutdown is not feasible due to an imminent risk of injury or loss of life to an individual; or risk of damage to a vessel that creates risk of injury or loss of life for individuals (see section 3.0 for more information). For right whales, shutdown is also triggered by: the visual PSO observing a right whale at any distance (i.e., even if it is outside the shutdown zone identified for other whale species), and a detection by the PAM operator of a vocalizing right whale at a distance determined to be within the identified PAM shutdown zone.

Table 7.1.20. Proposed Clearance and Shutdown Zones

Species	Clearance Zone (m)	Shutdown Zone (m)
Impact pile driving for WTG and OSS Foundations		
North Atlantic right whale – visual PSO	Minimum visibility zone (1,500 m) plus any additional distance observable by the visual PSOs	Minimum visibility zone (1,500 m) plus any additional distance observable by the visual PSOs
North Atlantic right whale – PAM	5,000	1,500
fin, sei, and sperm whale – monitored by visual PSOs and PAM	2,000	1,500

Note that these are in addition to a minimum visibility zone of 1,500 m. Zone sizes identified here are those described in the proposed MMPA ITA and BOEM's BA.

For impact pile driving for WTG and OSS foundations, clearance zones will be monitored by at least two PSOs at the pile driving platform and at least two PSOs actively observing on a dedicated PSO vessel. All distances to the edge of clearance zones are the radius from the center of the pile. The proposed clearance zones are larger than the modeled distances to the isopleths corresponding to Level A harassment (considering peak and cumulative thresholds) for all ESA listed whales. The PSO vessel will be located at a distance from the pile that maximizes the opportunity for effective visual observation of the clearance and shutdown zone, likely approximately 1,500 - 2,000 m from the pile. The PSOs would be required to maintain watch at all times when impact pile driving of monopiles is underway. Concurrently, at least one PAM operator would be actively monitoring for marine mammals before, during, and after pile driving (more information on PAM is provided below). PSOs would visually monitor for marine mammals for a minimum of 60 minutes while PAM operators would review data from at least 24 hours prior to pile driving and actively monitor hydrophones for 60 minutes prior to pile driving. Prior to initiating soft-start procedures, the PSO must confirm that the relevant clearance zones have been free of marine mammals for at least the 30 minutes immediately prior to starting a soft-start of pile driving. For fin, sei, and sperm whales, this means that the PSOs have not seen any individuals within the 2,000 m clearance zone or detected any vocalizations from those species within that zone. For right whales, this means that the PSO has not seen any right whales in the 2,000 m clearance zone plus any additional distance that they can see beyond the 1,500 m minimum visibility zones (considering both sets of PSOs, this would extend at least 3,000 m from the pile). Similarly, the PAM operator must confirm that there have been no detections of vocalizing right whales in the PAM clearance zone (5,000 m from the pile) for the preceding 60 minutes. If a visual PSO observes a marine mammal entering or within the relevant clearance zone, or the PAM operator detects a right whale within the PAM clearance zone prior to the initiation of impact pile driving activities, pile driving must be delayed and will not begin until either the marine mammal(s) has voluntarily left the clearance zone and has been visually or acoustically confirmed beyond that clearance zone, or, when 30 minutes have elapsed with no further sightings or acoustic detections. Pile driving must only commence when lighting, weather (e.g., rain, fog, etc.), and sea state have been sufficient for the observer to be able to detect a marine mammal within the identified minimum visibility distances for at least 30 minutes (i.e., clearance zone is fully visible for at least 30 minutes). As required by the proposed MMPA ITA, any large whale sighted by a PSO or acoustically detected by a PAM operator that cannot be identified as a species other than a North Atlantic right whale must be treated as if it were a North Atlantic right whale.

As described above, unless an alternative monitoring plan is approved by BOEM, NMFS OPR, and NMFS GARFO and that plan demonstrates that PSOs working at night can observe the clearance and shutdown zones as well at night as during the day, pile driving would not be initiated at night, or, when conditions prevent the full extent of all relevant clearance zones to be confirmed to be clear of marine mammals, as determined by the lead PSO on duty. The requirement for the minimum visibility zones for WTG and OSS foundations and requirement that PSOs be working from two platforms (two near the pile driving platform, two on a vessel at a distance from the pile), makes it reasonable to expect that the full extent of the clearance zones are expected to be able to be observed. The clearance zones may only be declared clear, and pile driving started, when the full extent of all clearance zones are visible (*i.e.*, when not obscured by dark, rain, fog, etc.) for a full 30 minutes prior to pile driving. To ensure adequate visibility for PSOs, impact pile driving may commence only during daylight hours and no earlier than one hour after civil sunrise. Impact pile driving may not be initiated any later than 1.5 hours before civil sunset and may continue after dark only when the installation of that pile began during daylight hours, and must proceed for human safety or installation feasibility reasons (i.e., stopping would result in pile refusal or pile instability that would risk human life). Pile driving may continue after dark only when the driving of the same pile began during the day when clearance zones were fully visible and it was anticipated that pile installation could be completed before sundown. Given that the time to install the pile is expected to be predictable, we expect these instances of pile driving taking longer than anticipated to be very rare.

For impact pile driving, monitoring of the clearance zones by PSOs at the stationary platform and PSO vessel will be supplemented by real-time passive acoustic monitoring (PAM). PAM systems are designed to detect the vocalizations of marine mammals, allowing for detection of the presence of whales underwater or outside of the range where a visual observer may be able to detect the animals. Monitoring with PAM not only allows for potential documentation of any whales exposed to noise above thresholds of concern that were not detected by the visual PSOs but also allows for greater awareness of the presence of whales in the project area. As with the monitoring data collected by the visual PSOs, this information can be used to plan the pile driving schedule to minimize pile driving at times when whales are nearby and may be at risk of exposure to pile driving noise. The PAM system will be designed and established such that calls can be localized within 5 km from the pile driving location and to ensure that the PAM operator is able to review acoustic detections within 15 minutes of the original detection. If the PAM operator has confidence that a vocalization originated from a right whale located within the PAM clearance zone (see Table 7.1.20 above), the appropriate associated clearance or shutdown procedures must be implemented (i.e., delay or stop pile driving). More details on PAM operator training and PAM protocols are included in the Notice of Proposed ITA (88 FR 22696).

If an ESA listed whale is observed entering or within the identified shutdown zone (see Table 7.1.20) after pile driving has begun, a shutdown must be implemented. The purpose of a shutdown is to prevent a specific acute impact, such as auditory injury or severe behavioral disturbance of sensitive species, by halting the activity. Additionally, pile driving must be halted upon visual observation of a North Atlantic right whale by PSOs at any distance from the pile, or upon a confirmed PAM detection of a North Atlantic right whale within the shutdown zone. If a marine mammal is observed entering or within the respective shutdown zone after impact pile driving has begun, the PSO will request a temporary cessation of impact pile driving. In situations when shutdown is called for but Empire Wind determines shutdown is not feasible due to imminent risk of injury or loss of life to an individual, or risk of damage to a vessel that creates risk of injury or loss of life for individuals, reduced hammer energy must be implemented. As described in section 3.3, in rare instances, shutdown may not be feasible, as shutdown would result in a risk to human life. Specifically, pile refusal or pile instability could result in not being able to shut down pile driving immediately. Pile refusal occurs when the pile driving sensors indicate the pile is approaching refusal (i.e., the limits of installation), and a shutdown would lead to a stuck pile which then poses an imminent risk of injury or loss of life to an individual, or risk of damage to a vessel that creates risk for individuals. Pile instability occurs when the pile is unstable and unable to stay standing if the piling vessel were to “let go.” During these periods of instability, the lead engineer may determine a shut-down is not feasible because the shut-down combined with impending weather conditions may require the piling vessel to “let go,” which then poses an imminent risk of injury or loss of life to an individual, or risk of damage to a vessel that creates risk for individuals as it means the pile would be released while unstable and could fall over. As explained in section 3 and above, the likelihood of shutdown being called for and not implemented is considered very low.

After shutdown, impact pile driving may be restarted once all clearance zones are clear of marine mammals for the minimum species-specific periods, or, if required to maintain pile stability, at which time the lowest hammer energy must be used to maintain stability. If pile driving has been shut down due to the presence of a North Atlantic right whale, pile driving may not restart until the North Atlantic right whale is no longer observed or 30 minutes has elapsed since the last detection. Upon re-starting pile driving, soft start protocols must be followed.

Consideration of the Effectiveness of Clearance and Shutdown Zones

As explained above, noise above the Level A peak harassment threshold is not anticipated to occur during pile driving for the WTG or OSS foundations. The clearance zone is larger than the modeled exposure ranges to the Level A cumulative threshold for all species. Pile driving cannot begin if a whale is detected by the visual PSOs within the clearance zone. Considering the minimum visibility requirement of 1.5 km and placement of visual PSOs at the pile driving platform and on a vessel approximately 1.5 km from the pile being driven and with a visual range of another at least 1.5km, we expect that an area of at least 3 km from the pile will be able to be effectively monitored for ESA listed whales by the visual PSOs. Given the visibility requirements and the ability of the PSOs to monitor the entirety of the clearance zone, it is unlikely that any pile driving would begin with a whale within the clearance zone.

Modeling predicted the exposure of a small number of fin whales to noise above the cumulative Level A harassment threshold. Considering the modeled species-specific exposure range, a fin whale approaching within 1 km of a typical monopile (9.6 or 11 m diameter) or within 1.35-1.95 of a difficult to drive monopile (dependent on number driven per day and season) is expected to have been exposed to enough pile driving noise over the course of the pile driving events that day to experience PTS. For some difficult to drive piles, the distance to the cumulative Level A threshold for fin whales exceeds the size of the shutdown zone (1.5 km). As such, shutdown is not expected to prevent all exposure of fin whales to noise above the cumulative Level A harassment threshold. This was considered in the proposed authorization of the take of 6 fin whales by Level A harassment in the proposed MMPA ITA.

Modeling predicts the exposure of 0.06 right whales and 0.43 sei whales above the cumulative Level A harassment threshold over the two years of pile driving. The model does not consider the pre-start clearance or shutdown requirements. For sei, right, and sperm whales, the clearance and shutdown zone exceeds the modeled distances to the Level A harassment threshold for all piles to be installed (note that the distance to the Level A threshold for sperm whales is not exceeded at any distance from the pile). As explained above, we do not expect pile driving to begin if a whale is within the clearance zone. Even considering that there may be a brief delay between a PSO detecting a whale within the shutdown zone and shutdown occurring, we do not expect any instances where a whale is close enough to the pile for a long enough period such that it would actually be exposed to noise above the cumulative Level A threshold. As such, exposure of any sei or right whales to noise above the Level A thresholds is extremely unlikely to occur and PTS is also extremely unlikely to occur and is not anticipated.

The proposed action incorporates additional measures to further reduce the already very low risk of exposure to noise that could result in PTS for right whales. Based on the best available data NMFS expects that North Atlantic right whales to be present in the WDA predominantly from January – April (Roberts et al. 2022), with the highest density months outside of that period being May and December. Due to this seasonal pattern in North Atlantic right whale occurrence in the project area, we expect the most significant measure to minimize impacts to North Atlantic right whales is the prohibition on impact pile driving from January through April, when North Atlantic right whale abundance in the project area is greatest. During impact pile driving, PSOs and PAM will be used to monitor clearance and shutdown zones for right whales. As explained above, the visual and PAM clearance and shutdown zones proposed by BOEM and NMFS OPR, and part of the proposed action, are larger than the distance to the Level A cumulative harassment threshold. Pile driving cannot begin if a right whale is detected via PAM within 5,000 m of the pile or is detected by the visual PSOs at any distance from the pile to be driven, even beyond the identified 2,000 m clearance zone. Considering placement of visual PSOs at the pile driving platform and on a vessel approximately 1.5 km from the pile being driven and with a visual range of another at least 1.5km, we expect that an area of at least 3 km from the pile will be able to be effectively monitored for right whales by the visual PSOs; on days when visibility is better than the minimum visibility requirements the area able to be monitored is likely to be even larger. Visual monitoring will be supplemented by PAM, which has the potential to detect vocalizing right whales that are too far away to be seen by the visual observer or that are submerged. These right whale specific measures effectively extend the clearance zone well beyond the distance to the cumulative Level A threshold (nearly 10x for typical piles and nearly 5x for difficult to drive piles). In the event that shutdown cannot occur (i.e., to prevent imminent risk of injury or loss of life to an individual, or risk of damage to a vessel that creates risk for individuals), the energy that the pile driver operates at will be reduced. The lower energy results in less noise and shorter distances to thresholds. As such, even if shutdown cannot occur, we do not expect that a right whale would remain close enough to the pile being driven for a long enough period to be exposed to noise above the Level A cumulative harassment threshold. We expect that these measures in combination with the requirements for monitoring North Atlantic right whale sightings reports, which increases awareness of potential North Atlantic right whales in the WDA, and the low density of right whales in the WDA when pile driving could occur make it extremely unlikely that any of the modeled exposure to noise above the Level A threshold, which already were small fractions of individuals (0.01 right whales in year 1 of pile driving and 0.05 right whales in year 2 of pile driving) will occur. As a result of these mitigation measures, and in light of our independent review, we agree with BOEM's and NMFS OPR's determinations that the already small potential for North Atlantic right whales to be exposed to project-related sound above the Level A cumulative harassment threshold is extremely unlikely to occur. As such, as stated above, it is extremely unlikely that any right whales will experience permanent threshold shift or any other injury.

Given that the size of the area with noise above the Level B harassment threshold is larger than the clearance and shutdown zone, the exclusion and shutdown procedures may limit the duration of exposure of fin, right, sei, and sperm whales to noise above the Level B harassment thresholds; however, they are not expected to eliminate the potential for exposure to noise above the Level B harassment threshold. We also note that not all whales that are exposed to noise above the Level B harassment threshold are likely to be observed by the PSOs. Therefore, we cannot reduce or refine the take estimates based on the Level B harassment thresholds in consideration of the effectiveness of the clearance zone. We anticipate that, as modeled and presented in the Proposed ITA and BA, up to 190 fin, 22 right, 8 sei, and 6 sperm whales may be exposed to noise above the Level B threshold during the installation of monopiles.

Soft Start

As described in the Notice of Proposed ITA, the use of a soft start procedure is believed to provide additional protection to marine mammals by warning marine mammals or providing them with a chance to leave the area prior to the hammer operating at full capacity, and typically involves a requirement to initiate sound from the hammer at reduced energy followed by a waiting period. Empire Wind will utilize soft start techniques for impact pile driving including by performing 4-6 strikes per minute at 10 to 20 percent of the maximum hammer energy (i.e., 400 to 800 KJ), for a minimum of 20 minutes. Soft start, which we consider part of the proposed action, would be required at the beginning of each day's impact pile driving work and at any time following a cessation of impact pile driving of thirty minutes or longer. Without soft start procedures, pile driving would begin with full hammer energy, which would present a greater risk of more severe impacts to more animals. In this context, soft start is a mitigation measure designed to reduce the amount and severity of effects incidental to pile driving.

Use of a soft start can reduce the cumulative sound exposure if animals respond to a stationary sound source by swimming away from the source quickly (Ainslie et al. 2017). The result of the soft start will be an increase in underwater noise in an area radiating from the pile that is expected to exceed the Level B harassment threshold and, therefore, is expected to cause any whales exposed to the noise to swim away from the source. The use of the soft start gives whales near enough to the piles to be exposed to the soft start noise a "head start" on escape or avoidance behavior by causing them to swim away from the source. Through use of soft start, marine mammals are expected to move away from a sound source that is annoying, thereby avoiding exposure resulting in a serious injury and avoiding sound sources at levels that would cause hearing loss (Southall et al. 2007, Southall et al. 2016). It is possible that some whales may swim out of the noisy area before full force pile driving begins; in this case, the risk of whales being exposed to noise that exceeds the cumulative Level A harassment threshold would be reduced. It is likely that by eliciting avoidance behavior prior to full power pile driving, the soft start will reduce the duration of exposure to noise that could result in Level A or Level B harassment. However, we are not able to predict the extent to which the soft start will reduce the number of whales exposed to pile driving noise or the extent to which it will reduce the duration of exposure. Therefore, while the soft start is expected to reduce the duration of exposure of pile driving noise, the level of reduction is uncertain, and we are not able to modify the estimated take numbers to account for any benefit provided by the soft start.

7.1.3.2 Effects to ESA-Listed Whales from Exposure to Pile Driving Noise
As explained above, we anticipate that up to 6 fin whales will be exposed to noise above the Level A harassment threshold and up to 190 fin, 22 right, 5 sei, and 6 sperm whales will be exposed to noise above the Level B harassment threshold. Consequences of that exposure are addressed here.

Effects of Exposure to Noise Above the Level A Harassment Threshold
As explained above, up to six fin whales are expected to be exposed to impact pile driving noise that is loud enough to result in Level A harassment in the form of permanent threshold shift. Consistent with OPR's determination in the notice of proposed ITA, in consideration of the duration and intensity of noise exposure we expect that the consequences of exposures above the Level A harassment threshold would be in the form of slight permanent threshold shift (PTS). PTS would consist of minor degradation of hearing capabilities occurring predominantly at frequencies one-half to one octave above the frequency of the energy produced by pile driving (*i.e.*, the low-frequency region below 2 kHz) (Cody and Johnstone, 1981; McFadden, 1986; Finneran, 2015), not severe hearing impairment. If hearing impairment occurs, it is expected that the affected animal would lose a few decibels in its hearing sensitivity, which is not likely to meaningfully affect its ability to forage and communicate with conspecifics, or detect environmental cues, i.e. minor degradation of hearing capabilities within regions of hearing that align most completely with the energy produced by pile driving (i.e. the low-frequency region below 2 kHz), not severe hearing impairment. If hearing impairment occurs, it is most likely that the affected animal would lose a few decibels in its hearing sensitivity, which, given the limited impact to hearing sensitivity, is not likely to meaningfully affect its ability to forage and communicate with conspecifics. No severe hearing impairment or serious injury is expected because of the received levels of noise anticipated and the short duration of exposure. The PTS

anticipated is considered a minor but permanent auditory injury and is considered harm in the context of the ESA definition of take.

The measures designed to minimize exposure or effects of exposure that are proposed to be required by NMFS OPR through the terms of the ITA, and by BOEM through the conditions of COP approval, and implemented by Empire Wind–all of which are considered elements of the proposed action–make it extremely unlikely that any whale will be exposed to pile driving noise that would result in severe hearing impairment or serious injury. Severe hearing impairment or serious injury would require both greater received levels of noise and longer duration of exposure than are anticipated to result from the Empire Wind pile driving. The sound attenuation measures, clearance and shutdown requirements, and soft start all effectively limit the potential for exposure to noise that could result in severe hearing impairment or serious injury make the necessary noise exposure extremely unlikely to occur.

PTS is permanent, meaning the effects of PTS last well beyond the duration of the proposed action and outside of the action area as animals migrate. As such, PTS has the potential to affect aspects of affected animal's life functions that do not overlap in time and space with the proposed action. The PTS anticipated is considered a minor auditory injury. With this minor degree of PTS, we do not expect it to affect any of the six individuals' overall health, reproductive capacity, or survival. The six individual fin whales could be less efficient at locating conspecifics or have decreased ability to detect threats at long distances, but these animals are still expected to be able to locate conspecifics to socialize and reproduce, and will likely still be able to detect threats with enough time to avoid injury. For this reason, we do not anticipate that the instances of PTS will result in any other injuries or any impacts on foraging or reproductive success, inclusive of mating, gestation, and nursing, or survival of any of the fin whales that experience PTS.

Effects of Exposure to Noise Above the Level B Harassment Threshold but Below the Level A Harassment Threshold

Potential impacts associated exposure above the Level B harassment threshold would include only low-level, temporary behavioral modifications, most likely in the form of avoidance behavior or potential alteration of vocalizations, as well as potential Temporary Threshold Shift (TTS).

An extensive discussion of TTS is presented in the proposed MMPA ITA and is summarized here, with additional information presented in Southall et al. (2019) and NMFS 2018. TTS represents primarily tissue fatigue and is reversible (Henderson et al. 2008). In addition, investigators have suggested that TTS is within the normal bounds of physiological variability and tolerance and does not represent physical injury (*e.g.*, Ward, 1997; Southall *et al.*, 2019). Therefore, NMFS does not consider TTS to constitute auditory injury.

While experiencing TTS, the hearing threshold rises, and a sound must be at a higher level in order to be heard; that is, the animal experiences a temporary loss of hearing sensitivity. TTS, a temporary hearing impairment, can last from a few minutes to days, be of varying degree, and occur across different frequency bandwidths. All of these factors determine the severity of the impacts on the affected individual, which can range from minor to more severe. In many cases, hearing sensitivity recovers rapidly after exposure to the sound ends. Observations of captive odontocetes suggest that wild animals may have a mechanism to self-mitigate the impacts of noise exposure by dampening their hearing during prolonged exposures to loud sound, or if conditioned to anticipate intense sounds (Finneran, 2018, Nachtigall *et al.*, 2018).

Impact pile driving generates sounds in the lower frequency ranges (with most of the energy below 1-2 kHz but with a small amount energy ranging up to 20 kHz); therefore, in general and all else being equal, we would anticipate the potential for TTS as more likely to occur in frequency bands in which the animals communicate. However, we would not expect the TTS to span the entire communication or hearing range of any species, given the frequencies produced by pile driving do not span entire hearing ranges for any particular species. Additionally, though the frequency range of TTS that marine mammals might sustain would overlap with some of the frequency ranges of their vocalization types, the frequency range of TTS from Empire Wind's pile driving activities would not usually span the entire frequency range of one vocalization type, much less span all types of vocalizations or other critical auditory cues for any given species.

Generally, both the degree of TTS and the duration of TTS would be greater if the marine mammal is exposed to a higher level of energy (which would occur when the peak dB level is higher or the duration is longer). Source level alone is not a predictor of TTS. An animal would have to approach closer to the source or remain in the vicinity of the sound source appreciably longer to increase the received SEL, which would be difficult considering the proposed mitigation and the anticipated movement of the animal relative to the stationary sources such as impact pile driving. The recovery time of TTS is also of importance when considering the potential impacts from TTS. In TTS laboratory studies--some using exposures of almost an hour in duration or up to 217 SEL--almost all individuals recovered within 1 day or less, often in minutes. We note that while the impact pile driving activities WTG foundations will last for approximately three to four hours at a time, it is unlikely that ESA listed whales would stay in the close proximity to the source long enough to incur more severe TTS. Overall, given that we do not expect an individual to experience TTS from pile driving more than once, the low degree of TTS and the short anticipated duration (less than a day), and that it is extremely unlikely that any TTS overlapped the entirety of a critical hearing range, we expect that, consistent with the literature cited above, the effects of TTS and any behavioral response resulting from this TTS will be limited to no more than 24 hours from the time of exposure. Effects of TTS resulting from exposure to Empire Wind project noise are addressed more fully below.

In order to evaluate whether or not individual behavioral responses, in combination with other stressors, impact animal populations, scientists have developed theoretical frameworks that can then be applied to particular case studies when the supporting data are available. One such framework is the population consequences of disturbance model (PCoD), which attempts to assess the combined effects of individual animal exposures to stressors at the population level (NAS 2017). Nearly all PCoD studies and experts agree that infrequent exposures of a single day or less are unlikely to impact individual fitness, let alone lead to population level effects (Booth et al. 2016; Booth et al. 2017; Christiansen and Lusseau 2015; Farmer et al. 2018; Harris et al. 2017; Harwood and Booth 2016; King et al. 2015; McHuron et al. 2018; NAS 2017; New et al. 2014; Pirotta et al. 2018; Southall et al. 2007; Villegas-Amtmann et al. 2015).

Since we expect that any exposures to disturbing levels of noise would be limited to significantly less time than an entire day (limited only to the time it takes to swim out of the area with noise above the Level B threshold, but never more than the three to four hours of pile driving per pile), and repeat exposures to the same individuals are unlikely (based on abundance, distribution and sightings data including that whales in the WDA are transient and not remaining in the area for extended periods), any behavioral responses that would occur due to animals being exposed to pile driving are expected to be temporary, with behavior returning to a baseline state shortly after the acoustic stimuli ceases (i.e., pile driving stops or the animal swims far enough away from the source to no longer be exposed to disturbing levels of noise). Given this, and our evaluation of the available PCoD studies, this infrequent, time-limited exposure of individuals to pile driving noise is unlikely to impact the fitness of any individual; that is, the anticipated disturbance is not expected to impact individual animals' health or have effects on individual animals' survival or reproduction. Specific effects to the different species are considered below.

North Atlantic Right Whales
We expect that up to 22 North Atlantic right whales may experience TTS or behavioral disturbance from exposure to pile driving noise. We expect that this will be up to 22 different individuals each experiencing a single exposure to pile driving noise above the Level B harassment threshold. We do not expect repeat exposures (i.e., the same individual exposed to multiple pile driving events) due to the short duration and intermittent natures of the pile driving noise and the limited residence time of right whales in the area. When in the action area surrounding and including the WDA, where noise exposure would occur, the primary activity North Atlantic right whales are expected to be engaged in is migration. However, we also expect the animals to perform other behaviors, including opportunistic foraging and resting. If North Atlantic right whales exhibited a behavioral response to the pile driving noise, the activity that the animal was carrying out would be disrupted, and it may pose some energetic cost; these effects are addressed below. Because use of this area is limited to transient individuals, we do not expect that animals displaced from a particular portion of the area due to exposure to pile driving noise would return to the area, rather, they would continue their normal behaviors from the location they moved to. As noted previously, responses to pile driving noise are anticipated to be short-term (no more than about 3 to 4 hours depending on the pile type).

Right whales are considerably slower than the other whale species in the action area, with maximum speeds of about 9 kilometers per hour (kph). Hatin et al. (2013) report median swim speeds of singles, non mother-calf pairs, and mother-calf pairs in the southeastern United States recorded at 1.3 kph, with examples that suggest swim speeds differ between within-habitat movement and migration-mode travel (Hatin et al. 2013). Studies of marine mammal avoidance of sonar, which like pile driving is an impulsive sound source, demonstrate clear, strong, and pronounced behavioral changes, including sustained avoidance with associated energetic swimming and cessation of feeding behavior (Southall et al. 2016) suggesting that it is reasonable to assume that a whale exposed to noise above the Level B harassment threshold would take a direct path to get outside of the noisy area. During impact pile driving of monopiles, the area with noise above the Level B harassment threshold extends less than 4 km for typical WTG foundations, up to 5.5 km for difficult to drive foundations, and up to 1.2 km for OSS foundations. As such, considering a right whale that was at the pile driving location when pile driving starts (i.e., at the center of the area with a 1.2 -5.5 km radius that will experience noise above the 160 dB re 1uPa threshold), we would expect that right whale swimming at maximum speed (9 kph) would escape from the area with noise above 160 dB re 1uPa the noise in about 8-36 minutes, but at the median speed observed in Hatin et al. (1.3 kph, 2013), it would take the animal approximately 1 to 4 hours to move out of the noisy area. However, given the requirements for visual and PAM clearance, it is unlikely that any right whale would be closer than the minimum visibility distance (1.5 km). Rather, it is far more likely that any exposure and associated disturbance would be for a significantly shorter period of time as a right whale would be much further from the pile being driven when pile driving started. In any event, it would not exceed the period of pile driving (about three to four hours).

Based on best available information that indicates whales resume normal behavior quickly after the cessation of sound exposure (e.g., Goldbogen et al. 2013a; Melcon et al. 2012), we anticipate that exposed animals will be able to return to normal behavioral patterns (i.e., socializing, foraging, resting, migrating) after the exposure ends. If an animal exhibits an avoidance response, it would experience a cost in terms of the energy associated with traveling away from the acoustic source. That said, migration is not considered a particularly costly activity in terms of energetics (Villegas-Amtmann et al. 2015). As established in this Opinion, only limited, opportunistic foraging by transient individuals is expected in the WDA; thus, the potential for pile driving to disrupt foraging is extremely limited. However, given that the duration of pile driving is short (3 to 4 hours), and foraging in the area is rare, in the event that foraging was disrupted, we expect it would be a one-time, temporary, disruption to foraging activity; this would be the case if a right whale was foraging while pile driving started and it stopped foraging to move away from the noise or if it was actively avoiding the noisy area and did not forage during that period. Goldbogen et al. (2013a) hypothesized that if the temporary behavioral responses due to acoustic exposure interrupted feeding behavior, this could have impacts on individual fitness and eventually, population health. However, for this to be true, we would have to assume that an individual whale could not compensate for this lost feeding opportunity by either immediately feeding at another location once it escapes the noisy area, by feeding shortly after cessation of acoustic exposure, or by feeding at a later time. There is no indication this is the case, particularly since unconsumed prey would likely still be available in the environment following the cessation of acoustic exposure (i.e. the pile driving is not expected to disrupt copepod prey) and foraging is expected to be rare and opportunistic in the WDA. Disruption of resting and socializing may also result in short term stress. Efforts have been made to try to quantify the potential consequences of responses to behavioral disturbance, and frameworks have been developed for this assessment (e.g., Population Consequences of Disturbance). However, models that have been developed to date to address this question require many input parameters and, for most species, there are insufficient data for parameterization (Harris et al. 2017a). Nearly all studies and experts agree that infrequent exposures of a single day or less are unlikely to impact an individual's overall energy budget (Farmer et al. 2018; Harris et al. 2017b; King et al. 2015b; NAS 2017; New et al. 2014; Southall et al. 2007d; Villegas-Amtmann et al. 2015). Based on best available information, we expect this to be the case for North Atlantic right whales exposed to acoustic stressors associated with this project even for animals that may already be in a stressed or compromised state due to factors unrelated to the Empire Wind project.

Based on best available information that indicates whales resume normal behavior quickly in their new location after the cessation of sound exposure (e.g., Goldbogen et al. 2013a; Melcon et al. 2012), we anticipate that the 22 individuals exposed to noise above the Level B harassment threshold will resume normal behavioral patterns (primarily migrating, but also resting, socialization, and potential limited, opportunistic foraging) after the exposure ends. If an animal exhibits an avoidance response, it would experience a cost in terms of the energy associated with traveling away from the acoustic source. That said, migration is not considered a particularly costly activity in terms of energetics (Villegas-Amtmann et al. 2015). An animal that was migrating through the area and was exposed to pile driving noise would make minor alterations to their route, taking them 1.2 to 5.5 km out of their way. This is far less than the distance normally traveled over the course of a day (they have been tracked moving more than 80 km in a day in the Gulf of St. Lawrence) and we expect that even for stressed individuals or mother-calf pairs, this alteration in course would result in only a small energetic impact that would not have consequences for the animals health or fitness.

We have also considered the possibility that a resting animal could be exposed to pile driving noise and its rest disturbed. Resting would be disrupted until the animal moved outside of the area with increased pile driving noise. As explained above, we expect this disruption would likely last less than 40 minutes but could last 3 to 4 hours. Given that disruptions to resting will be a one-time event that likely lasts only a few minutes and at most a few hours, we expect that any exposed individuals would be able to make up that lost rest without consequences to their overall energy budget, health, or fitness.

Stress responses are also anticipated in the 22 right whales experiencing temporary behavioral disruption. However, the available literature suggests these acoustically induced stress responses will be of short duration (similar to the duration of exposure), and not result in a chronic increase in stress that could result in physiological consequences to the animal; this is true for all potentially exposed animals, including mother-calf pairs. The stress response is expected to fully resolve when the animal has moved away from the disturbing levels of noise; as such, the stress response is limited to the minutes to up to 4 hours the individual right whales are expected to be exposed to disturbing levels of noise during impact pile driving. These short-term stress responses are not equivalent to stress responses and associated elevated stress hormone levels that have been observed in North Atlantic right whales that are chronically entangled in fishing gear (Rolland et al. 2017). This is also in contrast to stress level changes observed in North Atlantic right whales due to fluctuations in chronic ocean noise. Rolland et al. (2012) documented that stress hormones in North Atlantic right whales significantly decreased following the events of September 11, 2001 when shipping was significantly restricted. This was thought to be due to the resulting decline in ocean background noise level because of the decrease in shipping traffic. As noted in Southall et al. (2007a), substantive behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are considered more likely to be significant if they last more than 24 hours, or recur on subsequent days; this is not the case here as the behavioral response and associated effects will in all cases last less than 12 hours and will not recur on subsequent days. Because we expect these 22 individuals to only be exposed to a single pile driving event, we do not expect chronic exposure to pile driving noise. In summary, we do not anticipate long duration exposures to occur, and we do not anticipate that behavioral disturbance and associated stress response as a result of exposure to pile driving noise will affect the health of any individual and therefore, there would be no consequences on body condition or other factor that would affect health, survival, reproductive or calving success**.**

As noted above, TTS represents primarily tissue fatigue and is reversible (Southall et al., 2007). Temporary hearing loss is not considered physical injury but will cause auditory impairment to animals over the short period in which the TTS lasts. The TTS experienced by up to 22 right whales is expected to be a minor degradation of hearing capabilities within regions of hearing that align most completely with the energy produced by pile driving (i.e. the low-frequency region below 2 kHz), not severe hearing impairment. If hearing impairment occurs, it is most likely that the affected animal would lose a few decibels in its hearing sensitivity, which, given the limited impact to hearing sensitivity, is not likely to meaningfully affect its ability to forage and communicate with conspecifics, including communication between mothers and calves. We anticipate that any instances of TTS will be of minimum severity and short duration. This conclusion is based on literature indicating that even following relatively prolonged periods of sound exposure resulting in TTS, recovery occurs quickly (Finneran 2015). TTS is expected to resolve within a day and in all cases would resolve within a week of exposure (that is, hearing sensitivity will return to normal) and is not expected to affect the health of any whale or its ability to migrate, forage, breed, or calve (Southall et al. 2007).

Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity. Pile driving noise may mask right whale calls and could have effects on mother-calf communication and behavior. If such effects were severe enough to prevent mothers and calves from reuniting or initiating nursing, they may result in missed feeding opportunities for calves, which could lead to reduced growth, starvation, and even death. Any mother-calf pairs in the action area would have left the southern calving grounds and be making northward migrations to northern foraging areas. The available data suggests that North Atlantic right whale mother-calf pairs rarely use vocal communication on the calving grounds and so the two maintain visual contact until calves are approximately three to four months of age (Parks and Clark 2007; Parks and Van Parijs 2015; Root-Gutteridge et al. 2018; Trygonis et al. 2013). Such findings are consistent with data on southern right and humpback whales, which appear to rely more on mechanical stimulation to initiate nursing rather than vocal communication (Thomas and Taber 1984; Videsen et al. 2017). When mother-calf pairs leave the calving grounds and begin to migrate to the northern feeding grounds, if they begin to rely on acoustic communication more, then any masking could interfere with mother-calf reunions. For example, even though humpback whales do not appear to use vocal communication for nursing, they do produce low-level vocalizations when moving that have been suggested to function as cohesive calls (Videsen et al. 2017). However, when calves leave the foraging grounds at around four months of age, they are expected to be more robust and less susceptible to a missed or delayed nursing opportunity. Any masking would only last for the duration of the exposure to pile driving noise, which in all cases would be no more than four hours. As such, even if masking were to interfere with mother-calf communication in the action area, we do not anticipate that such effects would result in fitness or health consequences given their short-term nature. We also note that given the time of year restriction on impact pile driving and that mother-calf pairs are most likely to swim through the WDA in March and April (LaBreque et al. 2015) and are less likely to be present when impact pile driving occurs between May and December.

Quantifying the fitness consequences of sub-lethal impacts from acoustic stressors is exceedingly difficult for marine mammals, and we do not currently have data to conduct a quantitative analysis on the likely consequences of such sub-lethal impacts. While we are unable to conduct a quantitative analysis on how sub-lethal behavioral effects and temporary hearing impacts (i.e., masking and TTS) may impact animal vital rates (and therefore fitness), based on the best available information, we expect an increased likelihood of consequential effects when exposures and associated effects are long-term and repeated, occur in locations where the animals are conducting critical activities, and when the animal affected is in a compromised state. While we acknowledge that the 22 right whales exposed to pile driving noise may be in a compromised state, individual exposures will be short term (in most cases less than an hour but potentially for up to approximately 4 hours) and none will be repeated. The effects of this temporary exposure and associated behavioral response will not affect the health or fitness of any individual right whale.

Harris et al. (2017a) summarized the research efforts conducted to date that have attempted to understand the ways in which behavioral responses may result in long-term consequences to individuals and populations. Efforts have been made to try to quantify the potential consequences of such responses, and frameworks have been developed for this assessment (e.g., Population Consequences of Disturbance). However, models that have been developed to date to address this question require many input parameters and, for most species, there are insufficient data for parameterization (Harris et al. 2017a). Nearly all studies and experts agree that infrequent exposures of a single day or less are unlikely to impact an individual's overall energy budget (Farmer et al. 2018; Harris et al. 2017b; King et al. 2015b; NAS 2017; New et al. 2014; Southall et al. 2007d; Villegas-Amtmann et al. 2015). Based on best available information, we expect this to be the case for North Atlantic right whales exposed to pile driving noise even for animals that may already be in a stressed or compromised state due to factors unrelated to the Empire Wind project. We do not anticipate that instances of behavioral response and any associated energy expenditure or stress will impact an individual's overall energy budget or result in any health or fitness consequences to any individual North Atlantic right whales.

We have also considered whether TTS, masking, or avoidance behaviors would be likely to increase the risk of vessel strike or entanglement in fishing gear. As explained above, we would not expect the TTS to span the entire communication or hearing range of right whales given the frequencies produced by pile driving do not span entire hearing ranges for right whales. Additionally, though the frequency range of TTS that right whales might sustain would overlap with some of the frequency ranges of their vocalization types, the frequency range of TTS from Empire Wind's pile driving activities would not span the entire frequency range of one vocalization type, much less span all types of vocalizations or other critical auditory cues. As such, we do not expect TTS to affect the ability of a right whale to communicate with other right whales or to detect audio cues to the extent they rely on audio cues to avoid vessels or other threats. Similarly, we do not expect masking to affect the ability of a right whale to avoid a vessel. These risks are lowered even further by the short duration of TTS (less than a week) and masking (limited only to the time that the whale is exposed to the pile driving noise, so less than four hours). As such, TTS and masking are not expected to increase the risk that a right whale will be hit by a vessel or become entangled in fishing gear.

While we do expect pile driving noise to cause avoidance and temporary localized displacement as discussed above, we do not expect that avoidance of pile driving noise would result in right whales moving to areas with higher risk of vessel strike or entanglement in fishing gear. Information on patterns and distribution of vessel traffic and fishing activity, including fishing gear that may result in the entanglement of right whales, is illustrated in the Navigational Safety Risk Assessment prepared for the Empire Wind Project (Anatec 2022, Empire Wind NSRA, COP Appendix DD). Specifically, while the Empire Wind WFA is located between the traffic lanes outside the entrance to New York Harbor, a right whale migrating through this area would be exposed to the areas with higher densities of traffic regardless of pile driving activity. We do not expect that avoidance of pile driving noise would increase the residence time of a right whale in the areas surrounding the lease area that have higher vessel traffic or otherwise result in an increased risk of vessel strike. Similarly, the available information on the distribution of fishing effort inside and outside the lease area does not suggest any increased risk of entanglement that would result from avoidance of pile driving noise. Based on the available information, we do not expect avoidance of pile driving noise resulting in an increased risk of vessel strike or entanglement in fishing gear. This determination is based on the relatively small size of the area with noise that a right whale is expected to avoid (no more than 1.2-5.5 km from the pile being installed), the short term nature of any disturbance, and the lack of any significant differences in vessel traffic or fishing activity in the area an individual may move to that would put a right whale at greater risk of vessel strike or entanglement/capture.

The ESA's definition of take includes harassment of a listed species. NMFS Interim Guidance on the ESA Term "Harass" (PD 02-110-19; December 21, 2016[48] provides for a four-step process to determine if a response meets the definition of harassment. The Interim Guidance defines harassment as to "[c]reate the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." The guidance states that NMFS will consider the following steps in an assessment of whether proposed activities are likely to harass: 1) Whether an animal is likely to be exposed to a stressor or disturbance (i.e., an annoyance); and 2) The nature of that exposure in terms of magnitude, frequency, duration, etc. Included in this may be type and scale as well as considerations of the geographic area of exposure (e.g., is the annoyance within a biologically important location for the species, such as a foraging area, spawning/breeding area, or nursery area?); 3) The expected response of the exposed animal to a stressor or disturbance (e.g., startle, flight, alteration [including abandonment] of important behaviors); and 4) Whether the nature and duration or intensity of that response is a significant disruption of those behavior patterns which include, but are not limited to, breeding, feeding, or sheltering, resting or migrating.

Here, we carry out that four-step assessment to determine if the effects to the 22 individuals expected to be exposed to noise above the Level B harassment threshold meet the definition of harassment. We have established that up to 22 individual right whales will be exposed to disturbing levels of noise (step 1). For an individual, the nature of this exposure is expected to be limited to a one-time exposure to pile driving noise and will last for as long as it takes the individual to swim away from the disturbing noise or, at maximum, the duration of the pile event

[48] Available at: https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy-directives

(up to approximately 4 hours); this disruption will occur in areas where individuals may be migrating, foraging, resting, or socializing (step 2). Animals that are exposed to this noise are expected to abandon their activity and move far enough away from the pile being driven to be outside the area where noise is above the Level B harassment threshold (traveling up to 3.8-4.7km). As explained above, these individuals are expected to experience TTS (temporary hearing impairment), masking, stress, disruptions to foraging, and energetic consequences of moving away from the pile driving noise (step 3). Together, these effects will significantly disrupt a right whale's normal behavior for that day; that is, the nature and duration/intensity of these responses are a significant disruption of normal behavioral patterns that creates the likelihood of injury (step 4). Therefore, based on this four-step analysis, we find that the 22 right whales exposed to pile driving noise louder than 160 dB re 1uPa rms threshold are likely to be adversely affected and that effect amounts to ESA take by harassment. As such, we expect the take by harassment of 22 right whales as a result of pile driving noise.

NMFS defines "harm" in the ESA's definition of "take" as "an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering" (50 CFR §222.102). No right whales will be injured or killed due to exposure to pile driving noise. Further, while exposure to pile driving noise will significantly disrupt normal behaviors of individual right whales on the day that the whale is exposed to the pile driving noise creating the likelihood of injury, it will not actually kill or injure any right whales by significantly impairing any essential behavioral patterns. This is because the effects will be limited to that single day and are expected to be fully recoverable, there will not be an effect on the animal's overall energy budget in a way that would compromise its ability to successfully obtain enough food to maintain its health, or impact the ability of any individual to make seasonal migrations or participate successfully in nursing, breeding, or calving. TTS will resolve within no more than a week of exposure and is not expected to affect the health of any whale or its ability to migrate, forage, breed, calve, or raise its young. We also expect that stress responses will be limited to the single day that exposure to pile driving noise occurs and there will not be such an increase in stress that there would be physiological consequences to the individual that could affect its health or ability to socialize, migrate, forage, breed, calve, or raise its young. Thus, as no injury or mortality will actually occur, the response of right whales to pile driving noise does not meet the definition of "harm."

Fin, Sei and Sperm Whales

Behavioral responses may impact health through a variety of different mechanisms, but most Population Consequences of Disturbance models focus on how such responses affect an animal's energy budget (Costa et al. 2016c; Farmer et al. 2018; King et al. 2015b; NAS 2017; New et al. 2014; Villegas-Amtmann et al. 2017). Responses that relate to foraging behavior, such as those that may indicate reduced foraging efficiency (Miller et al. 2009) or involve the complete cessation of foraging, may result in an energetic loss to animals. Other behavioral responses, such as avoidance, may have energetic costs associated with traveling (NAS 2017). When considering whether energetic losses due to reduced foraging or increased traveling will affect an individual's fitness, it is important to consider the duration of exposure and associated response. Nearly all studies and experts agree that infrequent exposures of a single day or less are unlikely to impact an individual's overall energy budget and that long duration and repetitive disruptions would be necessary to result in consequential impacts on an animal (Farmer et al. 2018; Harris et al. 2017b; King et al. 2015b; NAS 2017; New et al. 2014; Southall et al. 2007d; Villegas-Amtmann et al. 2015). As explained below, individuals exposed to pile driving noise will experience only a singular, temporary behavioral disruption that will not last for more than a few hours and will not be repeated. As such, the factors necessary for behavioral disruption to have consequential impacts on an animal are not present in this case. We also recognize that aside from affecting health via an energetic cost, a behavioral response could result in more indirect impacts to health and/or fitness. For example, if a whale hears the pile driving noise and avoids the area, this may cause it to travel to an area with other threats such as vessel traffic or fishing gear. However, as explained below, this is extremely unlikely to occur.

Quantifying the fitness consequences of sub-lethal impacts from acoustic stressors is exceedingly difficult for marine mammals and we do not currently have data to conduct a quantitative analysis on the likely consequences of such sub-lethal impacts. While we are unable to conduct a quantitative analysis on how sub-lethal behavioral effects and temporary hearing impacts (i.e., masking) may impact animal vital rates (and therefore fitness), based on the best available information, we expect an increased likelihood of consequential effects when exposures and associated effects are long-term and repeated, occur in locations where the animals are conducting normal or essential behavioral activities, and when the animal affected is in a compromised state.

We do not have information to suggest that affected sperm, sei, or fin whales are likely to be in a compromised state at the time of exposure. During exposure, affected animals may be engaged in migration, foraging, or resting. If fin, sei, or sperm whales exhibited a behavioral response to pile driving noise, these activities would be disrupted, and the disruption may pose some energetic cost. However, as noted previously, responses to pile driving noise are anticipated to be singular and short term (up to approximately four hours); that is, the identified number of individuals are each expected to be exposed to a single pile driving event that will result in the individual altering their behavior to avoid the disturbing level of noise. Based on the estimated abundance of blue, fin, sei, and sperm whales in the action area, anticipated residency time in the lease area, and the number of instances of behavioral disruption expected, multiple exposures of the same animal are not anticipated. Sperm whales normal cruise speed is 5-15 kph, with burst speed of up to 35-45 kph for up to an hour. Fin whales cruise at approximately 10 kph while feeding and have a maximum swim speed of up to 35 kph. Sei whales swim at speeds of up to 55 kph. During impact pile driving, the area with noise above the Level B harassment threshold extends up to approximately 1.2 to 5.5 km from the pile being driven. Assuming that a whale exposed to noise above the Level B harassment threshold takes a direct path to get outside of the noisy area, a sperm, fin, or sei whale that was at the pile driving location when pile driving starts (i.e., at the center of the area with a 5.5 km radius that will experience noise above the 160 dB re 1uPa threshold), would escape from the area with noise above 160 dB re 1uPa the noise in less than an hour, even at a slow speed of 5 kph; actual time spent swimming away from the noise is likely to be significantly less. However, given the requirements for ensuring an area extending 2 km from a foundation pile is clear of fin, sei, and sperm whales before pile driving begins, such a scenario is unlikely to occur. Rather, it is far more likely that any exposure and associated disturbance would be for a significantly shorter period. In any event, it would not exceed the period of a pile driving event.

Considering the density and distribution of fin, sei, and sperm whales in the WDA and their known prey, disruptions of foraging activity are most likely for individual fin whales. Goldbogen et al. (2013a) suggested that if the documented temporary behavioral responses interrupted feeding behavior, this could have impacts on individual fitness and eventually, population health. However, for this to be true, we would have to assume that an individual whale could not compensate for this lost feeding opportunity by either immediately feeding at another location, by feeding shortly after cessation of acoustic exposure, or by feeding at a later time. There is no indication this will occur, particularly since unconsumed prey would still be available in the environment following the cessation of acoustic exposure (i.e., the pile driving is not expected to result in a reduction in prey). There would likely be an energetic cost associated with any temporary habitat displacement to find alternative locations for foraging, but unless disruptions occur over long durations or over subsequent days, we do not anticipate this movement to be consequential to the animal over the long-term (Southall et al 2007). Based on the estimated abundance of fin, sei, and sperm whales in the action area, anticipated residency time in the lease area, and the number of instances of behavioral disruption expected, multiple exposures of the same animal are not anticipated. Therefore, we do not anticipate repeat exposures, and based on the available literature that indicates infrequent exposures are unlikely to impact an individual's overall energy budget (Farmer et al. 2018; Harris et al. 2017b; King et al. 2015b; NAS 2017; New et al. 2014; Southall et al. 2007d; Villegas-Amtmann et al. 2015), we do not expect this level of exposure to impact the fitness of exposed animals.

There is no indication that sperm whale calves occur in the action area. For fin, and sei whales, little information exists on where they give birth as well as on mother-calf vocalizations. As such, it is difficult to assess whether masking could significantly interfere with mother-calf communication in a way that could result in fitness consequences. In our judgment it is reasonable to assume here that it is likely that some of the sei or fin whales exposed to pile driving noise are mother-calf pairs. Absent data on mother-calf communication for these species within the action area, we rely on our analysis of the effects of masking to North Atlantic right whales, which given their current status, are considered more vulnerable than any of these whale species. Based on this analysis, we expect that any effects of TTS and/or masking on communication or nursing by fin, or sei whale mother-calf pairs will be extremely unlikely to occur or will be so small that they cannot be meaningfully measured, evaluated, or detected; therefore, all effects of TTS and/or masking on mother-calf fitness will be insignificant or discountable.

We have also considered whether TTS, masking, or avoidance behaviors would be likely to increase the risk of vessel strike or entanglement in fishing gear. As explained above, we would not expect the TTS to span the entire communication or hearing range of right, fin, sei, or sperm whales given the frequencies produced by pile driving do not span entire hearing ranges for any whales. Additionally, though the frequency range of TTS that right, fin, sei, or sperm whales might sustain would overlap with some of the frequency ranges of their vocalization types, the frequency range of TTS from Empire Wind's pile driving activities would not span the entire frequency range of one vocalization type, much less span all types of vocalizations or other critical auditory cues for any given species. As such, we do not expect TTS to affect the ability of any of these whales to communicate with other whales or to detect audio cues to the extent they rely on audio cues to avoid vessels or other threats. Similarly, we do not expect masking to affect the ability of a whale to avoid a vessel. These risks are lowered even further by the short duration of TTS (less than a week) and masking (limited only to the time that the whale is exposed to the pile driving noise, so less than four hours).

While we do expect pile driving noise to cause avoidance and temporary localized displacement as discussed above, we do not expect that avoidance of pile driving noise would result in right, fin, sei, or sperm whales moving to areas with higher risk of vessel strike or entanglement in fishing gear. Information on patterns and distribution of vessel traffic and fishing activity, including fishing gear that may result in the entanglement of right whales, is illustrated in the Navigational Safety Risk Assessment prepared for the Empire Wind Project (Anatec 2022, Empire Wind NSRA, COP Appendix DD). Specifically, while the Empire Wind WFA is located between the traffic lanes outside the entrance to New York Harbor, a whale migrating through this area would be exposed to the areas with higher densities of traffic regardless of pile driving activity. We do not expect that avoidance of pile driving noise would increase the residence time of a whale in the areas surrounding the lease area that have higher vessel traffic or otherwise result in an increased risk of vessel strike. Similarly, the available information on the distribution of fishing effort inside and outside the lease area does not suggest any increased risk of entanglement that would result from avoidance of pile driving noise. Based on the available information, we do not expect avoidance of pile driving noise resulting in an increased risk of vessel strike or entanglement in fishing gear. This determination is based on the relatively small size of the area with noise that a fin, sei, or sperm whale is expected to avoid (no more than 1.2-5.5 km from the pile being installed), the short term nature of any disturbance, and the lack of any significant differences in vessel traffic or fishing activity in the area an individual may move to that would put a whale at greater risk of vessel strike or entanglement/capture.

We set forth the NMFS interim guidance definition of ESA take by harassment above and the four-step analysis to evaluate whether harassment is likely to occur. Here, we carry out that four-step assessment to determine if the effects to the up to 190 fin, 5 sei, and 6 sperm whales expected to be exposed to noise above the Level B harassment threshold, but below the Level A harassment threshold, meet the ESA definition of harassment. We have established that up to 190 fin, 5 sei, and 6 sperm whales will be exposed to disturbing levels of noise (step 1). For an individual, the nature of this exposure is expected to be limited to a one-time exposure to pile driving noise and will last for as long as it takes the individual to swim away from the disturbing noise or, at maximum, the duration of the pile event (up to 4 hours); this disruption will occur in areas where individuals may be migrating, foraging, resting, or socializing (step 2). Animals that are exposed to this noise are expected to abandon their activity and move far enough away from the pile being driven to be outside the area where noise is above the Level B harassment threshold (traveling up to 1.2-5.5 km). As explained above, these individuals are expected to experience TTS (temporary hearing impairment that may impair their ability to communicate), masking, stress, disruptions to foraging, and energetic consequences of moving away from the pile driving noise and potentially needing to seek out alternative locations to forage (step 3). Together, these effects will significantly disrupt an individual fin, sei, or sperm whale's normal behavior for that day; that is, the nature and duration/intensity of these responses are a significant disruption of normal behavioral patterns that creates the likelihood of injury (step 4). Therefore, based on this four-step analysis, we find that the 190 fin, 5 sei, and 6 sperm whales exposed to pile driving noise louder than 160 dB re 1uPa rms threshold are likely to be adversely affected and that effect amounts to ESA take by harassment. As such, we expect the ESA take by harassment of up to 190 fin, 5 sei, and 6 sperm whales as a result of exposure to pile driving noise above the Level B harassment threshold but below the Level A harassment threshold.

As noted, NMFS defines "harm" for ESA take purposes as "an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering." No right, fin, sei, or sperm whales will be injured or killed due to exposure to pile driving noise above the Level B harassment threshold but below the Level A harassment threshold. Further, while exposure to pile driving noise will significantly disrupt normal behaviors of individual whales on the day that the whale is exposed to the pile driving noise creating the likelihood of injury, it will not actually kill or injure any individuals by significantly impairing any essential behavioral patterns. This is because the effects will be limited to that single day and are expected to be fully recoverable, there will not be an effect on the animal's overall energy budget in a way that would compromise its ability to successfully obtain enough food to maintain its health, or impact the ability of any individual to make seasonal migrations or participate successfully in nursing, breeding, or calving. TTS will resolve within no more than a week of exposure and is not expected to affect the health of any whale or its ability to migrate, forage, breed, calve, or raise its young. We also expect that stress responses will be limited to the single day that exposure to pile driving noise occurs and there will not be such an increase in stress that there would be physiological consequences to the individual that could affect its health or ability to socialize, migrate, forage, breed, calve, or raise its young. Thus, as no injury or mortality will actually occur, the response of fin, sei, or sperm whales to pile driving noise above the Level B harassment threshold but below the Level A harassment threshold does not meet the definition of "harm."

Vessel Noise and Cable Installation

The frequency range for vessel noise (10 to 1000 Hz; MMS 2007) overlaps with the generalized hearing range for sei, fin, and right whales (7 Hz to 35 kHz) and sperm whales (150 Hz to 160 kHz) and would therefore be audible. As described in the BA, vessels without ducted propeller thrusters would produce levels of noise of 150 to 170 dB re 1 μPa-1 meter at frequencies below 1,000 Hz, while the expected sound-source level for vessels with ducted propeller thrusters level is 177 dB (RMS) at 1 meter. For ROVs, source levels may be as high as 160 dB. Given that the noise associated with the operation of project vessels is below the thresholds that could result in injury, no injury is expected. Noise produced during cable installation is dominated by the vessel noise; therefore, we consider these together.

Marine mammals may experience masking due to vessel noises. For example, right whales were observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks et al. 2007a) as well as increasing the amplitude (intensity) of their calls (Parks et al. 2011a; Parks et al. 2009). Right whales also had their communication space reduced by up to 84 percent in the presence of vessels (Clark et al. 2009a). Although humpback whales did not change the frequency or duration of their vocalizations in the presence of ship noise, their source levels were lower than expected, potentially indicating some signal masking (Dunlop 2016).

Vessel noise can potentially mask vocalizations and other biologically important sounds (e.g., sounds of prey or predators) that marine mammals may rely on. Potential masking can vary depending on the ambient noise level within the environment, the received level and frequency of the vessel noise, and the received level and frequency of the sound of biological interest. In the open ocean, ambient noise levels are between about 60 and 80 dB re 1 µPa in the band between 10 Hz and 10 kHz due to a combination of natural (e.g., wind) and anthropogenic sources (Urick 1983a), while inshore noise levels, especially around busy ports, can exceed 120 dB re 1 µPa. When the noise level is above the sound of interest, and in a similar frequency band, masking could occur. This analysis assumes that any sound that is above ambient noise levels and within an animal's hearing range may potentially cause masking. However, the degree of masking increases with increasing noise levels; a noise that is just detectable over ambient levels is unlikely to cause any substantial masking.

Vessel noise has the potential to disturb marine mammals and elicit an alerting, avoidance, or other behavioral reaction. These reactions are anticipated to be short-term, likely lasting the amount of time the vessel and the whale are in close proximity (e.g., Magalhaes et al. 2002; Richardson et al. 1995d; Watkins 1981a), and not consequential to the animals. We also note that we do not anticipate any project vessels to occur within close proximity of any ESA listed whales; regulations prohibit vessels from approaching right whales closer than 500m and the vessel strike avoidance measures identified in Section 3 (inclusive of Appendix A and B) are expected to ensure no project vessels operate in close proximity to any whales in the action area. Additionally, short-term masking could occur. Masking by passing ships or other sound sources transiting the action area would be short term and intermittent, and therefore unlikely to result in any substantial costs or consequences to individual animals or populations. Areas with increased levels of ambient noise from anthropogenic noise sources such as areas around busy shipping lanes and near harbors and ports may cause sustained levels of masking for marine mammals, which could reduce an animal's ability to find prey, find mates, socialize, avoid predators, or navigate.

Based on the best available information, ESA-listed marine mammals are either not likely to respond to vessel noise or are not likely to measurably respond in ways that would significantly disrupt normal or essential behavior patterns that include, but are not limited to, breeding, feeding or sheltering. Therefore, the effects of vessel noise on ESA-listed marine mammals are insignificant (i.e. so minor that the effect cannot be meaningfully evaluated or detected).

Operation of WTGs
As described above, many of the published measurements of underwater noise levels produced by operating WTGs range from older geared WTGs and are not expected to be representative of newer direct-drive WTGs, like those that will be installed for the Empire Wind project has direct-drive GE Haliade 150-6 MW turbines; as explained in section 7.1.2, this is the best available data for estimating operational noise of the Empire Wind turbines.

In considering the potential effects of operational noise on ESA listed whales we consider the expected noise levels from the operational turbines and the ambient noise (i.e., background noise that exists without the operating turbines) in the WDA. Ambient noise is a relevant factor because if the operational noise is not louder than ambient noise we would not expect an animal to react to it.

Ambient noise includes the combination of biological, environmental, and anthropogenic sounds occurring within a particular region. In temperate marine environments including the WDA, major contributors to the overall acoustic ambient noise environment include the combination of surface wave action (generated by wind), weather events such as rain, lightning, marine organisms, and anthropogenic sound sources such as ships. In temperate marine environments including the WDA, major contributors to the overall acoustic ambient noise environment include the combination of surface wave action (generated by wind), weather events such as rain, lightning, marine organisms, and anthropogenic sound sources such as ships. The coastal waters off New York have relatively high levels of ambient noise, attributed to nearby shipping noise (Rice et al. 2014); noise levels were highest in areas off Boston and New York compared to other areas along the U.S. Atlantic coast (Rice et al. 2014). Salisbury et al. 2018 monitored ambient noise off the coast of Virginia in consideration of the hearing frequencies of a number of marine mammal species. In the right whale frequency band (71-224 Hz), ambient noise exceeded 110 dB 50% of the time and 115 dB 14% of the time. Noise levels in the fin whale frequency band (18-28 Hz) were lower than the other whale species, with noise levels exceeding 100 dB 50% of the time. Kraus et al. (2016) surveyed the ambient underwater noise environment in the RI/MA WEA. Depending on location, ambient underwater sound levels within the RI/MA WEA varied from 96 to 103 dB in the 70.8- to 224-Hz frequency band at least 50% of the recording time, with peak ambient noise levels reaching as high as 125 dB in proximity to the Narraganset Bay and Buzzards Bay shipping lanes (Kraus et al. 2016). Similar to the conclusions of Rice et al. (2014) for New York, low-frequency sound from large marine vessel traffic in these and other major shipping lanes to the east (Boston Harbor) and south (New York) were the dominant sources of underwater noise in the RI/MA WEA. These reports of ambient noise in areas within and adjacent to the Empire Wind WFA consistently indicate that vessel noise is a significant noise source in the marine environment; we expect that ambient noise in the Empire Wind WFA is similar to the values reported in the referenced studies.

Elliott et al. (2019) notes that the direct-drive turbines measured at BIWF generated operational noise above background sound levels at the measurement location of 50 m (164 ft.) from the foundation. The authors also conclude that even in quiet conditions (i.e., minimal wind or weather noise, no transiting vessels nearby), operational noise at any frequency would be below background levels within 1 km (0.6 mi) of the foundation. This information suggests that in quiet conditions, a whale located within 1 km of the foundation may be able to detect operational noise above ambient noise conditions. However, given the typical ambient noise in the WDA, we expect these instances of quiet to be rare. Regardless, detection of the noise does not mean that there would be any effect to the individual.

Elliot et al. (2019) conclude that based on monitoring of underwater noise at the Block Island site, under most intense condition likely to occur, no risk of temporary or permanent hearing damage (PTS or TTS) could be projected even if an animal remained in the water at 50 m (164 ft.) from the turbine for a full 24-hour period. As such, we do not expect any PTS, TTS, or other potential injury to result from even extended exposure to the operating WTGs. The loudest noise recorded by Elliot et al. (2019) was 126 dB re 1uPa at 50 m from the turbine when wind speeds exceeded 56 km/h; at wind speeds of 43.2 km/h and less, measured noise did not exceed 120 dB re 1uPa at 50 m from the turbine (Eliot et al. 2019). As noted above, based on wind speed records within the WDA (Empire Wind COP) and the nearby Ambrose Buoy, average wind speeds in the WDA are between 11.2 and 26 km/h and exceed 40 km/h less than 3% of the time.

Given the conditions necessary to result in noise above 120 dB re 1uPa only occur less than 3% of the time on an annual basis, and that in such windy conditions ambient noise is also increased, we do not anticipate the underwater noise associated with the operations noise of the direct-drive WTGs to result in avoidance of an area any larger than 50m from the WTG foundation. As such, even if ESA-listed marine mammals avoided the area with noise above ambient, any effects would be so small that they could not be meaningfully measured, detected, or evaluated, and are therefore insignificant.

We recognize that the data from Elliot et al. (2019) represents WTGs that are of a smaller capacity than those proposed for use at Empire Wind. We also recognize the literature that has predicted larger sound fields for larger turbines. However, we also note that Tougaard et al. (2020) and Stober and Thomsen (2021) both indicate that operational noise is less than shipping noise; this suggests that in areas with consistent vessel traffic, such as the Empire Wind WDA, operational noise is not expected to be detectable above ambient noise at a distance more than 50 m from the foundation. Additionally, while there are no studies documenting distribution of large whales in an area before and after construction of a wind farm, data from other marine mammals (harbor porpoise) indicates that any reduction in abundance in the wind farm area that occurred during the construction period resolves and that harbor porpoise are as abundant in the wind farm area during project operations as they were before (Tougaard et al. 2006, Teilmann and Carstensen 2012, Thompson et al. 2010, Scheidat et al. 2011). This supports our determination that effects of operational noise are likely to be insignificant.

HRG Survey Equipment

HRG surveys are planned within the lease area and cable routes and are elements of the proposed action under consultation in this opinion. A number of minimization measures for HRG surveys are also included as part of the proposed action. This includes maintenance of a 500 m clearance and shutdown zone for North Atlantic right whales and 100 m clearance and shutdown zone for other ESA listed marine mammals during the operations of equipment that operates within the hearing frequency of these species (i.e., less than 180 kHz).

In their ITA application, Empire Wind requested Level B harassment take associated with HRG surveys during the 5-year effective period of the ITA. The survey activities that have the potential to result in Level B harassment (i.e., exposure to noise above the 160 dB re 1uPa threshold) include the EdgeTech DW106, EdgeTech 424, and Teledyne Benthos Chirp III. No boomer, sparkers, or airguns are proposed. In 2024-2029, 41-191 active survey vessel days per year are anticipated, with the estimated distance per day of 177.792 km. NMFS OPR is proposing to authorize the take, by Level B harassment, of 7 right whales, 11 fin whales, and 4 sei whales. As explained above, given the difference in the definitions between MMPA harassment and NMFS guidance defining take by harassment under the ESA, it is reasonable for

NMFS OPR to find, in certain instances, that noise is likely to result in Level B harassment, while we determine that the intensity of those impacts (i.e. likely to cause injury) is not severe enough to cause take by harassment under the ESA. As described below, we do not expect that exposure of any ESA listed whales to noise resulting from HRG surveys will result in any take by harassment as defined by the ESA. That is, we have determined that exposure of any ESA listed whales to noise above ESA behavioral harassment threshold or at levels anticipated to cause take by harm is extremely unlikely to occur. Further, we expect, any exposure to noise resulting from HRG surveys to be of very brief duration causing only minor behavioral reactions. Therefore, we have determined that all effects of exposure to HRG survey noise to be insignificant or extremely unlikely to occur (i.e. discountable). The basis for this conclusion is set forth below.

Extensive information on HRG survey noise and potential effects of exposure to ESA listed whales is provided in NMFS June 29, 2021 programmatic ESA consultation on certain geophysical and geotechnical survey activities (NMFS GAR 2021) which we consider the best available science and information on these effects. We summarize the relevant conclusions here. Based on the characteristics of the noise sources planned, no ESA listed whales are anticipated to be exposed to noise above the Level A harassment thresholds (peak or cumulative). The peak noise threshold is not exceeded at any distance; the cumulative noise threshold is less than 1.5m. It is extremely unlikely that a whale would be close enough to the sound source to experience any exposure at all, and even less likely that it would experience sustained exposure. This is due to both the very small distance from the source that noise above the threshold extends (1.5 m) and because the sound source is being towed behind a vessel and therefore is moving. Considering the loudest source that would be used for the surveys (Teledyne CHIRP III), the distance to the Level B harassment threshold extends approximately 50 m from the source. Given the very small area ensonified and considering the source is moving, any exposure of ESA listed whales to noise above the Level B harassment threshold is extremely unlikely to occur. The use of PSOs to monitor a clearance and shutdown zone (500 m for right whales and 100 m for other ESA listed whales) makes exposure even less likely to occur.

In the unlikely event that a whale did get within 50 m of the source, we expect that the result of this exposure would be, at worst, temporary avoidance of the area with underwater noise louder than this threshold, which is a reaction that is considered to be of low severity and with no lasting biological consequences (e.g., Ellison et al. 2007). The noise source itself will be moving. This means that any co-occurrence between a whale, even if stationary, will be brief and temporary. Given that exposure will be short (no more than a few seconds, given that the noise signals themselves are short and intermittent and because the vessel towing the noise source is moving) and that the reaction to exposure is expected to be limited to changing course and swimming away from the noise source only far/long enough to get out of the ensonified area (50 m or less), the effect of this exposure and resulting response will be so small that it will not be able to be meaningfully detected, measured or evaluated and, therefore, is insignificant. Further, the potential for substantial disruption to activities such as feeding (including nursing), resting, and migrating is extremely unlikely given the very brief exposure to any noise (given that the source is traveling and the area ensonified at any given moment is so small). Any brief interruptions of these behaviors are not anticipated to have any lasting effects. Additionally, given the extremely short duration of any behavioral disruption and the very small distance any animal would have to swim to avoid the noise it is extremely unlikely that the behavioral response would increase the risk of exposure to other threats including vessel strike or entanglement in fisheries gear. Because the effects of these temporary behavioral changes are so minor as to be insignificant, it is extremely unlikely that, under the NMFS' interim ESA definition of harassment, they are equivalent to an act that would "create the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering." For similar reasons it is extremely unlikely that any individual would experience ESA take by harm.

7.1.4 Effects of Project Noise on Sea Turtles

Background Information – Sea Turtles and Noise

Sea turtles are low frequency hearing specialists, typically hearing frequencies from 30 Hz to 2 kHz, with a range of maximum sensitivity between 100 to 800 Hz (Bartol and Ketten 2006, Bartol et al. 1999, Lenhardt 1994, Lenhardt 2002, Ridgway et al. 1969). Below, we summarize the available information on expected responses of sea turtles to noise.

Stress caused by acoustic exposure has not been studied for sea turtles. As described for marine mammals, a stress response is a suite of physiological changes that are meant to help an organism mitigate the impact of a stressor. If the magnitude and duration of the stress response is too great or too long, it can have negative consequences to the animal such as low reproductive rates, decreased immune function, diminished foraging capacity, etc. Physiological stress is typically analyzed by measuring stress hormones (such as cortisol), other biochemical markers, and vital signs. To our knowledge, there is no direct evidence indicating that sea turtles will experience a stress response if exposed to acoustic stressors such as sounds from pile driving. However, physiological stress has been measured for sea turtles during nesting, capture and handling (Flower et al. 2015; Gregory and Schmid 2001; Jessop et al. 2003; Lance et al. 2004), and when caught in entangling nets and trawls (Hoopes et al. 2000; Snoddy et al. 2009). Therefore, based on their response to these other anthropogenic stressors, and including what is known about cetacean stress responses, we assume that some sea turtles will exhibit a stress response if exposed to a detectable sound stressor.

Marine animals often respond to anthropogenic stressors in a manner that resembles a predator response (Beale and Monaghan 2004b; Frid 2003; Frid and Dill 2002; Gill et al. 2001; Harrington and Veitch 1992; Lima 1998; Romero 2004). As predators generally induce a stress response in their prey (Dwyer 2004; Lopez and Martin 2001; Mateo 2007), we assume that sea turtles may experience a stress response if exposed to acoustic stressors, especially loud sounds. We expect breeding adult females may experience a lower stress response, as studies on loggerhead, hawksbill, and green turtles have demonstrated that females appear to have a physiological mechanism to reduce or eliminate hormonal response to stress (predator attack, high temperature, and capture) in order to maintain reproductive capacity at least during their breeding season; a mechanism apparently not shared with males (Jessop 2001; Jessop et al. 2000; Jessop et al. 2004). We note that the only portion of the action area where breeding females may occur is the portion of vessel transit routes between Charleston, SC and the WDA that travel south of Virginia and that presence is limited seasonally.

Based on the limited information about acoustically induced stress responses in sea turtles, it is reasonable to assume that physiological stress responses would occur concurrently with any other response such as hearing impairment or behavioral disruptions. However, we expect such responses to be brief, with animals returning to a baseline state once exposure to the acoustic source ceases. As with cetaceans, such a short, low-level stress response may in fact be adaptive and, in part, beneficial as it may result in sea turtles exhibiting avoidance behavior, thereby minimizing their exposure duration and risk from more deleterious, high sound levels.

Effects to Hearing

Interference, or masking, occurs when a sound is a similar frequency and similar to or louder than the sound an animal is trying to hear (Clark et al. 2009b; Erbe et al. 2016). Masking can interfere with an individual's ability to gather acoustic information about its environment, such as predators, prey, conspecifics, and other environmental cues (Richardson 1995). This can result in loss of environmental cues of predatory risk, mating opportunity, or foraging options. Compared to other marine animals, such as marine mammals, which are highly adapted to use sound in the marine environment, sea turtle hearing is limited to lower frequencies and is less sensitive. Because sea turtles likely use their hearing to detect broadband low-frequency sounds in their environment, the potential for masking would be limited to certain sound exposures. Only continuous anthropogenic sounds that have a significant low-frequency component, are not of brief duration, and are of sufficient received level could create a meaningful masking situation (e.g., long-duration vibratory pile extraction or long term exposure to vessel noise affecting natural background and ambient sounds); this type of noise exposure is not anticipated based on the characteristics of the sound sources considered here.

There is evidence that sea turtles may rely primarily on senses other than hearing for interacting with their environment, such as vision (Narazaki et al. 2013), magnetic orientation (Avens and Lohmann 2003; Putman et al. 2015), and scent (Shine et al. 2004). Thus, any effect of masking on sea turtles would likely be mediated by their normal reliance on other environmental cues.

Behavioral Responses

To date, very little research has been done regarding sea turtle behavioral responses relative to underwater noise. Popper et al. (2014) describes relative risk (high, moderate, low) for sea turtles exposed to pile driving noise and concludes that risk of a behavioral response decreases with distance from the pile being driven. O'Hara and Wilcox (1990) and McCauley et al. (2000b), who experimentally examined behavioral responses of sea turtles in response to seismic airguns. O'Hara and Wilcox (1990) found that loggerhead turtles exhibited avoidance behavior at estimated sound levels of 175 to 176 dB re: 1 μPa (rms) (or slightly less) in a shallow canal. Mccauley et al. (2000a) experimentally examined behavioral responses of sea turtles in response to seismic air guns. The authors found that loggerhead turtles exhibited avoidance behavior at estimated sound levels of 175 to 176 dB rms (re: 1 μPa), or slightly less, in a shallow canal. Mccauley et al. (2000a) reported a noticeable increase in swimming behavior for both green and loggerhead turtles at received levels of 166 dB rms (re: 1 μPa). At 175 dB rms (re: one μPa), both green and loggerhead turtles displayed increased swimming speed and increasingly erratic behavior (Mccauley et al. 2000a). Based on these data, NMFS GARFO finds that sea turtles would exhibit a behavioral response in a manner that constitutes take by harassment, as defined for ESA take purposes above in this opinion, when exposed to received levels of 175 dB rms (re: 1 μPa) for a period long enough such that the behavioral response significantly disrupts normal behavioral patterns. This is the level at which sea turtles are expected to begin to exhibit avoidance behavior based on experimental observations of sea turtles exposed to multiple firings of nearby or approaching air guns.

7.1.4.1 Thresholds Used to Evaluate Effects of Project Noise on Sea Turtles

In order to evaluate the effects of exposure to noise by sea turtles that could result in physical effects, NMFS relies on the available literature related to the noise levels that would be expected to result in sound-induced hearing loss (i.e., TTS or PTS); we relied on acoustic thresholds for PTS and TTS for impulsive sounds developed by the U.S. Navy for Phase III of their programmatic approach to evaluating the environmental effects of their military readiness activities (U.S. Navy 2017a). At the time of this consultation, we consider these the best available data since they rely on all available information on sea turtle hearing and employ the same methodology to derive thresholds as in NMFS recently issued technical guidance for auditory injury of marine mammals (NMFS 2018). Below we briefly detail these thresholds and their derivation. More information can be found in the U.S. Navy's Technical report on the subject (U.S. Navy 2017a).

To estimate received levels from airguns and other impulsive sources expected to produce TTS in sea turtles, the U.S. Navy compiled all sea turtle audiograms available in the literature in an effort to create a composite audiogram for sea turtles as a hearing group. Since these data were insufficient to successfully model a composite audiogram via a fitted curve as was done for marine mammals, median audiogram values were used in forming the hearing group's composite audiogram. Based on this composite audiogram and data on the onset of TTS in fishes, an auditory weighting function was created to estimate the susceptibility of sea turtles to TTS. Data from fishes were used since there are currently no data on TTS for sea turtles and fishes are considered to have hearing range more similar to sea turtles than do marine mammals (Popper et al. 2014). Assuming a similar relationship between TTS onset and PTS onset as has been described for humans and the available data on marine mammals, an extrapolation to PTS susceptibility of sea turtles was made based on the methods proposed by Navy 2017. From these data and analyses, dual metric thresholds were established similar to those for marine mammals: one threshold based on peak sound pressure level (0-pk SPL) that does not incorporate the auditory weighting function nor the duration of exposure, and another based on cumulative sound exposure level (SELcum) that incorporates both the auditory weighting function and the exposure duration (Table 7.1.21). The cumulative metric accumulates all sound exposure within a 24-hour period and is therefore different from a peak, or single exposure, metric.

Table 7.1.21. Acoustic thresholds identifying the onset of permanent threshold shift and Temporary threshold shift for sea turtles exposed to impulsive sounds (U.S. Navy 2017a)

Hearing Group	Generalized Hearing Range	Permanent Threshold Shift Onset	Temporary Threshold Shift Onset
Sea Turtles	30 Hz to 2 kHz	204 dB re: 1 $Pa^2 \cdot s$ SEL_{cum} 232 dB re: 1 μPa SPL (0-pk)	189 dB re: 1 $\mu Pa^2 \cdot s$ SEL_{cum} 226 dB re: 1 μPa SPL (0-pk)

Criteria for Considering Behavioral Effects
For assessing behavioral effects, in the BA BOEM used the 175 dB re 1uPa RMS criteria based on McCauley et al. (2000b), consistent with NMFS recommendations. This level is based upon work by Mccauley et al. (2000a), who experimentally examined behavioral responses of sea turtles in response to seismic air guns. The authors found that loggerhead turtles exhibited avoidance behavior at estimated sound levels of 175 to 176 dB rms (re: 1 μPa), or slightly less, in a shallow canal. Mccauley et al. (2000a) reported a noticeable increase in swimming behavior for both green and loggerhead turtles at received levels of 166 dB rms (re: 1 μPa). At 175 dB rms (re: 1 μPa), both green and loggerhead turtles displayed increased swimming speed and increasingly erratic behavior (Mccauley et al. 2000a). Based on these data, NMFS assumes that sea turtles would exhibit a significant behavioral response when exposed to received levels of 175 dB rms (re: 1 μPa). This is the level at which sea turtles are expected to begin to exhibit avoidance behavior based on experimental observations of sea turtles exposed to multiple firings of nearby or approaching air guns. Because data on sea turtle behavioral responses to pile driving is limited, the air gun data set is used to inform potential risk.

7.1.4.2 Effects of Project Noise on Sea Turtles
Here, we consider the effects of the noise producing activities of the Empire Wind project in the context of the noise thresholds presented above.

Impact Pile Driving for WTG and OSS Foundation Installation
Similar to the results presented for marine mammals, the acoustic ranges (Rmax) and exposure ranges (ER95%) for sea turtles were modeled (Küsel et al. 2022); these are summarized below for the WTG and OSS monopile foundations, assuming 10 dB broadband attenuation and a summer acoustic propagation environment. Exposure ranges vary between species due to differences in their behavior (e.g., swim speeds, dive depths). These differences can impact both dwell time and how the animats (i.e., simulated animals) sample the sound field. As explained above for marine mammals, we are using acoustic range when considering potential for exposure to noise above the peak injury criteria (232 dB) and behavioral disturbance criteria (175 dB) and exposure ranges for the cumulative injury threshold (204 dB). For acoustic modeling, the average sound speed profile for May through September was used for the summer profile, and December through March were averaged for winter. Summer is presented here because it represents the period when sea turtle exposure to pile driving noise is expected to occur.

Acoustic range estimates for the modeled piles and pile locations for sea turtles are included in Tables 47 – 62 in Küsel et al. 2022 (COP Appendix M). Based on these results, noise is not expected to exceed the peak injury criteria (232 dB) during any pile driving for the Empire project.

Exposure ranges for the modeled piles and pile locations for sea turtles are included in Tables 40-46 in Küsel et al. 2022 (COP Appendix M). The results are summarized in Table 7.1.22 below. As illustrated below, with the exception of the difficult to drive piles, no exposure to noise above the cumulative injury threshold is expected. For the difficult to drive piles, the closest point of approach during active pile driving that would have to occur for enough sound exposure to accumulate to have the potential for injury (PTS), ranges from 100 to 310 m depending on species and whether one or two piles per day are being driven. As discussed further below, this is within the clearance and shutdown zone for sea turtles (500 m).

Table 7.1.22 Exposure ranges ($ER_{95\%}$) in km to sea turtle injury threshold criteria (204 dB cSEL) with 10 dB attenuation for all pile types (summer sound profile).

Species	**9.6m typical**		**9.6m difficult**		**11m (loudest location)**		**OSS pin piles**
	one/day	**two/day**	**one/day**	**two/day**	**one/day**	**two/day**	**two or three/day**
Kemp's ridley	<0.01	0	0.1	0.12	<0.01	0	0
Leatherback	0	0	0.15	0.31	0	0	0
loggerhead	0	0	0	0.03	0	0	0
green	0	0	0.17	0.11	0	0	0

Source: Tables 40-46 in Küsel et al. 2022 (COP Appendix M).

As noted above, acoustic range estimates for the modeled piles and pile locations for sea turtles are included in Tables 47 – 62 in Küsel et al. 2022 (COP Appendix M). The results of modeling to predict acoustic range estimates to the sea turtle behavioral disturbance threshold (175 dB) are summarized in Table 7.1.23 below. As illustrated below, for monopiles noise will exceed the behavioral disturbance threshold from 0.77 to 1.59 km from the pile being driven; for pin piles, noise exceeds the threshold within 0.1 to 0.12 km from the pile being driven. For pin piles, this is within the clearance and shutdown zone for sea turtles (500 m).

Table 7.1.23. Acoustic ranges (Rmax) in km to sea turtle behavioral threshold criteria with 10 dB attenuation (summer sound profile). All at "loudest" location

	9.6m monopile typical	**9.6m monopile difficult**	**11m monopile**	**OSS 1 jacket**	**OSS 2 jacket**
distance from pile (m)	0.77	1.59	0.84	0.12	0.1

Source: Tables 47 – 62 in Küsel et al. 2022

Modeling was carried out to determine the numbers of individual sea turtles predicted to receive sound levels above threshold criteria using animal movement modeling (Küsel et al. 2022). Küsel et al. (2022) used the JASCO Animal Simulation Model Including Noise Exposure (JASMINE) to predict the exposure of animats (virtual sea turtles) to sound arising from sound sources. An individual animat's modeled sound exposure levels are summed over the total simulation duration, such as 24 hours or the entire simulation, to determine its total received energy, and then compared to the assumed threshold criteria. The tables below include results assuming broadband attenuation of 10 dB for impact pile driving with maximum seasonal densities for each species (as described below). No aversion behaviors (e.g., avoidance) or mitigation measures (e.g., shutdown zones) other than the 10 dB attenuation for impact pile driving were incorporated into the modeling to generate the number of sea turtles of each species that are expected to be exposed to the noise.

As described in Küsel et al. (2022), there are limited density estimates for sea turtles in the WDA. The WDA is in the Mid-Atlantic North region defined in NEFSC and SEFSC (2011) for sea turtle distribution. Sea turtles are expected to be present in the WDA during summer and fall due to seasonal habitat use. Aerial surveys conducted for the New York State Department of Environmental Conservation in the New York Offshore Planning Area (OPA) monthly over a period of three years recorded sea turtles to be most frequently seen in summer, followed by fall, absent in winter, and rare in spring (Tetra Tech and LGL 2020). The OPA area extends south from Long Island to the Outer Continental Shelf, covering 16,740 square miles[49]; the Empire WDA is within the OPA. Also in the New York Bight, a multi-year series of seasonal aerial surveys was conducted by Normandeau associates for the New York State Energy Research and Development Authority (NYSERDA; Normandeau Associates and APEM Inc. 2018, 2019c, 2019a, 2019b, 2020). The purpose of the aerial surveys was to gather high resolution data on marine resources within the OPA off Long Island, New York. High-resolution digital aerial photographs were collected along specific line transects each season for three consecutive years. Four sea turtle species were reported as being present in the area during the NYSERDA surveys: loggerhead, leatherback, Kemp's ridley, and green.

To obtain the densities for the acoustic modeling, Küsel et al. (2022) extracted the maximum seasonal abundance for each species from the NYSERDA data. The abundance was corrected to represent the abundance in the entire OPA and then scaled by the full OPA area to obtain a density in units of animals per square kilometer. Two categories listed in the reports included more than one species: one combined loggerhead and Kemp's ridley turtles, and the other included turtles that were observed but not identified to the species level. The counts within the two categories that included more than one species were distributed amongst the relevant species with a weighting that reflected the recorded counts for each species. For example, loggerhead turtles were identified far more frequently than any other species; therefore, more of the unidentified counts were assigned to them. The underlying assumption is that a given sample of unidentified turtles would have a distribution of species that was similar to the observed distribution within a given season. The NYSERDA study (Normandeau Associates and APEM Inc. 2018, 2019c, 2019a, 2019b, 2020) reported that in the survey area, most of the sea turtles

[49] Map available at: https://www.dec.ny.gov/lands/113833.html#:~:text=The%20New%20York%20Bight%20Whale,Shelf%2C%20covering%2016%2C740%20square%20miles.&text=sea%20is%20from%203%20nautical,side%20of%209%20square%20nm. Last accessed August 20, 2023.

recorded were loggerhead sea turtles, by an order of magnitude. Seasonal sea turtle densities used in animal movement modeling are listed in Table 23 in Küsel et al. 2022; BOEM has clarified that the summer density for green sea turtles used in the modeling was not 0 but was 0.0.38 (Table 7.1.24). As explained in the Status of the Species and Environmental Baseline sections of this Opinion, due to seasonal water temperature patterns, sea turtles are most likely to occur in the lease area from June through October, with few sea turtles present in May, November, and early December and turtles absent in the winter months (January – April).

Table 7.1.24. Sea turtle density estimates for the Empire Wind WDA plus a 10 km buffer.

Species	**Density (animals/100km^2)**			
	Spring	***Summer***	***Fall***	***Winter***
Kemp's ridley sea turtle	0.001	0.010	0.002	0.000
Leatherback sea turtle	0.000	0.003	0.008	0.000
Loggerhead sea turtle	0.003	0.268	0.002	0.000
Green sea turtle	0.000	0.038	0.000	0.000

(Source: Küsel et al. 2022 (table 23); Densities calculated from NYSERDA aerial survey reports)

We considered whether sufficient information was available on detection rates from aerial surveys from which we could further adjust the exposure estimates. We reviewed the NYSERDA reports that informed the density estimates and note that they do not appear to make any adjustments to sea turtle sightings based on detectability from the survey platform. Describing an aerial survey in the MA/RI Wind Energy Area, Kraus et al. (2016) notes that the number of sea turtle sightings was substantially increased by detections in the vertical camera (mounted under the plane) compared to the number observed by observers using binoculars during the aerial survey but does not provide any information on overall sea turtle detectability nor does it adjust observations to account for availability bias. We note that the NYSERDA studies used high-resolution digital aerial photographs, which would improve detectability.

Some studies have concurrently conducted tagging studies to account for availability bias. We reviewed the literature for similar studies conducted in the lease area, however no studies were found. The closest geographic study, NEFSC 2011, estimated regional abundance of loggerhead turtles in Northwestern Atlantic Ocean continental shelf waters using aerial surveys and accounted for availability bias using satellite tags. However, as determining availability bias depends on the species and is influenced by habitat, season, sea surface temperature, time of day, and other factors, we determined that while we may be able to identify studies that identified availability bias (such as NEFSC 2011) it would not be reasonable to apply those post-hoc to the density estimates given differences in the study designs, location, habitat, sea surface temperature, etc.

We also considered whether it would be reasonable to adjust the density estimates to account for the percent of time that sea turtles are likely to be at the surface while in the WDA and therefore would be available to be detected for such a survey. However, after consulting with subject matter experts we determined it was not reasonable to adjust the density estimates with general observations about the amount of time sea turtles may be spending at the surface. Therefore, we have determined that there is no information available for us to use that could result in a different estimate of the amount of exposure that is reasonably certain to occur and have not made any further adjustments to the exposure estimates. As such, the density estimates provided in Küsel et al. 2022 as derived from the NYSERDA aerial monitoring are considered the best available scientific information.

As explained above, modeling was carried out for four construction scenarios, with the difference between those scenarios being the number of days of pile driving, as influenced by whether one or two monopiles were installed per day and whether two or three pin piles were installed per day. Considering all four scenarios, no sea turtles are expected to be exposed to noise above the peak injury (PTS) threshold; this is because noise during pile driving is not expected to exceed the peak injury (PTS) threshold. Considering all four construction scenarios, the number of sea turtles that the modeling predicts would be exposed to noise above the cumulative PTS threshold is extremely small, less than 0.5 individuals across the two years (see table 7.1.25), with exposure estimates the same for schedules 1 and 2 and the same for schedules 3 and 4. Exposure of sea turtles to noise above the behavioral disturbance threshold is predicted for all four construction scenarios. Exposure estimates above the behavioral harassment threshold for construction schedules 1 and 2 are the same (1 monopile per day with two or three pin piles per day) and exposure estimates above the behavioral harassment threshold for construction schedules 3 and 4 are the same (2 monopiles per day with two or three pin piles per day).

Table 7.1.25. Modeled Number of Sea Turtles Predicted to Receive Sound Levels Above Cumulative and Peak Injury and Behavioral Criteria from Impact Pile Driving for Construction Schedules 1 or 2 and Construction Schedules 3 or 4 (Source: Tables 29-32 in Küsel et al. 2022).

Construction Schedules 1 or 2, inclusive of Years 1 and 2

Sea Turtle Species	**Individuals Exposed to Noise above the Injury (PTS) threshold**		**Individuals Exposed to Noise above the 175 dB threshold (TTS and/or Behavioral Effects)**
	Peak	**Cumulative (24 hour)**	
Kemp’s ridley	0	0.47	8.22
Leatherback	0	0.03	2.07
Loggerhead	0	0	41.29
Green	0	<0.01	0.14

Construction Schedules 3 or 4, Inclusive of Years 1 and 2

Sea Turtle Species	**Individuals Exposed to Noise above the Injury (PTS) threshold**		**Individuals Exposed to Noise above the 175 dB threshold (TTS and/or Behavioral Effects)**
	Peak	**Cumulative (24 hour)**	
Kemp’s ridley	0	0.05	7.81

Leatherback	0	0.04	1.58
Loggerhead	0	0.46	95.6
Green	0	<0.01	0.25

The table below represents the maximum anticipated exposure for each species considering all impact pile driving (Table 7.1.26). Note that for each of the two construction schedules (1/2 and 3/4) we have added up all modeled exposures and rounded up fractions to whole animals with the exception that fractions 0.1 or less have been rounded down to zero as we consider modeled exposures at that level extremely unlikely to occur. These estimates do not account for any aversion behavior and they do not incorporate the clearance or shutdown zones.

Table 7.1.26. Maximum modeled exposure for each species across pile driving scenarios

Sea Turtle Species	Individuals Exposed to Noise above the Injury (PTS) threshold				Individuals Exposed to Noise above the 175 dB threshold (TTS and/or Behavioral Effects)	
	Peak		Cumulative			
	schedule 1/2	schedule 3/4	schedule 1/2	schedule 3/4	schedule 1/2	schedule 3/4
Kemp's ridley	0	0	<1	<1	9	8
Leatherback	0	0	<1	<1	2	2
Loggerhead	0	0	<1	<1	42	96
Green	0	0	<1	<1	1	1

Proposed Measures to Minimize Exposure of Sea Turtles to Pile Driving Noise
Here, we consider the measures that are part of the proposed action, because they are proposed by Empire Wind or BOEM and are reflected in the proposed action as described to us by BOEM in the BA, or they are proposed to be required through the ITA (recognizing that those measures are required for marine mammals but may provide benefit to sea turtles). Specifically, we consider if and how those measures will serve to minimize exposure of ESA listed sea turtles to pile driving noise. Details of these proposed measures are included in the Description of the Action section above. We do not consider the use of PAM here; because sea turtles do not vocalize, PAM cannot be used to monitor sea turtle presence.

Seasonal Restriction on Pile Driving
No impact pile driving activities for monopiles would occur between January 1 and April 30 to avoid the time of year with the highest densities of right whales in the project area. The January 1 – April 30 period overlaps with the period when we do not expect sea turtles to occur in the action area due to cold water temperatures. This seasonal restriction is factored into the acoustic modeling that supported the development of the amount of exposure estimates above. That is,

the modeling does not consider any pile driving in the January 1 – April 30 period. Thus, the exposure estimates do not need to be adjusted to account for this seasonal restriction.

Sound Attenuation Devices and Sound Field Verification
Empire Wind will implement sound attenuation measures that is designed and projected to achieve at least a 10 dB reduction in pile driving noise, as described above. The attainment of a 10 dB reduction in pile driving noise was incorporated into the exposure estimate calculations presented above. Thus, the exposure estimates do not need to be adjusted to account for the use of sound attenuation. If a reduction greater than 10 dB is achieved, the number of sea turtles exposed to pile driving noise could be lower as a result of resulting smaller distances to thresholds of concern.

As described above, Empire Wind will conduct hydroacoustic monitoring for a subset of impact-driven piles. The required sound source verification will provide information necessary to confirm that the sound source characteristics predicted by the modeling are reflective of actual sound source characteristics in the field. If noise levels are higher than predicted by the modeling described here (i.e., measured distances exceed the distances to the peak and/or cumulative injury and/or behavioral disturbance thresholds identified in tables 7.1.32 and 7.1.33), additional or alternative noise attenuation measures will be implemented to reduce noise and avoid exceeding the modeled distances to the injury and behavioral disturbance thresholds that were analyzed here. In the event that noise attenuation measures and/or adjustments to pile driving cannot reduce the distances to less than those modeled (assuming 10 dB attenuation), this would be considered new information that reveals effects of the action that may affect listed species in a manner or to an extent not previously considered and reinitiation of this consultation is expected.

Clearance and Shutdown Zone
As described in the BA, Empire Wind would use PSOs to establish clearance zones of 500 m around the pile driving equipment to ensure the area is clear of sea turtles prior to the start of pile driving. PSOs will be located at an elevated location on the pile driving platform and on a vessel at a distance from the pile driving platform determined to ensure maximum detection probability of animals in the clearance and shutdown zones. Prior to the start of pile driving activity, the clearance zone will be monitored for 60 minutes for protected species including sea turtles. If a sea turtle is observed approaching or entering the clearance zone prior to the start of pile driving operations, pile driving activity will be delayed until either the sea turtle has voluntarily left the respective clearance zone and been visually confirmed beyond that clearance zone, or, 30 minutes have elapsed without re-detection of the animal. Sea turtles observed within a clearance zone will be allowed to remain in the clearance zone (*i.e.*, must leave of their own volition), and their behavior will be monitored and documented. The clearance zones may only be declared clear, and pile driving started, when the entire clearance zone is visible (*i.e.,* when not obscured by dark, rain, fog, etc.) for a full 30 minutes prior to pile driving. As required by conditions of the ITA, a zone of at least 1,500 m must be fully visible before pile driving can begin. If a sea turtle is observed entering or within the 500 m clearance zone after pile driving has begun, the PSO will request a temporary cessation of pile driving as explained for marine mammals above.

There will be at least two PSOs stationed at an elevated position at or near the pile being driven and at least two PSOs on a vessel transiting an area that will allow effective monitoring of the entirety of the marine mammal clearance and shutdown zones (likely 1,500 to 2,000 m from the pile). Given that PSOs at an elevated position are expected to reasonably be able to detect sea turtles at a distance of 500 m from their station, we expect that the PSOs from the pile driving platform will be able to effectively monitor the clearance zone and that the PSOs on the PSO vessel will provide additional information on sea turtles detected outside the clearance zone. While visibility of sea turtles in the clearance zone is limited to only sea turtles at or very near the surface, we expect that the use of the clearance zone will reduce the number of times that pile driving begins with a sea turtle closer than 500 m to the pile being driven. The single strike PTS (peak) threshold will not be exceeded during any impact pile driving of monopiles or pin piles; thus, injury is not expected to occur even if a sea turtle was within the clearance zone for long enough to be exposed to a single pile strike. The exposure range for the cumulative injury threshold for sea turtles is greater than zero only for the 9.6 m difficult to drive monopile foundation. Depending on species and whether one or two piles are driven per day, a sea turtle would need to approach within 30 to 310 m of the pile being driven to have accumulated enough energy to experience PTS. Given that the clearance and shutdown zone is larger than the area within which a sea turtle would need to remain to experience injury from exposure to pile driving noise, the requirement to implement a clearance and shutdown zone further reduces the already low likelihood of a sea turtle being exposed to noise above the injury threshold. The clearance and shutdown requirements may also reduce the number of sea turtles potentially exposed to noise above the behavioral disturbance thresholds but we are not able to estimate the extent of any reduction.

Soft Start

As described above, before full energy pile driving begins, the hammer will operate at 10-20% energy for 20 minutes (400 – 800 kJ for WTG and OSS monopiles). Based on information in Küsel et al. 2022, at these hammer energies, underwater noise does not exceed the peak threshold for considering PTS for sea turtles; noise above the 175 dB re 1uPa threshold would extend approximately 300 m from a monopile and about 30 m from a pin pile during the soft start period. The use of the soft start gives sea turtles near enough to the piles to be exposed to the soft start noise a "head start" on escape or avoidance behavior by causing them to swim away from the source. This means that sea turtles within the clearance zone that had not been detected by the PSOs would be expected to begin to swim away from the noise before full force pile driving begins; this further reduces the potential for a sea turtle remaining close enough to any pile being actively driven to experience PTS. It is likely that by eliciting avoidance behavior prior to full power pile driving, the soft start will reduce the duration of exposure to noise that could result in behavioral disturbance. In this context, soft start is a mitigation measure designed to reduce the amount and severity of effects incidental to pile driving. However, we are not able to predict the extent to which the soft start will reduce the number of sea turtles exposed to pile driving noise or the extent to which it will reduce the duration of exposure. Therefore, while the soft start is expected to reduce effects of pile driving, we are not able to modify the estimated exposures to noise above the behavioral disturbance threshold to account for any benefit provided by the soft start.

7.1.4.1 Effects to Sea Turtles Exposed to Impact Pile Driving Noise for Foundation Installation

As noted above, modeling indicates the peak PTS threshold is not exceeded in any pile driving scenario. Acoustic modeling indicates that exposure to noise above the cumulative PTS threshold is expected only for the installation of the up to 17 difficult to drive piles (9.6 m diameter). The modeled acoustic ranges for sea turtles for the difficult to drive piles is less than 120 m for Kemp's ridleys; less than 310 m for leatherbacks; less than 30 m for loggerheads; and less than 170 m for greens. These distances are the "closest point of approach"; that is, based on animat modeling that factors in species specific behavior (but not aversion from the noise source), an individual turtle needs to get at least that close to the pile for it to have accumulated enough acoustic energy to experience PTS. The exposure analysis conducted by Küsel et al. (2022) predicts exposure of less than 1 Kemp's ridley, 1 leatherback, and 1 loggerhead, and approximately 1 green sea turtle to noise above the cumulative PTS threshold. In order for noise exposure above the cumulative PTS threshold to occur, a sea turtle would need to come closer than 310 m of the difficult to drive pile. Based on the clearance and shutdown requirements which are triggered if a sea turtle is within 500 m of the pile being installed and the anticipated behavioral response (i.e., avoidance) to noise above the 175 dB re 1uPa RMS threshold (which extends approximately 1 to 1.5km from the difficult to drive monopile), it is extremely unlikely that this will occur. Based on this, despite the modeled predictions of sea turtles exposed to noise above the cumulative PTS threshold we do not expect this to occur and no sea turtles are expected to experience permanent hearing loss or any other injury. No mortalities are anticipated due to exposure to pile driving noise. Therefore, take by harm (i.e. auditory injury, non-auditory injury) or mortality, as the result of impact pile driving is not anticipated.

The exposure analysis also predicts exposure of sea turtles to noise expected to result in a behavioral response. As noted above, considering the different proposed construction schedules, modeling predicts the exposure of up to 9 Kemp's ridleys, 2 leatherbacks, 96 loggerheads, and 1 green sea turtle will be exposed to noise above the behavioral impacts threshold (Tables 7.X and Y). Neither Empire Wind nor BOEM modeled the number of sea turtles expected to be exposed to noise above the TTS threshold; we are assuming that some of the sea turtles exposed to noise above the 175 dB threshold would also be exposed to noise above the TTS threshold.

Any sea turtles affected by TTS would experience a temporary, recoverable, hearing loss manifested as a threshold shift around the frequency of the pile driving noise. Because sea turtles do not use noise to communicate, any TTS would not impact communications. We expect that this temporary hearing impairment would affect frequencies utilized by sea turtles for acoustic cues such as the sound of waves, coastline noise, or the presence of a vessel or predator. Sea turtles are not known to depend heavily on acoustic cues for vital biological functions (Nelms et al. 2016; Popper et al. 2014), and instead, may rely primarily on senses other than hearing for interacting with their environment, such as vision (Narazaki et al. 2013) and magnetic orientation (Avens and Lohmann 2003; Putman et al. 2015). As such, it is unlikely that the temporary loss of hearing sensitivity in a sea turtle would affect its fitness (i.e., survival or reproduction). That said, it is possible that sea turtles use acoustic cues such as waves crashing, wind, vessel and/or predator noise to perceive the environment around them. If such cues increase survivorship (e.g., aid in avoiding predators, navigation), temporary loss of hearing sensitivity may have effects on individual sea turtle fitness. TTS of sea turtles is expected to only last for several days following the initial exposure (Moein et al. 1994). Given this short period of time, and that sea turtles are not known to rely heavily on acoustic cues, we do not anticipate single TTSs would have any impacts on the health or reproductive capacity or success of individual sea turtles; TTS is considered in the context of harassment below.

Masking

Sea turtle hearing abilities and known use of sound to detect environmental cues is discussed above. Sea turtles are thought capable of detecting nearby broadband sounds, such as would be produced by pile driving. Thus, environmental sounds, such as the sounds of waves crashing along coastal beaches or other important cues for sea turtles, could possibly be masked for a short duration during pile driving. However, any masking would not persist beyond the period a sea turtle is exposed to the pile driving noise (likely minutes but in no case more than the approximately three to four hours it takes to install a single pile). As addressed in Hazel et al. (2004), sea turtle reaction to vessels is thought to be based on visual cues and not sound; thus, we do not expect that any masking would increase the risk of vessel strike as sea turtles are not expected to rely on the noise of vessels to avoid vessels.

Behavioral Response and Stress

Based on prior observations of sea turtle reactions to sound, if a behavioral reaction were to occur, the responses could include increases in swim speed, change of position in the water column, or avoidance of the sound. The area where pile driving will occur is not known to be a breeding area and is over 400 km north of the nearest beach where sea turtle nesting has been documented (Virginia Beach, VA). Therefore, breeding adults and hatchlings are not expected in the area. The expected behavioral reactions would temporarily disrupt migration, feeding, or resting. However, that disruption will last for no longer than it takes the sea turtle to swim away from the noisy area (from 0.1 to 1.59 km depending on the pile being driven) and displacement from a particular areas would last, at the longest, the duration of pile driving (3.5 hours for a monopile, 4.2 hours for a pin pile). There is no evidence to suggest that any behavioral response would persist beyond the duration of the sound exposure, which in this case is the time it takes the turtle to swim less than 1.6 km or the time to drive a pile, approximately three to four hours. For migrating sea turtles, it is unlikely that this temporary disturbance, which would result in a change in swimming direction, would have any consequence to the animal. Resting sea turtles are expected to resume resting once they escape the noise. Foraging sea turtles would resume foraging once suitable forage is located outside the noisy area.

While in some instances, temporary displacement from an area may have significant consequences to individuals or populations this is not the case here. For example, if individual turtles were prevented from accessing nesting beaches and missed a nesting cue or were precluded from a foraging area for an extensive period, there could be impacts to reproduction and the health of individuals, respectively. However, the area where noise may be at disturbing levels at any one time is an extremely small portion of the coastal area used for north-south and south-north migrations and is only a fraction of the WDA used by foraging sea turtles. We have no information to indicate that any particular portion of the WDA is more valuable to sea turtles than another and no information to indicate that resting, foraging and migrating cannot take place in any portion of the WDA or that any area is better suited for these activities than any other area. A disruption in migration, feeding, or resting for no more than four hours, and likely even less given the short distance a sea turtle would need to swim to avoid the noise, is not expected to result in any reduction in the health or fitness of any sea turtle. Additionally, significant behavioral responses that result in disruption of important life functions are more likely to occur from multiple exposures within a longer period of time, which are not expected to occur during the pile driving operations for the Empire Wind project as the impact pile driving noise will be intermittent and temporary.

Concurrent with the above responses, sea turtles are also expected to experience physiological stress responses. Stress is an adaptive response and does not normally place an animal at risk. Distress involves a chronic stress response resulting in a negative biological consequence to the individual. While all ESA-listed sea turtles that experience TTS and behavioral responses are also expected to experience a stress response, such responses are expected to be short-term in nature given the duration of pile driving (no more than four hours at a time) and because we do not expect any sea turtles to be exposed to pile driving noise on more than one day. As such, we do not anticipate stress responses would be chronic, involve distress, or have negative long-term impacts on any individual sea turtle's fitness.

All behavioral responses to a disturbance, such as those described above, will have an energetic or metabolic consequence to the individual reacting to the disturbance (e.g., adjustments in migratory movements or disruption/delays in foraging or resting). Short-term interruptions of normal behavior are likely to have little effect on the overall health, reproduction, and energy balance of an individual or population (Richardson *et al.* 1995). As the disturbance will occur for a portion of each day for a period of 48 to 96 days in year 1 and 25-51 days in year 2 (depending on number of piles installed per day), with pile driving occurring for no more than approximately 3 to 15 hours per day (and typically three to eight hours per day), this exposure and displacement will be temporary and not chronic. Therefore, any interruptions in behavior and associated metabolic or energetic consequences will similarly be temporary. Thus, we do not anticipate any impairment of the overall health, survivability, or reproduction of any individual sea turtle.

As explained above, we do not expect masking to increase the risk of vessel strike as sea turtles are expected to rely on visual, rather than acoustic, cues when attempting to avoid vessels. We have considered if the avoidance of pile driving noise is likely to result in an increased risk of vessel strike or entanglement in fishing gear. This could theoretically occur if displacement from an area ensonified by pile driving noise resulted in individuals moving into areas where vessel traffic was higher or where fishing gear was more abundant. Information available in the Navigational Safety Risk Assessment describes vessel traffic and fishing activity within and outside the WFA where pile driving will occur. Information on patterns and distribution of vessel traffic and fishing activity, including fishing gear that may result in the entanglement or capture of sea turtles, is illustrated in the Navigational Safety Risk Assessment prepared for the Empire Wind Project (Anatec 2022, Empire Wind NSRA, COP Appendix DD)). Based on the available information, we do not expect avoidance of pile driving noise to result in an increased risk of vessel strike or entanglement in fishing gear. This determination is based on the relatively small size of the area with noise that a sea turtle is expected to avoid (no more than 1.6 km from the pile being installed), the short term nature of any disturbance, the limited number of sea turtles impacted, and the lack of any significant differences in vessel traffic or fishing activity in that 1.6 km area that would put a sea turtle at greater risk of vessel strike or entanglement/capture.

We evaluate the potential for noise produced by the proposed action to cause ESA take by harassment. As explained above, the NMFS Interim Guidance on the ESA Term "Harass" (NMFS PD-02-111-XX) provides for a four-step process to determine if a response meets the definition of harassment. Here, we carry out that four-step assessment to determine if the effects to the up to 9 Kemp's ridley, 1 green, 2 leatherback and 96 loggerhead sea turtles expected to be exposed to noise above the 175 dB threshold meet the definition of harassment. We have established that up to 9 Kemp's ridley, 1 green, 2 leatherback, and 96 loggerhead sea turtles will be exposed to disturbing levels of noise (step 1). For an individual, the nature of this exposure is expected to be limited to a one-time exposure to pile driving noise and will last for as long as it takes the individual to swim away from the disturbing noise or, at maximum, the duration of the pile driving event (approximately 3 to 4 hours); this disruption will occur in areas where individuals may be migrating, foraging, or resting (step 2). Animals that are exposed to this noise are expected to abandon their activity and move far enough away from the pile being driven to be outside the area where noise is above the 175 dB threshold (traveling up to 1.6 km). As explained above, these individuals are expected to experience TTS (temporary hearing impairment), masking (which, together with TTS would affect their ability to detect certain environmental cues), stress, disruptions to foraging, and energetic consequences of moving away from the pile driving noise and potentially needing to seek out alternative prey resources (step 3). Together, these effects will significantly disrupt a sea turtle's normal behavior at a level that creates the likelihood of injury for that day; that is, the nature and duration/intensity of these responses are a significant disruption of normal behavioral patterns that creates the likelihood of injury (step 4). Therefore, based on this four-step analysis, we find that the up to 9 Kemp's ridley, 1 green, 2 leatherback, and 96 loggerhead sea turtles exposed to pile driving noise louder than 175 dB re 1uPa rms are likely to be adversely affected and that effect amounts to harassment. As such, we expect the harassment of 9 Kemp's ridley, 1 green, 2 leatherback, and 96 loggerhead sea turtles as a result of pile driving.

NMFS defines "harm" in the definition of ESA "take" as "an act which actually kills or injures fish or wildlife (50 CFR 222.102). Such an act may include significant habitat modification or degradation where it actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering" (50 CFR §222.102). No sea turtles will be injured or killed due to exposure to pile driving noise. Further, while exposure to pile driving noise will significantly disrupt normal behaviors of individual sea turtles on the day that the turtle is exposed to the pile driving noise creating the likelihood of injury, it will not actually kill or injure any sea turtles by significantly impairing any essential behavioral patterns. This is because the effects will be limited to that single day and are expected to be fully recoverable, there will not be an effect on the animal's overall energy budget in a way that would compromise its ability to successfully obtain enough food to maintain its health, or impact the ability of any individual to make seasonal migrations or participate successfully in breeding or nesting. TTS will resolve within no more than a week of exposure and is not expected to affect the health of any turtle or its ability to migrate, forage, breed, or nest. We also expect that stress responses will be limited to the single day that exposure to pile driving noise occurs and there will not be such an increase in stress that there would be physiological consequences to the individual that could affect its health or ability to migrate, forage, breed, or nest. Thus, as no injury or mortality will actually occur, the response of individual sea turtles to pile driving noise does not meet the definition of “harm.”

Pile Driving to Support Cable Installation

As described in section 3, at each HDD exit pit either sheet pile cofferdams (vibratory) or goal posts (impact) will be installed. Additionally, sheet piles will be installed for bulkhead repairs and timber piles will be removed at Substation C. Substation C is located inshore Long Island along the Wreck Lead Channel. Water depths average approximately 1 m.

Modeling was carried out to estimate the distances to thresholds of interest (acoustic range) for all pile driving associated with these activities (see Table 7.1.27). Noise above the peak PTS and TTS thresholds are not expected at any distance from the pile. The distance to the cumulative PTS and cumulative TTS thresholds range from 2 to 207 m, depending on the activity. Exposure to noise above this threshold would require an individual sea turtle to remain within that distance of all pile driving activity carried out in a 24 hour period. Given the size of the area impacted and that sea turtles in the area are highly mobile, such exposure is extremely unlikely to occur. To be exposed to noise above the 175 dB re 1uPa RMS behavioral disturbance threshold, a sea turtle would need to be within 1 to 53 of the pile driving activity. Even if a sea turtle came that close to the pile driving activity, the anticipated behavioral response is limited to the individual swimming away from the noisy area. Given the extremely small area impacted (extending 1 to 53 m from the pile), any effects would be so small that they cannot be meaningfully measured, evaluated, or detected, and are therefore insignificant.

Table 7.1.27. Modeled distances to sea turtle thresholds of interest for identified pile driving activities associated with cable landfall; distances are in meters.

Activity/Location	Peak PTS	cumulative PTS	Peak TTS	cumulative TTS	behavior
vibratory pile driving - cofferdam installation for HDD exit (location with greatest distance)	0.00	94.00	0.00	14-207	53.00
impact pile driving - goal post installation (no noise attenuation system)	0.00	18.30	0.00	183.00	39.80
vibratory pile driving - Substation C Bulkhead Sheet Piles	0	2	0	20	1
vibratory hammer - Substation C timber pile removal	0	2.4	0	24.4	1.9

Prior to the start of pile driving to support the sea to shore transition, a clearance zone with a 300 m radius around the piles to be driven will be monitored by a PSO for at least 30 minutes. Any visual detection of sea turtles within the 300-m clearance zones will trigger a delay in pile installation. Upon a visual detection of a sea turtle entering or within the relevant clearance zone during pile-driving, pile driving will not start until: 1) The lead PSO verifies that the animal(s) voluntarily left and headed away from the clearance area; or 2) 30 minutes have elapsed without re-detection of the sea turtle(s) by the lead PSO. Similarly, if a sea turtle is detected in the clearance zone once pile driving is started, pile driving will stop until the above conditions are met. At a distance of 300 m or less, sea turtles at the surface are expected to be able to be sighted by the PSO. While submerged sea turtles may not be detected by the PSO, the length of the clearance period increases the potential for detection as individuals surface to breath. The clearance procedures further reduce the already very low likelihood of exposure of sea turtles to these noise sources. No take of sea turtles is anticipated as a result of noise caused by the installation or removal of the casing pipes, sheet pile cofferdams, bulkhead sheet piles, or timber pile removal.

Pile Driving at SBMT

As described in BOEM’s BA, the Connected Action would include installation of 36-inch (0.9-meter) steel pipe piles (vibratory and impact) and steel sheet piles (vibratory). Pipe piles would be installed using a vibratory hammer for the majority of installation with an impact hammer; sn impact hammer would be used to drive the pile during the final 10 to 15 feet (3 to 4.5 meters). Sheet piles will be installed entirely using a vibratory hammer. Mitigation measures for pile driving associated with the Connected Action include soft start and use of a bubble curtain, as well as a time of year restriction limiting in-water work to June 1 to December 15 (AECOM 2021) and clearance and shutdown zones extending at least 300 m from the pile being driven. To evaluate pile driving impacts for the Connected Action for sea turtles, BOEM used the NMFS Multi-Species Pile Driving Calculator to calculate distances to the recommended thresholds for sea turtles. Assuming a strike rate of 60 strikes per minute (Matuschek and Betke 2009) and 5 decibels of attenuation due to use of a bubble curtain, noise levels associated with pile driving for the Connected Action could exceed the cumulative injury threshold at a distance of 139 m from the pile being driven; the distance to this threshold for vibratory pile driving is only 1.4 m. Exposure to noise above this threshold would require a sea turtle to remain with that distance of all piles driven in a given day. The rare and transient nature of any sea turtles in the area near SBMT makes this extremely unlikely to occur. Noise levels may exceed the behavioral disturbance threshold for sea turtles up to approximately 74 meters from impact pile driving and 5 meters from vibratory pile driving. Even if a sea turtle came that close to the pile driving activity, the anticipated behavioral response is limited to the individual swimming away from the noisy area. Given the extremely small area impacted (extending 5 to 74 m from the pile) in an area that few, if any, sea turtles are expected to occur, any effects would be so small that they cannot be meaningfully measured, evaluated, or detected, and are therefore insignificant. The clearance procedures further reduce the already very low likelihood of exposure of sea turtles to these noise sources. No take of sea turtles is anticipated as a result of noise caused by the pile driving at SBMT.

Vessel Noise and Cable Installation

The vessels used for the proposed project will produce low-frequency, broadband underwater sound below 1 kHz (for larger vessels), and higher-frequency sound between 1 kHz to 50 kHz (for smaller vessels), although the exact level of sound produced varies by vessel type. Noise produced during cable installation is dominated by the vessel noise; therefore, we consider these together.

ESA-listed turtles could be exposed to a range of vessel noises within their hearing abilities. Depending on the context of exposure, potential responses of green, Kemp's ridley, leatherback, and loggerhead sea turtles to vessel noise disturbance, would include startle responses, avoidance, or other behavioral reactions, and physiological stress responses. Very little research exists on sea turtle responses to vessel noise disturbance. Currently, there is nothing in the available literature specifically aimed at studying and quantifying sea turtle response to vessel noise. However, a study examining vessel strike risk to green sea turtles suggested that sea turtles may habituate to vessel sound and may be more likely to respond to the sight of a vessel rather than the sound of a vessel, although both may play a role in prompting reactions (Hazel et al. 2007). Regardless of the specific stressor associated with vessels to which turtles are responding, they only appear to show responses (avoidance behavior) at approximately 10 m or closer (Hazel et al. 2007).

Therefore, the noise from vessels is not likely to affect sea turtles from further distances, and disturbance may only occur if a sea turtle hears a vessel nearby or sees it as it approaches. These responses appear limited to non-injurious, minor changes in behavior based on the limited information available on sea turtle response to vessel noise.

For these reasons, vessel noise is expected to cause minimal disturbance to sea turtles. If a sea turtle detects a vessel and avoids it or has a stress response from the noise disturbance, these responses are expected to be temporary and only endure while the vessel transits through the area where the sea turtle encountered it. Therefore, sea turtle responses to vessel noise disturbance are considered insignificant (i.e., so minor that the effect cannot be meaningfully evaluated), and a sea turtle would be expected to return to normal behaviors and stress levels shortly after the vessel passes by.

Operation of WTGs

As described above, many of the published measurements of underwater noise levels produced by operating WTGs are from older geared WTGs and may not be representative of newer direct-drive WTGs, like those that will be installed for the Empire Wind project. Elliot et al. (2019) reports underwater noise monitoring at the Block Island Wind Farm, which has direct-drive GE Haliade turbines; as explained in section 7.1.2, this is the best available data for estimating operational noise of the Empire Wind turbines. The loudest noise recorded was 126 dB re 1uPa at a distance of 50 m from the turbine when wind speeds exceeded 56 kmh. As noted above, based on wind speed records within the WDA (Empire Wind COP) and the nearby Ambrose Buoy, average wind speeds in the WDA are between 11.2 and 26 km/h and exceed 40 km/h less than 3% of the time. Elliot et al. (2019) conclude that based on monitoring of underwater noise at the Block Island site, under maximum potential impact scenarios, no risk of temporary or permanent hearing damage (PTS or TTS) for sea turtles could be projected even if an animal remained in the water at 50 m (164 ft.) from the turbine for a full 24-hour period. As underwater noise associated with the operation of the WTGs is below the thresholds for considering behavioral disturbance, and considering that there is no potential for exposure to noise above the peak or cumulative PTS or TTS thresholds, effects to sea turtles exposed to noise associated with the operating turbines are extremely unlikely to occur. No take of sea turtles from exposure to operational noise is expected.

HRG Surveys

While some HRG survey equipment operates in a frequency that can be perceived by sea turtles (e.g, boomers, sparkers, bubble guns), none of that equipment is proposed for use by Empire Wind. None of the equipment that is described for the HRG surveys that are part of the proposed action, including the CHIRP, produce underwater noise that can be perceived by sea turtles. As such, no effects to sea turtles are anticipated from any exposure to HRG survey noise; this is because it will be outside the hearing frequency of sea turtles.

7.1.5. Effects of Project Noise on Sturgeon

Background Information – Sturgeon and Noise

Impulsive sounds such as those produced by impact pile driving can affect fish in a variety of ways, and in certain circumstances, can cause mortality, auditory injury, barotrauma, and behavioral changes. Impulsive sound sources produce brief, broadband signals that are atonal transients (e.g., high amplitude, short-duration sound at the beginning of a waveform; not a continuous waveform). They are generally characterized by a rapid rise from ambient sound pressures to a maximal pressure followed by a rapid decay period that may include a period of diminishing, oscillating maximal and minimal pressures. For these reasons, they generally have an increased capacity to induce physical injuries in fishes, especially those with swim bladders (Casper et al. 2013a; Halvorsen et al. 2012b; Popper et al. 2014). These types of sound pressures cause the swim bladder in a fish to rapidly and repeatedly expand and contract, and pound against the internal organs. This pneumatic pounding may result in hemorrhage and rupture of blood vessels and internal organs, including the swim bladder, spleen, liver, and kidneys. External damage has also been documented, evident with loss of scales, hematomas in the eyes, base of fins, etc. (e.g., Casper et al. 2012c; Gisiner 1998; Halvorsen et al. 2012b; Wiley et al. 1981; Yelverton et al. 1975a). Fish can survive and recover from some injuries, but in other cases, death can be instantaneous, occur within minutes after exposure, or occur several days later.

Hearing impairment

Research is limited on the effects of impulsive noise on the hearing of fishes, however some research on seismic air gun exposure has demonstrated mortality and potential damage to the lateral line cells in fish larvae, fry, and embryos after exposure to single shots from a seismic air gun near the source (0.01 to 6 m; Booman et al. 1996; Cox et al. 2012). Popper et al. (2005a) examined the effects of a seismic air gun array on a fish with hearing specializations, the lake chub (*Couesius plumbeus*), and two species that lack notable hearing specializations, the northern pike (*Esox lucius*) and the broad whitefish (*Coregonus nasus*), a salmonid species. In this study, the average received exposure levels were a mean peak pressure level of 207 dB re 1 μPa; sound pressure level of 197 dB re 1 μPa; and single-shot sound exposure level of 177 dB re 1 μPa^2-s. The results showed temporary hearing loss for both lake chub and northern pike to both 5 and 20 air gun shots, but not for the broad whitefish. Hearing loss was approximately 20 to 25 dB at some frequencies for both the northern pike and lake chub, and full recovery of hearing took place within 18-24 hours after sound exposure. Examination of the sensory surfaces showed no damage to sensory hair cells in any of the fish from these exposures (Song et al. 2008). Popper et al. (2006) also indicated exposure of adult fish to a single shot from an air gun array (consisting of four air guns) within close range (six meters) did not result in any signs of mortality, seven days post-exposure. Although non-lethal injuries were observed, the researchers could not attribute them to air gun exposure as similar injuries were observed in controlled fishes. Other studies conducted on fishes with swim bladders did not show any mortality or evidence of other injury (Hastings et al. 2008; McCauley and Kent 2012; Popper et al. 2014; Popper et al. 2007; Popper et al. 2005a).

McCauley et al. (2003) showed loss of a small percent of sensory hair cells in the inner ear of the pink snapper (*Pagrus auratus*) exposed to a moving air gun array for 1.5 hours. Maximum received levels exceeded 180 dB re 1 μPa^2-s for a few shots. The loss of sensory hair cells continued to increase for up to at least 58 days post-exposure to 2.7 percent of the total cells. It is not known if this hair cell loss would result in hearing loss since TTS was not examined. Therefore, it remains unclear why McCauley et al. (2003) found damage to sensory hair cells while Popper et al. (2005a) did not. However, there are many differences between the studies, including species, precise sound source, and spectrum of the sound that make it difficult speculate what the caused hair cell damage in one study and no the other.

Hastings et al. (2008) exposed the pinecone soldierfish (*Myripristis murdjan*), a fish with anatomical specializations to enhance their hearing and three species without notable specializations: the blue green damselfish (*Chromis viridis*), the saber squirrelfish (*Sargocentron spiniferum*), and the bluestripe seaperch (*Lutjanus kasmira*) to an air gun array. Fish in cages in 16 ft. (4.9 m) of water were exposed to multiple air gun shots with a cumulative sound exposure level of 190 dB re 1 μPa^2-s. The authors found no hearing loss in any fish following exposures. Based on the tests to date that indicated TTS in fishes from exposure to impulsive sound sources (air guns and pile driving) the recommended threshold for the onset of TTS in fishes is 186 dB SEL_{cum} re 1 μPa^2-s, as described in the 2014 *ANSI Guidelines*.

Physiological Stress

Physiological effects to fishes from exposure to anthropogenic sound are increases in stress hormones or changes to other biochemical stress indicators (e.g., D'amelio et al. 1999; Sverdrup et al. 1994; Wysocki et al. 2006). Fishes may have physiological stress reactions to sounds that they can detect. For example, a sudden increase in sound pressure level or an increase in overall background noise levels can increase hormone levels and alter other metabolic rates indicative of a stress response. Studies have demonstrated elevated hormones such as cortisol, or increased ventilation and oxygen consumption (Hastings and C. 2009; Pickering 1981; Simpson et al. 2015; Simpson et al. 2016; Smith et al. 2004a; Smith et al. 2004b). Although results from these studies have varied, it has been shown that chronic or long-term (days or weeks) exposures of continuous anthropogenic sounds can lead to a reduction in embryo viability (Sierra-Flores et al. 2015) and decreased growth rates (Nedelec et al. 2015).

Generally, stress responses are more likely to occur in the presence of potentially threatening sound sources such as predator vocalizations or the sudden onset of loud and impulsive sound signals. Stress responses are typically considered brief (a few seconds to minutes) if the exposure is short or if fishes habituate or have previous experience with the sound**.** However, exposure to chronic noise sources may lead to more severe effects leading to fitness consequences such as reduced growth rates, decreased survival rates, reduced foraging success, etc. Although physiological stress responses may not be detectable on fishes during sound exposures, NMFS assumes a stress response occurs when other physiological impacts such as injury or hearing loss occur.

Some studies have been conducted that measure changes in cortisol levels in response to sound sources. Cortisol levels have been measured in fishes exposed to vessel noises, predator vocalizations, or other tones during playback experiments**.** Nichols et al. (2015a) exposed giant kelpfish (*Heterostichus rostratus*) to vessel playback sounds, and fish increased levels of cortisol were found with increased sound levels and intermittency of the playbacks. Sierra-Flores et al. (2015) demonstrated increased cortisol levels in fishes exposed to a short duration upsweep (a tone that sweeps upward across multiple frequencies) across 100 to 1,000 Hz. The levels returned to normal within one hour post-exposure, which supports the general assumption that spikes in stress hormones generally return to normal once the sound of concern ceases**.** Gulf toadfish (*Opsanus beta*) were found to have elevated cortisol levels when exposed to low-frequency dolphin vocalization playbacks (Remage-Healey et al. 2006). Interestingly, the researchers observed none of these effects in toadfish exposed to low frequency snapping shrimp "pops," indicating what sound the fish may detect and perceive as threats. Not all research has indicated stress responses resulting in increased hormone levels. Goldfish exposed to continuous (0.1 to 10 kHz) sound at a pressure level of 170 dB re 1 μPa for one month showed no increase in stress hormones (Smith et al. 2004b). Similarly, Wysocki et al. (2007b) exposed rainbow trout to continuous band-limited noise with a sound pressure level of about 150 dB re 1 μPa for nine months with no observed stress effects. Additionally, the researchers found no significant changes to growth rates or immune systems compared to control animals held at a sound pressure level of 110 dB re 1 μPa.

Masking

As described previously in this biological opinion, masking generally results from a sound impeding an animal's ability to hear other sounds of interest. The frequency of the received level and duration of the sound exposure determine the potential degree of auditory masking. Similar to hearing loss, the greater the degree of masking, the smaller the area becomes within which an animal can detect biologically relevant sounds such as those required to attract mates, avoid predators or find prey (Slabbekoorn et al. 2010). Because the ability to detect and process sound may be important for fish survival, anything that may significantly prevent or affect the ability of fish to detect, process or otherwise recognize a biologically or ecologically relevant sound could decrease chances of survival. For example, some studies on anthropogenic sound effects on fishes have shown that the temporal pattern of fish vocalizations (e.g., sciaenids and gobies) may be altered when fish are exposed to sound-masking (Parsons et al. 2009). This may indicate fish are able to react to noisy environments by exploiting "quiet windows" (e.g., Lugli and Fine 2003) or moving from affected areas and congregating in areas less disturbed by nuisance sound sources. In some cases, vocal compensations occur, such as increases in the number of individuals vocalizing in the area, or increases in the pulse/sound rates produced (Picciulin et al. 2012). Fish vocal compensations could have an energetic cost to the individual, which may lead to a fitness consequence such as affecting their reproductive success or increase detection by predators (Amorin et al. 2002; Bonacito et al. 2001).

Behavioral Responses

In general, NMFS assumes that most fish species would respond in similar manner to both air guns and impact pile driving. As with explosives, these reactions could include startle or alarm responses, quick bursts in swimming speeds, diving, or changes in swimming orientation. In other responses, fish may move from the area or stay and try to hide if they perceive the sound as a potential threat. Other potential changes include reduced predator awareness and reduced feeding effort. The potential for adverse behavioral effects will depend on a number of factors, including the sensitivity to sound, the type and duration of the sound, as well as life stages of fish that are present in the areas affected.

Fish that detect an impulsive sound may respond in “alarm” detected by Fewtrell (2003), or other startle responses may also be exhibited. The startle response in fishes is a quick burst of swimming that may be involved in avoidance of predators. A fish that exhibits a startle response may not necessarily be injured, but it is exhibiting behavior that suggests it perceives a stimulus indicating potential danger in its immediate environment. However, fish do not exhibit a startle response every time they experience a strong hydroacoustic stimulus. A study in Puget Sound, Washington suggests that pile driving operations disrupt juvenile salmon behavior (Feist et al. 1992). Though no underwater sound measurements are available from that study, comparisons between juvenile salmon schooling behavior in areas subjected to pile driving/construction and other areas where there was no pile driving/construction indicate that there were fewer schools of fish in the pile-driving areas than in the non-pile driving areas. The results are not conclusive but there is a suggestion that pile-driving operations may result in a disruption in the normal migratory behavior of the salmon in that study, though the mechanisms salmon may use for avoiding the area are not understood at this time.

Because of the inherent difficulties with conducting fish behavioral studies in the wild, data on behavioral responses for fishes is largely limited to caged or confined fish studies, mostly limited to studies using caged fishes and the use of seismic air guns (Lokkeborg et al. 2012). In an effort to assess potential fish responses to anthropogenic sound, NMFS has historically applied an interim criteria for onset injury of fish from impact pile driving which was agreed to in 2008 by a coalition of federal and non-federal agencies along the West Coast (FHWG 2008). These criteria were also discussed in Stadler and Woodbury (2009), wherein the onset of physical injury for fishes would be expected if either the peak sound pressure level exceeds 206 dB (re 1 μPa), or the SEL_{cum}, (re 1 μPa^2-s) accumulated over all pile strikes occurring within a single day, exceeds 187 dB SEL_{cum} (re 1 μPa^2-s) for fish two grams or larger, or 183 dB re 1 μPa^2-s for fishes less than two grams. The more recent recommendations from the studies conducted by Halvorsen et al. (2011a), Halvorsen et al. (2012b), and Casper et al. (2012c), and summarized in the 2014 *ANSI Guidelines* are similar to these levels, but also establishes levels based upon fish hearing abilities, the presence of a swim bladder as well as severity of effects ranging from mortality, recoverable injury to TTS. The interim criteria developed in 2008 were developed primarily from air gun and explosive effects on fishes (and some pile driving) because limited information regarding impact pile driving effects on fishes was available at the time.

7.1.5.1. Criteria Used for Assessing Effects of Noise Exposure to Sturgeon

There is no available information on the hearing capabilities of Atlantic sturgeon specifically, although the hearing of two other species of sturgeon have been studied. While sturgeon have swimbladders, they are not known to be used for hearing, and thus sturgeon appear to only rely directly on their ears for hearing. Popper (2005) reported that studies measuring responses of the ear of European sturgeon (*Acipenser sturio*) using physiological methods suggest sturgeon are likely capable of detecting sounds from below 100 Hz to about 1 kHz, indicating that sturgeon should be able to localize or determine the direction of origin of sound. Meyer and Popper (2002) recorded auditory evoked potentials of varying frequencies and intensities for lake sturgeon (*Acipenser fulvescens*) and found that lake sturgeon can detect pure tones from 100 Hz to 2 kHz, with best hearing sensitivity from 100 to 400 Hz. They also compared these sturgeon data with comparable data for oscar (*Astronotus ocellatus*) and goldfish (*Carassius auratus*) and reported that the auditory brainstem responses for the lake sturgeon were more similar to goldfish (that can hear up to 5 kHz) than to the oscar (that can only detect sound up to 400 Hz); these authors, however, felt additional data were necessary before lake sturgeon could be considered specialized for hearing (Meyer and Popper 2002). Lovell et al. (2005) also studied sound reception and the hearing abilities of paddlefish (*Polyodon spathula*) and lake sturgeon. Using a combination of morphological and physiological techniques, they determined that paddlefish and lake sturgeon were responsive to sounds ranging in frequency from 100 to 500 Hz, with the lowest hearing thresholds from frequencies in a bandwidth of between 200 and 300 Hz and higher thresholds at 100 and 500 Hz; lake sturgeon were not sensitive to sound pressure. We assume that the hearing sensitivities reported for these other species of sturgeon are representative of the hearing sensitivities of all Atlantic sturgeon DPSs.

The Fisheries Hydroacoustic Working Group (FHWG) was formed in 2004 and consists of biologists from NMFS, USFWS, FHWA, USACE, and the California, Washington and Oregon DOTs, supported by national experts on underwater sound producing activities that affect fish and wildlife species of concern. In June 2008, the agencies signed an MOA documenting criteria for assessing physiological effects of impact pile driving on fish. The criteria were developed for the acoustic levels at which physiological effects to fish could be expected. It should be noted that these criteria are for the onset of physiological effects (Stadler and Woodbury, 2009), not levels at which fish are necessarily mortally damaged. These criteria were developed to apply to all fish species, including listed green sturgeon, which are biologically similar to shortnose and Atlantic sturgeon and for these purposes can be considered a surrogate. The interim criteria are:

- Peak SPL: 206 dB re 1 µPa
- SELcum: 187 dB re 1µPa^2-s for fishes 2 grams or larger (0.07 ounces).
- SELcum: 183 dB re 1µPa^2-s for fishes less than 2 grams (0.07 ounces).

At this time, these criteria represent the best available information on the thresholds at which physiological effects to sturgeon are likely to occur. It is important to note that physiological effects may range from minor injuries from which individuals are anticipated to completely recover with no impact to fitness to significant injuries that will lead to death. The severity of injury is related to the distance from the pile being installed and the duration of exposure. The closer to the source and the greater the duration of the exposure, the higher likelihood of significant injury.

Popper et al. (2014) presents a series of proposed thresholds for onset of mortality and potential injury, recoverable injury, and temporary threshold shift for fish species exposed to pile driving noise. This assessment incorporates information from lake sturgeon and includes a category for fish that have a swim bladder that is not involved in hearing (such as Atlantic sturgeon). The criteria included in Popper et al. (2014) are:

- Mortality and potential mortal injury: 210 dB SELcum or >207 dB peak
- Recoverable injury: 203 dB SELcum or >207 dB peak
- TTS: >186 dB SELcum.

While these criteria are not exactly the same as the FHWG criteria, they are very similar. Based on the available information, for the purposes of this Opinion, we consider the potential for physiological effects upon exposure to 206 dB re 1 µPa peak and 187 dB re 1 µPa^2-s cSEL. Use of the 183 dB re 1 µPa^2-s cSEL threshold is not appropriate for this consultation because all sturgeon in the action area will be larger than 2 grams. Physiological effects could range from minor injuries that a fish is expected to completely recover from with no impairment to survival to major injuries that increase the potential for mortality, or result in death.

NMFS has adopted thresholds described in FHWG 2008 and Popper et al. 2014 for the anticipated onset of mortality and physical injury resulting from exposure to underwater explosives. These thresholds are:

- onset of mortality (received level): $L_{p,\text{0-pk,flat}}$: 229 dB
- onset of physical injury (received level): $L_{p,\text{0-pk,flat}}$: 206 dB; $L_{\text{E},p,,\text{12h}}$: 187 dB (fish 2 grams or greater); $L_{\text{E},p,,\text{12h}}$: 183 dB (fish less than 2 g)

We use 150 dB re: 1 µPa RMS as a threshold for examining the potential for behavioral responses by individual listed fish to noise with frequency less than 1 kHz. This is supported by information provided in a number of studies described above (Andersson et al. 2007, Purser and Radford 2011, Wysocki et al. 2007). Responses to temporary exposure of noise of this level is expected to be a range of responses indicating that a fish detects the sound, these can be brief startle responses or, in the worst case, we expect that listed fish would completely avoid the area ensonified above 150 dB re: 1 uPa rms. Popper et al. (2014) does not identify a behavioral threshold but notes that the potential for behavioral disturbance decreases with the distance from the source.

7.1.5.2 Effects to Atlantic Sturgeon Exposed to Project Noise, Including the Connected Action

Similar to the results presented for sea turtles, the acoustic ranges (Rmax) for Atlantic sturgeon were modeled (Küsel et al. 2022); these are summarized below for the WTG and OSS monopile foundations, assuming 10 dB broadband attenuation. As Atlantic sturgeon may be present in the WDA throughout the year, results are presented for both the summer and winter acoustic propagation environment. Species specific information necessary to model exposure is not available for Atlantic sturgeon; thus, only acoustic ranges are presented.

Acoustic range estimates for the modeled piles and pile locations for sturgeon are included in Tables 47 – 62 in Küsel et al. 2022 (COP Appendix M). Based on these results, noise is not expected to exceed the peak injury criteria (232 dB) during any pile driving for the Empire project.

Table 7.1.28 Acoustic range (Rmax) in km to sturgeon threshold criteria with 10 dB attenuation. The largest modeled distances are shown when multiple locations were modeled.

	9.6m typical		9.6m difficult		11m		OSS1 (2 or 3 pin piles/day)		OSS2 (3 pin piles day)	
	summer	winter	summer	winter	summer	winter	summer	winter	summer	winter
peak injury (206)	0.06	0.06	0.1	0.11	0.07	0.07	0.01	0.01	0	0
cumulative injury (187)	3.19	3.46	4.77	5.2	2.89	3.14	1.71	1.72	1.72	1.74
behavior (150)	6.62	7.66	8.23	9.28	6.59	7.51	2.64	2.59	2.66	2.6

No density estimates for Atlantic sturgeon are available for the action area or for any area that could be used to estimate density in the action area. Therefore, it was not possible to conduct an exposure analysis to predict the number of Atlantic sturgeon likely to be exposed to any of the thresholds identified here.

Consideration of Mitigation Measures
Here, we consider the measures that are part of the proposed action, either because they are proposed by Empire Wind or by BOEM and reflected in the proposed action as described to us by BOEM in the BA, or are proposed to be required through the ITA. Specifically, we consider how those measures may minimize exposure of Atlantic sturgeon to pile driving noise. Details of these proposed measures are included in the Description of the Action section above.

Atlantic sturgeon are not visible to PSOs because they occur near the bottom, and depths in the areas where pile driving is planned would preclude visual observation of fish near the bottom. Therefore, monitoring of clearance zones or areas beyond the clearance zones will not minimize exposure of Atlantic sturgeon to pile driving noise. Because Atlantic sturgeon do not vocalize, PAM cannot be used to monitor Atlantic sturgeon presence; therefore, the use of PAM will not reduce exposure of Atlantic sturgeon to pile driving noise.

No impact pile driving activities for monopiles would occur between January 1 and April 30 to avoid the time of year with the highest densities of right whales in the project area. No UXO detonations will occur between December 1 and April 30. Information from Ingram et al. (2019) indicates that abundance of Atlantic sturgeon in the New York Wind Energy Area peaked from November through January. As such, the seasonal restriction is expected to reduce the number of Atlantic sturgeon that would otherwise have been exposed to foundation pile driving noise; however, we are not able to produce any quantitative estimates of the extent of the reduction.

For all impact pile driving of monopiles, Empire Wind would implement sound attenuation technology that would target at least a 10 dB reduction in noise, and that must achieve in-field measurements no greater than those modeled and presented in the BA. The attainment of a 10 dB reduction in impact pile driving and explosive noise was incorporated into the estimates of the area where injury or behavioral disruption may occur as presented above. If a reduction greater than 10 dB is achieved, the size of the area of impact would be smaller which would likely result in a smaller number of Atlantic sturgeon exposed to pile driving noise.

Soft start procedures can provide a warning to animals or provide them with a chance to leave the area prior to the hammer operating at full capacity. As described above, for impact pile driving before full energy pile driving begins, pile driving will occur at 4-6 strikes per minute at 10 to 20 percent of the maximum hammer energy (i.e., 400 to 800 kJ for monopiles), for a minimum of 20 minutes. During installation of the WTG and OSS monopiles, at 800 kJ hammer intensity, a sturgeon would need to be within 10 m of the pile being driven, to be exposed to be exposed to noise above the 206 dB re 1uPa threshold (see Table 47-62 in Küsel et al. 2022). Given the dispersed nature of Atlantic sturgeon in the lease area, this co-occurrence is extremely unlikely to occur. We expect that any Atlantic sturgeon close enough to the pile to be exposed to noise above 150 dB re 1uPa rms would experience behavioral disturbance as a result of the soft start and that these sturgeon would exhibit evasive behaviors and swim away from the noise source. During the soft start period, noise will be above 150 dB at a distance of approximately 3-4km from the WTG monopile being driven (approximately 1.2-2 km for the OSS pin piles) (see tables 47-62 in Küsel et al. 2022). The use of the soft start is expected to give Atlantic sturgeon near enough to the piles to be exposed to the soft start noise a “head start” on escape or avoidance behavior by causing them to swim away from the source. It is possible that some Atlantic sturgeon would swim out of the noisy area before full force pile driving begins; in this case, the number of Atlantic sturgeon exposed to noise that may result in injury would be reduced. It is likely that by eliciting avoidance behavior prior to full power pile driving, the soft start will reduce the duration of exposure to noise that could result in behavioral disturbance. However, we are not able to predict the extent to which the soft start will reduce the extent of exposure above the 150 dB re 1uPa threshold for considering behavioral impacts.

As described above, Empire Wind will also conduct hydroacoustic monitoring for a subset of impact-driven piles. The required sound source verification will provide information necessary to confirm that the sound source characteristics predicted by the modeling are reflective of actual sound source characteristics in the field. If noise levels are higher than predicted by the modeling described here, additional noise attenuation measures will be implemented to reduce distances to the injury and behavioral disturbance thresholds. In the event that noise attenuation measures and/or adjustments to pile driving cannot reduce the distances to less than those modeled, this may be considered new information that reveals effects of the action that may affect listed species in a manner or to an extent not previously considered and reinitiation of this consultation may be necessary.

As summarized in the Environmental Baseline, Ingram et al. (2019) studied Atlantic sturgeon distribution in the New York Wind Energy Area (which is co-extensive with the Empire Wind lease area) by monitoring the movements of tagged Atlantic sturgeon from November 2016 through February 2018 on an array of 24 acoustic receivers (see Figure 1 in Ingram et al. 2019 for acoustic receiver locations). Detections peaked from November through January, with tagged individuals uncommon or absent in July, August, and September. Individual Atlantic sturgeon were actively moving throughout the area. Residence events, (defined in the paper as "a minimum of two successive detections of an individual at a single transceiver station over a minimum period of two hours. Residence events are completed by either a detection of the individual on another transceiver station or a period of 12 hours without detection") were uncommon (only 22 events over the study period) and of short duration (mean of 10 hours). By assuming the maximum observed rate of movement of 0.86 m/s and maximum straight-line distance of 40.6 km between stations from the transceiver-distance matrix, the minimum transit time for an Atlantic Sturgeon through the NY WEA at its longest point was estimated to be 13.1 hrs.

Impact Pile Driving for Foundations
Acoustic range modeling (Table 7.1.28) indicates that in order to be exposed to pile driving noise that could result in injury, an Atlantic sturgeon would need to be within 1 m of a pin pile and within 6-110 m of a WTG monopile for a single pile strike (based on the 206 dB peak threshold). Given the dispersed distribution and transient nature of Atlantic sturgeon in and near the WDA, the potential for co-occurrence in time and space is extremely unlikely given the small area where exposure to peak noise could occur (extending less than 110 m from the pile). We also expect that the bubble curtain(s) deployed as part of the noise attenuation system will extend further than 110 m from the pile, this is likely to further deter Atlantic sturgeon from being closer than that to the pile. The soft-start, which we expect would result in a behavioral reaction and movement outside the area with the potential for exposure to the peak injury threshold, reduces this risk even further. As described above, during the soft start, an Atlantic sturgeon would need to be within approximately 10 meters of the pile being driven to be exposed to peak noise that could result in physiological effects. Given these considerations, we do not anticipate any Atlantic sturgeon to be exposed to noise above the peak injury threshold during monopile installation.

Considering the 187 dB SELcum threshold, an Atlantic sturgeon would need to remain within 2.9-5.2 km of a single monopile (with distance dependent on pile diameter, typical or difficult installation, and season) for the duration of the pile driving event (i.e., 3- 4 hours) or stay within approximately 1.7 km of the two to three pin piles installed per day for the OSS foundations. Considering the anticipated behavioral reaction of sturgeon to avoid pile driving noise above 150 dB re 1 uPa RMS and the swimming abilities of Atlantic sturgeon, this is extremely unlikely to occur. Downie and Kieffer (2017) reviewed available information on maximum sustained swimming ability (Ucrit) for a number of sturgeon species. No information was presented on Atlantic sturgeon. Kieffer and May (2020) report that swimming speed of sturgeons is consistent at approximately 2 body lengths/second. Considering that the smallest Atlantic sturgeon in the ocean environment where piles will be driven will be migratory subadults (at least 75 cm length), we can assume a minimum swim speed of 150 cm/second (equivalent to 5.4 km/hour) for Atlantic sturgeon in the WDA. Assuming a straight line escape and the slowest anticipated swim speed (5.4 km/h), even a sturgeon that was close by the pile at the start of pile driving would be able to swim away from the noisy area well before being exposed to the noise for a long enough period to meet the 187 dB SELcum threshold. The distance we would expect a sturgeon to cover in the approximately 3 hours it would take to install a pile WTG monopile is 16.2 km, in the four hours it would take to install a pin pile, a sturgeon could swim 21.6 km; these distances are at least three times the distance a sturgeon would need to swim to escape from noise above the 150 dB threshold. We expect that the soft-start will mean that the closest a sturgeon is to the pile being driven at the start of full power driving is several hundred meters away which further reduces the duration of exposure to noise that could accumulate to exceed the 187 dB SELcum threshold. Given these considerations, we expect any Atlantic sturgeon that are exposed to pile driving noise will be able to avoid exposure to noise above the levels that could result in exposure to the cumulative injury threshold. Based on this analysis and consideration of the peak and cumulative noise thresholds for injury, it is extremely unlikely that any Atlantic sturgeon will be exposed to noise that will result in injury. Therefore, no take by harm (i.e. injury) of any Atlantic sturgeon is expected to occur.

Effects of Noise Exposure above 150 dB re 1uPa rms but below the injury threshold
We expect Atlantic sturgeon to exhibit a behavioral response upon exposure to noise louder than 150 dB re 1uPa RMS but below the injury threshold. This response could range from a startle with immediate resumption of normal behaviors to complete avoidance of the area. The area where pile driving will occur is used for migration of Atlantic sturgeon, with opportunistic foraging expected to occur where suitable benthic resources are present. The area is not an aggregation area, and sustained foraging is not known to occur in this area.

During the 3-4 hour periods where impact pile driving occurs for WTG and OSS foundations, the area that will have underwater noise above the 150 dB re 1uPa RMS threshold will extend approximately 2.6-9.3 km from the pile being installed. We expect that Atlantic sturgeon exposed to noise above 150 dB re 1uPa RMS would exhibit a behavioral response and may temporarily avoid the entire area where noise is louder than 150 dB re 1uPa RMS. The consequences for an individual sturgeon would be alteration of movements to avoid the noise and temporary cessation of opportunistic foraging. Considering the swimming speeds noted above, we expect a sturgeon actively avoiding this area could swim out of it in 0.5 – 1.7 hours.

While in some instances temporary displacement from an area may have significant consequences to individuals or populations, this is not the case here. For example, if individual Atlantic sturgeon were prevented or delayed from accessing spawning habitat or were precluded from a foraging area for an extensive period, there could be impacts to reproduction and the health of individuals, respectively. However, as explained above, the area where noise may be at disturbing levels is used only for movement between other more highly used portions of the coastal Atlantic Ocean and is used only for opportunistic, occasional foraging; avoidance of any area ensonified during impact pile driving for the WTG or OSS foundations would not block or delay movement to spawning, foraging, or other important habitats.

All behavioral responses to a disturbance, such as those described above, will have an energetic or metabolic consequence to the individual reacting to the disturbance (e.g., adjustments in migratory movements or disruption in opportunistic foraging). Short-term interruptions of normal behavior are likely to have little effect on the overall health, reproduction, and energy balance of an individual or population (Richardson *et al.* 1995). As the disturbance will occur for a portion of each day for a period of 48 to 96 days in year 1 and 25-51 days in year 2 (depending on number of piles installed per day), with pile driving occurring for no more than approximately 3 to 15 hours per day (and typically three to eight hours per day), this exposure and displacement will be temporary and not chronic. Therefore, any interruptions in behavior and associated metabolic or energetic consequences will similarly be temporary. Thus, we do not anticipate any impairment of the health, survivability, or reproduction of any individual Atlantic sturgeon.

As explained above, NMFS Interim Guidance defines harassment as to "[c]reate the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." Here, we consider whether the effects to Atlantic sturgeon resulting from exposure to pile driving noise meet the ESA definition of harassment. We have established that some Atlantic sturgeon are likely to be exposed to the stressor or disturbance (in this case, pile driving noise above 150 dB re 1uPa rms). This disturbance is expected to be intermittent and limited in time and space as it will only occur when active pile driving is occurring and only in the geographic area where noise is above the behavioral disturbance threshold. As explained above, the expected response of any Atlantic sturgeon exposed to disturbing levels of noise, are expected to be alterations to their movements and swimming away from the source of the noise. This means they will need to alter their migration route; foraging would also be disrupted during this period. This will result in minor, temporary energetic costs that are expected to be fully recoverable. The nature, duration, and intensity of the response will not be a significant disruption of any behavior patterns. This is because any alterations of the movements of an individual sturgeon to avoid pile driving noise will be a minor disruption of migration, potentially taking it off of its normal migratory path for a few hours but not disrupting its overall migration (e.g., it will not result in delays or other impacts that would have a consequence to the individual). Similarly, any disruption of foraging will be temporary and limited to the few hours that the sturgeon is moving away from the noise. As the area where these impacts will occur is an area where only occasional, opportunistic foraging will occur, this will not be a significant disruption to foraging behavior. Based on this analysis, the nature and duration of the response to exposure to pile driving noise above the behavioral disturbance threshold is not a significant disruption of behavior patterns; therefore, no take by harassment is anticipated. Based on this analysis we have similarly determined that it is extremely unlikely that any Atlantic sturgeon will be exposed to noise which actually kills or injures any individual; thus no take by harm is anticipated.

We have also considered if the avoidance of the area where pile driving noise will be experienced would increase the risk of vessel strike or entanglement in fishing gear. As explained above, a sturgeon would need to travel no more than 9.2 km to swim outside the area where noise is above the threshold where behavioral disturbance is expected; this distance would result from a sturgeon being very near the source when pile driving started, it is more likely that the distance traveled would be smaller. As we do not expect vessel strike to occur in the open ocean, regardless of traffic levels, we do not expect any increase in risk of vessel strike even if a sturgeon was displaced into an area with higher vessel traffic. Based on the available information on the distribution of fishing activities that may interact with sturgeon (i.e., gillnets, trawl), it is extremely unlikely that a sturgeon avoiding pile driving noise would be more at risk of entanglement or capture than had it not been exposed to the noise source. This is because the distance that a sturgeon would need to move to avoid potentially disturbing level of noise would not put the individual in areas with higher levels of trawl or gillnet fishing than in the WDA

(Anatec 2022, Empire Wind NSRA, COP Appendix DD). Based on this analysis, all effects to Atlantic sturgeon from exposure to impact pile driving noise are expected to be extremely unlikely, or so small that they cannot be meaningfully measured, detected, or evaluated and are, therefore, insignificant. Take is not anticipated as a result of exposure to noise from driving of WTG or OSS foundations.

Pile Driving to Support Cable Installation
As described in section 3, at each HDD exit pit either sheet pile cofferdams (vibratory) or goal posts (impact) will be installed. Additionally, sheet piles will be installed for bulkhead repairs and timber piles will be removed at Substation C. Substation C is located inshore Long Island along the Wreck Lead Channel. Water depths average approximately 1 m; due to the shallow depths and near shore location, no Atlantic sturgeon are expected to occur in the area affected by work at Substation C.

Modeling was carried out to estimate the distances to thresholds of interest (acoustic range) for all pile driving associated with these activities (see Table 7.1.29). Noise above the peak PTS and TTS thresholds are not expected at any distance from the pile. The distance to the cumulative PTS and cumulative TTS thresholds range from 2 to 207 m, depending on the activity. Exposure to noise above this threshold would require an individual sea turtle to remain within that distance of all pile driving activity carried out in a 24 hour period. Given the size of the area impacted and that sea turtles in the area are highly mobile, such exposure is extremely unlikely to occur. To be exposed to noise above the 175 dB re 1uPa RMS behavioral disturbance threshold, a sea turtle would need to be within 1 to 53 of the pile driving activity. Even if a sea turtle came that close to the pile driving activity, the anticipated behavioral response is limited to the individual swimming away from the noisy area. Given the extremely small area impacted (extending 1 to 53 m from the pile), any effects would be so small that they cannot be meaningfully measured, evaluated, or detected, and are therefore insignificant.

Table 7.1.29. Modeled distances to sturgeon thresholds of interest for identified pile driving activities associated with cable landfall; distances are in meters.

Activity/Location	Peak Injury	cumulative injury	behavior
vibratory pile driving - cofferdam installation for HDD exit (location with greatest distance)	0.00	0	16-268
impact pile driving - goal post installation (no noise attenuation system)	0.00	631	1,847

Injury is not an expected outcome of exposure of sturgeon to vibratory pile driving noise. For the goal post installation, the peak injury threshold is not exceeded. In order to be exposed to pile driving noise that could result in injury, an Atlantic sturgeon would need to remain within 631 of all piles installed to support the goal post. Given the dispersed and mobile distribution of Atlantic sturgeon in and near the cable landfall locations, including the landfall for EW1 at SBMT, the potential for co-occurrence in time and space is extremely unlikely given the small area where exposure to this noise could occur. The potential is further reduced by the anticipated behavioral reaction of sturgeon to avoid pile driving noise above 150 dB re 1 uPa RMS. Considering the swim speeds noted above, it would take a sturgeon only a few minutes to swim far enough from the goal post installation to avoid being exposed to noise that could result in injury. Given these considerations, we expect any Atlantic sturgeon that are exposed to pile driving noise associated with goal post installation will be able to avoid exposure to noise above the levels that could result in exposure to the cumulative injury threshold. Based on this analysis and consideration of the peak and cumulative noise thresholds for injury, it is extremely unlikely that any Atlantic sturgeon will be exposed to noise that will result in injury. Therefore, no injury of any Atlantic sturgeon is expected to occur.

We expect Atlantic sturgeon to exhibit a behavioral response upon exposure to noise louder than 150 dB re 1uPa RMS but below the injury threshold. This response could range from a startle with immediate resumption of normal behaviors to complete avoidance of the area. The area where pile driving will occur to support cable landfall, inclusive of the area at SBMT, is used for migration of Atlantic sturgeon, with opportunistic foraging expected to occur where suitable benthic resources are present. The area is not an aggregation area, and sustained foraging is not known to occur in this area.

Vibratory pile driving for sheet pile installation and removal will occur over up to 12 hours a day for three days each. Goal post pile driving will occur for two two-hour periods per day. The consequences for an individual sturgeon would be alteration of movements to avoid the noise and temporary cessation of opportunistic foraging. During these periods, sturgeon are expected to avoid the area surrounding the pile where noise is above the 150 dB threshold (extending up to 268 m from a sheet pile and approximately 1.8 km from a casing pipe). Considering the swimming speeds noted above, we expect a sturgeon actively avoiding this area could swim out of it in less than 20 minutes.

While in some instances temporary displacement from an area may have significant consequences to individuals or populations, this is not the case here. For example, if individual Atlantic sturgeon were prevented or delayed from accessing spawning habitat or were precluded from a foraging area for an extensive period, there could be impacts to reproduction and the health of individuals, respectively. However, as explained above, the area where noise may be at disturbing levels is used only for movement between other more highly used portions of the coastal Atlantic Ocean and is used only for opportunistic, occasional foraging; avoidance of any area ensonified during pile driving to support cable installation would not block or delay movement to spawning, foraging, or other important habitats.

All behavioral responses to a disturbance, such as those described above, will have an energetic or metabolic consequence to the individual reacting to the disturbance (e.g., adjustments in migratory movements or disruption in opportunistic foraging). Short-term interruptions of normal behavior are likely to have little effect on the overall health, reproduction, and energy balance of an individual or population (Richardson *et al.* 1995). As the disturbance will occur for only a few minutes a day for less than 30 non-consecutive days, this exposure and displacement will be temporary and not chronic. Therefore, any interruptions in behavior and associated metabolic or energetic consequences will similarly be temporary. Thus, we do not anticipate any impairment of the health, survivability, or reproduction of any individual Atlantic sturgeon. Given the small areas that sturgeon will be displaced from or avoid and the short time period of any displacement or avoidance, and that use of the area is limited to migration and opportunistic foraging which are expected to be able to continue to occur with only minor and temporary disruptions or adjustments in travel route, all effects to Atlantic sturgeon from exposure to this pile driving noise are expected to be so small that they can not be meaningfully measured, evaluated, or detected, and are therefore insignificant.

Pile Driving at SBMT

As described in BOEM's BA, the Connected Action would include installation of 36-inch (0.9-meter) steel pipe piles (vibratory and impact) and steel sheet piles (vibratory). Pipe piles would be installed using a vibratory hammer for the majority of installation with an impact hammer; sn impact hammer would be used to drive the pile during the final 10 to 15 feet (3 to 4.5 meters). Sheet piles will be installed entirely using a vibratory hammer. Mitigation measures for pile driving associated with the Connected Action include soft start and use of a bubble curtain, as well as a time of year restriction limiting in-water work to June 1 to December 15 (AECOM 2021); this limits the potential for overlap of this pile driving work and the period when adult sturgeon are entering the Hudson River prior to spawning.

To evaluate pile driving impacts for the Connected Action for sturgeon, BOEM used the NMFS Multi-Species Pile Driving Calculator to calculate distances to the recommended thresholds for sturgeon. Assuming a strike rate of 60 strikes per minute (Matuschek and Betke 2009) and 5 dB of attenuation due to use of a bubble curtain, noise levels associated with pile driving for the Connected Action could exceed the cumulative injury threshold at a distance of 736 m from the pile being driven; the distance to this threshold for vibratory pile driving is not exceeded at any distance. Exposure to noise above this threshold would require a sturgeon to remain with that distance of all piles driven in a given day. The transient nature of any sturgeon in the area near SBMT where this noise level will be exceeded makes this extremely unlikely to occur. Noise levels may exceed the behavioral disturbance threshold for sturgeon up to approximately 3.4 km from impact pile driving and 215 meters from vibratory pile driving. This noise will be intermittent and not continuous throughout the day. As described in AECOM 2021, pile installation is expected to occur in sets of seven with vibration of piles (either to depth or to 10 to 15 ft. above final depth) taking 80 minutes (+ 5 minutes for setup). Therefore, vibration of a set of seven piles takes 600 minutes (10hr) of non-continuous installation. Impact pile driving is anticipated to take 20 minutes per pile, with piles installed in series of seven. Including 10 minutes of setup time per pile, pile driving operations would occur for 3.5 hours per set of 7 piles, with periods of 20 minutes of impact pile driving noise, followed by a 10 minute quiet period, etc. A portion of the area that may have noise above the behavioral threshold is used by individual sturgeon migrating in and out of the Hudson River. However, the area impacted does not extend across the width of New York Bay and even during active impact pile driving there will always be a zone of passage extending at least 1 km into the Bay from the western shoreline. As such, given the size of the area that may be avoided by individual sturgeon and that it will only be impacted by noise for 20 minutes at a time, any effects to sturgeon from any temporary avoidance of the area where noise is above the 150 dB threshold will be so small that they can not be meaningfully measured, evaluated, or detected and are therefore insignificant. No take of Atlantic sturgeon is anticipated as a result of noise caused by the pile driving at SBMT.

Vessel Noise and Cable Installation
The vessels used for the proposed project will produce low-frequency, broadband underwater sound below 1 kHz (for larger vessels), and higher-frequency sound between 1 kHz to 50 kHz (for smaller vessels), although the exact level of sound produced varies by vessel type. Noise produced during cable installation is dominated by the vessel noise; therefore, we consider these together. Vessels operating with dynamic positioning thrusters produce peak noise of 171 dB SEL peak at a distance of 1 m, with noise attenuating to below 150 dB rms at a distance of 135 m (BOEM 2021, see table 23).

In general, information regarding the effects of vessel noise on fish hearing and behaviors is limited. Some TTS has been observed in fishes exposed to elevated background noise and other white noise, a continuous sound source similar to noise produced from vessels. Caged studies on sound pressure sensitive fishes show some TTS after several days or weeks of exposure to increased background sounds, although the hearing loss appeared to recover (e.g., Scholik and Yan 2002; Smith et al. 2006; Smith et al. 2004b). Smith et al. (2004b) and Smith et al. (2006) exposed goldfish (a fish with hearing specializations, unlike any of the ESA-listed species considered in this opinion) to noise with a sound pressure level of 170 dB re 1 μPa and found a clear relationship between the amount of TTS and duration of exposure, until maximum hearing loss occurred at about 24 hours of exposure. A short duration (e.g., 10-minute) exposure resulted in 5 dB of TTS, whereas a three-week exposure resulted in a 28 dB TTS that took over two weeks to return to pre-exposure baseline levels (Smith et al. 2004b). Recovery times were not measured by researchers for shorter exposure durations, so recovery time for lower levels of TTS was not documented.

Vessel noise may also affect fish behavior by causing them to startle, swim away from an occupied area, change swimming direction and speed, or alter schooling behavior (Engas et al. 1998; Engas et al. 1995; Mitson and Knudsen 2003). Physiological responses have also been documented for fish exposed to increased boat noise. Nichols et al. (2015b) demonstrated physiological effects of increased noise (playback of boat noise) on coastal giant kelpfish. The fish exhibited acute stress responses when exposed to intermittent noise, but not to continuous noise. These results indicate variability in the acoustic environment may be more important than the period of noise exposure for inducing stress in fishes. However, other studies have also shown exposure to continuous or chronic vessel noise may elicit stress responses indicated by increased cortisol levels (Scholik and Yan 2001; Wysocki et al. 2006). These experiments demonstrate physiological and behavioral responses to various boat noises that have the potential to affect species' fitness and survival, but may also be influenced by the context and duration of exposure. It is important to note that most of these exposures were continuous, not intermittent, and the fish were unable to avoid the sound source for the duration of the experiment because this was a controlled study. In contrast, wild fish are not hindered from movement away from an irritating sound source, if detected, so are less likely to be subjected to accumulation periods that lead to the onset of hearing damage as indicated in these studies. In other cases, fish may eventually become habituated to the changes in their soundscape and adjust to the ambient and background noises.

All fish species can detect vessel noise due to its low-frequency content and their hearing capabilities. Because of the characteristics of vessel noise, sound produced from vessels is unlikely to result in direct injury, hearing impairment, or other trauma to Atlantic sturgeon. In addition, in the near field, fish are able to detect water motion as well as visually locate an oncoming vessel. In these cases, most fishes located in close proximity that detect the vessel either visually, via sound and motion in the water would be capable of avoiding the vessel or move away from the area affected by vessel sound. Thus, fish are more likely to react to vessel noise at close range than to vessel noise emanating from a greater distance away. These reactions may include physiological stress responses, or avoidance behaviors. Auditory masking due to vessel noise can potentially mask biologically important sounds that fish may rely on. However, impacts from vessel noise would be intermittent, temporary, and localized, and such responses would not be expected to compromise the general health or condition of individual fish from continuous exposures. Instead, the only impacts expected from exposure to project vessel noise for Atlantic sturgeon may include temporary auditory masking, physiological stress, or minor changes in behavior.

Therefore, similar to marine mammals and sea turtles, exposure to vessel noise for fishes could result in short-term behavioral or physiological responses (e.g., avoidance, stress). Vessel noise would only result in brief periods of exposure for fishes and would not be expected to accumulate to the levels that would lead to any injury, hearing impairment or long-term masking of biologically relevant cues. For these reasons, exposure to vessel noise is not expected to significantly disrupt normal behavior patterns (i.e., cause harassment) of Atlantic sturgeon in the action area or harm the species. Based on this analysis we have similarly determined that it is extremely unlikely that any Atlantic sturgeon will experience significant impairment of essential behavioral patterns. Thus, no take by harassment is anticipated. The effects are also so minor that they cannot be meaningfully measured, detected, or evaluated. Therefore, the effects of vessel noise on Atlantic sturgeon are considered insignificant and discountable.

Operation of WTGs

As described above, many of the published measurements of underwater noise levels produced by operating WTGs are from older geared WTGs and are not expected to be representative of newer direct-drive WTGs, like those that will be installed for the Empire Wind project. Elliot et al. (2019) reports underwater noise monitoring at the Block Island Wind Farm, which has direct-drive GE Haliade turbines; as explained in section 7.1.2, this is the best available data for estimating operational noise of the Empire Wind turbines. The loudest noise recorded was 126 dB re 1uPa at a distance of 50 m when wind speeds exceeded 56 kmh. As noted above, based on wind speed records within the WDA (Empire Wind COP) and the nearby Ambrose Buoy, average wind speeds in the WDA are between 11.2 and 26 km/h and exceed 40 km/h less than 3% of the time. As underwater noise associated with the operation of the WTGs is expected to be below the thresholds for injury or behavioral disturbance for Atlantic sturgeon, we do not expect any impacts to any Atlantic sturgeon due to noise associated with the operating turbines. Additionally, we note that many studies of fish resources within operating wind farms, including the Block Island Wind Farm, and wind farms in Europe with the older, louder geared turbines report localized increases in fish abundance during operations (due to the reef effect; e.g., Stenburg et al. 2015, Methartta and Dardick 2019, Wilber et al. 2022). This data supports the conclusion that operational noise is not likely to result in the displacement or disturbance of Atlantic sturgeon.

HRG Surveys

While some HRG survey equipment operates in a frequency that can be perceived by Atlantic sturgeon (e.g, boomers, sparkers, bubble guns), none of that equipment is proposed for use by Empire Wind. None of the equipment that is described for the HRG surveys that are part of the proposed action, including the CHIRP, produce underwater noise that can be perceived by Atlantic sturgeon. As such, no effects to Atlantic sturgeon are anticipated from any exposure to HRG survey noise; this is because it will be outside the hearing frequency of Atlantic sturgeon.

7.1.5.3 Effects of Pile Driving Noise on Shortnose sturgeon

The only pile driving that shortnose sturgeon may be exposed to is pile driving at SBMT, inclusive of pile driving at the EW1 cable landfall, and SBMT improvements. Shortnose sturgeon presence in this area is expected to be rare and limited to occasional transient subadults that are present in New York Bay and may occasionally transit into Gowanus Bay where SBMT is located. The thresholds considered for injury and behavioral disturbance are the same for Atlantic and shortnose sturgeon. Thus, consistent with the analysis for Atlantic sturgeon above, we expect that effects to shortnose sturgeon from exposure to pile driving at SBMT will be insignificant and discountable. No take is anticipated.

7.1.6 Effects of Noise on Prey

The ESA listed species in the WDA forage in varying frequencies and intensities on a wide variety of prey. With the exception of fish, little information is available on the effects of underwater noise on many prey species, such as most benthic invertebrates and zooplankton, including copepods and krill. Effects to schooling fish that are preyed upon by some whale species are likely to be similar to the effects described for Atlantic sturgeon; that is, effects are expected to be limited to temporary behavioral disturbance with no injury or mortality anticipated. However, like Atlantic sturgeon, we expect these disturbances and changes in distribution to be temporary and not represent any reduction in biomass or reduction in the availability of prey. Most benthic invertebrates have limited mobility or move relatively slowly compared to the other species considered in this analysis. As such, there may be some small reductions in prey for sea turtles and Atlantic sturgeon as a result of exposure of benthic prey species to pile driving noise. However, these reductions are expected to be small and limited to the areas immediately surrounding the piles being installed. We expect that the effects to Atlantic sturgeon and loggerhead and Kemp’s ridley sea turtles from any small and temporary reduction in benthic invertebrates due to exposure to pile driving noise to be so small that they cannot be meaningfully measured, detected, or evaluated and are therefore insignificant. No take is anticipated as a consequence of disturbance to prey..

We are not aware of any information on the effects of pile driving noise exposure to krill, copepods, or other zooplankton. McCauley et al. (2017) documented mortality of juvenile krill exposed to seismic airguns. No airguns are proposed as part of the Empire Wind project. We are not aware of any evidence that pile driving noise, HRG surveys, or the other noise sources considered here are likely to result in the mortality of zooplankton. Effects to marine mammals due to disturbance of prey are expected to be so small that they cannot be meaningfully measured, detected, or evaluated and are therefore insignificant. No take is anticipated to occur.

Similarly, we expect that any effects of operational noise on the prey of ESA listed species to be extremely unlikely or so small that they cannot be meaningfully measured, detected, or evaluated. As described above, many of the published measurements of underwater noise levels produced by operating WTGs are from older geared WTGs and are not expected to be representative of newer direct-drive WTGs, like those that will be installed for the Empire Wind project. Elliot et al. (2019) reports underwater noise monitoring at the Block Island Wind Farm, which has direct-drive GE Haliade turbines; as explained in section 7.1.2, this is the best available data for estimating operational noise of the Empire Wind turbines. The loudest noise recorded was 126 dB re 1uPa at a distance of 50 m when wind speeds exceeded 56 kmh. As noted above, based on wind speed records within the WDA (Empire Wind COP) and the nearby Ambrose Buoy, average wind speeds in the WDA are between 11.2 and 26 km/h and exceed 40 km/h less than 3% of the time. Elliot et al. note that based on monitoring of underwater noise at the Block Island site, the noise levels identified in the vicinity of the turbine are far below any numerical criteria for adverse effects on fish. As underwater noise associated with the operation of the WTGs is expected to be below the thresholds for injury or behavioral disturbance for fish species, we do not expect any impacts to any fish species due to noise associated with the operating turbines. There is no information to indicate that operational noise will affect krill, copepods, or other zooplankton. Additionally, we note that many studies of fish and benthic resources within operating wind farms, including the Block Island Wind Farm, and wind farms in Europe with the older, louder geared turbines report localized increases in fish and benthic invertebrate abundance during operations (due to the reef effect; e.g., Stenburg et al. 2015, Methartta and Dardick 2019, Wilber et al. 2022). This data supports the conclusion that operational noise is not likely to result in the displacement or disturbance of prey species. As effects to prey from operational noise on prey are extremely unlikely, effects to ESA listed species resulting from impacts to prey are also extremely unlikely and therefore, discountable.

7.2 Effects of Project Vessels

In this section we consider the effects of the operation of project vessels on listed species in the action area by describing the existing vessel traffic in the action area (as summarized in the *Environmental Baseline*, Section 6 of this Opinion), estimating the anticipated increase in vessel traffic associated with construction, operations, and decommissioning of the project, including the connected actions, (as described in BOEM's BA), and then analyzing risk of vessel strike and determining likely effects to sea turtles, listed whales, and shortnose and Atlantic sturgeon. We also consider impacts to air quality from vessel emissions and whether those impacts may cause effects to listed species. Section 3 of the Opinion describes proposed vessel use over all phases of the project, and is not repeated here but some information is summarized. Effects of vessel noise were considered in Section 7.1, above, and are not repeated here.

Project vessels will operate in distinct areas within the action area over the life of the project: in and around the WDA and transiting to/from relatively nearby ports in New York (South Brooklyn Marine Terminal, the Port of Coeymans, the Port of Albany); between the WDA and a more distant port along the U.S. east coast (Port of Charleston); and, within the U.S. EEZ on routes between the WDA and foreign ports. As explained below, over 99% of project vessel traffic will be between the WDA and ports in New York. Transits during the operation period will only be between the WDA and the O&M facility at South Brooklyn Marine Terminal, with the exception of a limited number of vessel transits of fisheries and benthic survey vessels from ports along the Atlantic coast of New York. We note that if there is an unexpected, non-routine maintenance event, a vessel may travel to the project site from an additional location; however, it is not possible to predict when or where such unanticipated trips may occur and therefore, neither the trips or their effects are reasonably certain to occur and therefore do not meet the definition of "effects of the action" and are not considered here, 50 CFR 402.02; 402.17.

7.2.1 Project Vessel Descriptions and Increase in Vessel Traffic from Proposed Project

Descriptions of project vessel use and traffic are described in Section 3 of this Opinion and summarized here for reference. Vessel traffic will occur in the WDA and between the WDA and the ports used to support EW1 and EW2 construction, operations and maintenance, and decommissioning; these ports were identified in BOEM's BA. As explained in Section 3, approximately 50 vessels of various classes will be used during the construction phase for each of the projects with a total of 1,032 annual vessel trips between various ports and the Empire Wind WDA. Not all vessels will utilize all ports under consideration. Table 7.2.1 presents the number of possible vessels, vessel class, and trips for each port, consistent with the information presented in Section 3 of this Opinion.

Table 7.2.1. Maximum Design Scenario for Transport during Construction Activities.

Port	Usage	Vessel Class	Anticipated Schedule
South Brooklyn Marine Terminal (Brooklyn, NY)	Infrastructure improvement project	One crane barge, one sediment cap barge, tugs and material transport barges	Approximately 950 trips per year for 4 years during construction period
	EW1 and EW2 staging and laydown	Various	
Port of Albany (Albany, NY)	Transportation of wind turbine towers	One (300-400 ft.) barge	Three towers per barge and tug configuration One transport every 14 days Transport would begin at Port of Albany and transit to SBMT before heading to the Lease Area for installation.
		Two tugs	
Port of Coeymans (Ravena, NY)	Transportation of rock for scour protection	One fall pipe vessel	Approximately 8 trips spread across approximately 26 weeks in 2025 and approximately 7 trips spread across approximately 26 weeks in 2026 Transport would begin at Port of Coeymans and proceed directly to the Lease Area for installation.
Nexans Cable Facility (Goose Creek, SC)	Transportation of submarine cables	One Export Cable Lay Vessel	2 trips spread across approximately 26 weeks in 2025 for EW1 1 trip in 2026 for EW2

			Transport would begin at the Nexans cable facility on the Cooper River just north of Charleston, South Carolina and proceed directly to the Lease Area
		One Interarray Cable Lay Vessel	3 trips spread across approximately 26 weeks in 2025 for EW1 4 trips spread across approximately 26 weeks in 2026 for EW2 Transport would begin at the Nexans cable facility on the Cooper River just north of Charleston, South Carolina and proceed directly to the Lease Area.
Asia (Singapore and Indonesia)	Transportation of OSS topsides	Two heavy transport vessels	2 trips for each vessel Transport would begin at ports in Asia and proceed directly to the Lease Area.

Sources: AECOM 2023, Empire COP Appendix DD (2022), COP Appendix K (2022)

As described in Section 3 of the Opinion, during the construction phase all vessels will travel at speeds of up to 10 knots, with the exceptions of tugs and barges, which are anticipated to travel at speeds of up to 6 knots of and crew transfer vessels which, when not subject to vessel speed restrictions, are expected to travel at an average speed of 17 knots within the WFA. Outside of the WFA, vessel speeds will be dependent on weather, vessel design, and current regulations governing operational speeds. Construction vessels will range from 25 to 185 meters in length and draft from 2 to 7 meters. The larger installation vessels, such as the floating/jack-up crane and cable-laying vessel, will generally travel to and from the construction area in the WDA at the beginning and end of the wind turbine and cable construction/installation and will not make transits to port on a regular basis. Tugs and barges transporting construction equipment and materials will make more frequent trips (e.g., weekly) from ports to the project site while smaller support vessels carrying supplies and crew may travel to the Empire Wind WDA more frequently. However, we note that construction crews responsible for assembling the WTGs may hotel onboard installation vessels at sea thus limiting the number of crew vessel transits expected during wind farm installation. Within the Empire Wind WDA, many vessels will be stationary or moving 10 knots or less. Construction of the offshore export cables will utilize various vessel types including a cable-laying vessel, tugs, barges, and work and transport vessels (see Table 4 in the Empire BA).

As described in the BA for the SBMT Port Infrastructure Improvement Project, dredging may be required in the “interpier” channels and basins adjacent to the seaward bulkheads at the SMBT to facilitate vessel access for vessels intended to utilize the SBMT facility. Empire also proposes to dredge at the base of the cable landfall for EW1. Deepening and dredging activities require the use of dredge and support vessels. Clamshell dredging takes place from a barge with a mounted excavator. Barges typically require one or two tugboats to position them. Clamshell dredging also involves a scow vessel where contractors deposit the dredged material for disposal.
During the operation and maintenance phase, Empire Wind vessel traffic to the WDA will be limited to visits to carry out inspections and maintenance; there will be approximately 517 annual operation and maintenance transits during the approximate 35-year lifespan of the project

primarily occurring from the SBMT to the Empire Wind WDA. Helicopters may also be used for transporting workers from land to construction sites and structures during operation. Jack-up vessels, cable-lay/cable burial vessels, and support barges may be required on an as-needed basis for major repairs. Typical draft and operational speeds for operation and maintenance vessel types are expected to be similar to those for equivalent vessels used during construction.
As described in the BA, the number and type of vessels required for project decommissioning would be similar to those used during project construction, with the exception that impact pile driving would not be required. As such, while the same class of vessel used for foundation installation may be used for decommissioning, that vessel would not be equipped with an impact hammer. At this time, no information is available on the ports that may be used for disposal and/or recycling during the decommissioning phase; however, based on information presented in the BA, we expect that trips will occur primarily between the WDA and the SBMT.
Total vessel trips during the construction period are 3,972 over the 5-year construction period; these trips will be between the Empire Wind WDA and the ports identified above. During the operation and maintenance phase, approximately 517 vessel trips will occur annually over the 35-year period, all trips would occur to/from the SBMT. At this time, no information is available on the ports that may be used to support fisheries and benthic resource surveys or infrastructure improvements at SBMT. During the decommissioning period, 1,890 trips are anticipated over a two-year period.

As explained in Section 6, the areas to be transited by Empire Wind vessels have relatively high levels of vessel traffic. The best available information indicates there are approximately 85,092 vessel transits annually in the Upper New York Bay, Bay Ridge and Red Hook Channels, and New York Harbor Lower Entrance Channels (i.e., the general area that the majority of Empire Wind vessels will transit to/from SBMT). Additionally, there are approximately 292,748 annual vessel transits up and down the Hudson River. More information on vessel traffic in the area is presented in Empire's COP Appendix DD.

Table 7.2.2 below describes the calculated increase in traffic attributable to Empire Wind project vessels during each project phase considering the estimates of Empire Wind vessel transits and the information on existing vessel transits in the areas where these trips will occur. Table 7.2.3 describes the calculated increase in traffic attributable to Empire Wind project vessels transiting the Hudson River.

Table 7.2.2. Percent Increase above Baseline Vessel Traffic in the WDA and surrounding areas transited by Empire Project Vessels

Phase	Annual Project-Related Vessel Transits	Phase Duration	% Increase in Annual Vessel Transits in the Project Area
Construction	1024[a,b]	5 years	1.2%
Operation	517[c]	35 years	0.61%
Decommissioning	945	2 years	1.1%

[a] Source: BOEM BA 2023 (1032 total trips during construction phase minus 4 Asia trips and 4 Nexans Cable Facility trips which will proceed directly to the WFA from the ports of origin).
[b] Assumes annual vessel trips to support fisheries and benthic resource surveys are already accounted for.

Table 7.2.3. Percent Increase above Baseline Vessel Traffic in the Hudson River Due to Empire Project Vessels

Phase	**Annual Project- Related Vessel Transits**	**Phase Duration**	**% Increase in Annual Vessel Transits in the Project Area**
Hudson River Ports (Port of Albany and Port of Coeymans)			
Construction	82	2 years	.028%

7.2.2 Minimization and Monitoring Measures for Vessel Operations

There are a number of measures that Empire is proposing to take and/or BOEM is proposing to require as conditions of COP approval that are designed to avoid, minimize, or monitor effects of the action on ESA listed species during construction, operation, and decommissioning of the project. NMFS OPR's proposed ITA also contains requirements for vessel strike avoidance measures for marine mammals; these measures will be implemented if the final ITA is issued and active (5 years from when first valid) and will also be required by BOEM as conditions of COP approval over the life of the project. The complete list of required measures is provided in Appendices A and B of this Opinion. These measures can be grouped into two main categories: vessel speed reductions and increased vigilance/animal avoidance. These measures are all considered part of the proposed action including those otherwise required by regulation (62 FR 6729, February 13, 1997), (66 FR 58066, November 20, 2001), (73 FR 60173, October 10, 2008).

Specific measures related to vessel speed reduction that are part of the proposed action (inclusive of the requirements included in the proposed MMPA ITA, see Section 3 and Appendixes A and B) include the following specific measures outlined in the proposed MMPA ITA; note that the New York SMA overlaps with a small portion of the lease area and the area between the mouth of New York Harbor and the inshore portion of the lease area.

- Between November 1st and April 30th, all vessels of all sizes, traveling within the lease area, along the cable corridor, or to and from ports (including SBMT) must transit at 10 kts or less;
- Year-round, all vessels, of all sizes, must transit active Slow Zones, Dynamic Management Areas (DMAs), and Seasonal Management Areas (SMAs) at 10 kts or less;
- Year round, all vessels of all sizes will reduce speed to 10 knots or less when a North Atlantic right whale is sighted, at any distance, by anyone on a Project vessel, or when any large whale, mother/calf pairs, or large assemblages of non-delphinid cetaceans are observed near (within 500 m) an underway Project vessel.
- During the 5-year period that the MMPA ITA is in effect, between May 1 and October 31, in order for a vessel to travel at greater than 10 kts, in addition to the required dedicated visual observer, Empire Wind must monitor the transit

corridor in real-time with PAM prior to and during transits. If a North Atlantic right whale is detected via visual observation or PAM within or approaching the transit corridor, all crew transfer vessels must travel at 10 kts or less for 12 hours following the detection. Each subsequent detection triggers an additional 12-hour period at 10 kts or less. A slowdown in the transit corridor expires when there has been no further visual or acoustic detection of North Atlantic right whales in the transit corridor for 12 hours

- Year round, all underway vessels operating at any speed must have a dedicated visual observer on duty at all times to monitor for protected species. For vessels operating at speeds greater than 10 knots, that observer/lookout must have no other duties during the period the vessel is traveling at speeds greater than 10 knots.
- Additionally, at all times of the year regardless of vessel size, visual observers must monitor a vessel strike avoidance zone and if an animal is spotted, the vessel must slow down and take action to transit safely around the animal.

After the MMPA ITA expires, Empire Wind may seek an exemption from BOEM to the 10 knot speed restriction in DMAs by submitting a vessel strike risk reduction plan that details revised measures and an analysis demonstrating that the measure(s) will provide a level of risk reduction at least equivalent to the vessel speed reduction measure(s) proposed for replacement. The plan included with the request must be provided to NMFS Greater Atlantic Regional Fisheries Office, Protected Resources Division and BOEM at least 90 days prior to the date scheduled for the activities for the waiver is requested. The plan must not be implemented unless NMFS and BOEM reach consensus on the appropriateness of the plan (i.e., that it would provide equivalent risk reduction as a 10 knot speed restriction).

Monitoring measures also include the integration of sighting communication tools such as Mysticetus, Whale Alert, and WhaleMap to establish a situational awareness network for marine mammal and sea turtle detections. To minimize risk to sea turtles, if a sea turtle is sighted within 100 meters or less of the operating vessel's forward path, the vessel operator is required to slow down to 4 knots (unless unsafe to do so) and then proceed away from the turtle at a speed of 4 knots or less until there is a separation distance of at least 100 meters at which time the vessel may resume normal operations. Additionally, vessel captains/operators must avoid transiting through areas of visible jellyfish aggregations or floating sargassum lines or mats. In the event that operational safety prevents avoidance of such areas, vessels would slow to 4 knots while transiting through such areas.

During the consultation period, we discussed these measures with NMFS OPR to gain greater clarity on the intent. The purpose of the suite of measures outlined in the proposed MMPA ITA is to restrict vessel speed of all Empire Wind vessels, regardless of size, to 10 knots or less wherever they are operating. The only exception will be that between May 1 – October 31, vessels operating in a transit corridor monitored by PAM, may travel above 10 knots when there have been no detections of a North Atlantic right whale via visual observation or PAM within or approaching the transit corridor for the previous 12 hours, with any subsequent detection triggering a 12-hour reset. Note that we expect the "transit corridors" will be defined in the MMPA final ITA; however, based on the language in the proposed rule that refers to operation of CTVs in transit corridors, we expect that these "transit corridor" will include the area between the WDA and the port used by CTVs (SBMT).

7.2.3 Assessment of Risk of Vessel Strike – Construction, Operations and Maintenance, and Decommissioning

Here, we consider the risk of vessel strike to ESA-listed species. This assessment incorporates the strike avoidance measures identified in Section 3, because they are considered part of the proposed action and include measures that are otherwise required by regulation. This analysis is organized by species group (i.e., Atlantic sturgeon, shortnose sturgeon, whales, and sea turtles) because the risk factors and effectiveness of strike avoidance measures are different for the different species groups. Within the species groups, the effects analysis is organized around the different geographic areas where project related vessel traffic would be experienced.

As noted in Section 2 of this Opinion and further addressed below, the effects of some vessel transits have been addressed in other Biological Opinions. Specifically, some Empire Wind project vessels will utilize the Nexans Cable Plant in Charleston, SC, which was constructed pursuant to USACE permits. The May 4, 2020 Biological Opinion prepared by NMFS' Southeast Regional Office (SERO) considers the effects of the construction and subsequent use of the Nexans Plant (2020 Nexans Opinion) on shortnose sturgeon, Atlantic sturgeon, and critical habitat designated for the Carolina DPS of Atlantic sturgeon. This Biological Opinion analyzed an overall amount of vessel transits, of which Empire would contribute a small part. The effects analyzed in the completed Nexans Opinion have been considered as part of the Environmental Baseline of this Opinion, given the definition of that term at 50 CFR §402.02. The effects specific to Empire Wind's vessel use of this port will be discussed here in this Effects of the Action section by referencing the analysis in the port Opinion and determining whether the effects of Empire Wind's vessels transiting to and from this port is consistent with the analysis or anticipated to cause additional effects. As previously explained, by using this methodology, this Opinion ensures that all of the effects of Empire Wind's vessel transits to and from the ports analyzed in other Biological Opinions will be considered in the Integration and Synthesis section and reflected in this Opinion's final determination under ESA 7(a)(2). This methodology also ensures this Opinion does not "double- count" effects of Empire Wind's vessel transits to and from the Nexans Cable Facility–once in the Environmental Baseline and once here in this Opinion's *Effects of the Action* section. This approach is being taken because BOEM was not a party to the Nexans Cable Facility Biological Opinion's consultation process, yet Empire Wind's vessel transits would not occur but for BOEM's proposed COP approval with conditions.

7.2.3.1 Atlantic Sturgeon

The distribution of Atlantic sturgeon does not overlap with the entirety of the action area. The marine range of Atlantic sturgeon extends from Hamilton Inlet, Labrador, Canada, to Cape Canaveral, Florida with distribution largely from shore to the 50m depth contour (ASMFC 2006; Stein et al. 2004). Considering the area where project vessels will operate, Atlantic sturgeon may be present in nearshore waters along the U.S. Atlantic coast (depths less than 50 m), including the WDA, and in some rivers and bays that may be transited by Project vessels (i.e., Hudson River (Port of Albany and Port of Coeymans), Charleston Harbor and the Cooper River (Port of Charleston), and New York Bay (SBMT)).

Effects of Vessel Transits in the Marine Environment and to/from SBMT

While Atlantic sturgeon are known to be struck and killed by vessels in rivers and in estuaries adjacent to spawning rivers (e.g., Delaware Bay), we have no reports of vessel strikes in the marine environment. We have considered whether Atlantic sturgeon are likely to be struck by project vessels or if the increase in vessel traffic is likely to otherwise increase the risk of strike for Atlantic sturgeon in the lease area, along the EW1 and EW2 cable corridors, at the EW2 landfall, and during transits to and from the proposed O&M Facility at SBMT.

As established elsewhere in this Opinion, Atlantic sturgeon are present within the WDA (described in Section 3.0) and are transient, not resident, within the area; there are no aggregation areas in the area in the WDA, the cable corridors or along the vessel transit route to SMBT. The dispersed and transient nature of Atlantic sturgeon in this area means that the potential for co-occurrence between a project vessel and an Atlantic sturgeon in time and space in this portion of the action area is extremely low.

In order to be struck by a vessel, an Atlantic sturgeon needs to co-occur with the vessel hull or propeller in the water column. Given the depths in the vast majority of the marine waters that will be transited by project vessels (with the exception of near shore areas where vessels will dock at the EW2 landfall in either Long Beach or Lido Beach, New York) and that sturgeon typically occur at or near the bottom while in the marine environment, the potential for co-occurrence of a vessel and a sturgeon in the water column is extremely low even if a sturgeon and vessel co-occurred generally. The areas identified in this section to be transited by the project vessels are free flowing with no obstructions; therefore, even in the event that a sturgeon was up in the water column such that it could be vulnerable to strike, there is ample room for a sturgeon to swim deeper to avoid a vessel or to swim away from it which further reduces the potential for strike. The nearshore areas at the EW2 landfall location in either Long Beach or Lido Beach, New York where vessels will enter shallower water and dock are not known to be used by Atlantic sturgeon; as such, co-occurrence between any Atlantic sturgeon and any project vessels in areas near these landfall sites with shallow water or constricted waterways where the risk of vessel strike is theoretically higher, is extremely unlikely to occur. Considering this analysis, it is extremely unlikely that any project vessels operating in the Empire Wind WDA or transiting in marine waters in the New York Bight around the WDA, inclusive of transits along the cable corridors will strike an Atlantic sturgeon during any phase of the proposed project. Therefore, effects to Atlantic sturgeon of project vessels operating in this portion of the action area are discountable.

Project vessels transiting between the WDA and SBMT will enter lower New York Bay and travel through the Bay Ridge Channel to Gowanus Bay. From 2013 to 2020, NYSDEC reported 13 Atlantic sturgeon carcasses in New York Bay that had some evidence of a possible vessel strike. These carcasses were not examined and we do not have an estimate of the total number of vessel strikes in this area annually. While we are not able to use these reports to estimate the total number of Atlantic sturgeon struck in this year, the number of carcasses reported and detected in an area that has high volumes of vessel traffic, accessible and well populated shorelines and waterways, and an established reporting system (through the NYSDEC), indicates that risk of vessel strike in this area may be considerably lower than in other geographic areas (e.g., the Delaware River). This may be due to the deep depths of the waterways in this area, the transient nature of Atlantic sturgeon in the New York Harbor/New York Bay area (i.e., sturgeon use of this area is limited to individuals migrating in and out of the Hudson River), and the lack of constrictions that would increase the potential for co-occurrence of deep draft vessels and individual sturgeon.

As noted above, the best available information indicates there are approximately 85,092 vessel transits annually in the Upper New York Bay, Bay Ridge and Red Hook Channels, and New York Harbor Lower Entrance Channels (i.e., the general area that the majority of Empire Wind vessels will transit to/from SBMT). Considering the construction, operations and maintenance, and decommissioning phases of the project, trips between the WDA and SBMT (approximately 500-1,000/annually) will represent approximately 0.5-1% of vessel transits in this area annually. Given the anticipated low risk of vessel strike in this area, and this very small increase in vessel traffic, it is extremely unlikely that an Empire Wind vessel transiting to/from SBMT will increase the risk of vessel strike of Atlantic sturgeon in this area or result in the strike of an Atlantic sturgeon. As such, effects to Atlantic sturgeon from project vessels operating in this portion of the action area are extremely unlikely to occur and are discountable.

Effects of Vessel Transits to Hudson River Ports (Albany and Coeymans)

Vessels traveling to/from the Port of Albany and the Port of Coeymans will travel up and down the Hudson River. As established elsewhere in this Opinion (described in Section 6.3), Atlantic sturgeon are present throughout the Hudson River from the Albany and Coeymans areas to the mouth of the river. Approximately 74 vessel trips annually over a two-year period will begin at the Port of Albany and transit to SBMT before heading to the lease area. The Port of Albany is located 124 nm north of the New York Harbor, followed by approximately 32 nm to the lease area. Approximately 4 vessel trips annually over a two year period will originate from the Port of Coeymans and travel to the lease area. The Port Coeymans is located 10 miles south of Albany. The distance for each trip from the Port of Coeymans to the lease area is approximately 147 nm.

While Atlantic sturgeon vessel strikes are known to occur in the Hudson River, the best available information indicates that comparatively, there is less risk of vessel strikes to sturgeon in the Hudson River compared to other rivers because the river is generally wider and deeper than either the Delaware River or the James River (NMFS 2021). Additionally, large vessels, such as the Empire Wind project vessels, that transit the Hudson River are typically assisted by tug boats and travel at speeds of less than 1 knot with their propeller idling; this is expected to reduce the risk of vessel strike. The NYSDEC compiles public reports of dead or injured sturgeon and reports those to NMFS. From 2017- July 2023, there were reports of 172 Atlantic sturgeon, with 120 of those reported with injuries that could be indicative of vessel strike. In that same period there were reports of 27 shortnose sturgeon, with 12 of those reported with injuries that could be indicative of vessel strike. There were also 18 reports of sturgeon where species was unreported or undetermined, 3 of those were reported with injuries that could be indicative of vessel strike. Very few reports are salvaged (i.e., collected and evaluated) by NYSDEC or other trained staff. Not all reports are accompanied by photos which makes any determination of species and injuries less reliable. Thus, while we have information reported by NYSDEC, at this time it is not possible to use that data to develop an estimate of the total number of shortnose or Atlantic sturgeon struck by vessels annually in the Hudson River. It is not even clear if the reports represent a reasonably minimum estimate as the uncertainty about species identification and cause of death is based largely on anecdotal reporting by untrained members of the public. However, the data does indicate that some number of Atlantic and shortnose sturgeon are struck by vessels in the Hudson River each year.

In 2018, the USACE WCSC reports a total of 292,748 trips up and down the Hudson River. It is reasonable to use these data when considering the effects of project vessels because this trip count represents an approximate annual average for vessel transits in the Hudson River portion of the action area. Depending on whether the years that Coeymans and Albany are used by project vessels completely overlap, between 4 and 74 transits between the upper Hudson River and the Empire Wind WDA will occur for two to four years. The 74 Empire Wind vessel trips to the Port of Albany and approximately 4 annual vessel trips to the Port of Coeymans represent 0.025% and 0.001% of the annual commerce-carrying vessel traffic traveling up and down the Hudson River respectively and an even smaller percentage of the total vessel traffic in the area. Given this extremely small increase in vessel traffic and the generally low risk posed by vessel transits in the Hudson River, these trips are unlikely to increase the risk of a vessel strike that would occur absent the Empire Wind project. As such, based on this analysis , it is extremely unlikely that an Empire Wind vessel transiting to/from the Port of Albany or the Port of Coeymans will result in the strike of an Atlantic sturgeon. As such, effects to Atlantic sturgeon from project vessels operating in this portion of the action area are extremely unlikely to occur and are discountable.

Effects of Vessel Transits to the Nexans Facility at the Port of Charleston (SC)
Vessels traveling along the Atlantic coast between the lease area and the Nexans cable facility in the lower portions of the Cooper River will transit past a number of Atlantic sturgeon aggregation areas or “hot spots”; however, these vessels will be transiting in deeper, more offshore waters and not actually pass through any of these areas. As such, the risk to Atlantic sturgeon from the oceanic portions of these trips is the same as identified for the marine environment above; that is, it is extremely unlikely that any Atlantic sturgeon will be struck by project vessels operating in the Atlantic Ocean on the way to/from the Nexans facility.

As explained in Section 2.0 of this Opinion and above, NMFS completed an ESA section 7 consultation on the construction and use of Nexans Facility in Charleston. In the May 4, 2020, Biological Opinion issued to USACE for the construction and operations of the Nexans Cable Facility, NMFS concluded that the construction and use of the Nexans Facility was likely to adversely affect but not likely to jeopardize the Carolina DPS of Atlantic sturgeon. However, the only adverse effects to Atlantic sturgeon were dredging and riprap installation. In the Opinion, NMFS concluded that vessel strikes between vessels using the facility to transport cable were extremely unlikely to occur based on the frequency of vessel operations, type of vessel, and low transit speed and that vessels using the facility were not likely to adversely affect any DPS of Atlantic sturgeon. As the effects of this vessel traffic were already considered in the April 2020 Biological Opinion issued for the Nexans Facility, and no take of Atlantic sturgeon by vessel strike was anticipated, and we do not anticipate any difference in the type or level of effects from vessel traffic from those considered in that opinion, Empire’s use of the Nexans Facility is also extremely unlikely to result in vessel strikes, no take is anticipated: the effects of vessel strike are thus discountable..

Summary of Effects of Vessel Operations on Atlantic Sturgeon
Considering all vessel traffic over the life of the project and the negligible increase over existing annual traffic levels in the riverine portions of the vessel transit routes for the project, and the expectation that vessel strike will not occur in the marine portions of the action area, effects to Atlantic sturgeon from project vessel operations are extremely unlikely to occur and are discountable. No take of Atlantic sturgeon by vessel strike is expected to occur as a result of Empire Wind vessels operating in the action area.

7.2.3.2 Shortnose sturgeon
The only portions of the action area that overlap with the distribution of shortnose sturgeon are in the New York Bay at the landfall site for the EW1 export cable, along the EW1 export cable route within state waters, and along the vessel transit routes within the Hudson River and Cooper River (SC). As we do not expect shortnose sturgeon to occur in the marine waters transited by project vessels, they will not be exposed to vessel traffic that portion of the action area.

Effects of Vessel Transits in the Marine Environment and to/from SBMT
Adult shortnose sturgeon have occasionally been captured in trawl surveys in Upper New York Bay. From 1998-2011, six shortnose sturgeon total were identified in the HDP Aquatic Biological Survey (ABS) program (USACE 2021); from 2003-2017, 19 shortnose sturgeon were collected in the Hudson River Utilities winter trawl survey (unpublished data). The best available information indicates that only rare transient adult shortnose sturgeon are likely to occur in the area transited by vessels traveling to/from the SBMT. We have no evidence of any vessel strikes of shortnose sturgeon in this area. The 1,024 Empire Wind vessel trips during the construction phase represents approximately 1.2% of the annual commerce-carrying vessel traffic traveling through New York Bay and an even smaller percentage of the total vessel traffic in the area. As the vessels will be using existing port facilities, we do not expect there to be an increase in vessel traffic or an increase in the risk of vessel strike. Given this, and the lack of evidence of shortnose sturgeon being struck in this area, it is extremely unlikely that an Empire Wind vessel transiting to/from the SBMT will strike a shortnose sturgeon. As such, effects to shortnose sturgeon from project vessels operating in this portion of the action area are extremely unlikely to occur and are discountable.

Effects of Vessel Transits to Hudson River Ports (Albany and Coeymans)
Shortnose sturgeon occur throughout the Hudson River and are most abundant in the freshwater and low salinity reaches of the river (Bain, 1997). As noted above, vessels traveling to/from the Port of Albany and the Port of Coeymans will travel up and down the Hudson River. As with Atlantic sturgeon, shortnose sturgeon vessel strikes are known to occur in the Hudson River. However, the best available information indicates that compared to other rivers (e.g., the Delaware River or the James River), the risk of vessel strike is reduced by the geography and depth of the Hudson River, which does not restrict shortnose sturgeon distribution in the way that narrow or more constricted rivers may.

The 74 Empire Wind vessel trips to the Port of Albany and approximately 4 annual vessel trips to the Port of Coeymans represent 0.025% and 0.001% of the annual commerce-carrying vessel traffic traveling up and down the Hudson River respectively and an even smaller percentage of the total vessel traffic in the area. Consistent with the analysis above for Atlantic sturgeon, we do not expect there to be an increase in vessel traffic or an increase in the risk of vessel strike. As such, it is extremely unlikely that an Empire Wind vessel transiting to/from the Port of Albany or the Port of Coeymans will result in the strike of a shortnose sturgeon. Therefore, effects to shortnose sturgeon from project vessels operating in this portion of the action area are extremely unlikely to occur and are discountable.

Effects of Vessel Transits to the Nexans Facility at the Port of Charleston (SC)
In the May 4, 2020, Biological Opinion NMFS concluded that the construction and subsequent use of the Nexans Facility by any vessels was likely to adversely affect but not likely to jeopardize shortnose sturgeon. However, the only adverse effects to shortnose sturgeon were from dredging and riprap installation. In the Opinion, NMFS concluded that vessel strikes of shortnose sturgeon by vessels using the facility to transport cable were extremely unlikely to occur based on the frequency of vessel operations, type of vessel, and low transit speeds. In the Opinion, NMFS concluded that vessel use of the Nexans Facility was not likely to adversely affect shortnose sturgeon and, therefore, not likely to jeopardize the continued existence of shortnose sturgeon As the effects of this vessel traffic were already considered in the April 2020 Biological Opinion issued for the Nexans Facility, and no take of shortnose sturgeon by vessel strike was anticipated, and we do not anticipate any difference in the type or level of effects from vessel traffic from those considered in that opinion and no take is anticipated, Empire's use of the Nexans Facility is also extremely unlikely to result in vessel strikes: the effects of vessel strike are thus discountable.

In summary, considering all vessel traffic over the life of the project, no take of shortnose sturgeon by vessel strike is expected to occur as a result of a vessel transiting within the WDA or in rivers and bays that may be transited by Project vessels. Effects of vessel strike are discountable.

7.2.3.3 ESA-Listed Whales

Background Information on the Risk of Vessel Strike to ESA-Listed Whales
Vessel strikes from a variety of sizes of commercial, recreational, and military vessels have resulted in serious injury and fatalities to ESA listed whales (Laist et al. 2001, Lammers et al. 2003, Douglas et al. 2008, Laggner 2009, Berman-Kowalewski et al. 2010, Calambokidis 2012). Records of collisions date back to the early 17th century, and the worldwide number of collisions appears to have increased steadily during recent decades (Laist et al. 2001, Ritter 2012).
The most vulnerable marine mammals are those that spend extended periods at the surface feeding or in order to restore oxygen levels within their tissues after deep dives. Baleen whales, such as the North Atlantic right whale, seem generally unresponsive to vessel sound, making them more susceptible to vessel collisions (Nowacek et al. 2004). Many studies have been conducted analyzing the impact of vessel strikes on whales; these studies suggest that a greater rate of mortality and serious injury to large whales from vessel strikes correlates with greater vessel speed at the time of a ship strike (Laist et al. 2001, Vanderlaan and Taggart

2007 as cited in Aerts and Richardson 2008). Vessels transiting at speeds >10 knots present the greatest potential severity of collisions (Jensen and Silber 2004, Silber et al. 2009). Vanderlann and Taggart (2007) demonstrated that between vessel speeds of 8.6 and 15 knots, the probability that a vessel strike is lethal increases from 21% to 79%. In assessing records with known vessel speeds, Laist et al. (2001) found a direct relationship between the occurrence of a whale strike and the speed of the vessel involved in the collision. The authors concluded that most deaths occurred when a vessel was traveling in excess of 24.1 km/h (14.9 mph; 13 knots). Large whales do not have to be at the water's surface to be struck. In a study that used scale models of a container ship and a right whale in experimental flow tanks designed to characterize the hydrodynamic effects near a moving hull that may cause a whale to be drawn to or repelled from the hull, Silber et al. (2010) found when a whale is below the surface (about one to two times the vessel draft), there is likely to be a pronounced propeller suction effect. This modeling suggests that in certain circumstances, particularly with large, fast moving ships and whales submerged near the ship, this suction effect may draw the whale closer to the propeller, increasing the probability of propeller strikes. Additionally, Kelley et al (2020) found that collisions that create stresses in excess of 0.241 megapascals were likely to cause lethal injuries to large whales and through biophysical modeling that vessels of all sizes can yield stresses higher than this critical level. Growing evidence shows that vessel speed, rather than size, is the greater determining factor in the severity of vessel strikes on large whales.

In an effort to reduce the likelihood and severity of fatal collisions with right whales, NMFS established vessel speed restrictions in specific locations, primarily at key port entrances, and during certain times of the year, these areas are referred to as Seasonal Management Areas (SMA). A 10-knot speed restriction applies to vessels 65 feet and greater in length operating within any SMA (73 FR 60173, October 10, 2008). As noted above, NMFS has published proposed modifications to these regulations that would increase the scope of the speed restrictions (87 FR 46921; August 1, 2022) by expanding the geographic area and the size of vessels subject to the speed restrictions. That regulation has not been finalized and the effects of those regulations are not considered here.

In the 2008 regulations, NMFS also established a Dynamic Management Area (DMA) program whereby vessels are requested, but not required, to either travel at 10 knots or less or route around locations when certain aggregations of right whales are detected outside SMAs. These temporary protection zones are triggered when three or more whales are visually sighted within 2-3 miles of each other outside of active SMAs. The size of a DMA is larger if more whales are present. A DMA is a rectangular area centered over whale sighting locations and encompasses a 15-nautical mile buffer surrounding the sightings' core area to accommodate the whales' movements over the DMA's 15-day lifespan. The DMA lifespan is extended if three or more whales are sighted within 2-3 miles of each other within its bounds during the second week the DMA is active. Only verified sightings are used to trigger or extend DMAs; however, DMAs can be triggered by a variety of sources, including dedicated surveys, or reports from mariners. Acoustically triggered Slow Zones were implemented in 2020 to complement the visually triggered DMAs. The protocol for the current acoustic platforms that are implemented in the Slow Zone program specify that 3 upcalls must be detected (and verified by an analyst) to consider right whales as "present" or "detected" during a specific time period. Acknowledging that visual data and acoustic data differ, experts from NMFS' right whale Northeast Implementation Team, including NEFSC and Woods Hole Oceanographic Institute staff, developed criteria for accepting detection information from acoustic platforms. To indicate right whale presence acoustically (and be used for triggering notifications), the system must meet the following criteria: (1) evaluation has been published in the peer-reviewed literature, (2) false detection rate is 10% or lower over daily time scales and (3) missed detection rate is 50% or lower over daily time scales. For consistency, acoustically triggered Slow Zones are active for 15 days when right whales are detected and can be extended with additional detections. However, acoustic areas are established by rectangular areas encompassing a circle with a radius of 20 nautical miles around the location of the passive acoustic monitoring system.

In an analytical assessment of when the vessel restrictions were and were not in effect, Conn and Silber (2013) estimated the speed restrictions required by the ship strike rule reduced total ship strike mortality by 80 to 90%. In 2020, NMFS published a report evaluating the conservation value and economic and navigational safety impacts of the 2008 North Atlantic right whale vessel speed regulations. The report found that the level of mariner compliance with the speed rule increased to its highest level (81%) during 2018-2019. In most SMAs more than 85% of vessels subject to the rule maintained speeds under 10 knots, but in some portions of SMAs mariner compliance is low, with rates below 25% for the largest commercial vessels outside four ports in the southeast. Evaluations of vessel traffic in active SMAs revealed a reduction in vessel speeds over time, even during periods when SMAs were inactive. An assessment of the voluntary DMA program found limited mariner cooperation that fell well short of levels reached in mandatory SMAs. The report examined AIS-equipped vessel traffic (<65 ft. in length, not subject to the rule) in SMAs, in the four New England SMAs, more than 83% of all <65 ft. vessel traffic transited at 10 knots or less, while in the New York, Delaware Bay, and Chesapeake SMAs, less than 50% of transit distance was below 10 knots. The southern SMAs were more mixed with 55-74% of <65 ft. vessel transit distance at speeds under 10 knots (NMFS 2020). The majority of AIS-equipped <65 ft. vessel traffic in active SMAs came from four vessel types: pleasure, sailing, pilot, and fishing vessels (NMFS 2020).

The Empire Wind WDA overlaps with the SMA around the Port of New York and New Jersey. Project vessels transiting to the Nexans Facility at the Port of Charleston will travel through or adjacent to the SMA along the coast from Wilmington, NC to Charleston, SC. These Mid-Atlantic SMAs are in effect from November 1 - April 30 each year. Additionally, DMAs and acoustically triggered Slow Zones have been established in response to aggregations of right whales in the waters of Mid-Atlantic, and may overlap vessel transit routes and/or the lease area throughout the year. For example, in 2022, NMFS declared a total of 77[50] DMAs/Right Whale Slow Zones along the U.S. East Coast. Of these, 30 were triggered by right whale sightings and 47 were triggered by acoustic detections. DMAs/Slow Zones were declared in 11 locations in the Northeast/Mid-Atlantic U.S. (Martha's Vineyard,

[50] https://www.fisheries.noaa.gov/s3/2023-01/2022_DMAs_and_Right_Whale_Slow_Zones_508.pdf; last accessed June 27, 2023.

MA, Virginia Beach, VA, Portsmouth, NH, Nantucket, MA, Boston, MA, Chatham, MA, Portland, ME, Ocean City, MD, New York Bight, NY, Atlantic City, NJ and Cape Cod Bay, MA) and in one location in the Southeast U.S. (Ocracoke, NC). As elaborated on below, BOEM will require that Empire Wind vessels of any size travel at speeds of 10 knots or less in any SMA or DMA/Slow Zone (visually triggered) in all project phases.

Exposure Analysis – ESA-Listed Whales

Effects of Vessel Transits in the Empire Wind WDA and to/from Ports in NY

To assess risk of vessel strike in the area where the majority of vessel traffic will occur (i.e., the WDA and the waters of the New York Bight where vessels will transit between New York Harbor and the WDA) we carried out a four-step process. First, we used the best available information to establish an estimate of the number of right, fin, sei, and sperm whales struck annually in that geographic area (i.e., the area where the majority of vessel traffic will occur: the WDA, and the waters of the New York Bight. Second, we used the best available information on baseline traffic (i.e., the annual number of vessel transits within that geographic area absent the proposed action) and the information provided by BOEM and Empire on the number of anticipated vessel transits in that area by Empire Wind project vessels to determine to what extent vessel traffic would increase in this geographic area during each of the three phases of the Empire Wind project. For example, if baseline traffic was 100 trips per year and the Empire Wind project would result in 10 new trips in that area, we would conclude that traffic was likely to increase by 10%. Third, based on the assumption that risk of vessel strike is related to the amount of vessel traffic (i.e., that more vessels operating in that geographic area would lead to a proportional increase in vessel strike risk), we calculated the increase in baseline vessel strikes by the increase in vessel traffic. For example, if in the baseline condition, we expect a whale to be struck and the project doubled traffic, we would produce an estimate of two strikes (double the baseline number). It is important to note that these steps were carried out without consideration of any measures designed to reduce vessel strike and the assumption that all vessels have the same likelihood of striking a whale. Finally, we considered the risk reduction measures that are part of the proposed action and whether, with those risk reduction measures in place, any vessel strike was reasonably certain to occur.

The numbers of baseline vessel transits and Project vessel transits were used to evaluate the effects of vessel traffic on listed species in the action area as this provides the most accurate representation of vessel traffic in the action area and from the proposed Project. As explained above, baseline vessel transits were estimated using vessel AIS density data (number of trips) which provides a quantifiable comparison and approximation to estimate risk to listed species from the increase in Project vessel traffic. We considered an approach using vessel-miles; however, we have an incomplete baseline of vessel traffic in the region in the terms of vessel miles, as there is significant variability in vessel-mileage between vessel type and activity and no reliable way to obtain vessel miles from the existing baseline data we have access to. While data on the miles that project vessels will travel is partially available, without a robust baseline to compare it to, we are not able to provide an accurate comparison to baseline traffic levels. Further, given that we are considering the area within which the vessels will operate (i.e., evaluating risk along particular vessel routes) we do not expect that the results of our analysis would be any different even if we did have the information necessary to evaluate the increase in vessel traffic in the context of miles traveled rather than number of trips. Based on this foregoing reasoning, using vessel trips results in a more accurate assessment of the risk of adding the Empire Wind vessels to the baseline than could have been carried out using vessel miles. We therefore consider this the best available information for assessing the risk of vessel strike.

ESA listed whales use portions of the action area throughout the year, including the portion of the action area where vessels will transit in the Empire Wind WDA and identified ports in NY (see Section 5 and 6 for more information on distribution of whales in the action area). Baseline vessel traffic in the action area is described in Section 6. Vessel traffic between the WDA and ports in NY account for up to 99% of the anticipated vessel traffic during the construction phase and 100% of the anticipated traffic during the operations and maintenance phase.

We reviewed the best available data for the period since the 2008 vessel strike rule was implemented (Henry et al. 2015 for 2009-2010 data, Henry et al. 2017 for 2011-2015 data, Henry et al. 2022 from 2016-2020 data); from the marine mammal stock assessment reports and serious injury and mortality reports produced by NMFS, for the period of 2011-2020 (most recent reports available), we identified any records of mortality of ESA listed whales consistent with vessel strike that were first detected in waters of New York from the Ambrose to Hudson Canyon traffic lane to the Jones Inlet which is the best representation of the geographic area representing the Empire Wind WDA, and the area where vessels will transit between the WDA and ports in New York. In 2014, there was one fresh sei whale carcass documented on the bow of a vessel in the Hudson River (Henry et al. 2017). Additionally, Hayes et al. (2021) reports two vessel struck sei whales discovered on the bow of vessels entering port in the Hudson River: no information on where the whales were struck is available. There were no other reports of fin, sei, sperm, or right whales with vessel strike injuries in this area for the time period considered. As noted above, this area accounts for the geographic area where nearly all of the vessel traffic associated with the Empire Wind project will occur. We also reviewed NMFS records post-dating 2020, including information from the right whale UME[51], and did not identify any records of vessel strikes in this area. However, we note that multiple vessel strikes of sei, fin and right whales have occurred in this period in waters outside the geographic area considered here (Hayes et al. 2022, Henry et al. 2017, Henry et al. 2022). Additionally, we note that the location of where a vessel strike occurs is not always known and the location the animal is first documented may not be the location where the strike occurred.

Considering right and fin whales, absent any mitigation measures we would expect an increase in risk proportional to the increase in vessel traffic. As such, this would increase risk during the construction period by 1.1%, during the operational period by 0.75%, and 1.0% during the decommissioning period. As noted above, there are no records of right or fin whales with evidence of vessel strike where the first observation was in waters of New York from the Ambrose to Hudson Canyon traffic lane to the Jones Inlet, which is where vessel transits between the WDA and the NY ports will occur. This suggests that baseline risk of

[51] https://www.fisheries.noaa.gov/national/marine-life-distress/2017-2021-north-atlantic-right-whale-unusual-mortality-event; last accessed 8/20/2003

vessel strike in this area is low compared to other areas along the Atlantic coast: this is likely due to the nearshore environment where large whales typically are not common. Sei and sperm whales are typically found in deeper waters of the continental shelf, and are expected to be rare in the Empire Wind WDA and even less likely to occur in the nearshore/inland portions of the action area where vessels will transit between SBMT and the Empire Wind WDA. Thus, any potential increase in risk of strike of sei and sperm whales is even smaller. There are a number of factors that result in us determining that any potential increase in vessel strike is extremely unlikely to occur. As described above, a number of measures designed to reduce the likelihood of striking marine mammals including ESA listed large whales, particularly North Atlantic right whales, are included as part of the proposed action. These measures include seasonal speed restrictions and enhanced monitoring via PSOs, PAM, and alternative monitoring technologies.

The vessel speed limit requirements proposed by Empire, BOEM, and NMFS OPR are in accordance with measures outlined in NMFS Ship Strike Reduction Strategy as the best available means of reducing ship strikes of right whales and are consistent with the changes proposed to vessel size in the recent proposed rule. As described above and in Appendices A and B of this Opinion, specific measures related to vessel speed reduction include that between November 1 and April 30 vessels of all sizes will operate at speeds of 10 knots or less while traveling within the lease area, along the cable corridor, and between the WDA and ports in New York. Year round, vessels of all sizes transiting from other ports outside those described will operate at 10 knots or less when within any active SMA or DMA (with the only exception being that after the 5-year MMPA ITA expires, BOEM may grant a waiver to the 10 knot restriction in DMAs if an alternate plan that provides an equivalent level of risk reduction is approved by BOEM and NMFS GARFO). Year round, all underway vessels will have a lookout to monitor for protected species, with that lookout having no other duties when the vessel is transiting at speeds greater than 10 knots. Most ship strikes have occurred at vessel speeds of 13-15 knots or greater (Jensen and Silber 2003; Laist et al. 2001). An analysis by Vanderlaan and Taggart (2006) showed that at speeds greater than 15 knots, the probability of a ship strike resulting in death increases asymptotically to 100%. At speeds below 11.8 knots, the probability decreases to less than 50%, and at ten knots or less, the probability is further reduced to approximately 30%. In rulemaking, NMFS has concluded, based on the best available scientific evidence, that a maximum speed of 10 knots, as measured as "speed over ground," in certain times and locations, is the most effective and practical approach to reducing the threat of ship strikes to right whales. Absent any information to the contrary, we assume that a 10-knot speed restriction similarly reduces the risk to other whale species.

Substantial evidence (Laist et al., 2001; Jensen and Silber, 2003; Vanderlaan and Taggart, 2007; Kelley et al. 2020) indicates that vessel speed is an important factor affecting the likelihood and lethality of whale/vessel collisions. In a compilation of ship strikes of all large whale species that assessed ship speed as a factor in ship strikes, Laist et al. (2001) concluded that a direct relationship existed between the occurrence of a whale strike and the speed of the vessel. These authors indicated that most deaths occurred when a vessel was traveling at speeds of 14 knots or greater and that, as speeds declined below 14 knots, whales apparently had a greater opportunity to avoid oncoming vessels. Adding to the Laist et al. (2001) study, Jensen and Silber (2003) compiled 292 records of known or probable ship strikes of all large whale species from 1975 to 2002. Vessel speed at the time of the collision was reported for 58 of those cases; 85.5 percent of these strikes occurred at vessel speeds of 10 knots or greater. Effects of vessel speed on collision risks also have been studied using computer simulation models to assess hydrodynamic forces vessels have on a large whale (Knowlton et al., 1995; Knowlton et al., 1998). These studies found that, in certain instances, hydrodynamic forces around a vessel could act to pull a whale toward a ship. These forces increase with increasing speed and thus a whale's ability to avoid a ship in close quarters may be reduced with increasing vessel speed. Related studies by Clyne (1999) found that the number of simulated strikes with passing ships decreased with increasing vessel speeds, but that the number of strikes that occurred in the bow region increased with increasing vessel speeds. Additionally, vessel size has been shown to be less of a significant factor than speed, as biophysical modeling has demonstrated that vessels of all sizes can yield stresses likely to cause lethal injuries to large whales (Kelley et al. 2020). The speed reduction alone provides a significant reduction in risk of vessel strike as it both provides for greater opportunity for a whale to evade the vessel but also ensures that vessels are operating at such a speed that they can make evasive maneuvers in time to avoid a collision.

A number of measures will be in place to maximize the likelihood that during all times of the year and in all weather conditions that if whale is in the vicinity of a project vessel that the whale is detected, the captain can be notified and measures taken to avoid a strike (such as slowing down further and/or altering course). Although some of these measures have been developed to specifically reduce risk of vessel strike with right whales, all of these measures are expected to provide the same protection for other large whales as well. These measures apply regardless of the length of the transit and include dedicated PSOs or lookouts on all Project vessels during all phases to monitor the vessel strike avoidance zone and requirements to slow down less than 10 knots if a whale is spotted, alternative visual detection systems (e.g., thermal cameras) stationed on all transiting vessels that intend to operate at greater than 10 knots to improve detectability of large whales when operating at night or in other low visibility conditions, and additional measures as outlined in Appendices A and B. These measures are meant to increase earlier detection of whale presence and subsequently further increase time available to avoid a strike. Awareness of right whales in the area will also be enhanced through monitoring of reports on USCG Channel 16, communication between project vessel operators of any sightings, and monitoring of the NMFS Right Whale Sightings Advisory System.

Here, we explain how these measures support our determination that any potential increase in vessel strike due to increases in vessel transit caused by the proposed action is extremely unlikely to occur. Many of these measures are centered on vessel speed restrictions and increased monitoring. To avoid a vessel strike, a vessel operator both needs to be able to detect a whale and be able to slow down or move out of the way in time to avoid collision. The speed limits and monitoring measures that are part of the proposed action maximize the potential for effective detection and avoidance.

<u>Vessel speed restrictions:</u>

Consistent with the vessel speed measures included in the proposed action, all vessels operating in the geographic area described above (i.e., within the WDA or to/from Ports in NY) will be limited to traveling at speeds of 10 knots or less, with the only exception during the construction period being vessels operating from May 1 to October 31 in a "transit corridor" being monitored by real-time PAM, when no right whales have been detected in the previous 12 hours and when there is no overlap with an active SMA or Slow Zone/DMA. During the operations and maintenance and decommissioning periods, the only vessels transiting over 10 knots will be vessels operating between May 1 and October 31 outside of an active Slow Zone/DMA. Year round, all underway vessels operating at >10 knots will have a dedicated visual observer to monitor for protected species and implement mitigation measures as necessary. The November - April period is the time of year when North Atlantic right whales are most likely to occur in the area transited by project vessels being considered here and covers the months when density is highest. Vessels would also be required to slow to 10 knots or less any time a large whale (of any species) is observed within 500 m of a vessel. All vessels, regardless of size, would immediately reduce speed to 10 knots or less when a North Atlantic right whale is sighted, at any distance, by an observer or anyone else on the vessel.

By reducing speeds to10 knots or less, the probability of a lethal ship strike is greatly reduced; additionally, reduced speeds provide greater time to react if a PSO/lookout observes an animal in the path of a vessel and therefore reduces the likelihood of any strike occurring at all.

<u>Exceptions to 10 knot speed restriction:</u>
In this geographic area (i.e., within the WDA or to/from Ports in NY), vessels may travel at speeds greater than 10 knots only under particular circumstances. During the construction period, project vessels in this area may travel at speeds above 10 knots from May 1 – October 31 if the vessel is not transiting through a Slow Zone/DMA and a speed restriction has not been triggered by PAM detections and the transit is within a "transit corridor" being monitored by real-time PAM. During the Operations and Maintenance and Decomissioning periods, the only vessels transiting over 10 knots will be vessels operating between May 1 and October 31 outside of an active Slow Zone/DMA. The period of time and areas when vessels can travel at speeds greater than 10 knots are at times when North Atlantic right whales are expected to occur in very low numbers and thus the risk of a vessel strike is significantly lower. Additionally, during the construction period travel above 10 knots will only occur in areas with PAM when no right whales have been detected in the previous 12 hours, which decreases the potential for a vessel traveling greater than 10 knots to co-occur with a right whale (as described in further detail below). In all instances, PSOs/lookouts will be monitoring a vessel strike zone, see below.

<u>PSOs/Lookouts and Increased right whale awareness:</u>
A number of measures will be required by BOEM and/or NMFS OPR to increase awareness and detectability of whales. Vessel operators and crews will receive protected species identification training that covers species identification as well as making observations in good and bad weather. All vessel operators and crews must maintain a vigilant watch for all marine mammals and slow down, stop their vessel, or alter course (as appropriate) and

regardless of vessel size, to avoid striking any marine mammal. Year round, during any vessel transits within or to/from the Empire Wind WDA, an observer would be stationed at the best vantage point of the vessel(s) to ensure that the vessel(s) are maintaining the appropriate separation distance from protected species. During vessel transits over 10 knots, these lookouts will have no other duty than to monitor for listed species. If a whale is sighted, the lookout will communicate to the vessel captain to slow down and take measures to avoid the sighted animal. Visual observers will also be equipped with alternative monitoring technology for periods of low visibility (e.g., darkness, rain, fog, etc.). At all times the lookout will be monitoring for presence of whales and ensuring that the vessel stays at least 500 meters away from any right whale or unidentified large whale. If any whale is detected within 500 meters of the vessel, speed will be reduced to less than 10 knots; if any right whale is observed within any distance from the vessel, speed will be reduced to less than 10 knots.

Year-round, all vessel operators will monitor the project's Situational Awareness System, WhaleAlert, US Coast Guard VHF Channel 16, and the Right Whale Sighting Advisory System (RWSAS) for the presence of North Atlantic right whales once every 4-hour shift during project-related activities. The PSO and PAM operator monitoring teams for all activities will also monitor these systems no less than every 12 hours. If a vessel operator is alerted to a North Atlantic right whale detection within the project area, they will immediately convey this information to the PSO and PAM teams. All vessel operators must check for information regarding mandatory or voluntary ship strike avoidance (Slow Zones/DMAs and SMAs) and daily information regarding right whale sighting locations. Active monitoring of right whale sightings information provides situational awareness for monitoring of right whales in the area of vessel activities.

Passive Acoustic Monitoring:
As noted above, outside of Slow Zones/DMAs, SMAs, and the November 1 through April 30 period, a vessel is traveling at greater than 10 knots is limited to the geographic area that is being monitored by real-time PAM. If a North Atlantic right whale is detected via visual observation or PAM within or approaching the transit corridor, all vessels must travel at 10 knots or less for the following 12 hours. Each subsequent detection will trigger a 12-hour reset. A slowdown in the transit corridor expires when there has been no further visual or acoustic detection of North Atlantic right whales in the transit corridor in the past 12 hours. This increases detectability beyond the area that an observer can see and enhances the effectiveness of required vessel avoidance measures.

Summary of Effects of Vessel Transits in NY
In summary, we expect that despite the increase in vessel traffic that will result from the proposed action, the multi-faceted minimization measures that will be required of all Project vessels will allow for the effective detection of any ESA listed whale that may be in the path of a Project vessel with enough time to allow for vessel operators to avoid any such whales.

Given the more offshore distribution of sei and sperm whales and the low density of these species in this geographic area, we expect that the potential for co-occurrence of an individual of one of these species with an Empire Wind vessel operating in this area is extremely unlikely. The required minimization measures outlined above further reduce this risk. As such, effects to sei and sperm whales from the operation of Empire Wind vessels in this area are discountable.

Given the location of the Empire Wind WFA in the New York Bight and the area where vessel transits will occur to/from ports in NY and the WDA, vessels will be transiting in areas where right whale sightings and predicted density are low. Combined with the already very low increased risk of vessel strike anticipated due to increased project vessel traffic, we expect that the minimization measures that are specifically designed to reduce risk of project vessels striking a right whale will further reduce that risk and make it extremely unlikely that a Project vessel will strike a right whale. Therefore, effects to right whales from the operation of Empire Wind vessels in this area are discountable.

As described above, given the inshore coastal areas where Project vessels will be transiting, fin whale predicted density is low, thus there is not a high likelihood for co-occurrence. Additionally, there are no reports of vessel strikes of fin whales in this geographic area between 2011-2020. Combined with the already very low increased risk of vessel strike anticipated due to increased project vessel traffic, we expect that the minimization measures that are designed to reduce risk of project vessels striking fin whales will further reduce that risk and make it extremely unlikely that a Project vessel will strike a fin whale. Therefore, effects to fin whales from the operation of Empire Wind vessels in this area are discountable.

Effects of Vessel Transits to/from Nexans Facility at the Port of Charleston (SC) and the Empire Wind WDA

Empire anticipates up to 4 round vessel trips to Charleston, SC per year for 3 years of cable installation during the construction phase of the project. As described in Section 6, ESA-listed whales occur in this area in varying distribution and abundance throughout the year. North Atlantic right whales occur in the area along coastal waters as they migrate through the Mid-Atlantic to the Southeast calving grounds, primarily in the fall and early spring. Fin whales most commonly occur throughout the year in offshore waters of the northern Mid-Atlantic. Sei whales typically are found offshore along the shelf break throughout the year, primarily in northern Mid-Atlantic waters. Sperm whales along the Mid-Atlantic are found offshore along the shelf break year-round. In general, ESA-listed whales are expected to be highly dispersed in deeper offshore waters and, given the large area over which Project vessels could potentially transit, the likelihood of co-occurrence is low in offshore waters.

Over 74,000 vessel transits a year occur in the area surrounding the WDA. Given the presence of large ports in the South Atlantic, we expect similar levels of baseline vessel traffic along the coast south of New York Bay to Charleston (i.e., over 74,000 transits within the area annually). Considering the potential trips to Charleston, this would be an increase in vessel traffic of no more than 0.005% in that 3-year period. Additionally, we expect the multi-faceted minimization measures, including 10-knot speed restrictions for vessels traveling to/from these ports in the November – April period, to effectively enable the detection of any ESA-listed whale that may be in the path of a Project vessel with enough time to allow vessel operators to avoid any such whales. We expect that these measures will make it extremely unlikely that a Project vessel will strike a whale.

Effects of Vessel Transits in the U.S. EEZ East and North of the Empire Wind WDA
Due to project component and vessel availability, a small number of vessels will transit from ports in eastern Canada, Europe, and/or Asia to the Empire Wind WDA; this section considers those vessel transits while in the U.S. EEZ. These vessels will be heavy transport vessels, during transit these vessels may travel up to 15 knots with speed of less than 10 knots more typical. BOEM has indicated that during the entire five-year construction period there may be up to 94 vessel transits between the WDA and ports in eastern Canada, Europe, and/or Asia to transport project components. Project vessels will represent an extremely small portion of the vessel traffic traveling through the EEZ. In this portion of the action area, co-occurrence of project vessels and individual whales is expected to be extremely unlikely; this is due to the dispersed nature of whales in the open ocean and the only intermittent presence of project vessels (90 transits over a five year period). When operating outside of an active SMA or Slow Zone/DMA, these vessels could operate at speeds over 10 knots; however, they will have a dedicated lookout monitoring for whales and will be required to slow down if any whales are sighted. Given the limited amount of vessel trips in this area (i.e., up to 90 trips over a five-year period), the dispersed nature of whales in this offshore area, and the therefore limited potential for co-occurrence of a whale and one of these vessels, it is extremely unlikely that any ESA listed whales will be struck by a project vessel during one of the no more than 90 transits within the U.S. EEZ on its way to or from ports in eastern Canada, Europe, and/or Asia. The requirements for lookouts and slow downs would further decrease this risk. Therefore, effects to right, fin, sei, blue, and sperm whales from vessel strike due to project vessels operating in this portion of the action area are discountable.

Summary of Effects of Vessel Traffic on ESA Listed Whales
In summary, while there is an increase in risk of vessel strike during all phases of the proposed project due to the increase in vessel traffic, because of the minimization measures that will be in place as part of the proposed action, particularly the vessel speed restrictions and use of enhanced monitoring measures, we do not expect that this increase in risk will result in a vessel strike caused by the action. Based on the best available information on the risk factors associated with vessel strikes of large whales (i.e., vessel size and vessel speed), and the measures required to reduce risk, it is extremely unlikely that any project vessel will strike a right, fin, sei, or sperm whale during any phase of the proposed project. Therefore, effects to right, fin, sei, and sperm whales from vessel strike due to project vessels operating in the action area are discountable.

7.2.3.4 Sea Turtles
Background Information on the Risk of Vessel Strike to Sea Turtles
While research is limited on the relationship between sea turtles, ship collisions, and ship speeds, sea turtles are at risk of vessel strike where they co-occur with vessels. Sea turtles are vulnerable to vessel collisions because they regularly surface to breathe, and often rest at or near the surface. Sea turtles, with the exception of hatchlings and pre-recruitment juveniles, spend a majority of their time submerged (Renaud and Carpenter 1994; Sasso and Witzell 2006). Although, Hazel et al. (2007) demonstrated sea turtles preferred to stay within the three meters of the water's surface, despite deeper water being available. Any of the sea turtle species found in the action area can occur at or near the surface in open-ocean and coastal areas, whether resting, feeding or periodically surfacing to breathe. Therefore, all ESA-listed sea turtles considered in the biological opinion are at risk of vessel strikes.

A sea turtle's detection of a vessel is likely based primarily on the animal's ability to see the oncoming vessel, which would provide less time to react to as vessel speed increases (Hazel et al. 2007), however, given the low vantage point of a sea turtle at the surface it is unlikely they are readily able to visually detect vessels at a distance. Hazel et al. (2007) examined vessel strike risk to green sea turtles and suggested that sea turtles may habituate to vessel sound and are more likely to respond to the sight of a vessel rather than the sound of a vessel, although both may play a role in eliciting responses (Hazel et al. 2007). Regardless of what specific stressor associated with vessels turtles are responding to, they only appear to show responses (avoidance behavior) at approximately 10 m or closer (Hazel et al. 2007). This is a concern because faster vessel speeds also have the potential to result in more serious injuries (Work et al. 2010). Although sea turtles can move quickly, Hazel et al. (2007) concluded that at vessel speeds above 4 km/hour (2.1 knots) vessel operators cannot rely on turtles to actively avoid being struck. Thus, sea turtles are not considered reliably capable of moving out of the way of vessels moving at speeds greater than 2.1 knots.

Stranding networks that keep track of sea turtles that wash up dead or injured have consistently recorded vessel propeller strikes, skeg strikes, and blunt force trauma as a cause or possible cause of death (Chaloupka et al. 2008). Vessel strikes can cause permanent injury or death from bleeding or other trauma, paralysis and subsequent drowning, infection, or inability to feed. Apart from the severity of the physical strike, the likelihood and rate of a turtle's recovery from a strike may be influenced by its age, reproductive state, and general condition at the time of injury. Much of what has been documented about recovery from vessel strikes on sea turtles has been inferred from observation of individual animals for some duration of time after a strike occurs (Hazel et al. 2007; Lutcavage et al. 1997). In the U.S., the percentage of strandings that were attributed to vessel strikes increased from approximately 10 percent in the 1980s to a record high of 20.5 percent in 2004 (USFWS 2007). In 1990, the National Research Council estimated that 50-500 loggerhead and 5-50 Kemp's ridley sea turtles were struck and killed by boats annually in waters of the U.S. (NRC 1990). The report indicates that this estimate is highly uncertain and could be a large overestimate or underestimate.

Vessel strike has been identified as a threat in recovery plans prepared for all sea turtle species in the action area. As described in the Recovery Plan for loggerhead sea turtles (NMFS and USFWS 2008), propeller and collision injuries from boats and ships are common in sea turtles. From 1997 to 2005, 14.9% of all stranded loggerheads in the U.S. Atlantic and Gulf of Mexico were documented as having sustained some type of propeller or collision injuries although it is not known what proportion of these injuries were post or ante-mortem. The proportion of vessel- struck sea turtles that survive is unknown. In some cases, it is not possible to determine whether documented injuries on stranded animals resulted in death or were post-mortem injuries. However, the available data indicate that post-mortem vessel strike injuries are uncommon in stranded sea turtles. Based on data from off the coast of Florida, there is good evidence that when vessel strike injuries are observed as the principle finding for a stranded turtle, the injuries were both ante-mortem and the cause of death (Foley et al 2019). Foley et al. (2019) found that the cause of death was vessel strike or probable vessel strike in approximately 93% of stranded turtles with vessel strike injuries. Sea turtles found alive with concussive or propeller injuries are frequently brought to rehabilitation facilities; some are later released and others are deemed unfit to return to the wild and remain in captivity. Sea turtles in the wild have been documented with healed injuries so at least some sea turtles survive without human intervention. As noted in NRC 1990, the regions of greatest concern for vessel strike are outside the action area and include areas with high concentrations of recreational-boat traffic such as the eastern Florida coast, the Florida Keys, and the shallow coastal bays in the Gulf of Mexico. In general, the overall risk of strike for sea turtles in the Northwest Atlantic is considered greatest in areas with high densities of sea turtles and small, fast moving vessels such as recreational vessels (NRC 1990). This combination of factors in the action area is limited to nearshore areas in the southern extent of the action area, well outside the Empire Wind WFA and the transit routes to SBMT where the vast majority of vessel traffic will occur.

Exposure Analysis – Sea Turtles
We consider vessel strike of ESA-listed sea turtles in the context of specific project phases because the characteristics and volume of vessel traffic is distinctly different during the three phases of the project.

Effects of Vessel Transits in the Empire Wind WDA and to/from Ports in NY
Here we consider the risk of vessel strike to sea turtles from project vessels transiting between the lease area/cable corridors and the identified ports in New York. We queried the NMFS' Sea Turtle Stranding and Salvage Network (STSSN) database for records of sea turtles with injuries consistent with vessel strike (recorded as definitive vessel and blunt force trauma in the database) in the New York Bight region (i.e. NMFS statistical area 612) from 2013 to 2022. We selected this geographic area as it includes the waters that will be transited by project vessels traveling to/from the lease area/cable corridors and the ports identified in NY, inclusive of the SBMT. While it is larger than the area where those vessel transits will occur, this area is considered the best representation of the area where sea turtles struck by vessels operating in that area would strand. The results from this query are presented in Table 7.2.4 and illustrated in Figure 7.2.1.

While we recognize that some vessel strikes may be post-mortem, the available data indicate that post-mortem vessel strike injuries are uncommon in stranded sea turtles (Foley et al. 2019). Out of the 376 reported sea turtle stranding cases (excluding cold stuns) in the NY region during the 10-year time period (2013-2022) of data, there were 143 records of sea turtles recovered with definitive evidence from vessel strikes. In addition, there were 32 sea turtles with evidence from blunt force trauma, which indicates probable vessel collision. As anticipated based on abundance of turtle species in the area, the majority of these records are of loggerhead sea turtles.

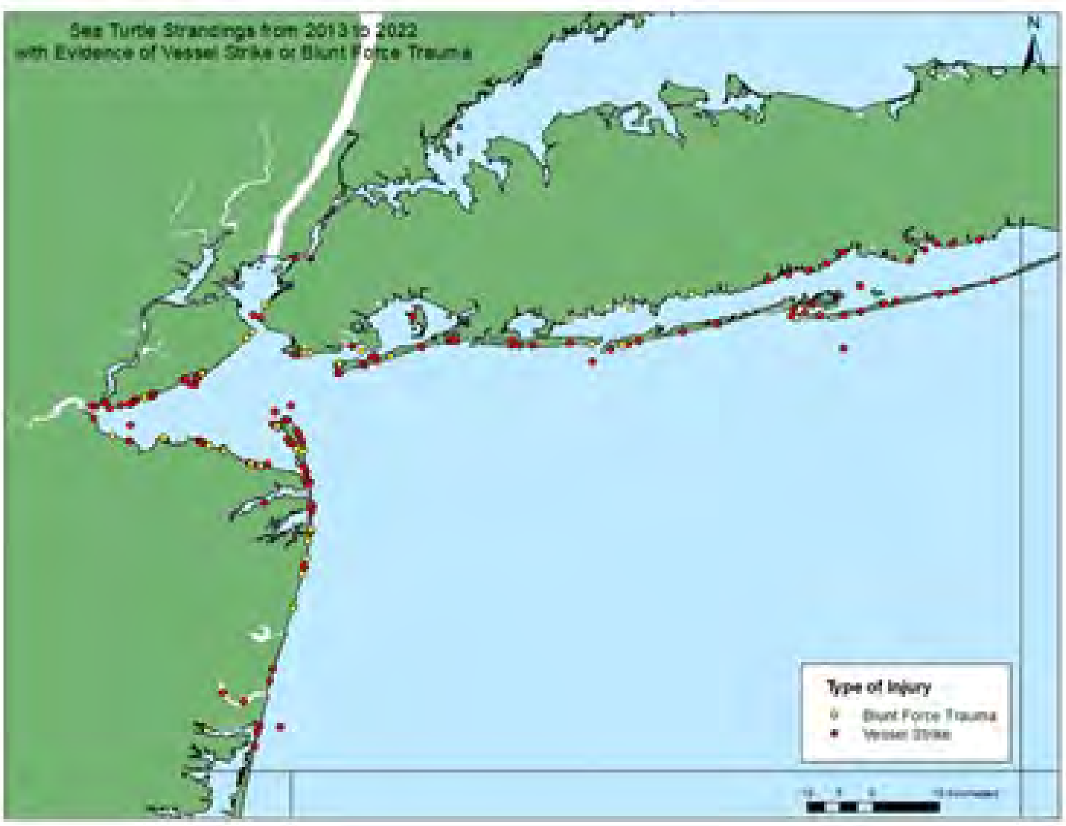
Based on the findings of Foley et al. (2019) that found vessel strike was the cause of death in 93% of strandings with indications of vessel strike, we consider that 93% of the sea turtle strandings recorded as “definitive vessel” and “blunt force trauma” had a cause of death attributable to vessel strike. Therefore, to estimate the number of interactions where vessel strike was the cause of death we first added the number of “definitive vessel” and “blunt force trauma” cases to get a total number of sea turtle strandings with indications of vessel strike, and then calculated 93% of the total (e.g., for loggerheads, we first added the “definitive vessel” (108) and “blunt force trauma” (25) then multiplied that value (133) by 0.93 (=75)). The result is the number of turtles in the “total presumed vessel mortalities” column in Table 7.2.4.

Table 7.2.4. Preliminary STSSN cases from 2013 to 2022 with evidence of propeller strike or probable vessel collision in the New York Bight region and estimated presumed vessel mortalities.

Sea Turtles	Total Records	Definitive Vessel	Blunt Force Trauma	Total Presumed Vessel Mortalities*
Loggerhead	266	108	25	123.69
Green	16	5	0	4.65
Leatherback	43	17	4	19.53
Kemp’s	47	13	3	14.88

Source: STSSN (July 2023)
*93% of the total vessel plus blunt force trauma

Figure 7.2.1. Location of Sea Turtle Strandings from 2013-2022 with Evidence of Vessel Strike or Blunt Force Trauma.



source: NMFS/STSSN unpublished data (July 2023).

The data in Table 7.2.4 reflect stranding records, which represent only a portion of the total at-sea mortalities of sea turtles. Sea turtle carcasses typically sink upon death, and float to the surface only when enough accumulation of decomposition gasses cause the body to bloat (Epperly et al., 1996). Though floating, the body is still partially submerged and acts as a drifting object. The drift of a sea turtle carcass depends on the direction and intensity of local currents and winds. As sea turtles are vulnerable to human interactions such as fisheries bycatch and vessel strike, a number of studies have estimated at-sea mortality of marine turtles and the influence of nearshore physical oceanographic and wind regimes on sea turtle strandings. Although sea turtle stranding rates are variable, they may represent as low as five percent of total mortalities in some areas but usually do not exceed 20 percent of total mortality, as predators, scavengers, wind, and currents prevent carcasses from reaching the shore (Koch et al. 2013). Strandings of dead sea turtles from fishery interaction have been reported to represent as low as seven percent of total mortalities caused at sea (Epperly et al. 1996). Remote or difficult to access areas may further limit the amount of strandings that are observed. Because of the low probability of stranding under different conditions, determining total vessel strikes directly from raw numbers of stranded sea turtle data would vary between regions, seasons, and other factors such as currents.
To estimate unobserved vessel strike mortalities, we relied on available estimates from the literature. Based on data reviewed in Murphy and Hopkins-Murphy (1989), only six of 22 loggerhead sea turtle carcasses tagged within the South Atlantic and Gulf of Mexico region were reported in stranding records, indicating that stranding data represent approximately 27 percent of at-sea mortalities. In comparing estimates of at-sea fisheries induced mortalities to estimates of stranded sea turtle mortalities due to fisheries, Epperly et al. (1996) estimated that strandings represented 7 to13 percent of all at-sea mortalities.

Based on these two studies, both of which include waters of the U.S. East Coast, stranding data likely represent 7 to 27 percent of all at-sea mortalities. While there are additional estimates of the percent of at-sea mortalities likely to be observed in stranding data for locations outside the action area (e.g., Peckham et al. 2008, Koch et al. 2013), we did not rely on these since stranding rates depend heavily on beach survey effort, current patterns, weather, and seasonal factors among others, and these factors vary greatly with geographic location (Hart et al. 2006). Thus, based on the mid-point between the lower estimate provided by Epperly et al. (1996) of seven percent, and the upper estimate provided by Murphy and Hopkins-Murphy (1989) of 27 percent, we assume that the STSSN stranding data represent approximately 17 percent of all at sea mortalities. This estimate closely aligns with an analysis of drift bottle data from the Atlantic Ocean by Hart et al. (2006), which estimated that the upper limit of the proportion of sea turtle carcasses that strand is approximately 20 percent.

To estimate the annual average vessel strike mortalities corrected for unobserved vessel strike mortalities, we adjusted our calculated total presumed vessel mortality with the detection value of 17 percent. The resulting, adjusted number of vessel strike mortalities of each species in the New York Bight region are presented in the "annual total presumed vessel mortalities" column in Table 7.2.5. In using the 17 percent correction factor, we assume that all sea turtle species and at-sea mortalities are equally likely to be represented in the STSSN dataset. That is, sea turtles killed by vessel strikes are just as likely to strand or be observed at sea and be recorded in the STSSN database (i.e., 17%) as those killed by other activities, such as interactions with fisheries, and the likelihood of stranding once injured or killed does not vary by species.

Table 7.2.5. Estimated Annual Vessel Strike Mortalities Corrected for Unobserved Vessel Strike Mortalities in the New York Bight region

Sea Turtles	Presumed Vessel Mortalities*Over 10 Years	Total Over 10 Years (17% detection rate)	Annual Total Presumed Vessel Mortalities
Loggerhead	124	729	73
Green	5	29	2.9
Leatherback	20	118	11.8
Kemp's ridley	15	88	8.8

* 93% of the total of "definitive vessel" plus "blunt force trauma"

Finally, assuming a proportional relationship between vessel strikes and vessel traffic, we considered the phase-specific increase in vessel traffic and increased the number of baseline strikes to account for the increase in project vessel traffic. As explained above, during the construction, operations, and decommissioning phases of the Empire Wind project the vast majority of vessel traffic will occur between the Empire Wind WDA and SBMT. The formula used to generate the estimate of project vessel strikes over the construction, operations, and decommissioning phases is: (annual baseline strikes)*(% increase in traffic)*(years of project phase).

Construction = 1.2% increase in traffic for 5 years
Loggerhead sea turtles: (73)(0.012)(5) = 4.38 loggerhead sea turtles
Green sea turtles: (2.9)(0.012)(5) = 0.17 green sea turtles
Leatherback sea turtles: (11.8)(0.012)(5) = 0.71 leatherback sea turtles
Kemp's Ridley sea turtles: (8.8)(0.012)(5) = 0.53 Kemp's Ridley sea turtles

Operation = .61% increase in traffic for 35 years
Loggerhead sea turtles: (73)(0.0061)(35) = 15.59 loggerhead sea turtles
Green sea turtles: (2.9)(0.0061)(35) = 0.62 green sea turtles
Leatherback sea turtles: (11.8)(0.0061)(35) = 2.5 leatherback sea turtles
Kemp's Ridley sea turtles: (8.8)(0.0061)(35) = 1.88 Kemp's Ridley sea turtles

Decommissioning = 1.1% increase in traffic for 2 years
Loggerhead sea turtles: (73)(0.011)(2) = 1.61 loggerhead sea turtles
Green sea turtles: (2.9)(0.011)(2) = 0.06 green sea turtles
Leatherback sea turtles: (11.8)(0.011)(2) = 0.26 leatherback sea turtles
Kemp's Ridley sea turtles: (8.8)(0.011)(2) = 0.19 Kemp's Ridley sea turtles

As explained above in section 7.2.2, Empire is proposing to take and/or BOEM is proposing to require a number of measures designed to minimize the potential for strike of a protected species that will be implemented over the life of the project. These include reductions in speed in certain areas, including certain times of the year to minimize the risk of vessel strike of large whales, the use of trained look outs, slowing down if a sea turtle is sighted within 100 m of the operating vessel's forward path and if a sea turtle is sighted within 50 m of the forward path of the operating vessel, the vessel operator must shift to neutral when safe to do so and then proceed away from the individual at a speed of 4 knots or less, and seasonally avoiding transiting through areas of visible jellyfish aggregations or floating vegetation (e.g., sargassum lines or mats). While we expect that these measures will help to reduce the risk of vessel strike of sea turtles, individual sea turtles can be difficult to spot from a moving vessel at a sufficient distance to avoid strike due to their low-lying appearance. With this information in mind, we expect that the risk reduction measures that are part of the proposed action will reduce collision risk overall but will not eliminate that risk. We are not able to quantify any reduction in risk that may be realized and expect that any reduction in risk may be small.

To determine the likely total number of sea turtles that will be struck by project vessels, we have added up the numbers for each phase then rounded up to whole animals. As such, based on our analysis, the proposed action is expected to result in vessel strike of sea turtles up to the number identified in Table 7.2.6 below:

Table 7.2.6. Estimate of sea turtle vessel strikes as a result of the proposed action over the entire project period.

Species	Maximum Vessel Strike Anticipated
NWA DPS Loggerhead sea turtle	22
NA DPS green sea turtle	1
Leatherback sea turtle	4
Kemp's ridley sea turtle	3

While not all strikes of sea turtles are lethal, we have no way of predicting what proportion of strikes will be lethal and what proportion will result in recoverable injury. As such, for the purposes of this analysis, given the likelihood of vessel strike to cause serious injury or mortality, it is reasonable to assume that all strikes are likely to result in serious injury or mortality.

Effects of Vessel Transits to/from Nexans Facility at the Port of Charleston (SC) and the Empire Wind WDA

In the BA, BOEM indicates that there may be up to 4 total round vessel trips to Charleston, SC per year for 3 years of cable installation during the construction phase. These trips will occur over a 3-year period. Sea turtles are expected to be highly dispersed in deeper offshore waters and, given the large area over which Project vessels could potentially transit, the likelihood of co-occurrence is low in deeper offshore waters. Project vessels have the greatest chance to co-occur with sea turtles in the nearshore waters, near major ports, or in the shipping lanes. Given the number of major ports along the South Atlantic, vessel traffic is expected to be similar or higher to the Mid-Atlantic (approximately 74,000 vessel transits a year). Considering, an estimated 74,000 vessel transits a year occur in the Mid-Atlantic area, this is about a 0.005% increase in traffic in this area in that 3-year period. Based on this analysis, given the very small increase in vessel traffic and associated very small increase in subsequent risk, effects of this increase in traffic resulting in vessel strikes of sea turtles is extremely unlikely and the effect of adding the vessels to the baseline cannot be meaningfully measured, detected, or evaluated; therefore, effects are both discountable and insignificant.

Effects of Vessel Transits in the U.S. EEZ East and North of the Empire Wind WDA
Due to project component and vessel availability, vessels will transit from ports in eastern Canada, Europe, and Asia to the Empire Wind WDA; this section considers vessel transits through the U.S. EEZ. These vessels will be heavy transport vessels, during transit these vessels may travel up to 15 knots when not subject to vessel speed restrictions that would limit speed to 10 knots. BOEM has indicated that during the entire five-year construction period there may be up to 50 vessel transits between the WDA and ports in eastern Canada; up to 40 vessel transits between the WDA and ports in Europe to transport project components to the project site; and up to four vessel transits between the WDA and ports in Asia to transport the OSS topsides. Project vessels will represent an extremely small portion of the vessel traffic traveling through the EEZ during this period of time. In this portion of the action area, co-occurrence of project vessels and individual sea turtles is expected to be extremely unlikely; this is due to overall low abundance and limited seasonal occurrence of sea turtles in this portion of the action area, the dispersed nature of sea turtles in the open ocean, and the only intermittent presence of project vessels. Based on this, it is extremely unlikely that any sea turtles will occur along the vessel transit route at the same time that a project vessel is moving through the area. Together, this makes it extremely unlikely that any ESA listed sea turtles will be struck by a project vessel. Therefore, effects of vessel transits on sea turtles by vessel strike in this portion of the action area are discountable.

7.2.3.5 Consideration of Potential Shifts in Vessel Traffic
Here, we consider how the proposed project may result in shifts or displacement of existing vessel traffic. As presented in the Navigational Safety Risk Assessment ("NSRA;" see COP Appendix X), the proposed WTG spacing is sufficient to allow the passage of vessels between the WTGs, and the directional trends of the vessel data are roughly in-line with the direction of the rows of WTGs as currently designed. However, transit through the lease area will be a matter of risk tolerance, and up to the individual vessel operators. While the presence of the WTGs and OSSs will not result in any requirements to reroute vessel traffic, it is possible that it will result in changes to vessel routes due to operator preferences and risk tolerances.

Currently, vessel traffic in the Empire Wind WDA is primarily commercial (cargo and tanker) vessels which transit the area through TSS lanes that guide large vessel traffic into and from the Port of New York and New Jersey. Fishing vessels frequently transit through the Empire Wind lease area (as opposed to fishing within the lease area) as these vessels move through the WDA to reach fishing grounds to the north, east, and south of the lease area. Depending on final layout, existing vessel traffic may transit within the turbines in the Empire Wind WDA, or operators may avoid the Empire Wind WDA and transit around it. However, this potential shift in traffic does not increase the risk of interaction with listed species as densities of listed species are not incrementally higher outside the Empire Wind WDA such that risk of ship strike would increase. As such, even if there is a shift in vessel traffic outside of the WDA or any other change in traffic patterns due to the construction and operation of the project, any effects to listed species would be so small that they would not be able to be meaningfully measured, evaluated, or detected and are therefore, insignificant.

7.2.4 Air Emissions Regulated by the OCS Air Permit

Empire has applied for an OCS Air Permit from the EPA. To date, EPA has not issued a proposed or draft OCS air permit. As described by EPA, the Outer Continental Shelf (OCS) Air Regulations, found at 40 CFR part 55, establish the applicable air pollution control requirements, including provisions related to permitting, monitoring, reporting, fees, compliance, and enforcement, for facilities subject to the Clean Air Act (CAA) section 328. Applicants within 25 nautical miles of a state seaward boundary are required to comply with the air quality requirements of the nearest or corresponding onshore area, including applicable permitting requirements. Applicants located beyond 25 nautical miles from the state seaward boundary are subject to federal air quality requirements and will likely need an OCS permit complying with the EPA's Prevention of Significant Deterioration (PSD) preconstruction permit program, and/or Part 71 Title V operating permit program requirements, and are subject to New Source Performance Standards and some standards for Hazardous Air Pollutants promulgated under section 112 of the CAA.

The "potential to emit" for Empire Wind OCS source's includes emissions from vessels installing the WTGs and the OSSs, engines on vessels that meet the definition of an OCS source, and engines (including any generators) on the WTGs and OSSs. Criteria air pollutant emissions and their precursors generated from the construction and operation of the windfarm include nitrogen oxides, carbon monoxide, sulfur dioxide, particulate matter, and volatile organic compounds. These air pollutants are associated with the combustion of diesel fuel in a vessel's propulsion and auxiliary engines and the engine(s) located on WTGs and OSSs. The BA notes that Empire must demonstrate compliance with the national ambient air quality standards (NAAQS). The NAAQS are health-based standards that the EPA sets to protect public health with an adequate margin of safety. Prevention of significant deterioration (PSD) increments. The PSD increments are designed to ensure that air quality in an area that meets the NAAQS does not significantly deteriorate from baseline levels.

In the BA, BOEM determined that the impact from air pollutant emissions is anticipated to be minor and short-term in nature. They determine that because EPA will require compliance with the NAAQS and the NAAQS are designed to ensure that air quality does not significantly deteriorate from baseline levels, it is reasonable to conclude that any effects to listed species from these emissions will be so small that they cannot be meaningfully measured, detected, or evaluated and, therefore, are insignificant. At this time, there is no information on the effects of air quality on listed species that may occur in the action area. However, as the NAAQS and PSD increments are designed to ensure that air quality in the area regulated by the permit do not significantly deteriorate from baseline levels, it is reasonable to conclude that any effects to listed species from these emissions will be so small that they cannot be meaningfully measured, detected, or evaluated and, therefore, are insignificant. Reinitiation of consultation may be required if permit terms and/or effects are likely to be different than anticipated.

7.3 Effects to Species during Construction

Here, we consider the effects of the proposed action on listed species from exposure of species to stressors as well as alterations or disruptions to habitat and environmental conditions caused by project activities during the construction phase of the project. Specifically, we address dredging to facilitate construction and vessel access, inter-array and export cable installation including megaripple and sand wave clearance, turbidity resulting from project activities including dredging, cable installation, pile driving, and installation of scour protection to support installation of the wind turbine generators and offshore substations, and project lighting during construction. Noise associated with these activities is discussed in section 7.1; associated vessel activities are discussed in section 7.2.

7.3.1 Dredging for Vessel Access at SBMT (Gowanus Bay, NY)

Prior to construction of the Empire Wind 1 and Empire Wind 2 projects dredging in Gowanus Bay near the SBMT will be carried out to increased depths sufficient to accommodate the drafts of vessels intended to utilize the SBMT facility. Dredging will occur in Gowanus Bay in the "interpier" channels and basins adjacent to the seaward bulkheads. Sediments will be dredged to depths of up to 20 ft. below the existing mudline to a final water depth of -38.1 ft. MLLW (-43.0 ft. MHW; -43.9 ft. MHWS). Dredging of approximately 189,000 cubic yards of sediments within a 7.5-acre area will be conducted using a clamshell dredge with an environmental bucket. The dredged material will be transferred to an upland disposal facility in scows. Disposal of dredged material will be in accordance with relevant components of EPA guidelines, USACE guidelines, N.J.A.C. 7:7 Appendix G for the Management and Regulation of Dredging Activities and Dredged Material in New Jersey's Tidal Waters, and applicable State Surface Water Quality Standards at N.J.A.C. 7:9B and permit conditions. No effects to ESA listed species are anticipated from upland disposal of dredged material.

Mechanical Dredging

Here, we consider effects to listed species of using a clamshell dredge in Gowanus Bay. Given the shallow, near shore location, ESA listed whales are not known to occur in Gowanus Bay or adjacent waters in the Upper New York Bay and thus would not be exposed to any effects of this dredging. There will be no effects of dredging for vessel access at SBMT on any ESA listed whales.

Mechanical dredging entails lowering the clamshell dredger through the water column, closing the bucket after impact on the bottom, lifting the bucket up through the water column, and emptying the bucket into a barge or truck. The bucket operates without suction or hydraulic intake, moves relatively slowly through the water column, and impacts only a small area of the aquatic bottom at any time. In order to be captured in a dredge bucket, an animal must be on the bottom directly below the dredge bucket as it impacts the substrate and remain stationary as the bucket closes. Species captured in dredge buckets can be injured or killed if entrapped in the bucket or buried in sediment during dredging and/or when sediment is deposited into the dredge scow. Species captured and emptied out of the bucket can suffer stress or injury, which can lead to mortality.

Sea Turtles

Occasional, transient sea turtles are seasonally present in the upper New York Bay area generally and therefore, it is possible that sea turtles may be present in the area to be mechanically dredged. However, they are not known to be vulnerable to capture in mechanical dredges, presumably because they are able to avoid the dredge bucket. Thus, if a sea turtle were to be present at the dredge sites, it would be extremely unlikely to be captured, injured, or killed as a result of dredging operations carried out by a mechanical dredge, because of the anticipated behavioral response to swim away from the dredge bucket. That response, however, would likely be short and the sea turtle would resume its normal behavior in an adjacent area without any consequences. Based on this information, interactions between sea turtles and the mechanical dredge are extremely unlikely to occur; therefore, effects are discountable. Any effects to individual sea turtles from avoiding the dredge bucket will be so small that they cannot be meaningfully measured, detected, or evaluated and are therefore insignificant.

Sturgeon

Subadult and adult Atlantic sturgeon are seasonally present in New York Bay as they migrate in and out of the Hudson River; while unexpected, occasional, transient Atlantic sturgeon may be present in Gowanus Bay where dredging will occur. Similarly, occasionally shortnose sturgeon are present in New York Bay and transient individuals may occasionally occur in Gowanus Bay where dredging will occur.

The risk of interactions between sturgeon and mechanical dredges is considered very low but is thought to be highest in areas where large numbers of sturgeon are known to aggregate. The risk of capture may also be related to the behavior of the sturgeon in the area. While foraging, sturgeon are at the bottom interacting with the sediment. This behavior may increase the susceptibility of capture with a dredge bucket. For entrapment to occur, an individual sturgeon would have to be present directly below the dredge bucket at the time of operation. Mechanical dredging is a common activity throughout the range of shortnose and Atlantic sturgeon and very few interactions have ever been recorded. Given that dredging will not occur in areas where concentrations of sturgeon occur and the available information on use of the action area by sturgeon, the co-occurrence of an Atlantic or shortnose sturgeon and the dredge bucket is extremely unlikely. As such, entrapment or any interactions with sturgeon causing adverse effects during the dredging operations is also extremely unlikely; therefore, effects are discountable. Any effects to individual sturgeon from avoiding the dredge bucket will be so small that they cannot be meaningfully measured, detected, or evaluated and are therefore insignificant.

7.3.2 Turbidity and Contaminant Exposure from Infrastructure Improvements at SBMT

Dredging and pile driving for the port modifications at SBMT would disrupt bottom habitat and suspend sediments with potentially increased concentrations of contaminants in the water column. The amount of sediment disturbed during piling activities for port modifications at SBMT is minimal; thus, any associated increase in TSS will be small and significantly lower than the TSS associated with dredging and sediment capping addressed below. Given the very small increase in TSS associated with installation of piles at SBMT, any physiological or behavioral responses by ESA listed species from exposure to TSS are extremely unlikely to occur and thus effects are discountable.

As described in the EA for the SBMT Port Infrastructure Improvement Project, dredging and capping activities would be conducted using a clamshell dredge with an environmental bucket. TSS concentrations associated with mechanical clamshell bucket dredging operations have been shown to range from 105 mg/L in the middle of the water column to 445 mg/L near the bottom (210 mg/L, depth-averaged)(NMFS 2020c citing USACE 2001). Additional studies indicate that elevated TSS concentrations at several hundreds of mg/L above background levels may be present in close proximity to the dredge bucket but would settle rapidly within a 2,400-foot (732-meter) radius of the dredge location (NMFS 2020c citing Burton 1993; NMFS 2020c citing USACE 2015). The EA for the SBMT Port Infrastructure Improvement Project indicates that impacts on water quality for finer sediments are anticipated to be short lived in duration and localized to the 13.1-acre dredge footprint. As explained in Section 3.2, the USACE will require the use of BMPs (closed environmental bucket, no barge overflow, no draining of the bucket over the water column, careful placement of the dredge material onto the scows, turbidity curtain) would limit the transport of sediments and serve as a barrier for ESA species, if present, in coming in close proximity to the resuspended sediments in the "interpier" areas.

Whales
As explained above, whales are not known to occur in Gowanus Bay. Due to their lack of presence in this area, there would be no effects on whales caused by increased turbidity during dredging operations.

Sea Turtles
Because sea turtles breathe air, some of the concerns about impacts of TSS on fish (i.e., gill clogging or abrasion) are not relevant. There is no scientific literature available on the effects of exposure of sea turtles to increased TSS. Michel et al. (2013) indicates that since sea turtles feed in water that varies in turbidity levels, changes in such conditions are extremely unlikely to inhibit sea turtle foraging even if they use vision to forage. Based on the available information, we expect that any effects to sea turtles from exposure to increased turbidity during dredging or sediment capping are extremely unlikely to occur. If turbidity-related effects did occur, we expect they would be so small that they could not be meaningfully measured, evaluated, or detected and would therefore be insignificant. Additionally, exposure of sea turtles to additional contaminants via bioaccumulation by consuming prey items in the vicinity of dredging and capping activities are extremely unlikely to occur. This is because foraging by sea turtles in the area to be dredged is not expected and even if it did occur, prey items within the dredge footprint represent an infinitesimally small fraction of potential forage compared to the availability of prey in the action area as a whole. If a sea turtle did eat prey that had been exposed to contaminants, any exposure and exposure-related effects would be so small that they could not be meaningfully measured, evaluated, or detected and would therefore be insignificant. Additional effects to sea turtle prey are addressed below in Section 7.3.3.

Sturgeon
While there have been no directed studies on the effects of TSS on shortnose or Atlantic sturgeon, shortnose and Atlantic sturgeon juveniles and adults are often documented in turbid water and Dadswell et al. (1984) reports that shortnose sturgeon are more active under lowered light conditions, such as those in turbid waters. Sturgeon forage at the bottom by rooting in soft

sediments meaning that they are routinely exposed to high levels of suspended sediments. Garakouei et al. (2009) calculated Maximum Allowable Concentrations (MAC) for total suspended solids in a laboratory study with *Acipenser stellatus* and *A. persicus* fingerlings (7-10 cm TL). The MAC value for suspended sediments was calculated as 853.9 mg/L for *A. stellatus* and 1,536.7 mg/L for *A. persicus*. All stellate sturgeon exposed to 1,000 and 2,320 mg/L TSS for 48 hours survived. All Persian sturgeon exposed to TSS of 5,000, 7,440, and 11,310 mg/L for 48 hours survived. Given that shortnose and Atlantic sturgeon occupy similar habitats as these sturgeon species, we expect them to be a reasonable surrogate for shortnose and Atlantic sturgeon. Wilkens et al. (2015) contained young of the year Atlantic sturgeon (100-175 mm TL) for a 3-day period in flow-through aquaria, with limited opportunity for movement, in sediment of varying concentrations (100, 250 and 500 mg L^{-1} TSS) mimicking prolonged exposure to suspended sediment plumes near an operating dredge. Four-percent of the test fish died; one was exposed to 250 TSS and three to 500 TSS for the full three-day period. The authors concluded that the impacts of sediment plumes associated with dredging are minimal where fish have the ability to move or escape. Other laboratory studies (Niklitschek 2001 and Secor and Niklitschek 2001) have demonstrated shortnose sturgeon are able to actively avoid areas with unfavorable water quality conditions and that they will seek out more favorable conditions when available. As tolerance to environmental stressors, including suspended sediment, increases with size and age (ASMFC, 2012); we expect that the sturgeon in the action area would be less sensitive to TSS than the test fish used in both of these studies. Moreover, the life stages of sturgeon most vulnerable to increased sediment are eggs and larvae that are subject to burial and suffocation. These life stages are not present in locations where dredging and sediment capping activities will occur since sturgeon spawn in the Hudson River many miles upstream from the SBMT.
Based on the information summarized above, any exposure to TSS would be below levels that would be expected to result in any effects to shortnose and Atlantic sturgeon occurring in the action area. As such, shortnose and Atlantic sturgeon are extremely unlikely to experience any physiological or behavioral responses to exposure to increased TSS. Any effects of this exposure will be so small that they will not be able to be meaningfully detected, measured or evaluated and, are therefore insignificant. Effects to sturgeon prey are addressed below.

7.3.3 Impacts of Infrastructure Improvements at SBMT on Benthic Prey

Summary of Information of Feeding of ESA-listed Species in the vicinity of SBMT

Sea turtles
Green sea turtles feed primarily on sea grasses and may feed on algae. Loggerhead turtles feed on benthic invertebrates such as gastropods, mollusks, and crustaceans. Diet studies focused on North Atlantic juvenile stage loggerheads indicate that benthic invertebrates, notably mollusks and benthic crabs, are the primary food items (Burke et al. 1993, Youngkin 2001, Seney 2003). Limited studies of adult loggerheads indicate that mollusks and benthic crabs make up their primary diet, similar to the more thoroughly studied neritic juvenile stage (Youngkin 2001). Kemp's ridleys primarily feed on crabs, with a preference for portunid crabs including blue crabs; crabs make up the bulk of the Kemp's ridley diet (NMFS et al. 2011). Leatherback sea turtles feed exclusively on jellyfish. A study of the foraging ecology of leatherbacks off the coast of Massachusetts indicates that leatherbacks foraging off Massachusetts primarily consume the scyphozoan jellyfishes, *Cyanea capillata* and *Chrysaora quinquecirrha*, and ctenophores, while

a smaller proportion of their diet comes from holoplanktonic salps and sea butterflies (*Cymbuliidae*) (Dodge et al. 2011); we expect leatherbacks in the Empire Wind action area to be foraging on similar species, however, we do not expect leatherbacks to occur in Gowanus Bay where activities associated with SBMT will occur.

Atlantic sturgeon
Atlantic sturgeon are opportunistic benthivores that feed primarily on mollusks, polychaete worms, amphipods, isopods, shrimps and small bottom-dwelling fishes (Smith 1985, Dadswell 2006). A stomach content analysis of Atlantic sturgeon captured off the coast of New Jersey indicates that polycheates were the primary prey group consumed; although the isopod *Politolana concharum* was the most important individual prey eaten (Johnson et al. 2008). The authors determined that mollusks and fish contributed little to the diet and that some prey taxa (i.e., polychaetes, isopods, amphipods) exhibited seasonal variation in importance in the diet of Atlantic sturgeon. Novak et al. (2017) examined stomach contents from Atlantic sturgeon captured at the mouth of the Saco River, Maine and determined that American Sand Lance *Ammodytes americanus* was the most common and most important prey.

Shortnose sturgeon
Shortnose sturgeon feed on a variety of benthic organisms found in the sandy, muddy bottom of rivers or on plant surfaces. According to stomach content analyses of shortnose sturgeon in the Hudson River, the diet of shortnose sturgeon includes insects and crustaceans with mollusks being a major component (25 to 50% of the diet)(Curran and Ries 1937, Townes 1937, Dadswell 1979, Dadswell et al. 1984, Bain 1997). In estuaries, adult shortnose sturgeon will eat polychaete worms, crustaceans, and mollusks.

7.3.3.1 Effects of Infrastructure Improvements on the Prey Base of ESA-listed Species in the vicinity of SBMT
According to the EA for the SBMT Port Infrastructure Improvement Project, benthic prey habitats will be eliminated (0.03 acres), shaded (0.64 acres), and disturbed via dredging (14.2 acres); this is likely to result in the mortality of some benthic invertebrates in the dredging footprint. Immediately following dredging, this area will likely be devoid of any benthic invertebrates. However, given the small size of this area and the highly-motile species assemblage, comprised primarily of pollution tolerant species that surrounds the area where dredging will take place, we expect recolonization to occur from adjacent areas that were not disturbed; therefore, this reduction in potential forage will be temporary.

As explained above, elevated TSS will be experienced during dredging and sediment capping. Because polychaete worms live in the sediment, we do not expect any effects due to exposure to elevated TSS in the water column. Wilbur and Clarke (2001) reviewed available information on effects of TSS exposure on crustacean and report that in experiments shorter than 2 weeks, nearly all mortality of crustaceans occurred with exposure to concentrations of suspended sediments exceeding 10,000 mg/L and that the majority of these mortality levels were less than 25%, even at very high concentrations. Wilbur and Clarke (2001) also noted that none of the crustaceans tested exhibited detrimental responses at dosages within the realm of TSS exposure anticipated in association with dredging. Based on this information, we do not anticipate any effects to crustaceans resulting from exposure to TSS associated with dredging and sediment capping. Given the thin layer of deposition associated with the settling of TSS out of the water column following dredging and sediment capping we do not anticipate any effects to benthic invertebrates. As noted above, foraging by sea turtles or sturgeon in the area impacted by these activities is not expected but could occasionally occur. Based on this analysis, we expect any effects to foraging Kemp's ridley and loggerhead sea turtles and shortnose and Atlantic sturgeon due to the loss of benthic invertebrates from dredging and sediment capping to be so small that they cannot be meaningfully measured, evaluated, or detected and, therefore, are insignificant.

7.3.4 Cable Installation

As described in Section 3.2.3 above, a number of cables will be installed as part of the Empire Wind 1 and Empire Wind 2 projects. Activities associated with cable installation include seabed preparation and cable laying. Effects of these activities are described here.

Empire is proposing to lay the inter-array cables and offshore export cables using cable installation equipment that would include either a jet plow or mechanical plow. Cable laying and burial may occur simultaneously using a lay and bury tool, or the cables may be laid on the seabed and then trenched post-lay. The burial method will be dependent on suitable seabed conditions and sediments along the cable route.

If seabed conditions do not permit burial of inter-array or export cables, Empire is proposing to employ other methods of cable protection such as: (1) rock placement, (2) concrete mattress placement, (3) rock bags, and (4) geotextile mattresses (Empire BA, 2023). Cable inspection would be carried out to confirm the cable burial depth along the route and to identify the need for any further remedial burial activities and/or secondary cable protection. Empire anticipates up to 10 percent of the interarray and offshore export cables would require one of the protective measures.

The offshore export cables will connect with onshore export cables using HDD. As described in Section 3.2.3, multiple methods are being proposed for sea to shore construction, one of which will be used. Noise associated with installation and removal of the casing pipe and sheet pile cofferdam alternatives is considered in Section 7.1. Mechanical dredging for the exit pit would occur in association with the sheet pile or no containment alternatives.

7.3.4.1 Pre-lay Grapnel Run

Prior to installation of the cables, a pre-lay grapnel run would be performed to locate and clear obstructions such as abandoned fishing gear and other marine debris.
The pre-lay grapnel run will involve towing a grapnel, via the main cable-laying vessel, along the benthos of the cable burial route. During the pre-lay grapnel run, the cable-lay vessel will tow the grapnel at slow speeds (i.e., approximately 1 knot or less) to ensure all debris is removed. Given the very slow speed of the operation, any listed species in the vicinity are expected to be able to avoid the devices and avoid an interaction. Additionally, the cable for the grapnel run will remain taught as it is pulled along the benthos; there is no risk for any listed species to become entangled in the cable. For these reasons, any interaction between the pre-lay grapnel run and ESA-listed species is extremely unlikely to occur. As any material moved during the pre-lay grapnel run would be placed adjacent to the cable corridor any effects to listed species from these

changes in the structure of the habitat are extremely unlikely to occur and effects are discountable.

7.3.4.2 Pre-sweeping, Pre-Trenching, and Dredging to facilitate Cable Installation
Following the pre-lay grapnel run, pre-sweeping activities in areas along the EW1 and EW2 export cable routes would occur to allow for effective cable laying through megaripples and sand waves. Tidal sand waves and megaripples are mobile slopes of sediment on the seabed (Vol I, COP, 2022). Generally, megaripple sand wave features are dynamic and have wavelengths that consist of hundreds of meters with heights of several meters and typically migrate several meters per day (Terwindt, 1971, Campmans et al., 2021). The leveling or clearance of tidal sand waves and megaripples is planned prior to cable installation. Megaripple and sand wave clearance volumes were estimated based on sand wave height, anticipated cable burial depth, the most likely cable installation technique, and the required cable clearance area. Empire anticipates that pre-sweeping would occur on megaripples and large sand waves of varying heights within a corridor that is 164 ft. (50 m) wide. Specific details on megaripple and sand wave clearing volumes are described in Section 3.2.2 above. There may be instances where there is a time lapse between sand wave clearance and cable installation activities. During this time lapse, tidal sediment may start to infill the areas that were cleared which would require pre-sweeping leveling to remove partial sediment infills.

In addition to pre-sweeping, pre-trenching activities in select locations along the EW1 and EW2 export cable routes would occur to allow for effective cable laying in areas where deeper burial depths may be required and/or seabed conditions are not suitable for traditional cable burial methods. Additionally, localized dredging may be required to facilitate the required burial depth along the EW 1 export cable route within the Bay Ridge Channel and at South Brooklyn Marine Terminal. Localized dredging would also occur to reduce the shoaling of the cross design at locations where the EW1 export cable crosses existing cables and pipelines or other assets that are in service. Planned methods for pre-sweeping, pre-trenching, and localized dredging include mass flow excavator or hydraulic trailing suction hopper (Empire BA, 2023).

<u>*Mass Flow Excavator*</u>
A mass flow excavator may be used for megaripple and sand wave clearance. The mass flow excavator uses jets of water to move sand and does not come into contact with the substrate. Given that there is no contact with the substrate and sand is not entrained or otherwise removed through the mass flow excavator, there is not expected to be any risk of impingement, entrainment, capture, or other sources of injury associated with the mass flow excavator. As such, effects to listed species from the mass flow excavator are extremely unlikely to occur and effects are discountable.

<u>*Trailing Suction Hopper Dredging*</u>
Hopper dredges are self-propelled seagoing vessels that are equipped with propulsion machinery, sediment containers (hoppers), dredge pumps, and trailing suction drag-heads required to perform their essential function of excavating sediments from the channel bottom. Hopper dredges have propulsion power adequate for required free-running speed and dredge against strong currents.

Dredged material is raised by dredge pumps through dragarms connected to drags in contact with the channel bottom and discharged into hoppers built in the vessel. Hopper dredges are equipped with large centrifugal pumps similar to those employed by other hydraulic dredges. Suction pipes (dragarms) are hinged on each side of the vessel with the intake (drag) extending downward toward the stern of the vessel. The forward moving vessel moves the drag along the bottom at speeds up to three mph (2.5-3.0 knots). The dredged material is sucked up through the pipe and deposited and stored in the hoppers of the vessel.

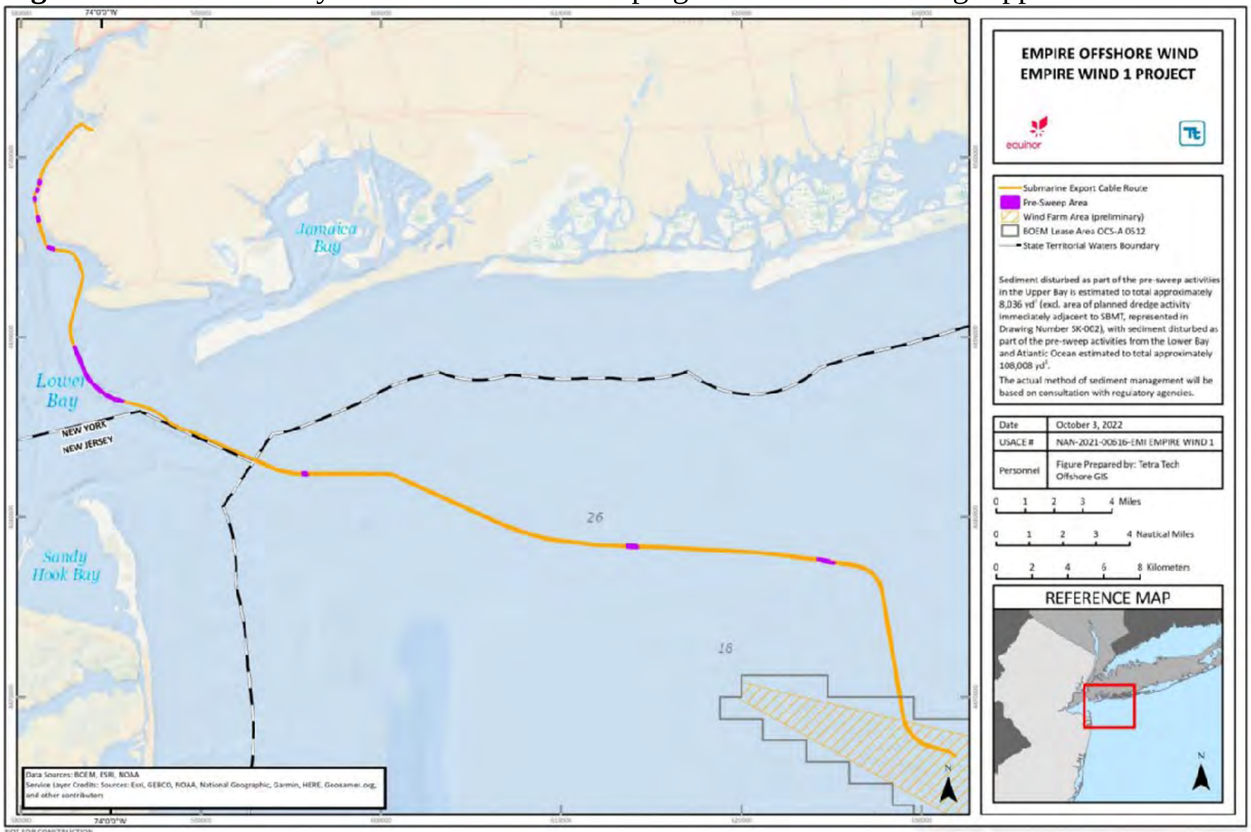
A hopper dredge removes material from the bottom of the channel in relatively thin layers, usually 2-12 inches, depending upon the density and cohesiveness of the dredged material. Pumps located within the hull, but sometimes mounted on the dragarm, create a region of low pressure around the dragheads and force water and sediment up the drag arm and into the hopper. The more closely the draghead is maintained in contact with the sediment, the more efficient the dredging, provided sufficient water is available to slurry the sediments. Hopper dredges can efficiently dredge non-cohesive sands and cohesive silts and low-density clay. Draghead types may consist of IHC and California type dragheads.

California type dragheads sit flatter in the sediment than the IHC configuration which is more upright. Individual draghead designs (*i.e.*, dimensions, structural reinforcing/configuration) vary between dredging contractors and hopper vessels. Port openings on the bottom of dragheads also vary between contractors and draghead design. The port geometry is typically rectangular or square with minimum openings of ten inch by ten inch or twelve inch by twelve inch or some rectangular variation.

Industry and government hopper dredges are equipped with various power and pump configurations and may differ in hopper capacity with different dredging capabilities. An engineering analysis of the known hydraulic characteristics of the pump and pipeline system on the USACE hopper dredge “Essayons” (a 6,423 CY hopper dredge) indicates an operational flow rate of forty cubic feet per second with a flow velocity of eleven feet per second at the draghead port openings. The estimated force exerted on a one-foot diameter turtle (i.e., one-foot diameter disc shaped object) at the pump operational point in this system was estimated to be twenty-eight pounds of suction or drag force on the object at the port opening of the draghead.

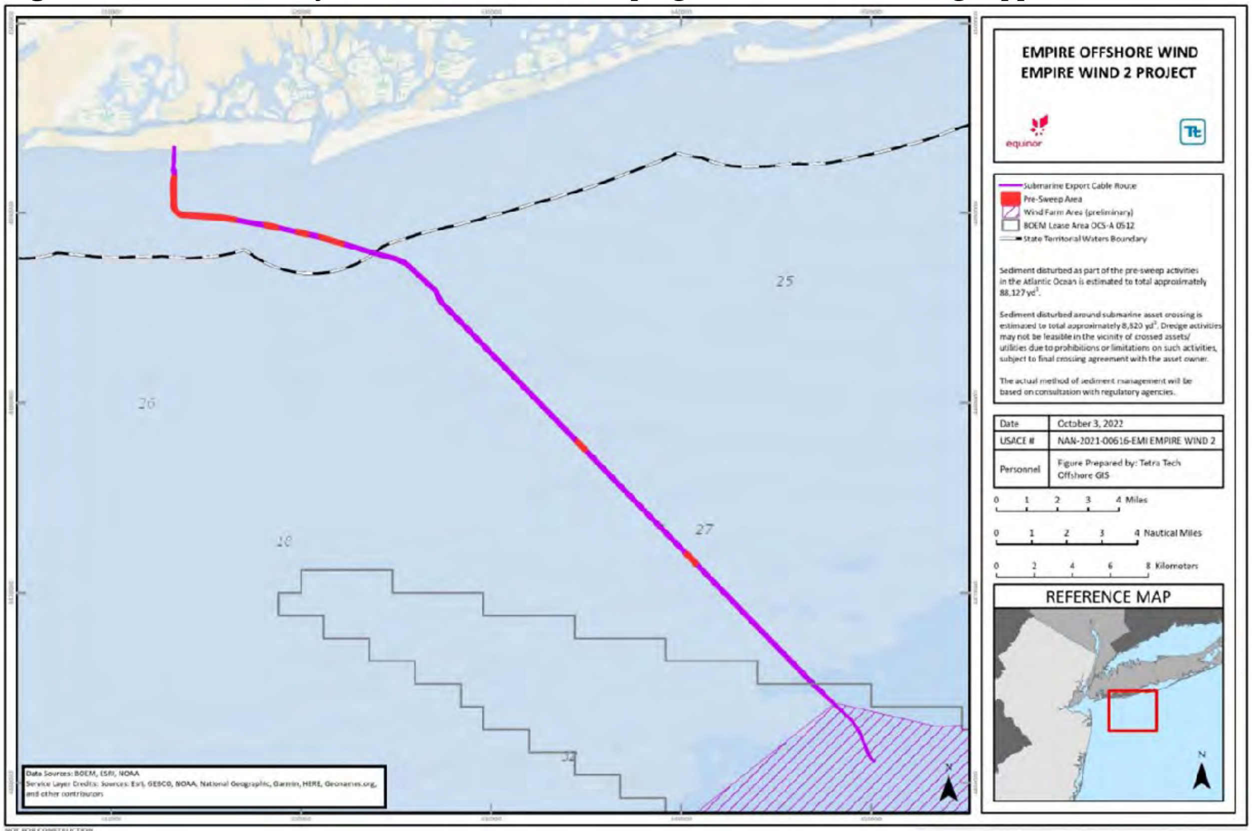
Empire proposes to use medium to large volume hopper dredge equipment to remove sediment from the EW1 and EW2 export cable routes where underwater megaripples and sand waves are present on the seafloor (Figures 7.3.1 and 7.3.2). The equipment likely to be utilized for these projects are of similar size and capacity used in recent previous hydraulic dredge projects in the region (i.e., NY/NJ Harbor Deepening Project), with the specific dredge plant depending upon dredge contractor equipment availability at the time of award. The volume of sediment to be dredged for the EW1 submarine export cable route is 116,044 CY. For the EW2 submarine export cable route, 88,127 CY of sediment will be dredged. In total, up to approximately 200,000 CY of sediment will be removed along the cable routes.

Figure 7.3.1. Preliminary Locations of Pre-Sweeping for Sand Waves/Megaripples for EW 1



Source: Empire BA 2023

Figure 7.3.2. Preliminary Locations of Pre-Sweeping for Sand Waves/Megaripples for EW 2



Source: Empire BA 2023

Whales

Even if whales are present in the suction hopper dredged area, they are far too large to be susceptible to entrapment by a trailing suction hopper dredge. As such, interactions between the hopper dredge and ESA listed whales are extremely unlikely to occur and effects are discountable.

Sea Turtles

Sea turtles can become entrained in trailing suction hopper dredges, which can result in severe injury or mortality (Dickerson et al., 2004; USACE 2020). Animal interactions with a hopper dredge occur primarily from crushing when the draghead is placed on the bottom of the seabed or when an animal is unable to escape the suction of the dredge and becomes stuck on the draghead (impingement). Further, entrainment occurs when animals are sucked through the draghead into the hopper. Mortality most often occurs when animals are sucked into the dredge draghead, pumped through the intake pipe, and then killed as they cycle through the centrifugal pump and into the hopper.

Interactions with the draghead can also occur if the suction is turned on while the draghead is in the water column (i.e., not seated on the bottom). For any dredging that occurs to support cable installation, procedures will be required to minimize the operation of suction when the draghead is not properly seated on the bottom sediments, which reduces the risk of these types of interactions.

The risk of interaction between suction hopper dredging and individual sea turtles is expected to be lower in the open ocean areas compared to nearshore navigational channels in coastal bays and harbors where sea turtles may be more concentrated and constrained, with interaction rates highest in southern waters where turtles are present year round and in higher densities than in the Mid-Atlantic (Michel et al., 2013; USACE 2022). Documented turtle mortalities during dredging operations in the USACE South Atlantic Division (SAD; i.e., south of the Virginia/North Carolina border) are more common than in the USACE North Atlantic Division (NAD; Virginia-Maine) presumably due to the greater abundance of turtles in these waters and the greater frequency of hopper dredge operations. For example, in the USACE SAD, over 480 sea turtles have been entrained in hopper dredges since 1980 and in the Gulf Region over 200 sea turtles have been killed since 1995. Records of sea turtle entrainment in the USACE NAD began in 1994. Through 2018, 88 sea turtles deaths (see Table 7.3.1) related to hopper dredge activities have been recorded in waters north of the North Carolina/Virginia border (USACE Sea Turtle Database[52]); 79 of these turtles have been entrained in dredges operating in Chesapeake Bay.

Interactions are likely to be most numerous in areas where sea turtles are resting or foraging on the bottom. When sea turtles are at the surface, or within the water column, they are not likely to interact with the dredge because there is little, if any, suction force in the water column. Sea turtles have been found resting in deeper waters, which could increase the likelihood of interactions from dredging activities. In 1981, observers documented the take of 71 loggerheads by a hopper dredge at the Port Canaveral Ship Channel, Florida (Slay and Richardson 1988). This channel is a deep, low productivity environment in the Southeast Atlantic where sea turtles are known to rest on the bottom, making them extremely vulnerable to entrainment. The large number of turtle mortalities at the Port Canaveral Ship Channel in the early 1980s resulted in part from turtles being buried in the soft bottom mud, a behavior known as brumation. Since 1981, 77 loggerhead sea turtles have been taken by hopper dredge operations in the Port Canaveral Ship Channel, Florida. Chelonid turtles have been found to make use of deeper, less productive channels as resting areas that afford protection from predators because of the low energy, deep water conditions. Habitat in the area along the Empire cable routes where dredging will occur is not consistent with areas where sea turtle brumation has been documented; therefore, we do not anticipate any sea turtle brumation in the action area. As such, this risk factor is not present.

As noted above, in the North Atlantic Division area, nearly all interactions with sea turtles have been recorded in nearshore bays and estuaries where sea turtles are known to concentrate for foraging (i.e., Chesapeake Bay and Delaware Bay). Very few interactions have been recorded at offshore dredge sites such as the ones considered in this Opinion. This may be because the area where the dredge is operating is more wide-open providing more opportunities for escape from the dredge as compared to a narrow river or harbor entrance. Sea turtles may also be less likely to be resting or foraging at the bottom while in open ocean areas, which would further reduce the potential for interactions.

[52] The USACE Sea Turtle Data Warehouse is maintained by the USACE's Environmental Laboratory and contains information on USACE dredging projects conducted since 1980 with a focus on information on interactions with sea turtles.

Before 1994, endangered species observers were not required on board hopper dredges and dredge baskets were not inspected for sea turtles or sea turtle parts. The majority of sea turtle takes in the NAD have occurred in the Norfolk district. This is largely a function of the large number of loggerhead and Kemp's ridley sea turtles that occur in the Chesapeake Bay each summer and the intense dredging operations that are conducted to maintain the Chesapeake Bay entrance channels and for beach nourishment projects at Virginia Beach. Since 1992, the take of nine sea turtles (all loggerheads) has been recorded during hopper dredge operations in the Philadelphia, Baltimore, and New York Districts.

Table 7.3.1. Recorded Sea Turtle Takes in USACE NAD Dredging Operations. (ODESS, https://dqm.usace.army.mil/odess/#/home, last accessed August 31, 2023).

Project Location	Year of Operation	Cubic Yardage Removed	Observed Takes
Cape Henry Channel	2018	2,500,000	1 Loggerhead
Thimble Shoals Channel	2016	1,098,514	1 Loggerhead
York Spit Channel	2015	815,979	6 Loggerheads
Cape Henry Channel	2014	2,165,425	3 Loggerheads 1 Kemp's ridley
Sandbridge Shoal	2013	815,842	1 Loggerhead[53]
Cape Henry Channel	2012	1,190,004	1 Loggerhead
York Spit	2012	145,332	1 Loggerhead
Thimble Shoal Channel	2009	473,900	3 Loggerheads
York Spit	2007	608,000	1 Kemp's Ridley
Cape Henry	2006	447,238	3 Loggerheads
Thimble Shoal Channel	2006	300,000	1 Loggerhead
Delaware Bay	2005	50,000	2 Loggerheads
Thimble Shoal Channel	2003	1,828,312	7 Loggerheads 1 Kemp's ridley 1 unknown
Cape Henry	2002	1,407,814	6 Loggerheads 1 Kemp's ridley 1 Green
VA Beach Hurricane Protection Project (Cape Henry)	2002	1,407,814	1 Loggerhead
York Spit Channel	2002	911,406	8 Loggerheads 1 Kemp's ridley
Cape Henry	2001	1,641,140	2 Loggerheads 1 Kemp's ridley

[53] Sea turtle observed in cage on beach (material pumped directly to beach from dredge).

VA Beach Hurricane Protection Project (Thimble Shoals)	2001	4,000,000	5 Loggerheads 1 unknown
Thimble Shoal Channel	2000	831,761	2 Loggerheads 1 unknown
York River Entrance Channel	1998	672,536	6 Loggerheads
Atlantic Coast of NJ	1997	1,000,000	1 Loggerhead
Thimble Shoal Channel	1996	529,301	1 Loggerhead
Delaware Bay	1995	218,151	1 Loggerhead
Cape Henry	1994	552,671	4 Loggerheads 1 unknown
York Spit Channel	1994	61,299	4 Loggerheads
Delaware Bay	1994	NA	1 Loggerhead
Cape May NJ	1993	NA	1 Loggerhead
Off Ocean City MD	1992	1,592,262	3 Loggerheads
			TOTAL = 88 Turtles

Typically, endangered species observers are required to observe at least 50% of the dredge activity (i.e., 6 hours on watch, 6 hours off watch). To address concerns that some loads would be unobserved, procedures have been in place since at least 2002 to ensure that inflow cages were only inspected and cleaned by observers. This maximizes the potential that any entrained sea turtles were observed and reported.

It is possible that not all sea turtles killed by dredges are observed onboard the hopper dredge. Several sea turtles stranded on Virginia shores with crushing type injuries from May 25 to October 15, 2002. The Virginia Marine Science Museum (VMSM) found 10 loggerheads, 2 Kemp's ridleys, and 1 leatherback exhibiting injuries and structural damage consistent with what they have seen in animals that were known dredge takes. While it cannot be conclusively determined that these strandings were the result of dredge interactions, it is reasonable to conclude that the death of these sea turtles was attributable to dredging operations given the location of the strandings (e.g., in the southern Chesapeake Bay near ongoing dredging activity), the time of the documented strandings in relation to dredge operations, the lack of other ongoing activities which may have caused such damage, and the nature of the injuries (e.g., crushed or shattered carapaces and/or flipper bones, black mud in mouth). In 1992, three dead sea turtles were found on an Ocean City, Maryland beach while dredging operations were ongoing at a borrow area located 3 miles offshore. Necropsy results indicate that the deaths of all three turtles were dredge related. Because there were no observers on board the dredge, it is unknown if turtles observed on the beach with these types of injuries were crushed by the dredge and subsequently stranded on shore or whether they were entrained in the dredge, entered the hopper and then were discharged onto the beach with the dredge spoils. Further analyses need to be conducted to better understand the link between crushed strandings and dredging activities, and if those strandings need to be factored into an incidental take level. Regardless, it is possible that dredges are taking animals that are not observed on the dredge, which may result in strandings on nearby beaches. However, there is not enough information at this time to determine the number of injuries or mortalities that are not detected.

The number of interactions between dredge equipment and sea turtles seems to be best associated with the volume of material removed, which is closely correlated to the length of time dredging takes, with a greater number of interactions associated with a greater volume of material removed and a longer duration of dredging. The number of interactions is also heavily influenced by the time of year dredging occurs (with more interactions correlated to times of year when more sea turtles are present in the action area) and the type of dredge plant used (sea turtles are apparently capable of avoiding pipeline and mechanical dredges as no takes of sea turtles have been reported with these types of dredges). The number of interactions may also be influenced by the terrain in the area being dredged, with interactions more likely when the draghead is moving up and off the bottom frequently. Interactions are also more likely at times and in areas when sea turtle forage items are concentrated in the area being dredged, as sea turtles are more likely to be spending time on the bottom while foraging.

We are not aware of any hopper dredging that has occurred in the areas where sand waves may be dredged as part of the Empire Wind 1 and Empire Wind 2 projects. The concentration of sea turtles in Chesapeake Bay is much higher than we anticipate for the areas to be dredged; therefore, using these projects to calculate an entrainment rate (i.e., sea turtles entrained per dredge volume) would result in a significant overestimate of the likelihood of interactions in the action area. We have calculated an entrainment rate by combining hopper dredge projects operating in Delaware Bay, in borrow areas on the Mid-Atlantic OCS, and mid-Atlantic navigation channels that have not used screening for unexploded ordnance (such screening decreases the ability of observers to detect entrained turtles) but have utilized endangered species observers for monitoring. These projects are combined in the Table 7.3.2 below. Using these projects to calculate an entrainment rate is in our view the best available information and expected to result in a reasonable estimate of risk given the geographic similarity to the EW1 and EW2 dredge areas. The entrainment rate calculated for the projects listed in Table 7.3.1 indicates that entrainment of a sea turtle is likely to occur for every 3.8 million cubic yards of material removed with a hopper dredge (calculated by dividing the total cubic yards removed by the number of sea turtles entrained: 15,280,061 CY / 4 sea turtles = 3,820,015).

Table 7.3.2. Hopper dredging projects in the Mid-Atlantic without UXO screens and with endangered species observers. (ODESS, https://dqm.usace.army.mil/odess/#/home, last accessed August 31, 2023).

Project Name	Year	CY Removed	Sea Turtle Interactions
Wallops Island, VA (OCS Borrow Area)	2013	1,000,000	0
Delaware Bay (Reach D)	2013	1,149,946	0
Wallops Island, VA (OCS Borrow Area)	2012	3,200,000	0
LBI Surf City	2006-2007	880,000	0

Delaware Bay - Channel Maintenance	2006	390,000	0
Delaware Bay - Channel Maintenance	2005	50,000	1
Delaware Bay - Channel Maintenance	2005	167,982	0
Delaware Bay	2005	162,682	0
Fenwick Island	2005	833,000	0
Cape May	2004	290,145	0
Delaware Bay - Channel Maintenance	2004	50,000	0
Cape May Meadows	2004	1,406,000	0
Cape May	2002	267,000	0
Delaware Bay - Channel Maintenance	2002	50,000	0 (bone)
Delaware Bay - Channel Maintenance	2001	50,000	0
Cape May City	1999	400,000	0
Delaware Bay - Channel Maintenance	1995	218,151	1
Bethany Beach and South Bethany Beach	1994	184,451	0
Delaware Bay - Channel Maintenance	1994	2,830,000	1
Dewey Beach	1994	624,869	0
Cape May	2005	300,000	0
Fenwick Island*	1998	141,100	0
Delaware Bay - Channel Maintenance (Brandywine)	1993	415,000	1
Bethany Beach*	1992	219,735	0
		15,280,061	**4**

Sand wave dredging associated with the installation of the EW1 and EW2 projects will remove no more than 204,171 cubic yards (116,044 CY for EW1 and 88,127 CY for EW2) of dredged material with only a portion of the dredging occurring at a time of year when sea turtles are present in the action area. Considering the entrainment rate calculated above, we would predict entrainment of no more than 0.05 sea turtles (0.03 sea turtles for EW1 and 0.02 sea turtles for EW2) during dredging for the proposed offshore cable installations. However, there are several factors that indicate this overestimates the risk of entrainment for the sand wave clearance activities, including that only a portion of the proposed dredging would occur when sea turtles are present in the action area, dredging would be intermittent, and only occur in certain limited areas of the export cable siting corridors where underwater megaripples and sand waves are present on the seafloor. Additionally, dredging in offshore areas outside of navigation channels in general appears to have a lower risk of interaction. Based on these considerations, interactions between the dredge and any sea turtles is extremely unlikely to occur and we do not expect any impingement or entrainment to occur.

Atlantic Sturgeon
Sturgeon are vulnerable to interactions with hopper dredges. The risk of interactions is related to both the amount of time sturgeon spend on the bottom and the behavior the fish are engaged in (i.e., whether the fish are overwintering, foraging, resting or migrating) as well as the intake velocity and swimming abilities of sturgeon in the area (Clarke 2011). Intake velocities at a typical large self-propelled hopper dredge are 11 feet per second. As noted above, exposure to the suction of the draghead intake is minimized by not turning on the suction until the draghead is properly seated on the bottom sediments and by maintaining contact between the draghead and the bottom. Here, we consider the risk to Atlantic sturgeon only as shortnose sturgeon are not expected to occur in the offshore areas where hopper dredging may occur and we therefore do not expect any effects to shortnose sturgeon from this activity..

A significant factor influencing potential entrainment is based upon the swimming stamina and size of the individual fish at risk (Boysen and Hoover, 2009). Swimming stamina is positively correlated with total fish length. Entrainment of larger sturgeon such as the ones in the action area is less likely due to the increased swimming performance and the relatively small size of the draghead opening. Juvenile entrainment is possible depending on the location of the dredging operations and the time of year in which the dredging occurs. Typically, major concerns of juvenile entrainment relate to fish below 200 mm (Hoover et al., 2005; Boysen and Hoover, 2009). Juvenile sturgeon are not powerful swimmers and they are prone to bottom-holding behaviors, which make them vulnerable to entrainment when in close proximity to dragheads (Hoover et al., 2011). Juvenile sturgeon do not occur in the action area. The estimated minimum size for sturgeon that out-migrate from their natal river is greater than 50cm; therefore, that is the minimum size of sturgeon anticipated in the action area.

In general, entrainment of large mobile animals, such as subadult and adult Atlantic sturgeon is relatively rare. Several factors are thought to contribute to the likelihood of entrainment. In areas where animals are present in high density, the risk of an interaction is greater because more animals are exposed to the potential for entrainment. The risk of entrainment is likely to be higher in areas where the movements of animals are restricted (e.g., in narrow rivers or confined bays) where there is limited opportunity for animals to move away from the dredge than in unconfined areas such as wide rivers or open bays. The hopper dredge draghead operates on the bottom and is typically at least partially buried in the sediment. Sturgeon are benthic feeders and are often found at or near the bottom while foraging or while moving within rivers. Sturgeon at or near the bottom could be vulnerable to entrainment if they were unable to swim away from the draghead. Atlantic sturgeon are not anticipated to be foraging in the sediment in the areas to be dredged given that they are areas of dynamic sand waves that would not support benthic invertebrates that sturgeon would forage on. As such, sturgeon are not anticipated to be so close to the sediment to be vulnerable to entrainment in the hopper dredge (Balazik et al. 2021, NMFS 2022).. If Atlantic sturgeon are up off the bottom while in offshore areas, such as the action area, the potential for interactions with the dredge are further reduced. Based on this information, the likelihood of an interaction of an Atlantic sturgeon with a hopper dredge operating in the action area is expected to be low.

Nearly all recorded entrainment of sturgeon during hopper dredging operations has been during maintenance or deepening of navigation channels within rivers with spawning populations of Atlantic sturgeon. We have records of three Atlantic sturgeon entrainments outside of such river channels. Two of these are from York Spit Channel, Virginia and based on the state of decomposition of one of these it was not killed interacting with the dredge. The other record is from the Sandy Hook Channel in New Jersey. To calculate an entrainment rate for Atlantic sturgeon that would be a reasonable estimate for the action area, we have considered projects where hopper dredges operated without UXO screens and with endangered species observers and where we expect the observers would have reported any observations of sturgeon. We have limited the projects considered to those that are outside of rivers or other inland areas as the size class of sturgeon present in those areas would be different from the action area and we expect behavior of sturgeon to be different in those areas. As such, the level of entrainment in these areas would not be comparable to the level of interactions that may occur in the action area.

Table 7.3.3. Hopper Dredging Operations in areas within the USACE NAD similar to the action area (only projects that operated without UXO screens, and carried observers and complete records available are included)(ODESS, https://dqm.usace.army.mil/odess/#/home, last accessed August 31, 2023).

Project Location	Year of Operation	Cubic Yards Removed	Observed Entrainment
Wallops Island offshore VA borrow area	2013	1,000,000	0
Wallops Island offshore VA borrow area	2012	3,200,000	0
York Spit Channel, VA	2011	1,630,713	1
Cape Henry Channel, VA	2011	2,472,000	0
York Spit Channel, VA	2009	372,533	0
Sandy Hook Channel, NJ	2008	23,500	1
York Spit Channel, VA	2007	608,000	0
Atlantic Ocean Channel, VA	2006	1,118,749	0
Thimble Shoal Channel, VA	2006	300,000	0
Cape May	2004	290,145	0
Thimble Shoal Channel, VA	2004	139,200	0
VA Beach Hurricane Protection Project	2004	844,968	0

Thimble Shoal Channel	2003	1,828,312	0
Cape May	2002	267,000	0
Cape Henry Channel, VA	2002	1,407,814	0
York Spit Channel, VA	2002	911,406	0
East Rockaway Inlet, NY	2002	140,000	0
Cape Henry Channel, VA	2001	1,641,140	0
Thimble Shoal Channel, VA	2000	831,761	0
Cape Henry Channel, VA	2000	759,986	0
Cape May City	1999	400,000	0
York Spit Channel, VA	1998	296,140	0
Cape Henry Channel, VA	1998	740,674	0
Thimble Shoal Channel, VA	1996	529,301	0
East Rockaway Inlet, NY	1996	2,685,000	0
Cape Henry Channel, VA	1995	485,885	0
East Rockaway Inlet, NY	1995	412,000	0
York Spit Channel, VA	1994	61,299	0
Cape Henry Channel , VA	1994	552,671	0
	TOTAL	25,950,197	2

In the absence of any dredging in the areas to be dredged for the Empire Wind 1 and Empire Wind 2 projects to base an entrainment estimate, we consider other projects that have been conducted in a comparable environment to that of the action area (see Table 7.3.3). As noted above, based on what we know about Atlantic sturgeon behavior in environments comparable to the action area, we consider the risk of entrainment at this site is similar to that of the projects identified in Table 7.3.3. At this time, this is the best available information on the potential for interactions with Atlantic sturgeon.

Using this method, and using the dataset presented in Table 7.3.3, we have calculated an interaction rate indicating that for every 12.98 million cubic yards of material removed, one Atlantic sturgeon is likely to be injured or killed. This calculation is based on a number of assumptions including the following: that Atlantic sturgeon are evenly distributed throughout the action area, that all hopper dredges will have the same entrainment rate, and that Atlantic sturgeon are equally likely to be encountered throughout the time period when dredging will occur. While this estimate is based on several assumptions, it is reasonable because it uses the best available information on entrainment of Atlantic sturgeon from past dredging operations, including dredging operations in the vicinity of the action area, it includes multiple projects over several years, and all of the projects have had observers present which we expect would have documented any entrainment of Atlantic sturgeon.

Megaripple and sand wave dredging associated with the installation of the EW1 and EW2 projects will remove no more than 204,171 cubic yards (116,044 CY for EW1 and 88,127 CY for EW2) of dredged material. Considering the entrainment rate calculated above, we would predict entrainment of no more than 0.02 Atlantic sturgeon (0.01 Atlantic sturgeon for EW1 and 0.01 Atlantic sturgeon for EW2) during dredging for the proposed offshore cable installation. Based on this, interactions between the dredge and Atlantic sturgeon, and any resulting injury, impingement, entrainment, or mortality, are extremely unlikely to occur and effects are discountable.

7.3.4.3 Jetting, Plowing, and Trenching during Cable Laying

Jetting involves the use of pressurized water jets to liquefy the sediment, creating a trench in which the cable is laid. Mechanical plowing involves dragging a cable plow along the seabed to create a small trench. Mechanical trenching involves the use of a trenching machine with a chain or wheel cutter fitted with picks capable of cutting through hard materials not suitable for plowing or jetting. Cable laying operations proceed at speeds of <1 knot. At these speeds, any sturgeon, sea turtle, or whale is expected to be able to avoid any interactions with the cable laying operation. Additionally, as the cable will be taut as it is unrolled and laid in the trench, there is no risk of entanglement. Based on this information adverse effects caused by these activities, including entanglement of any species during the cable laying operation, are extremely unlikely to occur and effects are discountable.

7.3.5 Turbidity from Cable Installation and Dredging Activities

Installation of the EW1 and EW2 export cables and inter-array cables would disrupt bottom habitat and suspend sediment in the water column. Vinhaterio et al. (2018) modeled anticipated total suspended solids (TSS) levels and the time required to dissipate those levels to ambient conditions. Potential types of equipment that may cause temporary increases in turbidity and sediment resuspension during cable installation include the use of a jet plow, mechanical plow, a mechanical trench, and/or the mass flow excavator and suction hopper dredge.

As described in the BA, sediment dispersion modeling was conducted for the two submarine export cable routes and the WFA (see COP Volume III, Appendix J for detailed descriptions; Empire BA 2023). The modeling indicated that maximum suspended sediment concentrations were dependent on burial depth and total percent fines at each trenching location. Locations with deeper burial depths or higher percentages of fine sediment particle classes had higher concentrations of suspended sediments because more particles were suspended due to jet plowing. The highest concentrations occurred at the release point, and concentrations decreased further from the trench. These concentrations, specifically at the trench, were confined close to the substrate. For locations in the vicinity of the EW 1 export cable in the New York Bay, which had 80 percent fine sediments, models suggested that nearly all of the material disturbed by the jet plow would be released into the water column. The conservative sediment transport model predicted that maximum suspended sediment concentration would be greater than 2.7*106 mg/L at the release point during flood and ebb conditions for locations with a trench depth of 8 ft. (2.5 m). For locations in the vicinity of the EW1 and EW2 export cables that were distant from the mouth of the Hudson River, which typically had high sand content, suspended sediment concentrations decreased by close to 75 percent within one minute of jet plowing operations and within 33 ft. (10 m) of the trench centerline. This reduced the amount of sediment that could be transported in the water column due to currents, and most of the fine sand deposits within 16 ft. (5 m) of the trench centerline. Concentrations decreased to around 2.1*104 mg/L within 328 ft. (100 m) of the trench centerline and 100 mg/L within 1,640 ft. (500 m) of the trench centerline. For all locations modeled in the vicinity of the EW1 and EW2 export cables, the sediment concentrations decreased rapidly with time, and water column concentrations were projected to return to ambient conditions within 4 hours.

The modeling indicated that for sediments suspended during mass flow excavation, the plume travels for much shorter distance as compared to jet plowing because of the difference in sediment composition of the upper layer of sediment compared to the deeper seabed sediment. Fine sand and very fine sand settle out quickly in comparison to silt and clay. Models indicated that the suspended sediment concentration drops by 50 percent within 60 seconds of suspension in the water column. Based on this information, if mass flow excavation is used during pre-sweeping activities, Empire expects the maximum suspended sediment concentrations to be similar to the jet plowing results because the sediment compositions are the same throughout locations that would require megaripple and sand wave clearance. Additionally, modeling results indicated that the potential for sedimentation and deposition from the installation of the EW1 and EW2 inter-array cables is similar to that described for the export cables. If a suction hopper dredge is used, suspended sediment is expected to be similar to the other equipment types described here.

Whales

In a review of dredging impacts to marine mammals, Todd et al. (2015) found that direct effects from turbidity have not been documented in the available scientific literature. Because whales breathe air, some of the concerns about impacts of TSS on fish (i.e., gill clogging or abrasion) are not relevant. Cronin et al. (2017) suggest that vision may be used by North Atlantic right whales to find copepod aggregations, particularly if they locate prey concentrations by looking upwards. However, Fasick et al. (2017) indicate that North Atlantic right whales certainly must rely on other sensory systems (e.g. vibrissae on the snout) to detect dense patches of prey in very dim light (at depths >160 meters or at night). Because ESA listed whales often forage at depths deeper than light penetration (i.e., it is dark), which suggests that vision is not relied on exclusively for foraging, TSS that reduces visibility would not be expected to affect foraging ability. Data are not available regarding whales avoidance of localized turbidity plumes; however, Todd et al. (2015) conclude that since marine mammals often live in turbid waters and frequently occur at depths without light penetration, impacts from turbidity are not anticipated to occur. As such, any effects to ESA listed whales from exposure to increased turbidity during cable installation are extremely unlikely to occur. If turbidity-related effects did occur, they would likely be so small that they cannot be meaningfully measured, evaluated, or detected and would therefore be insignificant. Effects to whale prey are considered below.

Sea Turtles

As explained above in Section 7.3.2, some of the concerns about impacts of TSS on fish (i.e., gill clogging or abrasion) are not relevant because sea turtles breathe air. There is no scientific literature available on the effects of exposure to increased TSS on juvenile and adult sea turtles. As any TSS increases would be confined to on or near the sea floor bottom, it is extremely unlikely that there would be any alteration to sea turtles' normal movements, especially since sea turtles feed in water that varies in turbidity levels (Michel et al. 2013). Based on the available information, we expect that any effects to sea turtles from exposure to increased turbidity during dredging or cable installation are extremely unlikely to occur. If turbidity-related effects did occur, they would likely be so small that they could not be meaningfully measured, evaluated, or detected and would therefore be insignificant. Effects to sea turtle prey are addressed below in Section 7.3.6.

Sturgeon
As explained above in Section 6.3, shortnose sturgeon are not known to occur in the WFA nor along the EW 2 submarine export cable route. As such, exposure to increased turbidity during dredging or cable installation will only occur as shortnose sturgeon transit through the EW1 landfall site and along a portion of the submarine export cable route within state waters.
As discussed more fully in Section 7.3.2 above, shortnose and Atlantic sturgeon are adapted to natural fluctuations in water turbidity through repeated exposure (e.g., high water runoff in riverine habitat, storm events) and are adapted to living in turbid environments (Hastings 1983, Dadswell et al. 1984, ECOPR Consulting 2009). Please refer to information in that section for additional information on published data reporting the effects of suspended sediment on sturgeon.

Any shortnose or Atlantic sturgeon within 20 m of the cable laying operations would be exposed to TSS concentrations of approximately 235 mg/L. These elevated TSS levels are not expected to persist for more than six hours at a time until the activity is completed and suspended sediment settles back to the seabed. Atlantic sturgeon within 200 m of the cable laying operations for the EW1 and EW2 export cables in federal waters would be exposed to TSS at or below 43 mg/L. As mentioned above, elevated TSS levels associated with EW1 and EW2 export cable-OCS installation are not expected to persist for more than four hours. Based on the information summarized above, any exposure to TSS would be below levels that would be expected to result in any effects to the adult shortnose sturgeon and subadult or adult Atlantic sturgeon occurring in the action area. As such, shortnose and Atlantic sturgeon are extremely unlikely to experience any physiological or behavioral responses to exposure to increased TSS and effects are discountable. Effects to sturgeon prey are addressed below.

7.3.6 Impacts of Dredging and Cable Installation Activities of on Prey
Cable installation could affect prey of whales, sea turtles, and shortnose and Atlantic sturgeon due to impacts of sediment disturbance during dredging or cable laying and resulting exposure to increased TSS. A summary of information of feeding of listed sea turtles, shortnose sturgeon, and Atlantic sturgeon is provided above in Section 7.3.3. Please refer to information in that section for a summary of the prey that these species forage on. Here, we provide a brief summary of the prey that ESA listed whale species forage on and then consider the effects of dredging and cable installation on prey for the various listed species, with the analysis organized by prey type. We conduct this analysis to consider whether listed species could be exposed to adverse effects due to adverse consequences to species on which they forage.

Summary of Information of Feeding of ESA-listed Species

Right whales

Right whales feed almost exclusively on copepods, a type of zooplankton. Of the different kinds of copepods, North Atlantic right whales feed especially on late stage *Calanus finmarchicus*, a large calanoid copepod (Baumgartner et al.. 2007), as well as *Pseudocalanus spp*. and *Centropages spp*. (Pace and Merrick 2008). Because a right whale's mass is ten or eleven orders of magnitude larger than that of its prey (late stage *C. finmarchicus* is approximately the size of a small grain of rice), right whales are very specialized and restricted in their habitat requirements – they must locate and exploit feeding areas where copepods are concentrated into high-density patches (Pace and Merrick 2008).

Fin whales
Fin whales in the North Atlantic eat pelagic crustaceans (mainly euphausiids or krill, including *Meganyctiphanes norvegica* and *Thysanoessa inerrnis*) and schooling fish such as capelin (*Mallotus villosus*), herring (*Clupea harengus*), and sand lance (*Ammodytes spp*.) (NMFS 2010). Fin whales feed by lunging into schools of prey with their mouth open, using their 50 to 100 accordion-like throat pleats to gulp large amounts of food and water. A fin whale eats up to 2 tons of food every day during the summer months.

Sei whales
An average sei whale eats about 2,000 pounds of food per day. They can dive 5 to 20 minutes to feed on plankton (including copepods and krill), small schooling fish, and cephalopods (including squid) by both gulping and skimming.

Sperm whales
Sperm whales hunt for food during deep dives with feeding occurring at depths of 500–1000 m depths (NMFS 2010). Deepwater squid make up the majority of their diet (NMFS 2010). Given the shallow depths of the area where the cable will be installed (less than 50 m), it is extremely unlikely that any sperm whales would be foraging in the area affected by the cable installation and extremely unlikely that any potential sperm whale prey would be affected by cable installation or dredging activities.

7.3.6.1 Effects of Cable Installation and Dredging on the Prey Base of ESA-listed Species in the Action Area

Copepods
Copepods exhibit diel vertical migration; that is, they migrate downward out of the euphotic zone at dawn, presumably to avoid being eaten by visual predators, and they migrate upward into surface waters at dusk to graze on phytoplankton at night (Baumgartner and Fratantoni 2008; Baumgartner et al. 2011). Baugmartner et al. (2011) concludes that there is considerable variability in this behavior and that it may be related to stratification and presence of phytoplankton prey with some copepods in the Gulf of Maine remaining at the surface and some remaining at depth. Because copepods even at depth are not in contact with the substrate, we do not anticipate any burial or loss of copepods during installation of the cable. We were unable to identify any scientific literature that evaluated the effects to marine copepods of exposure to TSS. Based on what we know about effects of TSS on other aquatic life, it is possible that high concentrations of TSS could negatively affect copepods. However, given that: the expected TSS levels are below those that are expected to result in effects to even the most sensitive species

evaluated; the sediment plume will be transient and temporary (i.e., persisting in any one area for no more than three hours); elevated TSS is limited to the bottom 3 meters of the water column; and will occupy only a small portion of the WFA at any given time, any effects to copepod availability, distribution, or abundance on foraging whales would be so small that they could not be meaningfully evaluated, measured, or detected. Therefore, effects are insignificant.

Fish
As explained above, elevated TSS will be experienced along the cable corridor during cable installation. Anticipated TSS levels are below the levels expected to result in the mortality of fish that are preyed upon by fin or sei whales or Atlantic sturgeon. In general, fish can tolerate at least short-term exposure to high levels of TSS. Wilber and Clarke (2001) reviews available information on the effects of exposure of estuarine fish and shellfish to suspended sediment. In an assessment of available information on sublethal effects to non-salmonids, they report that the lowest observed concentration–duration combination eliciting a sublethal response in white perch was 650 mg/L for 5 d, which increased blood hematocrit (Sherk et al. 1974 in Wilber and Clarke 2001). Regarding lethal effects, Atlantic silversides and white perch were among the estuarine fish with the most sensitive lethal responses to suspended sediment exposures, exhibiting 10% mortality at sediment concentrations less than 1,000 mg/L for durations of 1 and 2 days, respectively (Wilber and Clarke 2001). Forage fish in the action area will be exposed to maximum TSS concentration-duration combinations far less than those demonstrated to result in sublethal or lethal effects of the most sensitive non-salmonids for which information is available. Based on this, we do not anticipate the mortality of any forage fish; therefore, we do not anticipate any reduction in fish as prey for fin or sei whales or Atlantic sturgeon and effects to fin and sei whales and Atlantic sturgeon are extremely unlikely to occur and discountable.

Benthic Invertebrates
In the BA, BOEM indicates that an area approximately 10-feet wide will be disturbed during cable installation; this is likely to result in the mortality of some benthic invertebrates in the path of the jet plow. Immediately following cable installation, this area will likely be devoid of any benthic invertebrates. However, given the narrow area, we expect recolonization to occur from adjacent areas that were not disturbed; therefore, this reduction in potential forage will be temporary.

As explained above, elevated TSS will be experienced along the cable corridor during cable installation. Because polychaete worms live in the sediment, we do not expect any effects due to exposure to elevated TSS in the water column. Wilbur and Clarke (2001) reviewed available information on effects of TSS exposure on crustacean and report that in experiments shorter than 2 weeks, nearly all mortality of crustaceans occurred with exposure to concentrations of suspended sediments exceeding 10,000 mg/L and that the majority of these mortality levels were less than 25%, even at very high concentrations. Wilbur and Clarke (2001) also noted that none of the crustaceans tested exhibited detrimental responses at dosages within the realm of TSS exposure anticipated in association with dredging. Based on this information, we do not anticipate any effects to crustaceans resulting from exposure to TSS associated with cable installation. Given the thin layer of deposition associated with the settling of TSS out of the water column following cable installation we do not anticipate any effects to benthic invertebrates. Based on this analysis, we expect any impact of the loss of benthic invertebrates to foraging Kemp's ridley and loggerhead sea turtles and shortnose or Atlantic sturgeon due to cable installation to be so small that they cannot be meaningfully measured, evaluated, or detected and, therefore, are insignificant.

Jellyfish

A literature search revealed no information on the effects of exposure to elevated TSS on jellyfish. However, given the location of jellyfish in the water column and the information presented in the BA that indicates that any sediment plume associated with cable installation will be limited to the bottom 3 meters of the water column, we expect any exposure of jellyfish to TSS to be minimal. Based on this analysis, effects to leatherback sea turtles resulting from effects to their jellyfish prey are extremely unlikely to occur and thus discountable.

7.3.7 Onshore Cable Connections

The offshore export cables will connect with onshore export cables at transition joint bays (TJBs) with landfall sites at the SBMT for the EW1 export cable and up to two sites on either Long Beach or Lido Beach, New York. Offshore export cables will be installed up to the TJBs by utilizing HDD, Direct Pipe, or open-cut alternatives and may include installation of temporary cofferdams or goal posts. Sheet piles will be temporarily installed to support cofferdam or goal post installation (if required) during construction of HDD exit pits. The HDD installation involves excavation of an exit pit, drilling, and pumping drilling fluid to create a bore and then pulling conduit into the bore. The export cable is then pulled through the installed conduit. Noise associated with sheet pile installation is addressed in Section 7.1.

For the construction of the HDD, a drilling fluid of bentonite-water-based mud or another non-toxic drilling fluid would be used to cool the drill bit, maintain borehole stability, and control fluid loss during operations. Drilling mud would be injected into the drill pipe onshore using pumps that are located within the HDD workspace. The mud would be jetted through a rotating drill bit attached at the end of the drill pipe. Jetting of the mud would cool the drill bit and suspend drill cuttings within the mud solution. Mud and cuttings would flow back to the surface in the gap between the drill pipe and bore hole, which would stabilize the borehole. Once the mud flows back to the borehole entry, it would be collected and reused.

In the event that HDD methods are not feasible at certain landfall locations for the EW2 export cable (i.e., Landfall A, Landfall B, or Landfall E), the transition of the export cables from offshore to onshore may be accomplished by Direct Pipe as the trenchless installation method. The Direct Pipe method involves using a pipe thruster to grip and push a steel pipe with a microtunnel boring machine. Once the microtunnel boring machine exits onto the seafloor and is removed, the duct used to house the electrical can would be fabricated into a pipe string one joint at a time within the same onshore entry workspace area and pushed into the casing pipe previously installed using the Direct Pipe method (Empire Wind DEIS 2023).

HDD and Direct Pipe methodologies allow the cable to transition from the onshore to marine environment under the sediments. Before either of these trenchless methods begin, a temporary cofferdam or goal posts to support a casing pipe may be installed where the conduit exits from the seabed to facilitate cable pull-in. If conditions require a cofferdam or goal posts, it will be installed as sheet piled structures into the sea floor (see Section 3.4.2 in the COP, Volume I). Noise associated with cofferdam installation is addressed in Section 7.1 of this Opinion.

The only in-water work involved in the transition of the export cable from offshore to onshore would be at the transition site where a temporary cofferdam or goal posts would be installed. Given the shallow, nearshore location of either transition site, we do not expect any whales, sea turtles, or sturgeon to be exposed to any effects of turbidity or habitat disturbance from the cofferdam installation or cable pull-in.

7.3.8. Pile Installation and Removal for Onshore Substation C Marina

As described in Empire's COP, the proposed onshore export cable routes for EW2 will cross at Reynolds Channel and may connect to EW2 Onshore Substation C in Island Park, New York. As part of site preparation for activities for connecting EW2 interconnection cables to Onshore Substation C, the existing berthing piles will be removed and the bulkhead will be repaired at the marina that currently occupies a portion of the EW2 Onshore Substation C site. A vibratory pile driver will be used to install sheet piles and to remove the timber berthing piles; effects of noise are considered in section 7.1. Given the shallow (<9 meter), inland location of these marina activities, we do not expect any whales, sea turtles, or sturgeon to be exposed to any effects of turbidity or other habitat conditions due to marina activities at EW2 Onshore Substation C.

7.3.9 Pile Installation for Barnums Channel Cable Bridge

As described in Section 3.2.3, Empire has proposed a total of eight cable route segments to connect onshore cables for EW2 from Reynolds Crossing to the Oceanside POI. Two of the eight proposed routes (EW2 Island Park Routes C and F identified in Empire's BA), cross Barnums Channel utilizing an above-water cable bridge. Four support columns (pile caps) will be installed by hammer within the waterway to support a prefabricated steel truss system, which will hold the cables above the water. Given the shallow (i.e., 1 meter), inland location of the cable crossing, we do not expect any whales, sea turtles, or sturgeon to be exposed to any effects of construction activities for the Barnums Channel Cable Bridge.

7.3.10 Turbidity during WTG and OSS Installation

Pile driving for WTG and OSS installation as well as the deposition of rock for scour protection at the base of these foundations may result in a minor and temporary increase in suspended sediment in the area immediately surrounding the foundation or scour protection being installed. The amount of sediment disturbed during these activities is minimal; thus, any associated increase in TSS will be small and significantly lower than the TSS associated with cable installation addressed above. Given the very small increase in TSS associated with foundation installation and placement of scour protection, any physiological or behavioral responses by ESA listed species from exposure to TSS are extremely unlikely to occur and thus discountable.

7.3.11 Lighting

In general, lights will be required on offshore platforms and structures, vessels, and construction equipment during construction. Construction activities would occur 24 hours a day to minimize the overall duration of activities and the associated period of potential impact on marine species. Although not anticipated, Empire expects that pile driving that was started during daylight could continue after dark or in low visibility conditions. Construction and support vessels would be required to display lights when operating at night and deck lights would be required to illuminate work areas. However, lights would be down shielded to illuminate the deck, and would not intentionally illuminate surrounding waters. If sea turtles, Atlantic sturgeon, whales, or their prey is attracted to the lights, it could increase the potential for interaction with equipment or associated turbidity. However, due to the nature of project activities and associated seafloor disturbance, turbidity, and noise, listed species and their prey are not likely to be attracted by lighting because they are disturbed by these other factors. As such, we have determined that any effects of project lighting on sea turtles, sturgeon, or whales are extremely unlikely to occur and thus discountable.

Lighting may also be required at on shore areas, such as where the cables will make landfall. Many of the onshore areas used for staging will be part of an industrial port where artificial lighting already exists. Sea turtle hatchlings are known to be attracted to lights and artificial beach lighting is known to disrupt proper orientation towards the sea. However, due to the distance from the nearest nesting beach to the project area (the straight-line distance through the Atlantic Ocean from Virginia Beach, VA, the northernmost area where successful nesting has occurred, and the WFA is approximately 300 km), there is no potential for project lighting to impact the orientation of any sea turtle hatchlings and we therefore expect no effect to sea turtle hatchlings be caused due to lighting.

7.4 Effects to Habitat and Environmental Conditions during Operation

Here, we consider the effects to listed species from alterations or disruptions to habitat and environmental conditions during the operations phase of the project. Specifically, we address electromagnetic fields and heat during cable operation, project lighting during operations, and the effects of project structures.

7.4.1 Electromagnetic Fields and Heat during Cable Operation

Electromagnetic fields (EMF) are generated by current flow passing through power cables during operation and can be divided into electric fields (called E-fields, measured in volts per meter, V/m) and magnetic fields (called B-fields, measured in microteslas [μT]) (Taormina et al. 2018). Buried cables reduce, but do not entirely eliminate, EMF (Taormina et al. 2018). When electric energy is transported, a certain amount is lost as heat by the Joule effect, leading to an increase in temperature at the cable surface and a subsequent warming of the sediments immediately surrounding the cable; for buried cables, thermal radiation can warm the surrounding sediment in direct contact with the cable, even at several tens of centimeters away from it (Taormina et al. 2018).

To minimize EMF generated by cables, all cabling would be contained in electrical shielding (i.e., bitumen impregnated hessian tape and polypropylene threads) to prevent detectable direct electric fields. Empire would also bury cables to a target burial depth of approximately 6 feet (1.8 meters) below the surface. The electrical shielding and burial are expected to control the intensity of EMF. However, magnetic field emissions cannot be reduced by shielding, although multiple-stranded cables can be designed so that the individual strands cancel out a portion of the fields emitted by the other strands. Normandeau et al. (2011) compiled data from a number of existing sources, including 19 undersea cable systems in the U.S., to characterize EMF associated with cables consistent with those proposed for wind farms. The dataset considers cables consistent with those proposed by Empire (i.e., up to 345 kV). In the paper, the authors present information indicating that the maximum anticipated magnetic field would be experienced directly above the cable (i.e., 0 m above the cable and 0 m lateral distance), with the strength of the magnetic field dissipating with distance. Based on this data, the maximum anticipated magnetic field would be 7.85 μT at the source, dissipating to 0.08 μT at a distance of 10 m above the source and 10 m lateral distance. By comparison, the Earth's geomagnetic field strength ranges from approximately 20 to 75 μT (Bochert and Zettler 2006), while the highest calculated magnetic-field levels calculated for EW1 and EW2 submarine export and interarray cable configurations at a height of 3.3 ft. (1.0 m) above the seabed is 35 milligauss (mG; 3.5 μT) for the submarine export cable and 16 mG (1.6 μT) for the interarray cable (COP Appendix EE, Empire 2022).

When electric energy is transported, a certain amount gets lost as heat, leading to an increased temperature of the cable surface and subsequent warming of the surrounding environment (OSPAR 2009). As described in Taormina et al. (2018), the only published field measurement study results are from the 166 MW Nysted wind energy project in the Baltic Sea (maximal production capacity of about 166 MW), in the proximity of two 33 and 132 kV AC cables buried approximately 1 m deep in a medium sand area. In situ monitoring showed a maximal temperature increase of about 2.5 ºC at 50 cm directly below the cable and did not exceed 1.4°C in 20 cm depth above the cable (Meißner et al., 2007). Taormina et al. caution that application of these results to other locations is difficult, considering the large number of factors affecting thermal radiation including cable voltage, sediment type, burial depth, and shielding. The authors note that the expected impacts of submarine cables would be a change in benthic community makeup with species that have higher temperature tolerances becoming more common. Taormina et al. conclude at the end of their review of available information on thermal effects of submarine cables that considering the narrowness of cable corridors and the expected weakness of thermal radiation, impacts are not considered to be significant. Based on the available information summarized here, and lacking any site-specific predictions of thermal radiation from the EW1 Wind Farm inter-array cables, EW2 Wind Farm inter-array cables, and the EW1 and EW2 export cables, we expect that any impacts will be limited to a change in species composition of the infaunal benthic invertebrates immediately surrounding the cable corridor. As such, we do not anticipate thermal radiation to change the abundance, distribution, or availability of potential prey for any species. As any increase in temperature will be limited to areas within the sediment around the cable where listed species do not occur, we do not anticipate any exposure of listed species to an increase in temperature associated with the cable. There will therefore be no effect to any ESA-listed species from increased temperature caused by project cables.

Sturgeon

Sturgeons are electrosensitive and use electric signals to locate prey. Information on the impacts of magnetic fields on fish is limited. A number of fish species, including sturgeon, are suspected of being sensitive to such fields because they have magnetosensitive or electrosensitive tissues, have been observed to use electrical signals in seeking prey, or use the Earth’s magnetic field for navigation during migration (EPRI 2013). Atlantic sturgeon have specialized electrosensory organs capable of detecting electrical fields on the order of 0.5 millivolts per meter (mV/m) (Normandeau et al. 2011). Exponent Engineering, P.C. (2022) calculated that the maximum induced electrical field strength from the EW1 Wind Farm and EW2 Wind Farm inter-array cables and the EW1 and EW2 export cables would be 2.4 mV/m for the submarine export cable and 1.0 mV/m for the interarray cable at a height of 3.3 ft. (1.0 m) above the seabed. This suggests that Atlantic sturgeon would be able to detect the induced electrical fields in immediate proximity to those cable segments.

Bevelhimer *et al*. 2013 examined the behavioral responses of Lake Sturgeon to electromagnetic fields. The authors also report on a number of studies, which examined magnetic fields associated with AC cables consistent with the characteristics of the cables proposed by Empire and report that in all cases magnetic field strengths are predicted to decrease to near-background levels at a distance of 10 m from the cable. Like Atlantic sturgeon, Lake Sturgeon are benthic oriented species that can utilize electroreceptor senses to locate prey; therefore, they are a reasonable surrogate for Atlantic sturgeon in this context. Bevelhimer et al. 2013 carried out lab experiments examining behavior of individual lake sturgeon while in tanks with a continuous exposure to an electromagnetic source mimicking an AC cable and examining behavior with intermittent exposure (i.e., turning the magnetic field on and off). Lake sturgeon consistently displayed altered swimming behavior when exposed to the variable magnetic field. By gradually decreasing the magnet strength, the authors were able to identify a threshold level (average strength ~ 1,000–2,000 μT) below which short-term responses disappeared.

The anticipated maximum exposure of an Atlantic sturgeon to the proposed cable would range from 31 to 41 mG (3.1 to 4.1 μT) on the bed surface above the buried and exposed EW1 and EW2 export cables, and 16 to 20 mG (1.6 to 2.0 μT) above the buried and exposed inter-array cable, respectively. This is several orders of magnitude below the levels that elicited a behavioral response in the Bevelhimer et al. (2013) study. Project-specific magnetic-field models showed that magnetic-field levels decrease rapidly with distance, falling to less than 3 mG (0.3 μT) beyond a horizontal distance of 30 ft. (9.1 m) from either cable type (Exponent Engineering, P.C. 2022). By comparison, the earth's natural magnetic field is more than five times the maximum potential EMF effect from the Project. Background electrical fields in the action area are on the order of 1 to 10 mG from the natural field effects produced by waves and currents; this is several times higher than the EMF anticipated to result from the project's cables. As such, it is extremely unlikely that there will be any effects to Atlantic sturgeon due to exposure to the electromagnetic field from the proposed cable. Effects to ESA-listed sturgeon from electromagnetic fields caused by project cables are therefore discountable.

ESA-Listed Whales

The current literature suggests that cetaceans can sense the Earth's geomagnetic field and use it to navigate during migrations but not for directional information (Normandeau et al. 2011). It is not clear whether they use the geomagnetic field solely or in addition to other regional cues. It is also not known which components of the geomagnetic field cetaceans are sensing (i.e. the horizontal or vertical component, field intensity or inclination angle). Marine mammals appear to have a detection threshold for magnetic intensity gradients (i.e. changes in magnetic field levels with distance) of 0.1 percent of the earth's magnetic field or about 0.05 microtesla (μT) (Kirschvink 1990). Assuming a 50-mG (5 μT) sensitivity threshold (Normandeau 2011), marine mammals could theoretically be able to detect EMF effects from the inter-array and EW1 and EW2 export cables, but only in close proximity to cable segments lying on the bed surface. Individual marine mammals would have to be within 3 feet or less of those cable segments to encounter EMF above the 50-mG detection threshold.

As described in Normandeau et al. (2011), there is no scientific evidence as to what the response to exposures to the detectable magnetic field would be. However, based on the evidence that magnetic fields have a role in navigation it is reasonable to expect that any effects would be related to migration and movement. Given the limited distance from the cable that the magnetic field will be detectable, the potential for effects is extremely limited and as effects are extremely unlikely to occur, they are discountable. Even if listed whales did avoid the corridor along the cable route in which the magnetic field is detectable, the effects would be limited to minor deviations from normal movements. As such, any effects are likely to be so small that they cannot be meaningfully measured, detected, or evaluated and are therefore insignificant.

Sea Turtles

Sea turtles are known to possess geomagnetic sensitivity (but not electro sensitivity) that is used for orientation, navigation, and migration. They use the Earth's magnetic fields for directional or compass-type information to maintain a heading in a particular direction and for positional or hemap-type information to assess a position relative to a specific geographical destination (Lohmann et al. 1997). Multiple studies have demonstrated magneto sensitivity and behavioral responses to field intensities ranging from 0.0047 to 4000 μT for loggerhead turtles, and 29.3 to 200 μT for green turtles (Normandeau et al. 2011). While other species have not been studied, anatomical, life history, and behavioral similarities suggest that they could be responsive at similar threshold levels. For purposes of this analysis, it is reasonable to l assume that leatherback and Kemp's ridley sea turtles are as sensitive as loggerhead sea turtles.

Sea turtles are known to use multiple cues (both geomagnetic and nonmagnetic) for navigation and migration. However, conclusions about the effects of magnetic fields from power cables are still hypothetical, as it is not known how sea turtles detect or process fluctuations in the earth's magnetic field. In addition, some experiments have shown an ability to compensate for "miscues," so the absolute importance of the geomagnetic field is unclear.

Based on the demonstrated and assumed magneto sensitivity of sea turtle species that occur in the action area, we expect that loggerhead, leatherback, and Kemp's ridley sea turtles will be able to detect the magnetic field. As described in Normandeau et al. (2011), there is no scientific evidence as to what the response to exposures to the detectable magnetic field would be. However, based on the evidence that magnetic fields have a role in navigation it is reasonable to expect that effects would be related to migration and movement; however, the available information indicates that any such impact would be very limited in scope. As noted in Normandeau (2011), while a localized perturbation in the geomagnetic field caused by a power cable could alter the course of a turtle, it is likely that the maximum response would be some, probably minor, deviation from a direct route to their destination. Based on the available information, effects to sea turtles from the magnetic field associated with the EW1 Wind Farm inter-array cables, EW2 Wind Farm inter-array cables, and EW1 and EW2 export cables are expected to be so small that they cannot be meaningfully measured, detected, or evaluated and are, therefore, insignificant.

Effects to Prey

We have considered whether magnetic fields associated with the operation of the transmission line could impact benthic organisms that serve as sturgeon and sea turtle prey. Effects to forage fish, jellyfish, copepods, and krill are extremely unlikely to occur given the limited distance into the water column that any magnetic field associated with the transmission line is detectable. Information presented in COP Appendix EE summarizes a number of studies on the effects of exposure of benthic resources to magnetic fields. According to these studies, the survival and reproduction of benthic organisms are not thought to be affected by long-term exposure to static magnetic fields (Bochert and Zettler 2004, Normandeau *et al*. 2011). Results from the 30-month post-installation monitoring for the Cross Sound Cable Project in Long Island Sound indicated that the benthos within the transmission line corridor for this project continues to return to pre-installation conditions. The presence of amphipod and worm tube mats at a number of stations within the transmission line corridor suggest construction and operation of the transmission line did not have a long-term negative effect on the potential for benthic recruitment to surface sediments (Ocean Surveys 2005). Therefore, no impacts (short-term or long-term) of magnetic fields on prey for any listed species in the action area are expected and we thus expect no effect to ESA-listed species due to disturbance of prey.

7.4.2 Lighting and Marking of Structures

To comply with FAA and USCG regulations, the WTGs and OSS will be marked with distinct lettering/numbering scheme and with lighting. The USCG requires that offshore wind lessees obtain permits for private aids to navigation (PATON, see 33 CFR part 67) for all structures located in or near navigable waters of the United States (see 33 CFR part 66) and on the OCS. PATON regulations require that individuals or organizations mark privately owned marine obstructions or other similar hazards. No additional buoys or markers will be installed in association with the PATON.

In general, lights will be required on offshore platforms and structures, vessels, and construction equipment during O&M and decommissioning of the EW1 and EW2 Wind Farms. O&M and support vessels would be required to display lights when operating at night and deck lights would be required to illuminate work areas. However, lights would be down shielded to illuminate the deck, and would not intentionally illuminate surrounding waters (BOEM 2021). If sea turtles, Atlantic sturgeon, whales, or their prey, are attracted to the lights, it could increase the potential for interaction with equipment or associated turbidity. However, due to the nature of project activities and associated seafloor disturbance, turbidity, and noise, listed species and their prey are not likely to be attracted by lighting because these other deterring factors are likely to elicit avoidance behaviors which will offset attraction to lights. As such, we have determined that any effects of project lighting on sea turtles, sturgeon, or whales are extremely unlikely and thus discountable.

In addition to vessel lighting, the WTGs will be lit for navigational and aeronautical safety. Lighting may also be required at on shore areas, such as where the cables will make landfall. Many of the onshore areas used for staging will be part of an industrial port where artificial lighting already exists. Sea turtle hatchlings are known to be attracted to lights and artificial beach lighting is known to disrupt proper orientation towards the sea. However, due to the distance from the nearest nesting beach to the project area (the straight-line distance through the Atlantic Ocean from Virginia Beach, VA, the northernmost area where successful nesting has occurred, and the WFA is approximately 450 km), there is no potential for project lighting to impact the orientation of any sea turtle hatchlings and we therefore expect no effect to sea turtle hatchlings from these lighting sources.

7.4.3 WTG and OSS Foundations

The physical presence of structures in the water column has the potential to disrupt the movement of listed species but also serve as an attractant for prey resources and subsequently listed species. Structures may also provide habitat for some marine species, creating a reef effect. The foundations and generation of wind energy may affect the in-water and in-air conditions, which can result in changes to ecological conditions in the marine environment. Here, we consider the best available data that is currently available to address the potential effects on ESA listed species from the EW1 and EW2 offshore wind energy projects.

7.4.3.1 Consideration of the Physical Presence of Structures on Movements of Listed Species

The only wind turbines currently in operation in U.S. waters are the five WTGs that make up the Block Island Wind Farm and the two WTGs that are part of the Coastal Virginia Offshore Wind pilot project. To date, structures have been installed for South Fork Wind and Vineyard Wind 1. We have not identified any reports or publications that have examined or documented any changes in listed species distribution or abundance at the Block Island,Virginia Wind, South Fork, or Vineyard Wind 1 projects and have no information to indicate that the presence of these structures has resulted in any change in distribution of any ESA listed species.

As explained in Section 6 of this Opinion, the WFA is used by Atlantic sturgeon for migration and potentially for opportunistic foraging. Consistent with information from other coastal areas that are not aggregation areas, we expect individual Atlantic sturgeon to be present in the WFA for short periods of time (<2 days; Ingram et al. 2019, Rothermal et al. 2020). Because Atlantic sturgeon carry out portions of their life history in rivers, they are frequently exposed to structures in the water such as bridge piers and pilings. There is ample evidence demonstrating that sturgeon routinely swim around and past large and small structures in waterways, often placed significantly closer together than even the minimum distance of the closest WTGs (see e.g., AKRF 2012). As such, we do not anticipate that the presence of the WTGs or the OSS will affect the distribution of Atlantic sturgeon in the action area or their ability to move through the action area.

Given their distribution largely in the open ocean, whales and sea turtles may rarely encounter large fixed structures in the water column such as the turbine foundations; thus, there is little information to evaluate the effects that these structures will have on the use of the area by these species. Sea turtles are often sighted around oil and gas platforms and fishing piers in the Gulf of Mexico which demonstrates they do not have an aversion to structures and may utilize them to forage or rest (Lohoefener 1990, Rudloe and Rudloe 2005). Given the monopiles' large size (11 m diameter) and presence above and below water, we expect that whales and sea turtles will be able to visually detect the structures and, as a result, we do not expect whales or sea turtles to collide with the stationary foundations. Listed whales are the largest species that may encounter the foundations in the water column. Of the listed whales, blue whales are the largest species at up to 90 ft. Based on the spacing of the foundations (1 x 1 nm grid) relative to the sizes of the listed species that may be present in the WFA, we do not anticipate that the foundations would create a barrier or restrict the ability of any listed species to move through the area freely. While there is currently no before/after data for any of the ESA listed species that occur in the action area in the context of wind farm development, data is available for monitoring of harbor porpoises before, during, and after construction of three offshore wind projects in Europe. We consider that data here.

Horns Rev 1 in the North Sea consists of 80 WTGs laid out as an oblique rectangle of 5 km x 3.8 km (8 horizontal and 10 vertical rows). The distance between turbines is 560 m in both directions. The project was installed in 2002 (Tougaard et al. 2006). The turbines used at the Horns Rev 1 project are older geared WTGs and not more modern direct-drive turbines, which are quieter (Elliot et al. 2019; Tougaard et al. 2020). The Horns Rev 1 project has a similar number of foundations to the Empire Wind project (147 foundations) but turbine spacing is significantly closer together (0.5 km compared to at least 1.8 km). Pre-construction baseline data was collected with acoustic recorders and with ship surveys beginning in 1999; post-construction acoustic and ship surveys continued until the spring of 2006. In total, there were seven years of visual/ship surveys and five years of acoustic data. Both sets of data indicate a weak negative effect on harbor porpoise abundance and activity during construction, which has been tied to localized avoidance behavior during pile driving, and no effects on activity or abundance linked to the operating wind farm (Tougaard et al. 2006).

Teilmann et al. (2007) reports on continuous acoustic harbor porpoise monitoring at the Nysted wind project (Baltic Sea) before, during, and after construction. The results show that echolocation activity significantly declined inside Nysted Offshore Wind Farm since the pre-construction baseline during and immediately after construction. Teilmann and Carstensen (2012) update the dataset to indicate that echolocation activity continued to increase as time went by after operations began. Thompson et al. (2010) reported similar results for the Beatrice Demonstrator Project, where localized (1-2 km) responses of harbor porpoises were found through PAM, but no long term changes were found. Scheidat et al. (2011) reported results of acoustic monitoring of harbor porpoise activity for one year prior to construction and for two years during operation of the Dutch offshore wind farm Egmond aan Zee. The results show an overall increase in acoustic activity from baseline to operation, which the authors note is in line with a general increase in porpoise abundance in Dutch waters over that period. The authors also note that acoustic activity was significantly higher inside the wind farm than in the reference areas, indicating that the occurrence of porpoises in the wind farm area increased during the operational period, possibly due to an increase in abundance of prey in this area or as refuge from heavy vessel traffic outside of the wind farm area. Teilmann and Carstensen (2012) discuss the results of these three studies and are not able to determine why harbor porpoises reacted differently to the Nysted project. One suggestion is that as the area where the Nysted facility occurs is not particularly important to harbor porpoises, animals may be less tolerant of disturbance associated with the operations of the wind farm. It is important to note that the only ESA listed species that may occur within the WFA that uses echolocation is the sperm whale. Baleen whales, which includes North Atlantic right whales, fin, blue, and sei whales, do not echolocate. Sperm whales use echolocation primarily for foraging and social communication (NMFS 2010b, NMFS 2015, Miller et al. 2004, Watwood et al. 2006); sperm whales are expected to be rare in the WFA due to the shallow depths and more typical distribution near the continental shelf break and further offshore. Sperm whale foraging is expected to be limited in the lease area because sperm whale prey occurs in deeper offshore waters (500-1,000m) (NMFS 2010). Therefore, even if there was a potential for the presence of the WTGs or foundations to affect echolocation, it is extremely unlikely that this would have any effect on sperm whales given their rarity in the WFA. Consideration of the effects of operational noise on whale communication is presented in Section 7.1 of this Opinion.

Absent any information on the effects of wind farms or other foundational structures on the local abundance or distribution of whales and sea turtles, it is difficult to predict how listed whales and sea turtles will respond to the presence of the foundations in the water column. However, considering just the physical structures themselves, given the spacing between the turbines we do not expect that the physical presence of the foundations alone will affect the distribution of whales or sea turtles in the action area or affect how these animals move through the area. Additionally, the available data on harbor porpoises supports the conclusion that if there are decreases in abundance during wind farm construction those may not be sustained during the operational period. As explained in Section 7.1, we have determined that effects of operational noise will be insignificant and are not likely to disturb or displace whales, sea turtles, or Atlantic sturgeon. In the sections below, we consider the potential for the reef effect to affect species distribution in the WFA and the potential for the foundations and WTGs to affect habitat conditions and prey that could influence the abundance and distribution of listed species in the WFA.

7.4.3.2 Habitat Conversion and Reef Effect Due to the Presence of Physical Structures

As described in the BA, long-term habitat alteration would result from the installation of the foundations, scour protection around the WTG and OSS foundations, as well as cable protection along any portions of the inter-array and export cables that could not be buried to depth. Scour protection would be a maximum of 8.2 feet (2.5 meters) in height, would extend away from the foundations as far as 113 feet (34.5 meters), and would have a volume of 17,511 cubic yards (yd^3) per monopile. The maximum conversion from soft to hardened substrate through scour protection around WTG foundations would result in the conversion of 127.6 acres (0.5 km^2) of soft-bottom habitat to hard-bottom habitat. The installation of scour protection around OSS foundations would result in the conversion of 3.0 acres (0.01 km^2) of soft-bottom habitat to hard-bottom habitat.

The installation of up to 147 WTGs would result in the loss of up to 7.6 acres (0.03 km^2) of soft-bottom habitat in the foundation footprints. The installation of 2 OSSs would result in the loss of up to 1.3 acres (0.005 km^2) of soft-bottom habitat in the foundation footprints. The installation of cable protection for the export and inter-array cables would result in the conversion of 65 acres (0.3 km^2) and 58 acres (0.2 km^2) of soft-bottom habitat to hard-bottom habitat, respectively. The addition of the WTGs and two OSSs, spaced 0.65 nautical mile (1.2 km) apart, is expected to result in a habitat shift in the area immediately surrounding each monopile from soft sediment, open water habitat system to a structure-oriented system, including an increase in fouling organisms. Overall, construction of the EW1 and EW2 foundations, cables, and associated scour protection would transform 956 acres (3.9 km^2) (of soft bottom habitat into coarse, hard bottom habitat (the entire Empire WFA is approximately 65,559 acres (257 km^2). Over time (weeks to months), the areas with scour protection are likely to be colonized by sessile or mobile organisms (e.g., sponges, hydroids, crustaceans). This results in a modification of the benthic community in these areas from primarily infaunal organisms (e.g., amphipods, polychaetes, bivalves).

Hard-bottom and vertical structures in a soft-bottom habitat can create artificial reefs, thus inducing the ‘reef’ effect (Taormina et al. 2018). The reef effect is usually considered a beneficial impact, associated with higher densities and biomass of fish and decapod crustaceans in the area immediately surrounding the new structure (Taormina et al. 2018). This could provide a potential increase in available forage items for sea turtles compared to the surrounding soft-bottoms; however, this change in distribution/aggregation of some species does not necessarily increase overall biomass. In the North Sea, Coolen et al. (2018) sampled epifouling organisms at offshore oil and gas platforms and compared data to samples from the Princess Amalia Wind Farm (PAWF) and natural rocky reef areas. The 60 PAWF monopile turbine foundations with rock scour protection were deployed between November 2006 and March 2007 and surveys were carried out in October 2011 and July 2013. This study demonstrated that the WTG foundations and rocky scour protection acted as artificial reef with a rich abundance and diversity of epibenthic species, comparable to that of a natural rocky reef.

Stenburg et al. (2015) studied the long-term effects of the Horns Rev 1 offshore wind farm (North Sea) on fish abundance, diversity, and spatial distribution. Gillnet surveys were conducted in September 2001, before the WTGs were installed, and again in September 2009, 7 years post-construction at the wind farm site and at a control site 6 km away. The three most abundant species in the surveys were whiting (*Merlangius merlangus*), dab (*Limanda limanda*), and sand lance (*Ammodytidae spp*.). Overall fish abundance increased slightly in the area where the wind farm was established but declined in the control area 6 km away. None of the key fish species or functional fish groups showed signs of negative long-term effects due to the wind farm. Whiting and the fish group associated with rocky habitats showed different distributions relative to the distance to the artificial reef structures introduced by the turbines. Rocky habitat fishes were most abundant close to the turbines while whiting was most abundant away from them. The authors also note that the wind farm development did not appear to affect the sand-dwelling species dab and sand lance, suggesting that the direct loss of habitat (<1% of the area around the wind farm) and indirect effects (e.g. sediment composition) were too low to influence their abundance. Species diversity was significantly higher close to the turbines. The authors conclude that the results indicate that the WTG foundations were large enough to attract fish species with a preference for rocky habitats, but not large enough to have adverse negative effects on species inhabiting the original sand bottom between the turbines. However, more research is still needed within offshore wind farm areas because each offshore wind farm area contains different environmental characteristics. For instance, research from Daewel et al. (2022) suggest changes in organic sediment distribution and quantity could have an effect on the habitat quality for benthic species such as Ammodytes spp. (e.g., sand lance) that live in the sediments within wind farm areas.

Methratta and Dardick (2019) carried out a meta-analysis of studies in Europe to examine finfish abundance inside wind farms compared to nearby reference sites. The overall effect size was positive and significantly different from zero, indicating greater abundance of fish inside of wind farm areas compared to the reference sites. More specifically, the study determined increases were experienced for species associated with both soft-bottom and complex-bottom habitat but changes in abundance for pelagic species were not significantly different from zero. The authors report that no significant negative effects on abundance were identified.

Hutchison et al. (2020) describes benthic monitoring that took place within the Block Island Wind Farm (BIWF, Rhode Island) to assess spatiotemporal changes in sediment grain size, organic enrichment, and macrofauna, as well as the colonization of the jacket foundation structures, up to four years post-installation. The greatest benthic modifications occurred within the footprint of the foundation structures through the development of mussel aggregations. Additionally, based on the presence of juvenile crabs (Cancer sp.),the authors conclude that the BIWF potentially serves as a nursery ground, as suggested from increased production rates for crabs (*Cancer pagurus*) at European OWFs (Krone et al., 2017). The dominant mussel community created three-dimensional habitat complexity on an otherwise smooth structure, benefiting small reef species such as cunner (*Tautogolabrus adspersus*), while at a larger scale, the turbine structures hosted abundant black sea bass (*Centropristis striata*) and other indigenous bentho-pelagic fish.

For the EW1 and EW2 offshore wind energy projects, effects to listed species from the loss of soft bottom habitat and conversion of soft bottom habitat to hard bottom habitat may occur if this habitat shift resulted in changes in use of the area (considered below) by listed species or resulted in changes in the availability, abundance, or distribution of forage species.

The only forage fish species we expect to be impacted by the loss of soft-bottom habitat would be sand lance (*Ammodytes spp.).* The ESA listed species in the WDA that may forage on sand lance include Atlantic sturgeon, fin, and sei whales. As sand lance are strongly associated with sandy substrate, and the project would result in a loss of such soft bottom, there would be a reduction in availability of habitat for sand lance that theoretically could result in a localized reduction in the abundance of sand lance in the action area. However, even just considering the WFA, which is dominated by sandy substrate, the loss or conversion of soft bottom habitat is very small, less than 0.4% (and less than 0.000% of the action area). The results from Stenburg et al. (2015; summarized above) suggest that this loss of habitat is not great enough to impact abundance in the area and that there may be an increase in abundance of sand lance despite this small loss of habitat. However, even in a worst case scenario assuming that the reduction in the abundance of sand lance is directly proportional to the amount of soft substrate lost, we would expect a 0.4% reduction in availability of sand lance in the lease area and a 0.0001% reduction in the sand lance available as forage for fin and sei whales and Atlantic sturgeon in the action area. Given this small, localized reduction in sand lance and that sand lance are only one of many species the fin and sei whales and Atlantic sturgeon may feed on in the action area, any effects to these species are expected to be so small that they cannot be meaningfully measured, evaluated, or detected and are, therefore, insignificant.

Based on the available information (e.g., Methratta and Dardick 2019, Stenburg et al. 2015), we expect that there may be an increase in abundance of schooling fish in the WFA that sei or fin whales may prey on but that this increase may be a result of redistribution of species to the WFA rather than a true increase in abundance. Either way, at the scale of the action area, the effects of any increase in abundance of schooling fish resulting from the reef effect will be so small that the effects to sei or fin whales cannot be meaningfully measured, evaluated, or detected.

Similarly, we expect that there may be an increase in jellyfish and other gelatinous organism prey of leatherback sea turtles but that at the scale of the action area, any effects to leatherback sea turtles will be so small that they cannot be meaningfully measured, evaluated, or detected. Because we expect sperm whale foraging to be limited in the WFA (due to the shallow depths and location inshore of the shelf break), any effects to sperm whale foraging as a result of localized changes in the abundance or distribution of potential prey items are extremely unlikely. Atlantic sturgeon would experience a reduction in infaunal benthic organisms, such as polychaete worms, in areas where soft substrate is lost or converted to hard substrate. As explained above, the action area is not an aggregation area or otherwise known to be a high use area for foraging. Any foraging by Atlantic sturgeon is expected to be limited to opportunistic occurrences. Similar to the anticipated reduction in sand lance, the conversion of soft substrate to hard substrate may result in a proportional reduction in infaunal benthic organisms that could serve as forage for Atlantic sturgeon. Assuming that the reduction in the abundance of infaunal benthic organisms in the action area is directly proportional to the amount of soft substrate lost, we would expect an extremely small (0.4% of the lease area and an even smaller percentage of the total action area) reduction in the abundance of these species as forage for Atlantic sturgeon in the action area. Given that any reduction in potential prey items for Atlantic sturgeon will be small, localized, and patchy and that the WDA is not an area that sturgeon are expected to be dependent on for foraging, any effects to Atlantic sturgeon are expected to be so small that they cannot be meaningfully measured, evaluated, or detected and are, therefore, insignificant. Also, to the extent that epifaunal species richness is increased in the WFA due to the reef effect of the WTGs and their scour protection, and to the extent that sturgeon may feed on some of these benthic invertebrates, any negative effects may be offset.

The available information suggests that the prey base for Kemp's ridley and loggerhead sea turtles may increase in the action area due to the reef effect of the WTGs, associated scour protection, and an increase in crustaceans and other forage species. However, given the small size of the area impacted and any potential resulting increase in available forage, any effects of this patchy and localized increase in abundance are likely to be so small that they cannot be meaningfully measured, evaluated, or detected. No effects to the forage base of green sea turtles are anticipated as no effects on marine vegetation are anticipated.

No effects to copepods that serve as the primary prey for right whales are anticipated to result from the reef effect considered here. In Section 7.4.3.3 below, we explain how the physical presence of the foundations may affect ecological conditions that could impact the distribution, abundance, or availability of copepods.

7.4.3.3 Effects to Oceanic and Atmospheric Conditions due to Presence of Structures and Operation of WTGs

As explained in section 6.0 (*Environmental Baseline*), the Empire Wind WFA is located within multiple defined marine areas. Here, we consider the best available information on how the presence and operation of the 147 Empire Wind WTGs and 2 OSSs may affect the oceanographic and atmospheric conditions in the action area and whether there will be any consequences to listed species. A number of theoretical, model-based, and observational studies have been conducted that help inform the potential effects offshore wind farms may have on the oceanic and atmospheric environment; summaries of several of these studies, which in our view represent the best available science on operational effects to oceanic and atmospheric conditions, are described in this section. In 2022, NMFS contracted with EA Engineering to prepare a literature review on this topic. Much of the information in this section of the Opinion is based on that review. In general, most of these studies discuss local scale effects (within the area of a windfarm) and were carried out in Europe, specifically the North Sea, where commercial-scale offshore wind farms are already in operation. At various scales, documented effects include increased turbulence, changes in sedimentation, decreased dissolved oxygen, reduced water flow; and, changes in: hydrodynamics, wind fields, stratification, water temperature, nutrient upwelling, and primary productivity.

Two turbines were installed offshore Virginia in the summer of 2020 where the weather and hydrodynamic conditions were measured during the installation period; however, no additional reports or literature about oceanographic or atmospheric impacts during operation has been published (HDR 2020). Similarly, no reports or literature about oceanographic or atmospheric impacts during operation of the five turbines at the Block Island Wind Farm have been published. As described in the Environmental Baseline section, offshore construction for the Vineyard Wind 1 and South Fork Wind projects, both northeast of the Empire Wind project, began in the summer of 2023, thus there are not yet any available studies about the effects of either project on oceanographic or atmospheric conditions.

Background Information on Oceanic and Atmospheric Conditions in the Project Area
At the broadest area, the U.S. Northeast Shelf Large Marine Ecosystem, extends from the Gulf of Maine to Cape Hatteras, North Carolina (Kaplan 2011). The WDA is located at the border of the Southern New England and Southern Mid-Atlantic Bight sub-region of the Northeast U.S. Shelf Ecosystem as defined by Cook and Auster (2007), which are distinct from other regions based on differences in productivity, species assemblages and structure, and habitat features. As noted in Section 6 of the Opinion, we consider the Empire WDA to be situated in the southern Mid-Atlantic Bight sub-region. The physical oceanography of this region is influenced by the seafloor, freshwater input from multiple rivers and estuaries, large-scale weather patterns, and tropical or winter coastal storm events. Weather-driven surface currents, tidal mixing, and estuarine outflow all contribute to driving water movement through the area (Kaplan 2011).

A variety of existing oceanographic research and monitoring is conducted in the region by state and federal agencies, academic institutions, and non-governmental organizations using an array of platforms including ships, autonomous vehicles, buoys, moorings, and satellites. Research and monitoring efforts include measuring the physical and biological structure of the ocean environment such as such as temperature, chlorophyll, and salinity at a range of depths as well as long-term shelf-wide surveys that provide data used to estimate spawning stock biomass, overall fish biodiversity, zooplankton abundance, information on the timing and location of spawning events, marine mammal and sea turtle abundance, insight to detect changes in the environment, and other research needs. In the waters of the Empire Wind WFA and surrounding areas along the continental shelf, the broad, year-round pattern of currents are generally understood. Water flows south along the western margins of the Gulf of Maine due to a cyclonic gyre before splitting near the northern portion of the Great South Channel (east of Cape Cod), with one branch flowing northeast along the northern edge of Georges Bank, and the other west either over or around the outer edge of Nantucket Shoals, continuing westward along the continental shelf of southern New England towards the Mid-Atlantic Bight. Shelf currents in the offshore portion of the WDA are considered stable to moderate. The mean rate of currents has been estimated to range from 0.67 to 1.1 miles per hour (0.3 to 0.5 m/s) and are considered to be neither strong nor consistent (Oceanweather, Inc. 2018; UKHO 2009; Empire Wind COP 2022). Prominent bottom features of the WDA include a series of ridges and troughs that are composed of mainly soft sediments (i.e., sand with isolated patches of gravel-sand and occasional outcropping and subcropping older, more indurated strata). Current geological conditions underlying the WFA are generally flat and slope gradient across the WFA is typically less than 1°, the area contains sand ridges, filled valleys, shoal-retreat massifs, and paleo-shorelines, including the most prominent regional feature, the Hudson Shelf Valley (NYSERDA 2017). Geophysical surveys in the northwestern portion of the WFA characterized the seafloor as undulating with identified sand waves along the EW1 submarine export cable route of up to 6.6 ft. (2 m) above the surrounding seabed with wavelengths between 10 to 98 ft. (4 to 30 m). Data collected along the EW 2 submarine export cable route did not identify fields of sandwaves like those found along the EW 1 submarine export cable route (COP Volume 2, Empire 2023). The eastern portion of the WFA is characterized by slightly gravelly sand that is present in depressions and pockets located between bedforms. This portion of the WFA is also characterized by megaripples with a typical height of less than 3.2 ft. (1 m) (Guida et al. 2017; COP 2022). Water depths range from 78 to 144 ft. (24 to 44 m), with deeper water depths in the southeast portion of the WFA.

On a seasonal scale, the greater Mid-Atlantic Bight region experiences one of the largest transitions in stratification in the entire Atlantic Ocean (Castelao, Glenn, and Schofield, 2010). Starting in the late spring, a strong thermocline develops at approximately 20 m depth across the middle to outer shelf, and forms a thermally isolated body of water known as the "cold pool" which shifts annually but generally extends from the waters of southern New England to Cape Hatteras. Starting in the fall, the cold pool breaks down and transitions to cold and well-mixed conditions that last through the winter (Houghton et al. 1982). The cold pool is particularly important to a number of demersal and pelagic fish and shellfish species in the region, but also influences regional biological oceanography as wind-assisted transport and stratification have been documented to be important components of plankton transport in the region (Checkley et al. 1988, Cowen et al. 1993, Hare et al. 1996, Grothues et al. 2002, Sullivan et al. 2006, Narvaez et al. 2015, Munroe et al. 2016).

The region also experiences upwelling in the summer driven by southwest winds associated with the Bermuda High (Glenn & Schofield 2003; Glenn et al. 2004). Cold nutrient-rich water from the cold pool can be transported by upwelling events to surface and nearshore waters. At the surface, this cold water can form large phytoplankton blooms, which support many higher trophic species (Sha et al. 2015).

The cold pool supports prey species for ESA listed species, both directly through providing habitat and indirectly through its influence on regional biological oceanography, which supports a productive ecosystem (Kane 2005, Chen et al. 2018, Winton et al. 2018). Lower-trophic plankton species are well adapted to take advantage of the variable seasonality of the regional ecosystem, and support the upper food web for species such as pelagic fish, sea turtles, and marine mammals (Kenney and Vigness-Raposa 2010, Pershing and Stamieszkin 2019). Though plankton exhibit movement behavior, physical and oceanographic features (e.g. tidal mixing fronts, thermal fronts, freshwater plumes, internal waves, stratification, horizontal and vertical currents, and bathymetry) are the primary drivers that control aggregations and concentrate them by orders of magnitude (Pershing and Stamieszkin 2019, Kraus et al. 2019).

ESA-listed species in the action area are described in the Environmental Baseline, here we provide a summary of North Atlantic right whales occurrence and distribution in the WDA because they are the only ESA listed obligate zooplanktivore in the action area, feeding exclusively on copepods, which are primarily aggregated by physical and oceanographic features. Right whales have been observed in or near state and federal waters off New York during all four seasons; however, they are most common in spring when they are migrating north and in fall during their southbound migration (Roberts et al. 2016, Muirhead et al. 2018, Estabrook et al. 2021, Zoidis et al. 2021). These seasonal occurrence observations are aligned with more recent findings from aerial survey data collected from 2017-2020, where North Atlantic right whales were seen in waters adjacent to New York during all seasons except summer (Zoidis et al. 2021). Over the three survey years, Zoidis et al. (2021) recorded 15 sightings of 24 North Atlantic right whales. With respect to spatial distribution, no right whales were seen on the slope, sightings occurred in the nearshore, shelf zone, and plain habitats with the highest occurrence in the shelf zone followed by the nearshore habitat. In May 2019, Zoidis et al. (2021) reported behavior for a single right whale that was exhibiting skim-feeding behavior at the shelf break, further offshore than is typical. The authors suggest that this observation provides support for recent analysis (e.g., Meyer-Gutbrod et al. 2021) that shows how climate-driven oceanographic changes have altered the foraging environment and therefore habitat use of right whales. In Muirhead et al. (2018), passive acoustic monitoring equipment located near the entrance to New York Harbor and along a linear transect extending from Long Island to the continental shelf edge detected right whales sporadically during every month, but they were most often detected at near-shore recorders between late February and mid-May. Estabrook et al. (2021) reported results from three years of acoustic surveys of large whales in the New York Bight; right whales were most frequently detected in the New York Bight from fall through spring, with presence >5 days/week for most of this period. Moored buoys deployed in the New York Bight by Wood Hole Oceanographic Institution (WHOI) and the Wildlife Conservation Society (WCS) detected right whales between December and January and again in March and had occasional detections in July (WHOI 2018). Neither AOSS (2019) nor A.I.S. (2019) visual and acoustic ship-board surveys reported sightings or detections of right whales during their survey period in the Empire WFA.
Whitt et al. (2013) reported behaviors for two juvenile right whales that were sighted together including skim-feeding behavior in New Jersey waters, which are adjacent to the New York Bight region. Although feeding could not be confirmed by prey samples or evidence of prey patches, the authors surmise that the nearshore waters of New Jersey may be utilized as more than just a migratory pathway; and that feeding may occur outside of the typical feeding period of spring through early fall and in areas farther south than the main feeding grounds (Winn et al. 1986, Gaskin 1987, 1991, Hamilton and Mayo 1990, Kenney et al. 1995, Whitt et al 2013). The May 2019 sighting of a single North Atlantic right whale skim feeding at the shelf break in New York Bight waters, supplement and update what is currently known about the distribution and habitat use patterns of North Atlantic right whales in the larger Mid-Atlantic Bight.

Based on the best available scientific information, North Atlantic right whales may opportunistically forage in the Empire Wind WDA when suitably dense patches of prey are present. However, this does not appear to be a primary foraging area or an area where individuals are expected to be resident, and it is not known or expected to routinely support sustained foraging behavior.

Summary of Available Information on the Effects of Offshore Wind Projects on Environmental Conditions

Effects on Water Temperature

A modeling study was conducted for the Great Lakes region of the U.S. to simulate the impact of 432 9.5 MW (4.1 GW total) offshore wind turbines on Lake Erie's dynamic and thermal structure. Model results showed that the wind farms did have an impact on the area they were built in by reducing wind speed and wind stress, which led to less mixing, lower current speeds and higher surface water temperature (Afsharian et al. 2020). The model demonstrated reduced wind speed and stress leading to less mixing, lower current speeds, and higher surface water temperatures (1-2.8°C, depending on the month). No changes to temperatures below the surface were reported. The authors note that these impacts were limited to the vicinity of the wind farm. Though modeled in a lake environment, these results may be informative for predicting effects in the marine environment as the presence of structures and interactions with wind and water may act similarly; however, given the scale of the model and specificity of the modeled conditions and outputs to Lake Erie it is not possible to directly apply the results to an offshore wind project in the action area generally or the Empire Wind project in particular.

Some literature is available that considers the potential impacts of wind power development on temperature. Miller and Keith (2018) developed a model to better understand climatic impacts due to wind power extraction; however, the paper addresses how a modeled condition would affect average surface temperatures over the continental U.S. and does not address offshore wind turbines or any effects on ocean water temperatures. Wang and Prinn (2010 and 2011) carried out modeling to simulate the potential climatic effects of onshore and offshore wind power installations; they found that while models of large scale onshore wind projects resulted in localized increases in surface temperature (consistent with the pattern observed in the Miller and Keith paper), the opposite was true for models of offshore wind projects. The authors found a local cooling effect, of up to 1°C, from similarly sized offshore wind installations. The authors provide an explanation for why onshore and offshore turbines would result in different localized effects.

Golbazi et al. 2022 simulated the potential changes to near-surface atmospheric properties caused by large offshore wind farms equipped with offshore wind turbines of 10 and 15 megawatt. In the model, they simulated 30 GW of offshore wind turbines located in identified lease and planning areas in the U.S. Atlantic. The model results show that, at hub height, an average wind speed deficit of 0.5 m/s extends up to 50 km downwind from the edge of the farms with an average wind speed reduction at the surface that is 0.5 m s/1 or less (a 10% maximum reduction) within the project footprint. This results in a slight cooling, up to -0.06 K, at the surface in the summer. The authors conclude that, on average, meteorological changes at the surface induced by 10-15 MW offshore wind turbines will be nearly imperceptible in the summer. They also note that future research is needed to explore changes in other seasons.

If the effects predicted by the model in Golbazi et al. and Wang and Prinn are realized as a result of the Empire Wind project, minor cooling of waters in the action area in the summer months would be expected. We do not anticipate that any minor cooling of waters in the action area in the summer months would have any effects to the abundance or distribution of listed species or the abundance or distribution of prey. Based on the available information, any effects to listed species from any changes in water temperature (if there are any at all) will be so small that they cannot be meaningfully measured, evaluated, or detected and are therefore, insignificant.

Ocean-Atmosphere and Wind Field Interactions
Studies have examined the wind wakes produced by turbines and the subsequent turbulence and reductions in wind speed, both in the atmosphere and at the ocean surface. Alterations to wind fields and the ocean–atmosphere interface have the potential to modify both atmospheric and hydrodynamic patterns, potentially on large spatial scales up to dozens of miles (~20+ km) from the offshore wind facility (Dorrell et al. 2022, Gill et al. 2020, Christiansen et al. 2022). Interactions between the ocean and the atmosphere in the presence of wind turbine structures are highly variable based on ambient wind speed, the degree of atmospheric stability, and the number of turbines in operation. In general, as an air current moves towards and past a turbine, the structure reduces air velocities downstream and has the potential to generate turbulence near the ocean surface. This relative velocity deficit and increased turbulence near turbine structures create a cone-shaped wake of wind change (known as wind wake) in the downstream region. Studies elucidating the relationship between offshore wind facilities and the atmospheric boundary layer, meteorology, downstream areas, and the interface with the ocean are still emerging. As noted above, no in-situ studies have been carried out in the U.S. to date.

Generally, a wind energy facility is expected to reduce average wind speeds both upstream and downstream; however, studies report a wide range of values for average wind speed deficits, in terms of both magnitude and spatial extent. Upstream of a large, simulated offshore wind facility, Fitch et al. (2012) found wind blocking effects to reduce average wind speeds by 1% as far as 9 miles (15 km) ahead of the facility. Downstream of an offshore wind facility, wind speeds may be reduced up to 46%, with wind wakes ranging from 3 to 43 miles (5 to 70 km) from the turbine or array (Christiansen and Hasager 2005; Carpenter et al. 2016; Platis et al. 2018; Cañadillas et al. 2020; van Berkel et al. 2020; Floeter et al. 2022). Wind speed deficit is greatest at hub height downstream of the facility, with the deficit decreasing closer to the ocean surface (Golbazi et al. 2022). Simulations of multiple clustered, large offshore wind facilities in the North Sea suggest that wind wake may extend as far as 62 miles (100 km) (Siedersleben et al. 2018). On the U.S. northeast shelf, wind wakes emerging from simulations of full lease area buildouts were shown to combine and extend as far as 93 miles (150 km) on certain days (Golbazi et al. 2022). Wind speed reduction may occur in an area up to 100 times larger than the offshore wind facility itself (van Berkel et al. 2020). A recent study has investigated long-range wind wake deficit potential in the New York Bight offshore development area using weather research and forecasting (WRF) offshore wind facility parameterization. ArcVera Renewables (2022) determined that expert literature that used engineering wake loss models has under-predicted wind wakes, and their study describes wind wakes that extend up to or greater than 62 miles (100 km) downstream of large offshore wind facilities.

A study on the effect of large offshore wind farms (~ 80 turbines) in Europe on the local wind climate using satellite synthetic aperture radar found that a decrease of the mean wind speed is found as the wind flows through the wind farms, leaving a velocity deficit of 8–9% on average, immediately downstream of the wind turbine arrays. Wind speed was found to recover to within 2% of the free stream velocity over a distance of 5–20 km past the wind farm, depending on the ambient wind speed, the atmospheric stability, and the number of turbines in operation (Christiansen & Hasager 2005). Using an aircraft to measure wind speeds around turbines, Platis et al. (2018) found a reduction in wind speed within 10 km of the turbine.

Ocean-Atmosphere Responses to Wind Field Interactions

The disturbance of wind speed and wind wakes from wind farms can cause oceanic responses such as upwelling, downwelling, and desertification (van Berkel et al. 2020; Dorrell et al. 2022; Floeter et al. 2022). According to Broström (2008), a wind farm can cause a divergence/convergence in the upper ocean due to a strong horizontal shear in the wind stress and resulting curl of the wind stress. This divergence and convergence of wind wakes can cause upwelling and downwelling. Upwelling can have significant impacts on local ecosystems due to the influx of nutrient rich, cold, deep, water that increases biological productivity and forms the basis of the lower trophic level. Broström 2008 indicates that the induced upwelling by a wind farm will likely increase primary production, which may affect the local ecosystem. Oceanic response to an altered wind field is predicted to extend several kilometers around offshore wind facilities and to be strong enough to influence the local pelagic ecosystem (Broström 2008; Ludewig 2015; Floeter et al. 2022). Floeter et al. (2022) conducted the first observations of wind wake-induced upwelling/downwelling dipoles and vertical mixing downstream of offshore wind facilities in the North Sea. The study identified two characteristic hydrographic signatures of wind wake-induced dipoles. First, distinct changes in mixed layer depth and water column potential energy anomaly were observed over more than 3 miles (5 km). Second, the thermocline exhibited diagonal excursions, with maximum vertical displacement of 46 ft. (14 m) over a dipole dimension of 6–7 miles (10–12 km). Additionally, preliminary research by Daewel et al. (2022) suggests that ongoing offshore wind energy developments can have a significant impact on coastal marine ecosystems. This study deduced that wind wakes of large offshore wind energy clusters in the North Sea cause large-scale changes in annual primary production with local changes of up to 10%. These changes occur within the immediate vicinity of the offshore wind energy cluster and travel over a wider region (up to 1–2 km outside the cluster of projects).

Wave amplitude within and surrounding offshore wind energy facilities may be altered by changes to the wind field. A decrease in surface roughness can be observed in optical and radar images at considerable distances down-wind of a wind farm under certain conditions (Forster 2018). Johnson et al. (2021) analyzed localized turbulence effects of various proposed offshore wind build-out scenarios using a three-dimensional model from Cape Hatteras to offshore Cape Cod, with a finer mesh embedded in the southern New England lease areas. Results of the hydrodynamic modeling suggested that the extraction of wind energy by offshore wind facilities in the southern New England lease areas could reduce current magnitude and wave height. By modifying the sea surface wind shear stress, wind energy extraction affected the wind field within and beyond the modeled facility (comprising a full build-out of the wind energy area with 1,063 turbines, each 12-MW). Relative to the modeled baseline, significant wave height was reduced by up to 2.46 ft. (0.75 m) inside the facility, by up to 1.48 ft. (0.45 m) just outside the facility, and up to 0.49 ft. (0.15 m) at the coast.

The regional impact of wind wakes is challenging to quantify due to natural spatiotemporal variability of wind fields, sea levels, and local ocean surface currents in the northeast shelf (Floeter et al. 2022). Individual dipole patterns can either superimpose or decrease airflow velocities, for example, depending on the spatial orientation of the tidal ellipse in relation to the direction of the wind wake (Floeter et al. 2022). Increased airflow velocities near the water surface result in decreased water surface elevation of a 2-mm magnitude, while decreased airflow velocities result in increased water surface elevation of a similar magnitude (Christiansen et al. 2022). This magnitude may be negligible in the context of the substantial year-to-year changes in annually averaged coastal sea level in the northeast shelf (i.e., 650 mm), which is attributed to the region's existing along-shelf wind stress (Andres et al. 2013; Li et al. 2014). Christiansen et al. (2022) modeled sea surface velocity changes downstream of multiple offshore arrays in the North Sea and found that induced changes equated to a "substantial" 10–25% of the interannual and decadal sea surface velocity variability in the region.

Hydrodynamic Interactions

The introduction of offshore wind energy facilities into ocean waters influences adjacent ocean flow characteristics, as turbine foundation structures and currents, tides, etc. interact. The dynamics of ocean flow past vertical structures has received relatively more study in well-mixed seas than in strongly stratified seas (Dorrell et al. 2022). Most studies on wake and turbulence caused by foundation structures are gleaned from modeled simulations, as field studies are challenging due to the numerous variables and natural variability in flow (Schultze et al. 2020). Only two studies to date have observed in situ the response of stratified waters to the presence of offshore wind energy facilities (Floeter et al. 2017; Schultze et al. 2020).

Hydrodynamic effects of offshore wind facilities and their secondary effects are only beginning to be studied within United States shelf waters. Johnson et al. (2021) prepared a hydrodynamic modeling study investigating the potential impacts of offshore wind energy development on oceanographic conditions in the northeast shelf, assessing the changes in hydrodynamic conditions resulting from a theoretical modeled offshore wind facility in the Massachusetts-Rhode Island offshore wind energy area. The results suggest that introduction of 1,063 12 MW WTGs would influence the thermal stratification by introducing additional mixing. The model suggests a relative deepening in the thermocline compared to baseline temperatures of approximately 3.3 to 6.6 ft. (1 to 2 m) and retention of colder water within the footprint of the modeled wind facility through the summer months (Johnson et al. 2021). The study also suggested that the thermocline would, on average, move deeper in both the spring and summer, with more cold water retained within the footprint of the offshore wind facility (Johnson et al. 2021). The results of Johnson et al. (2021) contrast with a European field study by Floeter et al. (2017) in the German North Sea, which found a doming of the thermocline and enhanced mixing, or more uniform temperatures, in the layer below the thermocline. While the Floeter et al. (2017) study observed changes in vertical mixing, and enhanced local upwelling, these changes may be due to natural variability. Additionally, there are numerous differences between the sites in the Mid-Atlantic Bight and the German North Sea. First, the climate setting and hydrodynamic conditions differ (e.g., offshore wind facility locations relative to the shelf, general circulation around the offshore wind facilities, temperature and stratification regime, depth, and solar radiation and heat transfer). Second, the operational status of the actual and modeled offshore wind facilities differs (i.e., there being no current speed reduction due to wind wake loss in the German North Sea study) (Johnson et al. 2021). Additionally, while Johnson et al. (2021) conclude that the introduction of the offshore wind energy structures modifies temperature stratification by introducing additional mixing, the model did not include influences from strong storms, which are a primary component of mixing in the Mid-Atlantic Bight region. The authors acknowledge that the model's single year of simulations would require additional years to assess year-to-year variability of the model parameters and that modeling of this nature is more suited for a review of differences between scenarios rather than absolute accuracy of individual scenarios.

Using remote sensing, Vanhellemont and Ruddick (2014) showed that offshore wind farms can have impacts on suspended sediments. Wakes of turbidity from individual foundations were observed to be in the same direction as tidal currents, extending 30–150 m wide, and several kilometers in length. However, the authors indicate the environmental impact of these wakes and the source of the suspended material were unknown. Potential effects could include decreased underwater light field, sediment transport, and downstream sedimentation (Vanhellemont and Ruddick 2014).

The primary structure-induced hydrodynamic effects of wind turbine foundations are friction and blocking, which increase turbulence, eddies, sediment erosion, and turbidity in the water column (van Berkel et al. 2020). A number of studies have investigated the impacts of offshore wind farms on stratification and turbulence (Carpenter et al. 2016, Dorrell et al. 2022; Schultz et al. 2020). As water moves past wind turbine foundations the foundations generate a turbulent wake that will contribute to a mixing of a stratified water column or may disperse aggregations of plankton. These studies have demonstrated decreased flow and increased turbulence extending hundreds of meters from turbine foundations. However, the magnitude is highly dependent on the local conditions (e.g. current speed, tides, and wind speed), with faster flow causing greater turbulence and extending farther from the foundation. Carpenter et al. (2016) used a combination of numerical models and in situ measurements from two windfarms (Bard 1 and Global Tech 1) to conduct an analysis of the impact of increased mixing in the water column due to the presence of offshore wind structures on the seasonal stratification of the North Sea. Based on the model results and field measurements, estimates of the time scale for how long a complete mixing of the stratification takes was found to be longer, though comparable to, the summer stratification period in the North Sea. The authors concluded that it is unlikely the two windfarms would alter seasonal stratification dynamics in the region. The estimates of mixing were found to be influenced by the pycnocline thickness and drag of the foundations of the wind turbines. For there to be a significant impact on stratification from the hydrodynamic impacts of turbine foundations over a large area, large regions (length of 100 km) of the North Sea would need to be covered with wind farms; however the actual threshold was not defined (Carpenter et al. 2016). Schultz et al. 2020 found similar results in the same area of the German Bight of the North Sea.

Monopiles were found to increase localized vertical mixing due to the turbulence from the wakes generated from monopiles, which in turn could decrease localized seasonal stratification and could affect nutrient cycling on a local basis. Using both observational and modeling methods to study impacts of turbines on turbulence, Schultze et al. (2020) found through modeling simulations that turbulent effects remained within the first 100 m of the turbine foundation under a range of stratified conditions. Field measurements at the offshore wind farm DanTysk in the German Bight of the southern North Sea observed a wake area 70 m wide and 300 m long from a single monopile foundation during weak stratification (0.5°C surface-to bottom temperature difference). No wake or turbulence was detected in stronger thermal stratification (~3°C surface-to-bottom temperature difference) (Schultze et al. 2020). The offshore wind farm DanTysk is composed of 6 m diameter monopiles. Similarly, a laboratory study measured peak turbulence within 1 monopile diameter distance from the foundation and that downstream effects (greater than 5% of background) persisted for 8–10 monopile diameters distances from the foundation (Miles, Martin, and Goddard 2017).

Impacts on stratification and turbulence could lead to changes in the structure, productivity, and circulation of the oceanic regions; however, the scale and degree of those effects is dependent in part on location. If wind farms are constructed in areas of tidal fronts, the physical structure of wind turbine foundations (i.e., the foundation structure itself) may alter the structure of fronts, which could affect distribution of prey and lead to effects to the marine vertebrates that use these oceanic fronts for foraging (Cazenave et al. 2016). As areas of frontal activity are often pelagic biodiversity hotspots, altering their structure may decrease efficient foraging opportunities for listed species. In an empirical bio-physical study, Floeter et al. (2017) used a remotely operated vehicle to record conductivity, temperature, depth, oxygen, and chlorophyll-a measurements of an offshore wind farm. Vertical mixing was found to be increased within the wind farm, leading to a doming of the thermocline and a subsequent transport of nutrients into the surface mixed layer. Though discerning a wind farm-induced relationship from natural variability is difficult, wind farms may cause enhanced mixing, and due to the interaction between turbulence levels and the growth of phytoplankton, this could have cascading effects on nutrient levels, ecosystems, and marine vertebrates (Carpenter et al. 2016, Floeter et al. 2017). Water flowing around turbine foundations may also cause eddies to form, potentially resulting in more retention of plankton in the region when combined with daily vertical migration of the plankton (Chen et al. 2016, Nagel et al. 2018). However, it is important to note that these conclusions from Chen et al. (2016) are hypothesized based on a modeling study and are yet to be observed in the region.

Van Berkel et al (2020) investigated available information on the effects of offshore wind farms on hydrodynamics and implications for fish. The authors report that changes in the demersal community have been observed close to wind farms (within 50 m) and that those changes are related to structure-based communities at the wind farm foundations (e.g., mussels). The authors also report on long-term studies of fish species at the Horns Reef project (North Sea) and state that no significant changes in abundance or distribution patterns of pelagic and demersal fish have been documented between control sites and wind farm sites or inside/between the foundations at wind farm sites. They report that any observed changes in density were consistent with changes in the general trend of species reflected in larger scale stock assessment reports (see also Stenberg et al. 2015).

Modeling experiments have demonstrated that the introduction of monopiles could have an impact on the M2 amplitude (semidiurnal tidal component due to the moon) and phase duration. Modeling showed the amplitude increased between 0.5-7% depending on the preexisting amphidrome, defined as the geographical location, which has zero tidal amplitude for one harmonic constituent of the tide. Changes in the tidal amplitude may increase the chances of coastal flooding in low-lying areas. However, we have no information to suggest that any potential effects on M2 amplitude would have any effects on marine resources generally or ESA listed species specifically.

Primary Production and Plankton Distribution
The influence of altered atmospheric and hydrodynamic turbulence on the vertical mixing of the water column may impact the delivery of nutrients to the euphotic zone, the upper layer of the water column that receives sufficient light penetration for photosynthesis, and which generally occurs within the upper 100–170 ft. (30–52 m) of the water column in the northeast shelf (Ma and Smith 2022). Seasonal mixing of the water column provides nutrients to support phytoplankton growth, with primary production at deeper depths being limited by lack of sunlight (Dorrell et al. 2022). As water flows around turbine and OSS foundations there is the potential that aggregations of planktonic prey may be dispersed due to the increased mixing caused by water moving around foundations; however, it is also possible that foundations will act to trap prey if eddies form in the wake of turbine foundations or concentrate prey in a convergent current situation. However, decreased mixing could also cause increased stratification and subsequently affect the exchange of nutrients, heat, and trap prey.

A few studies have been conducted to evaluate how altered hydrodynamic patterns around offshore wind projects could affect primary production as well as upper trophic levels. Floeter et al., 2017 demonstrated with empirical data from the southern North Sea that increased vertical mixing at an offshore wind farm resulted in the transport of nutrients to the surface mixed layer and subsequent uptake by phytoplankton in the photic zone. Increased primary production could increase the productivity of bivalves and other macrobenthic suspension feeders that are expected to be a major component of artificial reef communities that form on turbine foundations (Slavik et al., 2019, Mavraki et al., 2020; Daewel et al. 2022). The results of analyses conducted by Floeter et al. 2017 and Friedland et al. 2021 suggest that wind farm effects on phytoplankton and zooplankton might extend to upper trophic level impacts, potentially modifying the distribution and abundance of finfish and invertebrates. However, the spatial scale of these effects remains unknown but could range from localized within individual farms to broader spatial scales (Carpenter et al., 2016; Bakhoday-Paskyabi et al., 2018).

Wang et al. 2018 evaluated pre and post-construction water column properties (water temperature, dissolved oxygen, and suspended matter concentration) and zooplankton community structure at an offshore wind farm in China. The wind farm consisted of 70 WTGs (232 MW total) located in the intertidal zone less than 11 km from the shore in the Yellow Sea. The goal of this study was to examine the responses of the zooplankton community to the establishment of an offshore wind farm, the causes of any observed effects, and their relation to environmental factors in the study area. The analysis documented changes in the zooplankton community (e.g., seasonal increases and decreases in macro and microzooplankton). However, given that there are significant differences in the location and conditions between the site in China and the Empire Wind location (e.g., tidal flat/intertidal zone vs. offshore) and the layout of the site (WTGs are much closer together at the China site) it is not clear that the results of this study will be informative for the Empire Wind project.

Daewel et al. 2022 used modeling to demonstrate the effects of wind wake from offshore wind projects in the North Sea on primary productivity. The model results show that the systematic modifications of stratification and currents alter the spatial pattern of ecosystem productivity; annual net primary production (netPP) changes in response to offshore wind farm wind wake effects in the southern North Sea show both areas with a decrease and areas with an increase in netPP of up to 10%. There was a decrease in netPP in the center of the large OWF clusters in the inner German Bight and at Dogger Bank, which are both situated in highly productive frontal areas, and an increase in areas around these clusters in the shallow, near-coastal areas of the German Bight and at Dogger Bank. The authors note that additional work is needed to identify the robustness of these patterns with respect to different weather conditions and interannual variations. They also note that when integrated over a larger area, the estimated positive and negative changes tend to even out. Besides the changes in the pelagic ecosystem, the model results highlight a substantial impact on sedimentation and seabed processes. The overall, large-scale reduction in average current velocities results in reduced bottom-shear stress to up to 10% locally; however, averaged over larger areas the effect is less pronounced with only a 0.2% increase North Sea wide. The model also indicates an impact of an offshore wind farm on bottom water oxygen in the southern North Sea. In an area with a bathymetric depression (Oyster Grounds), the dissolved oxygen concentrations in late summer and autumn were further reduced by about 0.3 mg l^{-1} on average and up to 0.68 mg l^{-1} locally. In other areas of the southern North Sea, the effect was estimated to be less severe, or even showing an increase in dissolved oxygen concentration, like e.g., along the edges of Dogger Bank.

Consideration of Potential Effects of the EW 1 and EW2 Projects

The predominant wind direction in the Empire Wind WFA is from the southwest, with some variability from the south, west, and northwest due to season, tides, winds, and bathymetry (COP 2023). Wind speeds in the WFA average between 7 and 16 miles per hour (3 and 7 meters per second [m/s]) annually (COP 2023). The predominant flow of water is southwest and west, with some variability due to season, tides, winds, and bathymetry. The mean rate of currents in the WFA are 0.67 to 1.1 miles per hour (0.3 to 0.5 m/s) and are considered to be neither strong nor constant (COP 2023).

In general, the studies referenced above describe varying scales of impacts on the oceanographic and atmospheric processes as a resultant effect of offshore wind turbine development. These impacts include increased turbulence generated by the presence of turbine foundations, extraction of wind by turbine operations reducing surface wind stress and altering water column turbulence, and upwelling and downwelling caused by the divergence and convergence of wind wakes (Miles et al. 2021). Oceanographic and atmospheric effects are possible at a range of temporal and spatial scales, based on regional and local oceanographic and atmospheric conditions as well as the size and locations of wind farms. However, discerning a wind farm-induced relationship from natural variability is difficult and very specific to local environmental conditions where the wind farm is located. As described above, the particular effects and magnitudes can vary based on a number of parameters, including model assumptions and inputs, study site, oceanographic and atmospheric conditions, turbine size, and wind farm size and orientation (Miles et al. 2021). Here, we consider the information presented above, incorporate the layout and parameters of the Empire Wind project and local oceanographic and atmospheric conditions and evaluate effects to ESA listed species. We note that while we are using the best available information to assess effects of the Empire Wind project, there is uncertainty about how offshore wind farms in the action area may alter oceanographic processes and the biological systems that rely on them. However, based on observed and modeled results described in the best available information, we do expect effects to occur, but there is uncertainty regarding the scale/magnitude and extent of these effects in the context of the Mid-Atlantic Bight ecosystem. The available information suggests that some impacts require very large scale wind development before they would be realized; as such, we note that the conclusions reached here are specific to the scope of the Empire Wind project (147 WTGs and their foundations and up to two OSSs and their foundations) and its specific geographic location and that the analysis and conclusions reached here may not be reflective of the consequences of larger scale development in the region or even a single project in a different location.

As explained above, based on the available information, we do not see any evidence that installation of 147 WTGs and their monopole foundations and up to two OSSs and their jacket foundations for the Empire Wind project would lead to ocean warming that could affect ESA listed whales, sea turtles or fish or that there is the potential for the Empire Wind project to contribute to or exacerbate warming ocean conditions; if anything, the project may result in minor, localized cooling. Based on the available information, it is likely that the Empire Wind project will produce a wind wake from operation of the turbines and that the foundations themselves will lead to disruptions in local conditions. The scale of these effects is expected to range in distance, with effects to turbulence, eddies, and turbidity extending around on a scale of hundreds of meters and up to 1 km from each foundation (Floeter et al. 2017, van Berkel et al. 2020). Documented changes in mixed layer depth and thermocline conditions have been observed in the form of a dipole extending up to 12 km at one wind farm (Floeter et al. 2022), while alterations to wind fields and the ocean–atmosphere interface have been modeled as modifying both atmospheric and oceanographic patterns on large spatial scales of to tens of kilometers (Gill et al. 2020, Christiansen et al. 2022). As noted above, oceanic response to an altered wind field is predicted to extend greater than several kilometers around offshore wind facilities and to be strong enough to influence the local pelagic ecosystem (Brostrom 2008, Ludewig 2015, Floeter et al. 2022).

When applying studies conducted outside the Mid-Atlantic Bight region to our consideration of the potential effects of the Empire Wind project on environmental conditions, it should be noted that the seasonal stratification over the summer, particularly in the studies conducted in the North Sea, is much less than the peak stratification seen in the summer over the Mid-Atlantic Bight region (Castelao, Glenn, and Schofield, 2010). The conditions in the North Sea are more representative of weaker stratification, similar to conditions seen in the Mid-Atlantic Bight during the spring or fall (van Leeuwen et al. 2015). Because of the weaker stratification during the spring and fall, the Mid-Atlantic Bight ecosystem may be more susceptible to changes in hydrodynamics due to the presence of structures and potential for increased turbulence during this period when waters are more unstable than during highly stratified conditions in the summer (Kohut and Brodie 2019, Miles et al. 2021).

Offshore wind energy development is likely to alter the atmospheric and the physical and biological oceanographic environment due to the influence of the energy extraction on the wind stress at the ocean surface and the physical presence of the in-water turbine foundations could influence the flow and mixing of water. Resultant, increased stratification could affect the timing and rate of breakdown of the cold pool in the fall, which could have cascading effects on species in the region. However, as described above, the available information (Carpenter et al. 2016, Schultz et al. 2020) indicates that in order to see significant impacts on strong stratification such as the cold pool, large regions had to be covered by wind turbines. Given the scale of the Empire Wind project (149 total foundations), any effects of stratification are not expected to reach the scale that they would affect the timing and rate of breakdown of the cold pool in the fall.

Due to the linkages between oceanography and food webs, lower-trophic level prey species that support listed species may be affected by changes in stratification and vertical mixing. Information on which to base an assessment of the degree that the proposed project will result in any such impacts is limited. No utility scale offshore wind farms are in operation in the region nor along any coast of the United States to evaluate potential impacts of the proposed Empire Wind project, thus we primarily have results from research conducted on offshore wind projects in other countries available to evaluate potential impacts on the oceanographic and atmospheric environment, and potential subsequent effects on protected species and their prey.

Results of in-situ research, and modeling and simulation studies, show that offshore wind farms can reduce wind speed and wind stress which can lead to less mixing, lower current speeds, and higher surface water temperature (Afsharian et al. 2020); increase localized vertical mixing due to the turbulence from the wakes produced from water flowing around turbine foundations (Miles, Martin, and Goddard 2017, Schultz et al. 2020); cause wind wakes that will result in detectable changes in vertical motion and/or structure in the water column (upwelling and downwelling) (Christiansen & Hasager 2005, Broström 2008, Floeter 2022); and result in detectable sediment wakes downstream from a wind farm by increased turbidity (Vanhellemont and Ruddick, 2014). We have considered if these factors could result in disruption of prey aggregations, primarily of planktonic organisms transported by currents such as copepods and gelatinous organisms (salps, ctenophores, and jellyfish medusa).

This possible effect is primarily relevant to North Atlantic right whales and leatherback sea turtles as their planktonic prey (primarily calanoid copepods and gelatinous organisms) are the only listed species' prey in the region whose aggregations are primarily driven by hydrodynamic processes. As aggregations of zooplankton, which provide a dense food source for listed species to efficiently feed upon, are concentrated by physical and oceanographic features, increased mixing may disperse aggregations and may decrease efficient foraging opportunities for listed species. Increased mixing may also increase the nutrient supply to the upper water column and in turn cause phytoplankton blooms, thus creating a food source for zooplankton. Potential effects of hydrodynamic changes in prey aggregations are specific to listed species that feed on plankton, whose movement is largely controlled by water flow, as opposed to other listed species that eat fish, cephalopods, crustaceans, and marine vegetation, which are either more stationary on the seafloor or are more able to move independent of typical ocean currents. Prey aggregations may also be influenced by the physical presence of turbine foundations and subsequent reef effect; this is considered in Section 7.4.3.2.

Relative to the Mid-Atlantic Bight region as a whole, the scale of the proposed Project (no more than 147 WTG monopole foundations and 2 OSS jacket foundations) and the footprint of the WFA (approximately 65,559-acres, 257 km²) with project foundations occupying only a small fraction of that) is small. Based on the available information, we do not expect the scope of oceanographic, atmospheric, or hydrodynamic effects from the proposed Empire Wind project to be large enough to influence regional conditions that could affect the broader distribution of prey, mainly plankton, or conditions that aggregate prey in the local area off the coast of New York or the broader Mid-Atlantic Bight region in a way that would have more than insignificant effects to listed species. We do expect localized impacts to oceanic conditions that would extend tens of kilometers from the outermost row of foundations in the Empire Wind lease area that would vary directionally based on the direction of the wind and flow of water (Gill et al. 2020, Christiansen et al. 2022, Floeter et al. 2022). However, based on the available information presented above and the location of the Empire Wind WFA relative to the predominant southwestward flow of water in the Mid-Atlantic Bight region, the area is not a primary foraging area for North Atlantic right whales and we do not expect the impacts to oceanic conditions resulting from the Empire Wind project to affect any oceanographic forces transporting plankton into the area from the east. We do not expect the construction and operation of the Empire Wind project to alter the broad current patterns in the region, and thus expect any alteration of the biomass of plankton in the region, and therefore, the total food supply, to be so small that it cannot be meaningfully measured, evaluated, or detected; therefore, effects would be insignificant. As explained above, right whale foraging in the area affected by the presence and operation of EW 1 and EW2 is expected to be rare and opportunistic; this area is not an area where regular foraging by right whales is known to occur as it is primarily a transit zone as animals move up and down the coast to and from calving habitat in the southeast.

Although uncertainty remains as to the magnitude and intensity of effects offshore wind farms may have on altering oceanographic processes, studies demonstrate increased turbulence is expected to occur in the wake of turbine (and OSS) foundations. These turbulence wakes have been detected up to 300 m from turbine foundations (Miles, Martin, and Goddard 2017, Schultz et al. 2020). Peak turbulence area is expected within the distance equivalent to the diameter of a single monopole, with turbulence measurable (greater than 5% above background) within a distance equivalent to 8-10 times the diameter of a single monopole (Miles, Martin and Goddard 2017), for the Empire Wind project that would be a distance of 88 to 110 m from the 11-m diameter piles used for the 147 WTGs and would be a shorter distance from the jacket foundations used for the 2 OSSs (jacket foundations use multiple 2.5-m diameter pin piles) as the diameter of piles and smaller and the water can flow through the jacket structure. We expect that any effects on the distribution or density of zooplankton prey due to turbulence from the foundation would be limited to the area where changes in turbulence would be experienced. These anticipated localized changes down-current of the foundations of the wind turbines could result in localized changes in plankton distribution and abundance within discrete areas of the Empire Wind WFA extending up to 300 m down-current from each foundation (Floeter et al.

2017). Based on the spacing of the turbines (no less than 1.2 km x 1.2 km), the available information suggests limited opportunity for these areas to interact and overlap which is expected to limit the impact of the distribution of plankton to small, discrete areas within the Empire Wind WFA. Therefore, while there may be changes in the distribution of plankton within the WFA, we do not expect any overall reduction in biomass of plankton. Thus, we do not anticipate any higher trophic level impacts; that is, we do not anticipate any associated effects to gelatinous organisms, pelagic fish, or benthic invertebrates that depend on plankton as forage.

As noted above, North Atlantic right whales are the only ESA listed obligate zooplanktivores in the action area, feeding almost exclusively on copepods, which are primarily aggregated by physical and oceanographic features. Based on observations of right whales and abundance of *C. finmarchicus*, Record et al. (2019) hypothesized that a 40,000 m^2 threshold for *C. finmarchicus* represents the regional copepod abundance at which high-density, exploitable, small-scale patches within a region are likely to occur. Mayo and Marx (1990) and Murison and Gaskin (1989) estimated the immediate decision-making threshold for right whale feeding to be approximately 1,000 m^3 for Cape Cod Bay and the Bay of Fundy, respectively. Kenney et al. (1986) estimated the minimum concentrations necessary for right whale feeding to provide a net energetic benefit over the long term to be in the 10^5–10^6 m^3 range. While we do not expect the Empire Wind WTGs and the foundations to affect the abundance of copepods in the WFA area or broader region, the distribution of copepods in the Empire Wind WFA may be affected. This disruption would likely occur if/when there is consistent wind and water movement in a particular direction, as stable and consistent conditions have the greatest influence. Given the predominant direction of water movement (southwest) and wind flow (from the southwest) and the potential area (up to 300 m from each foundation as described above) impacted by the presence of foundations, redistribution of prey in the Empire Wind WFA would only be expected from foundation-driven turbulence under some conditions and only within 300 m of each foundation. We expect that these geographically limited impacts on the distribution of plankton could reduce the density of copepods and it is possible that density could be reduced below the feeding thresholds of right whales. Increased mixing may also increase the nutrient supply to the upper water column and in turn cause phytoplankton blooms, thus creating a food source for zooplankton. However, as noted above, the Empire Wind WFA has not been documented as a a primary foraging area or an area where individuals are expected to be resident, and it is not known or expected to routinely support sustained foraging behavior for North Atlantic right whales. Given that the areas impacted by foundations would be limited to discrete areas within 300 m of each foundations and right whale foraging is rare and opportunistic in the Empire Wind WFA, we expect the effects on foraging right whales are unlikely but even if they did occur they would be so small that they cannot be meaningfully measured, evaluated, or detected and are therefore, insignificant. We do not expect there to be any lost or disrupted foraging events. Similarly, we do not expect any changes in the abundance of leatherback sea turtle’s jellyfish prey, and anticipate that any changes in distribution of jellyfish would have effects on leatherbacks that are so small that they cannot be meaningfully measured, evaluated, or detected and are therefore, insignificant.

Farther-field atmospheric effects that may occur downwind with consistent and stable wind directions of the Empire Wind WFA may alter the spatial distribution of primary productivity;

however, this area would likely be tens of kilometers to the northeast of the WFA given predominant wind direction. Due to the location of the WFA, these farther field effects may occur close to shore along the southern coast of Long Island or the inner shelf area south of Long Island, an area where right whales have not been observed consistently nor in high densities. We do not anticipate a larger disruption to conditions that would aggregate prey in or outside the WFA as the WFA is not a known foraging area for right whales nor is there a known feature that aggregates prey. We have made this conclusion in consideration of the *Environmental Baseline*, which includes consideration of the operational effects of the Vineyard Wind 1, South Fork, Ocean Wind 1, and Revolution Wind projects which are all located outside of the area that we anticipate may be affected by the presence and operation of the Empire Wind project.

In summary, based on the best available scientific information pertaining to the effects of offshore wind farms on oceanic and atmospheric conditions, we expect the presence and operation of the proposed Empire Wind project to have localized effects to the distribution and aggregation of the planktonic prey of listed species, however, we do not expect any overall reduction in the amount of prey in the action area. Any effects to foraging individual right, fin, or sei whales or leatherback sea turtles are expected to be so small that they cannot be meaningfully measured, evaluated, or detected and are therefore, insignificant. As described above, the Empire Wind WDA is not a primary foraging area, an area where individuals are expected to be resident, and it is not known or expected to routinely support sustained foraging behavior for North Atlantic right whales. Additionally, as Atlantic sturgeon in the marine environment primarily feed on benthic invertebrates and small fish such as sand lance, which are either free swimming or live on the seafloor, hydrodynamic effects are not likely to impact the distribution or availability of their prey, and any effects to Atlantic sturgeon are extremely unlikely to occur. Fin and sei whales may also forage on small schooling fish and cephalopods, given these prey species are free swimming, any effects to sei or fin whales are extremely unlikely to occur. Similarly, effects to the benthic prey base of green, Kemp's ridley, and loggerhead sea turtles are also extremely unlikely to occur. We do not expect any impacts to the abundance or distribution of the cephalopods on which sperm whales forage as these prey typically occur further offshore and are free swimming. As no effects to sperm whale prey are anticipated, we do not expect any effects to sperm whales.

We note that as the scale of offshore wind development in the greater Mid-Atlantic Bight region increases and the number of WTGs and OSSs increases, the scope and scale of potential hydrodynamic impacts may also increase and influence the environmental baselines for future projects. Our Biological Opinions prepared for the Vineyard Wind 1, South Fork Wind, Ocean Wind 1, and Revolution Wind projects assessed the construction, operation, and decommissioning of each project and concluded that there may be localized changes in the Vineyard Wind 1, South Fork, Ocean Wind 1, and Revolution Wind lease areas and surrounding waters within a few hundred meters to tens of kilometers down-current/downwind of the foundations and WTGs, with effects on zooplankton prey limited to the area within a few hundred meters of each foundation.

The Revolution Wind and South Fork projects are approximately 200 km to the northeast of the Empire Wind project and the Vineyard Wind 1 project is approximately 240 km to the northeast of the Empire Wind project. The Ocean Wind 1 project is approximately 138 km to the south of the Empire Wind project. Once built we expect that all of these projects will be too far away for oceanographic, hydrodynamic, or atmospheric effects to impact the Empire Wind WFA. Therefore, while in the future there may be additive effects resulting from the buildout of multiple adjacent lease areas, the conclusions reached in this analysis do not change when considering the effects in the context of the *Environmental Baseline*.

7.5 Effects of Marine Resource Survey and Monitoring Activities

Empire Wind will carry out survey and monitoring activities in and near the WDA as part of the proposed action for consultation in this opinion. As described in Section 3.0 of this Opinion, these will include: trawl survey, baited remote underwater video survey, eDNA sampling, sea scallop plan view camera surveys, and acoustic telemetry to characterize fisheries resources in the WDA; benthic monitoring to document the disturbance and recovery of marine benthic habitat and communities resulting from the construction and installation of Empire Wind project components in the WDA and along the offshore export cable corridors; and deployment of PAM buoys or autonomous PAM devices to record ambient noise and characterize the presence of protected species, specifically marine mammals. In this section, we consider the effects of the marine resource survey and monitoring activities on listed species in the action area by describing the effects of interactions between listed species, and proposed survey gear and the other sampling and monitoring methodologies, and then analyze risk and determine likely effects to sea turtles, listed whales, and Atlantic sturgeon. Section 7.1 of the Opinion addresses the effects of noise during surveys, including HRG surveys. Effects of Project vessels, including the ones that will be used for survey and monitoring activities are considered in Section 7.2, above, and are not repeated here.

7.5.1 Assessment of Effects of Benthic Monitoring, Sea Scallop Plan View Camera Surveys, eDNA, Acoustic Telemetry Monitoring, PAM, and Other Buoy Deployments

Benthic Sampling

Empire Wind is proposing to conduct novel hard bottom and structure associated organic enrichment benthic monitoring to document the disturbance and recovery of marine benthic habitat and communities resulting from the construction and installation of Project components, including WTGs, OSSs, and WTG scour protection as well as the inter-array cabling and offshore export cable corridors from the WDA to shore. Novel hard bottom habitat monitoring will be conducted using remotely operated vehicle (ROV) stereo camera imaging techniques. The WDA will be divided into two strata based on depth (<35 m [shallow] and >35 m [deep]). Four replicate WTGs will be randomly selected within each of the two depth strata for sampling. The baseline survey would be conducted during the first late summer/early fall following construction. The survey would be repeated annually for the next three years and again after five years after construction (i.e., skipping the fourth year after construction). All survey equipment will be deployed from contracted scientific research vessels. Structure-associated organic enrichment monitoring will include WTG foundations and the OSS foundations to document changes in the function of benthic habitats. Each survey would include sediment profile and plan view imagery, as well as sediment grabs for sediment grain size analysis and organic matter characterization. The sediment profile and plan view imagery equipment consists of a camera frame that is lowered onto the seabed by a cable, penetrating the bed surface to collect a plan view image of subsurface substrate composition. The baseline survey would be conducted in the pre-construction phase. Post-construction surveys would be conducted during the first late summer/early fall following construction and repeated annually for the next three years and again five years after construction (i.e., skipping the fourth year after construction). Physical disturbance of soft sediments from cable installation monitoring will be conducted using sediment profile and plan view imagery equipment to examine the effects of installation and operation of the export cables on the benthic habitat over time and along a spatial gradient with distance from the cable centerlines.

The ROV video and sediment profile and plan view imagery surveys will result in temporary disturbance of the benthos and temporary loss of benthic resources in the disturbed areas. ROV operation and sediment profile and plan view imagery surveys will affect an extremely small area at each survey location (~1.5 m^2). Any loss of benthic resources will be small, temporary, and localized to the areas disturbed by survey activities; recolonization is expected to be rapid. These temporary, isolated reductions in the amount of benthic resources in an area are not likely to have a measurable effect on any foraging activity or any other behavior of listed species; this is due to the small size of the affected areas and the temporary nature of any disturbance. As effects to listed species that may forage on these benthic resources (i.e., Atlantic sturgeon and some sea turtles) will be so small that they cannot be meaningfully measured, detected, or evaluated, effects are insignificant.

Sea Scallop Plan View Camera Surveys

The sea scallop plan view camera surveys will collect data on sea scallop resources to document shifts in density and abundance during the annual pre-construction, construction, and post-construction phases of the Project. The surveys will be conducted using a BACI design with two years of sampling in the pre-construction period, sampling throughout the construction periods, and at least two years of sampling in the post-construction period. Surveys are planned to be conducted in June each year. During each seasonal survey event, 60 station will be sampled in the WFA and an adjacent reference area located within the action area. The same reference area used in the trawl survey will be selected for this set of surveys. This will result in a total of 120 samples per sampling year. At each station, a plan view camera system will be deployed to capture downward facing images of the seafloor. At least eight images will be collected at each station to capture within station variability. As the plan view camera system is lowered to the seafloor, the a weight attached to the bounce trigger contacts the seafloor prior to the camera frame reaching the seafloor and triggers the plan view camera.

The plan view surveys will result in temporary disturbance of the benthos and temporary loss of benthic resources in the disturbed areas. The plan view imagery surveys will affect an extremely small area at each survey location (~1.5 m^2). Any loss of benthic resources will be small, temporary, and localized to the areas disturbed by survey activities; recolonization is expected to be rapid. These temporary, isolated reductions in the amount of benthic resources in an area are not likely to have a measurable effect on any foraging activity or any other behavior of listed species; this is due to the small size of the affected areas and the temporary nature of any disturbance. As effects to listed species that may forage on these benthic resources (i.e., Atlantic sturgeon and some sea turtles) will be so small that they cannot be meaningfully measured, detected, or evaluated, effects are insignificant.

eDNA Sampling
eDNA sampling will be conducted concurrently with the trawl and BRUV survey to provide a holistic understanding of the relative abundance and composition of species assemblage. At each trawl survey sampling location in the WFA and the reference area, an eDNA sample will be collected (eight samples will be targeted for collection in the Empire Wind impact area and the trawl survey reference area, for a total of 32 samples each year). At each BRUV survey location, one sample will be taken that corresponds to the sites where video data is recorded closest to the mid-line of the total transect (a total of 8 samples per seasonal sampling event, for a total of 32 samples each year). Additional surface samples will be taken at a subset of station locations during each sampling event. Each sample will be collected with a 1.2 L stainless steel polypropylene-lined Kemerer bottle within 2 m of the bottom. At a subset of locations, paired surface and bottom water samples will be collected to check for differences in the community composition between the surface and the bottom.

No effects to ESA listed species are anticipated to result from eDNA sampling other than general vessel activities, which are considered in Section 7.2 above. This is due to the short duration of each sampling event such that the water sample would be taken and retrieved immediately negating any entanglement risk. Effects to listed species as a result of incidental capture of potential prey are extremely unlikely to occur given that sampling is limited to water collection and the small amount of water (up to 1.2 L per sample) extracted per sample. These effects are thus discountable.

Acoustic Telemetry Monitoring
This section only considers the deployment of acoustic receivers in the Empire Wind WDA. As explained in section 3, the capture and tagging of species is proposed to occur independent of the Empire Wind project and is authorized through ESA section 10 permit 20351 issued by NMFS to Stony Brook University (Keith Dunton, Principle Investigator); work under the ESA permit would proceed regardless of the Empire Wind COP and associated project approvals and authorizations and is thus not considered an element of the proposed action. Empire Wind will deploy a receiver array comprised of 48 receivers. The receivers will be deployed year-round and receivers will be retrieved for data download twice per year. Each receiver will be equipped with a mooring recovery system that will utilize the receiver's acoustic release mechanism to deploy a retrieval line once the receiver is recalled to allow for recovery of the mooring used to anchor the receiver in place. At the time of retrieval, the vessel would be on station to immediately retrieve the receiver. Operationally, the acoustic receiver devices floats just above the seafloor to record the presence of nearby tagged animals.

No effects to ESA listed species are anticipated to result from acoustic telemetry surveys other than general vessel activities, which are considered in Section 7.2 above. This is because the acoustic receivers and moorings will utilize technology to not need a vertical line to the surface negating any entanglement risk. No effects to prey are anticipated from this activity. There are therefore no effects to ESA listed species expected from this type of passive monitoring.

Passive Acoustic Monitoring

PAM is used to measure, monitor, record, and determine the sources of sound in underwater environments. Moored PAM systems or autonomous PAM devices will be used prior to, during, and following Empire Wind construction. PAM will be used to characterize the presence of marine mammals and cod through passive detection of vocalizations, and will be used to record ambient noise, project vessel noise, pile driving noise, and WTG operational noise. Moored PAM systems are stationary and may include platforms that reside completely underwater with no surface expression (i.e., HARPs, high-frequency acoustic recording packages) or may consist of buoys (at the surface) connected via a data and power cable to an anchor or bottom lander on the seafloor. Moored PAM systems will use the best available technology to reduce any potential risks of entanglement and deployment will comply with best management practices designed to reduce the risk of entanglement in anchored monitoring gear. Appendix B of NMFS 2021a is appended to this Opinion and its minimization measures are incorporated into this opinion and those measures are thus part of the proposed action.. For moored PAM systems, there are cables connecting the hydrophones and/or buoy to the anchor or lander; however, entanglement is extremely unlikely to occur. The cables associated with moored systems have a minimum bend radius that minimizes entanglement risks and does not create loops during deployments, further minimizing entanglement risks. There are no records of any entanglement of listed species in moored PAM systems, and we do not anticipate any such entanglement will occur.

Mobile systems may include autonomous PAM devices that may operate at the surface or operate throughout the water column. These vehicles produce virtually no self-generated noise and travel at slow operational speeds (~0.25 m/s) as they collect data. Moored and mobile systems will be deployed and retrieved by vessels; maintenance will also be carried out from vessels. Potential effects of vessel traffic for all activities considered in this consultation are addressed in Section 7.2. The small size and slow operational speeds of mobile PAM systems make the risk of a collision between the system and a listed species extremely unlikely to occur. Even in the extremely unlikely event that a whale, sea turtle, or Atlantic sturgeon bumped into the mobile PAM system, it is extremely unlikely that there would be any consequences to the individual because of the relative lightweight of the mobile PAM system, slow operating speeds, small size, and rounded shape. These effects are thus discountable and, in the extremely unlikely event of an, interaction with an individual of any listed species such effects would be insignificant.

Based on the analysis herein, it is extremely unlikely that any ESA listed species will interact with any PAM system; any effects to ESA listed species of the PAM monitoring are extremely unlikely to occur and are therefore, discountable. No effects to prey are anticipated.

Other Buoy Deployments
BOEM has indicated that one or more data collection buoys may be deployed in the WDA to provide weather and other date in the project area. Best management practices for moored buoys used for data collection associated with offshore wind projects are described in June 29, 2021 informal programmatic consultation between NMFS/GARFO and BOEM on certain geophysical and geotechnical survey activities and data collection buoy deployment (see Appendix C of this Opinion). The minimization measures in Appendix C are incorporated as elements of the proposed action for this opinion. BOEM has indicated that any data collection buoys deployed as

part of the Empire Wind project will be consistent with the best management practices and project design criteria included in the June 2021 consultation. Therefore, consistent with the conclusions of the 2021 programmatic, we expect any effects to ESA listed species to be extremely unlikely to occur and therefore, discountable. No effects to prey are anticipated.

7.5.2 Assessment of Risk of Interactions with Trawl Gear

Empire Wind will conduct trawl surveys targeting longfin squid within the WDA in the summer (July and August) for two years of pre-construction sampling, during the construction phase of the project (four years) and for a minimum of two years post-construction. Longfin squid are typically targeted using bottom otter trawl gear. The trawl survey will be executed using a Before-After-Control-Impact experimental design, with observations occurring within the reference area serving as a regional proxy for relative abundance of longfin squid and bycatch fish and invertebrate species away from the influence of project activities or activities associated with other offshore wind development. The reference area is approximately the same size as the WFA (325 km^2) and is approximately 30 km southwest of the WFA, within the action area. The trawl survey will be stratified by depth with the number of survey tows evenly distributed between a “shallow” depth stratum (<35 m) and a “deep” stratum (>35 m). Each survey stratum will be evenly divided into grid cells and two grid cells will be selected randomly within each stratum for sampling tows before each survey trip. Four survey tows (two in each depth stratum) will be conducted in both the WFA and the reference area, twice each month (16 tows total in each area per month), and surveys will be conducted for two months each summer (32 total tows per year). Two sampling events will occur each month to distribute sampling effort and target the peak seasonal biomass. Within a sampling event, the replicate tows within the WFA and the reference area will be completed within as few days as possible, given practical constraints imposed by weather or other factors (e.g., mechanical issues with vessel). The trawl net used will be typical of the local squid fishery and utilize a codend fitted with a 2.5 cm (1 inch) knotless codend liner to sample squid and other marine taxa across a broad range of size and age classes. All tows will be completed during daylight hours, and the target tow duration will be 20 minutes. A target tow speed of approximately 3 knots will be used. Oceanographic data will be collected at each trawl station using a Conductivity Temperature Depth sensor. If any protected species are sighted in the vicinity of a trawl tow (< 500 m), sampling will be delayed at that location in order to minimize the risk of an interaction.

ESA Listed Whales

Factors Affecting Interactions and Existing Information on Interactions

Entanglement or capture of ESA listed North Atlantic right, fin, sei, blue, and sperm whales in trawl gear is extremely unlikely. While these species may occur in the study area where survey activities will take place, trawl gear is not expected to directly affect right, fin, sei, blue, and sperm whales given that these large cetaceans have the speed and maneuverability to get out of the way of oncoming gear, which is towed behind a slow moving vessel (less than 4 knots). There have been no observed or reported interactions of right, fin, sei, blue, or sperm whales with trawl gear (NEFSC observer/sea sampling database, unpublished data; GAR Marine Animal Incident database, unpublished data). The slow speed of the trawl gear being towed and the short tow times to be implemented further reduce the potential for entanglement or any other interaction. As a result, we have determined that it is extremely unlikely that any large whale would interact with the trawl survey gear and therefore, effects to these species are discountable.

Effects to Prey
The proposed trawl survey will not have any effects on the availability of prey for right, blue and sperm whales. Right whales feed exclusively on plankton/copepods (Perry et al. 1999). Blue whales feed on krill. Copepods and krill are very small organisms that will pass through trawl gear rather than being captured in it. In addition, copepods and krill will not be affected by turbidity created by the gear moving through the water. Sperm whales feed on deep-water species such as large squid, sharks, skates, and skates. Fin and sei whales feed on plankton, cephalopods, and small schooling fish (e.g., sand lance, herring, mackerel) (Aguilar 2002). The trawl gear to be used in the Empire Wind survey activities operates on or very near the bottom, while schooling fish such as herring and mackerel occur higher in the water column. Sand lance inhabit both benthic and pelagic habitats, however, they typically bury into the benthos and would not be caught in the trawl. Given that survey is targeting squid, this prey species of sei and fin whales will likely be caught during the trawl survey, however, given the small amount of biomass removed as a result of the surveys and the limited duration and location of the surveys, the effects on the forage base of sei and fin whales will be so small that they cannot be meaningfully measured, detected, or evaluated and, therefore, effects are insignificant.

Sea Turtles

Factors Affecting Interactions and Existing Information on Interactions
Sea turtles forcibly submerged in any type of restrictive gear can eventually suffer fatal consequences from prolonged anoxia and/or seawater infiltration of the lung (Lutcavage and Lutz 1997; Lutcavage et al. 1997). A study examining the relationship between tow time and sea turtle mortality in the shrimp trawl fishery showed that mortality was strongly dependent on trawling duration, with the proportion of dead or comatose sea turtles rising from 0% for the first 50 minutes of capture to 70% after 90 minutes of capture (Henwood and Stuntz 1987). Following the recommendations of the NRC to reexamine the association between tow times and sea turtle deaths, the data set used by Henwood and Stuntz (1987) was updated and re-analyzed (Epperly et al. 2002; Sasso and Epperly 2006). Seasonal differences in the likelihood of mortality for sea turtles caught in trawl gear were apparent. For example, the observed mortality exceeded 1% after 10 minutes of towing in the winter (defined in Sasso and Epperly (2006) as the months of December-February), while the observed mortality did not exceed 1% until after 50 minutes in the summer (defined as March-November; Sasso and Epperly 2006). In general, tows of short duration (<10 minutes) in either season have little effect on the likelihood of mortality for sea turtles caught in the trawl gear and would likely achieve a negligible mortality rate (defined by the NRC as <1%). Longer tow times (up to 200 minutes in summer and up to 150 minutes in winter) result in a rapid escalation of mortality, and eventually reach a plateau of high mortality, but will not equal 100%, as a sea turtle caught within the last hour of a long tow will likely survive (Epperly et al. 2002; Sasso and Epperly 2006). However, in both seasons, a rapid escalation in the mortality rate did not occur until after 50 minutes (Sasso and Epperly 2006) as had been found by Henwood and Stuntz (1987). Although the data used in the NRC reanalysis were specific to bottom otter trawl gear in the U.S. south Atlantic and Gulf of Mexico

shrimp fisheries, the authors considered the findings to be applicable to the impacts of forced submergence in general (Sasso and Epperly 2006).

Sea turtle behaviors may influence the likelihood of them being captured in bottom trawl gear. Video footage recorded by the NMFS, Southeast Fisheries Science Center (SEFSC), Pascagoula Laboratory indicated that sea turtles will keep swimming in front of an advancing shrimp trawl, rather than deviating to the side, until they become fatigued and are caught by the trawl or the trawl is hauled up (NMFS 2002). Sea turtles have also been observed to dive to the bottom and hunker down when alarmed by loud noise or gear (Memo to the File, L. Lankshear, December 4, 2007), which could place them in the path of bottom gear such as a bottom otter trawl. There are very few reports of sea turtles dying during research trawls. Based on the analysis by Sasso and Epperly (2006) and Epperly et al. (2002) as well as information on captured sea turtles from past state trawl surveys and the Northeast Area Monitoring and Assessment Program (NEAMAP) and NEFSC bottom trawl surveys, tow times less than 30 minutes are expected to eliminate the risk of death from forced submergence for sea turtles caught in beam and bottom otter trawl survey gear.

During the spring and fall bottom trawl surveys conducted by the NEFSC from 1963-2017, 85 loggerhead sea turtles were captured. Only one of the 85 loggerheads suffered injuries (cracks to the carapace) causing death. All others were alive and returned to the water unharmed. One leatherback and one Kemp's ridley sea turtle have also been captured in the NEFSC bottom trawl surveys and both were released alive and uninjured. NEFSC bottom trawl survey tows are approximately 30 minutes in duration. All 50 loggerhead, 34 Kemp's ridley, and one green sea turtles captured in the NEAMAP surveys since 2007 have also been released alive and uninjured. NEAMAP surveys operate with a 20-minute tow time. Swimmer et al. (2014) indicates that there are few reliable estimates of post-release mortality for sea turtles because of the many challenges and costs associated with tracking animals released at sea. However, based on the best available information as cited herein, we anticipate that post-release mortality for sea turtles in bottom otter trawl gear where tow times are short (less than 30 minutes) is minimal to non-existent unless the turtle is already compromised to begin with. In that case, the animal would likely be retained onboard the vessel and transported to a rehabilitation center rather than released back into the water.

Estimating Interactions with and Mortality of Sea Turtles

We have considered the available data sets to best predict the number of sea turtles that may be incidentally captured in the proposed trawl surveys. The largest and longest duration data sets for surveys in the general area of the Empire Wind WDA are the NEAMAP and NEFSC bottom trawl surveys. Both surveys occur in the spring and fall using trawl gear. The NEAMAP survey is inshore and adjacent to the area within the Empire Wind WFA and reference area where trawl surveys are proposed, while the NEFSC survey area occurs farther offshore and overlaps with the offshore portion of the WFA. We have also considered information on interactions with sea turtles and commercial trawl fisheries available from fisheries observer data (Murray 2020). These surveys considered here are multi-species surveys as opposed to the Empire trawl survey which is targeting squid in the WFA and reference area. However, the trawl gear (otter trawl net, codend) and tow times (~20 minutes) operating at ~3 knots during daylight hours are consistent with these other regional trawl surveys, thus the NEAMAP and NEFSC sea turtle interaction rates are the best available information for estimating sea turtle interactions in the proposed Empire trawl survey.

We reviewed records for sea turtles captured in the NEFSC spring (March-May) and fall (September-October) trawl surveys from 2012-2022 for trawls above 39° N (excluding the Gulf of Maine). This is the geographic area determined to best predict capture rates in a trawl survey carried out in or around the New York Bight and southern New England Wind Energy Areas. For the 2012-2022 fall surveys, three loggerhead sea turtle captures were documented over 1,716 tows; this is a capture rate of 0.00175 loggerhead sea turtles per tow. The NEFSC surveys did not capture any sea turtles during spring surveys in this geographic area; however, the surveys are conducted in early spring, likely before sea turtles arrive in the area. Empire Wind is proposing to carry out 32 tows per year and will only occur in summer months. We do not expect sea turtles to occur in the area during the winter and the NEFSC spring survey data would suggest that no sea turtles would be captured in the spring surveys. Applying the fall capture rate to the 32 tows, results in a prediction of 0.056 loggerheads captured per year or 0.448 loggerheads over the eight year survey period. We note that density of sea turtles in the areas to be surveyed is likely to be similar in the late summer period targeted by the Empire surveys compared to the fall period when the NEFSC trawl survey occurs.

The Empire Wind trawl survey will use a similar trawl design as the NEAMAP survey; the NEAMAP survey area is inshore and adjacent to the area within the Empire Wind WFA and reference area where trawl surveys are proposed. The NEAMAP nearshore trawl survey began in 2007. The majority of captures of sea turtles in the NEAMAP survey (2008-2022) have been loggerheads (50), followed by Kemp's ridley (34). Only one green sea turtle has been captured and there have been no captures of leatherback sea turtles. Sea turtles have been captured in the spring and fall surveys. Using the 2008-2022 spring and fall data to calculate a rate of sea turtle captures per tow and applying that to the number of tows (32) per year planned by Empire Wind, we would predict the capture of 0.36 loggerheads, 0.24 Kemp's ridley, zero leatherbacks, and 0.01 green sea turtles per year. Over the up to eight-year survey period, we would predict the capture of 2.84 loggerheads, 1.93 Kemp's ridley, zero leatherbacks, and 0.06 green sea turtles.

Murray (2020) estimated the interaction rates of sea turtles in the US commercial bottom trawl fisheries along the Atlantic coast between 2014-2018 using fisheries observer data. In this analysis, a total of 5,227 days fished were observed from 2014-2018 in bottom trawl fisheries in the Georges Bank and Mid-Atlantic, which represented 13% of commercial trawl fishing effort across both regions. During this period, NEFOP observers documented 50 loggerhead turtle interactions in bottom trawl gear, 48 of which occurred in the Mid-Atlantic; observers also recorded 5 Kemp's ridley turtles, 3 leatherback turtles, and 2 green turtles. These data overlap temporally and spatially with the survey area and the seasons that surveys will occur; however, there are differences in the trawl gear used in commercial fisheries compared to the gear that will be used in the proposed survey. Therefore, because other data sources are available that better align with the proposed surveys and have 100% observer coverage which allows for a more robust prediction of interaction rates, we are not using the interaction rate for commercial trawl fisheries to predict the number of sea turtles likely to be captured in the Empire Wind surveys.

However, we note that the Murray (2020) dataset demonstrates that all the sea turtle species that occur in the survey area are vulnerable to capture in commercial trawl gear.

Given the geographic distribution of the proposed Empire Wind surveys, it is likely that the number of sea turtles captured would fall between the number predicted using the NEFSC dataset and the NEAMAP dataset. However, the generally shallow depths of the area (less than 42 m) where the Empire Wind surveys will take place suggests that the NEAMAP survey data would be a better predictor of sea turtle interactions than the NEFSC survey which occurs in deeper, more offshore waters. We note that neither survey has ever captured a leatherback sea turtle; therefore, despite Murray (2020) documenting past captures of leatherback sea turtles in commercial trawl gear and predicting future interaction rates, we do not expect the Empire Wind survey to result in the capture of a leatherback sea turtle. Therefore, considering the best available data presented herein, we expect up to 3 loggerheads, up to 2 Kemp's ridleys, and up to 1 green sea turtle will be captured over the eight-year survey period (Table 7.5.1).

Based on the analysis by Sasso and Epperly (2006) and Epperly et al. (2002) discussed above, as well as information on captured sea turtles from past state trawl surveys and the NEAMAP and NEFSC trawl surveys (no mortalities or serious injuries), a 20-minute tow time for the bottom trawl gear to be used in the proposed Empire Wind surveys is expected to eliminate the risk of serious injury and mortality from forced submergence for sea turtles caught in the bottom trawl gear. We expect that effects to sea turtles captured in the trawl survey will be limited to minor abrasions from the nets and that these injuries will be fully recoverable with no impacts to the health or fitness of any individual. No serious injury or mortality of any sea turtle is anticipated to occur as a result of the trawl surveys and all captured turtles are expected to be quickly released back into the water alive.

Table 7.5.1. Estimated captures of sea turtles by species from Empire Wind trawl surveys over the eight-year duration.

Species	Total Estimated Captures Over Eight Years
Loggerhead	3
Kemp's ridley	2
Green	1
Leatherback	0

Estimates derived from NEAMAP Near Shore Trawl Program – Southern Segment data

Effects to Prey

Sea turtle prey items such as horseshoe crabs, other crab species, whelks, invertebrates, and fish are removed from the marine environment as bycatch in bottom trawls, jellies may also be incidentally caught. Leatherback sea turtles, neritic juveniles and adults of green, loggerhead, and Kemp's ridley sea turtles are known to feed on the species that may be caught as bycatch in the bottom trawls. However, all bycatch is expected to be returned to the water alive, dead, or injured to the extent that the organisms will shortly die. Injured or deceased bycatch would still be available as prey for sea turtles, particularly loggerheads, which are known to eat a variety of live prey as well as scavenge dead organisms. Given this information, any effects on sea turtles from collection of potential sea turtle prey in the trawl gear will be so small that they cannot be meaningfully measured, detected, or evaluated and, therefore, effects are insignificant.

Atlantic Sturgeon

Factors Affecting Interactions and Existing Information on Interactions
Atlantic sturgeon are generally benthic oriented but while migrating, Atlantic sturgeon may be present throughout the water column and could interact with trawl gear while it is moving through the water column. Atlantic sturgeon interactions with beam and bottom trawl gear are likely at times when and in areas where their distribution overlaps with the operation of the gear. Adult and subadult Atlantic sturgeon may be present in the areas to be surveyed year-round. In the marine environment, Atlantic sturgeon are most often captured in depths less than 50 m. Some information suggests that captures in otter trawl gear are most likely to occur in waters with depths less than 30 m (ASMFC TC 2007). The capture of Atlantic sturgeon in otter trawls used for commercial fisheries is well documented (see for example, Stein et al. 2004b and ASMFC TC 2007).

NEFOP data from Miller and Shepherd (2011) indicates that mortality rates of Atlantic sturgeon caught in commercial otter trawl gear is approximately 5 percent. Atlantic sturgeon are also captured incidentally in trawls used for scientific studies, including the standard NEFSC bottom trawl surveys and both the spring and fall NEAMAP bottom trawl surveys. The shorter tow durations and careful handling of any sturgeon once on deck during fisheries research surveys, compared to commercial fishing operations, is likely to result in an even lower potential for mortality, as commercial fishing trawls tend to be significantly longer in duration. None of the hundreds of Atlantic and shortnose sturgeon captured in past state ocean, estuary, and inshore trawl surveys have had any evidence of serious injury and there have been no recorded mortalities. Both the NEFSC and NEAMAP surveys have recorded the capture of hundreds of Atlantic sturgeon since the inception of each. To date, there have been no recorded serious injuries or mortalities. In the Hudson River, a trawl survey that incidentally captures shortnose and Atlantic sturgeon has been ongoing since the late 1970s; hundreds of individuals of a wide range of sizes have been captured with no mortalities recorded. To date, no serious injuries or mortalities of any sturgeon have been recorded in those surveys.

Estimating Interactions with and Mortality of Sturgeon
We have considered the available data sets to best predict the number of Atlantic sturgeon that may be incidentally captured in the proposed trawl surveys. The largest and longest duration data sets for surveys in the general area of the Empire Wind WDA are the NEAMAP and NEFSC bottom trawl surveys. The NEAMAP survey is inshore and adjacent to the area within the Empire Wind WFA and reference area where trawl surveys are proposed, while the NEFSC survey area occurs farther offshore and overlaps with the offshore portion of the WFA. These surveys considered here are multi-species surveys as opposed to the Empire trawl survey which is targeting squid in the WFA and reference area. However, the trawl gear (otter trawl net, codend) and tow times (~20 minutes) operating at ~3 knots during daylight hours are consistent with these other regional trawl surveys, thus we believe that using the NEAMAP and NEFSC sea turtle interaction rates are the most appropriate comparison for the Empire trawl survey.

We reviewed records for Atlantic sturgeon captured in the NEFSC spring (March-May) and fall (September-October) trawl surveys from 2012-2022 for trawls above 39° N (excluding the Gulf of Maine); this geographic area was considered the best predictor for interaction rates in the New York Bight and southern New England Wind Energy Areas. Three Atlantic sturgeon were captured in the spring surveys from 2012-2022; considering the total of over 1,796 tows, this results in an interaction rate of 0.00167 sturgeon per tow. During these same years, 1 Atlantic sturgeon was captured in the fall surveys; considering the total of over 1,716 tows, this results in an interaction rate of 0.00058 sturgeon per tow. Averaging the two interaction rates for a yearly rate, results in an interaction rate of 0.00113 sturgeon per tow. Applying the NEFSC annual interaction rate (0.00113 sturgeon/tow) to the 32 tows planned per year for the Empire Wind surveys predicts 0.036 Atlantic sturgeon captured per year. Over an eight year survey period, this would result in a predicted total capture of 0.288 Atlantic sturgeon.

The NEAMAP survey has captured 492 sturgeon from 2008-2022 and averages 300 tows per year, this equates to a capture rate of 0.109 sturgeon per tow. Using this data, we would predict the capture of 3.5 Atlantic sturgeon per year in the Empire Wind surveys, resulting in a total predicted capture of 28 Atlantic sturgeon over an eight year survey period.

Given the geographic distribution of the proposed Empire Wind surveys, it is likely that the number of Atlantic sturgeon captured would fall between the number predicted using the NEFSC dataset and the NEAMAP dataset. However, the generally shallow depths of the area (less than 42 m) where the Empire Wind surveys will take place suggests that the NEAMAP survey data would be a better predictor of sea turtle interactions than the NEFSC survey which occurs in deeper, more offshore waters. As such, we expect up to 28 Atlantic sturgeon will be captured over the eight year survey period.

As explained in the *Status of Species* section, the range of all five DPSs overlaps and extends from Canada through Cape Canaveral, Florida. Atlantic sturgeon originating from all five DPSs use the area where trawl gear will be set. The best available information on the composition of the mixed stock of Atlantic sturgeon in Atlantic coastal waters is the mixed stock analysis carried out by Kazyak et al. (2021). The authors used 12 microsatellite markers to characterize the stock composition of 1,704 Atlantic sturgeon encountered across the U.S. Atlantic Coast and provide estimates of the percent of Atlantic sturgeon that belong to each DPS in a number of geographic areas. This study confirmed significant movement of sturgeon between regions irrespective of their river of origin. The Empire Wind survey area falls within the "MID Offshore" area described in that paper. Using that data, we expect that Atlantic sturgeon in the area where trawl surveys will occur originate from the five DPSs at the following frequencies: New York Bight (55.3%), Chesapeake (22.9%), South Atlantic (13.6%), Carolina (5.8%), and Gulf of Maine (1.6%) DPSs (Table 7.5.2). It is possible that a small fraction (0.7%) of Atlantic sturgeon in the action area may be Canadian origin (Kazyak et al. 2021); Canadian-origin Atlantic sturgeon are not listed under the ESA. This represents the best available information on the likely genetic makeup of individuals occurring in this area. Using this data, we predict that the up to 28 Atlantic sturgeon expected to be captured in the Empire Wind trawl surveys will consist of individuals from the 5 DPSs as described in Table 7.5.2 below. Based on the information presented above and in consideration of the short tow times and priority handling of any sturgeon that are captured in the trawl net, we do not anticipate the serious injury or mortality of any

Atlantic sturgeon captured in the trawl gear. Individuals may experience minor abrasions or scrapes but these are expected to be fully recoverable in a short period of time with no effects on individual health or fitness.

Table 7.5.2. Estimated capture of Atlantic sturgeon by DPS in Empire Wind trawl survey. DPS percentages listed are the percentage values representing the genetics mixed stock analysis results (Kazyak et al. 2021). Fractions of animals are rounded to whole animals to generate the total estimate.

Bottom Trawl	Total Estimated Captures Over Eight Years
Total	**28**
New York Bight (55.3%)	15
Chesapeake (22.9%)	6
South Atlantic (13.6%)	4
Carolina (5.8%)	2
Gulf of Maine (1.6%)	1

Estimates derived from NEAMAP Near Shore Trawl Program – Southern Segment data

Effects to Prey

The effects of bottom trawls on benthic community structure have been the subject of a number of studies. In general, the severity of the impacts to bottom communities is a function of three variables: (1) energy of the environment, (2) type of gear used, and (3) intensity of trawling. High-energy and frequently disturbed environments are inhabited by organisms that are adapted to this stress and/or are short-lived and are unlikely to be severely affected, while stable environments with long-lived species are more likely to experience long-term and significant changes to the benthic community (Johnson 2002, Kathleen A. Mirarchi Inc. and CR Environmental Inc. 2005, Stevenson et al. 2004). While there may be some changes to the benthic communities on which Atlantic sturgeon feed as a result of bottom trawling, there is no evidence the bottom trawl activities will have a negative impact on availability of Atlantic sturgeon prey; therefore, effects to Atlantic sturgeon are extremely unlikely to occur and thus discountable.

7.5.3 Assessment of Risk of Interactions with Baited Remote Underwater Video Surveys

As described in Section 3.0, baited remote underwater video (BRUV) surveys to assess the relative abundance and community composition of structure-oriented fish species within the WFA during the pre-construction and post-construction phases of the Project. The survey design will consist of two years of pre-construction sampling and two years of post-construction sampling. Monitoring is also planned during construction, provided the survey will not interfere with construction operations. BRUV surveys will be conducted seasonally (spring, summer, fall, winter). Four BRUVs will be deployed at eight randomly selected turbine locations during each seasonal sampling period. This will result in a total of 128 samples per sampling period. These sampling locations will remain fixed for the duration of the survey (pre- and post-construction). As with the squid trawl survey, the Lease Area with be comprised of two depth strata, where four turbine locations will be sampled in each of the "shallow" (<35 m) and "deep" (>35 m) strata. At each sampling station, four BRUV's will be deployed at increasing distances from the planned turbine foundation location to examine the spatial extent of effects from the turbine foundation and surrounding scour protection. During the pre-construction period the first BRUV will be placed within the buffer zone around the planned turbine foundation location. Post-construction, the BRUV will be placed as close to the turbine foundation as is safely possible and that will allow for an adequate field of view around the turbine base. Three additional BRUVs will be placed at distances of 50 m, 100 m, and 200 m from the base of the turbine so that sampling occurs close to the turbine base and outside of habitat altered by turbine construction. BRUVs will use a vertical line attached to a surface buoy that will hold a stereo-camera system in the water column for approximately 60 minutes. The BRUVs will be tended during their deployment and survey staff will monitor for listed species during their deployment to ensure no interactions occur.

BRUVs will result in the temporary presence of four vertical lines deployed at each of the eight sampling locations. Despite the general concerns about the risk of entanglement for ESA-listed species due to buoy and anchor lines, we have determined that entanglement of ESA-listed species in vertical lines associated with the BRUVs is extremely unlikely to occur. This is because the limited number of vertical lines (four total per sampling location), the short soak times (and 60 minutes for BRUVs), and pre-deployment and continued observation for ESA-listed species makes it extremely unlikely that any ESA-listed species will encounter vertical lines associated with BRUVs. Risk reduction measures including the use of weak link and weak rope (engineered to break at 1,700 pounds [771 kg] or less) for all lines used in the survey to further reduce entanglement risks for ESA-listed species. Based on the analysis herein, it is extremely unlikely that any ESA-listed species will interact with the structure-associated fishes survey activities, and any effects to ESA-listed species because of structure-associated fishes surveys are extremely unlikely to occur and thus discountable.

7.5.4 Impacts to Habitat

Here we consider any effects of the proposed marine resource survey and monitoring activities on habitat of listed species. The SPI/PV equipment will be set on the ocean floor, which could result in disturbance of benthic resources. Acoustic receivers and moored PAM systems may include a lander or anchor that would rest on the seafloor. However, the size of the area that would be disturbed by setting this gear is extremely small and any effects to benthic resources would be limited to temporary disturbance of the bottom in the immediate area where the gear is set. In an analysis of effects to habitat from fishing gears, mud and sand habitats were found to recover more quickly than courser substrates (see Appendix D in NEFMC 2016, NEFMC 2020). No effects to any ESA listed species are anticipated to result from this small, temporary, intermittent, disturbance of the bottom sediments.

An assessment of fishing gear impacts found that mud, sand, and cobble features are more susceptible to disturbance by trawl gear, while granule-pebble and scattered boulder features are less susceptible (see Appendix D in NEFMC 2016, NEFMC 2020). Geological structures generally recovered more quickly from trawling on mud and sand substrates than on cobble and boulder substrates; while biological structures (i.e. sponges, corals, hydroids) recovered at similar rates across substrates. Susceptibility was defined as the percentage of habitat features encountered by the gear during a hypothetical single pass event that had their functional value reduced, and recovery was defined as the time required for the functional value to be restored (see Appendix D in NEFMC 2016, NEFMC 2020). The otter trawl may also interact with the ocean floor and may affect bottom habitat in the areas surveyed. However, given the infrequent survey effort, the limited duration of the surveys, and the very small footprint, any effects to ESA listed species resulting from these minor effects to benthic habitat will be so small that they cannot be meaningfully measured, evaluated, or detected and are thus insignificant. Similarly, the deployment of moored PAM or other data collection buoys would result in minor impacts to the substrate and benthic habitat. Given the small number of moored buoys, the dispersed nature of their deployment, and the very small footprint, any effects to ESA listed species resulting from these minor effects to benthic habitat will be so small that they cannot be meaningfully measured, evaluated, or detected and are thus insignificant.

7.6 Consideration of Potential Shifts of Displacement of Fishing Activity

As described in Section 7.2 (*Effects of Project Vessels*) the lease area and the area along the cable corridors, support commercial and recreational fishing activity throughout the year (Empire 2023). Fishing activity includes a variety of fixed gear (e.g. gillnets, pot/traps, hook and line) and mobile gear fisheries (e.g. trawl (bottom and mid-water)) and dredge gear (clam and scallop) targeting a variety of species. Fishing effort is highly variable due to factors including target species distribution and abundance, environmental conditions, fishing regulations, season, and market value. Within the Empire Wind lease area, scallop dredge is the primary commercial fishing gear utilized in terms of revenue. The primary landed commercial species in tonnage were Atlantic menhaden, Atlantic herring, and American lobster, while American lobster, Atlantic sea scallops, blue crab, and Eastern oyster were the most economically valuable species within the Empire Wind Study Area (BOEM 2023, NEFMC 2021, MAFMC 2021, ASMFC 2021, NMFS 2021a, NMFS 2021c). As described in the COP, based on the VMS data for the most recent set of years commercial species harvested in the lease area consist primarily of groundfish, squid, scallops, and ocean quahogs; based on the VMS data, for many of these target species most of the commercial fishing activity is located in the southeastern, southwestern, and northwestern portions of the Empire Wind Lease Area, with scallops being widespread throughout the lease area. As addressed in Sections 5 (*Status of the Species*) and 6 (*Environmental Baseline*) of this Opinion, interactions between fishing gear (e.g., bycatch, entanglement) and listed whales, sea turtles, and Atlantic sturgeon occur throughout their range and may occur in the action area.

Here, we consider how the potential shift or displacement of fishing activity from the lease area and cable corridors, because of the proposed project, may affect ESA listed whales, sea turtles, and Atlantic sturgeon. As described in Section 3.9.5.3 of the DEIS, potential impacts to fishing activities in the lease area and along the cable corridors during the construction phase of the proposed project are primarily related to accessibility due to construction activities and the presence of structures (BOEM 2023). During the construction and decommissioning phases, potential effects to fishing operations include displacement of vessel transit routes and shifts in fishing effort due to disruption in access to fishing grounds in the areas where construction activities will occur due to the presence of Project vessels, construction activities, and the structures themselves (wind turbine generators, scour protection, and cables). Impacts to fishing operations during the operational phase may result from habitat conversion, safety concerns operating around structures, and other factors that may affect access (increased user conflicts, increased insurance rates, etc.).

While changes in distribution and abundance of species targeted by commercial fisheries could occur during construction due to exposure to increased sediment, noise, and vibration, these effects are anticipated to be short-term and localized and not result in any changes in abundance or distribution of target species that would be great enough to result in changes in patterns of fishing activity. To the extent that construction has negative effects on the reproductive success of commercial fish species (e.g., Atlantic cod, longfin squid), there is the potential for a decrease in fish abundance and future consequences on fishing activity. Impacts during the decommissioning phase of the Project are expected to be similar. Displacement of fishing vessels and shifts in operations during the construction and decommissioning phases that are related to a shift or change in target species distribution and abundance are expected. Although the magnitude of the shifts is unknown based on the natural variability of the fisheries, fisheries impacts resulting from habitat impacts are likely to be related to the habitat conversion resulting from the presence of structures and scour protection which is estimated to result in approximately 254 acres of hard-bottom habitat inclusive of EW1 and EW2) (BOEM BA 2023).

During the operational phase of the project, the potential impacts to fishing activity are primarily anticipated from potential accessibility issues due to the presence and spacing of WTGs and the OSSs as well as potential avoidance of the inter-array and export cable routes due to concerns related to avoiding the potential for snags or other interactions with the cable or cable protection. Additionally, there may be localized impacts on the abundance and distribution of some target species due to changes in habitat conditions (e.g., habitat conversion due to foundations and scour/cable protection and associated changes to predator/prey relationships, noise and vibration associated with turbine operations, consequences of reef effect resulting in changes in localized species composition). While there are no restrictions proposed for fishing activity in the WDA, the presence and spacing of structures (less than 1x1 nautical miles) could impede fishing operations for certain gear types. Additionally, as explained in Section 7.4, the structures will provide new hard bottom habitat in the WDA creating a “reef effect” that may attract fish and, as a result, fishermen, particularly recreational anglers and party/charter vessels. This could create vessel congestion and could dissuade commercial vessels from fishing among the structures.

The potential for shifts in fishing effort due to the proposed project is expected to vary by gear type, vessel size, and fishery targeted. Of the gear types that fish within the lease area and cable corridors, bottom tending mobile gear is more likely to be displaced than fixed gear, with larger fishing vessels using dredges and trawl gear, including mid-water trawl gear, more likely to be displaced compared to smaller fishing vessels using similar gear types that may be easier to maneuver. However, even without any area use restrictions, there may be different risk tolerances among vessel captains that could lead to at least a temporary reduction in fishing effort in the lease area and along the cable corridors during construction and decommissioning activities, and longer-term reduction of fishing effort during the operational phase of the project. Space use conflicts due to displacement of commercial fishing activity from the lease area to surrounding waters could cause a temporary or permanent reduction in such fishing activities within the lease area and an increase in fishing activities elsewhere. Additionally, there could be increased potential for gear conflicts within the lease area as commercial fisheries and for-hire and private recreational fishing compete for space between turbines, especially if there is an increase in recreational fishing for structure-affiliated species attracted to the foundations (e.g., black sea bass). Fixed gear fisheries, may resume or even increase fishing activity in the lease area and along the cable corridors shortly after construction because these fisheries are relatively static (i.e., relatively stationery in location), though there may be small shifts in gear placement to avoid areas very close to project infrastructure. Mobile fisheries may take longer to resume fishing activity within the lease area or along the cable corridors as the physical presence of the new Project infrastructure may alter the habitat, behavior of fishing vessels, and target species. Research has shown that fishermen's adaptive behavior differs for various reasons; some vessels may choose not to resume fishing in the lease area and portions of the cable corridor due to potential operational safety risks, while others may continue operations in other areas near their traditional fishing grounds, yet others may leave the fishery entirely (O'Farrell et al. 2019, Papaioannou et al. 2021). However, for all fisheries, any changes in fishing location are expected to be limited to moves to nearby, geographically adjacent areas, given the distribution of target species, distance from home ports, and existing fishing regulations limiting where/when vessels can use certain gears, all of which limit the potential for significant geographic shifts in distribution of fishing effort.

The New York Bight is one of the busiest areas for commercial vessel traffic on the Eastern Seaboard with a large number of commercial and recreational fishing vessels that transit and fish in the waters in and near the Lease Area. The extent of fishing activity within the Project area is variable, while direct observation combined with AIS records and VMS data indicate low levels of fishing activity within the Project area in the most recent years (see Section 8.8.2 of the COP for particular fisheries in specific areas). Fishing activity will not be prohibited within the lease area and the proposed spacing of the turbines could allow for fishing activity to occur, depending on the risk tolerance of the operator and weather conditions, vessel congestion, and other factors (e.g., insurance premiums). Any reduction in fishing effort in the lease area would reduce the potential for interactions between listed species and fishing gear in the lease area, yet any beneficial effect would be expected to be so small that it cannot be meaningfully measured, evaluated, or detected. Similarly, any effects to listed species from shifts of fishing effort to areas outside of the WDA are also expected to be so small that they cannot be meaningfully measured, evaluated, or detected. This is because any potential shifts are expected to be limited to small changes in geographic area and any difference in the risk of interaction between fishing gear and listed species is expected to be so small that it cannot be meaningfully measured, detected, or evaluated.

As explained in Section 7.4 above, the presence of new structures (e.g., WTGs and OSS foundations) may also act as artificial reefs and could theoretically attract a range of species, including listed species such as sea turtles and sturgeon if the foundations serve to aggregate their prey. As explained in Section 7.4, any changes in biomass around the foundations are expected to be so small and localized that they would have insignificant effects on the distribution, abundance, and use of the lease area by listed sea turtles or Atlantic sturgeon. We do not expect that any reef effect would result in any increase in species preyed on by North Atlantic right, fin or sei whales and note that sperm whales are generally not expected to forage in the shallow waters of the lease area. As noted previously, we do not expect any effects on the distribution, abundance, or use of the lease area by ESA listed whales that would be attributable to the physical presence of the foundations.

This potential increase in biomass around the new structures (i.e., the WTG and OSS foundations and associated scour protection) may result in an increase in recreational anglers targeting structure affiliated fish species and subsequently may increase incidental interactions between recreational anglers and listed species. At the Block Island Wind Farm (Rhode Island), and offshore wind farms in Europe, recreational fishermen have expressed a generally positive sentiment about the wind farm as an enhanced fishing location due to the structures as there are no other offshore structures or artificial reefs in surrounding waters (Hooper, Hattam & Austern 2017, ten Brink & Dalton 2018, Smythe, Bidwell & Tyler 2021). In general, interactions between listed species, particularly sea turtles, and recreational fishing do occur, especially in areas where target species and listed species co-occur (Rudloe & Rudloe 2005, Seney 2016, Swingle et al. 2017, Cook, Dunch & Coleman 2020). Listed sea turtles may be attracted to the structures of the foundations to forage and seek refuge and also may be attracted to bait used by anglers, depending on species; however, as explained below, we expect any increase in risk of interactions with sea turtles resulting from the proposed action to be so small that it cannot be meaningfully measured, detected, or evaluated and is therefore insignificant.

The seafloor of New York Bight is predominantly characterized as sand with isolated patched of gravel-sand and occasional outcropping and subcropping older, more inundated strata (Empire 2023). This habitat supports a moderate level of recreational fishing activity, primarily in the summer, and if there is an increase in recreational fishing in the lease area, it is likely that this will represent a shift in fishing effort from areas outside the lease to within the lease and/or an increase in overall effort. Given the limited number of foundations (149) proposed to be installed and vessel safety concerns regarding being too close to foundations and other vessels, the likelihood of a significant number of recreational fishermen aggregating around the same turbine foundation at the same time is low. It is not likely that targeted recreational fishing pressure will increase to a point of causing a heightened risk of negative impact for any listed species including entanglement, bycatch, or incidental hooking/capture; that is, effects will be so small that they cannot be meaningfully measured, evaluated, or detected and are, therefore, insignificant.

Whales colliding/hitting vessels, primarily recreational vessels engaged in fishing activities is uncommon to begin with, but can happen[54], primarily when prey of whales and species targeted by fishermen co-occur. As mentioned in Section 7.4.3.1, it is expected whales will be able to transit the lease area freely given the spacing between turbine foundations and as explained in Section 7.4.3.2, turbine foundations are not expected to cause an increase in prey that would then result in greater co-occurrence of prey, target species, whales, and vessels and thus risk of whales colliding with vessels engaged in fishing. We expect the risk posed to protected species from any shifts and/or displacement of recreational fishing effort caused by the action to be so small that they cannot be meaningfully measured, evaluated, or detected and are therefore, insignificant. For the same reasons, we do not expect any increased vessel strike risk from fishing vessels and Atlantic sturgeon or sea turtles.

In summary, we expect the risks of entanglement, bycatch, or incidental hooking interactions due to any shifts or displacement of recreational or commercial fishing activity caused by the

[54] https://boston.cbslocal.com/2021/07/13/block-island-whale-boat-rescue/

proposed Project to be so small that they cannot be meaningfully measured, evaluated, or detected; therefore, effects to listed species are insignificant.

7.7 Repair and Maintenance Activities

Empire Wind personnel conducting O&M activities would access the lease area on an as-needed basis. With no personnel living offshore, the WTGs and OSS would be remotely monitored and controlled by the Supervisory Control and Data Acquisition (SCADA) system, which connects the WTGs to the OSS and the OSS to the Empire Wind Export Cable with fiber optic cables that would be embedded in the inter-array and export cables. Personnel would not be required to be present except to inspect equipment and conduct repairs. Effects of vessel traffic associated with repairs and maintenance during the operations phase is considered in section 7.2. Effects of noise associated with project vessels and aircraft are addressed in section 7.1; effects were determined to be insignificant. Project components would be inspected routinely with the frequency dependent on the component (see Section 3.5 in the COP). Underwater inspection would include visuals and eddy current tests conducted by divers or remotely operated vehicles. Effects of inspections and associated surveys are considered in Sections 7.1 and 7.5 above.

BOEM has indicated that given the burial depth (4-6 ft., 1-2 m, below sea floor) of the inter-array cable and the Empire Wind Export Cable-Offshore, displacement, or damage by vessel anchors or fishing gear is unlikely. Mechanical inspections of the Empire Wind Export Cable would include a cable burial assessment and debris field inspection. Empire Wind would perform mechanical inspections on a 5-year basis or following a storm event that may necessitate an unplanned inspection. In the event that cable repair was necessary due to mechanical damage, it could be necessary to remove a portion of the cable and splice in a new section. We determined that acoustic and habitat based effects of cable installation would be extremely unlikely to occur and are therefore discountable; as any cable repair will essentially follow the same process as cable installation except in only a small portion of the cable route and for a shorter period of time, we expect that the effects will be the same or less and therefore would also be insignificant. This conclusion is made in consideration of any repairs or additions to cable protection that is placed during cable installation.

Based on our review of the planned repair and maintenance activities described in the BA, DEIS, and COP, no additional effects beyond those considered in the previous sections of this Opinion are anticipated to result from repair and maintenance activities over the life of the project (BOEM 2023, Empire Wind DEIS 2023, Empire 2023).

7.8 Unexpected/Unanticipated Events -Failure of Foundations, WTGs, and OSSs

In this Section, we consider the “low probability events” that were identified by BOEM in the Empire Wind in the DEIS (Section 2.3). These events, while not part of the proposed action (because they are unexpected and would only occur as a result of an unanticipated or emergency event), include collisions between vessels, allisions (defined as a strike of a moving vessel against a stationary object) between vessels and WTGs or the OSS, and accidental spills. Here, we consider effects of these events on ESA listed species.

7.8.1 Oil Spill/Chemical Release

As explained in the Oil Spill Response Plan (OSRP) (COP, Appendix A), the worst-case discharge scenario would be a structural failure of the offshore substation (see Sections below for consideration of the failure of structures). A structural collapse would cause a subsequent rupture of the transformers oil reservoir (158,503 gallons) and the generator's diesel tank (7,925 gallons) for a total release of 166,428 gallons. Similarly, the structural failure of a WTG resulting in collapse and damage that released oil products would in the worst case, release 3,865 gallons of oil products in the ocean. The risk of a spill in the extremely unlikely event of a collapse is limited by the containment built into the structures. Both the WTGs and OSSs have been designed with a minimum of 110% of secondary containment of all identified oils, grease, and lubricants (Empire 2023). As explained above, catastrophic loss of any of the structures is extremely unlikely; therefore, the spill of oil from these structures is also extremely unlikely to occur. Modeling presented by BOEM in the BA (from Bejarano et al. 2013) indicates that there is a 0.01% chance of a "catastrophic release" of oil from the wind facility in any given year. Given the 35-year life of this project, the modeling supports our determination that such a release is extremely unlikely to occur and therefore, effects are discountable.

The Bejarano et al. (2013) modeling indicates the only incidents calculated to occur as a result of the Empire Wind project over its anticipated operational lifespan are spills of up to 90 to 440 gallons (340.7 to 1,665.6 liters) of WTG fluid or a diesel fuel spill of up to 2,000 gallons (7,570.8 liters) with model results suggesting that such spills would occur no more frequently than once in 10 years and once in 10-50 years, respectively. However, this modeling assessment does not account for any of the spill prevention plans that will be in place for the project which are designed to reduce risk of accidental spills/releases. Considering the predicted frequency of such events (i.e., no more than 3 WTG fluid spills over the anticipated 35-year life of the WTGs and no more than one diesel spill over the life of the project), and the reduction in risk provided by adherence to USCG and BSEE requirements as well as adherence to the spill prevention plan both of which are designed to eliminate the risk of a spill of any substance to the marine environment, we have determined that any fuel or WTG fluid spill is extremely unlikely; as such, any exposure of listed species to any such spill is also extremely unlikely and effects are discountable.

7.8.2 Vessel Collision/Allision with Foundation

A vessel striking a wind turbine theoretically could result in a spill of oil and/or other chemicals contained in the WTG or OSS or catastrophic failure/collapse of the foundation and a WTG or OSS. Effects of oil and chemical spills are addressed above. However, there are several measures in place that ensure such an event is extremely unlikely to occur. These include: inclusion of project components on nautical charts which would limit the likelihood of a vessel operator being unaware of the project components while navigating in the area; compliance with lighting and marking required by the USCG which is designed to allow for detection of the project components by vessels in the area; and, spacing of turbines to allow for safe navigation through the project area. Because of these measures, a vessel striking a turbine foundation or the OSS is extremely unlikely to occur. The Navigational Risk Assessment prepared for the project reaches similar conclusions and determined that it is highly unlikely that a vessel will strike a foundation and even in the unlikely event that such a strike did occur, the collapse of the foundation is highly unlikely even considering the largest/heaviest vessels that could transit the lease area. Therefore, based on this information, any effects to listed species that could theoretically result from a vessel collision/allision (i.e., oil/chemical spill, being struck by a failing structure) are extremely unlikely to occur and therefore, are discountable.

7.8.3 Failure of WTGs and OSSs due to Weather Event

As explained in the COP (2023) and DEIS (Section 2.3), Empire Wind designed the proposed Project components to withstand severe weather events. The WTGs are equipped with safety devices to ensure safe operation during their lifetime. These safety devices may vary depending on the WTG selected and may include vibration protection, over speed protection, and aerodynamic and mechanical braking systems, as well as electrical protection devices. In the COP, Empire Wind states that the WTG support structures (i.e., towers and foundations) will be designed to withstand 500-year hurricane wind and wave conditions, and the external platform level will be designed above the 1,000-year wave scenario. The OSSs will be designed to at least the 5,000-year hurricane wind and wave conditions in accordance with the American Petroleum Institute standards.

Few hurricanes pass directly through the New York Bight. Data provided by NOAA's Historical Hurricane Tracks database within 50nm of the Lease Area include one Category 2 storm (Storm Gloria, 1985) and two Category 1 storms (Storm Belle, 1976, and an unnamed storm in 1934) that intersected the Lease Area (Anatec 2022). The area is subjected to frequent Nor'easters that form offshore between Georgia and New Jersey, and typically reach maximum intensity in New England. These storms are usually characterized by winds from the Northeast, heavy precipitation, wind, storm surges, and rough seas. The greatest threat of tropical and extra tropical storms is in August and September (Anatec 2022). As described in the NRSA (Anatec 2022), a 17.5-year time series of hourly wind speed indicates a mean wind speed of 14.1 knots (7.2.0 m/s) at 33 ft. (10 m) with the highest wind speeds occurring between November and February. The maximum hourly average was 62.8 knots. As reported in the NRRSA, this is consistent with other wind speed data sets in this region. Empire Wind does not foresee a hazard to the integrity of WTGs due to ice accumulation because, should ice accumulate on WTG blades, the weight and center of mass of the blade would change causing an imbalance in the rotor. Should the rotor continue to rotate, it would vibrate, and vibrational sensors installed in the WTG would automatically trigger the WTG to shut down.

BOEM has indicated that the proposed WTGs and OSSs will meet design criteria to withstand extreme weather conditions that may be faced in the future. This includes consideration of 50-year 10 minute wind speed values and ocean forces for WTGs and 100-year 10 minute wind speed values and ocean forces for OSSs. The 50-year 10 minute wind speed is estimated to be 86.5 knots and the 100-year 10 minute wind speed is estimated to be 98 2 knots. (A 100-year 10-minute wind speed means there is a 1-percent chance of that event occurring in any given year, similarly a 50-year wind speed means there is a 2% chance of that happening in any given year.). The design will also be in accordance with various standards including International Electrotechnical Commission (IEC) 61400-1 and 61400-3. These standards require designs to withstand forces based on a 50-year return interval for the turbines, and 100-year return interval for electrical substation platforms. The requirements for extreme metocean loading for WTGs are based on 50-year return interval site-specific conditions for most operating load cases with a 500-year abnormal "robustness" load case check (a 500-year event has a 0.2% chance of occurring in any given year). The requirements for extreme metocean loading for OSSs are based on 100-year return interval site-specific conditions for most operating load cases with a 10,000-year abnormal "robustness" load case check for OSSs. BOEM states that the design standards are adequate even considering the predicted increase in hurricane activity that is anticipated to result from climate change (BOEM 2022).

Given that the project components are designed to endure wind and wave conditions that are far above the maximum wind and wave conditions recorded at the nearest weather monitoring buoy to the project, and exceed conditions for which there is only a 1% chance of occurring in any year (100-year event), it is not reasonable to conclude that project components will experience a catastrophic failure due to a weather event over the next 25-35 years. In other words, project components have been designed to withstand conditions that are not expected to occur more than once over the next 100 years (e.g., exceeding 100-year 10 minute wind speed values and ocean forces). As a catastrophic failure would require conditions that are extremely unlikely to occur, even considering projections of increased hurricane activity related to climate change projections over the next 25-35 years, any associated potential impacts to listed species resulting from foundation failure and associated debris and/or release or oil or other chemicals, as well as the strike of a listed species by a failing structure, are also extremely unlikely and therefore, discountable.

7.8.4 Failure of WTGs due to Seismic Activity
The Project is not within an active plate boundary area associated with an elevated seismic hazard, however earthquakes can occur in intra-plate areas. Data compiled by the Lamont Seismic Network, Columbia University, reports that there were 284 earthquakes recorded in in the northeastern United States and eastern Canada between 1990 and 2001, ranging between magnitudes 1 and 4.5. The closest cluster of micro-seismicity is associated with the Ramapo Fault Zone. Running southwest to northeast, it spans the northern portion of the state of New Jersey and has approximate endings near Schaefferstown, PA and Haverstraw, NY. The distance between the project area and local fault lines is such that events such as fault rupture, where fault movements are significant enough to breach the surface (which only occurs in a portion of earthquakes) are unlikely to occur in the lease area; therefore, effects to listed species that would be caused by a WTG's structural or equipment failure are extremely unlikely to occur and therefore, discountable.

7.9 Project Decommissioning
Consistent with current BOEM and BSEE requirements, Empire Wind would be required to remove or decommission all installations and clear the seabed of all obstructions created by the proposed Project within 2 years of the termination of its lease. All facilities would need to be removed 15 ft. (4.6 m) below the mudline (30 CFR § 585.910(a)). The portion buried below 15 ft. (4.6 m) would remain, and the depression refilled with the temporarily removed sediment. BOEM expects that WTGs and the OSS would be disassembled and the piles cut below the mudline. Empire Wind would clear the area after all components have been decommissioned to ensure that no unauthorized debris remains on the seabed. A cable-laying vessel would be used to remove as much of the inter-array and Empire Wind Export Cable transmission cables from the seabed as practicable to recover and recycle valuable metals. Cable segments that cannot be easily recovered would be left buried (below the seabed or rock armoring) (at least 4 to 6 ft. below the mudline).

Information on the proposed decommissioning is very limited and the information available to us in the BA, DEIS, and COP limits our ability to carry out a thorough assessment of effects on listed species. Here, we evaluate the information that is available on the decommissioning. We note that prior to decommissioning, Empire Wind would be required to submit a decommissioning plan to BOEM and/or BSEE. According to BOEM, this would be subject to an approval process that is independent of the proposed COP approval. BOEM indicates in the DEIS that the approval process will include an opportunity for public comment and consultation with municipal, state, and federal management agencies. Empire Wind would need to obtain separate and subsequent approval from BOEM and/or BSEE to retire any portion of the Proposed Action in place. Given that approval of the decommissioning plan will be a discretionary Federal action, albeit one related to the present action, we anticipate that a determination will be made based on the best available information at that time whether reinitiation of this consultation is necessary to consider effects of decommissioning that are different from those considered here.

As described in Section 3.6 of the COP, it is anticipated that the equipment and vessels used during decommissioning will likely be similar to those used during construction and installation (Empire 2023). For offshore work, vessels would likely include cable laying vessels, crane barges, jack-up barges, larger support vessels, tugboats, crew transfer vessels, and possibly a vessel specifically built for erecting WTG structures. Effects of the vessel traffic anticipated for decommissioning are addressed in section 7.2 of this Opinion. As described below, we have determined that all other effects of decommissioning will be insignificant.

As described in the COP 2023), if cable removal is required, the first step of the decommissioning process would involve disconnecting the inter-array 66 kV cables from the WTGs. Next, the inter-array cables would be pulled out of the J-tubes or similar connection and extracted from their embedded position in the seabed. In some places, in order to remove the cables, it may be necessary to jet plow the cable trench to fluidize the sandy sediments covering the cables. Then, the cables will be reeled up onto barges. Lastly, the cable reels will then be transported to the port area for further handling and recycling. The same general process will likely be followed for the 230 kV and 345 kV offshore export cables. If protective concrete mattresses or rocks were used for portions of the cable run, they will be removed prior to recovering the cable. We determined that acoustic and habitat based effects of cable installation would be insignificant or extremely unlikely to occur; as the cable removal will essentially follow the same process as cable installation except in reverse, we expect that effects will be the same and therefore would also be insignificant or extremely unlikely to occur.
Prior to dismantling the WTGs, they would be properly drained of all lubricating fluids, according to the established operations and maintenance procedures and the OSRP. Removed fluids would be brought to the port area for proper disposal and/or recycling. Next, the WTGs would be deconstructed (down to the transition piece at the base of the tower) in a manner closely resembling the installation process. The blades, rotor, nacelle, and tower would be sequentially disassembled and removed to port for recycling using vessels and cranes similar to those used during construction. It is anticipated that almost all of the WTG will be recyclable, except possibly for any fiberglass components. After removing the WTGs, the steel transition pieces and foundation components would be decommissioned.

Sediments inside the monopile could be suctioned out and temporarily stored on a barge to allow access for cutting. Because this sediment removal would occur within the hollow base of the monopile, no listed species would be exposed to effects of this operation. The foundation and transition piece assembly is expected to be cut below the seabed in accordance with the BOEM's removal standards (30 C.F.R. 250.913). The portion of the foundation below the cut will likely remain in place. Depending upon the available crane's capacity, the foundation/transition piece assembly above the cut may be further cut into several more manageable sections to facilitate handling. Then, the cut piece(s) would be lifted out of the water and placed on a barge for transport to an appropriate port area for recycling.
The steel foundations would likely be cut below the mudline using one or a combination of: underwater acetylene cutting torches, mechanical cutting, or a high pressure water jet. The OSS foundation piles will likely be removed according to the same procedures used in the removal of the WTG foundations.

BOEM did not provide any estimates of underwater noise associated with pile cutting, and we did not identify any reports of underwater noise monitoring of pile cutting with the proposed methods. Hinzmann et al. (2017) reports on acoustic monitoring of removal of a met-tower monopile associated with the Amrumbank West offshore wind project in the North Sea off the coast of Germany. Internal jet cutting (i.e., the cutter was deployed from inside the monopile) was used to cut the monopile approximately 2.5 m below the mudline. The authors report that the highest sound levels were between 250 and 1,000 Hz. Frequent stopping and starting of the noise suggests that this is an intermittent, rather than continuous noise source. The authors state that values of 160 dB SELcum and 190 dB Peak were not exceeded during the jet cutting process. At a distance of 750 m from the pile, noise attenuated to 150.6 dB rms. For purposes of this consultation, and absent any other information to rely on, we assume that these results are predictive of the underwater noise that can be expected during pile removal during project decommissioning. As such, using these numbers, we would not expect any injury to any listed species because the expected noise levels are below the injury thresholds for whales, sea turtles, and Atlantic sturgeon. We also do not expect any exposure to noise that could result in behavioral disturbance of sea turtles or whales because the noise is below the levels that may result in behavioral disturbance. Therefore, any effects to listed species are either extremely unlikely to occur and therefore discountable or will be so small that they cannot be meaningfully measured, detected, or evaluated and therefore, insignificant.

Any Atlantic sturgeon within 750 m of the pile being cut would be exposed to underwater noise that is expected to elicit a behavioral response. Exposure to that noise could result in short-term behavioral or physiological responses (e.g., avoidance, stress). Exposure would be brief, just long enough to detect and swim away from the noise, and consequences limited to avoidance of the area within 750 m of the pile during the activity. As such, effects to Atlantic sturgeon will be so small that they cannot be meaningfully measured, evaluated, or detected, and would be insignificant.

The sediments previously removed from the inner space of the pile would be returned to the depression left once the pile is removed. To minimize sediment disturbance and turbidity, a vacuum pump and diver or ROV-assisted hoses would likely be used. This, in combination with the removal of the stones used for scour protection and any concrete mattresses used along the cable route, would reverse the conversion of soft bottom habitat to hard bottom habitat that would occur as a result of project construction. Removal of the foundations would remove the potential for reef effects in the lease area. As we determined that effects of habitat conversion due to construction would be insignificant, we expect the reverse to also be true and would expect that effects of habitat conversion back to pre-construction conditions would also be insignificant.

7.10 Consideration of the Effects of the Action in the Context of Predicted Climate Change due to Past, Present, and Future Activities

Climate change is relevant to the *Status of the Species*, *Environmental Baseline*, *Effects of the Action*, and *Cumulative Effects* sections of this Opinion. In the *Status of the Species* section, climate change as it relates to the status of particular species is addressed. Rather than include partial discussion in several sections of this Opinion, we are synthesizing our consideration of the effects of the proposed action in the context of anticipated climate change here.

In general, waters in the Mid-Atlantic are warming and are expected to continue to warm over the 25-to-30-year life of the Empire Wind project. However, waters in the North Atlantic Ocean have warmed more slowly than the global average or slightly cooled. This is because of the Gulf Stream's role in the Atlantic Meridional Overturning Circulation (AMOC). Warm water in the Gulf Stream cools, becomes dense, and sinks, eventually becoming cold, deep waters that travel back equatorward, spilling over features on the ocean floor and mixing with other deep Atlantic waters to form a southward current approximately 1500 m beneath the Gulf Stream (IPCC 2021). Globally averaged surface ocean temperatures are projected to increase by approximately 0.7 °C by 2030 and 1.4 °C by 2060 compared to the 1986-2005 average (IPCC 2014), with increases of closer to 2°C predicted for the geographic area that includes the action area. The water temperatures in the immediate project area range from 6-24°C, with the warmest temperatures occurring July through September (9-24°C) and the coldest temperatures occurring February through April (5-7°C), depending on depth (BOEM 2023, NOAA 2013). Based on recent predictions (IPCC 2014[55]), this could shift to a range of 7.9°C in the winter to 23.8°C in the summer. Ocean acidification is also expected to increase over the life of the project (Hare et al. 2016) which may affect the prey of a number of ESA listed species. Ocean acidification is contributing to reduced growth or the decline of zooplankton and other invertebrates that have calcareous shells (Pacific Marine Environmental Laboratory [PMEL] 2020).

We have considered whether it is reasonable to expect ESA listed species whose northern distribution does not currently overlap with the action area to occur in the action area over the project life due to a northward shift in distribution. We have determined that it is not reasonable to expect this to occur. This is largely because water temperature is only one factor that influences species distribution. Even with warming waters we do not expect hawksbill sea turtles to occur in the WDA because there will still not be any sponge beds or coral reefs that hawksbills depend on and are key to their distribution (NMFS and USFWS 2013). We also do

[55] IPCC 2014 is used as a reference here consistent with NMFS 2016 Revised Guidance for Treatment of Climate Change in NMFS Endangered Species Act Decisions (Available at: *https://www.fisheries.noaa.gov/national/endangered-species-conservation/endangered-species-act-guidance-policies-and-regulations*, last accessed March 2, 2023).

not expect giant manta ray or oceanic whitetip shark to occur in the WDA. Oceanic whitetip shark are a deep-water species (typically greater than 184 m) that occurs beyond the shelf edge on the high seas (Young et al. 2018). Giant manta ray also occur in deeper, offshore waters and occurrence in shallower nearshore waters is coincident with the presence of coral reefs that they rely on for important life history functions (Miller et al. 2016). Smalltooth sawfish do not occur north of Florida. Their life history depends on shallow estuarine habitats fringed with vegetation, usually red mangroves (Norton et al. 2012); such habitat does not occur in the WDA and would not occur even with ocean warming over the course of the proposed action. As such, regardless of the extent of ocean warming that may be reasonably expected in the action area over the life of the project, the habitat will remain inconsistent with habitats used by ESA listed species that currently occur south of the lease area. Therefore, we do not anticipate that any of these species will occur in the lease area over the life of the proposed action.

We have also considered whether climate change will result in changes in the use of the action area by Atlantic sturgeon or the ESA listed turtles and whales considered in this consultation. In a climate vulnerability analysis, Hare et al. (2016) concluded that Atlantic sturgeon are relatively invulnerable to distribution shifts. Given the extensive range of the species along nearly the entire U.S. Atlantic Coast and into Canada, it is unlikely that Atlantic sturgeon would shift out of the action area over the life of the project. If there were shifts in the abundance or distribution of sturgeon prey, it is possible that use of lease area by foraging sturgeon could become more or less common. However, even if the frequency and abundance of use of the lease area by Atlantic sturgeon increased over time, we would not expect any different effects to Atlantic sturgeon than those considered based on the current distribution and abundance of Atlantic sturgeon in the action area.

Use of the action area by sea turtles is driven at least in part by sea surface temperature, with sea turtles absent from the WDA from the late fall through mid-spring due to colder water temperatures. An increase in water temperature could result in an expansion of the time of year that sea turtles are present in the action area and could increase the frequency and abundance of sea turtles in the action area. However, even with a 2°C increase in water temperatures, winter and early spring mean sea surface temperatures in the WDA are still too cold to support sea turtles. Therefore, any expansion in annual temporal distribution in the action area is expected to be small and on the order of days or potentially weeks, but not months. Any changes in distribution of prey would also be expected to affect distribution and abundance of sea turtles and that could be a negative or positive change. It has been speculated that the nesting range of some sea turtle species may shift northward as water temperatures warm. Currently, nesting in the mid-Atlantic is extremely rare. In order for nesting to be successful, fall and winter temperatures need to be warm enough to support the successful rearing of eggs and sea temperatures must be warm enough for hatchlings to survive when they enter the water. Predicted increases in water temperatures over the life of the project are not great enough to allow successful rearing of sea turtle hatchlings in the action area. Therefore, we do not expect that over the time-period considered here, that there would be any nesting activity or hatchlings in the action area. Based on the available information, we expect that any increase in the frequency and abundance of use of the lease area by sea turtles due to increases in mean sea surface temperature would be small. Regardless of this, we would not expect any different effects to sea turtles than those considered based on the current distribution and abundance of sea turtles in the action area. Further, given that any increase in frequency or abundance of sea turtles in the action area is expected to be small we do not expect there to be an increase in risk of vessel strike above what has been considered based on current known distribution and abundance.

The distribution, abundance and migration of baleen whales reflects the distribution, abundance and movements of dense prey patches (e.g., copepods, euphausiids or krill, amphipods, shrimp), which have in turn been linked to oceanographic features affected by climate change (Learmonth et al. 2006). Changes in plankton distribution, abundance, and composition are closely related to ocean climate, including temperature. Changes in conditions may directly alter where foraging occurs by disrupting conditions in areas typically used by species and can result in shifts to areas not traditionally used that have lower quality or lower abundance of prey.

Climate change is unlikely to affect the frequency or abundance of sperm or blue whales in the action area. The species rarity in the WDA is expected to continue over the life of the project due to the depths in the area being shallower than the open ocean deep-water areas typically frequented by sperm whales and their prey. Two of the significant potential prey species for fin whales in the lease area are sand lance and Atlantic herring. Hare et al. (2016) concluded that climate change is likely to negatively impact sand lance and Atlantic herring but noted that there was a high degree of uncertainty in this conclusion. The authors noted that higher temperatures may decrease productivity and limit habitat availability. A reduction in small schooling fish such as sand lance and Atlantic herring in the WDA could result in a decrease in the use of the area by foraging fin whales. The distribution of copepods in the North Atlantic, including in the WDA, is driven by a number of factors that may be impacted by climate change. Record et al. (2019) suggests that recent changes in the distribution of North Atlantic right whales are related to recent rapid changes in climate and prey and notes that while right whales may be able to shift their distribution in response to changing oceanic conditions, the ability to forage successfully in those new habitats is also critically important. Warming in the deep waters of the Gulf of Maine is negatively impacting the abundance of *Calanus finmarchicus*, a primary prey for right whales. *C. finmarchicus* is vulnerable to the effects of global warming, particularly on the Northeast U.S. Shelf, which is in the southern portion of its range (Grieve et al. 2017). Grieve et al. (2017) used models to project *C. finmarchicus* densities into the future under different climate scenarios considering predicted changes in water temperature and salinity. Based on their results, by the 2041–2060 period, 22 – 25% decreases in *C. finmarchicus* density are predicted across all regions of the Northeast U.S. shelf. A decrease in abundance of right whale prey in the WDA could be expected to result in a similar decrease in abundance of right whales in the WDA over the same time scale; however, whether the predicted decline in *C. finmarchicus* density is great enough to result in a decrease in right whale presence in the action area over the life of the project is unknown.

Right whale calving occurs off the coast of the Southeastern U.S. In the final rule designating critical habitat, the following features were identified as essential to successful calving: (1) calm sea surface conditions associated with Force 4 or less on the Beaufort Scale, (2) sea surface temperatures from 7 °C through 17 °C; and, (3) water depths of 6 to 28 m where these features simultaneously co-occur over contiguous areas of at least 231 km^2 during the months of November through April (81 FR 4837; February 26, 2016). Even with a 2°C shift in mean sea surface temperature, waters off New England in the November to April period will not be warm enough to support calving. While there could be a northward shift in calving over this period, it is not reasonable to expect that over the life of the project that calving would occur in the WDA. Further, given the thermal tolerances of young calves (Garrison 2007) we do not expect that the distribution of young calves would shift northward into the action area such that there would be more or younger calves in the action area.

Based on the available information, it is difficult to predict how the use of the action area by large whales may change over the operational life of the project. However, we do not expect changes in use by sperm or blue whales. Changes in habitat used by sei, fin, and right whales may be related to a northward shift in distribution due to warming waters and a decreased abundance of prey. However, it is also possible that reductions in prey in other areas, including the Gulf of Maine, result in more frequent foraging in the WDA over time; however, this would require shifts in distribution of prey species to the WDA or other changes in the species targeted by large whales that are not reasonably certain to occur. Based on the information available at this time, it seems most likely that the use of the WDA by large whales will decrease or remain stable. As such, we do not expect any changes in abundance or distribution that would result in different effects of the action than those considered in the *Effects of the Action* section of this Opinion. To the extent new information on climate change, listed species, and their prey becomes available in the future, reinitiation of this consultation may be necessary.

8.0 CUMULATIVE EFFECTS

“Cumulative effects” are those effects of future state or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation (50 C.F.R. §402.02). Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the ESA. It is important to note that, while there may be some overlap, the ESA definition of cumulative effects is not equivalent to the definition of “cumulative impacts” as described in the Empire Wind DEIS. Under NEPA, “cumulative effects…are the impact on the environment resulting from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. While the effects of past and ongoing Federal projects for which consultation has been completed are evaluated in both the NEPA and ESA processes (Section 6.0 *Environmental Baseline*), reasonably foreseeable future actions by federal agencies must be considered (see 40 CFR 1508.7) in the NEPA process but not the ESA Section 7 process.

We reviewed the list of past, ongoing and planned actions identified by BOEM in the DEIS and determined that most (other offshore wind energy development activities; undersea transmission lines, gas pipelines, and other submarine cables (e.g., telecommunications); tidal energy projects; marine minerals use and ocean-dredged material disposal; military use; Federal fisheries use, management, and monitoring surveys, and, oil and gas activities) do not meet the ESA definition of cumulative effects because we expect that if any of these activities were proposed in the action area, or proposed elsewhere yet were to have future effects inside the action area, they would require at least one Federal authorization or permit and would therefore require their own ESA section 7 consultation. BOEM identifies global climate change as a cumulative impact in the DEIS. Because global climate change is not a future state or private activity, we do not consider it a cumulative effect for the purposes of this consultation. Rather, future state or private activities reasonably certain to occur and contribute to climate change's effects in the action area are relevant. However, given the difficulty of parsing out climate change effects due to past and present activities from those of future state and private activities, we discussed the effects of the action in the context of climate change due to past, present, and future activities in the Effects of the Action section above. The remaining cumulative impacts identified in the DEIS (marine transportation, coastal development, and state and private fisheries use and management) are addressed below.

It is important to note that because any future offshore wind project will require section 7 consultation, these future wind projects do not fit within the ESA definition of cumulative effects and none of them are considered in this Opinion. However, in each successive consultation, the effects on listed species of other offshore wind projects under construction or completed would be considered to the extent they influence the status of the species and/or environmental baseline according to the best available scientific information. We have presented information on the South Fork, Vineyard Wind 1, Ocean Wind, and Revolution Wind projects in the *Environmental Baseline* of this Opinion.

During this consultation, we searched for information on future state, tribal, local, or private (non-Federal) actions reasonably certain to occur in the action area or have effects in the action area. We did not find any information about non-Federal actions other than what has already been described in the *Environmental Baseline*. The primary non-Federal activities that will continue to have effects in the action area are: Recreational fisheries, fisheries authorized by states, use of the action area by private vessels, discharge of wastewater and associated pollutants, and coastal development authorized by state and local governments. Any coastal development that requires a Federal authorization, inclusive of a permit from the USACE, would require future section 7 consultation and would not be considered a cumulative effect. We do not have any information to indicate that effects of these activities over the life of the proposed action will have different effects than those considered in the *Status of the Species* and *Environmental Baseline* sections of this Opinion, inclusive of how those activities may contribute to climate change.

9.0 INTEGRATION AND SYNTHESIS OF EFFECTS

The *Integration and Synthesis* section is the final step in our assessment of the effects and corresponding risk posed to ESA-listed species and designated critical habitat affected as a result of implementing the proposed action. In Section 4, we determined that the project will have no effect on the Gulf of Maine DPS of Atlantic salmon, the Northeast Atlantic DPS of loggerhead sea turtles or critical habitat designated for the North Atlantic right whale, New York Bight DPS of Atlantic sturgeon, Carolina DPS of Atlantic sturgeon, or the Northwest Atlantic DPS of loggerhead sea turtles. We concur with BOEM's determination that the proposed action is not likely to adversely affect blue whales, shortnose sturgeon, giant manta rays, hawksbill sea turtles, and oceanic whitetip sharks; with the exception of shortnose sturgeon, which is addressed here, the other species that we reached a "not likely to adversely affect" conclusion for are addressed in section 4 of this Opinion. In this section, we add the *Effects of the Action* (Section 7) to the *Environmental Baseline* (Section 6) and the *Cumulative Effects* (Section 8), while also considering effects in context of climate change and the status of the species (Section 5), to formulate the agency's biological opinion as to whether the proposed action "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of an ESA-listed species in the wild by reducing its numbers, reproduction, or distribution" (50 CFR §402.02; the definition of "jeopardize the continued existence of"). The purpose of this analysis in this Opinion is to determine whether the action is likely to jeopardize the continued existence of North Atlantic right, fin, sei, or sperm whales, five DPSs of Atlantic sturgeon, shortnose sturgeon, the Northwest Atlantic DPS of loggerhead sea turtles, North Atlantic DPS of green sea turtles, or leatherback or Kemp's ridley sea turtles.

Below, for the listed species that may be adversely affected by the proposed action (i.e. those species affected by the action and for which *all* effects are not extremely unlikely (discountable) and/or insignificant) we summarize the status of the species and consider whether the action will result in reductions in reproduction, numbers, or distribution of these species. We then consider whether any reductions in reproduction, numbers, or distribution resulting from the action would reduce appreciably the likelihood of both the survival and recovery of these species, consistent with the definition of "jeopardize the existence of" (50 C.F.R. §402.02) for purposes Sections 7(a)(2) and 7(b)of the federal Endangered Species Act and its implementing regulations.

In addition, we use the following guidance and regulatory definitions related to survival and recovery to guide our jeopardy analysis. In the NMFS/USFWS Section 7 Handbook, for the purposes of determining whether jeopardy is likely, survival is defined as, "the species' persistence as listed or as a recovery unit, beyond the conditions leading to its endangerment, with sufficient resilience to allow for the potential recovery from endangerment. Said in another way, survival is the condition in which a species continues to exist into the future while retaining the potential for recovery. This condition is characterized by a species with a sufficient population, represented by all necessary age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring, which exists in an environment providing all requirements for completion of the species' entire life cycle, including reproduction, sustenance, and shelter." Recovery is defined in regulation as, "Improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in Section 4(a)(1) of the Act." 50 C.F.R. §402.02

9.1 Shortnose Sturgeon

The only portions of the action area that overlap with the distribution of shortnose sturgeon are: New York Harbor/New York Bay, where cable installation activities will occur including the landfall site for the EW1 export cable; the area where work for the Connected Action at SBMT will take place; and, the vessel transit routes within the Hudson River and Cooper River (SC). We have not identified any adverse effects from the proposed action or the Connected Action, inclusive of consideration of all activities that are anticipated to occur in the portion of the action area that overlaps with the distribution of shortnose sturgeon. As explained above, on May 4, 2020, NMFS SERO issued a Biological Opinion to USACE for the construction and operations of the Nexans Cable Facility, NMFS concluded that the construction and use of the Nexans Facility was likely to adversely affect but not likely to jeopardize shortnose sturgeon. However, the only adverse effects to Atlantic sturgeon were dredging and riprap installation. In the Opinion, NMFS concluded that vessel strikes between vessels using the facility to transport cable were extremely unlikely to occur based on the frequency of vessel operations, type of vessel, and low transit speed and that vessels using the facility were not likely to adversely affect shortnose sturgeon. As explained in section 7.2 of this Opinion, Empire Wind will use the Nexans facility to support cable installation. As the effects of this vessel traffic were already considered in the April 2020 Biological Opinion issued for the Nexans Facility, and no take of shortnose sturgeon by vessel strike was anticipated, Empire Wind's use of the Nexans Facility is also extremely unlikely to result in vessel strikes, and no take is anticipated.

As all effects of the activities considered in this Opinion to shortnose sturgeon will be insignificant and/or discountable, the proposed action, inclusive of the Connected Action at SBMT is not likely to adversely affect shortnose sturgeon. Because the proposed action is not likely to adversely affect shortnose sturgeon, and no take of individuals will occur, it is also, by definition, not likely to jeopardize the continued existence of the species.

9.2 Atlantic sturgeon

In the *Effects of the Action* section above, we determined that 28 Atlantic sturgeon (1 Gulf of Maine, 15 New York Bight, 6 Chesapeake Bay, 4 South Atlantic, and 2 Carolina) are likely to be captured and released alive with only minor, recoverable injuries over the eight years of trawl surveys. While exposure to pile driving noise may result in a behavioral response from individuals close enough to the noise source to be disturbed, we determined that effects of that noise exposure will be insignificant; no take of any type including injury or mortality is expected to result from exposure to project noise. We determined that all effects to habitat and prey would be insignificant or extremely unlikely to occur. All effects of project operations, including operational noise and the physical presence of the turbine foundations and electric cables, and effects to Atlantic sturgeon from changes to ecological conditions are extremely unlikely to occur or insignificant. No strikes of Atlantic sturgeon from project vessels operating in any portion of the action area are anticipated to occur. Therefore, the only adverse effects anticipated are the capture and release of Atlantic sturgeon in the trawl surveys.

9.3.1 Gulf of Maine DPS of Atlantic sturgeon

The Gulf of Maine DPS is listed as threatened. While Atlantic sturgeon occur in several rivers in the Gulf of Maine DPS, recent spawning has only been documented in the Kennebec River. There are no abundance estimates for the Gulf of Maine DPS as a whole. The estimated effective population size of the Kennebec River is less than 70 adults, which suggests a relatively small spawning population (NMFS 2022). NMFS estimated adult and subadult abundance of the Gulf of Maine DPS based on available information for the genetic composition and the estimated abundance of Atlantic sturgeon in marine waters (Damon-Randall et al. 2013, Kocik et al. 2013) and concluded that subadult and adult abundance of the Gulf of Maine DPS was 7,455 sturgeon (NMFS 2013). This number encompasses many age classes since, across all DPSs, subadults can be as young as one year old when they first enter the marine environment, and adults can live as long as 64 years (Balazik et al. 2012a; Hilton et al. 2016).

Gulf of Maine origin Atlantic sturgeon are subject to numerous sources of human induced mortality and habitat disturbance throughout the riverine and marine portions of their range. There is currently not enough information to establish a trend for any life stage or for the DPS as a whole. The ASMFC stock assessment concluded that the abundance of the Gulf of Maine DPS is "depleted" relative to historical levels. The Commission also noted that the Gulf of Maine is particularly data poor among all five DPSs. The assessment concluded that there is a 51 percent probability that the abundance of the Gulf of Maine DPS has increased since implementation of the 1998 fishing moratorium. The Commission also concluded that there is a relatively high likelihood (74 percent probability) that mortality for the Gulf of Maine DPS exceeds the mortality threshold used for the assessment (ASMFC 2017). However, the Commission noted that there was considerable uncertainty related to these numbers, particularly concerning trends data for the Gulf of Maine DPS. For example, the stock assessment notes that it was not clear if: (1) the percent probability for the trend in abundance for the Gulf of Maine DPS is a reflection of the actual trend in abundance or of the underlying data quality for the DPS; and, (2) the percent probability that the Gulf of Maine DPS exceeds the mortality threshold actually reflects lower survival or was due to increased tagging model uncertainty owing to low sample sizes and potential emigration.

As described in the 5-Year Review for the Gulf of Maine DPS (NMFS 2022), the demographic risk for the DPS is "moderate"[56] because of its low productivity (i.e., relatively few adults compared to historical levels), low abundance (i.e., only one known spawning population and low DPS abundance, overall), and limited spatial distribution (i.e., limited spawning habitat within the one river known to support spawning). There is also new information indicating genetic bottlenecks as well as low levels of inbreeding. However, the recovery potential is considered high.

The effects of the action are in addition to ongoing threats in the action area, which include incidental capture in state and federal fisheries, boat strikes, coastal development, habitat loss, contaminants, and climate change. Entanglement in fishing gear and vessel strikes as described in the *Environmental Baseline* may occur in the action area over the life of the proposed action. As noted in the Cumulative Effects section of this Opinion, we have not identified any cumulative effects different from those considered in the *Status of the Species* and *Environmental Baseline* sections of this Opinion, inclusive of how those activities may contribute to climate change. As described in section 7.10, climate change may result in changes in the distribution or abundance of Atlantic sturgeon in the action area over the life of this project; however, we have not identified any different or exacerbated effects of the action due to anticipated climate change.

We have considered effects of the Empire Wind project over the construction, operations, and decommissioning periods in consideration of the effects already accounted for in the Environmental Baseline and in consideration of Cumulative Effects and climate change. The only adverse effects of the proposed action on Atlantic sturgeon are the non-lethal capture of 1 Gulf of Maine DPS Atlantic sturgeon in the trawl survey. We do not anticipate any adverse effects to result from exposure to pile driving or any other noise source including HRG surveys and operational noise. We do not expect any Gulf of Maine DPS Atlantic sturgeon to be struck by any project vessels. We do not expect the operation or existence of the turbines and other facilities, including the electric cables, to result in any changes in the abundance, reproduction, or distribution of Atlantic sturgeon in the action area. All effects to Atlantic sturgeon from impacts to habitat and prey will be insignificant.

[56] 84 FR 18243; April 30, 2019 - Listing and Recovery Priority Guidelines.

Live sturgeon captured and released in the trawl survey may experience minor injuries (i.e., scrapes, abrasions); however, they are expected to make a complete recovery without any impairment to future fitness. Capture will temporarily prevent these individuals from carrying out essential behaviors such as foraging and migrating. However, these behaviors are expected to resume as soon as the sturgeon are returned to the water; for trawls the length of capture will be no more than the 20 minute tow time plus a short handling period on board the vessel. The capture of live sturgeon will not reduce the numbers of Atlantic sturgeon in the action area or the numbers of Gulf of Maine DPS Atlantic sturgeon as a whole. Similarly, as the capture of live Atlantic sturgeon will not affect the fitness of any individual, no effects to reproduction are anticipated. The capture of live Atlantic sturgeon is also not likely to affect the distribution of Atlantic sturgeon in the action area or affect the distribution of Atlantic sturgeon throughout their range. As any effects to individual live Atlantic sturgeon removed from the trawl gear will be minor and temporary without any mortality or effects on reproduction, we do not anticipate any population level impacts.

The proposed project will not result in the mortality of any Gulf of Maine DPS Atlantic sturgeon and there will be no effects on reproduction. The proposed action is not likely to reduce distribution, because the action will not impede Gulf of Maine DPS Atlantic sturgeon from accessing any seasonal aggregation areas, including foraging, spawning, or overwintering grounds. Any consequences to distribution will be minor and temporary and limited to the temporary avoidance of areas with increased noise during pile driving.

Based on the information provided above, the proposed action will not appreciably reduce the likelihood of survival of the Gulf of Maine DPS (i.e., it will not decrease the likelihood that the species will continue to persist into the future with sufficient resilience to allow for the potential recovery from endangerment). The action will not affect the Gulf of Maine DPS Atlantic sturgeon in a way that prevents the species from having a sufficient population, represented by all necessary age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring, and it will not result in consequences to the environment which would prevent Atlantic sturgeon from completing their entire life cycle or completing essential behaviors including reproducing, foraging and sheltering. This is the case because: (1) the proposed action will not result in any mortality and associated reduction in the potential future reproduction; (2) the proposed action will not change the status or trends of the DPSas a whole; (3) there will be no effect on the levels of genetic heterogeneity in the population; (4) the action will have only a minor and temporary consequence on the distribution of Gulf of Maine DPS Atlantic sturgeon in the action area and no consequence on the distribution of the DPSthroughout its range; and, (5) the action will have only an insignificant effect on individual foraging or sheltering Gulf of Maine DPS Atlantic sturgeon.

In rare instances, an action that does not appreciably reduce the likelihood of a species' survival might appreciably reduce its likelihood of recovery. As explained above, we have determined that the proposed action will not appreciably reduce the likelihood that the Gulf of Maine DPS of Atlantic sturgeon will survive in the wild, which includes consideration of recovery potential. Here, we consider whether the action will appreciably reduce the likelihood of recovery from the perspective of ESA Section 4. As noted above, recovery is defined as the improvement in status such that listing under Section 4(a) as "in danger of extinction throughout all or a significant portion of its range" (endangered) or "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range…" (threatened) is no longer appropriate. Thus, we have considered whether the proposed action will appreciably reduce the likelihood that Gulf of Maine DPS Atlantic sturgeon can rebuild to a point where the Gulf of Maine DPS of Atlantic sturgeon is no longer likely to become an endangered or threatened species within the foreseeable future throughout all or a significant portion of its range.

No Recovery Plan for the Gulf of Maine DPS has been published. The Recovery Plan will outline the steps necessary for recovery and the demographic criteria, which once attained would allow the species to be delisted. In January 2018, we published a Recovery Outline for the five DPSs of Atlantic sturgeon (NMFS 2018[57]). This outline is meant to serve as an interim guidance document to direct recovery efforts, including recovery planning, until a full recovery plan is developed and approved. The outline provides a preliminary strategy for recovery of the species. We know that in general, to recover, a listed species must have a sustained positive trend of increasing population over time. To allow that to happen for sturgeon, individuals must have access to enough habitat in suitable condition for foraging, resting and spawning. Conditions must be suitable for the successful development of early life stages. Mortality rates must be low enough to allow for recruitment to all age classes so that successful spawning can continue over time and over generations. There must be enough suitable habitat for spawning, foraging, resting, and migrations of all individuals. For Gulf of Maine DPS Atlantic sturgeon, habitat conditions must be suitable both in the natal river and in other rivers and estuaries where foraging by subadults and adults will occur and in the ocean where subadults and adults migrate, overwinter and forage. Habitat connectivity must also be maintained so that individuals can migrate between important habitats without delays that impact their fitness. As described in the vision statement in the Recovery Outline, subpopulations of all five Atlantic sturgeon DPSs must be present across the historical range. These subpopulations must be of sufficient size and genetic diversity to support successful reproduction and recovery from mortality events. The recruitment of juveniles to the sub-adult and adult life stages must also increase and that increased recruitment must be maintained over many years. Recovery of these DPSs will require conservation of the riverine and marine habitats used for spawning, development, foraging, and growth by abating threats to ensure a high probability of survival into the future. Here, we consider whether this proposed action will reduce the Gulf of Maine DPS likelihood of recovery.

This action will not change the status or trend of the Gulf of Maine DPS. The proposed action will not affect the distribution of Atlantic sturgeon Gulf of Maine DPS across the historical range. The proposed action will not result in mortality or reduction in future reproductive output and will not impair the species' resiliency, genetic diversity, recruitment, or year class strength. The proposed action will have only insignificant effects on habitat and forage and will not impact habitat in a way that makes additional growth of the population less likely, that is, it will not reduce the habitat's carrying capacity. This is because impacts to forage will be insignificant or extremely unlikely, and the area that sturgeon may avoid is small. Any avoidance will be temporary and limited to the period of time when pile driving is occurring. For these reasons, the action will not reduce the likelihood that the Gulf of Maine DPS can recover. Therefore, the proposed action will not appreciably reduce the likelihood that the Gulf of Maine DPS of

[57] Available online at: https://media.fisheries.noaa.gov/dam-migration/ats_recovery_outline.pdf; last accessed July 1, 2023

Atlantic sturgeon can be brought to the point at which they are no longer listed as threatened; that is, the proposed action will not appreciably reduce the likelihood of recovery of the Gulf of Maine DPS.

Based on the analysis presented herein, the effects of the proposed action are not likely to appreciably reduce the likelihood of both the survival and recovery of the Gulf of Maine DPS of Atlantic sturgeon. These conclusions were made in consideration of the threatened status of the Gulf of Maine DPS of Atlantic sturgeon, the effects of the action, other stressors that individuals are exposed to within the action area as described in the *Environmental Baseline* and *Cumulative Effects*, and any anticipated effects of climate change.

9.3.2 New York Bight DPS of Atlantic sturgeon

The New York Bight DPS is listed as endangered. While Atlantic sturgeon occur in several rivers in the New York Bight, recent spawning has only been documented in the Hudson and Delaware rivers. The essential physical features necessary to support spawning and recruitment are also present in the Connecticut and Housatonic Rivers (82 FR 39160; August 17, 2017). However, there is no current evidence that spawning is occurring nor are there studies underway to investigate spawning occurrence in those rivers; except one recent study where young of year (YOY) fish of were captured in the Connecticut River (Savoy *et al.* 2017). Genetic analysis suggests that the YOY belonged to the South Atlantic DPS and at this time, we do not know if these fish were the result of a single spawning event due to unique straying of the adults from the South Atlantic DPS's spawning rivers. NMFS estimated adult and subadult abundance of the New York Bight DPS based on available information for the genetic composition and the estimated abundance of Atlantic sturgeon in marine waters (Damon-Randall et al. 2013, Kocik et al. 2013) and concluded that subadult and adult abundance of the New York Bight DPS was 34,566 sturgeon (NMFS 2013). This number encompasses many age classes since, across all DPSs, subadults can be as young as one year old when they first enter the marine environment, and adults can live as long as 64 years (Balazik et al. 2012a; Hilton et al. 2016).
The 2017 ASMFC stock assessment determined that abundance of the New York Bight DPS is "depleted" relative to historical levels (ASMFC 2017). The assessment also determined there is a relatively high probability (75 percent) that the New York Bight DPS abundance has increased since the implementation of the 1998 fishing moratorium, and a 31 percent probability that mortality for the New York Bight DPS exceeds the mortality threshold used for the assessment (ASMFC 2017). The Commission noted, however, there is significant uncertainty in relation to the trend data. Moreover, new information suggests that the Commission's conclusions primarily reflect the status and trend of only the DPS's Hudson River spawning population.

New York Bight DPS origin Atlantic sturgeon are subject to numerous sources of human induced mortality and habitat disturbance throughout the riverine and marine portions of their range. The largest single source of mortality appears to be capture as bycatch in commercial fisheries operating in the marine environment. Because early life stages and juveniles do not leave the river, they are not impacted by fisheries occurring in federal waters. Bycatch and mortality also occur in state fisheries; however, the primary fishery that impacted juvenile sturgeon (the shad fishery) has now been closed and there is no indication that it will reopen soon. New York Bight DPS Atlantic sturgeon are killed as a result of other anthropogenic activities in the Hudson, Delaware, and other rivers within the New York Bight as well; sources of potential mortality include vessel strikes and entrainment in dredges.

The effects of the action are in addition to ongoing threats in the action area, which include incidental capture in state and federal fisheries, boat strikes, coastal development, habitat loss, contaminants, and climate change. Entanglement in fishing gear and vessel strikes as described in the *Environmental Baseline* may occur in the action area over the life of the proposed action. EmpireAs noted in the *Cumulative Effects* section of this Opinion, we have not identified any cumulative effects different from those considered in the Status of the Species and Environmental Baseline sections of this Opinion, inclusive of how those activities may contribute to climate change. As described in section 7.10, climate change may result in changes in the distribution or abundance of New York Bight DPS Atlantic sturgeon in the action area over the life of this project; however, we have not identified any different or exacerbated effects of the action due to anticipated climate change.

We have considered effects of the Empire Wind project over the construction, operations, and decommissioning periods in consideration of the effects already accounted for in the Environmental Baseline and in consideration of Cumulative Effects and climate change. The only adverse effects of the proposed action on New York Bight DPS Atlantic sturgeon are the non-lethal capture of 15 New York Bight DPS Atlantic sturgeon in the trawl survey. We do not anticipate any adverse effects to result from exposure to pile driving or any other noise source including HRG surveys and operational noise. We do not expect any New York Bight DPS Atlantic sturgeon to be struck by any project vessels. We do not expect the operation or existence of the turbines and other facilities, including the electric cables, to result in any changes in the abundance, reproduction, or distribution of New York Bight DPS Atlantic sturgeon in the action area. All effects to New York Bight DPS Atlantic sturgeon from impacts to habitat and prey will be insignificant.

Live sturgeon captured and released in the trawl survey may experience minor injuries (i.e., scrapes, abrasions); however, they are expected to make a complete recovery without any impairment to future fitness. Capture will temporarily prevent these individuals from carrying out essential behaviors such as foraging and migrating. However, these behaviors are expected to resume as soon as the sturgeon are returned to the water; for trawls the length of capture will be no more than the 20 minute tow time plus a short handling period on board the vessel. The capture of live sturgeon will not reduce the numbers of Atlantic sturgeon from the New York Bight DPS in the action area or the numbers of New York Bight DPS Atlantic sturgeon as a whole. Similarly, as the capture of live Atlantic sturgeon from the New York Bight DPS will not affect the fitness of any individual, no effects to reproduction are anticipated. The capture of live Atlantic sturgeon is also not likely to affect the distribution of Atlantic sturgeon from the New York Bight DPS in the action area or affect the distribution of Atlantic sturgeon the DPS throughout its range. As any effects to individual live New York Bight DPS Atlantic sturgeon removed from the trawl gear will be minor and temporary without any mortality or effects on reproduction, we do not anticipate any population level impacts.

The proposed project will not result in the mortality of any New York Bight DPS Atlantic sturgeon and there will be no effects on reproduction. The proposed action is not likely to reduce distribution because the action will not impede New York Bight DPS Atlantic sturgeon from accessing any seasonal aggregation areas, including foraging, spawning, or overwintering grounds. Any consequences to distribution will be minor and temporary and limited to the temporary avoidance of areas with increased noise during pile driving.

Based on the information provided above, the proposed action will not appreciably reduce the likelihood of survival of the New York Bight DPS (*i.e.*, it will not decrease the likelihood that the species will continue to persist into the future with sufficient resilience to allow for the potential recovery from endangerment). The action will not affect the New York Bight DPS Atlantic sturgeon in a way that prevents the species from having a sufficient population, represented by all necessary age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring, and it will not result in consequences to the environment which would prevent New York Bight DPS Atlantic sturgeon from completing their entire life cycle or completing essential behaviors including reproducing, foraging and sheltering. This is the case because: (1) the proposed action will not result in any mortality and associated potential future reproduction; (2) the proposed action will not change the status or trends of the DPS as a whole; (3) there will be no effect on the levels of genetic heterogeneity in the population; (4) the action will have only a minor and temporary consequence on the distribution of New York Bight DPS Atlantic sturgeon in the action area and no consequence on the distribution of the DPS throughout its range; and, (5) the action will have only an insignificant effect on individual foraging or sheltering New York Bight DPS Atlantic sturgeon.

In rare instances, an action that does not appreciably reduce the likelihood of a species' survival might appreciably reduce its likelihood of recovery. As explained above, we have determined that the proposed action will not appreciably reduce the likelihood that the New York Bight DPS of Atlantic sturgeon will survive in the wild, which includes consideration of recovery potential. Here, we consider whether the action will appreciably reduce the likelihood of recovery from the perspective of ESA Section 4. As noted above, recovery is defined as the improvement in status of the DPS such that its listing under Section 4(a) as "in danger of extinction throughout all or a significant portion of its range" (endangered) or "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range…" (threatened) is no longer appropriate. Thus, we have considered whether the proposed action will appreciably reduce the likelihood that New York Bight DPS Atlantic sturgeon can rebuild to a point where the New York Bight DPS of Atlantic sturgeon is no longer likely to become an endangered or threatened species within the foreseeable future throughout all or a significant portion of its range.

No Recovery Plan for the New York Bight DPS has been published. The Recovery Plan will outline the steps necessary for recovery and the demographic criteria, which once attained would allow the species to be delisted. In January 2018, we published a Recovery Outline for the five DPSs of Atlantic sturgeon (NMFS 2018). This outline is meant to serve as an interim guidance document to direct recovery efforts, including recovery planning, until a full recovery plan is developed and approved. The outline provides a preliminary strategy for recovery of the species. We know that in general, to recover, a listed species must have a sustained positive trend of increasing population over time. To allow that to happen for sturgeon, individuals must have access to enough habitat in suitable condition for foraging, resting, migration and spawning.

Conditions must be suitable for the successful development of early life stages. Mortality rates must be low enough to allow for recruitment to all age classes so that successful spawning can continue over time and over generations. There must be enough suitable habitat for spawning, foraging, resting, and migrations of all individuals. For New York Bight DPS Atlantic sturgeon, habitat conditions must be suitable both in the natal river and in other rivers and estuaries where foraging by subadults and adults will occur and in the ocean where subadults and adults migrate, overwinter and forage. Habitat connectivity must also be maintained so that individuals can migrate between important habitats without delays that impact their fitness. As described in the vision statement in the Recovery Outline, subpopulations of all five Atlantic sturgeon DPSs must be present across the historical range. These subpopulations must be of sufficient size and genetic diversity to support successful reproduction and recovery from mortality events. The recruitment of juveniles to the sub-adult and adult life stages must also increase and that increased recruitment must be maintained over many years. Recovery of these DPSs will require conservation of the riverine and marine habitats used for spawning, development, foraging, and growth by abating threats to ensure a high probability of survival into the future. Here, we consider whether this proposed action will reduce the New York Bight DPS likelihood of recovery.

This action will not change the status or trend of the New York Bight DPS. The proposed action will not affect the distribution of New York Bight DPS Atlantic sturgeon across its historical range. The proposed action will not result in mortality or reduction in future reproductive output and will not impair the DPS's resiliency, genetic diversity, recruitment, or year class strength. The proposed action will have only insignificant effects on habitat and forage and will not impact habitat in a way that makes additional growth of the population less likely, that is, it will not reduce the habitat's carrying capacity. This is because impacts to forage will be insignificant or extremely unlikely, and the area that sturgeon may avoid is small. Any avoidance will be temporary and limited to the period of time when pile driving is occurring. For these reasons, the action will not reduce the likelihood that the New York Bight DPS can recover. Therefore, the proposed action will not appreciably reduce the likelihood that the New York Bight DPS of Atlantic sturgeon can be brought to the point at which the DPS is no longer listed as threatened or endangered; that is, the proposed action will not appreciably reduce the likelihood of recovery of the New York Bight DPS.

Based on the analysis presented herein, the effects of the proposed action are not likely to appreciably reduce the likelihood of both the survival and recovery of the New York Bight DPS of Atlantic sturgeon. These conclusions were made in consideration of the endangered status of the New York Bight DPS of Atlantic sturgeon, the effects of the action, other stressors that individuals are exposed to within the action area as described in the *Environmental Baseline* and *Cumulative Effects*, and any anticipated effects of climate change.

9.3.3 Chesapeake Bay DPS of Atlantic sturgeon

The Chesapeake Bay DPS is listed as endangered. While Atlantic sturgeon occur in several rivers in the Chesapeake Bay DPS, at the time of listing spawning was only known to occur in the James River. Since the listing, there is evidence of additional spawning populations in the Chesapeake Bay DPS, including the Pamunkey River, a tributary of the York River, and in Marshyhope Creek, a tributary of the Nanticoke River (Hager et al. 2014, Kahn et al. 2014, Richardson and Secor 2016, Secor et al. 2021). Detections of acoustically-tagged adult Atlantic sturgeon along with historical evidence suggests that Atlantic sturgeon belonging to the Chesapeake Bay DPS may be spawning in the Mattaponi and Rappahannock rivers as well (Hilton et al. 2016, ASMFC 2017, Kahn et al. 2019). However, information for these populations is limited and the research is ongoing.

Chesapeake Bay origin Atlantic sturgeon are affected by numerous sources of human induced mortality and habitat disturbance throughout the riverine and marine portions of their range. There is currently no census nor enough information to establish a trend, for any life stage, for the James River spawning population, or for the DPS as a whole. However, the NEAMAP data indicates that the estimated ocean population of Chesapeake Bay DPS Atlantic sturgeon is 8,811 sub-adult and adult individuals (2,203 adults and 6,608 subadults). The ASMFC (2017) stock assessment determined that abundance of the Chesapeake Bay DPS is "depleted" relative to historical levels. The assessment, while noting significant uncertainty in trend data, also determined that there is a relatively low probability (36 percent) that abundance of the Chesapeake Bay DPS has increased since the implementation of the 1998 fishing moratorium, and a 30 percent probability that mortality for the Chesapeake Bay DPS exceeds the mortality threshold used for the assessment (ASMFC 2017).

As described in the 5-Year Review for the Chesapeake Bay DPS (NMFS 2022), the demographic risk for the DPS is "High" because of its low productivity (e.g., relatively few adults compared to historical levels and irregular spawning success), low abundance (e.g., only three known spawning populations and low DPS abundance, overall), and limited spatial distribution (e.g. limited spawning habitat within each of the few known rivers that support spawning). There is also new information indicating genetic bottlenecks as well as low levels of inbreeding. However, the recovery potential is considered high.

The effects of the action are in addition to ongoing threats in the action area, which include incidental capture in state and federal fisheries, boat strikes, coastal development, habitat loss, contaminants, and climate change. Entanglement in fishing gear and vessel strikes as described in the *Environmental Baseline* may occur in the action area over the life of the proposed action. As noted in the Cumulative Effects section of this Opinion, we have not identified any cumulative effects different from those considered in the Status of the Species and Environmental Baseline sections of this Opinion, inclusive of how those activities may contribute to climate change. As described in section 7.10, climate change may result in changes in the distribution or abundance of Atlantic sturgeon in the action area over the life of this project; however, we have not identified any different or exacerbated effects of the action due to anticipated climate change.

We have considered effects of the Empire Wind project over the construction, operations, and decommissioning periods in consideration of the effects already accounted for in the Environmental Baseline and in consideration of Cumulative Effects and climate change. The only adverse effects of the proposed action on Chesapeake Bay DPS Atlantic sturgeon are the non-lethal capture of 6 Chesapeake Bay DPS Atlantic sturgeon in the trawl survey. We do not anticipate any adverse effects to result from exposure to pile driving or any other noise source including HRG surveys and operational noise. We do not expect any Chesapeake Bay DPS

Atlantic sturgeon to be struck by any project vessels. We do not expect the operation or existence of the turbines and other facilities, including the electric cables, to result in any changes in the abundance, reproduction, or distribution of Chesapeake Bay DPS Atlantic sturgeon in the action area. All effects to Chesapeake Bay DPS Atlantic sturgeon from impacts to habitat and prey will be insignificant.

Live sturgeon captured and released in the trawl survey may experience minor injuries (i.e., scrapes, abrasions); however, they are expected to make a complete recovery without any impairment to future fitness. Capture will temporarily prevent these individuals from carrying out essential behaviors such as foraging and migrating. However, these behaviors are expected to resume as soon as the sturgeon are returned to the water; for trawls the length of capture will be no more than the 20 minute tow time plus a short handling period on board the vessel. The capture of live sturgeon will not reduce the numbers of Atlantic sturgeon in the action area or the numbers of Chesapeake Bay DPS Atlantic sturgeon as a whole. Similarly, as the capture of live Atlantic sturgeon will not affect the fitness of any individual, no effects to reproduction are anticipated. The capture of live Atlantic sturgeon from the Chesapeake Bay DPS is also not likely to affect the distribution of the DPS in the action area or affect the distribution of the DPS throughout its range. As any effects to individual live Chesapeake Bay DPS Atlantic sturgeon removed from the trawl gear will be minor and temporary without any mortality or effects on reproduction, we do not anticipate any population level impacts.

The proposed project will not result in the mortality of any Chesapeake Bay DPS Atlantic sturgeon and there will be no effects on reproduction. The proposed action is not likely to reduce distribution, because the action will not impede Chesapeake Bay DPS Atlantic sturgeon from accessing any seasonal aggregation areas, including foraging, spawning, or overwintering grounds. Any consequences to distribution will be minor and temporary and limited to the temporary avoidance of areas with increased noise during pile driving.

Based on the information provided above, the proposed action will not appreciably reduce the likelihood of survival of the Chesapeake Bay DPS (*i.e.*, it will not decrease the likelihood that the species will continue to persist into the future with sufficient resilience to allow for the potential recovery from endangerment). The action will not affect the Chesapeake Bay DPS Atlantic sturgeon in a way that prevents the species from having a sufficient population, represented by all necessary age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring, and it will not result in consequences to the environment which would prevent Chesapeake Bay DPS Atlantic sturgeon from completing their entire life cycle or completing essential behaviors including reproducing, foraging and sheltering. This is the case because: (1) the proposed action will not result in any mortality and associated potential future reproduction; (2) the proposed action will not change the status or trends of the species as a whole; (3) there will be no effect on the levels of genetic heterogeneity in the population; (4) the action will have only a minor and temporary consequence on the distribution of Chesapeake Bay DPS Atlantic sturgeon in the action area and no consequence on the distribution of the species throughout its range; and, (5) the action will have only an insignificant effect on individual foraging or sheltering Chesapeake Bay DPS Atlantic sturgeon.

In rare instances, an action that does not appreciably reduce the likelihood of a species' survival might appreciably reduce its likelihood of recovery. As explained above, we have determined that the proposed action will not appreciably reduce the likelihood that the Chesapeake Bay DPS of Atlantic sturgeon will survive in the wild, which includes consideration of recovery potential. Here, we consider whether the action will appreciably reduce the likelihood of recovery from the perspective of ESA Section 4. As noted above, recovery is defined as the improvement in status such that listing under Section 4(a) as "in danger of extinction throughout all or a significant portion of its range" (endangered) or "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range…" (threatened) is no longer appropriate. Thus, we have considered whether the proposed action will appreciably reduce the likelihood that Chesapeake Bay DPS Atlantic sturgeon can rebuild to a point where the Chesapeake Bay DPS of Atlantic sturgeon is no longer likely to become an endangered or threatened species within the foreseeable future throughout all or a significant portion of its range.

No Recovery Plan for the Chesapeake Bay DPS has been published. The Recovery Plan will outline the steps necessary for recovery and the demographic criteria, which once attained would allow the species to be delisted. In January 2018, we published a Recovery Outline for the five DPSs of Atlantic sturgeon (NMFS 2018). This outline is meant to serve as an interim guidance document to direct recovery efforts, including recovery planning, until a full recovery plan is developed and approved. The outline provides a preliminary strategy for recovery of the species. We know that in general, to recover, a listed species must have a sustained positive trend of increasing population over time. To allow that to happen for sturgeon, individuals must have access to enough habitat in suitable condition for foraging, resting, migrating and spawning. Conditions must be suitable for the successful development of early life stages. Mortality rates must be low enough to allow for recruitment to all age classes so that successful spawning can continue over time and over generations. There must be enough suitable habitat for spawning, foraging, resting, and migrations of all individuals. For Chesapeake Bay DPS Atlantic sturgeon, habitat conditions must be suitable both in the natal river and in other rivers and estuaries where foraging by subadults and adults will occur and in the ocean where subadults and adults migrate, overwinter and forage. Habitat connectivity must also be maintained so that individuals can migrate between important habitats without delays that impact their fitness. As described in the vision statement in the Recovery Outline, subpopulations of all five Atlantic sturgeon DPSs must be present across the historical range. These subpopulations must be of sufficient size and genetic diversity to support successful reproduction and recovery from mortality events. The recruitment of juveniles to the sub-adult and adult life stages must also increase and that increased recruitment must be maintained over many years. Recovery of these DPSs will require conservation of the riverine and marine habitats used for spawning, development, foraging, and growth by abating threats to ensure a high probability of survival into the future. Here, we consider whether this proposed action will reduce the Chesapeake Bay DPS likelihood of recovery.

This action will not change the status or trend of the Chesapeake Bay DPS. The proposed action will not affect the distribution of Chesapeake Bay DPS Atlantic sturgeon across its historical range. The proposed action will not result in mortality or reduction in future reproductive output beyond what was considered in the Environmental Baseline and will not impair the DPS's resiliency, genetic diversity, recruitment, or year class strength. The proposed action will have only insignificant effects on habitat and forage and will not impact habitat in a way that makes additional growth of the population less likely, that is, it will not reduce the habitat's carrying capacity. This is because impacts to forage will be insignificant or extremely unlikely, and the area that sturgeon may avoid is small. Any avoidance will be temporary and limited to the period of time when pile driving is occurring. For these reasons, the action will not reduce the likelihood that the Chesapeake Bay DPS can recover. Therefore, the proposed action will not appreciably reduce the likelihood that the Chesapeake Bay DPS of Atlantic sturgeon can be brought to the point at which they are no longer listed as threatened; that is, the proposed action will not appreciably reduce the likelihood of recovery of the Chesapeake Bay DPS.

Based on the analysis presented herein, the effects of the proposed action are not likely to appreciably reduce the likelihood of both the survival and recovery of the Chesapeake Bay DPS of Atlantic sturgeon. These conclusions were made in consideration of the endangered status of the Chesapeake Bay DPS of Atlantic sturgeon, the effects of the action other stressors that individuals are exposed to within the action area as described in the *Environmental Baseline* and *Cumulative Effects*, and any anticipated effects of climate change.

9.3.4 Carolina DPS of Atlantic sturgeon

The Carolina DPS is listed as endangered. Atlantic sturgeon from the Carolina DPS spawn in the rivers of North Carolina south to the Cooper River, South Carolina. There are currently seven spawning subpopulations within the Carolina DPS: Roanoke River, Tar-Pamlico River, Neuse River, Northeast Cape Fear and Cape Fear Rivers, Waccamaw and Great Pee Dee Rivers, Black River, Santee and Cooper Rivers. NMFS estimated adult and subadult abundance of the Carolina DPS based on available information for the genetic composition and the estimated abundance of Atlantic sturgeon in marine waters (Damon-Randall et al. 2013, Kocik et al. 2013) and concluded that subadult and adult abundance of the Carolina DPS was 1,356 sturgeon (339 adults and 1,017 subadults) (NMFS 2013). This number encompasses many age classes since, across all DPSs, subadults can be as young as two years old when they first enter the marine environment, and adults can live as long as 64 years (Balazik et al. 2012; Hilton et al. 2016).

Very few data sets are available that cover the full potential life span of an Atlantic sturgeon. The ASMFC concluded for the Stock Assessment that it could not estimate abundance of the Carolina DPS or otherwise quantify the trend in abundance because of the limited available information. However, the Stock Assessment was a comprehensive review of the available information, and used multiple methods and analyses to assess the status of the Carolina DPS and the coast wide stock of Atlantic sturgeon. For example, the Stock Assessment Subcommittee defined a benchmark, the mortality threshold, against which mortality for the coast wide stock of Atlantic sturgeon as well as for each DPS were compared[58] to assess whether the current mortality experienced by the coast wide stock and each DPS is greater than what it can sustain. This information informs the current trend of the Carolina DPS.

[58]The analysis considered both a coast wide mortality threshold and a region-specific mortality threshold to evaluate the sensitivity of the model to differences in life history parameters among the different DPSs (e.g., Atlantic sturgeon in the northern region are slower growing, longer lived; Atlantic sturgeon in the southern region are faster growing, shorter lived).

In the Stock Assessment, the ASMFC concluded that abundance of the Carolina DPS is "depleted" relative to historical levels and there is a relatively low probability (36 percent) that abundance of the Carolina DPS has increased since the implementation of the 1998 fishing moratorium. The ASMFC also concluded that there is a relatively low likelihood (25 percent probability) that mortality for the Carolina DPS does not exceed the mortality threshold used for the Stock Assessment (ASMFC 2017).

The effects of the action are in addition to ongoing threats in the action area, which include incidental capture in state and federal fisheries, boat strikes, coastal development, habitat loss, contaminants, and climate change. Entanglement in fishing gear and vessel strikes as described in the *Environmental Baseline*, may occur in the action area over the life of the proposed action. As noted in the Cumulative Effects section of this Opinion, we have not identified any cumulative effects different from those considered in the Status of the Species and Environmental Baseline sections of this Opinion, inclusive of how those activities may contribute to climate change. As described in section 7.10, climate change may result in changes in the distribution or abundance of Atlantic sturgeon in the action area over the life of this project; however, we have not identified any different or exacerbated effects of the action due to anticipated climate change.

We have considered effects of the Empire Wind project over the construction, operations, and decommissioning periods in consideration of the effects already accounted for in the Environmental Baseline and in consideration of Cumulative Effects and climate change. The only adverse effects of the proposed action on Carolina DPS Atlantic sturgeon are the non-lethal capture of 2 Carolina DPS Atlantic sturgeon in the trawl survey. We do not anticipate any adverse effects to result from exposure to pile driving or any other noise source including HRG surveys and operational noise. We do not expect any Carolina DPS Atlantic sturgeon to be struck by any project vessels. We do not expect the operation or existence of the turbines and other facilities, including the electric cables, to result in any changes in the abundance, reproduction, or distribution of the Carolina DPS Atlantic sturgeon in the action area. All effects to the Carolina DPS Atlantic sturgeon from impacts to habitat and prey will be insignificant.

Live sturgeon captured and released in the trawl survey may experience minor injuries (i.e., scrapes, abrasions); however, they are expected to make a complete recovery without any impairment to future fitness. Capture will temporarily prevent these individuals from carrying out essential behaviors such as foraging and migrating. However, these behaviors are expected to resume as soon as the sturgeon are returned to the water; for trawls the length of capture will be no more than the 20 minute tow time plus a short handling period on board the vessel. The capture of live sturgeon will not reduce the numbers of the Carolina DPS Atlantic sturgeon in the action area or the numbers of Carolina DPS Atlantic sturgeon as a whole. Similarly, as the capture of live Carolina DPS Atlantic sturgeon will not affect the fitness of any individual, no effects to reproduction are anticipated. The capture of live Carolina DPS Atlantic sturgeon is also not likely to affect the distribution of Atlantic sturgeon in the action area or affect the distribution of the DPS sturgeon throughout its range. As any effects to individual live Carolina DPS Atlantic sturgeon removed from the trawl gear will be minor and temporary without any mortality or effects on reproduction, we do not anticipate any population level impacts.

The proposed project will not result in the mortality of any Carolina DPS Atlantic sturgeon. There will be no effects on reproduction of any Carolina DPS Atlantic sturgeon. The proposed action is not likely to reduce distribution, because the action will not impede Carolina DPS Atlantic sturgeon from accessing any seasonal aggregation areas, including foraging, spawning, or overwintering grounds. Any consequences to distribution will be minor and temporary and limited to the temporary avoidance of areas with increased noise during pile driving.

Based on the information provided above, the proposed action will not appreciably reduce the likelihood of survival of the Carolina DPS (*i.e.*, it will not decrease the likelihood that the species will continue to persist into the future with sufficient resilience to allow for the potential recovery from endangerment). The action will not affect the Carolina DPS Atlantic sturgeon in a way that prevents the species from having a sufficient population, represented by all necessary age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring, and it will not result in consequences to the environment which would prevent Carolina DPS Atlantic sturgeon from completing their entire life cycle or completing essential behaviors including reproducing, foraging, migrating and sheltering. This is the case because: (1) the proposed action will not result in any mortality and associated potential future reproduction; (2) the proposed action will not change the status or trends of the DPS as a whole; (3) there will be no effect on the levels of genetic heterogeneity in the population; (4) the action will have only a minor and temporary consequence on the distribution of Carolina DPS Atlantic sturgeon in the action area and no consequence on the distribution of the species throughout its range; and, (5) the action will have only an insignificant effect on individual foraging or sheltering Carolina DPS Atlantic sturgeon.

In rare instances, an action that does not appreciably reduce the likelihood of a species' survival might appreciably reduce its likelihood of recovery. As explained above, we have determined that the proposed action will not appreciably reduce the likelihood that the Carolina DPS of Atlantic sturgeon will survive in the wild, which includes consideration of recovery potential. Here, we consider whether the action will appreciably reduce the likelihood of recovery from the perspective of ESA Section 4. As noted above, recovery is defined as the improvement in status such that listing under Section 4(a) as "in danger of extinction throughout all or a significant portion of its range" (endangered) or "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range…" (threatened) is no longer appropriate. Thus, we have considered whether the proposed action will appreciably reduce the likelihood that Carolina DPS Atlantic sturgeon can rebuild to a point where the Carolina DPS of Atlantic sturgeon is no longer likely to become an endangered or threatened species within the foreseeable future throughout all or a significant portion of its range.

No Recovery Plan for the Carolina DPS has been published. The Recovery Plan will outline the steps necessary for recovery and the demographic criteria, which once attained would allow the species to be delisted. In January 2018, we published a Recovery Outline for the five DPSs of Atlantic sturgeon (NMFS 2018). This outline is meant to serve as an interim guidance document to direct recovery efforts, including recovery planning, until a full recovery plan is developed and approved. The outline provides a preliminary strategy for recovery of the species. We know that in general, to recover, a listed species must have a sustained positive trend of increasing population over time. To allow that to happen for sturgeon, individuals must have access to enough habitat in suitable condition for foraging, resting, migrating and spawning. Conditions must be suitable for the successful development of early life stages. Mortality rates must be low enough to allow for recruitment to all age classes so that successful spawning can continue over time and over generations. There must be enough suitable habitat for spawning, foraging, resting, and migrations of all individuals. For Carolina DPS Atlantic sturgeon, habitat conditions must be suitable both in the natal river and in other rivers and estuaries where foraging by subadults and adults will occur and in the ocean where subadults and adults migrate, overwinter and forage. Habitat connectivity must also be maintained so that individuals can migrate between important habitats without delays that impact their fitness. As described in the vision statement in the Recovery Outline, subpopulations of all five Atlantic sturgeon DPSs must be present across the historical range. These subpopulations must be of sufficient size and genetic diversity to support successful reproduction and recovery from mortality events. The recruitment of juveniles to the sub-adult and adult life stages must also increase and that increased recruitment must be maintained over many years. Recovery of these DPSs will require conservation of the riverine and marine habitats used for spawning, development, foraging, and growth by abating threats to ensure a high probability of survival into the future. Here, we consider whether this proposed action will reduce the Carolina DPS likelihood of recovery.

This action will not change the status or trend of the Carolina DPS. The proposed action will not affect the distribution of the Carolina DPS Atlantic sturgeon across the historical range. The proposed action will not result in mortality or reduction in future reproductive output of the Carolina DPS and will not impair the DPS's resiliency, genetic diversity, recruitment, or year class strength. The proposed action will have only insignificant effects on habitat and forage and will not impact habitat in a way that makes additional growth of the population less likely, that is, it will not reduce the habitat's carrying capacity. This is because impacts to forage will be insignificant or extremely unlikely, and the area that sturgeon may avoid is small. Any avoidance will be temporary and limited to the period of time when pile driving is occurring. For these reasons, the action will not reduce the likelihood that the Carolina DPS can recover. Therefore, the proposed action will not appreciably reduce the likelihood that the Carolina DPS of Atlantic sturgeon can be brought to the point at which they are no longer listed as threatened or endangered; that is, the proposed action will not appreciably reduce the likelihood of recovery of the Carolina DPS.

Based on the analysis presented herein, the effects of the proposed action are not likely to appreciably reduce the likelihood of both the survival and recovery of the Carolina DPS of Atlantic sturgeon. These conclusions were made in consideration of the endangered status of the Carolina DPS of Atlantic sturgeon, the effects of the action, other stressors that individuals are exposed to within the action area as described in the *Environmental Baseline* and *Cumulative Effects*, and any anticipated effects of climate change.

9.3.5 South Atlantic DPS of Atlantic sturgeon

The South Atlantic DPS Atlantic sturgeon is listed as endangered and Atlantic sturgeon originate from at least six rivers where spawning potentially still occurs. Secor (2002) estimates that 8,000 adult females were present in South Carolina prior to 1890. In Georgia, prior to the collapse of the fishery in the late 1800s, the sturgeon fishery was the third largest fishery. Secor (2002) estimated from U.S. Fish Commission landing reports that approximately 11,000 spawning females were likely present in Georgia prior to 1890. At the time of listing, only six spawning subpopulations were thought to have existed in the South Atlantic DPS: Combahee River, Edisto River, Savannah River, Ogeechee River, Altamaha River (including the Oconee and Ocmulgee tributaries), and the Satilla River. Three of the spawning subpopulations in the South Atlantic DPS are relatively robust and are considered the second (Altamaha River) and third (Combahee/Edisto River) largest spawning subpopulations across all five DPSs. Peterson *et al.* (2008) estimated the number of spawning adults in the Altamaha River was 324 (95 percent CI: 143-667) in 2004 and 386 (95 percent CI: 216-787) in 2005. Bahr and Peterson (2016) estimated the age-1 juvenile abundance in the Savannah River from 2013-2015 at 528 in 2013, 589 in 2014, and 597 in 2015. No census of the number of Atlantic sturgeon in any of the other spawning rivers or for the DPS as a whole is available. However, the NEAMAP data indicates that the estimated ocean population of South Atlantic DPS Atlantic sturgeon sub-adults and adults is 14,911 individuals (3,728 adults and 11,183 subadults).

The 2017 ASMFC stock assessment determined that abundance of the South Atlantic DPS is "depleted" relative to historical levels (ASMFC 2017). Due to a lack of suitable indices, the assessment was unable to determine the probability that the abundance of the South Atlantic DPS has increased since the implementation of the 1998 fishing moratorium. However, it was estimated that there is a 40 percent probability that mortality for the South Atlantic DPS exceeds the mortality threshold used for the assessment (ASMFC 2017). We note that the Commission expressed significant uncertainty in relation to the trends data.

The effects of the action are in addition to ongoing threats in the action area, which include incidental capture in state and federal fisheries, boat strikes, coastal development, habitat loss, contaminants, and climate change. Entanglement in fishing gear and vessel strikes as described in the *Environmental Baseline*, may occur in the action area over the life of the proposed action. As noted in the Cumulative Effects section of this Opinion, we have not identified any cumulative effects different from those considered in the Status of the Species and Environmental Baseline sections of this Opinion, inclusive of how those activities may contribute to climate change. As described in section 7.10, climate change may result in changes in the distribution or abundance of Atlantic sturgeon in the action area over the life of this project; however, we have not identified any different or exacerbated effects of the action due to anticipated climate change.

We have considered effects of the Empire Wind project over the construction, operations, and decommissioning periods in consideration of the effects already accounted for in the Environmental Baseline and in consideration of Cumulative Effects and climate change. The only adverse effects of the proposed action on South Atlantic DPS Atlantic sturgeon are the non-lethal capture of 4 South Atlantic DPS Atlantic sturgeon in the trawl survey. We do not anticipate any adverse effects to result from exposure to pile driving or any other noise source including HRG surveys and operational noise. We do not expect any South Atlantic DPS Atlantic sturgeon to be struck by any project vessels. We do not expect the operation or existence of the turbines and other facilities, including the electric cables, to result in any changes in the abundance, reproduction, or distribution of South Atlantic DPS Atlantic sturgeon in the action area. All effects to South Atlantic DPS Atlantic sturgeon from impacts to habitat and prey will be insignificant.

Live sturgeon captured and released in the trawl survey may experience minor injuries (i.e., scrapes, abrasions); however, they are expected to make a complete recovery without any impairment to future fitness. Capture will temporarily prevent these individuals from carrying out essential behaviors such as foraging and migrating. However, these behaviors are expected to resume as soon as the sturgeon are returned to the water; for trawls the length of capture will be no more than the 20 minute tow time plus a short handling period on board the vessel. The capture of live sturgeon will not reduce the numbers of Atlantic sturgeon in the action area or the numbers of South Atlantic DPS Atlantic sturgeon as a whole. Similarly, as the capture of live South Atlantic DPS Atlantic sturgeon will not affect the fitness of any individual, no effects to reproduction are anticipated. The capture of live South Atlantic DPS Atlantic sturgeon is also not likely to affect the distribution of the DPSin the action area or affect the distribution of South Atlantic DPS Atlantic sturgeon throughout their range. As any effects to individual live South Atlantic DPS Atlantic sturgeon removed from the trawl gear will be minor and temporary without any mortality or effects on reproduction, we do not anticipate any population level impacts.

The proposed project will not result in the mortality of any South Atlantic DPS Atlantic sturgeon. There will be no effects on reproduction. The proposed action is not likely to reduce distribution, because the action will not impede South Atlantic DPS Atlantic sturgeon from accessing any seasonal aggregation areas, including foraging, spawning, or overwintering grounds. Any consequences to distribution will be minor and temporary and limited to the temporary avoidance of areas with increased noise during pile driving.

Based on the information provided above, the proposed action will not appreciably reduce the likelihood of survival of the South Atlantic DPS (*i.e.*, it will not decrease the likelihood that the species will continue to persist into the future with sufficient resilience to allow for the potential recovery from endangerment). The action will not affect the South Atlantic DPS Atlantic sturgeon in a way that prevents the species from having a sufficient population, represented by all necessary age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring, and it will not result in consequences to the environment which would prevent Atlantic sturgeon from completing their entire life cycle or completing essential behaviors including reproducing, foraging and sheltering. This is the case because: (1) the proposed action will not result in any mortality and associated potential future reproduction; (2) the proposed action will not change the status or trends of the DPS as a whole; (3) there will be no effect on the levels of genetic heterogeneity in the population; (4) the action will have only a minor and temporary consequence on the distribution of South Atlantic DPS Atlantic sturgeon in the action area and no consequence on the distribution of the species throughout its range; and, (5) the action will have only an insignificant effect on individual foraging or sheltering South Atlantic DPS Atlantic sturgeon.

In rare instances, an action that does not appreciably reduce the likelihood of a species' survival might appreciably reduce its likelihood of recovery. As explained above, we have determined that the proposed action will not appreciably reduce the likelihood that the South Atlantic DPS of Atlantic sturgeon will survive in the wild, which includes consideration of recovery potential. Here, we consider whether the action will appreciably reduce the likelihood of recovery from the perspective of ESA Section 4. As noted above, recovery is defined as the improvement in status such that listing under Section 4(a) as "in danger of extinction throughout all or a significant portion of its range" (endangered) or "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range…" (threatened) is no longer appropriate. Thus, we have considered whether the proposed action will appreciably reduce the likelihood that South Atlantic DPS Atlantic sturgeon can rebuild to a point where the South Atlantic DPS of Atlantic sturgeon is no longer likely to become an endangered or threated species within the foreseeable future throughout all or a significant portion of its range.

No Recovery Plan for the South Atlantic DPS has been published. The Recovery Plan will outline the steps necessary for recovery and the demographic criteria, which once attained would allow the species to be delisted. In January 2018, we published a Recovery Outline for the five DPSs of Atlantic sturgeon (NMFS 2018). This outline is meant to serve as an interim guidance document to direct recovery efforts, including recovery planning, until a full recovery plan is developed and approved. The outline provides a preliminary strategy for recovery of the species. We know that in general, to recover, a listed species must have a sustained positive trend of increasing population over time. To allow that to happen for sturgeon, individuals must have access to enough habitat in suitable condition for foraging, resting, migration and spawning. Conditions must be suitable for the successful development of early life stages. Mortality rates must be low enough to allow for recruitment to all age classes so that successful spawning can continue over time and over generations. There must be enough suitable habitat for spawning, foraging, resting, and migrations of all individuals. For South Atlantic DPS Atlantic sturgeon, habitat conditions must be suitable both in the natal river and in other rivers and estuaries where foraging by subadults and adults will occur and in the ocean where subadults and adults migrate, overwinter and forage. Habitat connectivity must also be maintained so that individuals can migrate between important habitats without delays that impact their fitness. As described in the vision statement in the Recovery Outline, subpopulations of all five Atlantic sturgeon DPSs must be present across the historical range. These subpopulations must be of sufficient size and genetic diversity to support successful reproduction and recovery from mortality events. The recruitment of juveniles to the sub-adult and adult life stages must also increase and that increased recruitment must be maintained over many years. Recovery of these DPSs will require conservation of the riverine and marine habitats used for spawning, development, foraging, and growth by abating threats to ensure a high probability of survival into the future. Here, we consider whether this proposed action will reduce the South Atlantic DPS likelihood of recovery.

This action will not change the status or trend of the South Atlantic DPS. The proposed action will not affect the distribution of South Atlantic DPS Atlantic sturgeon across the historical range. The proposed action will not result in mortality or reduction in future reproductive output beyond what was considered in the *Environmental Baseline* and will not impair the DPS's resiliency, genetic diversity, recruitment or year class strength. The proposed action will have only insignificant effects on habitat and forage and will not impact habitat in a way that makes additional growth of the population less likely, that is, it will not reduce the habitat's carrying capacity. This is because impacts to forage will be insignificant or extremely unlikely, and the area that sturgeon may avoid is small. Any avoidance will be temporary and limited to the period of time when pile driving is occurring. For these reasons, the action will not reduce the likelihood that the South Atlantic DPS can recover. Therefore, the proposed action will not appreciably reduce the likelihood that the South Atlantic DPS of Atlantic sturgeon can be brought to the point at which they are no longer listed as threatened or endangered; that is, the proposed action will not appreciably reduce the likelihood of recovery of the South Atlantic DPS.

Based on the analysis presented herein, the effects of the proposed action are not likely to appreciably reduce the likelihood of both the survival and recovery of the South Atlantic DPS of Atlantic sturgeon. These conclusions were made in consideration of the status of the South Atlantic DPS of Atlantic sturgeon, the effects of the action, other stressors that individuals are exposed to within the action area as described in the *Environmental Baseline* and *Cumulative Effects*, and any anticipated effects of climate change.

9.4 Sea Turtles

Our effects analysis determined that impact pile driving noise is likely to adversely affect a number of individual ESA-listed sea turtles in the action area and cause temporary threshold shift, behavioral response, and stress but that no injury or mortality is anticipated. We determined that impacts to hearing (TTS and masking) and avoidance behavior would not increase the risk of vessel strike or entanglement or capture in fishing gear. We determined that exposure to other project noise, including HRG surveys and operational noise will have effects that are insignificant or discountable. We expect that project vessels will strike and kill no more than 4 leatherback, 22 loggerhead, 1 green, and 3 Kemp's ridley sea turtle over the 42-year life of the project, inclusive of the construction, operation, and decommissioning period. We expect that a number of sea turtles will be captured in the trawl surveys and be released alive. We do not expect the entanglement or capture of any sea turtles in any other fisheries surveys. We also determined that effects to habitat and prey are insignificant or discountable. In this section, we discuss the likely consequences of these effects to individual sea turtles, the populations those individuals represent, and the species those populations comprise.

While this biological opinion relies on the best available scientific and commercial information, our analysis and conclusions include uncertainty about the basic hearing capabilities of sea turtles, such as how they use sound to perceive and respond to environmental cues, and how temporary changes to their acoustic soundscape could affect the normal physiology and behavioral ecology of these species. Vessel strikes are expected to result in more significant effects on individuals than other stressors considered in this Opinion because these strikes are expected to result in serious injury or mortality. Those that are killed and removed from the population would decrease reproductive rates, and those that sustain non-lethal injuries and permanent hearing impairment could have fitness consequences during the time it takes to fully recover, or have long lasting impacts if permanently harmed. Temporary hearing impairment and significant behavioral disruption from exposure to noise could have similar effects, but given the duration of exposures, these impacts are expected to be temporary and a sea turtle's hearing is expected to return to normal shortly after the exposure ends. Therefore, these temporary effects are expected to exert significantly less adverse effects on any individual than severe injuries and permanent non-lethal injuries. We have determined the number of exposures that will meet the ESA definition of harassment; no behavioral disturbances will be severe enough to meet the ESA definition of harm.

In this section we assess the likely consequences of these effects to the sea turtles that have been exposed, the populations those individuals represent, and the species those populations comprise. Section 5.2 described current sea turtle population statuses and the threats to their survival and recovery. Most sea turtle populations have undergone significant to severe reduction by human harvesting of both eggs and sea turtles, loss of beach nesting habitats, as well as severe bycatch pressure in worldwide fishing industries. The *Environmental Baseline* identified actions expected to generally continue for the foreseeable future for each of these species of sea turtle that may affect sea turtles in the action area. As described in section 7.10, climate change may result in a northward distribution of sea turtles, which could result in a small change in the abundance, and seasonal distribution of sea turtles in the action area over the 42-year life of the Empire Wind project. However, as described there, given the cool winter water temperatures in the action area and considering the amount of warming that is anticipated, any shift in seasonal distribution is expected to be small (potential additional weeks per year, not months) and any increase in abundance in the action area is expected to be small. As noted in the *Cumulative Effects* section of this Opinion, we have not identified any cumulative effects different from those considered in the *Status of the Species* and *Environmental Baseline* sections of this Opinion, inclusive of how those activities may contribute to climate change.

9.4.1 Northwest Atlantic DPS of Loggerhead Sea Turtles

The Northwest Atlantic DPS of loggerhead sea turtles is listed as threatened. Based on nesting data and population abundance and trends at the time, NMFS and USFWS determined in 2011 that the Northwest Atlantic DPS should be listed as threatened and not endangered based on: (1) the large size of the nesting population, (2) the overall nesting population remains widespread, (3) the trend for the nesting population appears to be stabilizing, and (4) substantial conservation efforts are underway to address threats (76 FR 58868, September 22, 2011).

It takes decades for loggerhead sea turtles to reach maturity. Once they have reached maturity, females typically lay multiple clutches of eggs within a season, but do not typically lay eggs every season (NMFS and USFWS 2008). There are many natural and anthropogenic factors affecting the survival of loggerheads prior to their reaching maturity as well as for those adults who have reached maturity. As described in the *Status of the Species*, *Environmental Baseline*, and *Cumulative Effects* sections above, loggerhead sea turtles in the action area continue to be affected by multiple anthropogenic impacts including bycatch in commercial and recreational fisheries, habitat alteration, vessel interactions, and other factors that result in mortality of individuals at all life stages. Negative impacts causing death of various age classes occur both on land and in the water. Many actions have been taken to address known negative impacts to loggerhead sea turtles. However, others remain unaddressed, have not been sufficiently addressed, or have been addressed in some manner but whose success cannot be quantified.

There are five subpopulations of loggerhead sea turtles in the western North Atlantic (recognized as recovery units in the 2008 recovery plan for the species). These subpopulations show limited evidence of interbreeding. As described in the *Status of the Species*, recent assessments have evaluated the nesting trends for each recovery unit. Nesting trends are based on nest counts or nesting females; they do not include non-nesting adult females, adult males, or juvenile males or females in the population. Nesting trends for each of the loggerhead sea turtle recovery units in the Northwest Atlantic Ocean DPS are variable. Overall, short-term trends have shown increases, however, over the long-term the DPS is considered stable.

Estimates of the total loggerhead population in the Atlantic are not currently available. However, there is some information available for portions of the population. From 2004-2008, the loggerhead adult female population for the Northwest Atlantic ranged from 20,000 to 40,000 or more individuals (median 30,050), with a large range of uncertainty in total population size (NMFS SEFSC 2009). The estimate of Northwest Atlantic adult loggerhead females was considered conservative for several reasons. The number of nests used for the Northwest Atlantic was based primarily on U.S. nesting beaches. Thus, the results are a slight underestimate of total nests because of the inability to collect complete nest counts for many non-U.S. nesting beaches within the DPS. In estimating the current population size for adult nesting female loggerhead sea turtles, the report simplified the number of assumptions and reduced uncertainty by using the minimum total annual nest count (i.e., 48,252 nests) over the five years. This was a particularly conservative assumption considering how the number of nests and nesting females can vary widely from year to year (e.g., the 2008 nest count was 69,668 nests, which would have increased the adult female estimate proportionately to between 30,000 and 60,000). In addition, minimal assumptions were made about the distribution of remigration intervals and nests per female parameters, which are fairly robust and well known. A loggerhead population estimate using data from 2001-2010 estimated the loggerhead adult female population in the Northwest Atlantic at 38,334 individuals (SD =2,287) (Richards et al. 2011). The populations studies are consistent with the definition of the Northwest Atlantic DPS.
The AMAPPS surveys and sea turtle telemetry studies conducted along the U.S. Atlantic coast in the summer of 2010 provided preliminary regional abundance estimate of about 588,000 loggerheads along the U.S. Atlantic coast, with an inter-quartile range of 382,000-817,000 (NMFS 2011c). The estimate increases to approximately 801,000 (inter-quartile range of 521,000-1,111,000) when based on known loggerheads and a portion of unidentified sea turtle sightings (NMFS 2011c). Although there is much uncertainty in these population estimates, they provide some context for evaluating the size of the likely population of loggerheads in the Northwest Atlantic which is an indication of the size of the Northwest Atlantic DPS.

The impacts to Northwest Atlantic DPS loggerhead sea turtles from the proposed action are expected to result in the mortality of 22 individuals due to vessel strike over the 42-year construction, operations and decommissioning period and the capture of up to 3 loggerheads from the DPS over the 8-year survey period during the pre- and post-construction trawl surveys, we expect these individuals will be released alive with only minor, recoverable injuries (minor scrapes and abrasions). Additionally, we expect the exposure of 96 loggerhead sea turtles from the DPS to noise that will result in TTS and/or behavioral disturbance that meets the ESA definition of harassment. We determined that all other effects of the action would be insignificant or extremely unlikely to occur. In total, we expect the proposed action to result in the mortality of 22 Northwest Atlantic (NWA) DPS loggerheads over the 42 year life of the project.

The NWA DPS 96 loggerhead sea turtles that experience harassment due to exposure to pile driving could suffer temporary hearing impairment (TTS), and we assume these turtles would have physiological stress. TTS will resolve within one week while behavioral disturbance and stress will cease after exposure to pile driving noise ends (approximately 3- 4 hours). While TTS will temporarily affect the hearing of an individual sea turtle it is not expected to affect their ability to hear in a way that would impact their ability to sense or react to threats. As explained in section 7.1, temporary alterations in behavior of loggerheads exposed to disturbing levels of noise are not likely to reduce the overall fitness of individual turtles. The energetic consequences of the evasive behavior and delay in resting or foraging are not expected to affect any individual's ability to successfully obtain enough food to maintain their health, or impact the ability of any individual to make seasonal migrations or participate in breeding or nesting. Additionally, avoidance behavior is not expected to result in displacement to areas with increased risk of vessel strike or capture or entanglement in fishing gear.

In general, based upon what we know about sound effects on sea turtles, we do not anticipate exposure to these acoustic stressors to have long-term effects on an individual nor alter critical life functions. Therefore, we do not anticipate loggerhead sea turtles to have population level consequences from acoustic stressors.

The mortality of 22 loggerhead Northwest Atlantic DPS sea turtles in the action area over the 42 year life of the project (inclusive of 5 years of construction, 35 years of operations, and 2 years of decommissioning) would reduce the number of loggerhead sea turtles from the recovery unit of which they originated as compared to the number of loggerheads that would have been present in the absence of the proposed actions (assuming all other variables remained the same). The Peninsula Florida Recovery Unit and the Northern Recovery Unit represent approximately 87% and 10%, respectively of all nesting effort in the Northwest Atlantic DPS (Ceriani and Meylan 2017, NMFS and USFWS 2008). We expect that the majority of loggerheads in the action area originated from the Northern Recovery Unit (NRU) or the Peninsular Florida Recovery Unit (PFRU).

The Northern Recovery Unit, from the Florida-Georgia border through southern Virginia, is the second largest nesting aggregation in the DPS, with an average of 5,215 nests from 1989-2008, and approximately 1,272 nesting females (NMFS and U.S. FWS 2008). For the Northern recovery unit, nest counts at loggerhead nesting beaches in North Carolina, South Carolina, and Georgia declined at 1.9% annually from 1983 to 2005 (NMFS and U.S. FWS 2007a). Recently, the trend has been increasing. Ceriani and Meylan (2017) reported a 35% increase for this recovery unit from 2009 through 2013. A longer- term trend analysis based on data from 1983 to 2019 indicates that the annual rate of increase is 1.3 percent (Bolten et al. 2019).

Annual nest totals for the PFRU averaged 64,513 nests from 1989-2007, representing approximately 15,735 females per year (NMFS and USFWS 2008). Nest counts taken at index beaches in Peninsular Florida showed a significant decline in loggerhead nesting from 1989 to 2007, most likely attributed to mortality of oceanic-stage loggerheads caused by fisheries bycatch (Witherington et al. 2009). From 2009 through 2013, a 2 percent decrease for the Peninsular Florida Recovery Unit was reported (Ceriani and Meylan 2017). Using a longer time series from 1989-2018, there was no significant change in the number of annual nests; however, an increase in the number of nests was observed from 2007 to 2018 (Bolten et al. 2019).

The loss of 22 NWA DPS loggerheads over the 42 years of the project represents an extremely small percentage of the number of sea turtles in the PFRU or NRU. Even if the total population of the PFRU was limited to 15,735 loggerheads (the number of nesting females), the loss of 22 individuals would represent approximately 0.14% of the population. If the total NRU population was limited to 1,272 sea turtles (the number of nesting females), and all 22 individuals originated from that population, the loss of those individuals would represent approximately 1.7% of the population. Even just considering the number of adult nesting females this loss is extremely small and would be even smaller when considered for the total recovery unit and represents an even smaller percentage of the DPS as a whole.

As noted in the *Environmental Baseline*, the status of loggerhead Northwest Atlantic DPS sea turtles in the action area is expected to be the same as that of each recovery unit over the life of the project (stable to increasing). The loss of such a small percentage of the individuals from any of these recovery units represents an even smaller percentage of the DPS as a whole. Considering the extremely small percentage of the populations that will be killed, it is unlikely that these deaths will have a detectable effect on the numbers and population trends of loggerheads in these recovery units or the number of loggerheads in the Northwest Atlantic DPS. We make this conclusion in consideration of the status of the DPS as a whole, the status of loggerhead NWA DPS sea turtles in the action area, and in consideration of the threats experienced by NWA DPS loggerheads in the action area as described in the *Environmental Baseline* and *Cumulative Effects* sections of this Opinion. As described in section 7.10, climate change may result in changes in the distribution or abundance of loggerheads in the action area over the life of this project; however, we have not identified any different or exacerbated effects of the action in the context of anticipated climate change.

Any effects on reproduction are limited to the future reproductive output of the individuals that die. Even assuming that all of these losses were reproductive female (which is unlikely given the expected even sex ratio in the action area), given the number of nesting adults in each of these populations, it is unlikely that the expected loss of loggerheads would affect the success of nesting in any year. Additionally, this extremely small reduction in potential nesters is expected to result in a similarly small reduction in the number of eggs laid or hatchlings produced in future years and similarly, an extremely small effect on the strength of subsequent year classes with no detectable effect on the trend of any recovery unit or the DPS as a whole. The proposed actions will not affect nesting beaches in any way or disrupt migratory movements in a way that hinders access to nesting beaches or otherwise delays nesting. Additionally, given the small percentage of the DPS that will be killed as a result of the proposed actions, there is not likely to be any loss of unique genetic haplotypes and no loss of genetic diversity.

The proposed action is not likely to reduce distribution because while the action will temporarily affect the distribution of individual loggerheads through behavioral disturbance changes in distribution will be temporary and limited to movements to nearby areas in the WDA. As explained in section 7, we expect the project to have insignificant effects on use of the action area by Northwest Atlantic DPS loggerheads.

While generally speaking, the loss of a small number of individuals from a subpopulation or species may have an appreciable reduction on the numbers, reproduction and distribution of the species this is likely to occur only when there are very few individuals in a population, the individuals occur in a very limited geographic range or the species has extremely low levels of genetic diversity. This situation is not likely in the case of this DPS of loggerheads because the DPS is widely geographically distributed, it is not known to have low levels of genetic diversity, there are several thousand individuals in the DPS population and the number of loggerheads in the DPS is likely to be stable or increasing over the time period considered here.

Based on the information provided above, the death of 22 NWA DPS loggerheads over the 42 year life of the project will not appreciably reduce the likelihood of survival (i.e., it will not decrease the likelihood that the DPS will continue to persist into the future with sufficient resilience to allow for recovery and eventual delisting). The actions will not affect Northwest Atlantic DPS loggerheads in a way that prevents the DPS from having a sufficient population, represented by all necessary age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring and it will not result in effects to the environment which would prevent loggerheads in this DPS from completing their entire life cycle, including reproduction, sustenance, and shelter. This is the case because: (1) the death of 22 loggerheads represents an extremely small percentage of the DPS as a whole; (2) the death of 6 loggerheads will not change the status or trends of any recovery unit or the DPS as a whole; (3) the loss of 22 loggerheads is not likely to have an effect on the levels of genetic heterogeneity in the population; (4) the loss of 22 Northwest Atlantic DPS loggerheads is likely to have an extremely small effect on reproductive output that will be insignificant at the recovery unit or DPS level; (5) the actions will have only a minor and temporary effect on the distribution of NWA DPS loggerheads in the action area and no effect on the distribution of the DPS throughout its range; and, (6) the actions will have no effect on the ability of loggerheads to shelter and only an insignificant effect on individual foraging loggerheads.

In certain instances, an action may not appreciably reduce the likelihood of a species survival (persistence) but may affect its likelihood of recovery or the rate at which recovery is expected to occur. As explained above, we have determined that the proposed actions will not appreciably reduce the likelihood that this DPS of loggerhead sea turtles will survive in the wild. Here, we consider the potential for the actions to reduce the likelihood of recovery. As noted above, recovery is defined as the improvement in status such that listing is no longer appropriate. Thus, we have considered whether the proposed actions will affect the likelihood that the NWA DPS of loggerheads can rebuild to a point where listing is no longer appropriate. In 2008, NMFS and the USFWS issued a recovery plan for the Northwest Atlantic population of loggerheads (NMFS and USFWS 2008). The plan includes demographic recovery criteria as well as a list of tasks that must be accomplished. Demographic recovery criteria are included for each of the five recovery units. These criteria focus on sustained increases in the number of nests laid and the number of nesting females in each recovery unit, an increase in abundance on foraging grounds, and ensuring that trends in neritic strandings are not increasing at a rate greater than trends in in-water abundance. The recovery tasks focus on protecting habitats, minimizing and managing predation and disease, and minimizing anthropogenic mortalities.

Loggerheads have a stable trend; as explained above, the loss of 22 NWA DPS loggerheads over the life span of the proposed actions will not affect the population trend. The number of loggerheads likely to die as a result of the proposed actions is an extremely small percentage of any recovery unit or the DPS as a whole. This loss will not affect the likelihood that the population will reach the size necessary for recovery or the rate at which recovery will occur. As such, the proposed actions will not affect the likelihood that the demographic criteria will be achieved or the timeline on which they will be achieved. The action area does not include nesting beaches; all effects to habitat will be insignificant or extremely unlikely to occur; therefore, the proposed actions will have no effect on the likelihood that habitat based recovery criteria will be achieved. The proposed actions will also not affect the ability of any of the recovery tasks to be accomplished.

The effects of the proposed actions will not hasten the extinction timeline or otherwise increase the danger of extinction; further, the actions will not prevent this DPS of the species from growing in a way that leads to recovery and the actions will not change the rate at which recovery can occur. This is the case because while the actions may result in a small reduction in the number of loggerheads and a small reduction in the amount of potential reproduction due to the loss of these individuals, these effects will be undetectable over the long-term and the actions are not expected to have long term impacts on the future growth of the DPS or its potential for recovery. Therefore, based on the analysis presented above, the proposed actions will not appreciably reduce the likelihood that the NWA DPS of loggerhead sea turtles can be brought to the point at which they are no longer listed as threatened or endangered; that is, the proposed action will not appreciably reduce the likelihood of recovery of the NWA DPS of loggerhead sea turtles.

Based on the analysis presented herein, the effects of the proposed action are not likely to appreciably reduce the likelihood of both the survival and recovery of the NWA DPS of loggerhead sea turtles. These conclusions were made in consideration of the threatened status of NWA DPS loggerhead sea turtles, the effects of the action, other stressors that individuals are exposed to within the action area as described in the *Environmental Baseline* and *Cumulative Effects*, and any anticipated effects of climate change on the abundance, reproduction, and distribution of loggerhead sea turtles in the action area.

9.4.2 North Atlantic DPS of Green Sea Turtles

The North Atlantic DPS of green sea turtles is listed as threatened under the ESA. As described in the *Status of the Species*, the North Atlantic DPS of green sea turtles is the largest of the 11 green turtle DPSs with an estimated abundance of over 167,000 adult females from 73 nesting sites. All major nesting populations demonstrate long-term increases in abundance (Seminoff et al. 2015b). In 2021, green turtle nest counts on the 27-core index beaches in Florida reached more than 24,000 nests recorded. Green sea turtles face numerous threats on land and in the water that affect the survival of all age classes. While the threats of pollution, habitat loss through coastal development, beachfront lighting, and fisheries bycatch continue for this DPS, the DPS appears to be somewhat resilient to future perturbations. As described in the *Environmental Baseline* and *Cumulative Effects*, North Atlantic DPS green sea turtles in the action area are exposed to pollution and experience vessel strike and fisheries bycatch. As noted in the *Cumulative Effects* section of this Opinion, we have not identified any cumulative effects different from those considered in the Status of the Species and Environmental Baseline sections of this Opinion, inclusive of how those activities may contribute to climate change. As described in section 7.10, climate change may result in changes in the distribution or abundance of North

Atlantic DPS green sea turtles in the action area over the life of this project; however, we have not identified any different or exacerbated effects of the action in the context of anticipated climate change.

There are four regions that support high nesting concentrations in the North Atlantic DPS: Costa Rica (Tortuguero), Mexico (Campeche, Yucatan, and Quintana Roo), United States (Florida), and Cuba. Using data from 48 nesting sites in the North Atlantic DPS, nester abundance was estimated at 167,528 total nesters (Seminoff et al. 2015). The years used to generate the estimate varied by nesting site but were between 2005 and 2012. The largest nesting site (Tortuguero, Costa Rica) hosts 79 percent of the estimated nesting. It should be noted that not all female turtles nest in a given year (Seminoff et al. 2015). Nesting in the area has increased considerably since the 1970s, and nest count data from 1999-2003 suggested that 17,402-37,290 females nested there per year (Seminoff et al. 2015). In 2010, an estimated 180,310 nests were laid at Tortuguero, the highest level of green sea turtle nesting estimated since the start of nesting track surveys in 1971. This equated to somewhere between 30,052 and 64,396 nesters in 2010 (Seminoff et al. 2015). Nesting sites in Cuba, Mexico, and the United States were either stable or increasing (Seminoff et al. 2015). More recent data is available for the southeastern United States. Nest counts at Florida's core index beaches have ranged from less than 300 to almost 41,000 in 2019. The Index Nesting Beach Survey (INBS) is carried out on a subset of beaches surveyed during the Statewide Nesting Beach Survey (SNBS) and is designed to measure trends in nest numbers. The nest trend in Florida shows the typical biennial peaks in abundance and has been increasing (https://myfwc.com/research/wildlife/sea- turtles/nesting/beach-survey-totals/). The SNBS is broader but is not appropriate for evaluating trends. In 2019, approximately 53,000 green turtle nests were recorded in the SNBS (https://myfwc.com/research/wildlife/sea-turtles/nesting/). Seminoff et al. (2015) estimated total nester abundance for Florida at 8,426 turtles.

NMFS recognizes that the nest count data available for green sea turtles in the Atlantic indicates increased nesting at many sites. However, we also recognize that the nest count data, including data for green sea turtles in the Atlantic, only provides information on the number of females currently nesting, and is not necessarily a reflection of the number of mature females available to nest or the number of immature females that will reach maturity and nest in the future.

The impacts to North Atlantic DPS green sea turtles from the proposed action are expected to result in the harassment (inclusive of TTS) of 1 individual due to exposure to pile driving noise; the mortality of 1 individual due to vessel strike over the 42-year life of the project inclusive of construction, operations, and decommissioning; and, the capture of up to 1 green sea turtle over the 8-year survey period during the pre- and post-construction trawl surveys, we expect this individual will be released alive with only minor, recoverable injuries (minor scrapes and abrasions). One green sea turtles is expected to be exposed to noise during pile driving that will result in harassment due to TTS and significant behavioral disruption. We determined that all other effects of the action would be insignificant or extremely unlikely. In total, we anticipate the proposed action will result in the mortality of one North Atlantic DPS green sea turtle over the 42-year life of the project.

The 1 green North Atlantic DPS sea turtle that experiences harassment could suffer temporary hearing impairment (TTS), and we also assume this turtle would have physiological stress. These temporary conditions are expected to return to normal over a short period of time. TTS will resolve within one week while behavioral disturbance and stress will cease after exposure to pile driving noise ends (approximately 3-4 hours). The TTS and anticipated behavioral response to exposure to pile driving noise will significantly disrupt normal behavioral patterns and meet the ESA definition of harassment but not harm. TTS and behavioral disruptions from exposure to pile driving noise are not expected to reduce the overall fitness of individual turtles. The energetic consequences of the evasive behavior and delay in resting or foraging are not expected to affect any individual's ability to successfully obtain enough food to maintain their health, or impact the ability of any individual to make seasonal migrations or participate in breeding or nesting.

The death of one North Atlantic DPS green sea turtle, whether a male or female, immature or mature, would reduce the number of green sea turtles as compared to the number of green that would have been present in the absence of the proposed actions assuming all other variables remained the same. The loss of one green sea turtle represents a very small percentage of the DPS as a whole. Even compared to the number of nesting females (17,000-37,000), which represent only a portion of the number of greens worldwide, the mortality of one green represents less than 0.003% of the DPS's nesting population. The loss of this sea turtle would be expected to reduce the reproduction of green sea turtles as compared to the reproductive output of green sea turtles in the absence of the proposed action. As described in the *Status of the Species* section above, we consider the trend for North Atlantic DPS green sea turtles to be stable. As noted in the Environmental Baseline, the status of North Atlantic DPS green sea turtles in the action area is expected to be the same as that of each recovery unit over the life of the project. As explained below, the death of this green sea turtle will not appreciably reduce the likelihood of survival for this DPS of the species for the reasons outlined below. We make this conclusion in consideration of the status of the DPS as a whole, the status of North Atlantic DPS green sea turtles in the action area, and in consideration of the threats experienced by green sea turtles in the action area as described in the Environmental Baseline and Cumulative Effects sections of this Opinion.

While generally speaking, the loss of a small number of individuals from a subpopulation or species may have an appreciable reduction on the numbers, reproduction and distribution of the species this is likely to occur only when there are very few individuals in a population, the individuals occur in a very limited geographic range or the species has extremely low levels of genetic diversity. This situation is not likely in the case of greens because: this DPS of the species is widely geographically distributed, it is not known to have low levels of genetic diversity, there are several thousand individuals in the population and the number of greens is likely to be increasing and at worst is stable. These actions are not likely to reduce distribution of greens because the actions will not cause more than a temporary disruption to foraging and migratory behaviors.

Based on the information provided above, the death of one North Atlantic DPS green sea turtle over the 42 year life of the project, will not appreciably reduce the likelihood of survival (i.e., it will not decrease the likelihood that this DPS of the species will continue to persist into the future with sufficient resilience to allow for the potential recovery from endangerment). The action will not affect green sea turtles in a way that prevents this DPS of the species from having a sufficient population, represented by all necessary age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring and it will not result in effects to the environment which would prevent green sea turtles from completing their entire life cycle, including reproduction, sustenance, and shelter. This is the case because: (1) the DPS for this species' nesting trend is increasing; (2) the death of 1 green sea turtle represents an extremely small percentage of the DPS as a whole; (3) the loss of 1 green sea turtle will not change the status or trends of the DPS as a whole; (4) the loss of 1 green sea turtle is not likely to have an effect on the levels of genetic heterogeneity in the population; (5) the loss of 1 green sea turtle is likely to have an undetectable effect on reproductive output of the DPS as a whole; (6) the action will have insignificant and temporary effects on the distribution of greens in the action area and no effect on its distribution throughout the DPS's range; and (7) the action will have no effect on the ability of green sea turtles to shelter and only an insignificant effect on individual foraging green sea turtles.

In rare instances, an action may not appreciably reduce the likelihood of a species survival (persistence) but may affect its likelihood of recovery or the rate at which recovery is expected to occur. As explained above, we have determined that the proposed actions will not appreciably reduce the likelihood that this DPS of green sea turtles will survive in the wild. Here, we consider the potential for the actions to reduce the likelihood of recovery. As noted above, recovery is defined as the improvement in status such that listing is no longer appropriate. Thus, we have considered whether the proposed actions will affect the likelihood that this DPS of the species can rebuild to a point where listing is no longer appropriate. A Recovery Plan for Green sea turtles was published by NMFS and USFWS in 1991. The plan outlines the steps necessary for recovery and the criteria, which, once met, would ensure recovery. In order to be delisted, green sea turtles must experience sustained population growth, as measured in the number of nests laid per year, over time. Additionally, "priority one" recovery tasks must be achieved, nesting habitat must be protected (through public ownership of nesting beaches), and stage class mortality must be reduced.

The proposed actions will not appreciably reduce the likelihood of survival of green sea turtles in this DPS. Also, it is not expected to modify, curtail or destroy the range of the DPS since it will result in an extremely small reduction in the number of green sea turtles in any geographic area and since it will not affect the overall distribution of green sea turtles other than to cause minor temporary adjustments in movements in the action area. As explained above, the proposed actions are likely to result in the mortality of one North Atlantic DPS green sea turtle; however, as explained above, the loss of this individual over this time period is not expected to affect the persistence of green sea turtles or the trend for this DPS of the species. The actions will not affect nesting habitat and will have only an extremely small effect on mortality. The effects of the proposed actions will not hasten the extinction timeline or otherwise increase the danger of extinction; further, the actions will not prevent this DPS of the species from growing in a way that leads to recovery, and the actions will not change the rate at which recovery can occur. This is the case because while the actions may result in a small reduction in the number of greens and a small reduction in the amount of potential reproduction due to the loss of one individual, these effects will be undetectable in the DPS over the long-term, and the action is not expected to have long term impacts on the future growth of the population or its potential for recovery. Therefore, based on the analysis presented above, the proposed actions will not appreciably reduce the likelihood that green sea turtles in this DPS can be brought to the point at which they are no longer listed as endangered or threatened; that is, the proposed action will not appreciably reduce the likelihood of recovery of this DPS of green sea turtles.

Despite the threats faced by individual North Atlantic DPS green sea turtles inside and outside of the action area, the proposed actions will not increase the vulnerability of individual sea turtles to these additional threats and exposure to ongoing threats will not increase susceptibility to effects related to the proposed actions. We have considered the effects of the proposed actions in light of the status of the DPS of the species rangewide and in the action area, the environmental baseline, cumulative effects explained above, including climate change, and have concluded that even in light of the ongoing impacts of these activities and conditions, the conclusions reached above do not change.

Based on the analysis presented herein, the effects the proposed actions are not likely to appreciably reduce the likelihood of both the survival and recovery of the North Atlantic DPS of green sea turtles. These conclusions were made in consideration of the threatened status of the North Atlantic DPS of green sea turtles, the effects of the action, other stressors that individuals are exposed to within the action area as described in the *Environmental Baseline* and *Cumulative Effects*, and any anticipated effects of climate change on the abundance, reproduction, and distribution of green sea turtles in the action area.

9.4.3 Leatherback Sea Turtles

Leatherback sea turtles are listed as endangered under the ESA. Leatherbacks are widely distributed throughout the oceans of the world and are found in waters of the Atlantic, Pacific, and Indian Oceans, the Caribbean Sea, Mediterranean Sea, and the Gulf of Mexico (Ernst and Barbour 1972). Leatherback nesting occurs on beaches of the Atlantic, Pacific, and Indian Oceans as well as in the Caribbean (NMFS and USFWS 2013). Leatherbacks face a multitude of threats that can cause death prior to and after reaching maturity. Some activities resulting in leatherback mortality have been addressed.

The most recent published assessment, the leatherback status review, estimated that the total index of nesting female abundance for the Northwest Atlantic population of leatherbacks is 20,659 females (NMFS and USFWS 2020). This abundance estimate is similar to other estimates. The TEWG estimated approximately 18,700 (range 10,000 to 31,000) adult females using nesting data from 2004 and 2005 (TEWG 2007). The IUCN Red List assessment for the NW Atlantic Ocean subpopulation estimated 20,000 mature individuals (male and female) and approximately 23,000 nests per year (data through 2017) with high inter-annual variability in annual nest counts within and across nesting sites (Northwest Atlantic Leatherback Working Group 2019). The estimate in the status review is higher than the estimate for the IUCN Red List assessment, likely due to a different remigration interval, which has been increasing in recent years (NMFS and USFWS 2020). For this analysis, we found that the status review estimate of 20,659 nesting females represents the best available scientific information given that it uses the most comprehensive and recent demographic trends and nesting data.

In the 2020 status review, the authors identified seven leatherback populations that met the discreteness and significance criteria of DPSs (NMFS and USFWS 2020). These include the Northwest Atlantic, Southwest Atlantic, Southeast Atlantic, Southwest Indian, Northeast Indian, West Pacific, and East Pacific. The population found within the action area is that identified in the status review as the Northwest Atlantic DPS. While NMFS and USFWS concluded that seven populations met the criteria for DPSs, the species continues to be listed at the global level (85 FR 48332, August 10, 2020) as the agency has taken no action to list one or more DPSs. While we reference the DPSs and stocks to analyze the status and trends of various populations, our jeopardy analysis is based on the range-wide status of the species as listed.

Previous assessments of leatherbacks concluded that the Northwest Atlantic population was stable or increasing (TEWG 2007, Tiwari et al. 2013b). However, as described in the *Status of the Species*, more recent analyses indicate that the overall trends are negative (NMFS and USFWS 2020, Northwest Atlantic Leatherback Working Group 2018, 2019). At the stock level, the Working Group evaluated the NW Atlantic – Guianas-Trinidad, Florida, Northern Caribbean, and the Western Caribbean stocks. The NW Atlantic – Guianas-Trinidad stock is the largest stock and declined significantly across all periods evaluated, which was attributed to an exponential decline in abundance at Awala-Yalimapo, French Guiana as well as declines in Guyana; Suriname; Cayenne, French Guiana; and Matura, Trinidad. Declines in Awala-Yalimapo were attributed, in part, due to beach erosion and a loss of nesting habitat (Northwest Atlantic Leatherback Working Group 2018). The Florida stock increased significantly over the long-term, but declined from 2008-2017 (Northwest Atlantic Leatherback Working Group 2018). Slight increases in nesting were seen in 2018 and 2019, however, nest counts remain low compared to 2008-2015 (https://myfwc.com/research/wildlife/sea-turtles/nesting/beach-survey-totals/). The Northern Caribbean and Western Caribbean stocks have also declined. The Working Group report also includes trends at the site-level, which varied depending on the site and time period, but were generally negative especially in the recent period.

Similarly, the leatherback status review concluded that the Northwest Atlantic DPS exhibits decreasing nest trends at nesting aggregations with the greatest indices of nesting female abundance. Though some nesting aggregations indicated increasing trends, most of the largest ones are declining. This trend is considered to be representative of the DPS (NMFS and USFWS 2020). Data also indicated that the Southwest Atlantic DPS is declining (NMFS and USFWS 2020).

Populations in the Pacific have shown dramatic declines at many nesting sites (Mazaris et al. 2017, Santidrián Tomillo et al. 2017, Santidrián Tomillo et al. 2007, Sarti Martínez et al. 2007, Tapilatu et al. 2013). The IUCN Red List assessment estimated the number of total mature individuals (males and females) at Jamursba-Medi and Wermon beaches to be 1,438 turtles (Tiwari et al. 2013a). More recently, the leatherback status review estimated the total index of nesting female abundance of the West Pacific DPS at 1,277 females for the West Pacific DPS and 755 females for the East Pacific DPS (NMFS and USFWS 2020). The East Pacific DPS has exhibited a decreasing trend since monitoring began with a 97.4 percent decline since the 1980s or 1990s, depending on nesting beach (Wallace et al. 2013). Population abundance in the Indian Ocean is difficult to assess due to lack of data and inconsistent reporting. Most recently, the 2020 status review estimated that the total index of nesting female abundance for the SW Indian

DPS is 149 females and that the DPS is exhibiting a slight decreasing nest trend (NMFS and USFWS 2020). While data on nesting in the Northeast Indian Ocean DPS is limited, the DPS is estimated at 109 females. This DPS has exhibited a drastic population decline with extirpation of the largest nesting aggregation in Malaysia (NMFS and USFWS 2020).

The primary threats to leatherback sea turtles include fisheries bycatch, harvest of nesting females, and egg harvesting; of these, as described in the *Environmental Baseline* and *Cumulative Effects*, fisheries bycatch occurs in the action area. Leatherback sea turtles in the action area are also at risk of vessel strike. As noted in the Cumulative Effects section of this Opinion, we have not identified any cumulative effects different from those considered in the *Status of the Species* and *Environmental Baseline* sections of this Opinion, inclusive of how those activities may contribute to climate change. As described in section 7.10, climate change may result in changes in the distribution or abundance of leatherback sea turtles in the action area over the life of this project; however, we have not identified any different or exacerbated effects of the action in the context of anticipated climate change.

The impacts to leatherback sea turtles from the proposed action are expected to result in the harassment (inclusive of TTS) of 2 individuals due to exposure to impact pile driving noise. We also expect that 4 leatherbacks will be struck and killed by a project vessel over the 42-year life of the project inclusive of construction, operations, and decommissioning. We do not expect the capture of any leatherbacks in the trawl surveys. We determined that all other effects of the action would be insignificant or extremely unlikely to occur. In total, we anticipate the proposed action will result in the mortality of 4 leatherback sea turtles over the 42-year life of the project.

The two leatherback sea turtles that experience harassment would experience behavioral disturbance and could suffer temporary hearing impairment (TTS); we also assume these turtles would have physiological stress. These temporary conditions are expected to return to normal over a short period of time. TTS will resolve within one week while behavioral disturbance and stress will cease after exposure to pile driving noise ends (approximately 3-4 hours.). TTS and anticipated behavioral response to exposure to pile driving noise will significantly disrupt normal behavioral patterns and meet the ESA definition of harassment but not harm. TTS and behavioral disruptions from exposure to pile driving noise are not expected to reduce the overall fitness of individual turtles. The energetic consequences of the evasive behavior and delay in resting or foraging are not expected to affect any individual's ability to successfully obtain enough food to maintain their health, or impact the ability of any individual to make seasonal migrations or participate in breeding or nesting.

The death of 4 leatherbacks over the life span of the project represents an extremely small percentage of the number of leatherbacks in the North Atlantic, just 0.02% even considering the lowest population estimate of nesting females (20,659; NMFS and USFWS 2020) and an even smaller percentage of the species as a whole. Considering the extremely small percentage of the population that will be killed, it is unlikely that this death will have a detectable effect on the numbers and population trends of leatherbacks in the North Atlantic or the species as a whole.

Any effects on reproduction are limited to the future reproductive output of the individual killed. Even assuming that the mortality is to a reproductive female, given the number of nesting females in this population (20,659), it is unlikely that the expected loss of no more than 4 leatherbacks over 42 years would affect the success of nesting in any year. Additionally, this extremely small reduction in a potential nester is expected to result in a similarly small reduction in the number of eggs laid or hatchlings produced in future years and similarly, an extremely small effect on the strength of subsequent year classes with no detectable effect on the trend of any nesting beach or the population as a whole. The proposed action will not affect nesting beaches in any way or disrupt migratory movements in a way that hinders access to nesting beaches or otherwise delays nesting. Additionally, given the small percentage of the species that will be killed as a result of the proposed action, there is not likely to be any loss of unique genetic haplotypes and no loss of genetic diversity.

The proposed action is not likely to reduce distribution because while the action will temporarily affect the distribution of individual leatherbacks through behavioral disturbance, changes in distribution will be temporary and limited to movements to nearby areas in the WDA. As explained in section 7, we expect the project to have insignificant effects on use of the action area by leatherbacks.

While generally speaking, the loss of a small number of individuals from a subpopulation or species may have an appreciable reduction on the numbers, reproduction and distribution of the species this is likely to occur only when there are very few individuals in a population, the individuals occur in a very limited geographic range or the species has extremely low levels of genetic diversity. This situation is not likely in the case of leatherbacks because: the species is widely geographically distributed, it is not known to have low levels of genetic diversity, there are several thousand individuals in the population and the number of leatherbacks is likely to be stable or increasing over the period considered here.

Based on the information provided above, the death of 4 leatherbacks over the 42-year life of the project will not appreciably reduce the likelihood of survival (i.e., it will not decrease the likelihood that the species will continue to persist into the future with sufficient resilience to allow for recovery and eventual delisting). The actions will not affect leatherbacks in a way that prevents the species from having a sufficient population, represented by all necessary age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring and it will not result in effects to the environment which would prevent leatherbacks from completing their entire life cycle, including reproduction, sustenance, and shelter. This is the case because: (1) the death of 4 leatherbacks represents an extremely small percentage of the Northwest Atlantic population and an even smaller percentage of the species as a whole; (2) the death of 4 leatherbacks will not change the status or trends of any nesting beach, the Northwest Atlantic population or the species as a whole; (3) the loss of 4 leatherback is not likely to have an effect on the levels of genetic heterogeneity in the population; (4) the loss of 4 leatherbacks is likely to have an extremely small effect on reproductive output that will be insignificant at the nesting beach, population, or species level; (5) the actions will have only a minor and temporary effect on the distribution of leatherbacks in the action area and no effect on the distribution of the species throughout its range; and, (6) the actions will have no effect on the ability of leatherbacks to shelter and only an insignificant effect on individual foraging leatherbacks.

In certain instances, an action may not appreciably reduce the likelihood of a species survival (persistence) but may affect its likelihood of recovery or the rate at which recovery is expected to occur. As explained above, we have determined that the proposed actions will not appreciably reduce the likelihood that leatherback sea turtles will survive in the wild. Here, we consider the potential for the actions to reduce the likelihood of recovery. As noted above, recovery is defined as the improvement in status such that listing is no longer appropriate. Thus, we have considered whether the proposed actions will affect the likelihood that leatherbacks can rebuild to a point where listing is no longer appropriate. In 1992, NMFS and the USFWS issued a recovery plan for leatherbacks in the U.S. Caribbean, Atlantic, and Gulf of Mexico (NMFS and USFWS 1992). The plan includes three recovery objectives:

1) The adult female population increases over the next 25 years, as evidenced by a statistically significant trend in the number of nests at Culebra, Puerto Rico, St. Croix, USVI, and along the east coast of Florida.
2) Nesting habitat encompassing at least 75 percent of nesting activity in USVI, Puerto Rico and Florida is in public ownership.
3) All priority one tasks have been successfully implemented.

The recovery tasks focus on protecting habitats, minimizing and managing predation and disease, and minimizing anthropogenic mortalities.

Because the death of 4 leatherbacks over the 42-year life of the project is such a small percentage of the population and is not expected to affect the status or trend of the species, it will not affect the likelihood that the adult female population of loggerheads increases over time. This loss will not affect the likelihood that the population will reach the size necessary for recovery or the rate at which recovery will occur. As such, the proposed actions will not affect the likelihood that the demographic criteria will be achieved or the timeline on which they will be achieved. The action area does not include nesting beaches; all effects to habitat will be insignificant or extremely unlikely to occur; therefore, the proposed actions will have no effect on the likelihood that habitat based recovery criteria will be achieved. The proposed actions will also not affect the ability of any of the recovery tasks to be accomplished.

The effects of the proposed actions will not hasten the extinction timeline or otherwise increase the danger of extinction; further, the actions will not prevent the species from growing in a way that leads to recovery and the actions will not change the rate at which recovery can occur. This is the case because while the actions may result in a small reduction in the number of leatherbacks and a small reduction in the amount of potential reproduction due to the loss of these individual, these effects will be undetectable over the long-term and the actions are not expected to have long term impacts on the future growth of the species or its potential for recovery. Therefore, based on the analysis presented above, the proposed actions will not appreciably reduce the likelihood that leatherback sea turtles can be brought to the point at which they are no longer listed as endangered or threatened. Despite the threats faced by individual leatherback sea turtles inside and outside of the action area, the proposed actions will not increase the vulnerability of individual sea turtles to these additional threats and exposure to ongoing threats will not increase susceptibility to effects related to the proposed actions. We have considered the effects of the proposed actions in light of the status of the species rangewide and in the action area, the environmental baseline, cumulative effects explained above, including climate change, and have concluded that even in light of the ongoing impacts of these activities and conditions; the conclusions reached here do not change.

Based on the analysis presented herein, the proposed actions are not likely to appreciably reduce the survival and recovery of leatherback sea turtles. These conclusions were made in consideration of the endangered status of leatherback sea turtles, other stressors that individuals are exposed to within the action area as described in the Environmental Baseline and Cumulative Effects, and any anticipated effects of climate change on the abundance and distribution of leatherback sea turtles in the action area; that is, the proposed action will not appreciably reduce the likelihood of recovery of leatherback sea turtles.

Despite the threats faced by individual leatherback sea turtles inside and outside of the action area, the proposed actions will not increase the vulnerability of individual sea turtles to these additional threats and exposure to ongoing threats will not increase susceptibility to effects related to the proposed actions. We have considered the effects of the proposed actions in light of the status of the species rangewide and in the action area, the environmental baseline, cumulative effects explained above, including climate change, and have concluded that even in light of the ongoing impacts of these activities and conditions, the conclusions reached above do not change.

Based on the analysis presented herein, the effects of the proposed action, are not likely to appreciably reduce the likelihood of both the survival and recovery of leatherback sea turtles. These conclusions were made in consideration of the endangered status of leatherback sea turtles, the effects of the action, other stressors that individuals are exposed to within the action area as described in the *Environmental Baseline* and *Cumulative Effects*, and any anticipated effects of climate change on the abundance, reproduction, and distribution of leatherback sea turtles in the action area.

9.4.4 Kemp's Ridley Sea Turtles

Kemp's ridley sea turtles are listed as an endangered species under the ESA. They occur in the Atlantic Ocean and Gulf of Mexico, the only major nesting site for Kemp's ridleys is a single stretch of beach near Rancho Nuevo, Tamaulipas, Mexico (Carr 1963, NMFS and USFWS 2015, USFWS and NMFS 1992).

Nest count data provides the best available information on the number of adult females nesting each year. As is the case with other sea turtles species, nest count data must be interpreted with caution given that these estimates provide a minimum count of the number of nesting Kemp's ridley sea turtles. In addition, the estimates do not account for adult males or juveniles of either sex. Without information on the proportion of adult males to females and the age structure of the population, nest counts cannot be used to estimate the total population size (Meylan 1982, Ross 1996). Nevertheless, the nesting data does provide valuable information on the extent of Kemp's ridley nesting and the trend in the number of nests laid. It is the best proxy we have for estimating population changes.

Following a significant, unexplained one-year decline in 2010, Kemp's ridley sea turtle nests in Mexico reached a record high of 21,797 in 2012 (Gladys Porter Zoo nesting database, unpublished data). In 2013 and 2014, there was a second significant decline in Mexico nests, with only 16,385 and 11,279 nests recorded, respectively. In 2015, nesting in Mexico improved to 14,006 nests, and in 2016 overall numbers increased to 18,354 recorded nests. There was a record high nesting season in 2017, with 24,570 nests recorded (J. Pena, pers. comm. to NMFS SERO PRD, August 31, 2017 as cited in NMFS 2020(c) and decreases observed in 2018 and again in 2019. In 2019, there were 11,140 nests in Mexico. It is unknown whether this decline is related to resource fluctuation, natural population variability, effects of catastrophic events like the Deepwater Horizon oil spill affecting the nesting cohort, or some other factor. A small nesting population is also emerging in the United States, primarily in Texas. From 1980-1989, there were an average of 0.2 nests/year at Padre Island National Seashore (PAIS), rising to 3.4 nests/year from 1990-1999, 44 nests/year from 2000-2009, and 110 nests per year from 2010-2019. There was a record high of 353 nests in 2017 (NPS 2020). It is worth noting that nesting in Texas has paralleled the trends observed in Mexico, characterized by a significant decline in 2010, followed by a second decline in 2013-2014, but with a rebound in 2015-2017 (NMFS 2020c) and decreases in nesting in 2018 and 2019 (NPS 2020).

Estimates of the adult female nesting population reached a low of approximately 250-300 in 1985 (NMFS and USFWS 2015, TEWG 2000). Gallaway et al. (2016) developed a stock assessment model for Kemp's ridley to evaluate the relative contributions of conservation efforts and other factors toward this species' recovery. Terminal population estimates for 2012 summed over ages 2 to 4, ages 2+, ages 5+, and ages 9+ suggest that the respective female population sizes were 78,043 (SD = 14,683), 152,357 (SD = 25,015), 74,314 (SD =10,460), and 28,113 (SD = 2,987) (Gallaway et al. 2016). Using the standard IUCN protocol for sea turtle assessments, the number of mature individuals was recently estimated at 22,341 (Wibbels and Bevan 2019). The calculation took into account the average annual nests from 2016-2018 (21,156), a clutch frequency of 2.5 per year, a remigration interval of 2 years, and a sex ratio of 3.17 females: 1 male. Based on the data in their analysis, the assessment concluded the current population trend is unknown (Wibbels and Bevan 2019). However, some positive outlooks for the species include recent conservation actions, including the expanded TED requirements in the shrimp fishery (84 FR 70048, December 20, 2019) and a decrease in the amount of shrimping off the coast of Tamaulipas and in the Gulf of Mexico (NMFS and USFWS 2015).

Genetic variability in Kemp's ridley turtles is considered to be high, as measured by nuclear DNA analyses (i.e., microsatellites) (NMFS et al. 2011). If this holds true, then rapid increases in population over one or two generations would likely prevent any negative consequences in the genetic variability of the species (NMFS et al. 2011). Additional analysis of the mtDNA taken from samples of Kemp's ridley turtles at Padre Island, Texas, showed six distinct haplotypes, with one found at both Padre Island and Rancho Nuevo (Dutton et al. 2006).

Fishery interactions are the main threat to the species. The species' limited range and low global abundance make its resilience to future perturbation low. The status of Kemp's ridley sea turtles in the action area is the same as described in the Status of the Species. As described in the Environmental Baseline and Cumulative Effects, fisheries bycatch and vessel strike are likely to continue to occur in the action area over the life of the project. As noted in the *Cumulative Effects* section of this Opinion, we have not identified any cumulative effects different from those considered in the *Status of the Species* and *Environmental Baseline* sections of this

Opinion, inclusive of how those activities may contribute to climate change. As described in section 7.10, climate change may result in changes in the distribution or abundance of Kemp's ridley sea turtles in the action area over the life of this project; however, we have not identified any different or exacerbated effects of the action in the context of anticipated climate change.

The impacts to Kemp's ridley sea turtles from the proposed action are expected to result in the harassment of 9 individuals due to exposure to impact pile driving noise We also expect that 3 Kemp's ridley sea turtles will be struck and killed by a project vessel over the 42 year life of the project inclusive of construction, operations, and decommissioning. We expect the capture of up to 2 Kemp's ridley sea turtles over the 8-year survey period during the pre- and post-construction trawl surveys; we expect these individuals will be released alive with only minor, recoverable injuries (minor scrapes and abrasions). We determined that all other effects of the action would be insignificant or extremely unlikely to occur. In total, we expect the proposed action to result in the mortality of three Kemp's ridley sea turtles over the 42-year life of the project.

The 9 Kemp's ridley sea turtles that experience harassment could suffer temporary hearing impairment (TTS), and we also assume these turtles would have physiological stress. These temporary conditions are expected to return to normal over a short period of time. TTS will resolve within one week while behavioral disturbance and stress will cease after exposure to pile driving noise ends (approximately 3-4 hours). TTS and anticipated behavioral response to exposure to pile driving noise will significantly disrupt normal behavioral patterns and meet the ESA definition of harassment but not harm. TTS and behavioral disruptions from exposure to pile driving noise are not expected to reduce the overall fitness of individual turtles. The energetic consequences of the evasive behavior and delay in resting or foraging are not expected to affect any individual's ability to successfully obtain enough food to maintain their health, or impact the ability of any individual to make seasonal migrations or participate in breeding or nesting.

The mortality of three Kemp's ridley over a 42 year time period represents a very small percentage of the Kemp's ridleys worldwide. Even taking into account just nesting females (7-8,000), the death of one Kemp's ridley represents less than 0.038% of the nesting female population. While the death of three Kemp's ridley sea turtles will reduce the number of Kemp's ridleys compared to the number that would have been present absent the proposed actions, it is not likely that this reduction in numbers will change the status of this species or its stable to increasing trend as this loss represents a very small percentage of the population. Reproductive potential of Kemp's ridleys is not expected to be affected in any other way other than through a reduction in numbers of individuals.

A reduction in the number of Kemp's ridleys would have the effect of reducing the amount of potential reproduction, as any dead Kemp's ridleys would have no potential for future reproduction. In 2006, the most recent year for which data is available, there were an estimated 7-8,000 nesting females. While the species is thought to be female biased, there are likely to be several thousand adult males as well. Given the number of nesting adults, it is unlikely that the loss of three Kemp's ridley sea turtles over 42 years would affect the success of nesting in any year. Additionally, this small reduction in potential nesters is expected to result in a small reduction in the number of eggs laid or hatchlings produced in future years and similarly, a very small effect on the strength of subsequent year classes. Even considering the potential future nesters that would be produced by the individual that would be killed as a result of the proposed action, any effect to future year classes is anticipated to be very small and would not change the stable to increasing trend of this species. Additionally, the proposed action will not affect nesting beaches in any way or disrupt migratory movements in a way that hinders access to nesting beaches or otherwise delays nesting.

The proposed action is not likely to reduce distribution because the action will not impede Kemp's ridleys from accessing foraging grounds or cause more than a temporary disruption to other migratory behaviors. Additionally, given the small percentage of the species that will be killed as a result of the proposed action, there is not likely to be any loss of unique genetic haplotypes and no loss of genetic diversity.

While generally speaking, the loss of a small number of individuals from a subpopulation or species may have an appreciable reduction on the numbers, reproduction and distribution of the species this is likely to occur only when there are very few individuals in a population, the individuals occur in a very limited geographic range or the species has extremely low levels of genetic diversity. This situation is not likely in the case of Kemp's ridleys because: the species is widely geographically distributed, it is not known to have low levels of genetic diversity, there are several thousand individuals in the population and the number of Kemp's ridleys is likely to be increasing and at worst is stable.

Based on the information provided above, the death of three Kemp's ridley sea turtles over 42 years will not appreciably reduce the likelihood of survival (i.e., it will not decrease the likelihood that the species will continue to persist into the future with sufficient resilience to allow for the potential recovery from endangerment). The proposed action will not affect Kemp's ridleys in a way that prevents the species from having a sufficient population, represented by all necessary age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring and it will not result in effects to the environment which would prevent Kemp's ridleys from completing their entire life cycle, including reproduction, sustenance, and shelter. This is the case because: (1) the species' nesting trend is increasing; (2) the death of three Kemp's ridleys represents an extremely small percentage of the species as a whole; (3) the death of three Kemp's ridleys will not change the status or trends of the species as a whole; (4) the loss of these Kemp's ridleys is not likely to have an effect on the levels of genetic heterogeneity in the population; (5) the loss of these Kemp's ridleys is likely to have such a small effect on reproductive output that the loss of these individuals will not change the status or trends of the species; (5) the actions will have only a minor and temporary effect on the distribution of Kemp's ridleys in the action area and no effect on the distribution of the species throughout its range; and, (6) the actions will have no effect on the ability of Kemp's ridleys to shelter and only an insignificant effect on individual foraging Kemp's ridleys.

In rare instances, an action may not appreciably reduce the likelihood of a species survival (persistence) but may affect its likelihood of recovery or the rate at which recovery is expected to occur. As explained above, we have determined that the proposed action will not appreciably reduce the likelihood that Kemp's ridley sea turtles will survive in the wild. Here, we consider the potential for the actions to reduce the likelihood of recovery. As noted above, recovery is defined as the improvement in status such that listing is no longer appropriate. Thus, we have considered whether the proposed action will affect the likelihood that Kemp's ridleys can rebuild to a point where listing is no longer appropriate. In 2011, NMFS and the USFWS issued a recovery plan for Kemp's ridleys (NMFS et al. 2011). The plan includes a list of criteria necessary for recovery. These include:

1. An increase in the population size, specifically in relation to nesting females[59];
2. An increase in the recruitment of hatchlings[60];
3. An increase in the number of nests at the nesting beaches;
4. Preservation and maintenance of nesting beaches (i.e. Rancho Nuevo, Tepehuajes, and Playa Dos); and,
5. Maintenance of sufficient foraging, migratory, and inter-nesting habitat.

Kemp's ridleys have an increasing trend; as explained above, the loss of three Kemp's ridley over the 42-year life of the project will not affect the population trend. The number of Kemp's ridleys likely to die as a result of the proposed actions is an extremely small percentage of the species. This loss will not affect the likelihood that the population will reach the size necessary for recovery or the rate at which recovery will occur. As such, the proposed action will not affect the likelihood that criteria one, two, or three will be achieved or the timeline on which they will be achieved. The action area does not include nesting beaches; therefore, the proposed actions will have no effect on the likelihood that recovery criteria four will be met. All effects to habitat will be insignificant or extremely unlikely to occur; therefore, the proposed actions will have no effect on the likelihood that criteria five will be met.

The effects of the proposed action will not hasten the extinction timeline or otherwise increase the danger of extinction. Further, the actions will not prevent the species from growing in a way that leads to recovery and the actions will not change the rate at which recovery can occur. This is the case because while the actions may result in a small reduction in the number of Kemp's ridleys and a small reduction in the amount of potential reproduction, these effects will be undetectable over the long-term and the actions are not expected to have long term impacts on the future growth of the population or its potential for recovery. Therefore, based on the analysis presented above, the proposed action will not appreciably reduce the likelihood that Kemp's ridley sea turtles can be brought to the point at which they are no longer listed as endangered or threatened; that is, the proposed action will not appreciably reduce the likelihood of recovery of Kemp's ridley sea turtles.

Despite the threats faced by individual Kemp's ridley sea turtles inside and outside of the action area, the proposed action will not increase the vulnerability of individual sea turtles to these additional threats and exposure to ongoing threats will not increase susceptibility to effects related to the proposed actions. We have considered the effects of the proposed action in light of the status of the species, Environmental Baseline and cumulative effects explained above,

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[59]A population of at least 10,000 nesting females in a season (as measured by clutch frequency per female per season) distributed at the primary nesting beaches in Mexico (Rancho Nuevo, Tepehuajes, and Playa Dos) is attained in order for downlisting to occur; an average of 40,000 nesting females per season over a 6-year period by 2024 for delisting to occur

[60] Recruitment of at least 300,000 hatchlings to the marine environment per season at the three primary nesting beaches in Mexico (Rancho Nuevo, Tepehuajes, and Playa Dos).

including climate change, and have concluded that even in light of the ongoing impacts of these activities and conditions; the conclusions reached above do not change.

Based on the analysis presented herein, the effects of the proposed action, resulting in the mortality of three Kemp's ridleys, are not likely to appreciably reduce the likelihood of both the survival and recovery of this species. These conclusions were made in consideration of the endangered status of Kemp's ridley sea turtles, effects of the action, other stressors that individuals are exposed to within the action area as described in the *Environmental Baseline* and *Cumulative Effects*, and any anticipated effects of climate change on the abundance and distribution of Kemp's ridleys in the action area.

9.5 Marine Mammals

Our effects analysis determined that pile driving is likely to adversely affect ESA-listed marine mammals in the action area and cause temporary threshold shift (TTS), behavioral response, and stress in a small number of individual North Atlantic right, fin, sei, and sperm whales. Additionally, up to 6 fin whales are expected to be exposed to pile driving noise that would result in PTS, which will be a minor, but permanent, hearing impairment that is considered an injury. No injury of any kind, including PTS is anticipated, for any right, sei, or sperm whales. Animals exposed to sufficiently intense sound exhibit an increased hearing threshold (i.e., poorer sensitivity) for some period of time following exposure; this is called a noise-induced threshold shift (TS). The magnitude of TS normally decreases over time following cessation of the noise exposure, TS that eventually returns to zero (i.e., the threshold returns to the pre-exposure value), is called TTS (Southall et al. 2007). TTS represents primarily tissue fatigue and is reversible (Southall et al., 2007). In addition, other investigators have suggested that TTS is within the normal bounds of physiological variability and tolerance and does not represent physical injury (*e.g.*, Ward, 1997). Therefore, NMFS does not consider TTS to constitute auditory injury.

We determined that exposure to project noise other than impact pile driving for WTG and OSS foundations will have effects that are insignificant or are extremely unlikely to occur. We also determined that effects to habitat and prey are also insignificant or extremely unlikely to occur and concluded that with the incorporation of vessel strike risk reduction measures that are part of the proposed action, strike of an ESA listed whale by a project vessel is extremely unlikely to occur and that entanglement or capture in fisheries surveys is extremely unlikely to occur. In this section, we discuss the likely consequences of adverse effects to the individual whales that have been exposed, the populations those individuals represent, and the species those populations comprise.

Our analyses identified the likely effects of the EmpireEmpire Wind project, which requires authorizations from a number of federal agencies as described in section 3 of this Opinion, on the ESA-listed species that will be exposed to these actions. We measure effects to individuals of endangered or threatened marine mammals using changes in the individual's "fitness" or the individual's growth, survival, annual reproductive success, and lifetime reproductive success. When we do not expect listed marine mammals exposed to an action's effects to experience reductions in fitness, we would not expect the action to impact that animal's health or future reproductive success. Therefore, we would not expect adverse consequences on the overall reproduction, abundance, or distribution of the populations those individuals represent or the species those populations comprise. As a result, if we conclude that listed animals are not likely to experience reductions in their fitness, we would conclude our assessment. If, however, we conclude that listed animals are likely to experience reductions in their fitness, we would assess the consequences of those fitness reductions for the population represented in an action area and the species the population supports.

As documented in section 7 of this Opinion, the adverse effects anticipated on North Atlantic right, fin, sei, and sperm whales resulting from the proposed action are from sounds produced during pile driving in the action area. While this Opinion relies on the best available scientific and commercial information, our analysis and conclusions include uncertainty about the basic hearing capabilities of some marine mammals; how these animals use sounds as environmental cues; how they perceive acoustic features of their environment; the importance of sound to the normal behavioral and social ecology of species; the mechanisms by which human-generated sounds affect the behavior and physiology (including the non-auditory physiology) of exposed individuals; and the circumstances that could produce outcomes that have adverse consequences for individuals and populations of exposed species. Based on the best available information and exercising our best professional judgment, as explained in section 7 of this Opinion, we expect the effects of exposure to noise from impact pile driving below the MMPA Level A harassment threshold but above the MMPA Level B harassment threshold to have adverse, but temporary, effects on the behavior of individual fin, right, sei, and sperm whales that we have determined to cause harassment under the ESA. As is evident from the available literature cited herein, responses are expected to be short-term, with the animal returning to normal behavior patterns shortly after the exposure is over (e.g., Goldbogen et al. 2013a; Silve et al. 2015). While Southall et al. (2016) suggested that even minor, sub-lethal behavioral changes may still have significant energetic and physiological consequences given sustained or repeated exposure, as explained in section 7 of this Opinion, we do not expect such sustained or repeated exposure of any individuals in this case. As noted above, we expect the exposure of up to six fin whales to pile driving noise above the Level A harassment threshold; this is expected to result in PTS (i.e. injury).

9.5.1 North Atlantic Right Whales

As described in the *Status of the Species*, the endangered North Atlantic right whale is currently in decline in the western North Atlantic (Pace et al. 2017b; Pace et al. 2021) and experiencing an unusual mortality event (Daoust et al. 2017). The population estimate in the most recent Stock Assessment Report (Hayes et al. 2022) is 368 individuals (95% CI: 403-424); this is based on information through November 2019. The draft 2022 SAR (Hayes et al. 2023 draft) uses data from the photo-ID database as it existed in December 2021 and included photographic information up through November 2020. Using the hierarchical, state-space Bayesian open population model of these histories produced a median abundance value (N_{est}) as of November 30, 2020 of 338 individuals (95%CI: 325–350) and a minimum population estimate of 332. Modeling indicates that low female survival, a male-biased sex ratio, and low calving success are contributing to the population’s current decline (Pace et al. 2017b). The species has low genetic diversity, as would be expected based on its low abundance, and the species’ resilience to future perturbations (i.e., its ability to recover from declines in numbers of reductions) is expected to be very low (Hayes et al. 2018). Vessel strikes and entanglement of right whales in U.S. and Canadian waters continue to occur. Entanglement in fishing gear appears to have had substantial health and energetic costs that affect both survival and reproduction of right whales (van der Hoop et al. 2017a). Due to the declining status of North Atlantic right whales, the resilience of this population to stressors that would impact the distribution, abundance, and reproductive potential of the population is low. The species faces a high risk of extinction and the population size is small enough for the death of any individuals to have measurable effects in the projections on its population status, trend, and dynamics.

As described in the *Environmental Baseline* and *Status of the Species* sections, ongoing effects in the action area (e.g., global climate change, decreased prey abundance, vessel strikes, and entanglements in U.S. state and federal fisheries) have contributed to concern for the species' persistence. Sublethal effects from entanglement cannot be separated out from other stressors (e.g., prey abundance, climate variation, reproductive state, vessel collisions) which co-occur and affect calving rates. Entanglement in fishing gear and vessel strikes are currently understood to be the most significant threats to the species and, as described in the *Environmental Baseline* may occur in the action area over the life of the proposed action. As noted in the *Cumulative Effects* section of this Opinion, we have not identified any cumulative effects different from those considered in the *Status of the Species* and *Environmental Baseline* sections of this Opinion, inclusive of how those activities may contribute to climate change. As described in section 7.10, climate change is expected to continue to negatively affect right whales throughout their range, including in the action area, over the life of this project; however, we have not identified any different or exacerbated effects of the action in the context of anticipated climate change.

The distribution of right whales overlaps with some parts of the vessel transit routes that will be used through the 42-year life of the project. A number of measures designed to reduce the risk of vessel strike, including deploying lookouts and traveling at reduced speeds in areas where right whales are most likely to occur, are part of the proposed action. As explained in section 7.2, we have determined that strike of a right whale by a project vessel is extremely unlikely to occur. As such, vessel strike of a right whale and any associated injury or mortality is not an expected outcome of the Empire Wind project.

Based on the type of survey gear that will be deployed, we concluded that all effects to right whales from the surveys of fishery resources planned by Empire Wind and considered as part of the proposed action will be insignificant or discountable. We have concluded that capture or entanglement of a right whale and any associated injury or mortality is not an expected outcome of the Empire Wind project.

As explained in section 7.1, the effects of exposure to WTG operational noise and noise associated with other project activities (e.g., HRG surveys, vessels) are expected to be insignificant. We also determined that effects of construction, operation, and decommissioning, inclusive of project noise, will have insignificant effects on right whale prey. As right whales do not echolocate, there is no potential for noise or other project effects to affect echolocation. The area around operating WTGs where operational noise may be above ambient noise is expected to be very small (50 m or less) and any effects to right whales from avoiding that very small area would be insignificant. For HRG surveys, the best available data (Crocker and Fratantonio 2016) indicates that the area with noise above the level that would be disturbing to right whales is very small. Given the small area, the shutdown and clearance requirements, and that we only expect a whale exposed to that noise to swim just far enough way to avoid it (less than 500 m), effects are insignificant.

A number of measures that are part of the proposed action, including a seasonal restriction on impact pile driving, requirements to use noise attenuation devices, minimum visibility requirements, and clearance and shutdown measures during pile driving monitored by PSOs on multiple platforms, reduce the potential for exposure of right whales to pile driving noise. With these measures in place, we do not anticipate the exposure of any right whales to noise that could result in PTS, other injury, or mortality. However, even with these minimization measures in place, we expect 22 North Atlantic right whales to experience TTS, temporary behavioral disturbance (up to approximately 3-4 hours) \, and associated temporary physiological stress during the construction period due to exposure to impact pile driving noise. As explained in the *Effects of the Action* section, all of these impacts, including TTS, are expected to be temporary with normal behaviors resuming quickly after the noise ends (see Goldbogen et al. 2013a; Melcon et al. 2012). Any TTS will resolve within a week of exposure (that is, hearing sensitivity will return to normal within one week of exposure) and is not expected to affect the longterm health of any whale or its ability to migrate, forage, breed, or calve (Southall et al. 2007).

As explained in section 7.1, we have also considered whether TTS, masking, or avoidance behaviors experienced by the 22 right whales exposed to noise above the MMPA Level B harassment threshold would be likely to increase the risk of vessel strike or entanglement in fishing gear. We would not expect the TTS to span the entire communication or hearing range of right whales given the frequencies produced by pile driving do not span entire hearing ranges for right whales. Additionally, though the frequency range of TTS that right whales might sustain would overlap with some of the frequency ranges of their vocalization types, the frequency range of TTS from Empire Wind's pile driving activities would not span the entire frequency range of one vocalization type, much less span all types of vocalizations or other critical auditory cues for any given species. As such, any effects of TTS on the ability of a right whale to communicate with other right whales or to detect audio cues to the extent they rely on audio cues to avoid vessels or other threats are expected to be minor and temporary. As such, we do not expect masking to affect the ability of a right whale to avoid a vessel. These risks are lowered even further by the short duration of TTS (resolving within a week) and masking (limited only to the time that the whale is exposed to the pile driving noise). In addition, as explained in section 7.1, we do not expect that avoidance of pile driving noise would result in right whales moving to areas with higher risk of vessel strike or entanglement in fishing gear; increased risk of vessel strike or entanglement in fishing gear as a result of exposure to pile driving noise is extremely unlikely to occur. This determination was made in consideration of the distance a whale is expected to travel to avoid disturbing levels of noise and the distribution of vessel traffic and fishing activity in the WDA and surrounding waters.

We have considered if pile driving noise may mask right whale calls and could have effects on mother-calf communication and behavior. As noted in section 7.1, presence of mother-calf pairs is unlikely in the WDA during the May – December pile driving window. However, even if a mother-calf pair was exposed to pile driving noise, we do not anticipate that masking would result in fitness consequences given their short-term nature. As noted in section 7.1, when calves leave the foraging grounds off the coast of the southeastern U.S. at around four months of age, they are expected to be more robust and less susceptible to a missed or delayed nursing opportunity. Any masking of communications or any delays in nursing due to swimming away from the pile driving noise would only last for the duration of the exposure to pile driving noise; approximately 3-4 hours. This temporary disruption is not expected to have any health consequences to the calf or mother due to its short-term duration and the ability to resume normal behaviors as soon as they are out of range of the disturbance.

We expect that right whales in the WDA are migrating, or socializing, with limited, occasional and opportunistic foraging occurring. As explained in the effects analysis, if suitable densities of copepod prey are present, right whales may forage in the WDA; however, the WDA is outside of the areas where right whales are documented to aggregate and persist due to the presence of prey. Based on the best available information that indicates whales resume normal behavior quickly after the cessation of sound exposure (e.g., Goldbogen et al. 2013a; Melcon et al. 2012), we anticipate that the up to 22 right whales exposed to ESA harassment levels of noise during pile driving will return to normal behavioral patterns after the exposure ends. As such, even if a right whale exposed to pile driving noise was foraging, this disruption would be short term and impact no more than one foraging event on a single day.

A single impact pile driving event will take approximately 3 hours for WTG foundation installation and 4 hours for OSS foundation installation; therefore, even in the event that the 22 right whales expected to be exposed to impact pile driving noise were exposed to disturbing levels of noise for the entirety of a pile driving event, that disturbance would last approximately 3-4 hours. If an animal exhibits an avoidance response to pile driving noise, it would experience a cost in terms of the energy associated with traveling away from the acoustic source. Studies of marine mammal avoidance of sonar, which like pile driving is an impulsive sound source, demonstrate clear, strong, and pronounced behavioral changes, including sustained avoidance with associated energetic swimming and cessation of feeding behavior (Southall et al. 2016) suggesting that it is reasonable to assume that a whale exposed to noise above the MMPA Level B harassment threshold would take a direct path to get outside of the noisy area. As explained in section 7.1, during impact pile driving of monopiles, the area with noise above the Level B harassment threshold extends approximately 1.2-5.5 km from the pile being driven. As such, considering a right whale that was at the pile driving location when pile driving starts (i.e., at the center of the area with a 1.2 -5.5 km radius that will experience noise above the 160 dB re 1uPa threshold), we would expect that right whale swimming at maximum speed (9 kph) would escape from the area with noise above 160 dB re 1uPa the noise in about 8-36 minutes, but at the median speed observed in Hatin et al. (1.3 kph, 2013), it would take the animal approximately 1 to 4 hours to move out of the noisy area. However, given the requirements for visual and PAM clearance, it is unlikely that any right whale would be closer than the minimum visibility distance (1.5 km). Rather, it is far more likely that any exposure and associated disturbance would be for a significantly shorter period of time as a right whale would be much further from the pile being driven when pile driving started. In any event, it would not exceed the period of pile driving (about three to four hours).

There would likely be an energetic cost associated with any temporary displacement or change in migratory route, and disruption of a single foraging event, but unless disruptions occur over long durations or over subsequent days, which we do not expect, we do not anticipate this movement to be consequential to the animal over the long term (see Southall et al. 2007a). Similarly, the disruption of a single foraging event lasting for a few hours on a single day is not expected to affect the health of an animal, even an animal in poor condition. The energetic consequences of the evasive behavior and delay in resting or foraging for a few hours on a single day are not expected to affect any individual's ability to successfully obtain enough food to maintain their health, or impact the ability of any individual to make seasonal migrations or participate in future breeding or calving. Stress responses are also anticipated to occur as a result of noise exposure and the accompanying behavioral response. However, the available literature suggests these acoustically induced stress responses will be of short duration (similar to the duration of exposure), and not result in a chronic increase of stress that could result in physiological consequences to the animal (Southall et al. 2007). Given the short period of time during which elevated noise will be experienced, we do not anticipate long duration exposures to occur, and we do not anticipate the associated stress of exposure to result in long-term effects to affected individuals.

As explained in section 7 of this Opinion, the only adverse effects to North Atlantic right whales expected to result from the Empire Wind project are the temporary behavioral disturbance and/or temporary threshold shift (minor and temporary hearing impairment), inclusive of masking and stress, as a result of exposure to noise during impact pile driving for foundation installation. While we do not anticipate these effects to have long-term consequences, they are expected to create a short-term likelihood of injury by substantially disturbing normal behavioral patterns as the disturbance is experienced: these adverse effects thus meet NMFS's interim guidance definition of take by harassment under the ESA. These adverse effects will be experienced by up to 22 individual right whales as a result of exposure to noise from pile driving. As explained in section 7 of this Opinion, these effects do not meet the ESA definition of harm. No harm, injury (auditory or other), serious injury, or mortality is expected due to exposure to any aspect of the proposed action during the construction, operations, or decommissioning phases of the project.

As described in greater detail in Section 7.1, while of the anticipated behavioral disruptions, TTS, masking, and stress that are anticipated to result from exposure to noise during pile driving, will meet the ESA definition of harassment, there will not be long-term fitness consequences to any of the up to 22 individual North Atlantic right whales that will be harassed. Our analysis considered the overall number of exposures to acoustic stressors that are expected to result in harassment, inclusive of behavioral responses, TTS, masking, additional energy expenditure and stress, the duration and scope of the proposed activities expected to result in such impacts, the expected behavioral state of the animals at the time of exposure, and the expected condition of those animals. Instances of North Atlantic right whale exposure to acoustic stressors are expected to be short-term, with the animal returning to its previous behavioral state shortly thereafter. As described previously, information is not available to conduct a quantitative analysis to determine the likely fitness consequences of these exposures and associated responses because we do not have information from wild cetaceans that links short-term behavioral responses to vital rates and animal health. Harris et al. (2017a) summarized the research efforts conducted to date that have attempted to understand the ways in which behavioral responses may result in long-term consequences to individuals and populations. Efforts have been made to try to quantify the potential consequences of such responses, and frameworks have been developed for this assessment (e.g., Population Consequences of Disturbance). However, models that have been developed to date to address this question require many input parameters and, for most species, there are insufficient data for parameterization (Harris et al. 2017a). Nearly all studies and experts agree that infrequent exposures of a single day or less are unlikely to impact an individual's overall energy budget (Farmer et al. 2018; Harris et al. 2017b; King et al. 2015b; NAS 2017; New et al. 2014; Southall et al. 2007d; Villegas-Amtmann et al. 2015). Based on best available information, we expect this to be the case for North Atlantic right whales exposed to acoustic stressors associated with this project even for animals that may already be in a stressed or compromised state due to factors unrelated to the Empire Wind project; therefore, we do not expect this harassment to reduce the likelihood of successful migration, breeding, calving, or nursing.

In summary, while we expect the proposed action to result in the harassment of 22 right whales, we do not expect any harm, injury (auditory or otherwise), serious injury, or mortality of any right whale to result from the proposed action. We do not expect effects of the action to affect the health of any right whale. We also do not anticipate fitness consequences to any individual North Atlantic right whales; that is, we do not expect any effects on any individual's ability to reproduce or generate viable offspring. Because we do not anticipate any reduction in fitness, we do not anticipate any future effects on reproductive success to result from the proposed action. While many right whales in the action area are in a stressed state that is thought to contribute to a decreased calving interval, the short-term (no more than a few hours) exposure to pile driving noise experienced by a single individual is not anticipated to have any lingering effects and is not expected to have any effect on future reproductive output. As such, we do not expect any reductions in reproduction. Any effects to distribution will be limited to short-term alterations to normal movements by individuals to avoid disturbing levels of noise. Based on the information provided here, the proposed action will not appreciably reduce the likelihood of survival of the North Atlantic right whale (*i.e.*, it will not decrease the likelihood that the species will continue to persist into the future with sufficient resilience to allow for the potential recovery from endangerment).

The proposed action is not likely to affect the recovery potential of North Atlantic right whales (i.e. affect the likelihood that North Atlantic right whales can rebuild to a point where it is downlisted and ultimately listing is no longer appropriate). In making this determination we have considered generalized needs for species recovery and the goals and criteria identified in the 2005 Recovery Plan for North Atlantic right whales. We know that in general, to recover, a listed species must have a sustained positive trend of increasing population over time. In general, mortality rates must be low enough to allow for recruitment to all age classes so that successful calving can continue over time and over generations. The 2005 Recovery Plan (NMFS 2005) states that North Atlantic right whales may be considered for reclassifying to threatened when all of the following have been met: 1) The population ecology (range, distribution, age structure, and gender ratios, etc.) and vital rates (age-specific survival, age-specific reproduction, and lifetime reproductive success) of right whales are indicative of an increasing population; 2) The population has increased for a period of 35 years at an average rate of increase equal to or greater than 2% per year; 3) None of the known threats to Northern right whales (summarized in the five listing factors) are known to limit the population's growth rate; and, 4) Given current and projected threats and environmental conditions, the right whale population has no more than a 1% chance of quasi-extinction in 100 years. The proposed action will not result in any condition that impacts the time it will take to reach these goals or the likelihood that these goals will be met. This is because the proposed action will not result in any mortality or have any effect on the health or reproductive success of any individuals; therefore, it will not affect the trend of the species or prevent or delay it from achieving an increasing population or otherwise affect its growth rate and will not affect the chance of quasi-extinction. That is, the proposed action will not appreciably reduce the likelihood of recovery of North Atlantic right whales.

The proposed action will not affect the abundance of right whales; because no serious injury or mortality is anticipated, the project will not cause there to be fewer right whales. The only effects to distribution of right whales will be minor changes in the movements of up to 22 individuals exposed to pile driving noise above the MMPA Level B harassment threshold resulting in ESA take by harassment; there will be no changes in the distribution of the species in the action area or throughout its range. The proposed action will have no effect on reproduction because it will not affect the health of any potential mothers or the potential for successful breeding or calving; the project will not cause any reduction in reproduction. As explained above, the proposed action will not affect the recovery potential of the species.

For the reasons presented herein, the effects of the proposed action are not likely to appreciably reduce the likelihood of both the survival and recovery of North Atlantic right whales in the wild. These conclusions were made in consideration of the endangered status of North Atlantic right whales, the effects of the action, other stressors that individuals are exposed to within the action area as described in the *Environmental Baseline* and *Cumulative Effects* section of this Opinion, and any anticipated effects of climate change on the abundance, reproduction, and distribution of right whales in the action area.

9.5.2 Fin Whales

The best available current abundance estimate for fin whales in the North Atlantic stock is 6,802 (CV=0.24), sum of the 2016 NOAA shipboard and aerial surveys and the 2016 NEFSC and Department of Fisheries and Oceans Canada (DFO) surveys; the minimum population estimate for the western North Atlantic fin whale is 5,573 (Hayes et al. 2021). Fin whales in the North Atlantic compromise one of the three to seven stocks in the North Atlantic. According to the latest NMFS stock assessment report for fin whales in the Western North Atlantic, information is not available to conduct a trend analysis for this population (Hayes et al. 2021). Rangewide, there are over 100,000 fin whales occurring primarily in the North Atlantic Ocean, North Pacific Ocean, and Southern Hemisphere.

Entanglement in fishing gear and vessel strikes as described in the *Environmental Baseline* may occur in the action area over the life of the proposed action. As noted in the *Cumulative Effects* section of this Opinion, we have not identified any cumulative effects different from those considered in the *Status of the Species* and *Environmental Baseline* sections of this Opinion, inclusive of how those activities may contribute to climate change. As described in section 7.10, climate change may result in changes in the distribution or abundance of fin whales in the action area over the life of this project; however, we have not identified any different or exacerbated effects of the action in the context of anticipated climate change.

As explained in the section 7 of this Opinion, with the exception of 6 fin whales expected to experience PTS, the only adverse effects to fin whales expected to result from the Empire Wind project are temporary behavioral disturbance and/or temporary threshold shift (minor and temporary hearing impairment); we consider these adverse effects to occur at a level meeting NMFS's interim ESA definition of harassment. These adverse effects will be experienced by up to 190 individual fin whales as a result of exposure to noise from pile driving that is below the Level A harassment threshold but above the Level B harassment threshold. With the exception of 6 fin whales expected to experience PTS, no injury (auditory or other), serious injury or mortality is expected due to exposure to any effect of the proposed action during the construction, operations, or decommissioning phases of the project.

The distribution of fin whales overlaps with some parts of the vessel transit routes that will be used through the 42-year life of the project. A number of measures designed to reduce the risk of vessel strike, including deploying lookouts and traveling at reduced speeds in areas where fin whales are most likely to occur, are part of the proposed action. As explained in section 7.2, we have determined that strike of a fin whale by a project vessel is extremely unlikely to occur. As such, vessel strike of a fin whale and any associated injury or mortality is not an expected outcome of the Empire Wind project.

Based on the type of survey gear that will be deployed, we determined that effects to fin whales from the surveys of fishery resources planned by Empire Wind and considered as part of the proposed action are extremely unlikely to occur. As such, capture or entanglement of a fin whale and any associated injury or mortality is not an expected outcome of the Empire Wind project.

As explained in section 7.1, the effects of exposure to WTG operational noise and noise associated with other project activities (e.g., HRG surveys, vessels) are expected to be insignificant. We also determined that effects of construction, operation, and decommissioning, inclusive of project noise, will have insignificant effects on fin whale prey. As fin whales do not echolocate, there is no potential for noise or other project effects to affect echolocation. The area around operating WTGs where operational noise may be above ambient noise is expected to be very small (50 m or less) and any effects to fin whales from avoiding that very small area would be insignificant. For HRG surveys, the best available data (Crocker and Fratantonio 2016) indicates that the area with noise above the level that would be disturbing to fin whales is very small (no more than 500 m from the sound source). Given the small area, the shutdown and clearance requirements, and that we only expect a whale exposed to that noise to swim just far enough way to avoid it (less than 500 m), effects are insignificant.

A number of measures that are part of the proposed action, including a seasonal restriction on impact pile driving, requirements to use noise attenuation devices, minimum visibility requirements, and clearance and shutdown measures during pile driving monitored by PSOs on multiple platforms, reduce the potential for exposure of fin whales to pile driving noise. However, even with these minimization measures in place, we expect up to 6 fin whales to experience PTS and up to 190 fin whales to experience TTS, temporary behavioral disturbance and associated temporary physiological stress during the construction period due to exposure to impact pile driving noise.

PTS is permanent, meaning the effects of PTS last well beyond the duration of the proposed action and outside of the action area as animals migrate. As such, PTS has the potential to affect aspects of affected animal's life functions that do not overlap in time and space with the proposed action. As explained in section 7.1, we expect that the up to 6 fin whales estimated to be exposed to pile driving noise above the MMPA Level A harassment threshold would experience slight PTS, *i.e.* minor long-term or permanent degradation of hearing capabilities within regions of hearing that align most completely with the energy produced by pile driving (*i.e.* the low-frequency region below 2 kHz), not severe hearing impairment. If hearing impairment occurs, it is most likely that the affected animal would lose a few decibels in its hearing sensitivity, which in most cases is not likely to meaningfully affect its ability to forage and communicate with conspecifics, much less impact reproduction or survival (87 FR 64868; October 26, 2022). No severe hearing impairment or serious injury is expected because of the received levels of noise anticipated and the short duration of exposure. The PTS anticipated is considered a minor auditory injury and as such it constitutes take by harm under the ESA. As discussed previously in Section 7.1, permanent hearing impairment has the potential to affect individual whale survival and reproduction, although data are not readily available to evaluate how permanent hearing threshold shifts directly relate to individual whale fitness. Our exposure and response analyses indicate that no more than 6 fin whales would experience PTS, but this PTS is expected to be minor. With this minor degree of PTS, we do not expect it to affect the individuals' overall health, reproductive capacity, or survival. The 6 individual fin whales could be less efficient at locating conspecifics or have decreased ability to detect threats at long distances, but these animals are still expected to be able to locate conspecifics to socialize and reproduce, and will still be able to detect threats with enough time to avoid injury. For this reason, we do not anticipate that the instances of PTS will result in changes in the number, distribution, or reproductive potential of fin whales in the North Atlantic.

For the up to 190 fin whales that are exposed to noise loud enough to result in TTS and disruption of behavior, normal behaviors resuming quickly after the noise ends (see Goldbogen et al. 2013a; Melcon et al. 2012). Any TTS will resolve within a week of exposure (that is, hearing sensitivity will return to normal within one week of exposure) and is not expected to affect the health of any whale or its ability to migrate, forage, breed, or calve (Southall et al. 2007).

As explained in section 7.1, we have also considered whether TTS, masking, or avoidance behaviors experienced by the 190 fin whales exposed to noise above the MMPA Level B harassment threshold would be likely to increase the risk of vessel strike or entanglement in fishing gear. We would not expect the TTS to span the entire communication or hearing range of fin whales given the frequencies produced by pile driving do not span entire hearing ranges for fin whales. Additionally, though the frequency range of TTS that fin whales might sustain would overlap with some of the frequency ranges of their vocalization types, the frequency range of TTS from Empire Wind's pile driving activities would not span the entire frequency range of one vocalization type, much less span all types of vocalizations or other critical auditory cues for any given species. As such, we do not expect TTS to affect the ability of a fin whale to communicate with other fin whales or to detect audio cues to the extent they rely on audio cues to avoid vessels or other threats. As such, we do not expect masking to affect the ability of a fin whale to avoid a vessel. These risks are lowered even further by the short duration of TTS (resolving within a week) and masking (limited only to the time that the whale is exposed to the pile driving noise). Also, as explained in section 7.1, we do not expect that avoidance of pile driving noise would result in fin whales moving to areas with higher risk of vessel strike or entanglement in fishing gear; increased risk of vessel strike or entanglement in fishing gear as a result of exposure to pile driving noise is extremely unlikely to occur. This determination was made in consideration of the distance a whale is expected to travel to avoid disturbing levels of noise and the distribution of vessel traffic and fishing activity in the WDA and surrounding waters.

We have considered if pile driving noise may mask fin whale calls and could have effects on mother-calf communication and behavior. If a mother-calf pair was exposed to pile driving noise, we do not anticipate that masking would result in fitness consequences given their short-term nature. Any masking of communications or any delays in nursing due to swimming away from the pile driving noise would only last for the duration of the exposure to pile driving noise, which in all cases would be approximately 3-4 hours. This temporary disruption is not expected to have any health consequences to the calf or mother due to its short-term duration and the ability to resume normal behaviors as soon as they are out of range of the disturbance.

Fin whales in the WDA are migrating and may also forage. Based on the best available information that indicates whales resume normal behavior quickly after the cessation of sound exposure (e.g., Goldbogen et al. 2013a; Melcon et al. 2012), we anticipate that the up to 190 fin whales exposed to harassing levels of noise will return to normal behavioral patterns after the exposure ends. As such, even if a fin whale exposed to pile driving noise was foraging, this disruption would be short term and impact no more than one foraging event on a single day.

A single impact pile driving event will take approximately 3-4 hours; therefore, even in the event that the 190 fin whales expected to be exposed to impact pile driving noise were exposed to disturbing levels of noise for the entirety of a pile driving event, that disturbance would last approximately 3-4 hours.. If an animal exhibits an avoidance response to pile driving noise, it would experience a cost in terms of the energy associated with traveling away from the acoustic source. Studies of marine mammal avoidance of sonar, which like pile driving is an impulsive sound source, demonstrate clear, strong, and pronounced behavioral changes, including sustained avoidance with associated energetic swimming and cessation of feeding behavior (Southall et al. 2016) suggesting that it is reasonable to assume that a whale exposed to noise above the Level B harassment threshold would take a direct path to get outside of the noisy area. As explained in section 7.1, during impact pile driving for foundation installation, the area with noise above the MMPA Level B harassment threshold extends approximately 1.2-5.5 km from the pile being driven. As such, a fin whale that was at the pile driving location when pile driving starts , we would expect a fin whale swimming at maximum speed (35 kph) would escape from the area with noise above 160 dB re 1uPa the noise in less than 10 minutes, at the normal cruising speed of 10 kph, it would take the animal less than 20 minutes to move out of the noisy area.

There would likely be an energetic cost associated with any temporary displacement or change in migratory route, but unless disruptions occur over long durations or over subsequent days, which we do not expect, we do not anticipate this movement to be consequential to the animal over the long term (see Southall et al. 2007a). The energetic consequences of the evasive behavior and delay in resting are not expected to affect any individual's ability to successfully obtain enough food to maintain their health, or impact the ability of any individual to make seasonal migrations or participate in future breeding or calving. Stress responses are also anticipated with each of these instances of disruption. However, the available literature suggests these acoustically induced stress responses will be of short duration (similar to the duration of exposure), and not result in a chronic increase in stress that could result in physiological consequences to the animal (Southall et al. 2007). Given the short period of time during which individuals will be exposed to elevated noise, we do not anticipate long duration exposures to occur, and we do not anticipate the associated stress of exposure to result in significant costs to affected individuals**.**

As explained in section 7 of this Opinion, we determined that the adverse effects expected to result from the exposure of the 190 fin whales to noise below the Level A harassment threshold but above the Level B harassment threshold meet NMFS interim ESA definition of harassment. The proposed action will result in the harassment, but not harm, of 190 individual fin whales; the only injury anticipated is of the up to 6 fin whales that are expected to experience PTS due to exposure to pile driving noise above the Level A harassment threshold. No other injury, and no harm, serious injury, or mortality is expected due to exposure to any aspect of the proposed action during the construction, operations, or decommissioning phases of the project.

Our analysis considered the overall number of exposures to acoustic stressors that are expected to result in harassment, inclusive of behavioral responses, TTS, and stress, the duration and scope of the proposed activities expected to result in such impacts, the expected behavioral state of the animals at the time of exposure, and the expected condition of those animals. Instances of fin whale exposure to acoustic stressors are expected to be short-term, with the animal returning to its previous behavioral state shortly thereafter. As described previously, information is not available to conduct a quantitative analysis to determine the likely fitness consequences of these exposures and associated responses because we do not have information from wild cetaceans that links short-term behavioral responses to vital rates and animal health. Harris et al. (2017a) summarized the research efforts conducted to date that have attempted to understand the ways in which behavioral responses may result in long-term consequences to individuals and populations. Efforts have been made to try to quantify the potential consequences of such responses, and frameworks have been developed for this assessment (e.g., Population Consequences of Disturbance). However, models that have been developed to date to address this question require many input parameters and, for most species, there are insufficient data for parameterization (Harris et al. 2017a). Nearly all studies and experts agree that infrequent exposures of a single day or less are unlikely to impact an individual's overall energy budget (Farmer et al. 2018; Harris et al. 2017b; King et al. 2015b; NAS 2017; New et al. 2014; Southall et al. 2007d; Villegas-Amtmann et al. 2015). Based on best available information, we expect this to be the case for fin whales exposed to acoustic stressors associated with this project even for animals that may already be in a stressed or compromised state due to factors unrelated to the Empire Wind project. Because we do not anticipate fitness consequences to individual fin whales to result from instances of TTS and behavioral disturbance due to acoustic stressors that we have determined meets the ESA definition of harassment but not harm, we do not expect reductions in overall reproduction, abundance, or distribution of the fin whale population in the North Atlantic or rangewide.

The proposed action will not result in any reduction in the abundance or reproduction of fin whales. Any effects to distribution will be limited to short-term alterations to normal movements by individuals to avoid disturbing levels of noise. There will be no change to the overall distribution of fin whales in the action area or throughout their range. Based on the information provided here, the proposed action will not appreciably reduce the likelihood of survival of the fin whale (*i.e.*, it will not decrease the likelihood that the species will continue to persist into the future with sufficient resilience to allow for the potential recovery from endangerment).

The proposed action is not likely to affect the recovery potential of fin whales. In making this determination we have considered generalized needs for species recovery and the goals and criteria identified in the 2010 Recovery Plan for fin whales. We know that in general, to recover, a listed species must have a sustained positive trend of increasing population over time. In general, mortality rates must be low enough to allow for recruitment to all age classes so that successful calving can continue over time and over generations. The 2010 Recovery Plan for fin whales included two criteria for consideration for reclassifying the species from endangered to threatened:

> 1. Given current and projected threats and environmental conditions, the fin whale population in each ocean basin in which it occurs (North Atlantic, North Pacific and Southern Hemisphere) satisfies the risk analysis standard for threatened status (has no more than a 1% chance of extinction in 100 years) and has at least 500 mature, reproductive individuals (consisting of at least 250 mature females and at least 250 mature males) in each ocean basin. Mature is defined as the number of individuals known, estimated, or inferred to be capable of reproduction. Any factors or circumstances that are thought to substantially contribute to a real risk of extinction that cannot be incorporated into a Population Viability Analysis will be carefully considered before downlisting takes place; and,
>
> 2. None of the known threats to fin whales are known to limit the continued growth of populations. Specifically, the factors in 4(a)(l) of the ESA are being or have been addressed: A) the present or threatened destruction, modification or curtailment of a species' habitat or range; B) overutilization for commercial, recreational or educational purposes; C) disease or predation; D) the inadequacy of existing regulatory mechanisms; and E) other natural or manmade factors.

The proposed action will not result in any condition that impacts the time it will take to reach these goals or the likelihood that these goals will be met. This is because the proposed action will not affect the trend of the species or prevent or delay it from achieving an increasing population or otherwise affect the number of individuals or the species growth rate and will not affect the chance of extinction. The proposed action will not appreciably reduce the likelihood of recovery of fin whales.

The proposed action will not affect the abundance of fin whales; because no serious injury or mortality is anticipated, the project will not cause there to be fewer fin whales. The only effects to distribution of fin whales will be minor changes in the movements of up to 190 individuals exposed to pile driving noise above the Level B harassment threshold; there will be no changes in the distribution of the species throughout the action area or throughout its range. The proposed action will have no effect on reproduction because it will not affect the health of any potential mothers or the potential for successful breeding or calving; the project will not cause any reduction in reproduction. As explained above, the proposed action will not affect the recovery potential of the species.

Based on this analysis, the effects of the proposed action are not likely to appreciably reduce the likelihood of both the survival and recovery of fin whales in the wild by reducing the reproduction, numbers, or distribution of that species. These conclusions were made in consideration of the endangered status of fin whales, the effects of the action, other stressors that individuals are exposed to within the action area as described in the *Environmental Baseline* and *Cumulative Effects*, and any anticipated effects of climate change on the abundance, reproduction, and distribution of fin whales in the action area.

9.2.3 Sei Whales

The average spring 2010–2013 abundance estimate of 6,292 (CV=1.015) is considered the best available for the Nova Scotia stock of sei whales because it was derived from surveys covering the largest proportion of the range (Halifax, Nova Scotia to Florida), during the season when they are the most prevalent in U.S. waters (in spring), using only recent data (2010–2013), and correcting aerial survey data for availability bias (Hayes et al. 2022). However, as described in Hayes et al. 2022 (the most recent stock assessment report), there is considerable uncertainty in this estimate and there are insufficient data to determine population trends for the Nova Scotia stock of sei whales (Hayes et al. 2021). As described in the Status of the Species, a robust estimate of worldwide abundance is not available. The most recent abundance estimate for the North Atlantic is an estimate of 10,300 whales in 1989 (Cattanach et al. 1993 as cited in (NMFS 2011a). In the North Pacific, an abundance estimate for the entire North Pacific population of sei whales is not available. However, in the western North Pacific, it is estimated that there are 35,000 sei whales (Cooke 2018a). In the eastern North Pacific (considered east of longitude 180^{o}), two stocks of sei whales occur in U.S. waters: Hawaii and Eastern North Pacific. Abundance estimates for the Hawaii stock are 391 sei whales (Nmin=204), and for Eastern North Pacific stock, 519 sei whales (Nmin=374) (Carretta et al. 2019a). In the Southern Hemisphere, recent abundance of sei whales is estimated at 9,800 to 12,000 whales.

Entanglement in fishing gear and vessel strikes as described in the *Environmental Baseline* may occur in the action area over the life of the proposed action. As noted in the *Cumulative Effects* section of this Opinion, we have not identified any cumulative effects different from those considered in the Status of the Species and Environmental Baseline sections of this Opinion, inclusive of how those activities may contribute to climate change. As described in section 7.10, climate change may result in changes in the distribution or abundance of sei whales in the action area over the life of this project; however, we have not identified any different or exacerbated effects of the action in the context of anticipated climate change.

As explained in the section 7 of this Opinion, the only adverse effects to sei whales expected to result from the Empire Wind project are temporary behavioral disturbance and/or temporary threshold shift (minor and temporary hearing impairment) for up to 5 sei whales exposed to noise below the Level A harassment threshold but above the Level B harassment threshold; these adverse effects meet NMFS interim ESA definition of harassment. These adverse effects will be experienced by up to 5 individual sei whales as a result of exposure to noise from pile driving. No injury (auditory or other), serious injury, or mortality is expected due to exposure to any aspect of the proposed action during the construction, operations, or decommissioning phases of the project.

The distribution of sei whales overlaps with some parts of the vessel transit routes that will be used through the 42-year life of the project. A number of measures designed to reduce the risk of vessel strike, including deploying lookouts and traveling at reduced speeds in areas where sei whales are most likely to occur, are part of the proposed action. As explained in section 7.2, we have determined that strike of a sei whale by a project vessel is extremely unlikely to occur. As such, vessel strike of a sei whale and any associated injury or mortality is not an expected outcome of the Empire Wind project.

Based on the type of survey gear that will be deployed, we do not expect any effects to sei whales from the surveys of fishery resources planned by Empire Wind and considered as part of the proposed action. As such, capture or entanglement of a sei whale and any associated injury or mortality is not an expected outcome of the Empire Wind project.

As explained in section 7.1, the effects of exposure to WTG operational noise and noise associated with other project activities (e.g., HRG surveys, vessels) are expected to be insignificant. We also determined that effects of construction, operation, and decommissioning, inclusive of project noise, will have insignificant effects on sei whale prey. As sei whales do not echolocate, there is no potential for noise or other project effects to affect echolocation. The area around operating WTGs where operational noise may be above ambient noise is expected to be very small (50 m or less) and any effects to sei whales from avoiding that very small area would be insignificant. For HRG surveys, the best available data (Crocker and Fratantonio 2016) indicates that the area with noise above the level that would be disturbing to sei whales is very small (no more than 500 m from the sound source). Given the small area, the shutdown and clearance requirements, and that we only expect a whale exposed to that noise to swim just far enough away to avoid it (less than 500 m), effects are insignificant.

Up to 5 sei whales are expected to be exposed to pile driving noise that will be loud enough to result in TTS or behavioral disturbance, inclusive of masking and stress, that would meet the NMFS interim definition of ESA harassment but not harm. A number of measures that are part of the proposed action, including a seasonal restriction on impact pile driving, requirements to use noise attenuation devices, minimum visibility requirements, and clearance and shutdown measures during pile driving monitored by PSOs on multiple platforms, reduce the potential for exposure of sei whales to pile driving noise. However, even with these minimization measures in place, we expect 5 sei whales to experience TTS, temporary behavioral disturbance (approximately 3-4 hours), and associated temporary physiological stress during the construction period due to exposure to impact pile driving noise. As explained in the *Effects of the Action* section, all of these impacts, including TTS, are expected to be temporary with normal behaviors resuming quickly after the noise ends (see Goldbogen et al. 2013a; Melcon et al. 2012). Any TTS will resolve within a week of exposure (that is, hearing sensitivity will return to normal within one week of exposure) and is not expected to affect the long-term health of any whale or its ability to migrate, forage, breed, or calve (Southall et al. 2007).

As explained in section 7.1, we have also considered whether TTS, masking, or avoidance behaviors experienced by the 5 sei whales exposed to noise above the MMPA Level B harassment threshold would be likely to increase the risk of vessel strike or entanglement in fishing gear. We would not expect the TTS to span the entire communication or hearing range of sei whales given the frequencies produced by pile driving do not span entire hearing ranges for sei whales. Additionally, though the frequency range of TTS that sei whales might sustain would overlap with some of the frequency ranges of their vocalization types, the frequency range of TTS from Empire Wind's pile driving activities would not span the entire frequency range of one vocalization type, much less span all types of vocalizations or other critical auditory cues for any given species. As such, we do not expect TTS to affect the ability of a sei whale to communicate with other sei whales or to detect audio cues to the extent they rely on audio cues to avoid vessels or other threats. As such, we do not expect masking to affect the ability of a sei whale to avoid a vessel. These risks are lowered even further by the short duration of TTS (resolving within a week) and masking (limited only to the time that the whale is exposed to the pile driving noise). Also, as explained in section 7.1, we do not expect that avoidance of pile driving noise would result in sei whales moving to areas with higher risk of vessel strike or entanglement in fishing gear; increased risk of vessel strike or entanglement in fishing gear as a result of exposure to pile driving noise is extremely unlikely to occur. This determination was made in consideration of the distance a whale is expected to travel to avoid disturbing levels of noise and the distribution of vessel traffic and fishing activity in the WDA and surrounding waters.

We have considered if pile driving noise may mask sei whale calls and could have effects on mother-calf communication and behavior. If a mother-calf pair was exposed to pile driving noise, we do not anticipate that masking would result in fitness consequences given their short-term nature. Any masking of communications or any delays in nursing due to swimming away from the pile driving noise would only last for the duration of the exposure to pile driving noise, approximately 3- 4 hours. This temporary disruption is not expected to have any health consequences to the calf or mother due to its short-term duration and the ability to resume normal behaviors as soon as they are out of range of the disturbance.

Sei whales in the WDA are migrating and may forage in the WDA. Based on the best available information that indicates whales resume normal behavior quickly after the cessation of sound exposure (e.g., Goldbogen et al. 2013a; Melcon et al. 2012), we anticipate that the up to 5 sei whales exposed to harassing levels of noise will return to normal behavioral patterns after the exposure ends. As such, even if a sei whale exposed to pile driving noise was foraging, this disruption would be short term and impact no more than one foraging event.

A single impact pile driving event will take approximately 3-4 hours f; therefore, even in the event that the 5 sei whales expected to be exposed to impact pile driving noise were exposed to disturbing levels of noise for the entirety of a pile driving event, that disturbance would last approximately 3-4 hours. If an animal exhibits an avoidance response to pile driving noise, it would experience a cost in terms of the energy associated with traveling away from the acoustic source. Studies of marine mammal avoidance of sonar, which like pile driving is an impulsive sound source, demonstrate clear, strong, and pronounced behavioral changes, including sustained avoidance with associated energetic swimming and cessation of feeding behavior (Southall et al. 2016) suggesting that it is reasonable to assume that a whale exposed to noise above the Level B harassment threshold would take a direct path to get outside of the noisy area. As explained in section 7.1, during impact pile driving of monopiles, the area with noise above the Level B harassment threshold extends approximately 1.2 to 5.5 km from the pile being driven. As such, a sei whale that was at the pile driving location when pile driving starts and that is swimming at maximum speed (55 kph) would escape from the area with noise above 160 dB re 1uPa the noise in less than 15 minutes, at the normal cruising speed of 10 kph, it would take the animal less than 30 minutes to move out of the noisy area.

There would likely be an energetic cost associated with any temporary displacement or change in migratory route, but unless disruptions occur over long durations or over subsequent days, which we do not expect, we do not anticipate this movement to be consequential to the animal over the long term (see Southall et al. 2007a). The energetic consequences of the evasive behavior and delay in resting are not expected to affect any individual's ability to successfully obtain enough food to maintain their health, or impact the ability of any individual to make seasonal migrations or participate in future breeding or calving. Stress responses are also anticipated with each of these instances of disruption. However, the available literature suggests these acoustically induced stress responses will be of short duration (similar to the duration of exposure), and not result in a chronic increase in stress that could result in physiological consequences to the animal (Southall et al. 2007). Given the short period of time during which individuals will be exposed to elevated noise, we do not anticipate long duration exposures to occur, and we do not anticipate the associated stress of exposure to result in significant costs to affected individuals**.**

As described in greater detail in Section 7.1, we do not anticipate these instances of TTS and/or behavioral disturbance that meet the ESA definition of harassment but not harm to result in fitness consequences to the up to 5 individual sei whales to which this will occur. Our analysis considered the overall number of exposures to acoustic stressors that are expected to result in harassment, inclusive of behavioral responses, TTS, and stress, the duration and scope of the proposed activities expected to result in such impacts, the expected behavioral state of the animals at the time of exposure, and the expected condition of those animals. Instances of sei whale exposure to acoustic stressors are expected to be short-term, with the animal returning to its previous behavioral state shortly thereafter. As described previously, information is not available to conduct a quantitative analysis to determine the likely fitness consequences of these exposures and associated responses because we do not have information from wild cetaceans that links short-term behavioral responses to vital rates and animal health. Harris et al. (2017a) summarized the research efforts conducted to date that have attempted to understand the ways in which behavioral responses may result in long-term consequences to individuals and populations. Efforts have been made to try to quantify the potential consequences of such responses, and frameworks have been developed for this assessment (e.g., Population Consequences of Disturbance). However, models that have been developed to date to address this question require many input parameters and, for most species, there are insufficient data for parameterization (Harris et al. 2017a). Nearly all studies and experts agree that infrequent exposures of a single day or less are unlikely to impact an individual's overall energy budget (Farmer et al. 2018; Harris et al. 2017b; King et al. 2015b; NAS 2017; New et al. 2014; Southall et al. 2007d; Villegas-Amtmann et al. 2015). Based on best available information, we expect this to be the case for sei whales exposed to acoustic stressors associated with this project even for animals that may already be in a stressed or compromised state due to factors unrelated to the Empire Wind project. Because we do not anticipate fitness consequences to individual sei whales to result from the ESA harassment resulting from TTS, behavioral disturbance, and associated stress, due to exposure to acoustic stressors, we do not expect any reductions in overall reproduction, abundance, or distribution of the sei whale population in the North Atlantic or rangewide. Based on the information provided here, the proposed action will not appreciably reduce the likelihood of survival of the sei whale (*i.e.*, it will not decrease the likelihood that the species will continue to persist into the future with sufficient resilience to allow for the potential recovery from endangerment).

The proposed action will not result in any reduction in the abundance or reproduction of sei whales. Any effects to distribution will be limited to short-term alterations to normal movements by individuals to avoid disturbing levels of noise. There will be no change to the overall distribution of sei whales in the action area or throughout their range.

The proposed action is also not expected to affect recovery potential of the species. In the 2021 5-Year Review for sei whales, NMFS concluded that the recovery criteria outlined in the sei whale recovery plan (NMFS 2011) do not reflect the best available and most up-to-date information on the biology of the species. Therefore, we have not relied on the reclassification criteria specifically when considering the effects of the Empire Wind action on the recovery of the species. We know that in general, to recover, a listed species must have a sustained positive trend of increasing population over time. In general, mortality rates must be low enough to allow for recruitment to all age classes so that successful calving can continue over time and over generations. The Empire Wind project will not affect the status or trend of sei whales; this is because it will not result in the injury or mortality of any individuals or affect the ability of any individual to successfully reproduce or the ability of calves to grow to maturity. As such, the proposed action is not likely to affect the recovery potential of sei whales and is not likely to appreciably reduce the likelihood of recovery of North Atlantic right whales.

The proposed action will not affect the abundance of sei whales; this is, because no serious injury or mortality is anticipated, the project will not cause there to be fewer sei whales. The only effects to distribution of sei whales will be minor changes in the movements of up to 5 individuals exposed to pile driving noise; there will be no changes in the distribution of the species in the action area or throughout its range. The proposed action will have no effect on reproduction because it will not affect the health of any potential mothers or the potential for successful breeding or calving; the project will not cause any reduction in reproduction. As explained above, the proposed action will not affect the recovery potential of the species. Based on this analysis, the proposed action is not likely to appreciably reduce the likelihood of both the survival and recovery of sei whales in the wild by reducing the reproduction, numbers, or distribution of that species. These conclusions were made in consideration of the endangered status of sei whales, other stressors that individuals are exposed to within the action area as described in the *Environmental Baseline* and *Cumulative Effects*, and any anticipated effects of climate change on the abundance, reproduction, and distribution of sei whales in the action area.

9.2.4 Sperm Whales

As described in further detail in the Status of the Species, the most recent estimate indicated a global population of between 300,000 and 450,000 individuals (Whitehead 2009). The higher estimates may be approaching population sizes prior to commercial whaling, the reason for ESA listing. No other more recent rangewide abundance estimates are available for this species (Waring et al. 2015). Hayes et al. (2021) reports that several estimates from selected regions of sperm whale habitat exist for select time periods, however, at present there is no reliable estimate of total sperm whale abundance for the entire North Atlantic. Sightings have been almost exclusively in the continental shelf edge and continental slope areas; however, there has been little or no survey effort beyond the slope. The best recent abundance estimate for sperm whales in the North Atlantic is the sum of the 2016 surveys— 4,349 (CV=0.28) (Hayes et al. 2021).

Entanglement in fishing gear and vessel strikes as described in the *Environmental Baseline* may occur in the action area over the life of the proposed action. As noted in the *Cumulative Effects* section of this Opinion, we have not identified any cumulative effects different from those considered in the *Status of the Species* and *Environmental Baseline* sections of this Opinion, inclusive of how those activities may contribute to climate change. As described in section 7.10, climate change may result in changes in the distribution or abundance of sperm whales in the overall action area over the life of this project, but given the shallow depths of the lease area, any change in distribution of sperm whales over time is not expected to result in any change in use of the lease area. We have not identified any different or exacerbated effects of the action in the context of anticipated climate change.

As explained in the section 7 of this Opinion, the only adverse effects to sperm whales expected to result from the Empire Wind project are temporary behavioral disturbance and/or temporary threshold shift (minor and temporary hearing impairment) of up to 6 sperm whales that are exposed to pile driving noise above the Level B harassment threshold but below the Level A harassment threshold; these adverse effects meet NMFS interim ESA definition of harassment. These adverse effects will be experienced by up to 6 individual sperm whales as a result of exposure to noise from impact pile driving. No injury (auditory or other), serious injury or mortality is expected due to exposure to any aspect of the proposed action during the construction, operations, or decommissioning phases of the project.

The distribution of sperm whales overlaps with some parts of the vessel transit routes that will be used through the 42-year life of the project. A number of measures designed to reduce the risk of vessel strike, including deploying lookouts and traveling at reduced speeds in areas where sperm whales are most likely to occur, are part of the proposed action. As explained in section 7.2, we have determined that strike of a sperm whale by a project vessel is extremely unlikely to occur. As such, vessel strike of a sperm whale and any associated injury or mortality is not an expected outcome of the Empire Wind project.

Based on the type of survey gear that will be deployed, any effects to sperm whales from the surveys of fishery resources planned by Empire Wind and considered as part of the proposed action are extremely unlikely to occur. As such, capture or entanglement of a sperm whale and any associated injury or mortality is not an expected outcome of the Empire Wind project.

As explained in section 7.1, the effects of exposure to WTG operational noise and noise associated with other project activities (e.g., HRG surveys, vessels) are expected to be insignificant. We also determined that effects of construction, operation, and decommissioning, inclusive of project noise, will have insignificant effects on sperm whale prey. Potential effects to echolocation are also insignificant. The area around operating WTGs where operational noise may be above ambient noise is expected to be very small (50 m or less) and any effects to sperm whales from avoiding that very small area would be insignificant. For HRG surveys, the best available data (Crocker and Fratantonio 2016) indicates that the area with noise above the level that would be disturbing to sperm whales is very small (no more than 100 m from the sound source). Given the small area, the shutdown and clearance requirements, and that we only expect a whale exposed to that noise to swim just far enough away to avoid it (less than 100 m), effects are insignificant.

No sperm whales are expected to be exposed to noise from pile driving that could result in PTS or any other injury. Only a small number of sperm whales (no more than 6) are expected to be exposed to pile driving that will be loud enough to result in TTS or behavioral disturbance that would meet the NMFS interim definition of ESA harassment. A number of measures that are part of the proposed action, including a seasonal restriction on impact pile driving, requirements to use noise attenuation devices, minimum visibility requirements, and clearance and shutdown measures during pile driving monitored by PSOs on multiple platforms, reduce the potential for exposure of sperm whales to pile driving noise. With these measures in place, we do not anticipate the exposure of any sperm whales to noise that could result in PTS, other injury, or mortality. However, even with these minimization measures in place, we expect up to 6 sperm whales to experience TTS, temporary behavioral disturbance and associated temporary physiological stress during the construction period due to exposure to impact pile driving noise. We have determined that the effects experienced by these 6 sperm whales meet the ESA definition of harassment, but not harm.
As explained in the Effects of the Action section, all of these impacts, including TTS, are expected to be temporary with normal behaviors resuming quickly after the noise ends (see Goldbogen et al. 2013a; Melcon et al. 2012). Any TTS will resolve within a week of exposure (that is, hearing sensitivity will return to normal within one week of exposure) and is not expected to affect the health of any whale or its ability to migrate, forage, breed, or calve (Southall et al. 2007).

As explained in section 7.1, we have also considered whether TTS, masking, or avoidance behaviors experienced by the 6 sperm whales exposed to noise above the MMPA Level B harassment threshold would be likely to increase the risk of vessel strike or entanglement in fishing gear. We would not expect the TTS to span the entire communication or hearing range of sperm whales given the frequencies produced by pile driving do not span entire hearing ranges for sperm whales. Additionally, though the frequency range of TTS that sperm whales might sustain would overlap with some of the frequency ranges of their vocalization types, the frequency range of TTS from Empire Wind's pile driving activities would not span the entire frequency range of one vocalization type, much less span all types of vocalizations or other critical auditory cues for any given species. As such, we do not expect TTS to affect the ability of a sperm whale to communicate with other sperm whales or to detect audio cues to the extent they rely on audio cues to avoid vessels or other threats. As such, we do not expect masking to affect the ability of a sperm whale to avoid a vessel. These risks are lowered even further by the short duration of TTS (resolving within a week) and masking (limited only to the time that the whale is exposed to the pile driving noise). In addition, as explained in section 7.1, we do not expect that avoidance of pile driving noise would result in sperm whales moving to areas with higher risk of vessel strike or entanglement in fishing gear; increased risk of vessel strike or entanglement in fishing gear as a result of exposure to pile driving noise is extremely unlikely to occur. This determination was made in consideration of the distance a whale is expected to travel to avoid disturbing levels of noise and the distribution of vessel traffic and fishing activity in the WDA and surrounding waters.

We have considered if pile driving noise may mask sperm whale calls and could have effects on mother-calf communication and behavior. As noted in section 7.1, presence of mother-calf pairs is unlikely in the WDA. However, even if a mother-calf pair was exposed to pile driving noise, we do not anticipate that masking would result in fitness consequences given their short-term nature. Any masking of communications or any delays in nursing due to swimming away from the pile driving noise would only last for the duration of the exposure to pile driving noise, which in all cases would be no more than approximately 3-4 hours. This temporary disruption is not expected to have any health consequences to the calf or mother due to its short-term duration and the ability to resume normal behaviors as soon as they are out of range of the disturbance.

We expect that sperm whales in the WDA are migrating. Foraging is unexpected due to the nearshore location and shallow depths. As such, disruption of foraging is not expected.

A single impact pile driving event will take no more than approximately 3-4 hours; therefore, even in the event that the 3 sperm whales expected to be exposed to impact pile driving noise were exposed to disturbing levels of noise for the entirety of a pile driving event, that disturbance would last no more than approximately 3-4 hours. If an animal exhibits an avoidance response to pile driving noise, it would experience a cost in terms of the energy associated with traveling away from the acoustic source. Studies of marine mammal avoidance of sonar, which like pile driving is an impulsive sound source, demonstrate clear, strong, and pronounced behavioral changes, including sustained avoidance with associated energetic swimming and cessation of feeding behavior (Southall et al. 2016) suggesting that it is reasonable to assume that a whale exposed to noise above the MMPA Level B harassment threshold would take a direct path to get outside of the noisy area. As explained in section 7.1, during impact pile driving of monopiles, the area with noise above the MMPA Level B harassment threshold extends approximately 1.2-5.5 km from the pile being driven,. As such, a sperm whale that was at the pile driving location when pile driving starts we would expect a sperm whale swimming at maximum speed (45 kph) would escape from the area with noise above 160 dB re 1uPa the noise in about 5 minutes, but at normal cruise speed (5-15 kph), it would take the animal approximately 30 minutes to move out of the noisy area.

There would likely be an energetic cost associated with any temporary displacement or change in migratory route, but unless disruptions occur over long durations or over subsequent days, which we do not expect, we do not anticipate this movement to be consequential to the animal over the long term (see Southall et al. 2007a). The energetic consequences of the evasive behavior and delay in resting are not expected to affect any individual's ability to successfully obtain enough food to maintain their health, or impact the ability of any individual to make seasonal migrations or participate in future breeding or calving. Stress responses are also anticipated with each of these instances of disruption. However, the available literature suggests these acoustically induced stress responses will be of short duration (similar to the duration of exposure), and not result in a chronic increase in stress that could result in physiological consequences to the animal (Southall et al. 2007). Given the short period of time during which elevated noise will be experienced, we do not anticipate long duration exposures to occur, and we do not anticipate the associated stress of exposure to result in significant costs to affected individuals**.**

As described in greater detail in Section 7.1, we do not anticipate these instances of TTS and behavioral disturbance that we have determined meet the ESA definition of harassment, but not harm, to result in fitness consequences to the up to 6 sperm whales to which this will occur. Our analysis considered the overall number of exposures to acoustic stressors that are expected to result in harassment, inclusive of behavioral responses, TTS, and stress, the duration and scope of the proposed activities expected to result in such impacts, the expected behavioral state of the animals at the time of exposure, and the expected condition of those animals. Instances of sperm whale exposure to acoustic stressors are expected to be short-term, with the animal returning to its previous behavioral state shortly thereafter. As described previously, information is not available to conduct a quantitative analysis to determine the likely fitness consequences of these exposures and associated responses because we do not have information from wild cetaceans that links short-term behavioral responses to vital rates and animal health. Harris et al. (2017a) summarized the research efforts conducted to date that have attempted to understand the ways in which behavioral responses may result in long-term consequences to individuals and populations. Efforts have been made to try to quantify the potential consequences of such responses, and frameworks have been developed for this assessment (e.g., Population Consequences of Disturbance). However, models that have been developed to date to address this question require many input parameters and, for most species, there are insufficient data for parameterization (Harris et al. 2017a). Nearly all studies and experts agree that infrequent exposures of a single day or less are unlikely to impact an individual's overall energy budget (Farmer et al. 2018; Harris et al. 2017b; King et al. 2015b; NAS 2017; New et al. 2014; Southall et al. 2007d; Villegas-Amtmann et al. 2015). Based on best available information, we expect this to be the case for sperm whales exposed to acoustic stressors associated with this project even for animals that may already be in a stressed or compromised state due to factors unrelated to the Empire Wind project.

We do not expect any injury, serious injury or mortality of any sperm whale to result from the proposed action. We do not expect the action to affect the health of any sperm whale. We also do not anticipate fitness consequences to any individual sperm whales; that is, we do not expect any effects on any individual's ability to reproduce or generate viable offspring. Because we do not anticipate any reduction in fitness, we do not anticipate any future effects on reproductive success. Any effects to distribution will be limited to short-term alterations to normal movements by individuals to avoid disturbing levels of noise. Based on the information provided here, the proposed action will not appreciably reduce the likelihood of survival of the sperm whale (*i.e.*, it will not decrease the likelihood that the species will continue to persist into the future with sufficient resilience to allow for the potential recovery from endangerment).

The proposed action is not likely to affect the recovery potential of sperm whales. In making this determination we have considered generalized needs for species recovery and the goals and criteria identified in the 2010 Recovery Plan for sperm whales. We know that in general, to recover, a listed species must have a sustained positive trend of increasing population over time. In general, mortality rates must be low enough to allow for recruitment to all age classes so that successful calving can continue over time and over generations. The 2010 Recovery Plan contains downlisting and delisting criteria. As sperm whales are listed as endangered, we have considered whether the proposed action is likely to affect the likelihood that these criteria will be met or the time it takes to meet these criteria. The Plan states that sperm whales may be considered for reclassifying to threatened when all of the following have been met:

1. Given current and projected threats and environmental conditions, the sperm whale population in each ocean basin in which it occurs (Atlantic Ocean/Mediterranean Sea, Pacific Ocean, and Indian Ocean) satisfies the risk analysis standard for threatened status (has no more than a 1% chance of extinction in 100 years) and the global population has at least 1,500 mature, reproductive individuals (consisting of at least 250 mature females and at least 250 mature males in each ocean basin). Mature is defined as the number of individuals known, estimated, or inferred to be capable of reproduction. Any factors or circumstances that are thought to substantially contribute to a real risk of extinction that cannot be incorporated into a Population Viability Analysis will be carefully considered before downlisting takes place; and,
2. None of the known threats to sperm whales is known to limit the continued growth of populations. Specifically, the factors in 4(a)(l) of the ESA are being or have been addressed: A) the present or threatened destruction, modification or curtailment of a species' habitat or range; B) overutilization for commercial, recreational or educational purposes; C) disease or predation; D) the inadequacy of existing regulatory mechanisms; and E) other natural or manmade factors.

The proposed action will not result in any condition that impacts the time it will take to reach these goals or the likelihood that these goals will be met. This is because the proposed action will not affect the trend of the species or prevent or delay it from achieving an increasing population or otherwise affect its growth rate and will not affect the chance of extinction. That is, the proposed action will not appreciably reduce the likelihood of recovery of sperm whales.

The proposed action will not affect the abundance of sperm whales; this is, because no serious injury or mortality is anticipated, the project will not cause there to be fewer sperm whales. The only effects to distribution of sperm whales will be minor changes in the movements of up to 6 individuals exposed to pile driving noise; there will be changes in the distribution of the species throughout the action area or throughout its range. The proposed action will have no effect on reproduction because it will not affect the health of any potential mothers or the potential for successful breeding or calving; the project will not cause any reduction in reproduction. As explained above, the proposed action will not affect the recovery potential of the species. For these reasons, the effects of the proposed action are not likely to appreciably reduce the likelihood of both the survival and recovery of sperm whales in the wild by reducing the reproduction, numbers, or distribution of that species.. These conclusions were made in consideration of the endangered status of sperm whales, other stressors that individuals are exposed to within the action area as described in the *Environmental Baseline* and *Cumulative Effects*, and any anticipated effects of climate change on the abundance, reproduction, and distribution of sperm whales in the action area.

10.0 CONCLUSION

After reviewing the current status of the ESA-listed species and critical habitat, the environmental baseline within the action area, the effects of the proposed action, and cumulative effects, it is our biological opinion that the proposed action is likely to adversely affect but is not likely to jeopardize the continued existence of fin, sei, sperm, or North Atlantic right whales or the Northwest Atlantic DPS of loggerhead sea turtles, North Atlantic DPS of green sea turtles, Kemp's ridley or leatherback sea turtles, or any of the five DPSs of Atlantic sturgeon. The proposed action is not likely to adversely affect blue whales, shortnose sturgeon, giant manta rays, hawksbill sea turtles, or oceanic whitetip sharks. We have determined that the project will have no effect on the Gulf of Maine DPS of Atlantic salmon, or critical habitat designated for the North Atlantic right whale, the Northwest Atlantic DPS of loggerhead sea turtles, the Carolina DPS of Atlantic sturgeon, or the New York Bight DPS of Atlantic sturgeon.

11.0 INCIDENTAL TAKE STATEMENT

Section 9 of the ESA and Federal regulations pursuant to section 4(d) of the ESA prohibit the take of endangered and threatened species, respectively, without a special exemption. In the case of threatened species, section 4(d) of the ESA leaves it to the Secretary's discretion whether and to what extent to extend the statutory 9(a) ''take'' prohibitions, and directs the agency to issue regulations it considers necessary and advisable for the conservation of the species.

"Take" is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. Harm is further defined by regulation to include significant habitat modification or degradation that results in death or injury to ESA listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. NMFS has not yet defined "harass" under the ESA in regulation, but has issued interim guidance on the term "harass," defining it as to "create the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering" (NMFS PD 02-110-19). We considered NMFS' interim definition of harassment in evaluating whether the proposed activities are likely to result in harassment of ESA listed species. Incidental take statements serve a number of functions, including providing reinitiation triggers for all anticipated take, providing exemptions from the Section 9 prohibitions against take, and identifying reasonable and prudent measures with implementing terms and conditions that will minimize the impact of anticipated incidental take and monitor incidental take that occurs.

When an action will result in incidental take of ESA listed marine mammals, ESA section 7(b)(4) requires that such taking be authorized under the MMPA section 101(a)(5) before the Secretary can issue an Incidental Take Statement (ITS) for ESA listed marine mammals and that an ITS specify those measures that are necessary to comply with Section 101(a)(5) of the MMPA. Section 7(b)(4), section 7(o)(2), and ESA regulations provide that taking that is incidental to an otherwise lawful activity conducted by an action agency or applicant is not considered to be prohibited taking under the ESA if that activity is performed in compliance with the terms and conditions of this ITS, including those specified as necessary to comply with the MMPA, Section 101(a)(5). Accordingly, the terms of this ITS and the exemption from Section 9 of the ESA become effective only upon the issuance of MMPA authorization to take the ESA-listed marine mammals identified here. Absent such authorization, this ITS is inoperative for ESA listed marine mammals. As described in this Opinion, Empire Offshore Wind, LLC has applied for an MMPA ITA; a decision regarding issuance of the ITA is expected in early 2024 following issuance of the Record of Decision for the project.

The measures described below must be undertaken by the action agencies so that they become binding conditions for the exemption in section 7(o)(2) to apply. BOEM and other action agencies have a continuing duty to regulate the activity covered by this ITS. If one or more of them: (1) fails to assume and implement the terms and conditions, or (2) fails to require the project sponsor or their contractors to adhere to the terms and conditions of the ITS through enforceable terms and conditions that are included in any COP approval, grants, permits and/or contracts, the protective coverage of section 7(o)(2) may lapse. The protective coverage of section 7(o)(2) also may lapse if the project sponsor fails to comply with the terms and conditions. In order to monitor the impact of incidental take, BOEM, other action agencies, and Empire Wind must report the progress of the action and its impact on the species to us as specified in the ITS [50 CFR §402.14(i)(3)] (See U.S. Fish and Wildlife Service and National Marine Fisheries Service's Joint Endangered Species Act Section 7 Consultation Handbook (1998) at 4-49).

11.1 Amount or Extent of Take

Section 7 regulations require NMFS to specify the impact of any incidental take of endangered or threatened species; that is, the amount or extent of such incidental taking on the species (50 C.F.R. §402.14(i)(1)(i)). As explained in the Effects of the Action section, we anticipate pile driving during construction to result in the harassment of North Atlantic right, fin, sperm, and sei whales and NWA DPS loggerhead, NA DPS green, Kemp's ridley, and leatherback sea turtles. We anticipate the serious injury or mortality of an identified number of NWA DPS loggerhead, NA DPS green, Kemp's ridley, and leatherback sea turtles due to vessel strikes during construction, operation, and decommissioning phases of the project. We also anticipate the capture and minor injury of NWA DPS loggerhead, NA DPS green, and Kemp's ridley sea turtles and Atlantic sturgeon from the Gulf of Maine, New York Bight, Chesapeake Bay, Carolina, and South Atlantic DPSs in trawl surveys of fisheries resources. No other sources of incidental take of Atlantic sturgeon are anticipated. There is no incidental take anticipated to result from EPA's proposed issuance of an Outer Continental Shelf Air Permit or the USCG's proposed issuance of a Private Aids to Navigation (PATON) authorization. We anticipate no more than the amount and type of take described below to result from the construction, operation, and decommissioning of the Empire Wind project as proposed for approval by BOEM and pursuant to other permits, authorizations, and approvals by BSEE, USACE, and NMFS OPR.

Vessel Strike

We calculated the number of sea turtles likely to be struck by project vessels based on the anticipated increase in vessel traffic during the construction, operations, and decommissioning phases of the project. The following amount of incidental take is exempted over the 39-year life of the project, inclusive of all three phases:

Species	Vessel Strike
	Serious Injury or Mortality
North Atlantic DPS green sea turtle	1
Kemp's ridley sea turtle	3
Leatherback sea turtle	4
Northwest Atlantic DPS Loggerhead sea turtle	22

Surveys of Fisheries Resources

We calculated the number of sea turtles and Atlantic sturgeon likely to be captured in trawl gear over the period that the surveys are planned based on available information on capture and injury/mortality rates in similar surveys.

The following amount of incidental take is exempted over the eight-year duration of the planned trawl survey:

Species	Trawl Surveys	
	Capture, Minor Injury	**Serious Injury/Mortality**
Gulf of Maine DPS Atlantic sturgeon	1	None
New York Bight DPS Atlantic sturgeon	15	None
Chesapeake Bay DPS Atlantic sturgeon	6	None
South Atlantic DPS Atlantic sturgeon	4	None
Carolina DPS Atlantic sturgeon	2	None
NA DPS green sea turtle	1	None
Kemp's ridley sea turtle	2	None
Leatherback sea turtle	None	None

NWA DPS Loggerhead sea turtle	3	None

If any additional surveys are planned or the survey duration is extended, consultation may need to be reinitiated.

Pile Driving

We calculated the number of whales and sea turtles expected likely to be harassed (Temporary Threshold Shift and/or Behavioral Disturbance) due to exposure to pile driving noise during foundation installation based on the proposed construction scenario (i.e., 147 total WTG foundations and 2 OSS foundations, meeting the isopleth distances identified for 10 dB attenuation). For ESA listed whales, this is consistent with the amount of Level A and Level B harassment from impact pile driving that NMFS OPR is proposing to authorize through the MMPA ITA.

Species	**Take due to Exposure to Pile Driving Noise**	
	Impact Pile Driving	
	Injury (PTS)	**Harassment (TTS/Behavior)**
North Atlantic right whale	None	22
Fin whale	6	190
Sei Whale	None	5
Sperm whale	None	6
NA DPS green sea turtle	None	1
Kemp's ridley sea turtle	None	9
Leatherback sea turtle	None	2
NWA DPS Loggerhead sea turtle	None	96

11.2 Effects of the Take

In this opinion, we determined that the amount or extent of anticipated take, coupled with other effects of the proposed action, is not likely to jeopardize the continued existence of any ESA listed species under NMFS' jurisdiction.

11.3 Reasonable and Prudent Measures

We have determined the following RPMs are necessary and appropriate to minimize, monitor, document, and report the impacts of incidental take of threatened and endangered species that occurs during implementation of the proposed action:

1. Effects to ESA listed species must be minimized during pile driving.
2. Effects to, or interactions with, ESA listed Atlantic sturgeon, whales, and sea turtles must be properly documented during all phases of the proposed action, and all incidental take must be reported to NMFS GARFO.
3. Plans must be prepared that describe the implementation of activities or monitoring protocols for which the details were not available at the time this consultation was

completed. All required plans must be submitted to NMFS GARFO with sufficient time for review, comment, and concurrence.

4. BOEM and BSEE must exercise their authorities to assess and ensure compliance with the implementation of measures to avoid, minimize, and monitor, and report incidental take of ESA listed species during activities described in this Opinion. On-site observation and inspection must be allowed to gather information on the implementation of measures, and the effectiveness of those measures, to minimize and monitor incidental take during activities described in this Opinion, including its Incidental Take Statement.

11.4 Terms and Conditions

To be exempt from the prohibitions of Section 9 of the ESA, the federal action agencies (BOEM, BSEE, USACE, and NMFS OPR, each consistent with their own legal authority) – and Empire Wind (the lessee and applicant), must comply with the following terms and conditions (T&C), which implement the RPMs above. These include the take minimization, monitoring, and reporting measures required by the Section 7 regulations (50 C.F.R. §402.14(i)). These terms and conditions are non-discretionary; that is, if the Federal agencies and/or Empire Wind fail to ensure compliance with these terms and conditions and the RPMs they implement, the protective coverage of Section 7(o)(2) may lapse.

1. To implement the requirements of RPM 1 and 2 for ESA listed whales, to the extent that the final MMPA ITA requires additional or modified measures from those in the proposed ITA (which are incorporated into the proposed action) to minimize effects of pile driving on ESA listed whales, Empire Wind must comply with those measures. To facilitate implementation of this requirement:
    a. BOEM must require, through an enforceable condition of their approval of Empire Wind’s Construction and Operations Plan, that Empire Wind comply with any measures in the final MMPA ITA that are revised from, or in addition to, measures included in the proposed ITA, which already have been incorporated into the proposed action.
    b. NMFS OPR must ensure compliance with all mitigation measures as prescribed in the final ITA. We expect this will be carried out through NMFS OPR’s review of plans and monitoring reports, including interim and final SFV reports, submitted by Empire Wind over the life of the MMPA ITA and taking any responsive action within its statutory and regulatory authority it deems necessary to ensure compliance based on the foregoing review.
    c. The USACE must review the final MMPA ITA as issued by NMFS OPR and determine if an amendment or revision is necessary to the permit issued to Empire Wind by USACE to incorporate any new or revised measures for pile driving or related activities addressed in the USACE permit, to ensure compliance with any measures in the final MMPA ITA that are revised from, or in addition to, measures included in the proposed ITA, which have been incorporated into the proposed action; and, if necessary, exercise its regulatory authority to make appropriate amendments or revisions.
2. To implement the requirements of RPM 1, the following measures related to sound field verification (SFV) must be implemented by BOEM, BSEE, USACE, and/or Empire

Wind. The purpose of SFV and the steps outlined here are to ensure that Empire Wind does not exceed the distances to the injury or behavioral harassment threshold (Level A and Level B harassment respectively) for ESA listed marine mammals, the injury or behavioral harassment thresholds for sea turtles, or the injury or behavioral disturbance thresholds for Atlantic sturgeon that are identified in this Opinion and that underpin the effects analysis, exposure analysis and our determination of the amount and extent of incidental take exempted in this ITS, including the determination that no incidental take is anticipated. The measures outlined here are based on the expectation that Empire's initial pile driving methodology and sound attenuation measures will result in noise levels that do not exceed the identified distances (as modeled assuming 10 dB attenuation) but, if that is not the case, provide a step-wise approach for modifying operations and/or modifying or adding sound attenuation measures that can reasonably be expected to avoid exceeding those thresholds prior to the next pile being driven.

a. Consistent with the measures incorporated into the proposed action, BOEM, BSEE, and USACE must require and Empire Wind must implement SFV on at least the first three monopiles installed (see also T&C 8.d. below) in accordance with the additional requirements specified here. If any of the SFV measurements from any pile indicate that the distance to any isopleth of concern is greater than those modeled assuming 10 dB attenuation (see Tables 7.1.12, 7.1.13, 7.1.14, 7.1.22, 7.1.23. 7.1.28)[61], before the next pile is installed Empire Wind must implement the following measures as applicable:

    i. Identify and propose for review and concurrence: additional, modified, and/or alternative noise attenuation measures or operational changes that present a reasonable likelihood of reducing sound levels to the modeled distances (e.g., if the pile was installed with a single bubble curtain and a near field sound attenuation device, add a second bubble curtain or if the pile was installed with a double bubble curtain without a near field sound attenuation device, add a nearfield noise attenuation device; adjust hammer operations; adjust noise attenuation system to improve performance); provide an explanation to NMFS GARFO, BOEM, BSEE, and USACE supporting that determination and requesting concurrence to proceed; and, following NMFS GARFO's concurrence, deploy those additional measures on any subsequent piles that are installed (e.g., if threshold distances are exceeded on pile 1 then additional measures must be deployed before installing pile 2). NMFS GARFO will strive to provide concurrence as quickly as possible following review of the submission and necessary coordination with the action agencies and will ensure communication with the action agencies and BOEM no later than two business days after receiving Empire Wind's proposal and request for concurrence.

    ii. If any of the SFV measurements indicate that the distances to level A thresholds for ESA listed whales (peak or cumulative) or PTS peak or

[61] As noted in section 7.1 of the Opinion, when these tables reference exposure ranges, SFV results will be compared to the appropriate corresponding distances calculated for acoustic ranges as reported in Küsel et al. 2022.

cumulative thresholds for sea turtles are greater than the modeled distances (assuming 10 dB attenuation, see Tables 7.1.12, 7.1.13, 7.1.14, 7.1.22, 7.1.23), the clearance and shutdown zones (see Table 11.1) for subsequent piles must be increased so that they are at least the size of the distances to those thresholds as indicated by SFV (e.g., if threshold distances are exceeded on pile 1 then the clearance and shutdown zones for pile 2 must be expanded). For every 1,500 m that a marine mammal clearance or shutdown zone is expanded, additional PSOs must be deployed from additional platforms/vessels to ensure adequate and complete monitoring of the expanded shutdown and/or clearance zone; Empire Wind must submit a proposed monitoring plan for NMFS GARFO's concurrence describing the proposed deployment of additional PSOs including the number of PSOs and location of all PSOs. In the event that the clearance or shutdown zone for sea turtles needs to be expanded, the proposed monitoring plan must also include a description of how additional PSOs will be deployed to ensure effective monitoring for sea turtles in the expanded zones.

iii. If after implementation of 2.a.i, any subsequent SFV measurements indicate that the distances to any identified isopleth of concern are still greater than those modeled assuming 10 dB attenuation(see Tables 7.1.12, 7.1.13, 7.1.14, 7.1.22, 7.1.23, 7.1.28), Empire Wind must identify and propose for review and concurrence: additional, modified, and/or alternative noise attenuation measures or operational changes that present a reasonable likelihood of reducing sound levels to the modeled distances; provide an explanation to NMFS GARFO, BOEM, BSEE, and USACE supporting that determination and requesting concurrence to proceed; and, following NMFS GARFO's concurrence, deploy those additional measures or modifications on any subsequent piles that are installed (e.g., if threshold distances are exceeded on pile 1 then additional measures must be deployed before installing pile 2). NMFS GARFO will strive to provide concurrence as quickly as possible following review of the submission and necessary coordination with the action agencies and will ensure communication with the action agencies and BOEM no later than two business days after receiving Empire Wind's proposal and request for concurrence. Clearance and shutdown zones must be expanded consistent with the requirements of 2.b.ii.

iv. Following installation of the pile with additional, modified, and/or alternative noise attenuation measures or operational changes required by 2.a.iii, if SFV results indicate that any isopleths of concern are still greater than those modeled assuming 10 dB attenuation, before any additional piles can be installed, Empire Wind must identify and propose for review and concurrence: additional, modified, and/or alternative noise attenuation measures or operational changes that present a reasonable likelihood of reducing sound levels to the modeled distances; provide an explanation to NMFS GARFO, BOEM, BSEE, and USACE supporting that determination and requesting concurrence to proceed; and, following

NMFS GARFO's concurrence, deploy those additional measures or modifications on any subsequent piles that are installed (e.g., if threshold distances are exceeded on pile 2 then additional measures must be deployed before installing pile 3). Following concurrence from NMFS GARFO, BOEM, BSEE, and USACE must require and Empire Wind must implement those measures and any expanded clearance and shutdown zone sizes (and any required additional PSOs) consistent with the requirements of 2.b.ii. Additionally, BOEM, BSEE, and USACE must require and Empire Wind must continue SFV for two additional piles with enhanced sound attenuation measures and submit the interim reports as required above (for a total of at least three piles with consistent noise attenuation measures).

1. If no additional measures or modifications are identified for implementation, or if the SFV required by 2.a.iv indicates that the distance to any isopleths of concerns for any ESA listed species are still greater than those modeled assuming 10 dB attenuation, NMFS GARFO, NMFS OPR, BOEM, BSEE, and USACE will meet within three business days to discuss: the results of SFV monitoring, the severity of exceedance of distances to identified isopleths of concern, the species affected, modeling assumptions, and whether any triggers for reinitiation of consultation are met (50 CFR 402.16), including consideration of whether the SFV results constitute new information revealing effects of the action that may affect listed species in a manner or to an extent not previously considered in the consultation.

v. Following installation of the pile with additional, alternative, or modified noise attenuation measures/operational changes required by 2.a.iii or 2.a.iv, if SFV results indicate that all isopleths of concern are within distances to isopleths of concern modeled assuming 10 dB attenuation (7.1.12, 7.1.13, 7.1.14, 7.1.22, 7.1.23, 7.1.28), SFV must be conducted on two additional piles (for a total of at least three piles with consistent noise attenuation measures). If the SFV results from all three of those piles are within the distances to isopleths of concern modeled assuming 10 dB attenuation, then BOEM, BSEE, and USACE must require, and Empire Wind must continue to implement the approved additional, alternative, or modified sound attenuation measures/operational changes, BOEM, BSEE, USACE and/or Empire Wind can request concurrence from NMFS GARFO to the original clearance and shutdown zones (Table 11.1) or Empire Wind can continue with the expanded clearance and shutdown zones with additional PSOs.

b. Consistent with the measures incorporated into the proposed action, BOEM, BSEE, and USACE must require, and Empire Wind must implement Sound Field Verification (SFV) on all piles associated with installation of the first OSS foundation with the additional requirements specified here (see also T&C 8.d. below). If any of the SFV measurements from the first OSS foundation installation indicate that the distance to any isopleth of concern is larger than those modeled assuming 10 dB attenuation (see Tables 7.1.12, 7.1.13, 7.1.14, 7.1.22, 7.1.23, 7.1.28), before the second OSS foundation is installed BOEM, BSEE, and USACE must ensure that Empire Wind, and Empire Wind must:

i. Identify and propose for review and concurrence: additional, modified, and/or alternative noise attenuation measures or operational changes that present a reasonable likelihood of reducing sound levels to the modeled distances; provide an explanation to NMFS GARFO, BOEM, BSEE, and USACE supporting that determination and request concurrence to proceed; and, following NMFS GARFO's concurrence, deploy those additional, modified, and/or alternative measures or modifications to operations for the second OSS foundation. Additionally, SFV must be carried out for the second OSS foundation.
ii. If any of the SFV measurements indicate that the distances to level A thresholds for ESA listed whales or PTS peak or cumulative thresholds for sea turtles are larger than the modeled distances (assuming 10 dB attenuation, see Tables 7.1.12, 7.1.13, 7.1.14, 7.1.22, 7.1.23, 7.1.28), the clearance and shutdown zones (see Table 11.1) for the second OSS foundation must be increased so that they are at least the size of the distances to those thresholds as indicated by SFV. For every 1,500 m that a marine mammal clearance or shutdown zone is expanded, additional PSOs must be deployed from additional platforms or vessels to ensure adequate and complete monitoring of the expanded shutdown and/or clearance zone. Empire Wind must submit a proposed monitoring plan for NMFS GARFO's concurrence describing the proposed deployment of additional PSOs including the number and location of all PSOs. In the event that the clearance or shutdown zone for sea turtles needs to be expanded, the proposed monitoring plan must also include a description of how additional PSOs will be deployed to ensure effective monitoring for sea turtles in the expanded zones.

c. Abbreviated SFV Monitoring (consisting of a single acoustic recorder placed at an appropriate distance from the pile) must be performed on all foundation installations for which the complete SFV monitoring outlined in 2a and 2b is not carried out. Results must be included in the weekly reports. Any indications that distances to the identified Level A and Level B harassment thresholds for whales or distances to injury or behavioral disturbance distances for sea turtles or Atlantic sturgeon must be addressed by Empire Wind, including an explanation of factors that contributed to the exceedance and corrective actions that were taken to avoid exceedance on subsequent piles. BOEM, BSEE, USACE, and Empire Wind must meet with NMFS GARFO within two business days of Empire Wind's submission of a report that includes an exceedance to discuss if any additional action is necessary.

d. Empire Wind must inspect and carry out appropriate maintenance on the noise attenuation system prior to every pile driving event and prepare and submit a

Noise Attenuation System (NAS) inspection/performance report. For piles for which full SFV is carried out, this report must be submitted as soon as it is available, but no later than when the interim SFV report is submitted for the respective pile. Performance reports for all subsequent piles must be submitted with the weekly pile driving reports. All reports must be submitted by email to nmfs.gar.incidental-take@noaa.gov.

i. Performance reports for each bubble curtain deployed must include water depth, current speed and direction, wind speed and direction, bubble curtain deployment/retrieval date and time, bubble curtain hose length, bubble curtain radius (distance from pile), diameter of holes and hole spacing, air supply hose length, compressor type (including rated Cubic Feet per Minute (CFM) and model number), number of operational compressors, performance data from each compressor (including Revolutions Per Minute (RPM), pressure, start times, and stop times), free air delivery (m^3/min), total hose air volume (m^3/(min m)), schematic of GPS waypoints during hose laying, maintenance procedures performed (pressure tests, inspections, flushing, re-drilling, and any other hose or system maintenance) before and after installation and timing of those tests, and the length of time the bubble curtain was on the seafloor prior to foundation installation. Additionally, the report must include any important observations regarding performance (before, during, and after pile installation), such as any observed weak areas of low pressure. The report may also include any relevant video and/or photographs of the bubble curtain(s) operating during all pile driving.

3. To implement the requirements of RPM 2, Empire Wind must file a report with NMFS GARFO (nmfs.gar.incidental-take@noaa.gov) and BSEE (via TIMSWeb and notification email to protectedspecies@bsee.gov) in the event that any ESA listed species is observed within the identified shutdown zone during active pile driving. This report must be filed within 48 hours of the incident and include the following: duration of pile driving prior to the detection of the animal(s), location of PSOs and any factors that impaired visibility or detection ability, time of first and last detection of the animal(s), distance of animal at first detection, closest point of approach of animal to pile, behavioral observations of the animal(s), time the PSO called for shutdown, hammer log (number of strikes, hammer energy), time the pile driving began and stopped, and any measures implemented (e.g., reduced hammer energy) prior to shutdown. If shutdown was determined not to be feasible, the report must include an explanation for that determination and the measures that were implemented (e.g., reduced hammer energy).

4. To implement the requirements of RPM 2, BOEM, BSEE, USACE, and Empire Wind must implement the following reporting requirements necessary to document the amount or extent of incidental take that occurs during all phases of the proposed action:

   a. All observations or interactions with sea turtles or sturgeon that occur during the fisheries monitoring surveys must be reported within 48 hours to NMFS GARFO Protected Resources Division by email (nmfs.gar.incidental-take@noaa.gov). Take reports should reference the Empire Wind project and include the Take Report Form available on NMFS webpage (https://media.fisheries.noaa.gov/2021-

07/Take%20Report%20Form%2007162021.pdf?null). Reports of Atlantic sturgeon take must include a statement as to whether a fin clip sample for genetic sampling was taken. Fin clip samples are required in all cases to document the DPS of origin; the only exception to this requirement is when additional handling of the sturgeon would result in an imminent risk of injury to the fish or the survey personnel handling the fish, we expect such incidents to be limited to capture and handling of sturgeon in extreme weather. Instructions for fin clips and associated metadata are available at: https://www.fisheries.noaa.gov/new-england-mid-atlantic/consultations/section-7-take-reporting-programmatics-greater-atlantic, under the "Sturgeon Genetics Sampling" heading.

b. If a North Atlantic right whale is observed at any time by PSOs or project personnel, Empire Wind must ensure the sighting is immediately reported to NMFS. If immediate reporting is not possible, the report must be made within 24 hours of the sighting.

    i. The report must be made to the appropriate geographic reporting line:
    - If in the Northeast Region (ME to VA/NC border) call (866-755-6622).
    - If in the Southeast Region (NC to FL) call (877-WHALE-HELP or 877-942-5343).
    - If calling the hotline is not possible, reports can also be made to the U.S. Coast Guard via channel 16 or through the WhaleAlert app (http://www.whalealert.org/).

The sighting report must include the time (note time format, e.g., UTC, EST), date, and location (latitude/longitude in decimal degrees) of the sighting, number of whales, animal description/certainty of sighting (provide photos/video if taken), lease area/project name, PSO/personnel name, PSO provider company (if applicable), and reporter's contact information.

    ii. If a North Atlantic right whale is detected at any time by PSOs/PAM Operators via PAM, Empire Wind must ensure the detection is reported as soon as possible and no longer than 24 hours after the detection to NMFS via the 24-hour North Atlantic right whale Detection Template (https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates). Calling the hotline is not necessary when reporting PAM detections via the template.

    iii. A summary report must be sent within 24 hours to NMFS GARFO (nmfs.gar.incidental-take@noaa.gov), NMFS OPR (PR.ITP.MonitoringReports@noaa.gov), and NMFS-NEFSC (ne.rw.survey@noaa.gov) with the above information and confirmation the sighting/detection was reported to the respective hotline, the vessel/platform from which the sighting/detection was made, activity the vessel/platform was engaged in at time of sighting/detection, project construction and/or survey activity ongoing at time of sighting/detection (e.g., pile driving, cable installation, HRG survey), distance from vessel/platform to animal at time of initial sighting/detection, closest point of approach of whale to vessel/platform, vessel speed, and any mitigation actions taken in response to the sighting.

c. In the event of a suspected or confirmed vessel strike of any ESA listed species (e.g. marine mammal, sea turtle, listed fish) by any vessel associated with the Project or other means by which project activities caused a non-auditory injury or death of a ESA listed species, Empire Wind must immediately report the incident to NMFS. If in the Greater Atlantic Region (ME-VA), call the NMFS Greater Atlantic Stranding Hotline (866-755-6622) and if in the Southeast Region (NC-FL), call the NMFS Southeast Stranding Hotline (877-942-5343). As well as notify BSEE (via TIMSWeb and notification email to (protectedspecies@bsee.gov). Separately, Empire Wind must immediately report the incident to NMFS GARFO (*nmfs.gar.incidental-take@noaa.gov)*, and if in the Southeast region (NC-FL), also to NMFS SERO (*secmammalreports@noaa.gov*) The report must include: (A) Time, date, and location (coordinates) of the incident; (B) Species identification (if known) or description of the animal(s) involved (i.e., identifiable features including animal color, presence of dorsal fin, body shape and size); (C) Vessel strike reporter information (name, affiliation, email for person completing the report); (D) Vessel strike witness (if different than reporter) information (name, affiliation, phone number, platform for person witnessing the event); (E) Vessel name and/or MMSI number; (F) Vessel size and motor configuration (inboard, outboard, jet propulsion); (G) Vessel's speed leading up to and during the incident; (H) Vessel's course/heading and what operations were being conducted (if applicable); (I) Part of vessel that struck whale (if known); (J) Vessel damage notes; (K) Status of all sound sources in use; (L) If animal was seen before strike event; (M) behavior of animal before strike event; (N) Description of avoidance measures/requirements that were in place at the time of the strike and what additional measures were taken, if any, to avoid strike; (O) Environmental conditions (*e.g.*, wind speed and direction, Beaufort sea state, cloud cover, visibility) immediately preceding the strike; (P) Estimated (or actual, if known) size and length of animal that was struck; (Q) Description of the behavior of the marine mammal immediately preceding and following the strike; (R) If available, description of the presence and behavior of any other marine mammals immediately preceding the strike; (S) Other animal details if known (e.g., length, sex, age class); (T) Behavior or estimated fate of the animal post-strike (*e.g.*, dead, injured but alive, injured and moving, external visible wounds (linear wounds, propeller wounds, non-cutting blunt-force trauma wounds), blood or tissue observed in the water, status unknown, disappeared); (U) To the extent practicable, photographs or video footage of the animal(s); and (V) Any additional notes the witness may have from the interaction. For any numerical values provided (i.e., location, animal length, vessel length etc.), please provide if values are actual or estimated.

d. In the event that personnel involved in the Project discover a stranded, entangled, injured, or dead ESA listed species (e.g. marine mammal, sea turtle, listed fish), the Empire Wind must immediately report the observation to NMFS. If in the

Greater Atlantic Region (ME-VA) call the NMFS Greater Atlantic Stranding Hotline (866-755-6622) and if in the Southeast Region (NC-FL) call the NMFS Southeast Stranding Hotline (877-942-5343). Separately, Empire Wind must report the incident, if in the Greater Atlantic region (ME to VA) to GARFO (nmfs.gar.incidental-take@noaa.gov) or if in the Southeast region (NC-FL) to NMFS SERO (secmammalreports@noaa.gov) as soon as feasible. As well as notify BSEE (via TIMSWeb and notification email to (protectedspecies@bsee.gov). Note, the stranding hotline may request the report be sent to the local stranding network response team. Reports of listed fish should only be sent to nmfs.gar.incidental-take@noaa.gov. The report must include: (A) Contact information (name, phone number, etc.), time, date, and location (coordinates) of the first discovery (and updated location information if known and applicable); (B) Species identification (if known) or description of the animal(s) involved; (C) Condition of the animal(s) (including carcass condition if the animal is dead); (D) Observed behaviors of the animal(s), if alive; (E) If available, photographs or video footage of the animal(s); and (F) General circumstances under which the animal was discovered. Staff responding to the hotline call will provide any instructions for handling or disposing of any injured or dead animals, which may include coordination of transport to shore, particularly for injured sea turtles.

e. Empire Wind must compile and submit weekly reports during each month that foundation pile driving occurs that document the pile ID, type of pile, pile diameter, start and finish time of each pile driving event, hammer log (number of strikes, max hammer energy, duration of piling) per pile, any changes to noise attenuation systems and/or hammer schedule, details on the deployment of PSOs and PAM operators, including the start and stop time of associated observation periods by the PSOs and PAM Operators, and a record of all observations/detections of marine mammals and sea turtles including time (UTC) of sighting/detection, species ID, behavior, distance (meters) from vessel to animal at time of sighting/detection (meters), animal distance (meters) from pile installation vessel, vessel/project activity at time of sighting/detection, platform/vessel name, and mitigation measures taken (if any) and reason. Sightings/detections during pile driving activities (clearance, active pile driving, post-pile driving) and all other (transit, opportunistic, etc.) sightings/detection must be reported and identified as such. These weekly reports must be submitted to NMFS GARFO (nmfs.gar.incidental-take@noaa.gov), BOEM, and BSEE by Empire Wind or the PSO providers and can consist of QA/QC'd raw data. Weekly reports are due on Wednesday for the activities occurring the previous week (Sunday – Saturday, local time).

f. Starting in the first month that in-water activities occur (e.g., cable installation, fisheries surveys), Empire Wind must compile and submit monthly reports that include a summary of all project activities carried out in the previous month, including dates and location of any fisheries surveys carried out, vessel transits (name, type of vessel, number of transits, vessel activity, and route (origin and destination) (this includes transits from all ports, foreign and domestic)), cable installation activities (including sea to shore transition), number of piles installed and pile IDs, and all sightings/detections of ESA listed whales, sea turtles, and sturgeon, inclusive of any mitigation measures taken as a result of those observations. Sightings/detections must include species ID, time, date, initial detection distance, vessel/platform name, vessel activity, vessel speed, bearing to animal, project activity, and if any mitigation measures taken. These reports must be submitted to NMFS GARFO (nmfs.gar.incidental-take@noaa.gov) and are due on the 15th of the month for the previous month.

g. Empire Wind must submit to NMFS GARFO (nmfs.gar.incidental-take@noaa.gov) an annual report describing all activities carried out to implement their Fisheries Research and Monitoring Plan. This report must include a summary of all activities conducted, the dates and locations of all fisheries surveys, including location and duration for all trawl surveys summarized by month, number of vessel transits inclusive of port of origin and destination, and a summary table of any observations and captures of ESA listed species during these surveys. The report must also summarize all acoustic telemetry and benthic monitoring activities that occurred, inclusive of vessel transits. Each annual report is due by February 15 (i.e., the report for 2024 activities is due by February 15, 2025).

h. BOEM, BSEE, and/or Empire Wind must submit full detection data, metadata, and location of recorders (or GPS tracks, if applicable) from all real-time hydrophones used for monitoring during construction within 90 calendar days after pile-driving has ended. Reporting must use the webform templates on the NMFS Passive Acoustic Reporting System website at *https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates*. BOEM, BSEE, and/or Empire Wind must submit the full acoustic recordings from all the real-time hydrophones to the National Centers for Environmental Information (NCEI) for archiving within 90 calendar days after pile-driving has ended and instruments have been pulled from the water. Archiving guidelines outlined here (https://www.ncei.noaa.gov/products/passive-acoustic-data#tab-3561) must be followed. Confirmation of both submittals must be sent to NMFS GARFO.

5. To implement the requirements of RPM 2 and to facilitate monitoring of the incidental take exemption for sea turtles, BOEM, BSEE, USACE, and NMFS must meet twice annually to review sea turtle observation records. These meetings/conference calls will be held in September (to review observations through August of that year) and December (to review observations from September to November) and will use the best available information on sea turtle presence, distribution, and abundance, project vessel activity, and observations to estimate the total number of sea turtle vessel strikes in the action area that are attributable to project operations.

6. To implement the requirements of RPM 2, within 10 business days of BOEM, BSEE, and/or USACE obtaining updated information on project plans (i.e., as obtained through a relevant Facility Design Report (FDR) and/or Fabrication and Installation Report (FIR), or other submission), BOEM, BSEE, and/or USACE must provide NMFS GARFO (nmfs.gar.incidental-take@noaa.gov) with the following information: number and size of foundations to be installed to support wind turbine generators and offshore substations,

installation method for the sea to shore transition (e.g., casing pipe, cofferdam, no containment), the proposed construction schedule (i.e., months when pile driving is planned), and any available updates on anticipated vessel transit routes (e.g., any changes to the ports identified for use by project vessels) that will be used by project vessels . NMFS GARFO will review this information and request a meeting with BOEM, BSEE, and USACE if there is any indication that there are changes to the proposed action that would cause an effect to listed species or critical habitat that was not considered in this Opinion, including the amount or extent of predicted take, such that any potential trigger for reinitiation of consultation can be discussed with the relevant action agencies.

7. To implement RPM 2 for trawl surveys:
    a. At least one of the survey staff onboard the trawl survey vessels must have completed NMFS Northeast Fisheries Observer Program (NEFOP) training within the last 5 years or other training in protected species identification and safe handling (inclusive of taking genetic samples from Atlantic sturgeon); documentation of training must be submitted to NMFS GARFO at least 7 calendar days prior to the start of the trawl surveys and at any later time that a different NEFOP trained observer is deployed on the survey.
    b. If Empire Wind will deploy non-NEFOP trained survey personnel in lieu of NEFOP-trained observers, BOEM, BSEE, and/or Empire Wind must submit a plan to NMFS describing the training that will be provided to those survey observers. This Observer Training Plan for Trawl Surveys must be submitted as soon as possible after issuance of this Opinion but no later than 15 calendar days prior to the start of trawl surveys for which a non-NEFOP trained observer will be deployed. BOEM, BSEE, and Empire Wind must obtain NMFS GARFO's concurrence with this plan prior to the start of any such trawl surveys. This plan must include a description of the elements of the training (i.e., curriculum, virtual or hands on, etc.) and identify who will carry out the training and their qualifications. Once the training is complete, confirmation of the training and a list of trained survey staff must be submitted to NMFS; this list must be updated if additional staff are trained for future surveys. In all cases, a list of trained survey staff must be submitted to NMFS at least one business day prior to the beginning of the survey.

8. To implement RPM 3, the plans identified below must be submitted to NMFS GARFO at nmfs.gar.incidental-take@noaa.gov by BOEM, BSEE, and/or Empire Wind. Any of the identified plans can be combined such that a single submitted plan addresses multiple requirements provided that the plan clearly identifies which requirements it is addressing. For each plan, within 45 calendar days of receipt of the plan, NMFS GARFO will provide comments to BOEM, BSEE, and Empire Wind, including a determination as to whether the plan is consistent with the requirements outlined in this ITS and/or in Section 3 of this Opinion. If the plan is determined to be inconsistent with these requirements, BOEM, BSEE and/or Empire Wind must resubmit a modified plan that addresses the identified issues within 30 days of the receipt of the comments but at least 15 calendar days before the start of the associated activity; at that time, BOEM, BSEE and NMFS GARFO and OPR will discuss a timeline for review and approval of the modified plan. If further revisions are necessary, at all times, NMFS GARFO, BOEM, and BSEE will be

provided at least three business days for review and whenever possible, NMFS GARFO, BOEM, and BSEE will aim to provide responses within four business days. BOEM, BSEE and Empire Wind must receive NMFS GARFO's concurrence with these plans before the identified activity is carried out:

a. Passive Acoustic Monitoring Plan for Pile Driving. BOEM, BSEE, and/or Empire Wind must submit this Plan to NMFS GARFO at least 180 calendar days before impact pile driving is planned. BOEM, BSEE, and Empire Wind must obtain NMFS GARFO's concurrence with this Plan prior to the start of any pile driving. The Plan must include a description of all proposed PAM equipment and hardware, the calibration data, bandwidth capability and sensitivity of hydrophones, and address how the proposed passive acoustic monitoring will follow standardized measurement, processing methods, reporting metrics, and metadata standards for offshore wind (Van Parijs *et al.*, 2021). The Plan must describe and include all procedures, documentation, and protocols including information (i.e., testing, reports, equipment specifications) to support that it will be able to detect vocalizing whales within the clearance and shutdown zones, including deployment locations, procedures, detection review methodology, and protocols; hydrophone detection ranges with and without foundation installation activities and data supporting those ranges; communication time between call and detection, and data transmission rates between PAM Operator and PSOs on the pile driving vessel; where PAM Operators will be stationed relative to hydrophones and PSOs on pile driving vessel calling for delay/shutdowns; and a full description of all proposed software, call detectors, and filters. The Plan must also incorporate the requirements relative to North Atlantic right whale reporting in 6.b.

b. Marine Mammal and Sea Turtle Monitoring Plan – Pile Driving. BOEM, BSEE, and/or Empire Wind must submit this Plan to NMFS GARFO at least 180 calendar days before any pile driving for foundation installation is planned. BOEM, BSEE, and/or Empire Wind must obtain NMFS GARFO's concurrence with this Plan(s) prior to the start of any pile driving for foundation installation. The Plan(s) must include: a description of how all relevant mitigation and monitoring requirements contained in the incidental take statement will be implemented, a pile driving installation summary and sequence of events, a description of all training protocols for all project personnel (PSOs, PAM Operators, trained crew lookouts, etc.), a description of all monitoring equipment and evidence (i.e., manufacturer's specifications, reports, testing) that it can be used to effectively monitor and detect ESA listed marine mammals and sea turtles in the identified clearance and shutdown zones (i.e., field data demonstrating reliable and consistent ability to detect ESA listed large whales and sea turtles at the relevant distances in the conditions planned for use), communications and reporting details, and PSO monitoring and mitigation protocols (including number and location of PSOs) for effective observation and documentation of sea turtles and ESA listed marine mammals during all pile driving events. The Plan(s) must demonstrate sufficient PSO and PAM Operator staffing (in accordance with watch shifts), PSO and PAM Operator schedules, and contingency plans for instances if additional PSOs and PAM Operators are required. The Plan must detail all plans and procedures for sound attenuation, including procedures for adjusting the noise attenuation system(s) and available contingency noise attenuation measures/systems if distances to modeled isopleths of concern are exceeded during SFV. The plan must also describe how Empire Wind would determine the number of sea turtles exposed to noise above the 175 dB harassment threshold during impact pile driving of WTG and OSS foundations and how Empire Wind would determine the number of ESA listed whales exposed to noise above the Level B harassment threshold during impact pile driving of WTG and OSS foundations.

c. Reduced Visibility Monitoring Plan/Nighttime Pile Driving Monitoring Plan. BOEM, BSEE, and/or Empire Wind must submit this Plan or Plans (if separate Daytime Reduced Visibility and Nighttime Monitoring Plans are prepared) to NMFS GARFO at least 180 calendar days before impact pile driving is planned to begin. BOEM, BSEE, and Empire Wind must obtain NMFS GARFO's concurrence with this Plan(s) prior to the start of pile driving. This Plan(s) must contain a thorough description of how Empire Wind will monitor pile driving activities during reduced visibility conditions (e.g. rain, fog) and at night, including proof of the efficacy of monitoring devices (e.g., mounted thermal/infrared camera systems, hand-held or wearable night vision devices NVDs, spotlights) in detecting ESA listed marine mammals and sea turtles over the full extent of the required clearance and shutdown zones, including demonstration that the full extent of the minimum visibility zones (1,500 m) can be effectively and reliably monitored. The Plan must identify the efficacy of the technology at detecting marine mammals and sea turtles in the clearance and shutdown zones under all the various conditions anticipated during construction, including varying weather conditions, sea states, and in consideration of the use of artificial lighting. If the plan does not include a full description of the proposed technology, monitoring methodology, and data demonstrating to NMFS GARFO's satisfaction that marine mammals and sea turtles can reliably and effectively be detected within the clearance and shutdown zones for monopiles before and during impact pile driving, nighttime pile driving (unless a pile was initiated 1.5 hours prior to civil sunset) may not occur. Additionally, this Plan must contain a thorough description of how Empire Wind will monitor pile driving activities during daytime when unexpected changes to lighting or weather occur during pile driving that prevent visual monitoring of the full extent of the clearance and shutdown zones.

d. Sound Field Verification Plan - WTG and OSS Installation. BOEM, BSEE, and/or Empire Wind must submit this Plan to NMFS GARFO at least 180 calendar days before pile driving for WTG and/or OSS foundations is planned to begin. BOEM, BSEE, and Empire Wind must obtain NMFS GARFO's concurrence with this Plan(s) prior to the start of these pile driving activities. To validate the estimated sound field, SFV measurements will be conducted during pile driving of the first three monopiles installed over the course of the Project, with noise attenuation activated. SFV measurements will also be conducted during pile driving of the first full pin pile foundation. The Plan(s) must describe how the first three monopile installation sites and installation scenarios (i.e., hammer energy, number of strikes, total hammer energy) are representative of the rest of the monopile installations and, therefore, why these monopile installations would be representative of the remaining monopile installations. If the monitored pile locations are different from the ones used for exposure modeling, justification must be provided for why these locations are representative of the modeling. In the case that these sites are not determined to be representative of all other monopile installation sites, Empire Wind must include information on how additional monopiles/sites would be selected for SFV. The Plan(s) must also include the piling schedule and sequence of events, communication and reporting protocols, methodology for collecting, analyzing, and preparing SFV data for submission to NMFS GARFO including instrument deployment, locations of all hydrophones including direction and distance from the pile, hydrophone sensitivity, recorder/measurement layout, and analysis methods, and a template of the interim report to be submitted. The Plan must also identify the number and location of hydrophones that will be reported in the SFV Interim Reports and any additional hydrophone locations that will be included in the final report(s). The Plan must describe how the effectiveness of the sound attenuation methodology would be evaluated based on the results. The Plan must address how Empire Wind will implement Terms and Condition 2a and 2b (see above) which includes, but is not limited to identifying additional noise attenuation measures (e.g., add noise attenuation device, adjust hammer operations, adjust NMS) that will be applied to reduce sound levels if measured distances are greater than those modeled. The plan must describe how Abbreviated SFV Monitoring (consisting of a single acoustic recorder placed at an appropriate distance from the pile) required by Term and Condition 2c will be performed on all foundation installations for which the complete SFV monitoring outlined in 2a and 2b is not carried out. The plan must also outline the anticipated results that will be included in the weekly reports. The plan must also specify steps that will be taken should any exceedances occur.

i. SFV Interim Reports - Pile Driving. BOEM, BSEE, and USACE must require and Empire Wind must provide, as soon as they are available but no later than 48 hours after the installation of each of the first three monopiles and after the installation of the first full pin pile foundation, the initial results of the SFV measurements to NMFS GARFO in an interim report. If technical or other issues prevent submission within 48 hours, Empire Wind must notify BOEM, BSEE, and NMFS GARFO within that 48-hour period with the reasons for delay and provide an anticipated schedule for submission of the report. These reports are required for each of the first three monopiles installed, the first pin pile OSS foundation, and any additional piles for which SFV is required. The interim report must include data from hydrophones identified for interim reporting in the SFV Plan and include a summary of pile installation activities (pile diameter, pile weight, pile length, water depth, sediment type, hammer type, total strikes, total installation time [start time, end time], duration of pile driving, max single strike energy, NAS deployments), pile location, recorder locations, modeled and measured distances to thresholds, received levels (rms, peak, and SEL) results from Conductivity, Temperature, and Depth (CTD) casts/sound velocity profiles, signal and kurtosis rise times, pile driving plots, activity logs, weather conditions. Additionally, any important sound attenuation device malfunctions (suspected or definite), must be summarized and substantiated with data (e.g. photos, positions, environmental data, directions, etc.) and observations. Such malfunctions include gaps in the bubble curtain, significant drifting of the bubble curtain, and any other issues which may indicate sub-optimal mitigation performance or are used by Empire Wind to explain performance issues. Requirements for actions to be taken based on the results of the SFV are identified in 2.a. above.

ii. The final results of SFV for monopile and pin pile installations must be submitted as soon as possible, but no later than within 90 days following completion of pile driving for which SFV was carried out.

e. Vessel Strike Avoidance Plan. BOEM, BSEE, and/or Empire Wind must submit this plan to NMFS GARFO as soon as possible after issuance of this Biological Opinion but no later than 90 days prior to the planned start of in-water construction activities outside of SBMT (including cable installation). The Plan must provide details on all relevant mitigation and monitoring measures for listed species, vessel speeds and transit protocols from all planned ports, vessel-based observer protocols for transiting vessels, communication and reporting plans, proposed alternative monitoring equipment to maintain vessel strike avoidance zones in varying weather conditions, darkness, sea states, and in consideration of the use of artificial lighting. If Empire Wind plans to implement PAM in any transit corridor to allow vessel transit above 10 knots, the plan must describe how PAM, in combination with visual observations, will be conducted to ensure the transit corridor is clear of North Atlantic right whales. PAM information should follow what is required to be submitted for the PAM Plan in 8.a.

9. To implement the requirements of RPM 4, BOEM and BSEE must exercise their authorities to assess the implementation of measures to avoid, minimize, monitor, and report incidental take of ESA listed species during activities described in this Opinion. BOEM and/or BSEE shall immediately exercise their respective authorities to take effective action to ensure prompt implementation and compliance if Empire Wind is not complying with: any avoidance, minimization, and monitoring measures incorporated into the proposed action or any term and condition(s) specified in this statement, as currently drafted or otherwise amended in agreement between the BOEM, BSEE, and NMFS; if BOEM and/or BSEE fail to do so, the protective coverage of Section 7(o)(2) may lapse.

10. To implement the requirements of RPM 4, Empire Wind must consent to on-site observation and inspections by Federal agency personnel (including NOAA personnel) during activities described in the Biological Opinion, for the purposes of evaluating the effectiveness and implementation of measures designed to minimize or monitor incidental take.

Table 11.1. Clearance and Shutdown Zones for ESA Listed Species - Impact Pile Driving

Species	Clearance Zone (m)	Shutdown Zone (m)
Impact Pile Driving Minimum visibility zone for WTG and OSS foundations is 1,500 m		
North Atlantic right whale – visual PSO	Minimum visibility zone (1,500 m) plus any additional distance observable by the visual PSOs	Minimum visibility zone (1,500 m) plus any additional distance observable by the visual PSOs
North Atlantic right whale – PAM	5,000	1,500
Blue, fin, sei, and sperm whale – monitored by visual PSOs and PAM	2,000	1,500
Sea Turtles - visual PSO	500	500

Note: these are the clearance and shutdown zones incorporated into the proposed action; the zones for marine mammals reflect the proposed conditions of the MMPA ITA and the zones for sea turtles reflect the zone sizes identified in BOEM's BA.

As explained above, reasonable and prudent measures are measures to minimize the amount or extent of incidental take (50 C.F.R. §402.02) that must be implemented in order for the incidental take exemption to be effective. The reasonable and prudent measures and terms and conditions are specified as required by 50 CFR 402.14 (i)(1)(ii), (iii) and (iv) to document the incidental take by the proposed action, minimize the impact of that take on ESA-listed species and, in the case of marine mammals, specify those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking. We document our consideration of these requirements for reasonable and prudent measures and terms and conditions here. We have determined that all of these RPMs and associated terms and conditions are reasonable and necessary or appropriate, to minimize or document take and that they all comply with the minor change rule. That is, none of these RPMs or their implementing terms and conditions alter the basic design, location, scope, duration, or timing of the action, and all involve only minor changes.

RPM 1 and 2/Term and Condition 1

The proposed ITA includes a number of general conditions and specific mitigation measures that are considered part of the proposed action. The final ITA issued under the MMPA may have modified or additional measures that clarify or enhance the measures identified in the proposed ITA. Compliance with those measures is necessary and appropriate to minimize and document incidental take of North Atlantic right, sperm, sei, and fin whales. As such, the terms and conditions that require BOEM, BSEE, USACE, and NMFS OPR to ensure compliance with the conditions and mitigation measures of the final ITA are necessary and appropriate to minimize the extent of take of these species and to ensure that take is documented.

RPM 1/Term and Condition 2

The proposed action incorporates requirements for sound field verification (SFV) and outlines general measures to be implemented as a result of SFV. Term and Condition 2 is necessary and appropriate to provide clarification of the required steps related to sound field verification and measures to be implemented as a result of sound field verification. Additionally, this measure requires abbreviated SFV monitoring, using a single hydrophone, during all foundation pile driving where full SFV monitoring is not carried out. This requirement implements one of the recommendations included in BOEM's August 2023 *Recommendations for Offshore Wind Project Pile Driving Sound Exposure Modeling and Sound Field Measurement*[62]. This measure is necessary and appropriate to monitor take; the exposure estimates and amount and extent of incidental take exempted in this ITS are based on the size of the area that will experience noise above the identified thresholds during pile driving. While the initial, full SFV monitoring, and the associated steps to require any changes to the noise attenuation system, are designed to ensure that pile driving will proceed in a way that is not expected to exceed the modeled distances, there is likely to be variability in pile driving and there may be issues with the sound attenuation systems (e.g., poor bubble curtain performance) that would be undetected without at least minimal SFV monitoring. We expect that the required abbreviated SFV will both allow a continuous check on noise levels and the attenuation system which will allow us to monitor take in a way that supplements detections of sea turtles and whales by the PSOs, but also allow for expeditious detection of any issues with the noise attenuation system or unanticipated variations in noise produced during pile driving so that adjustments can be made and Empire Wind can avoid exceeding the amount and extent of take exempted herein. Additionally, we have determined in this Opinion that take of Atlantic sturgeon as a result of exposure to pile driving noise is not expected and no take has been exempted; because PSOs can not see sturgeon, this abbreviated SFV monitoring will allow for monitoring of noise levels to compare to the modeled distances to the injury and behavioral disturbance thresholds for sturgeon and ensure that these distances are not exceeded.

RPM 2/Term and Conditions 3-7

Documenting take that occurs is essential to ensure that reinitiation of consultation occurs if the amount or extent of take identified in the ITS is exceeded. Some measures for documenting and reporting take are included in the proposed action. The requirements of Term and Conditions 3 - 6 enhance or clarify those requirements. Documentation and timely reporting of observations of whales, sea turtles, and Atlantic sturgeon is important to monitoring the amount or extent of actual take compared to the amount or extent of take exempted. The reporting requirements included here will allow us to track the progress of the action and associated take. Proper identification and handling of any sturgeon and sea turtles that are captured in the survey gear is essential for documenting take and to minimize the extent of that take (i.e., reducing the potential for further stress, injury, or mortality). The measures identified here are consistent with established best practices for proper handling and documentation of these species. Identifying existing tags helps to monitor take by identifying individual animals. Requiring genetic samples (fin clips) from all Atlantic sturgeon and that those samples be analyzed to determine the DPS of origin is essential for monitoring actual take as genetic analysis is the only way to identify the

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[62] https://www.boem.gov/sites/default/files/documents/renewable-energy/BOEMOffshoreWindPileDrivingSoundModelingGuidance.pdf; last accessed August 30, 2023.

DPS of origin for subadult and adult Atlantic sturgeon captured in the ocean. Taking fin clips is not expected to increase stress or result in any injury of Atlantic sturgeon.

RPM 2/Term and Condition 5

We recognize that documenting sea turtles that were struck by project vessels may be difficult given their small size and the factors that contribute to cryptic mortality addressed in the *Effects of the Action* section of this Opinion. Therefore, we are requiring that BOEM, BSEE, and Empire Wind document any and all observations of dead or injured sea turtles over the course of the project and that we meet twice annually to review that data and determine which, if any, of those sea turtles have a cause of death that is attributable to project operations. We expect that we will consider the factors reported with the particular turtle (i.e., did the lookout suspect the vessel struck the turtle), the state of decomposition, any observable injuries, and the extent to which project vessel traffic contributed to overall traffic in the area at the time of detection.

RPM 3/Term and Condition 8

A number of plans are proposed for development and submission by Empire Wind and/or required for submission by BOEM, BSEE, or NMFS OPR. These plans will describe implementation of activities for which details were not available prior to initiation of consultation or by the time this consultation was complete. Term and Condition 8 identifies all of the plans that must be submitted to NMFS GARFO, identifies timeline for submission, and clarifies any relevant requirements. This will minimize confusion over submission of plans and facilitate efficient review of the plans. Implementation of these plans will minimize or monitor take, dependent on the plan. Our concurrence on these plans prior to implementation of the associated activities is necessary to ensure that the activities described in the plan are consistent with the requirements of this ITS and to ensure that the activities are carried out in a way that is consistent with the actions considered in this Opinion.

RPM 4/Term and Condition 9-10

RPM 4 and its associated terms and conditions are reasonable and necessary or appropriate to minimize and monitor incidental take. Measures to minimize and monitor incidental take, whether part of the proposed action or this ITS, first must be implemented in order to achieve the beneficial results anticipated in this Opinion for ESA listed species. BOEM and BSEE exercising their authorities to assess and ensure compliance with the measures to avoid, minimize, monitor, and report incidental take of ESA listed species, including the measures that were incorporated into the description of the proposed action is an essential component of ensuring that incidental take is minimized and monitored. Likewise, such measures once implemented must be effective at minimizing and monitoring incidental take consistent with the analysis. While the measures described as part of the proposed action and in the ITS are consistent with best practices in other industries, and are anticipated to be practicable and functional, gathering information in situ through observation, inspection, and assessment may confirm expectations or reveal room for improvement in a measure’s design or performance, or in Empire Wind’s implementation and compliance. While the ITS states that action agencies must adopt the RPMs and terms and conditions as enforceable conditions in their own actions, and while each agency is responsible for oversight regarding its own actions taken, specifying that Empire Wind must consent to NOAA personnel’s attendance during offshore wind activities clarifies its role as well. Given the nascence of the U.S. offshore wind industry information gathering on the implementation and effectiveness of these measures will help ensure that effects to listed species and their habitat are minimized and monitored.

12.0 CONSERVATION RECOMMENDATIONS

In addition to Section 7(a)(2), which requires agencies to ensure that all projects will not jeopardize the continued existence of listed species, Section 7(a)(1) of the ESA places a responsibility on all federal agencies to "utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species." Conservation Recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information in furtherance of these identified purposes. As such, NMFS recommends that the BOEM, BSEE, USACE, and the other action agencies implement the following Conservation Recommendations consistent with their authorities:

1. Work with the lessee to develop a construction schedule that further reduces potential exposure of North Atlantic right whales to noise from pile driving including avoiding impact pile driving in May and December.
2. Collect data to add to the limited information we have on underwater noise generated during vibratory pile driving for installation and removal of sheet piles and on operational noise of the direct drive wind turbines in the action area.
    i. If sheet pile cofferdams are used at the sea-to-shore transition, sound field verification should be carried out during installation and removal of at least one cofferdam.
    ii. A study to document operational noise of WTGs during a variety of wind and weather conditions should be carried out.
3. Support research and development of technology to aid in the minimization of risk of vessel strikes on marine mammals, sea turtles, and Atlantic sturgeon.
4. Support development of regional monitoring of project and cumulative effects through the Regional Wildlife Science Collaborative for Offshore Wind (RWSC).
5. Work with the NEFSC to support robust monitoring and study design with adequate sample sizes, appropriate spatial and temporal coverage, and proper design allowing the detection of potential impacts of offshore wind projects on a wide range of ecological and oceanographic conditions including protected species distribution, prey distribution, pelagic habitat, and habitat usage.
6. Support research into understanding the effects of offshore wind on regional oceanic and atmospheric conditions through modeling and data collection, and assessment of potential impacts on protected species, their habitats, and distribution of zooplankton and other prey.
7. Support the continuation of aerial surveys for post-construction monitoring of listed species in the Empire Wind WFA and surrounding waters, and methods for survey adaptation to the presence of wind turbines.
8. Support research on construction and operational impacts to protected species distribution, particularly the North Atlantic right whale and other listed whales. Conduct monitoring pre/during/post construction, including long-term monitoring during the operational phase, including sound sources associated with turbine maintenance (e.g.,

service vessels), to understand any changes in protected species distribution and habitat use in the New York Bight.

9. Support the deployment of acoustic tags on sea turtles and sturgeon and the continued maintenance of the receiver array in the Empire Wind WDA.
10. Support research regarding the abundance and distribution of Atlantic sturgeon in the Empire Wind WDA and surrounding region in order to understand the distribution and habitat use and aid in density modeling efforts, including the continued use of acoustic telemetry networks to monitor for tagged fish.
11. Require the lessee to send all acoustic telemetry metadata and detections to the Mid-Atlantic Acoustic Telemetry Observation System (MATOS) database via https://matos.asascience.com/ for coordinated tracking of marine species over broader spatial scales in US Animal Tracking Network and Ocean Tracking Network.
12. Conduct or support long-term ecological monitoring to document the changes to the ecological communities on, around, and between foundations and other benthic areas disturbed by the proposed Project.
13. Develop or support the development of a PAM array in the Empire Wind WDA to monitor changes in ambient noise and use of the area by baleen whales (and other marine mammals) during the life of the Project, including construction, and to detect small-scale changes at the scale of the Empire Wind WDA. Bottom mounted recorders should be deployed at a maximum of 20 km distance from each other throughout the given study area in order to ensure near to complete coverage of the area over which North Atlantic right whales and other baleen whales can be heard. See Van Parijs et al. 2021 for specific details. Resulting data products should be provided according to https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates.
14. Support the development of a regional PAM network across lease areas to monitor long-term changes in baleen whale distribution and habitat use. A regional PAM network should consider adequate array/hydrophone design, equipment, and data evaluation to understand changes over the spatial scales that are relevant to these species for the duration of these projects, as well as the storage and dissemination of these data.
15. Monitor changes in commercial fishing activity to detect changes in bycatch or entanglement rates of protected species, particularly the North Atlantic right whale, and support the adaptation of ropeless fishing practices where necessary. Conduct regular surveys and removal of marine debris from project infrastructure.
16. Provide support to groups that participate in regional stranding networks.

13.0 REINITIATION NOTICE

This concludes formal consultation for the proposed authorizations associated listed herein for the Empire Wind offshore energy project. As 50 C.F.R. §402.16 states, reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

(1) If the amount or extent of taking specified in the incidental take statement is exceeded;

(2) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or,

(4) If a new species is listed or critical habitat designated that may be affected by the identified action.

14.0 LITERATURE CITED

Note: citations are organized by section of the Biological Opinion in the heading below; citations that appear in more than one section may appear more than once in this list.

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APPENDIX A

Measures Included in BOEM's BA that are Part of the Proposed Action for the ESA Consultation

BA Table 7. Environmental Protection Measures Proposed by Empire Wind and Included in BOEM's BA as Part of the Proposed Action (with minor modifications made during the consultation period)

Measure	Description	Project Phase
Vessel strike avoidance procedures	Vessel operators and crew must maintain a vigilant watch for cetaceans and pinnipeds by slowing down or stopping their vessels to avoid striking these protected species. Vessel crew members responsible for navigation duties will receive site-specific training on marine mammal sighting/reporting and vessel strike avoidance measures. Vessel strike avoidance measures will include, but are not limited to the following, except under extraordinary circumstances when complying with these measures would put the safety of the vessel or the crew at risk: • Vessel operators and crew will maintain vigilant watch for cetaceans and pinnipeds, and slow down or stop their vessel to avoid striking these protected species; • All vessel operators will comply with 10 knot (18.5 km/hr) or less speed restrictions in any SMA, DMA or visually triggered Slow Zone; • All vessel operators will reduce vessel speed to 10 knots (18.5 km/hr) or less when any large whale, any mother/calf pairs, whale or dolphin pods, or larger assemblages of cetaceans are observed near (within 100 m [330 ft]) an underway vessel; • All vessels will maintain a separation distance of 500 m (1,640 ft) or greater from any sighted NARW; • If underway, vessels must steer a course away from any sighted NARW at 10 knots (18.5 km/hr) or less until the 500 m (1,640 ft) minimum separation distance has been established. If a NARW is sighted in a vessel's path, or within 100 m (330 ft) of an underway vessel, the underway vessel must reduce speed and shift the engine to neutral. Engines will not be engaged until the NARW has moved outside of the vessel's path and beyond 100 m. If stationary, the vessel must not engage engines until the NARW has moved beyond 100 m; • All vessels will maintain a separation distance of 100 m (330 ft) or greater of any sighted whales. If sighted, the vessel underway must reduce speed and shift the engine to neutral, and must not engage the engines until the whale has moved outside the vessel's path and beyond 100 m. If a survey vessel is stationary, the vessel will not engage engines until the whale has moved out of the vessel's path and beyond 100 m; • All vessels will maintain a separation distance of 50 m (164 ft) or greater from any sighted small cetacean. Any underway vessel must remain parallel to a sighted small cetacean's course whenever possible, and avoid excessive speed or abrupt changes in direction. Vessels may not adjust course and speed until the small cetaceans have moved beyond 50 m and/or the beam of the underway vessel; • All vessels underway will not divert or alter course in order to approach any whale, small cetacean, or pinniped. Any vessel underway will avoid excessive speed or abrupt changes in direction to avoid injury to the sighted cetacean or pinniped; and • All vessels will maintain a separation distance of 50 m (164 ft) or greater from any sighted pinniped. Vessel operators will use all available sources of information of NARW presence, including daily monitoring of the Right Whale Sightings Advisory System, WhaleAlert app, and monitoring of Coast Guard VHF Channel 16 to receive	C, O&M, D

	notifications of right whale detections to plan vessel routes to minimize the potential for co-occurrence with right whales. As part of vessel strike avoidance a training program will be implemented. The training program will be provided to NMFS for review and approval prior to the start of surveys. Confirmation of the training and understanding of the requirements will be documented on a training course log sheet. Signing the log sheet will certify that the crew members understand and will comply with the necessary requirements throughout the survey event.	
Foundation installation: Seasonal pile driving restrictions	Impact pile driving of foundations will not occur from January 1 through April 30. In addition, pile driving will not occur from December 1 through December 31, unless unanticipated delays due to weather or technical issues arise that necessitate extending pile driving into December in which case Empire would notify NMFS and BOEM in writing by September 1 that circumstances are expected to necessitate pile driving in December.	C
Foundation installation: Pile driving weather and time restrictions	Impact pile driving will commence only during daylight hours no earlier than one hour after (civil) sunrise. Impact pile driving will not be initiated later than 1.5 hours before (civil) sunset. Pile driving may continue after dark when the installation of the same pile began during daylight (1.5 hours before [civil] sunset), when clearance zones were fully visible for at least 30 minutes and must proceed for human safety or installation feasibility reasons. Impact pile driving will not be initiated in times of low visibility when the visual clearance zones cannot be visually monitored, as determined by the lead PSO on duty.	C
Foundation installation: Visual monitoring	During impact pile driving visual monitoring will occur as follows: • A minimum of two PSOs must be on active duty at the impact pile driving vessel/platform from 60 minutes before, during, and for 30 minutes after all pile installation activity; and • A minimum of two PSOs must be on active duty on a dedicated PSO vessel from 60 minutes before, during, and for 30 minutes after all monopile installation activity, or, an alternate monitoring technology (e.g., UAS) that has been demonstrated as having greater visual monitoring capability compared to two PSOs on a dedicated PSO vessel and is approved by NMFS, will be employed from 60 minutes before, during, and for 30 minutes after all monopile installation activity. If a dedicated PSO vessel is selected, the vessel must be located at the best vantage point to observe and document marine mammal sightings in proximity to the Clearance/Shutdown zones.	C

Foundation installation: Pre- start clearance	For impact pile driving, the Applicant will implement a 60-minute pre-start clearance period of the Clearance zones prior to the initiation of soft-start to ensure no marine mammals are in the vicinity of the pile. During this period the Clearance zones will be monitored by both PSOs and PAM. Pile driving will not be initiated if any marine mammal is observed within its respective Clearance zone. If a marine mammal is observed within a Clearance zone during the pre- start clearance period, impact pile driving may not begin until the animal(s) has been observed exiting its respective zone, or, until an additional time period has elapsed with no further sightings (i.e., 15 minutes for dolphins and pinnipeds and 30 minutes for all other species). In addition, impact pile driving will be delayed upon a confirmed PAM detection of a NARW, if the PAM detection is confirmed to have been located within the 5 km NARW PAM Clearance zone. Any large whale sighted by a PSO within 1,000 m of the pile that cannot be identified as a non-North Atlantic right whale must be treated as if it were a NARW. Impact pile driving will not be initiated if the clearance zones cannot be adequately monitored (i.e., if they are obscured by fog, inclement weather, poor lighting conditions) for a 30-minute period prior to the commencement of soft start, as determined by the Lead PSO. If light is insufficient, the Lead PSO will call for a delay until the Clearance zone is visible in all directions. If a soft start has been initiated before the onset of inclement weather, pile driving activities may continue through these periods if deemed necessary to ensure human safety and/or the integrity of the Project.	C
Foundation installation: Clearance and shutdown zones	Clearance and Shutdown zones will be established (see Table 42 of the LOA application [Empire 2022b]) and continuously monitored during impact pile driving to minimize impacts to marine mammals. These zones will be monitored as described under Foundation installation: Visual monitoring and mitigation enacted as described under Foundation installation: Shutdown and power down.	C
Foundation installation: Passive acoustic monitoring	PAM will occur during all impact pile driving and will supplement the visual monitoring program. During impact pile driving, PAM will begin 60 minutes prior to the initiation of soft-start, throughout foundation installation, and for 30 minutes after impact pile driving has been completed. PAM will be conducted by a dedicated, qualified, and NMFS-approved PAM operator. The PAM operator will monitor the hydrophone signals in real time both aurally (using headphones) and visually (via the monitor screen displays). The PAM operator will communicate detections of any marine mammals to the Lead PSO on duty who will ensure the implementation of the appropriate mitigation measures (i.e., delay or shutdown of pile driving). PAM detection alone (i.e., in the absence of visual confirmation by a PSO of a marine mammal within a relevant Clearance/Shutdown zone) will not trigger mitigation measures (i.e., delay or shutdown of pile driving), with the exception of a confirmed PAM detection of a NARW within the relevant zone. The real-time PAM system will be designed and established such that detection capability extends to 5 km from the pile driving location, for all monopile installations. Real-time PAM will begin at least 60 minutes before pile driving begins. The real-time PAM system will be configured to ensure that the PAM operator is able to review acoustic detections within approximately 15 minutes of the original detection, in order to verify whether a NARW has been detected. Any possible NARW vocalization will be reported as a detection if the vocalization is determined by the PAM operator to be within the Clearance/Shutdown zones.	C

Foundation installation: Soft start	A soft start refers to initiating the pile driving process at reduced hammer energy to provide marine mammals a warning and an opportunity to vacate the area prior to pile driving at full hammer energy. Soft start will occur at the beginning of the driving of each pile and at any time following the cessation of impact pile driving of 30 minutes or longer. The soft start protocol will be consistent with the requirements of the MMPA ITA.	C
Foundation installation: Shutdown and power down	The Clearance and Shutdown zones around the pile driving activities will be maintained by PSOs for the presence of marine mammals before, during, and after impact pile driving activity. If a marine mammal is observed entering or within the respective zones after pile driving has commenced, a shutdown of impact pile driving will occur when practicable as determined by the lead engineer on duty, who must evaluate the following to determine whether shutdown is safe and practicable: • Use of site-specific soil data and real-time hammer log information to judge whether a stoppage would risk causing piling refusal at re-start of piling; • Confirmation that pile penetration is deep enough to secure pile stability in the interim situation, taking into account weather statistics for the relevant season and the current weather forecast; and •Determination by the lead engineer on duty will be made for each pile as the installation progresses and not for the site as a whole. If a shutdown is called for but the lead engineer determines shutdown is not safe and/or practicable reduced hammer energy (power down) will be implemented, when the lead engineer determines it is practicable. Subsequent restart/increased power of the equipment can be initiated if the animal has been observed exiting its respective zone within 30 minutes of the shutdown, or, after an additional time period has elapsed with no further sighting of the animal that triggered the shutdown (i.e., 15 minutes for small odontocetes and 30 minutes for all other species). If pile driving shuts down for reasons other than mitigation (e.g., mechanical difficulty) for brief periods (i.e., less than 30 minutes), it may be activated again without ramp-up, if PSOs have maintained constant observation and no detections of any marine mammal have occurred within the respective zones.	C
Foundation installation: Attenuation	The Applicant will employ noise mitigation techniques during all impact pile driving that will attenuate pile driving noise by a minimum of 10 dB, such that measured ranges to isopleth distances corresponding to relevant marine mammal harassment thresholds are consistent with those modeled based on 10 dB attenuation, determined via sound field verification. The Applicant will employ a double bubble curtain or an attenuation technology that achieves noise reduction equivalent to or greater than that achieved by a double bubble curtain.	C
Foundation installation: Sound field verification	Sound field measurements will be conducted during the driving of at least three monopiles and at least one jacket pile over the course of construction to compare sound field measurements with modeled isopleth distances. Sound field measurements will be conducted at distances of approximately 750 meters, 2,500 meters, and 5,000 meters from the pile being driven, as well as at the extent of the modeled behavioral harassment zones to verify the accuracy of those modeled zones. The recordings will be continuous throughout the duration of all impacts hammering of each pile monitored. The measurement systems will have a sensitivity appropriate for the expected sound levels from pile driving received at the nominal ranges throughout the installation of the pile. The frequency range of the system will cover the range of at least 20 hertz to 20 kilohertz. The system will be designed to have omnidirectional sensitivity and will be designed so that the predicted broadband received level of all impact pile-driving strikes exceed the system noise floor by at least 10 decibels. The dynamic range of the will be sufficient	C

	such that at each location, pile driving signals are not clipped and are not masked by the noise floor. A Sound Field Verification Plan will be submitted to NMFS for review and approval at least 180 days prior to the planned start of pile driving. This plan will describe how Empire will ensure that the location selected is representative of the rest of the piles of that type to be installed and how the effectiveness of the sound attenuation methodology will be evaluated based on the results. The Applicant will provide the initial results of the field measurements to NMFS as soon as they are available.	
Cable landfall and marina activities: Visual monitoring	A minimum of two PSOs will be on active duty on the vibratory pile driving platform, or on a vessel nearby the construction vessel, from 30 minutes before, during, and 30 minutes after all pile driving.	C
Cable landfall and marina activities: Pre- start clearance	For all pile driving, the Applicant will implement a 30-minute clearance period of the Clearance zones prior to the initiation of installation. During this period the Clearance zones will be monitored by the PSOs, using the appropriate visual technology for a 30-minute period. Installation may not be initiated if any marine mammal is observed within its respective Clearance zone. If a marine mammal is observed within a Clearance zone during the pre-start clearance period, installation may not begin until the animal(s) has been observed exiting its respective zone or until an additional time period has elapsed with no further sightings (i.e., 15 minutes for dolphins and pinnipeds and 30 minutes for all other species). Any large whale sighted by a PSO within 1,000 m of the pile that cannot be identified as a non-NARW must be treated as if it were a NARW.	C
Cable landfall and marina activities: Clearance and shutdown zones	Clearance and shutdown zones for vibratory pile driving will be established as described in Table 43 of the LOA application (Empire 2022b).	C
Cable landfall and marina activities: Shutdown and power down procedures	The Clearance and Shutdown zones around pile driving activities will be maintained, as previously described, by PSOs for the presence of marine mammals before, during, and after pile driving activity. An immediate shutdown of the hammer will be required if a marine mammal is sighted within or approaching its respective Shutdown zone. The operator will comply immediately with any call for shutdown by the Lead PSO, except in cases where immediate shutdown would represent a human safety risk. Any disagreement between the Lead PSO and operator will be discussed only after shutdown has occurred. Subsequent restart of the equipment can be initiated if the animal has been observed exiting its respective Shutdown zone within 30 minutes of the shutdown, or, after an additional time period has elapsed with no further sighting (i.e., 15 minutes for small odontocetes and 30 minutes for all other species).	C

HRG survey activities	The specific measures identified in the LOA application (Empire 2022b) included HRG survey mitigation measures for marine mammals from the 2021 programmatic ESA section 7 consultation regarding offshore wind geophysical and geotechnical surveys (NMFS 2021b).	C, O&M

BA Table 8 Proposed Additional Mitigation, Monitoring, and Reporting Measures included in BOEM's BA or Updated by BOEM during the Consultation Period

Measure	Description	Project Phase
LOA Requirements	The measures required by the final MMPA LOA for Incidental Take Regulations would be required in the COP approval.	C
Marine debris awareness and elimination	Marine Debris Awareness Training. The Lessee must ensure that vessel operators, employees, and contractors engaged in offshore activities pursuant to the approved COP complete marine trash and debris awareness training annually. The training consists of two parts: (1) viewing a marine trash and debris training video or slide show (described below); and (2) receiving an explanation from management personnel that emphasizes their commitment to the requirements. The marine trash and debris training videos, training slide packs, and other marine debris related educational material may be obtained at https://www.bsee.gov/debris or by contacting BSEE. The training videos, slides, and related material may be downloaded directly from the website. Operators engaged in marine survey activities will continue to develop and use a marine trash and debris awareness training and certification process that reasonably assures that their employees and contractors are in fact trained. The training process will include the following elements: • Viewing of either a video or slide show by the personnel specified above; • An explanation from management personnel that emphasizes their commitment to the requirements; • Attendance measures (initial and annual); and Recordkeeping and the availability of records for inspection by DOI. Training Compliance Report. By January 31 of each year, the Lessee must submit to DOI an annual report that describes its marine trash and debris awareness training process and certifies that the training process has been followed for the previous calendar year. The Lessee must send the reports via email to BOEM (at renewable_reporting@boem.gov) and to BSEE (at via TIMSWeb with a notification email sent to marinedebris@bsee.gov). Marking. Materials, equipment, tools, containers, and other items used in OCS activities, which are of such shape or configuration that make them likely to snag or damage fishing devices or be lost or discarded overboard, must be clearly marked with the vessel or facility identification number, and properly secured to prevent loss overboard. All markings must clearly identify the owner and must be durable enough to resist the effects of the environmental conditions to which they may be exposed. Recovery and Prevention. The Lessee must recover marine trash and debris that is lost or discarded in the marine environment while performing OCS activities when such incident is likely to (1) cause undue harm or damage to natural resources, including their physical, atmospheric, and biological components, which particular attention to marine trash or debris that could entangle or be ingested by marine protected species; or (2) significantly interfere with OCS uses (e.g., the marine trash or debris is likely to damage fishing equipment, or present a hazard to navigation). The Lessee must notify DOI within 48 hours of the incident (using the email address listed on the DOI's most recent incident reporting guidance) if recovery activities are (a) not possible because conditions are unsafe; or (b) not practicable or not warranted because the marine trash and debris released is not likely to result in any of the conditions listed in (1) or (2) above. Notwithstanding this notification, DOI may still order the Lessee to recover the lost or	Pre-C, C, O&M, D

	discarded marine trash and debris if DOI finds the reasons provided by the Lessee in the notification unpersuasive. If the marine trash and debris is located within the boundaries of a potential archaeological resource/avoidance area, or a sensitive ecological/benthic resource area, the Lessee must contact DOI for concurrence before conducting any recovery efforts. Recovery of the marine trash and debris should be completed as soon as practicable, but no later than 30 calendar days from the date on which the incident occurred. If the Lessee is not able to recover the marine trash or debris within 48 hours of the incident, the Lessee must submit a plan to DOI explaining the activities planned to recover the marine trash or debris (Recovery Plan). The Lessee must submit the Recovery Plan no later than 10 calendar days from the date on which the incident occurred. Unless DOI objects within 48 hours of the filing of the Recovery Plan, the Lessee can process with the activities described in the Recovery Plan. The Lessee must request and obtain a time extension if recovery activities cannot be completed within 30 calendar days from the date on which the incident occurred. The Lessee must enact steps to prevent similar incidents and must submit a description of these actions to BOEM and BSEE within 30 calendar days from the date on which the incident occurred. Reporting. The Lessee must report to DOI (using the email address listed on DOI's most recent incident reporting guidance) all lost or discarded marine trash and debris. This report must be made monthly and submitted no later than the fifth day of the following month. The Lessee is not required to submit a report for those months in which no marine trash and debris was lost or discarded. The report must include the following: • Project identification and contact information for the Lessee and for any operators or contractors involved • The date and time of the incident • The lease number, OCS area and block, and coordinates of the object's location (latitude and longitude in decimal degrees) • A detailed description of the dropped object, including dimensions (approximate length, width, height, and weight) and composition (e.g., plastic, aluminum, steel, wood, paper, hazardous substances, or defined pollutants)	
	• Pictures, data imagery, data streams, and/or a schematic/illustration of the object, if available	
	• An indication of whether the lost or discarded item could be detected as a magnetic anomaly of greater than 50 nanotesla, a seafloor target of greater than 1.6 feet (0.5 meters), or a sub-bottom anomaly of greater than 1.6 feet (0.5 meters) when operating a magnetometer or gradiometer, side scan sonar, or sub-bottom profiler in accordance with DOI's most recent, applicable guidance	
	• An explanation of the how the object was lost	
	• A description of immediate recovery efforts and results, including photos	

	In addition to the foregoing, the Lessee must submit a report within 48 hours of the incident (48-hour Report) if the marine trash or debris could (1) cause undue harm or damage to natural resources, including their physical, atmospheric, and biological components, which particular attention to marine trash or debris that could entangle or be ingested by marine protected species; or (2) significantly interfere with OCS uses (e.g., the marine trash or debris is likely to damage fishing equipment, or present a hazard to navigation). The information in the 48-hour Report must be the same as that listed for the monthly report, but only for the incident that triggered the 48-hour Report. The Lessee must report to DOI (using the email address listed on DOI's most recent incident reporting guidance) if the object is recovered and, as applicable, describe any substantial variance from the activities described in the Recovery Plan that were required during the recovery efforts. The Lessee must include and address information on unrecovered marine trash and debris in the description of the site clearance activities provided in the decommissioning application required under 30 CFR §585.906.	
	Option to Comply with Most Current Non-Required Measures. The Lessee may opt to comply with the most current non-required measures (e.g., measures in a programmatic consultation that are not binding on the Lessee) related to protected species and habitat in place at the time an activity is undertaken under the Lease. At least 30 calendar days prior to undertaking an activity, the Lessee must notify DOI of its intention to comply with such measures in lieu of those required under the terms and conditions above. DOI reserves the right to object or request additional information on how the Lessee intends to comply with such measures. If DOI does not respond with objections within 15 calendar days of receipt of the Lessee's notification, then the Lessee may conclude the DOI has concurred.	
Pile Driving PAM Plan	Pile Driving PAM Plan (Planning) (Construction). BOEM, BSEE, and the USACE will require a Pile Driving PAM Plan be submitted to BOEM, BSEE, NMFS GARFO, and NMFS OPR at least 180 calendar days before impact pile driving is planned. BOEM, BSEE, and NMFS GARFO will review the plan and will provide comments within 45 days of receipt of the plan. NMFS GARFO may comment to BOEM, BSEE, and the Lessee about whether the plan is consistent with the requirements outlined in the BiOp and its Incidental Take Statement (ITS). If BOEM and BSEE determines that the plan is inconsistent with those requirements, the Lessee must resubmit a modified plan that addresses the identified issues at least 15 days before the start of the associated activity. BOEM, BSEE and NMFS GARFO will discuss a timeline for review of the modified plan to meet the Lessee's schedule to the maximum extent practicable. The Lessee must obtain BOEM's and BSEE's concurrence with this Plan prior to the start of any pile driving. The plan must include a description of all proposed PAM equipment and hardware, the calibration data, bandwidth capability and sensitivity of hydrophones, and address how the proposed PAM will follow standardized measurement, processing methods, reporting metrics, and metadata standards for offshore wind (Van Parijs et al., 2021). The plan must describe and include all procedures, documentation, and protocols including information (i.e., testing, reports, equipment specifications) to support that it will be able to detect vocalizing whales, including the North Atlantic right whale (NARW, within the clearance and shutdown zones. This information includes deployment locations, procedures, detection review methodology, and protocols; hydrophone detection ranges with and without foundation installation activities and data supporting those ranges; where PAM Operators will be stationed relative to hydrophones and PSOs on pile driving vessel calling for delay/shutdowns; and a full description of all proposed software, call detectors and their performance metrics, and filters. The plan must also incorporate the requirements relative to NARW reporting. Empire will be required to submit full detection data, metadata, and location of recorders (or GPS tracks, if applicable) from all real-time hydrophones used for monitoring during construction except for abbreviated SFV monitoring within 90 calendar days after pile-driving has ended and instruments have been pulled from the water. Reporting must use the webform templates on the NMFS Passive Acoustic Reporting System website at https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-	C, O&M

	templates. The Lessee must submit the full acoustic recordings from all the real-time hydrophones to the National Centers for Environmental Information (NCEI) for archiving within 90 calendar days after pile-driving has ended and instruments have been pulled from the water. Confirmation of both submittals must be sent to BOEM, BSEE, NMFS GARFO.	
Pile Driving Monitoring Plan	BOEM will require Empire to prepare and submit a Pile Driving Monitoring Plan to NMFS and BSEE (at OSWsubmittals@BSEE.gov) for review at least 180 days before start of pile driving. The plan will detail all plans and procedures for sound attenuation as well as for monitoring ESA-listed whales and sea turtles during all impact and vibratory pile driving. Empire must obtain BOEM, BSEE, USACE (for pile driving in State waters), and NMFS' concurrence with this plan prior to starting any pile driving.	C
PSO coverage	Empire Wind must use NMFS-approved PSOs and PAM operators before, during, and after all foundation installation activities. At minimum, four visual PSOs must be actively observing for marine mammals and sea turtles before, during, and after pile driving. At least three two visual PSOs must be stationed on the pile driving vessel and at least two visual PSOs must be stationed on a secondary, PSO-dedicated vessel. The dedicated PSO vessel must be positioned near the outer edge of the modelled large whale clearance zone (2 km in the summer; 2. kilometer in the winter) to maximize detectability for monitoring and must adjust this distance as needed based upon on SFV results. The dedicated PSO vessel must be located at the outer edge of the 2 kilometer large whale clearance zone (unless modified by NMFS based on SFV). At least one active PSO on each platform must have a minimum of 90 days at-sea experience working in those roles in offshore environments, with no more than 18 months elapsed since the conclusion of the at-sea experience. These PSOs must maintain watch at all times when impact pile driving of monopiles is underway. Concurrently, at least one PAM operator must actively monitor for vocalizing marine mammals before, during and after pile driving. Furthermore, all crew and personnel working on the Project are required to maintain situational awareness of marine mammal presence (discussed further above) and are required to report any sightings to the PSOs. a) Empire Wind must ensure that PSO coverage is sufficient to reliably detect marine mammals and sea turtles at the surface in the identified clearance and shutdown zones to execute any pile driving delays or shutdown requirements. If, at any point prior	C

	to or during construction, the PSO coverage is determined not to be sufficient to reliably detect ESA-listed marine mammals and sea turtles within the clearance and shutdown zones, additional PSOs and/or platforms must be deployed. Determinations prior to construction must be based on review of the Marine Mammal and Sea Turtle Monitoring Plan for Pile Driving. Determinations during construction must be based on review of the weekly reports and other information, as appropriate. b) Empire Wind must ensure that, if the clearance and/or shutdown zones are expanded due to the verification of sound fields from Project activities, PSO coverage is sufficient to reliably monitor the expanded clearance and/or shutdown zones. Additional observers must be deployed on additional platforms for every 1,500 meters that a clearance or shutdown zone is expanded beyond the initial clearance and shutdown zones. In the event that the clearance or shutdown zone for sea turtles needs to be expanded, Empire Wind must submit a proposed monitoring plan for the expanded zones to BOEM, BSEE, USACE, and NMFS for approval.	
Noise Abatement Systems	Empire Wind must employ noise abatement systems, also known as noise mitigation systems (NMS), during all impact pile driving, consistent with the Protected Species Mitigation and Monitoring Plan to reduce the sound pressure levels that are transmitted through the water in an effort to reduce ranges to acoustic thresholds and minimize any acoustic impacts resulting from pile driving. The Lessee must employ a double big bubble curtain or a combination of two or more noise mitigation systems during these activities; the method used must be capable of achieving, at a minimum, 10 decibels of modelled sound attenuation during all impact pile driving of foundation piles. Empire Wind must also adjust operational protocols to minimize noise levels. . a) The bubble curtain(s) must distribute air bubbles using an airflow rate of at least 0.5 meters3/(minutes*meter). The bubble curtain(s) must surround 100 percent of the piling perimeter throughout the full depth of the water column. In the unforeseen event of a single compressor malfunction, the offshore personnel operating the bubble curtain(s) must make appropriate adjustments to the air supply and operating pressure such that the maximum possible sound attenuation performance of the bubble curtain(s) is achieved. b) The lowest bubble ring must be in contact with the seabed for the full circumference of the ring, and the weights attached to the bottom ring must ensure 100-percent seabed contact. c) No parts of the ring or other objects may prevent full seabed contact. d) Empire Wind must use qualified and experienced staff to train personnel in the proper balancing of airflow to the ring. The Lessee must ensure that construction contractors submit an inspection and performance report for approval by the Lessee within 72 hours following the performance test; that report must also be submitted to NMFS GARFO, NMFS OPR Office of Protected Resources, BOEM, and BSEE at that time. Corrections to the bubble ring(s) to meet the performance standards must occur prior to impact pile driving of monopiles. If the Lessee uses a noise mitigation device in addition to the big bubble curtain, the Lessee must maintain similar quality control measures as described here. e) Empire Wind must report any important observations regarding performance (before, during, and after installation), such as the weak areas of low pressure supported any relevant video and/or photographs of the bubble curtain(s) operating during all pile driving.with the weekly PSO pile driving reports specified in condition.	C
Sound field verificatio n	BOEM will ensure that the distance to the PTS and behavioral thresholds for marine mammals, sea turtle injury and harassment thresholds, and Atlantic sturgeon injury and harassment thresholds are no larger than those modeled assuming 10 dB re 1 μPa noise attenuation are met by conducting field verification during pile driving. At least 180 calendar days before beginning the first pile driving activities for the Project, the Lessee must prepare, submit, and implement a Sound Field Verification Plan (SFVP) for each EW1 and EW2 for review and comment to USACE, BOEM (at renewable_reporting@boem.gov), and NMFS (at nmfs.gar.incidental- take@noaa.gov). DOI will review the SFVP and provide any comments on the plan within 45 calendar days of its submittal. Empire Wind must resubmit a modified plan that addresses the	C

	identified issues at least 15 days before the start of the associated activity; at that time, BOEM, BSEE and NMFS will discuss a timeline for review of the modified plan to meet the Lessee's schedule to the maximum extent practicable. Empire Wind must obtain BOEM's and BSEE's concurrence with this Plan prior to the start of pile driving activities. To validate the estimated sound field, SFV measurements will be conducted during pile driving of the first three monopiles installed over the course of the Project, with noise attenuation activated. The plan(s) must describe how the first three monopile installation sites and installation scenarios (i.e., hammer energy and number of strikes) are representative of the rest of the monopile installations and, therefore, why these monopile installations would be representative of the remaining monopile installations. If the monitored pile locations are different from the ones used for exposure modeling, Empire Wind will provide a justification for why these locations are representative of the modeling. In the case that these sites are not determined to be representative of all other monopile installation sites, Empire Wind must include information on how additional monopiles/sites will be selected for SFV. The plan must also include methodology for collecting, analyzing, and preparing SFV data for submission to NMFS GARFO. Empire Wind's plan must describe how the effectiveness of the sound attenuation methodology will be evaluated based on the results. For the first 3 piles, Empire must also provide, as soon as they are available, but no later than 48 hours after each installation, the initial results of the SFV measurements to BOEM, BSEE, and NMFS GARFO in an interim report after each monopile. If any interim SFV report submitted for any of the first 3 monopiles indicates the sound fields exceed the modeled distances to any protected species injury or behavioral harassment/disturbance thresholds (as modeled assuming 10 decibel attenuation), the Lessee must carry out SFV for the next 3 monopiles (e.g., the fourth, fifth, and sixth pile driven) and provide a SFV report to BOEM, BSEE, and NMFS GARFO within 48 hours after each foundation is installed. After receiving reports for the first 6 monopiles, BOEM, BSEE, or NMFS GARFO may require the Lessee to carry out additional SFV and provide additional interim SFV reports to BOEM, BSEE, and NMFS GARFO if the measured sound fields continue to exceed the modeled results. These requirements are in addition to the requirement for the Lessee to implement additional sound mitigation measures and/or adjustments to clearance and shutdown zones if sound fields exceed the modeled distances to any protected species injury or behavioral harassment/disturbance thresholds (as modeled assuming 10 decibel attenuation). Abbreviated SFV Monitoring: A single acoustic recorder must be placed at an appropriate distance from the pile and the sound field monitored for all foundation installations for which the complete SFV monitoring outlined above is not carried out. Results of measured sound levels must be included in the weekly PSO pile driving reports. Any indications that distances to the identified Level A and Level B harassment thresholds for whales or distances to injury or behavioral disturbance distances for sea turtles must be addressed by Empire Wind, including an explanation of factors that contributed to the exceedance and corrective actions that were taken to avoid exceedance on subsequent piles.	
Shutdown zones	BOEM, BSEE, and USACE may reduce clearance and shutdown zones for ESA-listed sei, fin, or sperm whales based upon sound field verification of a minimum of 3 piles and with concurrence from NMFS GARFO and NMFS OPR. However, the shutdown zone for sei, fin, and sperm whales will not be reduced to less than 1,000 m, or less than 500 m for ESA-listed sea turtles. The clearance or shutdown zones for NARWs will not be reduced regardless of the results of sound field verification of a minimum of three piles.	C
Monitoring zone for sea turtles	To ensure that any "take" is documented, BOEM, BSEE, and USACE will require Empire to monitor and record all observations of ESA-listed sea turtles over the full extent practicable beyond the 500m shutdown zone, of any area where noise may exceed 175 dB rms (based on modeling or as may be approved by sound field verification	C

	results) during any pile driving activities and for 30 minutes following the cessation of pile driving activities.	
Look out for sea turtles and reporting	• For all vessels operating north of the Virginia/North Carolina border, between June 1 and November 30, Empire must have a trained lookout posted on all vessel transits during all phases of the Projects to observe for sea turtles. The trained lookout must communicate any sightings, in real time, to the captain so that the requirements in (e) below can be implemented. • For all vessels operating south of the Virginia/North Carolina border, year-round (reflecting year-round sea turtle presence), Empire must have a trained lookout posted on all vessel transits during all phases of the Projects to observe for sea turtles. The trained lookout would communicate any sightings, in real time, to the captain so that the requirements in (e) below can be implemented. • The trained lookout will review https://seaturtlesightings.org/ before each trip and report any observations of sea turtles in the vicinity of the planned transit to all vessel operators or captains and lookouts on duty that day. • The trained lookout will maintain a vigilant watch and monitor a 500-m Vessel Strike Avoidance Zone at all times to maintain this minimum separation distance between the vessel and ESA-listed sea turtle species. Alternative monitoring technology, such as night vision and thermal cameras, will be available to ensure effective watch at night and in any other low visibility conditions. If the trained lookout is a vessel crew member, lookout will be their designated role and primary responsibility while the vessel is transiting at speed above 10 knots. Any designated crew lookouts will receive training on protected species identification, vessel strike minimization procedures, how and when to communicate with the vessel captain, and reporting requirements. • When trained lookouts or PSOs are required to monitor for ESA-listed species of whales during vessel transits, the lookouts or PSOs will also monitor for sea turtles. Vessel captains must take care to avoid striking sea turtles at all times. If a sea turtle is sighted within 100 m or less of the operating vessel's forward path, the vessel operator must slow down to 4 knots (unless unsafe to do so) and then proceed away from the turtle at a speed of 4 knots or less until there is a separation distance of at least 100 m between the vessel and the sea turtle at which time the vessel may resume normal operations • Vessel captains or operators must avoid transiting through areas of visible jellyfish aggregations or floating sargassum lines or mats. If operational safety precludes avoiding such areas, vessels must slow to 4 knots when transiting. • All vessel crew members must be briefed on identification of sea turtles, applicable regulations, and best practices for avoiding vessel collisions with sea turtles. Reference materials for identification of sea turtles must be available aboard all Project vessels. The requirement and process for reporting sea turtles (including live, entangled, and dead individuals) must be clearly communicated, including posting in highly visible locations aboard all Project vessels. This communication must clearly convey that sea turtle observations are to be reported to the designated vessel contact (such as the lookout or the vessel captain) and provide a communication channel and process for crew members to do so. • If a vessel is carrying a PSO or trained lookout for the purposes of maintaining watch for NARWs, an additional lookout is not required so long as the PSO or trained lookout maintains watch for both whales and sea turtles. • Vessel transits to and from the Wind Farm Area that require PSOs will maintain a speed commensurate with weather conditions and effectively detecting sea turtles prior to reaching the 100 m avoidance measure. • Exceptions to the requirements of this mitigation measure (Look out for sea turtles and reporting) are allowed only if the safety of the vessel or crew	Pre-C, C, O&M, D

	necessitates deviation from the requirements on an emergency basis. Any such exceptions must be reported to NMFS and BSEE within 24 hours after they occur.	
Gear identification	To facilitate identification of gear on any entangled animals, all trap/pot gear used in any Project survey must be uniquely marked to distinguish it from other commercial or recreational gear. Gear must be marked with a 3-foot-long strip of black and white duct tape within 2 fathoms of a buoy attachment. In addition, 3 additional marks must be placed on the top, middle and bottom of the line using black and white paint or duct tape. No variation from these marking requirements may be made without notification and approval from NMFS.	Pot/trap surveys
Lost survey gear	All reasonable efforts that do not compromise human safety must be undertaken to recover any lost survey gear. Any lost gear must be reported to NMFS (nmfs.gar.incidental-take@noaa.gov) and BSEE (OSWsubmittals@bsee.gov) within 24 hours after the gear is documented as missing or lost. This report must include information on any markings on the gear and any efforts undertaken or planned to recover the gear.	All fisheries surveys
Survey training	For any vessel trips where gear is set or hauled for trawl or ventless trap surveys, at least one of the survey staff onboard must have completed NEFOP observer training within the last 5 years or completed other equivalent training in protected species identification and safe handling (inclusive of taking genetic samples from Atlantic sturgeon). Reference materials for identification, disentanglement, safe handling, and genetic sampling procedures must be available on board each survey vessel. Empire must prepare a training plan that addresses how these survey requirements will be met and must submit that plan to NMFS in advance of any trawl or trap surveys.	Trawl and ventless trap surveys – *NMFS NOTE: there are no ventless trap surveys proposed and none are considered in this Opinion*
Sea turtle disentanglement	Vessels deploying fixed gear (e.g., pots/traps) must have adequate disentanglement equipment onboard, such as a knife and boathook. Any disentanglement must occur consistent with the Northeast Atlantic Coast STDN Disentanglement Guidelines at https://www.reginfo.gov/public/do/DownloadDocument?objectID=10248 6501 and the procedures described in "Careful Release Protocols for Sea Turtle Release with Minimal Injury" (NOAA Technical Memorandum 580; https://repository.library.noaa.gov/view/noaa/3773).	Pot/trap surveys
Sea turtle/Atlantic sturgeon identification and data collection	Any sea turtles or Atlantic sturgeon caught or retrieved in any fisheries survey gear must first be identified to species or species group. Each ESA-listed species caught or retrieved must then be documented using appropriate equipment and data collection forms. Biological data collection, sample collection, and tagging activities must be conducted as outlined below. Live, uninjured animals must be returned to the water as quickly as possible after completing the required handling and documentation. The Sturgeon and Sea Turtle Take Standard Operating Procedures must be followed (https://media.fisheries.noaa.gov/2021-11/Sturgeon%20%26%20Sea%20Turtle%20Take%20SOPs_external_ 11032021.pdf). Survey vessels must have a passive integrated transponder (PIT) tag reader onboard capable of reading 134.2 kHz and 125 kHz encrypted tags (e.g., Biomark GPR Plus	All fisheries surveys

	Handheld PIT Tag Reader). This reader must be used to scan any captured sea turtles and sturgeon for tags, and any tags found must be recorded on the take reporting form (see below). Genetic samples must be taken from all captured Atlantic sturgeon (alive or dead) to allow for identification of the DPS of origin of captured individuals and tracking of the amount of incidental take. This must be done in accordance with the Procedures for Obtaining Sturgeon Fin Clips (https://media.fisheries.noaa.gov/dam-migration/sturgeon_genetics_sampling_revised_june_2019.pdf). Fin clips must be sent to a NMFS-approved laboratory capable of performing genetic analysis and assignment to DPS of origin. Empire must cover all reasonable costs of the genetic analysis. Arrangements for shipping and analysis must be made before samples are submitted and confirmed in writing to NMFS within 60 days of the receipt of the Project BiOp with ITS. Results of genetic analyses, including assigned DPS of origin must be submitted to NMFS within 6 months of the sample collection. Subsamples of all fin clips and accompanying metadata forms must be held and submitted to a tissue repository (e.g., the Atlantic Coast Sturgeon Tissue Research Repository) on a quarterly basis. The Sturgeon Genetic Sample Submission Form is available for download at: https://media.fisheries.noaa.gov/2021-02/Sturgeon%20Genetic%20Sample%20Submission%20sheet%20for%20S7_v1.1_Form%20to%20Use.xlsx?nullhttps://www.fishe ries.noaa.gov/new-england-mid-atlantic/consultations/section-7- take-reporting-programmatics-greater-atlantic. All captured sea turtles and Atlantic sturgeon must be documented with required measurements and photographs. The animal's condition and any marks or injuries must be described. This information must be entered as part of the record for each incidental take. Particularly, a NMFS Take Report Form must be filled out for each individual sturgeon and sea turtle (download at: https://media.fisheries.noaa.gov/2021-07/Take%20Report%20Form%2007162021.pdf?null) and submitted to NMFS as described in the take notification measure below.	
Sea turtle/Atlantic sturgeon handling and resuscitation guidelines	Any sea turtles or Atlantic sturgeon caught and retrieved in gear used in fisheries surveys must be handled and resuscitated (if unresponsive) according to established protocols provided at-sea conditions are safe for those handling and resuscitating the animal(s) to do so. Specifically: • Priority must be given to the handling and resuscitation of any sea turtles or sturgeon that are captured in the gear being used. Handling times for these species must be minimized, and if possible kept to 15 minutes or less to limit the amount of stress placed on the animals. • All survey vessels must have onboard copies of the sea turtle handling and resuscitation requirements (found at 50 CFR 223.206(d)(1)) before beginning any on-water activity (download at: https://media.fisheries.noaa.gov/dam-migration/sea_turtle_handling_and_resuscitation_measures.pdf). These handling and resuscitation procedures must be carried out any time a sea turtle is incidentally captured and brought onboard the vessel during survey activities. • If any sea turtles that appear injured, sick, or distressed, are caught and retrieved in fisheries survey gear, survey staff must immediately contact the Greater Atlantic Region Marine Animal Hotline at 866-755-6622 for further instructions and guidance on handling the animal, and potential coordination of transfer to a rehabilitation facility. If survey staff are unable to contact the hotline (e.g., due to distance from shore or lack of ability to communicate via phone), the USCG must be contacted via VHF marine radio on Channel 16. If required, hard-shelled sea turtles (i.e., non-leatherbacks) may be held on board for up to 24 hours and managed in accordance with handling instructions provided by the Hotline before transfer to a rehabilitation facility. • Survey staff must attempt resuscitate any Atlantic sturgeon that are unresponsive or comatose by providing a running source of water over the gills as described in the Sturgeon Resuscitation Guidelines (https://media.fisheries.noaa.gov/dam-	All fisheries surveys

	migration/sturgeon_resuscitation_card_06122020_508.pdf). • If appropriate cold storage facilities are available on the survey vessel, any dead sea turtle or Atlantic sturgeon must be retained on board the survey vessel for transfer to an appropriately permitted partner or facility on shore unless NMFS indicates that storage is unnecessary or storage is not safe. • Any live sea turtles or Atlantic sturgeon caught and retrieved in gear used in any fisheries survey must ultimately be released according to established protocols including safety considerations.	
Take notification	GARFO PRD must be notified as soon as possible of all observed takes of sea turtles, and Atlantic sturgeon occurring as a result of any fisheries survey. Specifically: GARFO PRD must be notified within 24 hours of any interaction with a sea turtle or sturgeon (nmfs.gar.incidental- take@noaa.gov). The report will include at a minimum: • survey name and applicable information (e.g., vessel name, station number); (2) GPS coordinates describing the location of the interaction (in decimal degrees); (3) gear type involved (e.g., bottom trawl, gillnet, longline); (4) soak time, gear configuration and any other pertinent gear information; (5) time and date of the interaction; and (6) identification of the animal to the species level. Additionally, the e-mail will transmit a copy of the NMFS Take Report Form (download at: https://media.fisheries.noaa.gov/2021-07/Take%20Report%20Form%2007162021.pdf?null) and a link to or acknowledgement that a clear photograph or video of the animal was taken (multiple photographs are suggested, including at least one photograph of the head scutes). If reporting within 24 hours is not possible due to distance from shore or lack of ability to communicate via phone, fax, or email, reports must be submitted as soon as possible; late reports must be submitted with an explanation for the delay. • At the end of each survey season, a report must be sent to NMFS that compiles all information on any observations and interactions with ESA-listed species. This report will also contain information on all survey activities that took place during the season including location of gear set, duration of soak/trawl, and total effort. The report on survey activities must be comprehensive of all activities, regardless of whether ESA-listed species were observed.	All fisheries surveys
Monthly/annual reporting requirements	Empire must implement the following reporting requirements to document the amount or extent of take that occurs during all phases of the Proposed Action: • All reports must be sent to: NMFS at nmfs.gar.incidental- take@noaa.gov and BSEE at OSWsubmittals@bsee.gov. • During the construction phase and for the first year of operations, Empire must compile and submit monthly reports summarizing all Project activities carried out in the previous month, including vessel transits (number, type of vessel, and route), piles installed, and all observations of ESA-listed species. Monthly reports are due on the 15th of the month for the previous month. • Beginning in year 2 of operations, Empire must compile and submit annual reports that summarize all Project activities carried out in the previous year, including vessel transits (number, type of vessel, and route), repair and maintenance activities, survey activities, and all observations of ESA-listed species. These reports are due by April 1 of each year (i.e., the 2026 report is due by April 1, 2027). Upon mutual agreement of NMFS and BOEM, the frequency of reports can be changed.	C, O&M
Geophysical and Geotechnical Surveys	Empire must comply with all the Project Design Criteria and Best Management Practices for Protected Species at https://www.boem.gov/sites/default/files/documents//PDCs%20and%20BMPs%20for%20Atlantic%20Data%20Collection%2011222021.pdf that implement the integrated requirements for threatened and endangered species in the June 29, 2021, programmatic consultation under the ESA, revised September 22, 2021.	C, O&M, D

Data Collection BA BMPs	BOEM will ensure that all Project Design Criteria and Best Management Practices as they may apply to HRG surveys, geotechnical surveys designed to characterize benthic and subsurface conditions and deployment, survey vessel transits, and retrieval of environmental data collection buoys as required in the Atlantic Data Collection consultation for Offshore Wind Activities (June 29, 2021) shall be applied to activities associated with the construction, maintenance and operations of the Empire Wind project as applicable.	Pre-C, C, O&M, D
Alternative Monitoring Plan (AMP) for pile driving	Empire must not conduct pile driving operations at any time when lighting or weather conditions (e.g., darkness, rain, fog, sea state) prevent visual monitoring of the clearance and shutdown zones unless BOEM and NMFS have approved an AMP. Empire must submit an AMP to BOEM and NMFS for review and approval at least 180 days prior to the planned start of pile-driving. This plan may include deploying additional observers, alternative monitoring technologies such as night vision, thermal, and infrared technologies, or use of PAM and must demonstrate the ability and effectiveness of the proposed equipment and methods to monitor clearance and shutdown zones. The AMP must address daytime conditions when lighting or weather (e.g., fog, rain, sea state) conditions prevent effective visual monitoring of clearance and shutdown zones, and nighttime condition (if permitted), daytime being defined as one hour after civil sunrise to 1.5 hours before civil sunset. The lead PSO will determine as to when there is sufficient light to ensure effective visual monitoring can be accomplished in all directions and when the alternative monitoring plan will be implemented. If a marine mammal or sea turtle is observed entering or found within the shutdown zones after impact pile-driving has commenced, Empire must follow the shutdown procedures outlined in the Protected Species Mitigation Monitoring Plan. Empire must notify BOEM and NMFS of any shutdown occurrence during pile driving operations with 24 hours of the occurrence unless otherwise authorized by BOEM and NMFS. The AMP must include, but is not limited to the following information: • Identification of night vision devices, such as mounted thermal or IR camera systems, hand-held or wearable NVDs, and IR spotlights, if proposed for use to detect marine mammals and sea turtles. • The AMP must demonstrate the capability of the proposed monitoring methodology to detect sea turtles within the clearance and shutdown zones. Only devices and methods demonstrated as being effective of detecting marine mammals and sea turtles within the clearance and shutdown zones will be acceptable. • Evidence and discussion of the efficacy (range and accuracy) of each device proposed for low visibility monitoring must include an assessment of the results of field studies, as well as supporting documentation regarding the efficacy of all proposed alternative monitoring methods (e.g., best scientific data available). • Reporting procedures, contacts and timeframes. • BOEM may request additional information, when appropriate, to assess the efficacy of the AMP	C

Periodic underwater surveys, reporting of monofilament and other fishing gear around WTG foundations	Empire must monitor potential loss of fishing gear in the vicinity of WTG foundations by surveying at least ten different WTGs in each EW 1 and EW 2 project area annually. Survey design and effort may be modified based upon previous survey results after review and concurrence by BOEM. Empire must conduct surveys by remotely operated vehicles, divers, or other means to determine the locations and amounts of marine debris. Empire must report the results of the surveys to BOEM (at renewable_reporting@boem.gov) and BSEE (at marinedebris@bsee.gov) in an annual report, submitted by April 30 for the preceding calendar year. Annual reports must be submitted in Microsoft Word format. Photographic and videographic materials must be provided on a portable drive in a lossless format such as TIFF or Motion JPEG 2000. Annual reports must include survey reports that include: the survey date; contact information of the operator; the location and pile identification number; photographic and/or video documentation of the survey and debris encountered; any animals sighted; and the disposition of any located debris (i.e., removed or left in place). Required data and reports may be archived, analyzed, published, and disseminated by BOEM.	O&M
PDC minimize vessel interactions with listed species (from HRG Programmatic)	All vessels associated with survey activities (transiting [i.e., travelling between a port and the survey site] or actively surveying) must comply with the vessel strike avoidance measures specified below. The only exception is when the safety of the vessel or crew necessitates deviation from these requirements. If any ESA-listed marine mammal is sighted within 500 m of the forward path of a vessel, the vessel operator must steer a course away from the whale at <10 knots (18.5 km/hr) until the minimum separation distance has been established. Vessels may also shift to idle if feasible. If any ESA-listed marine mammal is sighted within 200 m of the forward path of a vessel, the vessel operator must reduce speed and shift the engine to neutral. Engines must not be engaged until the whale has moved outside of the vessel's path and beyond 500 meters. If stationary, the vessel must not engage engines until the large whale has moved beyond 500 m. If a sea turtle or manta ray is sighted at any distance within the operating vessel's forward path, the vessel operator must slow down to 4 knots and steer away, unless unsafe to do so. The vessel may resume normal operations once the vessel has passed the sea turtle or manta ray.	Pre-C, C, O&M, D
Protected Species Detection and Vessel Strike Avoidance: Vessel Speed Requirements	• Vessel captain and crew must maintain a vigilant watch for all protected species and slow down, stop their vessel, or alter course, as appropriate and regardless of vessel size, to avoid striking any listed species. The presence of a single individual at the surface may indicate the presence of submerged animals in the vicinity; therefore, precautionary measures should always be exercised upon the sighting of a single individual. Vessels underway must not divert their course to approach any protected species. • Vessels of all sizes will operate port to port at 10 knots or less between November 1 and April 30 and while operating in the Lease Area, along the export cable route, or transit area to and from ports. • Regardless of vessel size, vessel operators must reduce vessel speed to 10 knots (11.5 mph) or less while operating in any Seasonal Management Area (SMA) or visually detected Slow Zones. This requirement does not apply when necessary for the safety of the vessel or crew. Any such events must be reported (see reporting requirements). Otherwise, these speed limits do not apply in areas of Narragansett Bay or Long Island Sound where the presence of NARWs is not expected. • The Lessee may only request a waiver from any visually triggered Slow	Pre-C, O&M, D

	Zone/DMA vessel speed reduction requirements during operations and maintenance, by submitting a vessel strike risk reduction plan that details revised measures and an analysis demonstrating that the measure(s) will provide a level of risk reduction at least equivalent to the vessel speed reduction measure(s) proposed for replacement. The plan included with the request must be provided to NMFS Greater Atlantic Regional Fisheries Office, Protected Resources Division and BOEM at least 90 days prior to the date scheduled for the activities for the waiver is requested. The plan must not be implemented unless NMFS and BOEM reach consensus on the appropriateness of the plan. • BOEM encourages increased vigilance through voluntary implementation of best management practices to minimize vessel interactions with NARWs, and by voluntarily reducing speeds to 10 knots or less when operating within an acoustically triggered slow zone, and when feasible, avoid Slow Zones.	
Vessel Strike Avoidance of Large Cetaceans	All vessel operators must check for information regarding mandatory or voluntary ship strike avoidance and daily information regarding NARW sighting locations. These media may include, but are not limited to: NOAA weather radio, U.S. Coast Guard NAVTEX and Channel 16 broadcasts, Notices to Mariners, the Whale Alert app, or WhaleMap website. Information about active SMAs and Slow Zones can be accessed at: https://www.fisheries.noaa.gov/national/endangered-species-conservation/reducing-vessel-strikes-north-atlantic-right-whales • If an ESA-listed whale or large unidentified whale is identified within 500 meters of the forward path of any vessel (90 degrees port to 90 degrees starboard), the vessel operator must immediately implement strike avoidance measures and steer a course away from the whale at 10 knots (18.5 km/hr) or less until the vessel reaches a 500-meter separation distance from the whale. Trained lookouts, visual observers, vessel crew, or PSOs must notify the vessel captain of any whale observed or detected within 1,640 feet (500 meters) of the survey vessel. Upon notification, the vessel captain must immediately implement vessel strike avoidance procedures to maintain a separation distance of 1,640 feet (500 meters) or reduce vessel speed to allow the animal to travel away from the vessel. If a whale is observed but cannot be confirmed as a species other than a NARW, the vessel operator must assume that it is a NARW and execute the required vessel strike avoidance measures to avoid the animal. • If an ESA-listed large whale is sighted within 200 meters of the forward path of a vessel, the vessel operator must initiate a full stop by reducing speed and shift the engine to neutral. Engines must not be engaged until the whale has moved outside of the vessel’s path and beyond 500 meters. If stationary, the vessel must not engage engines until the ESA-listed large whale has moved beyond 500 meters.	Pre-C, O&M, D
Vessel Observer Requirements	Empire Wind must ensure that vessel operators and crew members maintain a vigilant watch for marine mammals and sea turtles, and reduce vessel speed, alter the vessel’s course, or stop the vessel as necessary to avoid striking marine mammals or sea turtles. • All vessels must have a visual observer on board who is responsible for monitoring the vessel strike avoidance zone for marine mammals and sea turtles. Visual observers may be PSO or crew members, but crew members responsible for these duties must be provided sufficient training by the Lessee to distinguish marine mammals and sea turtles from other marine fauna and must be able to identify a marine mammal as a NARW, other whale (defined in this context as sperm whales or baleen whales other than NARW), or other marine mammal, as well as identify sea turtles. Crew members serving as visual observers must not have duties other than observing for marine mammals while the vessel is operating over 10 knots.	Pre-C, O&M, D

Vessel Communication of Threatened and Endangered Species Sightings	During Operations and decommissioning, Empire Wind must ensure that whenever multiple Project vessels are operating, any detections of ESA-listed species (marine mammals and sea turtles) are communicated in near real time to these personnel on the other Project vessels: PSOs, vessel captains, or both. • Year-round, all vessel operators must monitor the Project's Situational Awareness System, WhaleAlert, USCG VHF Channel 16, and the Right Whale Sighting Advisory System (RWSAS) for the presence of NARWs once every 4-hour shift during Project-related activities. The PSO and PAM operator monitoring teams for all activities must also monitor these systems no less than every 12 hours. If a vessel operator is alerted to a NARW detection within the Project area, they must immediately convey this information to the PSO and PAM teams. For any UXO/MEC detonation, these systems must be monitored for 24 hours prior to blasting. • Any observations of any large whale by any of Empire Wind's staff or contractor, including vessel crew, must be communicated immediately to PSOs and all vessel captains to increase situational awareness.	Pre-C, O&M, D
Reporting of All NARW Sightings	The Lessee must immediately report all NARWs observed at any time by PSOs or vessel personnel on any Project vessels, during any Project- related activity, or during vessel transit. Reports must be sent to: BOEM (at renewable_reporting@boem.gov) and BSEE (at protectedspecies@bsee.gov); the NOAA Fisheries 24-hour Stranding Hotline number (866-755-6622); the Coast Guard (via Channel 16); and WhaleAlert (through the WhaleAlert app at http://www.whalealert.org/). The report must include the time, location, and number of animals.	Pre-C, O&M, D
Detected or Impacted Protected Species Reporting	The Lessee is responsible for reporting dead or injured protected species, regardless of whether they were observed during operations or due to Project activities. The Lessee must report any potential take, strikes, dead, or injured protected species caused by Project vessels or sighting of an injured or dead marine mammal or sea turtle, regardless of the cause, to the NMFS Greater Atlantic Regional Fisheries Office, Protected Resources Division (at nmfs.gar.incidental-take@noaa.gov), NOAA Fisheries 24-hour Stranding Hotline number (866-755-6622), BOEM (at renewable_reporting@boem.gov), and BSEE (at protectedspecies@bsee.gov). Reporting must be as soon as practicable but no later than 24 hours from the time the incident took place (Detected or Impacted Protected Species Report). Staff responding to the hotline call will provide any instructions for the handling or disposing of any injured or dead protected species by individuals authorized to collect, possess, and transport sea turtles.	Pre-C, C, O&M, D

APPENDIX B

Mitigation Measures included in the April 2023 Proposed ITA

(a) *General conditions*. The following measures apply to the Empire Wind Project:

(1) A copy of any issued LOA must be in the possession of Empire Wind and its designees, all vessel operators, visual protected species observers (PSOs), passive acoustic monitoring (PAM) operators, pile driver operators, and any other relevant designees operating under the authority of the issued LOA;

(2) Empire Wind must conduct briefings between construction supervisors, construction crews, and the PSO and PAM team prior to the start of all construction activities, and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring and reporting protocols, and operational procedures. An informal guide must be included with the Marine Mammal Monitoring Plan to aid personnel in identifying species if they are observed in the vicinity of the project area;

(3) Empire Wind must instruct all vessel personnel regarding the authority of the PSO(s). Any disagreement between the Lead PSO and the vessel operator would only be discussed after shutdown has occurred;

(4) Empire Wind must ensure that any visual observations of an ESA-listed marine mammal are communicated to PSOs and vessel captains during the concurrent use of multiple project-associated vessels (of any size; *e.g.*, construction surveys, crew/supply transfers, *etc.*);

(5) If an individual from a species for which authorization has not been granted, or a species for which authorization has been granted but the authorized take number has been met, is observed entering or within the relevant Level B harassment zone for each specified activity, pile driving and HRG acoustic sources must be shut down immediately, unless shutdown would result in imminent risk of injury or loss of life to an individual or risk of damage to a vessel that creates risk of injury or loss of life for individuals or be delayed if the activity has not commenced. Impact and vibratory pile driving and initiation of HRG acoustic sources must not commence or resume until the animal(s) has been confirmed to have left the relevant clearance zone or the observation time has elapsed with no further sightings.

(6) Prior to and when conducting any in-water construction activities and vessel operations, Empire Wind personnel (*e.g.*, vessel operators, PSOs) must use available sources of information on North Atlantic right whale presence in or near the project area including daily monitoring of the Right Whale Sightings Advisory System, and monitoring of Coast Guard VHF Channel 16 throughout the day to receive notification of any sightings and/or information associated with any Slow Zones (*i.e.*, Dynamic Management Areas (DMAs) and/or acoustically-triggered slow zones) to provide situational awareness for both vessel operators and PSOs; and

(7) Any marine mammals observed within a clearance or shutdown zone must be allowed to remain in the area (*i.e.*, must leave of their own volition) prior to commencing pile driving activities or HRG surveys;

(8) Empire Wind must treat any large whale sighted by a PSO or acoustically detected by a PAM operator as if it were a North Atlantic right whale, unless a PSO or a PAM operator confirms it is another type of whale; and

(9) For in-water construction heavy machinery activities other than impact or vibratory pile driving, if a marine mammal is on a path towards or comes within 10 m of equipment, Empire Wind must cease operations until the marine mammal has moved more than 10 m on a path away from the activity to avoid direct interaction with equipment.

(b) *Vessel strike avoidance measures*. The following measures apply to all vessels associated with the Empire Wind Project:

(1) Prior to the start of construction activities, all vessel operators and crew must receive a protected species identification training that covers, at a minimum:

(i) Identification of marine mammals and other protected species known to occur or which have the potential to occur in the Empire Wind project area;

(ii) Training on making observations in both good weather conditions (*i.e.*, clear visibility, low winds, low sea states) and bad weather conditions (*i.e.*, fog, high winds, high sea states, with glare);

(iii) Training on information and resources available to the project personnel regarding the applicability of Federal laws and regulations for protected species;

(iv) Observer training related to these vessel strike avoidance measures must be conducted for all vessel operators and crew prior to the start of in-water construction activities; and

(v) Confirmation of marine mammal observer training must be documented on a training course log sheet and reported to NMFS.

(2) All vessel operators and crews, regardless of their vessel's size, must maintain a vigilant watch for all marine mammals and slow down, stop their vessel, or alter course, as appropriate, to avoid striking any marine mammal;

(3) All vessels must have a visual observer on board who is responsible for monitoring the vessel strike avoidance zone for marine mammals. Visual observers may be PSO or crew members, but crew members responsible for these duties must be provided sufficient training by Empire Wind to distinguish marine mammals from other types of animals or objects and must be able to identify a marine mammal as a North Atlantic right whale, other whale (defined in this context as sperm whales or baleen whales other than North Atlantic right whales), or other marine mammal. Crew members serving as visual observers must not have duties other than observing for marine mammals while the vessel is operating over 10 knots (kts);

(4) Year-round and when a vessel is in transit, all vessel operators must continuously monitor U.S. Coast Guard VHF Channel 16, over which North Atlantic right whale sightings are broadcasted. At the onset of transiting and at least once every four hours, vessel operators and/or trained crew members must monitor the project's Situational Awareness System, WhaleAlert, and the Right Whale Sighting Advisory System (RWSAS) for the presence of North Atlantic right whales Any observations of any large whale by any Empire Wind staff or contractors, including vessel crew, must be communicated immediately to PSOs, PAM operator, and all vessel captains to increase situational awareness. Conversely, any large whale observation or detection via a sighting network (*e.g.*, Mysticetus) by PSOs or PAM operators must be conveyed to vessel operators and crew;

(5) Any observations of any large whale by any Empire Wind staff or contractor, including vessel crew, must be communicated immediately to PSOs and all vessel captains to increase situational awareness. Any large whale observation or detections via a sighting network (*e.g.*, Mysticetus) by PSOs or PAM operators will be conveyed to vessel operators and crew;

(6) All vessels must comply with existing NMFS vessel speed regulations in 50 CFR 224.105, as applicable, for North Atlantic right whales;

(7) All vessels must transit active Slow Zones, Dynamic Management Areas (DMAs), and Seasonal Management Areas (SMAs) at 10 kts or less;

(8) Between November 1st and April 30th, all vessels traveling to and from ports in New Jersey, New York, Maryland, Delaware, and Virginia must transit at 10 kts or less;

(9) All vessels, regardless of size, must immediately reduce speed to 10 kts or less when any large whale, mother/calf pairs, or large assemblages of non-delphinid cetaceans are observed (within 500 m) of an underway vessel;

(10) All vessels, regardless of size, must immediately reduce speed to 10 kts or less when a North Atlantic right whale is sighted, at any distance, by anyone on the vessel;

(11) All underway vessels (*e.g.*, transiting, surveying) operating at any speed must have a dedicated visual observer on duty at all times to monitor for marine mammals within a 180° direction of the forward path of the vessel (90° port to 90° starboard) located at the best vantage point for ensuring vessels are maintaining appropriate separation distances from marine mammals. Visual observers must be equipped with alternative monitoring technology for periods of low visibility (*e.g.*, darkness, rain, fog, etc.). The dedicated visual observer must receive prior training on protected species detection and identification, vessel strike minimization procedures, how and when to communicate with the vessel captain, and reporting requirements. Visual observers may be third-party observers (*i.e.*, NMFS-approved PSOs) or crew members. Observer training related to these vessel strike avoidance measures must be conducted for all vessel operators and crew prior to the start of vessel use;

(12) All vessels must maintain a minimum separation distance of 500 m from North Atlantic right whales. If underway, all vessels must steer a course away from any sighted North Atlantic right whale at 10 kts or less such that the 500-m minimum separation distance requirement is not violated. If a North Atlantic right whale is sighted within 500 m of an underway vessel, that vessel must shift the engine to neutral. Engines must not be engaged until the whale has moved outside of the vessel's path and beyond 500 m. If a whale is observed but cannot be confirmed as a species other than a North Atlantic right whale, the vessel operator must assume that it is a North Atlantic right whale.

(13) All vessels must maintain a minimum separation distance of 100 m from sperm whales and baleen whales other than North Atlantic right whales. If one of these species is sighted within 100 m of an underway vessel, that vessel must shift the engine to neutral. Engines must not be engaged until the whale has moved outside of the vessel's path and beyond 100 m;

(14) All vessels must maintain a minimum separation distance of 50 m from all delphinoid cetaceans and pinnipeds, with an exception made for those that approach the vessel (*e.g.*, bow-riding dolphins). If a delphinid cetacean or pinniped is sighted within 50 m of an underway vessel, that vessel must shift the engine to neutral, with an exception made for those that approach the vessel (*e.g.*, bow-riding dolphins). Engines must not be engaged until the animal(s) has moved outside of the vessel's path and beyond 50 m;

(15) When a marine mammal(s) is sighted while a vessel is underway, the vessel must take action as necessary to avoid violating the relevant separation distances (*e.g.*, attempt to remain parallel to the animal's course, avoid excessive speed or abrupt changes in direction until the animal has left the area). If a marine mammal(s) is sighted within the relevant separation distance, the vessel must shift the engine to neutral and not engage the engine(s) until the animal(s) outside and on a path away from the separation area. This does not apply to any vessel towing gear or any situation where respecting the relevant separation distance would be unsafe (*i.e.*, any situation where the vessel is navigationally constrained);

(16) All vessels underway must not divert or alter course to approach any marine mammal. Any vessel underway must avoid speed over 10 kts or abrupt changes in course direction until the animal is out of an on a path away from the separation distances; and

(17) If a vessel is traveling at greater than 10 kts, in addition to the required dedicated visual observer, Empire Wind must monitor the transit corridor in real-time with PAM prior to and during transits. If a North Atlantic right whale is detected via visual observation or PAM within or approaching the transit corridor, all crew transfer vessels must travel at 10 kts or less for 12 hours following the detection. Each subsequent detection triggers an additional 12-hour period at 10 kts or less. A slowdown in the transit corridor expires when there has been no further visual or acoustic detection of North Atlantic right whales in the transit corridor for 12 hours;

(18) Empire Wind must submit a North Atlantic right whale vessel strike avoidance plan 90 days prior to commencement of vessel use. The plan will, at minimum, describe how PAM, in combination with visual observations, will be conducted to ensure the transit corridor is clear of right whales. The plan will also provide details on the vessel-based observer protocols on transiting vessels.

(c) *WTG and OSS foundation installation.* The following requirements apply to pile driving activities associated with the installation of WTG and OSS foundations:

(1) Foundation impact pile driving activities may not occur January 1 through April 30;

(2) Pile driving may not occur from December 1 through December 31, unless unanticipated delays due to weather or technical issues arise that necessitate extending pile driving into December. If impact pile driving must occur in December, Empire Wind must notify NOAA Fisheries in writing by September 1 that circumstances are expected to necessitate pile driving in December;

(3) Monopiles must be no larger than 11 m in diameter. Pin piles must be no larger than 2.5 m in diameter. During all monopile and pin pile installation, the minimum amount of hammer energy necessary to effectively and safely install and maintain the integrity of the piles must be used. Hammer energies must not exceed 5,500 kJ for monopile installation and 3,200 kJ for pin pile installation. No more than two monopile foundations or three pin piles for jacket foundations may be installed per day;

(4) Empire Wind must not initiate pile driving earlier than 1 hour after civil sunrise or later than 1.5 hours prior to civil sunset, unless Empire Wind submits, and NMFS approves, an Alternative Monitoring Plan as part of the Pile Driving and Marine Mammal Monitoring Plan that reliably demonstrates the efficacy of their night vision devices;

(5) Empire Wind must deploy dual noise attenuation systems that are capable of achieving, at a minimum, 10-dB of sound attenuation, during all impact pile driving of monopile and pin piles:

(i) A single bubble curtain must not be used unless paired with another noise attenuation device;

(ii) A big double bubble curtain may be used without being paired with another noise attenuation device;

(iii) The bubble curtain(s) must distribute air bubbles using an air flow rate of at least 0.5 $m^3/(min*m)$. The bubble curtain(s) must surround 100 percent of the piling perimeter throughout the full depth of the water column. In the unforeseen event of a single compressor malfunction, the offshore personnel operating the bubble curtain(s) must make appropriate adjustments to the air supply and operating pressure such that the maximum possible sound attenuation performance of the bubble curtain(s) is achieved;

(iv) The lowest bubble ring must be in contact with the seafloor for the full circumference of the ring, and the weights attached to the bottom ring must ensure 100-percent seafloor contact;

(v) No parts of the ring or other objects may prevent full seafloor contact; and

(vi) Construction contractors must train personnel in the proper balancing of airflow to the ring. Construction contractors must submit an inspection/performance report for approval by Empire Wind within 72 hours following the performance test. Empire Wind must then submit that report to NMFS; and

(vii) Corrections to the bubble ring(s) to meet the performance standards in this paragraph (c)(5) must occur prior to impact pile driving of monopiles and pin piles. If Empire Wind uses a noise mitigation device in addition to the bubble curtain, Empire Wind must maintain similar quality control measures as described in this paragraph (c)(2);

(6) Empire Wind must have a minimum of two PSOs actively observing marine mammals before, during, and after the installation of all foundation piles (*i.e.*, pin piles and monopiles). Concurrently, at least one PAM operator must be actively monitoring for marine mammals before, during and after impact pile driving with PAM;

(7) All visual PSOs and PAM operators used for the Empire Wind project must meet the requirements and qualifications described in § 217.285 (a-e), as applicable to the specified activity;

(8) Empire Wind must establish and implement clearance and shutdown zones (all distances to the perimeter are the radii from the center of the pile being driven) as described in the LOA for all monopile and pin pile installation;

(9) Empire Wind must use visual PSOs and PAM operators to monitor the area around each foundation pile before, during and after pile driving. PSOs must visually monitor clearance zones for marine mammals for a minimum of 60 minutes prior to commencing pile driving. At least one PAM operator must review data from at least 24 hours prior to pile driving and actively monitor hydrophones for 60 minutes prior to pile driving. Prior to initiating soft-start procedures, all clearance zones must be confirmed to be free of marine mammals for 30 minutes immediately prior to starting a soft-start of pile driving;

(10) PSOs must be able to visually clear (*i.e.*, confirm no marine mammals are present) an area that extends around the pile being driven. The entire minimum visibility zone must be visible (*i.e.*, not obscured by dark, rain, fog, etc.) for a full 60 minutes immediately prior to commencing impact pile driving (minimum visibility zone size dependent on season);

(11) If a marine mammal is observed acoustically detected within the relevant clearance zone prior to the initiation of impact pile driving activities, pile driving must be delayed and must not begin until either the marine mammal(s) has voluntarily left the specific clearance zones and have been visually or acoustically confirmed beyond that clearance zone, or, when specific time periods have elapsed with no further sightings or acoustic detections. The specific time periods are 15 minutes for small odontocetes and pinnipeds and 30 minutes for all other marine mammal species;

(12) The clearance zone may only be declared clear if no confirmed North Atlantic right whale acoustic detections (in addition to visual) have occurred within the PAM clearance zone during the 60-minute monitoring period. Any large whale sighting by a PSO or detected by a PAM operator that cannot be identified as a non-North Atlantic right whale must be treated as if it were a North Atlantic right whale;

(13) If a marine mammal is observed entering or within the respective shutdown zone, as defined in the LOA, after impact pile driving has begun, the PSO must call for a temporary shutdown of impact pile driving;

(14) Empire Wind must immediately cease pile driving if a PSO calls for shutdown, unless shutdown is not practicable due to imminent risk of injury or loss of life to an individual or pile refusal or instability. In this situation, Empire Wind must reduce hammer energy to the lowest level practicable and the reason(s) for not shutting down must be documented and reported to NMFS;

(15) Pile driving must not restart until either the marine mammal(s) has voluntarily left the specific clearance zones and has been visually or acoustically confirmed beyond that clearance zone, or, when specific time periods have elapsed with no further sightings or acoustic detections have occurred. The specific time periods are 15 minutes for small odontocetes and pinnipeds and 30 minutes for all other marine mammal species. In cases where these criteria are not met, pile driving may restart only if necessary to maintain pile stability at which time Empire Wind must use the lowest hammer energy practicable to maintain stability;

(16) If impact pile driving has been shut down due to the presence of a North Atlantic right whale, pile driving may not restart until the North Atlantic right whale is no longer observed or 30 minutes has elapsed since the last detection;

(17) Empire Wind must utilize a soft-start protocol for impact pile driving of monopiles by performing 4-6 strikes per minute at 10 to 20 percent of the maximum hammer energy, for a minimum of 20 minutes;

(18) Soft-start must occur at the beginning of monopile installation and at any time following a cessation of impact pile driving of 30 minutes or longer;

(19) If a marine mammal is detected within or about to enter the applicable clearance zones, prior to the beginning of soft-start procedures, impact pile driving must be delayed until the animal has been visually observed exiting the clearance zone or until a specific time period has elapsed with no further sightings. The specific time periods are 15 minutes for small odontocetes and pinnipeds and 30 minutes for all other species;

(20) PAM operators must assist the visual PSOs in monitoring by conducting PAM activities 60 minutes prior to any impact pile driving, at all times during pile driving, and for 30 minutes after pile driving completion for the appropriate size PAM clearance zone (dependent on season). The entire minimum visibility zone must be clear for at least 30 minutes, with no marine mammal detections within the visual or PAM clearance zones prior to the start of impact pile driving. PAM operators must immediately communicate all detections of marine mammals at any distance (*i.e.*, not limited to the Level B harassment zones) to the Lead PSO, including any determination regarding species identification, distance, and bearing and the degree of confidence in the determination;

(21) Any acoustic monitoring must complement visual monitoring efforts and must cover an area of at least the Level B harassment zone around each monopile foundation;

(22) Empire Wind must submit a Pile Driving and Marine Mammal Monitoring Plan to NMFS for review and approval at least 180 days before the start of any pile driving. The plan must include final project design related to pile driving (*e.g.*, number and type of piles, hammer type, noise attenuation systems, anticipated start date, etc.) and all information related to PSO and PAM monitoring protocols;

(23) Empire Wind must submit a Passive Acoustic Monitoring Plan to NMFS for review and approval at least 180 days prior to the planned start of monopile installation. The plan must

describe all proposed PAM equipment, procedures, and protocols. The authorization to take marine mammals is contingent upon NMFS' approval of the PAM Plan;

(24) Empire Wind must conduct sound field verification (SFV) on the first three monopiles installed and all piles associated with the first OSS foundation installed. Subsequent SFV is required should additional piles be driven that are anticipated to produce louder sound fields than those previously measured;

(25) Empire Wind must conduct SFV after construction is complete to estimate turbine operational source levels based on measurements in the near and far-field at a minimum of three locations from each foundation monitored. These data must be used to also identify estimated transmission loss rates;

(26) Empire Wind must submit a sound field verification (SFV) plan to NOAA Fisheries for review and approval at least 180 days prior to planned start of pile driving that identifies how Empire Wind will comply with the following requirements:

(i) Empire Wind must empirically determine source levels, the ranges to the isopleths corresponding to the Level A harassment and Level B harassment thresholds in meters, and the transmission loss coefficient(s). Empire Wind may also estimate ranges to the Level A harassment and Level B harassment isopleths by extrapolating from *in situ* measurements conducted at several distances from the piles monitored;

(ii) Empire Wind must perform sound field measurements at four distances from the pile being driven, including, but not limited to, 750 m and the modeled Level B harassment zones to verify the accuracy of those modeled zones;

(iii) The recordings must be continuous throughout the duration of all impact hammering of each pile monitored;

(iv) The measurement systems must have a sensitivity appropriate for the expected sound levels from pile driving received at the nominal ranges throughout the installation of the pile;

(v) The frequency range of the system must cover the range of at least 20 Hz to 20 kHz;

(vi) The system will be designed to have omnidirectional sensitivity and will be designed so that the predicted broadband received level of all impact pile-driving strikes exceed the system noise floor by at least 10 dB. The dynamic range of the system must be sufficient such that at each location, pile driving signals are not clipped and are not masked by noise floor; and

(vii) Identify operational noise levels and transmission loss rates.

(27) If acoustic field measurements collected during installation of foundation piles indicate ranges to the isopleths, corresponding to Level A harassment and Level B harassment thresholds, are greater than the ranges predicted by modeling (assuming 10 dB attenuation), Empire Wind must implement additional noise mitigation measures prior to installing the next monopile. Each modification must be evaluated empirically by acoustic field measurements;

(28) In the event that field measurements indicate ranges to isopleths, corresponding to Level A harassment and Level B harassment thresholds, are greater than the ranges predicted by modeling (assuming 10 dB attenuation), NMFS may expand the relevant harassment, clearance, and shutdown zones and associated monitoring protocols;

(29) If harassment zones are expanded beyond an additional 1,500 m, additional PSOs would be deployed on additional platforms with each observer responsible for maintaining watch in no more than 180 degrees and of an area with a radius no greater than 1,500 m;

(30) If acoustic measurements indicate that ranges to isopleths corresponding to the Level A harassment and Level B harassment thresholds are less than the ranges predicted by modeling

(assuming 10 dB attenuation), Empire Wind may request to NMFS a modification of the clearance and shutdown zones for impact pile driving of monopiles and jacket foundation piles;

(31) For NMFS to consider a modification request for reduced zone sizes, Empire Wind must have had to conduct SFV on three or more monopiles to verify that zone sizes are consistently smaller than those predicted by modeling (assuming 10 dB attenuation) and subsequent piles would be installed within and under similar conditions (e.g., monitoring data collected during installation of a typical pile can not be used to adjust difficult-to-drive pile ranges); and

(32) If a subsequent monopile installation location is selected that was not represented by the previous three locations (*i.e.*, substrate composition, water depth), SFV would be required.

(d) *Cable landfall construction and marina activities.* The following requirements apply to cable landfall and marina pile driving activities:

(1) Empire Wind must conduct impact and vibratory pile driving during daylight hours only;

(2) Empire Wind must have a minimum of two PSOs on active duty during any installation and removal of the temporary cofferdams and goal posts. These PSOs must be located at the best vantage point(s) on the vibratory pile driving platform or secondary platform in the immediate vicinity of the vibratory pile driving platform, in order to ensure that appropriate visual coverage is available for the entire visual clearance zone and as much of the Level B harassment zone, as possible;

(3) If a marine mammal is observed entering or within the respective shutdown zone, as defined in the LOA, after pile driving has begun, the PSO must call for a temporary shutdown of pile driving;

(4) Empire Wind must immediately cease pile driving if a PSO calls for shutdown, unless shutdown is not practicable due to imminent risk of injury or loss of life to an individual or pile refusal or instability. In this situation, Empire Wind must reduce hammer energy to the lowest level practicable and the reason(s) for not shutting down must be documented and reported to NMFS; and

(5) Pile driving must not restart until either the marine mammal(s) has voluntarily left the specific clearance zones and has been visually or acoustically confirmed beyond that clearance zone, or, when specific time periods have elapsed with no further sightings or acoustic detections have occurred. The specific time periods are 15 minutes for small odontocetes and pinnipeds and 30 minutes for all other marine mammal species. In cases where these criteria are not met, pile driving may restart only if necessary to maintain pile stability at which time Empire Wind must use the lowest hammer energy practicable to maintain stability.

(e) *HRG surveys.* The following requirements apply to HRG surveys operating sub bottom profilers (SBPs):

(1) Per vessel, Empire Wind would be required to have at least one PSO on active duty during HRG surveys that are conducted during daylight hours (*i.e.*, from 30 minutes prior to sunrise through 30 minutes following sunset) and at least two PSOs during HRG surveys that are conducted during nighttime hours;

(2) Empire Wind must deactivate acoustic sources during periods where no data are being collected, except as determined to be necessary for testing. Unnecessary use of the acoustic source(s) is prohibited;

(3) All personnel with responsibilities for marine mammal monitoring must participate in joint, onboard briefings that would be led by the vessel operator and the Lead PSO, prior to the

beginning of survey activities. The briefing must be repeated whenever new relevant personnel (*e.g.*, new PSOs, acoustic source operators, relevant crew) join the survey operation before work commences;

(4) PSOs must begin visually monitoring clearance and shutdown zones 30 minutes prior to the initiation of the specified acoustic source (*i.e.*, ramp-up, if applicable), during the HRG activities, and for 30 minutes after the use of the specified acoustic source has ceased;

(5) Empire Wind is required to ramp-up sub-bottom profilers (SBPs) prior to commencing full power (unless the equipment operates on a binary on/off switch) and only when visual clearance zones are fully visible (*e.g.*, not obscured by darkness, rain, fog, etc.) and clear of marine mammals, as determined by the Lead PSO, for at least 30 minutes immediately prior to the initiation of survey activities using a specified acoustic source;

(6) Prior to a ramp-up procedure starting, the operator must notify the Lead PSO of the planned start of the ramp-up. This notification time must not be less than 60 minutes prior to the planned ramp-up activities as all relevant PSOs must monitor the clearance zone for 30 minutes prior to the initiation of ramp-up;

(7) Prior to starting the survey and after receiving confirmation from the PSOs that the clearance zone is clear of any marine mammals, Empire Wind must ramp-up sources to half power for 5 minutes and then proceed to full power, unless the source operates on a binary on/off switch in which case ramp-up is not required. Ramp-up activities must be delayed if a marine mammal(s) enters its respective shutdown zone. Ramp-up may only be reinitiated if the animal(s) has been observed exiting its respective shutdown zone or until 15 minutes for small odontocetes and pinnipeds, and 30 minutes for all other species;

(8) Empire Wind must implement a 30 minute clearance period of the clearance zones immediately prior to the commencing of the survey or when there is more than a 30 minute break in survey activities or PSO monitoring;

(9) If a marine mammal is observed within a clearance zone during the clearance period, ramp-up or acoustic surveys may not begin until the animal(s) has been observed voluntarily exiting its respective clearance zone or until a specific time period has elapsed with no further sighting. The specific time period is 15 minutes for small odontocetes and seals, and 30 minutes for all other species;

(10) In any case when the clearance process has begun in conditions with good visibility, including via the use of night vision equipment (IR/thermal camera), and the Lead PSO has determined that the clearance zones are clear of marine mammals, survey operations would be allowed to commence (*i.e.*, no delay is required) despite periods of inclement weather and/or loss of daylight;

(11) Once the survey has commenced, Empire Wind must shut down SBPs if a marine mammal enters a respective shutdown zone, except in cases when the shutdown zones become obscured for brief periods due to inclement weather, survey operations would be allowed to continue (*i.e.*, no shutdown is required) so long as no marine mammals have been detected. The shutdown requirement does not apply to small delphinids of the following genera: *Delphinus*, *Stenella*, *Lagenorhynchus*, and *Tursiops*. If there is uncertainty regarding the identification of a marine mammal species (*i.e.*, whether the observed marine mammal belongs to one of the delphinid genera for which shutdown is waived), the PSOs must use their best professional judgment in making the decision to call for a shutdown. Shutdown is required if a delphinid that belongs to a genus other than those specified here is detected in the shutdown zone;

(12) If SBPs have been shutdown due to the presence of a marine mammal, the use of SBPs not commence or resume until the animal(s) has been confirmed to have left the Level B harassment zone or until a full 15 minutes (for small odontocetes and seals) or 30 minutes (for all other marine mammals) have elapsed with no further sighting;

(13) Empire Wind must immediately shutdown any SBP acoustic source if a marine mammal is sighted entering or within its respective shutdown zones;

(14) If a SBP is shut down for reasons other than mitigation (*e.g.*, mechanical difficulty) for less than 30 minutes, it would be allowed to be activated again without ramp-up only if:

(i) PSOs have maintained constant observation; and

(ii) No additional detections of any marine mammal occurred within the respective shutdown zones;

(17) If a SBP was shut down for a period longer than 30 minutes, then all clearance and ramp-up procedures must be initiated; and

(18) If multiple HRG vessels are operating concurrently, any observations of marine mammals must be communicated to PSOs on all nearby survey vessels.

(f) *Trawl Surveys*. The following measures apply to all trawl surveys:

(1) All captains and crew conducting fishery surveys will be trained in marine mammal detection and identification. Marine mammal monitoring will be conducted by the captain and/or a member of the scientific crew before (within 1 nautical mile (nm) and 15 minutes prior to deploying gear), during, and after haul back;

(2) Survey gear will be deployed as soon as possible once the vessel arrives on station;

(3) Empire Wind and/or its cooperating institutions, contracted vessels, or commercially-hired captains must implement the following “move-on” rule: If marine mammals are sighted within 1 nm of the planned location and 15 minutes before gear deployment, Empire Wind and/or its cooperating institutions, contracted vessels, or commercially-hired captains, as appropriate, may decide to move the vessel away from the marine mammal to a different section of the sampling area if the animal appears to be at risk of interaction with the gear, based on best professional judgment. If, after moving on, marine mammals are still visible from the vessel, Empire Wind and/or its cooperating institutions, contracted vessels, or commercially-hired captains may decide to move again or to skip the station;

(4) If a marine mammal is deemed to be at risk of interaction after the gear is set, all gear will be immediately removed from the water;

(5) Empire Wind will maintain visual monitoring effort during the entire period of time that gear is in the water (*i.e.*, throughout gear deployment, fishing, and retrieval). If marine mammals are sighted before the gear is fully removed from the water, Empire Wind will take the most appropriate action to avoid marine mammal interaction;

(6) Trawls must have a limited tow time of 20 minutes (and depth);

(7) Empire Wind must open the codend of the trawl net close to the deck/sorting area to avoid damage to animals that may be caught in gear; and

(8) Trawl nets must be fully cleaned and repaired (if damaged) before setting again; and

(9) Any lost gear associated with the fishery surveys must be reported to the NOAA Greater Atlantic Regional Fisheries Office Protected Resources Division within 48 hours.

§ 217.285 Requirements for monitoring and reporting.

(a) *Protected Species Observer* (*PSO) and PAM operator qualifications.* The following measures apply to PSOs and PAM operators:

(1) Empire Wind must use independent, dedicated, qualified PSOs, meaning that the PSOs must be employed by a third-party observer provider, must have no tasks other than to conduct observational effort, collect data, and communicate with and instruct relevant vessel crew with regard to the presence of protected species and mitigation requirements;

(2) PSOs must successfully complete relevant training, including completion of all required coursework and passing a written and/or oral examination developed for the training;

(3) PSOs must have successfully attained a bachelor's degree from an accredited college or university with a major in one of the natural sciences, a minimum of 30 semester hours or equivalent in the biological sciences, and at least one undergraduate course in math or statistics. The educational requirements may be waived if the PSO has acquired the relevant skills through alternate experience. Requests for such a waiver shall be submitted to NMFS and must include written justification. Alternate experience that may be considered includes, but is not limited to: Secondary education and/or experience comparable to PSO duties; previous work experience conducting academic, commercial, or government sponsored marine mammal surveys; or previous work experience as a PSO; the PSO should demonstrate good standing and consistently good performance of PSO duties;

(4) PSOs must have visual acuity in both eyes (with correction of vision being permissible) sufficient enough to discern moving targets on the water's surface with the ability to estimate the target size and distance (binocular use is allowable); Ability to conduct field observations and collect data according to the assigned protocols; Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations; writing skills sufficient to document observations, including but not limited to, the number and species of marine mammals observed, the dates and times of when in-water construction activities were conducted, the dates and time when in-water construction activities were suspended to avoid potential incidental injury of marine mammals from construction noise within a defined shutdown zone, and marine mammal behavior; and the ability to communicate orally, by radio, or in-person, with project personnel to provide real-time information on marine mammals observed in the area, as necessary;

(5) All PSOs must be approved by NMFS. Empire Wind must submit PSO resumes for NMFS' review and approval at least 60 days prior to commencement of in-water construction activities requiring PSOs. Resumes must include dates of training and any prior NMFS approval, as well as dates and description of last experience, and must be accompanied by information documenting successful completion of an acceptable training course. NMFS shall be allowed three weeks to approve PSOs from the time that the necessary information is received by NMFS, after which PSOs meeting the minimum requirements will automatically be considered approved;

(6) PSOs must have visual acuity in both eyes (with correction of vision being permissible) sufficient enough to discern moving targets on the water's surface with the ability to estimate the target size and distance (binocular use is allowable);

(7) All PSOs must be trained in marine mammal identification and behaviors and must be able to conduct field observations and collect data according to assigned protocols. Additionally, PSOs must have the ability to work with all required and relevant software and equipment necessary during observations;

(8) At least one PSO on active duty for each activity (*i.e.*, foundation installation, cable landfall and marina activities, and HRG surveys) must be designated as the "Lead PSO". The Lead PSO must have a minimum of 90 days of at-sea experience working in an offshore

environment and is required to have no more than eighteen months elapsed since the conclusion of their last at-sea experience; and

(9) PAM operators must complete specialized training for operating PAM systems and must demonstrate familiarity with the PAM system on which they must be working. PSOs may act as both acoustic operators and visual observers (but not simultaneously), so long as they demonstrate that their training and experience are sufficient to perform each task.

(b) *General PSO requirements*. The following measures apply to PSOs during all project activities:

(1) All PSOs must be located at the best vantage point(s) on the primary vessel in order to obtain 360° visual coverage of the entire clearance and shutdown zones around the vessels, and as much of the Level B harassment zone as possible;

(2) During all visual observation periods, PSOs must use high magnification (25x) binoculars, standard handheld (7x) binoculars, and the naked eye to search continuously for marine mammals. During impact pile driving, at least one PSO on the primary pile driving must be equipped with Big Eye binoculars (*e.g.*, 25 x 150; 2.7 view angle; individual ocular focus; height control) of appropriate quality. These must be pedestal mounted on the deck at the best vantage point that provides for optimal sea surface observation and PSO safety;

(3) During periods of low visibility (*e.g.*, darkness, rain, fog, poor weather conditions, etc.), PSOs must use alternative technologies (*i.e.*, infrared or thermal cameras) to monitor the shutdown and clearance zones;

(4) PSOs must not exceed four consecutive watch hours on duty at any time, must have a two-hour (minimum) break between watches, and must not exceed a combined watch schedule of more than 12 hours in a 24-hour period;

(5) Any PSO has the authority to call for a delay or shutdown of project activities.

(6) Any visual observations of ESA-listed marine mammals must be communicated immediately to PSOs and vessel captains associated with other vessels to increase situational awareness; and

(7) Empire Wind's personnel and PSOs are required to use available sources of information on North Atlantic right whale presence to aid in monitoring efforts. These include daily monitoring of the Right Whale Sightings Advisory System, consulting of the WhaleAlert app, and monitoring of the Coast Guard's VHF Channel 16 throughout the day to receive notifications of any sightings and information associated with any Dynamic Management Areas, to plan construction activities and vessel routes, if practicable, to minimize the potential for co-occurrence with North Atlantic right whales.

(c) *PSO and PAM operator requirements during WTG and OSS foundation installation.* The following measures apply to PSOs and PAM operators during monopile and OSS foundation installation:

(1) At least two PSOs must be actively observing marine mammals before, during, and after installation of foundation piles (monopiles). At least two PSOs must be stationed and observing on the pile driving vessel. Concurrently, at least one acoustic monitoring PSO (*i.e.*, passive acoustic monitoring (PAM) operator) must be actively monitoring for marine mammals with PAM before, during and after impact pile driving;

(2) All on-duty visual PSOs must remain in contact with the on-duty PAM operator, who would monitor the PAM systems for acoustic detections of marine mammals in the area.

(3) If PSOs cannot visually monitor the minimum visibility zone at all times using the equipment described in paragraph (b)(1)(ii) of this section, impact pile driving operations must not commence or must shutdown if they are currently active;

(4) All PSOs must begin monitoring 60 minutes prior to pile driving, during, and for 30 minutes after an activity. The impact pile driving of monopiles must only commence when the minimum visibility zone is fully visible (*e.g.*, not obscured by darkness, rain, fog, etc.) and the clearance zones are clear of marine mammals for at least 30 minutes, as determined by the Lead PSO, immediately prior to the initiation of impact pile driving;

(5) For North Atlantic right whales, any visual or acoustic detection must trigger a delay to the commencement of pile driving. In the event that a large whale is sighted or acoustically detected that cannot be confirmed by species, it must be treated as if it were a North Atlantic right whale;

(6) Empire Wind must prepare and submit a Pile Driving and Marine Mammal Monitoring Plan to NMFS for review and approval at least 180 days before the start of any pile driving. The plans must include final pile driving project design (*e.g.*, number and type of piles, hammer type, noise attenuation systems, anticipated start date, *etc*.) and all information related to PAM PSO monitoring protocols for pile-driving and visual PSO protocols for all activities;

(8) Empire Wind must conduct PAM for at least 24 hours immediately prior to foundation installation pile driving activities;

(9) During use of any real-time PAM system, at least one PAM operator must be designated to monitor each system by viewing data or data products that would be streamed in real-time or in near real-time to a computer workstation and monitor;

(10) PAM operators may be located on a vessel or remotely on-shore but must have the appropriate equipment (*i.e.*, computer station equipped with a data collection software system (*i.e.*, Mysticetus or similar system and acoustic data analysis software) available wherever they are stationed;

(11) Visual PSOs must remain in contact with the PAM operator currently on duty regarding any animal detection that might be approaching or found within the applicable zones no matter where the PAM operator is stationed (*i.e.*, onshore or on a vessel); and

(12) PAM operators must be on watch for a maximum of four consecutive hours, followed by a break of at least two hours between watches, and may not exceed a combined watch schedule of more than 12 hours in a single 24-hour period.

(d) *PSO requirements during cable landfall construction and marina activities.* The following measures apply to PSOs during pile driving associated with cable landfall construction and marina activities:

(1) At least two PSOs must be on active duty during all activities related to the installation and removal of cofferdams, goal posts, and casing pipes;

(2) These PSOs must be located at the best vantage points on the pile driving platform or secondary platform in the immediate vicinity of the pile driving;

(3) PSOs must ensure that there is appropriate visual coverage for the entire clearance and shutdown zones and as much of the Level B harassment zone as possible; and

(4) PSOs must monitor the clearance zone for the presence of marine mammals for 30 minutes before, throughout pile driving, and for 30 minutes after all pile driving activities have ceased. Pile driving must only commence when visual clearance zones are fully visible (*e.g.*, not obscured by darkness, rain, fog, *etc*.) and clear of marine mammals, as determined by the Lead PSO, for at least 30 minutes immediately prior to initiation of impact or vibratory pile driving.

(e) *PSO requirements during HRG surveys.* The following measures apply to PSOs during HRG surveys using SBPs:

(1) At least one PSO must be on active duty monitoring during HRG surveys conducted during daylight (*i.e.*, from 30 minutes prior to sunrise through 30 minutes following sunset) and at least two PSOs must be on activity duty monitoring during HRG surveys conducted at night;

(2) During periods of low visibility (*e.g.*, darkness, rain, fog, *etc*.), PSOs must use alternative technology (*i.e.*, infrared/thermal camera) to monitor the clearance and shutdown zones;

(3) PSOs on HRG vessels must begin monitoring 30 minutes prior to activating SBPs during the use of these acoustic sources, and for 30 minutes after use of these acoustic sources has ceased;

(4) Any observations of marine mammals must be communicated to PSOs on all nearby survey vessels during concurrent HRG surveys; and

(5) During daylight hours when survey equipment is not operating, Empire Wind must ensure that visual PSOs conduct, as rotation schedules allow, observations for comparison of sighting rates and behavior with and without use of the specified acoustic sources. Off-effort PSO monitoring must be reflected in the monthly PSO monitoring reports.

(f) *Reporting.* Empire Wind must comply with the following reporting measures:

(1) Prior to initiation of project activities, Empire Wind must demonstrate in a report submitted to NMFS (at *robert.pauline@noaa.gov* and *pr.itp.monitoringreports@noaa.gov*) that all required training for Empire Wind personnel (including the vessel crews, vessel captains, PSOs, and PAM operators) has been completed;

(2) Empire Wind must use a standardized reporting system during the effective period of this subpart and LOA. All data collected related to the Empire Wind Project must be recorded using industry-standard softwares (*e.g.*, Mysticetus or a similar software) that is installed on field laptops and/or tablets. Empire Wind must submit weekly (during foundation installation only), monthly and annual reports as described below. For all monitoring efforts and marine mammal sightings, Empire Wind must collect the following information:

(i) Date and time that monitored activity begins or ends;

(ii) Construction activities occurring during each observation period;

(iii) Watch status (*i.e.*, sighting made by PSO on/off effort, opportunistic, crew, alternate vessel/platform);

(iv) PSO who sighted the animal;

(v) Time of sighting;

(vi) Weather parameters (*e.g.*, wind speed, percent cloud cover, visibility);

(vii) Water conditions (*e.g.*, sea state, tide state, water depth);

(viii) All marine mammal sightings, regardless of distance from the construction activity;

(ix) Species (or lowest possible taxonomic level possible);

(x) Pace of the animal(s);

(xi) Estimated number of animals (minimum/maximum/high/low/best);

(xii) Estimated number of animals by cohort (*e.g.*, adults, yearlings, juveniles, calves, group composition, etc.);

(xiii) Description (*i.e.*, as many distinguishing features as possible of each individual seen, including length, shape, color, pattern, scars or markings, shape and size of dorsal fin, shape of head, and blow characteristics);

(xiv) Description of any marine mammal behavioral observations (*e.g.*, observed behaviors such as feeding or traveling) and observed changes in behavior, including an assessment of behavioral responses thought to have resulted from the specific activity;

(xv) Animal's closest distance and bearing from the pile being driven or specified HRG equipment and estimated time entered or spent within the Level A harassment and/or Level B harassment zones;

(xvi) Activity at time of sighting (*e.g.*, vibratory installation/removal, impact pile driving, construction survey), use of any noise attenuation device(s), and specific phase of activity (*e.g.*, ramp-up of HRG equipment, HRG acoustic source on/off, soft-start for pile driving, active pile driving, *etc*.);

(xvii) Marine mammal occurrence in Level A harassment or Level B harassment zones;

(xviii) Description of any mitigation-related action implemented, or mitigation-related actions called for but not implemented, in response to the sighting (*e.g.*, delay, shutdown, etc.) and time and location of the action; and

(xix) Other human activity in the area.

(3) If a marine mammal is acoustically detected during PAM monitoring, the following information must be recorded and reported to NMFS:

(i) Location of hydrophone (latitude & longitude; in Decimal Degrees) and site name;

(ii) Bottom depth and depth of recording unit (in meters);

(iii) Recorder (model & manufacturer) and platform type (*i.e.*, bottom-mounted, electric glider, etc.), and instrument ID of the hydrophone and recording platform (if applicable);

(iv) Time zone for sound files and recorded date/times in data and metadata (in relation to UTC. *i.e.*, EST time zone is UTC-5);

(v) Duration of recordings (start/end dates and times; in ISO 8601 format, yyyy-mm-ddTHH:MM:SS.sssZ);

(vi) Deployment/retrieval dates and times (in ISO 8601 format);

(vii) Recording schedule (must be continuous);

(viii) Hydrophone and recorder sensitivity (in dB *re. 1 μPa*);

(ix) Calibration curve for each recorder;

(x) Bandwidth/sampling rate (in Hz);

(xi) Sample bit-rate of recordings; and,

(xii) Detection range of equipment for relevant frequency bands (in meters);

(4) Information required for each detection, the following information must be noted:

(i) Species identification (if possible);

(ii) Call type and number of calls (if known);

(iii) Temporal aspects of vocalization (date, time, duration, etc.; date times in ISO 8601 format);

(iv) Confidence of detection (detected, or possibly detected);

(v) Comparison with any concurrent visual sightings;

(vi) Location and/or directionality of call (if determined) relative to acoustic recorder or construction activities;

(vii) Location of recorder and construction activities at time of call;

(viii) Name and version of detection or sound analysis software used, with protocol reference;

(ix) Minimum and maximum frequencies viewed/monitored/used in detection (in Hz); and

(x) Name of PAM operator(s) on duty.

(5) Empire Wind must compile and submit weekly reports to NMFS (at *robert.pauline@noaa.gov* and *PR.ITP.monitoringreports@noaa.gov*) that document the daily start and stop of all pile driving and HRG survey, the start and stop of associated observation periods by PSOs, details on the deployment of PSOs, a record of all detections of marine mammals (acoustic and visual), any mitigation actions (or if mitigation actions could not be taken, provide reasons why), and details on the noise attenuation system(s) used and its performance. Weekly reports are due on Wednesday for the previous week (Sunday – Saturday) and must include the information required under this section. The weekly report must also identify which turbines become operational and when (a map must be provided). Once all foundation pile installation is completed, weekly reports are no longer required;

(6) Empire Wind must compile and submit monthly reports to NMFS (at *robert.pauline@noaa.gov* and *PR.ITP.monitoringreports@noaa.gov*) that include a summary of all information in the weekly reports, including project activities carried out in the previous month, vessel transits (number, type of vessel, and route), number of piles installed, all detections of marine mammals, and any mitigative action taken. Monthly reports are due on the 15th of the month for the previous month. The monthly report must also identify which turbines become operational and when (a map must be provided). Once foundation installation is complete, monthly reports are no longer required;

(7) Empire Wind must submit an annual report to NMFS (at *robert.pauline@noaa.gov* and *PR.ITP.monitoringreports@noaa.gov*) no later than 90 days following the end of a given calendar year. Empire Wind must provide a final report within 30 days following resolution of comments on the draft report. The report must detail the following information:

(i) The total number of marine mammals of each species/stock detected and how many were within the designated Level A harassment and Level B harassment zones with comparison to authorized take of marine mammals for the associated activity type;

(ii) Marine mammal detections and behavioral observations before, during, and after each activity;

(iii) What mitigation measures were implemented (*i.e.*, number of shutdowns or clearance zone delays, etc) or, if no mitigative actions was taken, why not;

(iv) Operational details (*i.e.*, days of impact and vibratory pile driving, days/amount of HRG survey effort etc.);

(v) Any PAM systems used;

(vi) The results, effectiveness, and which noise attenuation systems were used during relevant activities (*i.e.*, impact pile driving);

(vii) Summarized information related to Situational Reporting; and

(viii) Any other important information relevant to the Empire Wind Project, including additional information that may be identified through the adaptive management process.

(ix) The final annual report must be prepared and submitted within 30 calendar days following the receipt of any comments from NMFS on the draft report. If no comments are received from NMFS within 60 calendar days of NMFS' receipt of the draft report, the report must be considered final.

(8) Empire Wind must submit its draft final report to NMFS (at *robert.pauline@noaa.gov* and *PR.ITP.monitoringreports@noaa.gov*) on all visual and acoustic monitoring conducted under the LOA within 90 calendar days of the completion of activities occurring under the LOA. A final report must be prepared and submitted within 30 calendar days following receipt of any

NMFS comments on the draft report. If no comments are received from NMFS within 30 calendar days of NMFS' receipt of the draft report, the report shall be considered final.

(9) Empire Wind must submit situational reports if the following circumstances occur:

(i) If a North Atlantic right whale is observed at any time by PSOs or personnel on or in the vicinity of any project vessel, or during vessel transit, Empire Wind must immediately report sighting information to the NMFS North Atlantic Right Whale Sighting Advisory System (866) 755-6622, through the WhaleAlert app (*http://www.whalealert/org/*), and to the U.S. Coast Guard via channel 16, as soon as feasible but no longer than 24 hours after the sighting. Information reported must include, at a minimum: time of sighting, location, and number of North Atlantic right whales observed.

(ii) When an observation of a large whale occurs during vessel transit, the following information must be recorded and reported to NMFS:

(A) Time, date, and location (latitude/longitude; in Decimal Degrees);

(B) The vessel's activity, heading, and speed;

(C) Sea state, water depth, and visibility;

(D) Marine mammal identification to the best of the observer's ability (*e.g.*, North Atlantic right whale, whale, dolphin, seal);

(E) Initial distance and bearing to marine mammal from vessel and closest point of approach; and

(F) Any avoidance measures taken in response to the marine mammal sighting.

(iii) If a North Atlantic right whale is detected via PAM, the date, time, location (*i.e.*, latitude and longitude of recorder) of the detection as well as the recording platform that had the detection must be reported to *nmfs.pacmdata@noaa.gov* as soon as feasible, but no longer than 24 hours after the detection. Full detection data and metadata must be submitted monthly on the 15th of every month for the previous month via the webform on the NMFS North Atlantic right whale Passive Acoustic Reporting System website (*https://www.fisheries.noaa.gov/resource/document/passive-acoustic-reporting-system-templates*);

(iv) In the event that the personnel involved in the activities defined in § 217.280(a) discover a stranded, entangled, injured, or dead marine mammal, Empire Wind must immediately report the observation to the NMFS Office of Protected Resources (OPR), the NMFS Greater Atlantic Stranding Coordinator for the New England/Mid-Atlantic area (866-755-6622), and the U.S. Coast Guard within 24 hours. If the injury or death was caused by a project activity, Empire Wind must immediately cease all activities until NMFS OPR is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the LOA. NMFS may impose additional measures to minimize the likelihood of further prohibited take and ensure MMPA compliance. Empire Wind may not resume their activities until notified by NMFS. The report must include the following information:

(A) Time, date, and location (latitude/longitude; in Decimal Degrees) of the first discovery (and updated location information if known and applicable);

(B) Species identification (if known) or description of the animal(s) involved;

(C) Condition of the animal(s) (including carcass condition if the animal is dead);

(D) Observed behaviors of the animal(s), if alive;

(E) If available, photographs or video footage of the animal(s); and

(F) General circumstances under which the animal was discovered.

(v) In the event of a vessel strike of a marine mammal by any vessel associated with the Empire Wind Project, Empire Wind must immediately report the strike incident to the NMFS OPR and the NMFS Greater Atlantic Regional Fisheries Office (GARFO) within and no later than 24 hours. Empire Wind must immediately cease all on-water activities until NMFS OPR is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the LOA. NMFS may impose additional measures to minimize the likelihood of further prohibited take and ensure MMPA compliance. Empire Wind may not resume their activities until notified by NMFS. The report must include the following information:

(A) Time, date, and location (latitude/longitude; in Decimal Degrees) of the incident;

(B) Species identification (if known) or description of the animal(s) involved;

(C) Vessel's speed leading up to and during the incident;

(D) Vessel's course/heading and what operations were being conducted (if applicable);

(E) Status of all sound sources in use;

(F) Description of avoidance measures/requirements that were in place at the time of the strike and what additional measures were taken, if any, to avoid strike;

(G) Environmental conditions (*e.g.*, wind speed and direction, Beaufort sea state, cloud cover, visibility) immediately preceding the strike;

(H) Estimated size and length of animal that was struck;

(I) Description of the behavior of the marine mammal immediately preceding and following the strike;

(J) If available, description of the presence and behavior of any other marine mammals immediately preceding the strike;

(K) Estimated fate of the animal (*e.g.*, dead, injured but alive, injured and moving, blood or tissue observed in the water, status unknown, disappeared); and

(L) To the extent practicable, photographs or video footage of the animal(s).

APPENDIX C

Site Assessment Survey Activities for Renewable Energy Development on the Atlantic Outer Continental Shelf, NMFS 2021a

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
GREATER ATLANTIC REGIONAL FISHERIES OFFICE
55 Great Republic Drive
Gloucester, MA 01930

June 29, 2021

James F. Bennett
Program Manager, Office of Renewable Energy Programs
U.S. Department of the Interior
Bureau of Ocean Energy Management
45600 Woodland Road, VAM-OREP
Sterling, Virginia 20166

Dear Mr. Bennett:

We have completed consultation pursuant to section 7 of the Endangered Species Act (ESA) of 1973, as amended, concerning the effects of certain site assessment and site characterization activities to be carried out to support the siting of offshore wind energy development projects off the U.S. Atlantic coast. The Bureau of Ocean Energy Management (BOEM) is the lead federal agency for this consultation. BOEM's request for consultation included a biological assessment (BA) that was finalized in February 2021 and was supplemented with modified Project Design Criteria (PDC) and supplemental information through June 11, 2021. The activities considered in this consultation may occur in the three Atlantic Renewable Energy Regions (North Atlantic Planning Area, Mid-Atlantic Planning Area, and South Atlantic Planning Area; see Figure 1 in Appendix A) and adjacent coastal waters over the next 10 years (i.e., June 2021 – June 2031). Other action agencies include the U.S. Army Corps of Engineers (USACE), the U.S. Department of Energy (DOE), the U.S. Environmental Protection Agency (EPA), and the National Marine Fisheries Service's (NMFS) Office of Protected Resources (OPR).

ACTION AREA AND PROPOSED ACTIONS

As defined in 50 CFR 402.02, "programmatic consultation is a consultation addressing an agency's multiple actions on a program, region, or other basis. Programmatic consultations allow NMFS to consult on the effects of programmatic actions such as: (1) Multiple similar, frequently occurring, or routine actions expected to be implemented in particular geographic areas; and, (2) A proposed program, plan, policy, or regulation providing a framework for future proposed actions." This programmatic consultation considers category 1--multiple similar, frequently occurring, or routine actions expected to be implemented in particular geographic areas.

The survey activities considered in this consultation are geophysical and geotechnical surveys and the deployment, operation, and retrieval of environmental data collection buoys. These frequent, similar activities are expected to be implemented along the U.S. Atlantic coast in the three Atlantic Renewable Energy Regions (North Atlantic Planning Area, Mid-Atlantic Planning Area, and South Atlantic Planning Area). The meteorological buoys and geophysical and geotechnical surveys are expected to occur to support the potential future siting of offshore wind turbines, cables, and associated offshore facilities such as substations or service platforms.

Action Agencies
As noted above, the activities considered here may be authorized, funded, or carried out by BOEM, the DOE, the EPA, the USACE, and NMFS. The roles of these action agencies are described here.

BOEM
The Outer Continental Shelf Lands Act (OCSLA), as amended, mandates the Secretary of the Interior (Secretary), through BOEM, to manage the siting and development of the Outer Continental Shelf (OCS) for renewable energy facilities. BOEM is delegated the responsibility for overseeing offshore renewable energy development in Federal waters (30 C.F.R. Part 585). Through these regulations, BOEM oversees responsible offshore renewable energy development, including the issuance of leases for offshore wind development. This consultation considers the effects of certain data collection activities (geophysical and geotechnical surveys and deployment of meteorological buoys) that may be undertaken to support offshore wind development. BOEM regulations require that a lessee provide the results of shallow hazard, geological, geotechnical, biological, and archaeological surveys with its Site Assessment Plan and Construction and Operations Plan (see 30 C.F.R. 585.610(b) and 30 C.F.R. 585.626(a)). BOEM also funds data collection projects, such as seafloor mapping through the Environmental Studies Program (ESP). The activities considered here may or may not occur in association with a BOEM lease. This consultation does not obviate the need for an appropriate consultation to occur on lease issuance or the approval of a Site Assessment Plan or Construction and Operations Plan.

DOE
The DOE's Office of Energy Efficiency and Renewable Energy (EERE) provides federal funding (financial assistance) in support of renewable energy technologies. EERE's Wind Energy Technologies Office invests in energy science research and development activities that enable the innovations needed to advance U.S. wind systems, reduce the cost of electricity, and accelerate the deployment of wind power, including offshore wind. EERE's Water Power Technologies Office enables research, development, and testing of emerging technologies to advance marine energy. DOE's financial assistance in support of renewable energy projects could have consequences for listed species in federal or state waters. Data collection activities that may be supported by DOE and are considered in this programmatic consultation include deployment of meteorological buoys and geotechnical and geophysical surveys.

EPA
Section 328(a) of the Clean Air Act (CAA) (42 U.S.C. § 7401 *et seq.*) as amended by Public Law 101-549 enacted on November 15, 1990, required the EPA to establish air pollution control requirements for OCS sources subject to the OCSLA for all areas of the OCS, except those located in the Gulf of Mexico west of 87.5 degrees longitude (near the border of Florida and Alabama),[1] in order to attain and maintain Federal and State ambient air quality standards and comply with the provisions of part C of title I of the Act.[2] To comply with this statutory mandate, on September 4, 1992, EPA promulgated "Outer Continental Shelf Air Regulations" at 40 C.F.R. part 55. (57 Fed. Reg. 40,791). 40 C.F.R part 55 also established procedures for

[1] Public Law 112-74, enacted on December 23, 2011, amended § 328(a) to add an additional exception from EPA regulation for OCS sources "located offshore of the North Slope Borough of the State of Alaska."
[2] Part C of title I contains the Prevention of Significant Deterioration of Air Quality (PSD) requirements.

implementation and enforcement of air pollution control requirements for OCS sources. 40 C.F.R. § 55.2 states:

> OCS source means any equipment, activity, or facility, which:
> (1) Emits or has the potential to emit any air pollutant;
> (2) Is regulated or authorized under OCSLA (43 U.S.C. § 1331 *et seq*.); and,
> (3) Is located on the OCS or in or on waters above the OCS.
> This definition shall include vessels only when they are:
> (1) Permanently or temporarily attached to the seabed and erected thereon and used for the purpose of exploring, developing, or producing resources therefrom …; or
> (2) Physically attached to an OCS facility, in which case only the stationary sources aspects of the vessels will be regulated.

As described in the BA, where activities considered in this consultation emit or will have the potential to emit air pollutants and are located on the OCS or in or on waters above the OCS, the activities may be subject to the 40 C.F.R. part 55 requirements, including the 40 C.F.R. § 55.6 permitting requirements. Such activities are expected to be limited to vessel operations and some meteorological buoys.

USACE

Of the activities considered in this consultation, the deployment of meteorological buoys and carrying out geotechnical surveys may require authorization from the USACE. The USACE has regulatory responsibilities under Section 10 of the Rivers and Harbors Act of 1899 to approve/permit any structures or activities conducted below the mean high water line of navigable waters of the United States. The USACE also has responsibilities under Section 404 of the Clean Water Act (CWA) to prevent water pollution, obtain water discharge permits and water quality certifications, develop risk management plans, and maintain such records. A USACE Nationwide Permit (NWP) 5 or Regional General Permit (RGP) for Scientific Measurement Devices is required for devices and scientific equipment whose purpose is to record scientific data through such means as meteorological stations (which would include buoys); water recording and biological observation devices, water quality testing and improvement devices, and similar structures. In New England States, RGPs are required instead of the NWP. As stated in both types of permit, "*upon completion of the use of the device to measure and record scientific data, the measuring device and any other structures or fills associated with that device (e.g., foundations, anchors, buoys, lines, etc.) must be removed to the maximum extent practicable and the site restored to preconstruction elevations,*" as prescribed by Section 404 of the CWA (U. S. Army Corps of Engineers 2012).

Consideration of Potential Issuance of Incidental Harassment Authorizations for Survey Activities

The Marine Mammal Protection Act (MMPA), and its implementing regulations, allows, upon request, the incidental take of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographic region. Incidental take is an unintentional, but not unexpected, "take." Upon receipt and review of an adequate and complete application, NMFS OPR may authorize the incidental take of marine mammals incidental to the marine site characterization surveys pursuant to the MMPA, if the required findings are made. Proponents of some survey activities considered here may be required to obtain Incidental Take Authorizations (ITAs) under the MMPA. Therefore, the Federal actions considered in this consultation include the issuance of ITAs for survey activities described herein. Those ITAs may or may not provide MMPA take authorization for marine mammal species that are also listed under the ESA. As noted above, we have determined that all activities considered (inclusive of all PDC and BMPs) in this consultation will have no effect or are not likely to adversely affect any species listed under the ESA. By definition, that means that no take, as defined in the ESA, is anticipated. However, given the differences in the definitions of "harassment" under the MMPA and ESA, it is possible the site characterization surveys could result in harassment, as defined under the MMPA, but meet the ESA definition of "not likely to adversely affect." This consultation addresses such situations.

Under the MMPA (16 U.S.C. §1361 et seq.), take is defined as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal" and further defined by regulation (50 C.F.R. §216.3). Harassment is defined under the MMPA as any act of pursuit, torment, or annoyance which: has the potential to injure a marine mammal or marine mammal stock in the wild (Level A Harassment); or 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 defined in the MMPA, Level B harassment does not include an act that has the potential to injure a marine mammal or marine mammal stock in the wild.

Under the ESA, take is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." Harm is defined by regulation (50 C.F.R. §222.102) as "an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding, or sheltering." NMFS does not have a regulatory definition of "harass." However, on December 21, 2016, NMFS issued interim guidance[3] on the term "harass," under the ESA, defining it as to "create the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering." The NMFS interim ESA definition of "harass" is not equivalent to MMPA Level B harassment. Due to the differences in the definition of "harass" under the MMPA and ESA, there may be activities that result in effects to a marine mammal that would meet the threshold for harassment under both the MMPA and the ESA, while other activities may result in effects that would meet the threshold for harassment under the MMPA but not under the ESA. This issue is addressed further in the Marine Mammals section of this letter.

For this consultation, we considered NMFS' interim guidance on the term "harass" under the ESA when evaluating whether the proposed activities are likely to harass ESA-listed species, and we considered the available scientific evidence to determine the likely nature of the behavioral responses and their potential fitness consequences. As explained below, we determined that the effects to ESA-listed marine mammals resulting from the survey activities considered here would be insignificant and not result in harassment per NMFS' interim guidance on harassment under the ESA.

[3] NMFS Policy Directive 02-110-19; available at *https://media.fisheries.noaa.gov/dam-migration/02-110-19.pdf*; last accessed March 25, 2021.

Activities Considered in this Programmatic Consultation

The survey activities that are considered here consist of high resolution geophysical (HRG) and geotechnical surveys designed to characterize benthic and subsurface conditions and deployment, operation, and retrieval of environmental data collection buoys. A complete description of representative survey equipment to be used is included in Appendix A (Tables A.1 and A.2). Additionally, this consultation considers effects of deploying, operating, and retrieving buoys equipped with scientific instrumentation to collect oceanographic, meteorological, and biological data. All activities considered here will comply with a set of PDC (see Appendix B). We also consider the effects of vessel traffic associated with these activities. All vessels carrying out these activities, including during transits, will comply with measures outlined in Appendix B regardless of the equipment used or the sound levels/frequency at which equipment is operating. This consultation does not consider the effects of any survey activities that have the potential to result in directed or incidental capture or collection of any ESA-listed species (e.g., trawl surveys in areas where ESA-listed sea turtles occur).

This consultation does not evaluate the construction of any commercial electricity generating facilities or transmission cables with the potential to export electricity. Consistent with our understanding of the relevant regulations, BOEM has indicated that any such proposals for installation of electricity generating facilities (i.e., installation of wind turbines) or transmission cables would be a separate federal action (including authorization from BOEM) requiring a separate section 7 consultation. "Effects of the action are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action" (50 CFR §402.02; see also 50 CFR §402.17). The construction, operation, and/or decommissioning of any offshore wind facility or appurtenant facilities (e.g., cables, substations, etc.) are not consequences of the proposed survey activities considered here as they are not reasonably certain to occur. As such, this consultation does not consider these activities.

Action Area

The action area is defined by regulation as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action" (50 CFR 402.02). The Action Area for this consultation includes the areas to be surveyed and where buoys will be deployed, areas where increased levels of noise will be experienced as well as the vessel transit routes between existing Atlantic coast ports and the survey area. This area encompasses all effects of the proposed action considered here.

Surveys considered in this programmatic consultation will take place at depths 100-meters (m) or less within the three Atlantic Renewable Energy Regions (North Atlantic Planning Area, Mid-Atlantic Planning Area, and South Atlantic Planning Area) located on the Atlantic Outer Continental Shelf (OCS) and may also occur along potential cable corridor routes in nearshore waters of Atlantic coast states. The three planning areas extend from the US/Canada border in the north to Palm Bay, Florida in the south. The North, Mid-Atlantic, and South Atlantic planning areas together extend seaward from the U.S./Canadian border in the North to Palm Bay, Florida in the South. For the purposes of this consultation, the action area includes the Atlantic Renewable Energy Regions in OCS waters out to the 100 m depth contour in the North Atlantic, extending from waters offshore Maine to New Jersey; Mid-Atlantic, extending from waters offshore Delaware to North Carolina; and the South Atlantic extending from waters offshore South Carolina to east-central Florida and the adjacent coastal waters to the Atlantic coast (see Figure 1 in Appendix A for map of the action area). The offshore extent of the action area is defined by the anticipated maximum water depth where potential offshore wind facilities could be constructed. The seaward limit for siting a wind energy facility on the OCS is approximately 25 nautical miles (nm) (46.3 kilometers [km]) from shore or 100 m (328 feet [ft.]) water depth due to economic viability limitations. The current fixed foundation technologies are limited to depths of about 60 m. Although the majority of site assessment and site characterization activities will occur in water <60 m to accommodate the depth limitations in support of fixed foundations for wind turbine generators, floating foundations may be used in water depths >60 m in the future.

IMPLEMENTATION, TRACKING, AND REPORTING FOR THIS PROGRAMMATIC CONSULTATION

As noted above, activities considered in this consultation may be authorized, funded, or carried out by one or more action agencies. When one of these action agencies identifies a proposed activity that they believe falls within the scope of this programmatic consultation, they will first identify a lead action agency for the review (we anticipate that in most cases this will be BOEM). They will then review the activity to confirm that it is consistent with the activities covered by this consultation, including a review to confirm that all relevant PDCs (as outlined in Appendix B) will be implemented. The lead action agency for the activity will send written correspondence to the NMFS Greater Atlantic Regional Fisheries Office (GARFO) (nmfs.gar.esa.section7@noaa.gov) providing a brief summary of the proposed activity, including location and duration, and the agency's determination that the proposed activity is consistent with the scope of activities considered in this consultation. The action agency will also confirm in writing that all relevant PDCs 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. Activities that are determined to not be within the scope of this consultation can be modified by the action agency to bring them within the scope of this consultation or the action agency can request a stand-alone ESA section 7 consultation outside of this programmatic consultation.

To provide flexibility while maintaining the intent of this programmatic consultation, if an action agency proposes use of an equipment type different than described in this consultation, but can demonstrate that the acoustic characteristics are similar to the representative equipment described in Table A.2 and that implementation of the PDCs will result in the same effects considered here, this can be described when the survey plan is transmitted to us. Similarly, it is possible to consider modifications to the PDCs for a particular survey plan when the lead action agency can demonstrate that the same conservation benefit or risk reduction can be achieved with an alternate proposal.

In order to track activities carried out under this programmatic consultation, by February 15 of each year, BOEM, as the lead agency for this programmatic consultation, will provide a written report to NMFS documenting the activities that occurred under the scope of this consultation in the previous year (e.g., the report for 2021 activities will be due by February 15, 2022). This annual report will also transmit any monitoring reports and any reports of instances where PDCs were not implemented (e.g., where human safety prevented implementation of an otherwise required speed reduction). Following the receipt of the annual report, a meeting will be held if necessary to review and update any PDCs and to update the list of representative equipment.

ESA-LISTED SPECIES AND CRITICAL HABITAT CONSIDERED IN THIS CONSULTATION

In their BA, BOEM described the ESA-listed species and critical habitats that occur along the U.S. Atlantic coast. Of the species listed in the BA, we have determined that oceanic whitetip shark (*Carcharhinus longimanus*), Nassau grouper (*Epinephelus striatus*)[4], staghorn coral (*Acropora cervicornis*), elkhorn coral (*Acropora palmata*), pillar coral (*Dendrogyra cylindrus*), rough cactus coral (*Mycetophyllia ferox*), lobed star coral (*Orbicella annularis*), mountainous star coral (*Orbicella faveolata*), and boulder star coral (*Orbicella franksi*) do not occur in the action area.

ESA-Listed Species in the Action Area

The following listed species occur in the action area and are considered in this consultation:

Table 1. ESA-listed species that may be affected by the proposed action.

Common Name	Scientific Name	ESA Status
Marine Mammals – Cetaceans		
North Atlantic right whale	*Eubalaena glacialis*	Endangered
Fin Whale	*Balaenoptera physalus*	Endangered
Sei Whale	*Balaenoptera borealis*	Endangered
Sperm Whale	*Physeter macrocephalus*	Endangered
Blue whale	*Balaenoptera musculus*	Endangered
Sea Turtles		
Loggerhead turtle - Northwest Atlantic DPS	*Caretta*	Threatened
Green turtle - North Atlantic DPS and South Atlantic DPS	*Chelonia mydas*	Threatened
Kemp's ridley turtle	*Lepidochelys kempii*	Endangered

[4] Nassau grouper may occur in nearshore and offshore waters in the Florida Straits Planning Area but are not known to occur in nearshore or offshore waters of the South Atlantic Planning Area (NMFS 2013)

Leatherback turtle	*Dermochelys coriacea*	Endangered
Hawksbill turtle	*Eretmochelys imbricata*	Endangered
Fishes		
Atlantic salmon	*Salmo salar*	Endangered
Atlantic sturgeon	*Acipenser oxyrinchus*	Endangered
New York Bight DPS		Endangered
Chesapeake Bay DPS		Endangered
Carolina DPS		Endangered
South Atlantic DPS		Endangered
Gulf of Maine DPS		Threatened
Giant Manta Ray	*Manta birostris*	Threatened
Shortnose sturgeon	*Acipenser brevirostrum*	Endangered
Smalltooth sawfish	*Pristis pectinate*	Endangered

BOEM has determined the proposed action is not likely to adversely affect any of these species. We concur with this determination based on the rationale presented below. More information on the status of the species and critical habitat considered in this consultation, as well as relevant listing documents, status reviews, and recovery plans, can be found within the BA and on NMFS webpages accessible at: *https://www.greateratlantic.fisheries.noaa.gov/protected/section7/listing/index.html*, *https://sero.nmfs.noaa.gov/protected_resources/section_7/threatened_endangered/index.html*, and *https://www.fisheries.noaa.gov/species-directory*.

Critical Habitat in the Action Area

The action area overlaps, at least in part, with critical habitat designated for all five DPSs of Atlantic sturgeon, North Atlantic right whales, and the Northwest Atlantic Ocean DPS of loggerhead sea turtles. While critical habitat is designated for some of the other species considered in this consultation, that critical habitat does not occur in the action area. Critical habitat for the Gulf of Maine DPS of Atlantic salmon is limited to certain mainstem rivers in the State of Maine. At this time, we do not know of any geotechnical or geophysical survey activities that are likely to occur in those waters. As such, the proposed action will not overlap with critical habitat designated for the Gulf of Maine DPS of Atlantic salmon. BOEM determined that the activities considered here may affect, but are not likely to adversely affect critical habitat designated for the five DPSs of Atlantic sturgeon or the Northwest Atlantic DPS of loggerhead sea turtles. We concur with these determinations based on the rationale presented in the Effects of the Action section below.

BOEM determined that the activities considered here would have no effect on critical habitat designated for North Atlantic right whales. We agree with this determination as described briefly below.

Critical Habitat designated for the North Atlantic Right Whale

On January 27, 2016, NMFS issued a final rule designating critical habitat for North Atlantic right whales (81 FR 4837). Critical habitat includes two areas (Units) located in the Gulf of Maine and Georges Bank Region (Unit 1) and off the coast of North Carolina, South Carolina, Georgia and Florida (Unit 2). Geophysical and geotechnical surveys and met buoy deployment may occur in Unit 1 and Unit 2. Note that there are seasonal restrictions on certain acoustic survey equipment in Unit 1 and Unit 2 (PDC 4); however, these seasonal restrictions are in place to further reduce the potential for effects to right whales in these areas and are not related to effects on the features of that critical habitat.

Consideration of Potential Effects to Unit 1

As identified in the final rule (81 FR 4837), the physical and biological features essential to the conservation of the North Atlantic right whale that provide foraging area functions in Unit 1 are: The physical oceanographic conditions and structures of the Gulf of Maine and Georges Bank region that combine to distribute and aggregate *C. finmarchicus* for right whale foraging, namely prevailing currents and circulation patterns, bathymetric features (basins, banks, and channels), oceanic fronts, density gradients, and temperature regimes; low flow velocities in Jordan, Wilkinson, and Georges Basins that allow diapausing *C. finmarchicus* to aggregate passively below the convective layer so that the copepods are retained in the basins; late stage *C. finmarchicus* in dense aggregations in the Gulf of Maine and Georges Bank region; and diapausing *C. finmarchicus* in aggregations in the Gulf of Maine and Georges Bank region.

The activities considered here will not affect the physical oceanographic conditions and structures of the region that distribute and aggregate *C. finmarchicus* for foraging. This is because the activities considered here have no potential to affect currents and circulation patterns, flow velocities, bathymetric features (basins, banks, and channels), oceanic fronts, density gradients, or temperature regimes. Therefore, we have determined that the activities considered in this programmatic consultation will have no effect on Unit 1 of right whale critical habitat.

Consideration of Potential Effects to Unit 2

As identified in the final rule (81 FR 4837), the physical and biological features essential to the conservation of the North Atlantic right whale, which provide calving area functions in Unit 2, are: (i) Sea surface conditions associated with Force 4 or less on the Beaufort Scale; (ii) Sea surface temperatures of 7 °C to 17 °C; and, (iii) Water depths of 6 to 28 meters, where these features simultaneously co-occur over contiguous areas of at least 231 nmi^2 of ocean waters during the months of November through April. When these features are available, they are selected by right whale cows and calves in dynamic combinations that are suitable for calving, nursing, and rearing, and which vary, within the ranges specified, depending on factors such as weather and age of the calves.

The activities considered here will have no effect on the features of Unit 2; this is because geophysical and geotechnical surveys, met buoys, and vessel operations do not affect sea surface state, water temperature, or water depth. Therefore, we have determined that the activities considered in this programmatic consultation will have no effect on Unit 2 of right whale critical habitat

EFFECTS OF THE ACTION ON NMFS LISTED SPECIES AND CRITICAL HABITAT

Potential effects of the proposed action on listed species can be broadly categorized into the following categories: (1) effects to individual animals of exposure to noise associated with the survey activities (HRG, geotechnical), (2) effects of buoy deployment, operation, and retrieval; (3) effects to habitat from survey activities (including consideration of effects to Atlantic sturgeon and loggerhead critical habitat), and (4) effects of vessel use.

Effects of Exposure to Noise Associated With Survey Activities

Here we consider effects of noise associated with HRG and geotechnical surveys on ESA-listed species. Noise associated with meteorological buoys and vessel operations is discussed in those sections of this consultation.

Acoustic Thresholds

Due to the different hearing sensitivities of different species groups, NMFS uses different sets of acoustic thresholds to consider effects of noise on ESA-listed species. Below, we present information on thresholds considered for ESA-listed whales, sea turtles, and fish considered in this consultation.

ESA-listed Whales

NMFS *Technical Guidance for Assessing the Effects of Anthropogenic Noise on Marine Mammal Hearing* compiles, interprets, and synthesizes scientific literature to produce updated acoustic thresholds to assess how anthropogenic, or human-caused, sound affects the hearing of all marine mammals under NMFS jurisdiction (NMFS 2018[5]). Specifically, it identifies the received levels, or thresholds, at which individual marine mammals are predicted to experience temporary or permanent changes in their hearing sensitivity for acute, incidental exposure to underwater anthropogenic sound sources. As explained in the document, these thresholds represent the best available scientific information. These acoustic thresholds cover the onset of both temporary (TTS) and permanent hearing threshold shifts (PTS).

[5] See *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance* for more information.

Table 2. Impulsive acoustic thresholds identifying the onset of permanent threshold shift and temporary threshold shift for ESA-listed whales (NMFS 2018).

Hearing Group	Generalized Hearing Range[6]	Permanent Threshold Shift Onset[7]	Temporary Threshold Shift Onset
Low-Frequency Cetaceans (LF: baleen whales)	7 Hz to 35 kHz	Lpk,flat: 219 dB LE,LF,24h: 183 dB	Lpk,flat: 213 dB LE,LF,24h: 168 dB
Mid-Frequency Cetaceans (MF: sperm whales)	150 Hz to 160 kHz	Lpk,flat: 230 dB LE,MF,24h: 185 dB	Lpk,flat: 224 dB LE,MF,24h: 170 dB

These thresholds are a dual metric for impulsive sounds, with one threshold based on peak sound pressure level (0-pk SPL) that does not incorporate the duration of exposure, and another based on cumulative sound exposure level (SEL_{cum}) that does incorporate exposure duration. The two metrics also differ in regard to considering information on species hearing. The cumulative sound exposure criteria incorporate auditory weighting functions, which estimate a species group's hearing sensitivity, and thus susceptibility to TTS and PTS, over the exposed frequency range, whereas peak sound exposure level criteria do not incorporate any frequency dependent auditory weighting functions.

Additionally, NMFS considers exposure to impulsive/intermittent noise greater than 160 dB re 1uPa rms to have the potential to result in Level B harassment, as defined under the MMPA (which does not necessarily equate to ESA harassment). This value is based on observations of behavioral responses of baleen whales (Malme et al. 1983; Malme et al. 1984; Richardson et al. 1986; Richardson et al. 1990), but is used for all marine mammal species.

Sea Turtles

In order to evaluate the effects of exposure to the survey noise by sea turtles, we rely on the available scientific literature. Sea turtles are low frequency hearing specialists, typically hearing frequencies from 30 Hz to 2 kHz, with a range of maximum sensitivity between 100 to 800 Hz (Ridgway et al. 1969, Lenhardt 1994, Bartol et al. 1999, Lenhardt 2002, Bartol and Ketten 2006). Currently, the best available data regarding the potential for noise to cause behavioral disturbance come from studies by O'Hara and Wilcox (1990) and McCauley et al. (2000), who experimentally examined behavioral responses of sea turtles in response to seismic airguns. O'Hara and Wilcox

[6] Represents the generalized hearing range for the entire group as a composite (i.e., all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on approximately 65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall et al. 2007).

[7] $L_{pk,flat}$: unweighted ($_{flat}$) peak sound pressure level (L_{pk}) with a reference value of 1 µPa; $L_{E,XF,24h}$: weighted (by species group; $_{LF}$: Low Frequency, or $_{MF}$: Mid-Frequency) cumulative sound exposure level (L_E) with a reference value of 1 μPa^2-s and a recommended accumulation period of 24 hours ($_{24h}$)

(1990) found that loggerhead turtles exhibited avoidance behavior at estimated sound levels of 175 to 176 dB re: 1 µPa (rms) (or slightly less) in a shallow canal. McCauley et al. (2000) reported a noticeable increase in swimming behavior for both green and loggerhead turtles at received levels of 166 dB re: 1 µPa (rms). At 175 dB re: 1 µPa (rms), both green and loggerhead turtles displayed increased swimming speed and increasingly erratic behavior (McCauley et al. 2000). Based on these data, we assume that sea turtles would exhibit a behavioral response when exposed to received levels of 175 dB re: 1 µPa (rms) and higher.

In order to evaluate the effects of exposure to the survey noise by sea turtles that could result in physical effects, we relied on the available literature related to the noise levels that would be expected to result in sound-induced hearing loss (i.e., temporary threshold shift (TTS) or permanent threshold shift (PTS)); we relied on acoustic thresholds for PTS and TTS for impulsive sounds developed by the U.S. Navy for Phase III of their programmatic approach to evaluating the environmental effects of their military readiness activities (U.S. Navy 2017). At the time of this consultation, we consider these the best available data since they rely on all available information on sea turtle hearing and employ the same statistical methodology to derive thresholds as in NMFS recently issued technical guidance for auditory injury of marine mammals (NMFS 2018). Below we briefly detail these thresholds and their derivation. More information can be found in the U.S. Navy's Technical report on the subject (U.S. Navy 2017).

To estimate received levels from airguns and other impulsive sources expected to produce TTS in sea turtles, the U.S. Navy compiled all sea turtle audiograms available in the literature in an effort to create a composite audiogram for sea turtles as a hearing group. Since these data were insufficient to successfully model a composite audiogram via a fitted curve as was done for marine mammals, median audiogram values were used in forming the hearing group's composite audiogram. Based on this composite audiogram and data on the onset of TTS in fishes, an auditory weighting function was created to estimate the susceptibility of sea turtles to TTS. Data from fishes were used since there are currently no data on TTS for sea turtles and fishes are considered to have hearing more similar to sea turtles than do marine mammals (Popper et al. 2014). Assuming a similar relationship between TTS onset and PTS onset as has been described for humans and the available data on marine mammals, an extrapolation to PTS susceptibility of sea turtles was made based on the methods proposed by (Southall et al. 2007). From these data and analyses, dual metric thresholds were established similar to those for marine mammals: one threshold based on peak sound pressure level (0-pk SPL) that does not incorporate the auditory weighting function nor the duration of exposure, and another based on cumulative sound exposure level (SEL_{cum}) that incorporates both the auditory weighting function and the exposure duration (Table 3).

Table 3. Acoustic thresholds identifying the onset of permanent threshold shift and temporary threshold shift for sea turtles exposed to impulsive sounds (U.S. Navy 2017, McCauley et al. 2000).

Hearing Group	Generalized Hearing Range	Permanent Threshold Shift Onset	Temporary Threshold Shift Onset	Behavioral Response
Sea Turtles	30 Hz to 2 kHz	204 dB re: 1 μPa^2·s SEL$_{cum}$	189 dB re: 1 μPa^2·s SEL$_{cum}$	175 dB re: 1 μPa (rms)
		232 dB re: 1 μPa SPL (0-pk)	226 dB re: 1 μPa SPL (0-pk)	

Marine Fish
There are no criteria developed for considering effects to ESA-listed fish specific to HRG equipment. However, all of the equipment that operates within a frequency that these fish species are expected to respond to, produces intermittent or impulsive sounds; therefore, it is reasonable to use the criteria developed for impact pile driving, seismic, and explosives when considering effects of exposure to this equipment (FHWG 2008). However, unlike impact pile driving, which produces repetitive impulsive noise in a single location, the geophysical survey sound sources are moving; therefore, the potential for repeated exposure to multiple pulses is much lower when compared to pile driving. We expect fish to react to noise that is disturbing by moving away from the sound source and avoiding further exposure. Injury and mortality is only known to occur when fish are very close to the noise source and the noise is very loud and typically associated with pressure changes (i.e., impact pile driving or blasting).

The Fisheries Hydroacoustic Working Group (FHWG) was formed in 2004 and consists of biologists from NMFS, United States Fish and Wildlife Service, Federal Highway Administration, USACE, and the California, Washington, and Oregon Department of Transportations, supported by national experts on underwater sound producing activities that affect fish and wildlife species of concern. In June 2008, the agencies signed an MOA documenting criteria for assessing physiological effects of impact pile driving on fish. The criteria were developed for the acoustic levels at which physiological effects to fish could be expected. It should be noted, that these are onset of physiological effects (Stadler and Woodbury, 2009), and not levels at which fish are necessarily mortally damaged. These criteria were developed to apply to all fish species. The interim criteria are:

- Peak SPL: 206 dB re 1 μPa
- SELcum: 187 B re 1μPa^2-s for fishes 2 grams or larger (0.07 ounces).
- SELcum: 183 dB re 1μPa^2-s for fishes less than 2 grams (0.07 ounces).

At this time, these criteria represent the best available information on the thresholds at which physiological effects to ESA-listed marine fish are likely to occur. It is important to note that physiological effects may range from minor injuries from which individuals are anticipated to completely recover with no impact to fitness to significant injuries that will lead to death. The severity of injury is related to the distance from the noise source and the duration of exposure. The closer to the source and the greater the duration of the exposure, the higher likelihood of significant injury. Use of the 183 dB re 1 μPa^2-s cSEL threshold, is not appropriate for this consultation because all sturgeon in the action area will be larger than 2 grams. Physiological effects could range from minor injuries that a fish is expected to completely recover from with no impairment to survival to major injuries that increase the potential for mortality, or result in death.

We use 150 dB re: 1 μPa RMS as a threshold for examining the potential for behavioral responses by individual listed fish to noise with frequency less than 1 kHz. This is supported by information provided in a number of studies (Andersson et al. 2007, Purser and Radford 2011, Wysocki et al. 2007). Responses to temporary exposure of noise of this level is expected to be a range of responses indicating that a fish detects the sound, these can be brief startle responses or in the worst case, we expect that listed fish would completely avoid the area ensonified above 150 dB re: 1 uPa rms. Popper et al. (2014) does not identify a behavioral threshold but notes that the potential for behavioral disturbance decreases with the distance from the source.

HRG Acoustic Sources

HRG surveys are used for a number of site characterization purposes: locating shallow hazards, cultural resources, and hard-bottom areas; evaluating installation feasibility; assisting in the selection of appropriate foundation system designs; and determining the variability of subsurface sediments. The equipment typically used for these surveys includes: Bathymetry/Depth Sounder; Magnetometer; Seafloor Imagery/Side-Scan Sonar; Shallow and Medium (Seismic) Penetration Sub-bottom Profilers (e.g., CHIRPs, boomers, bubble guns). This consultation does not consider the use of seismic airguns because this equipment is not required for site characterization activities to support offshore wind development (due to the shallow sediment depths that need to be examined, compared to the miles into the seabed that are examined for oil and gas exploration where airguns are used).

As described in the BA, BOEM completed a desktop analysis of nineteen HRG sources in Crocker and Fratantonio (2016) to evaluate the distance to thresholds of concern for listed species (see tables in Appendix A). Equipment types or frequency settings that would not be used for the survey purposes by the offshore wind industry were not included in this analysis. To provide the maximum impact scenario for these calculations, the highest power levels and most sensitive frequency setting for each hearing group were used when the equipment had the option for multiple user settings. All sources were analyzed at a tow speed of 2.315 m/s (4.5 knots), which is the expected speed vessels will travel while towing equipment. PTS cumulative exposure distances were calculated for the low-frequency hearing group (sei, fin, and North Atlantic right whales), the mid-frequency group (sperm whales), and for a worst-case exposure scenario of 60 continuous minutes for sea turtles and fish.

Tables 4 and 5 describe the greatest distances to thresholds of concern for the various equipment types analyzed by BOEM. It is important to note that as different species groups have different hearing sensitivities, not all equipment operates within the hearing threshold of all species considered here. Complete tables are included in Appendix B of BOEM’s BA.

Table 1. Summary of greatest PTS Exposure Distances from mobile HRG Sources at Speeds of 4.5 knots.

HRG SOURCE	Highest Source Level (dB re 1 µPa)	PTS DISTANCE (m) Sea Turtles		Fish[b]		Baleen Whales		Sperm Whales[c]	
Mobile, Impulsive, Intermittent Sources									
		Peak	*SEL*	*Peak*	*SEL*	*Peak*	*SEL*	*Peak*	*SEL*
Boomers, Bubble Guns	176 dB SEL 207 dB RMS 216 PEAK	0	0	3.2	0	0	0.3	0	0
Sparkers	188 dB SEL 214 dB RMS 225 PEAK	0	0	9	0	2	12.7	0	0.2
Chirp Sub-Bottom Profilers	193 dB SEL 209 dB RMS 214 PEAK	NA	NA	NA	NA	0	1.2	0	0.3
Mobile, Non-impulsive, Intermittent Sources									
Multi-beam echosounder (100 kHz)	185 dB SEL 224 dB RMS 228 PEAK	NA	NA	NA	NA	NA	NA	0	0.5
Multi-beam echosounder (>200 kHz) (mobile, non-impulsive, intermittent)	182 dB SEL 218 dB RMS 223 PEAK	NA	NA	NA	NA	NA	NA	NA	NA
Side-scan sonar (>200 kHz) (mobile, non-impulsive, intermittent)	184 dB SEL 220 dB RMS 226 PEAK	NA	NA	NA	NA	NA	NA	NA	NA

[a] Sea turtle PTS distances were calculated for 203 cSEL and 230 dB peak criteria from Navy (2017).
[b] Fisheries Hydroacoustic Working Group (2008).
[c] PTS injury distances for listed marine mammals were calculated with NOAA's sound exposure spreadsheet tool using sound source characteristics for HRG sources in Crocker and Fratantonio (2016)
NA = not applicable due to the sound source being out of the hearing range for the group.

Using the same sound sources for the PTS analysis, BOEM calculated the distances to 175 dB re 1 µPa rms for sea turtles, 160 dB re 1 µPa rms for marine mammals, and 150 dB re 1 µPa rms for fish were calculated using a spherical spreading model (20 LogR) (Table 5). BOEM has conservatively used the highest power levels for each sound source reported in Crocker and Fratantonio (2016). Additionally, the spreadsheet and geometric spreading models do not consider the tow depth and directionality of the sources; therefore, these are likely overestimates of actual disturbance distances.

Table 5. Summary of greatest disturbance distances by equipment type.

HRG SOURCE	**DISTURBANCE DISTANCE (m)**			
	Sea Turtles (175 dB re 1uPa rms)	**Fish (150 dB re 1uPa rms)**	**Baleen Whales (160 dB re 1uPa rms)**	**Sperm Whales (160 dB re 1uPa rms)**
Boomers, Bubble Guns	40	708	224	224
Sparkers	90	1,996[a]	502	502
Chirp Sub-Bottom Profilers	2	32	10	10
Multi-beam Echosounder (100 kHz)	NA	NA	NA	<369[b]
Multi-beam Echosounder (>200 kHz)	NA	NA	NA	NA
Side-scan Sonar (>200 kHz)	NA	NA	NA	NA

a – the calculated distance to the 150 dB rms threshold for the Applied Acoustics Dura-Spark is 1,996m; however, the distances for other equipment in this category is significantly smaller
b – this distance was recalculated using the NMFS spreadsheet following receipt of the BA.
NA = not applicable due to the sound source being out of the hearing range for the group.

Marine Mammals
Considering peak noise levels, the equipment resulting in the greatest isopleth to the marine mammal PTS threshold is the sparker (2.0 m for baleen whales, 0 m for sperm whales; Table A.3). Considering the cumulative threshold (24 hour exposure), the greatest distance to the PTS threshold is 12.7 m for baleen whales and 0.5 m for sperm whales. Animals in the survey area during the HRG survey are unlikely to incur any hearing impairment due to the characteristics of the sound sources, considering the source levels (176 to 205 dB re 1 µPa-m) and generally very short pulses and duration of the sound. Individuals would have to make a very close approach and

also remain very close to vessels operating these sources (<13 m) in order to receive multiple exposures at relatively high levels, as would be necessary to have the potential to result in any hearing impairment. Kremser et al. (2005) noted that the probability of a whale swimming through the area of exposure when a sub-bottom profiler emits a pulse is small—because if the animal was in the area, it would have to pass the transducer at close range in order to be subjected to sound levels that could cause PTS and would likely exhibit avoidance behavior to the area near the transducer rather than swim through at such a close range. Further, the restricted beam shape of many of HRG survey devices planned for use makes it unlikely that an animal would be exposed more than briefly during the passage of the vessel. The potential for exposure to noise that could result in PTS is even further reduced by the clearance zone and the use of PSOs to all for a shutdown of equipment operating within the hearing range of ESA-listed whales should a right whale or unidentified large whale be detected within 500 m or 100 m for an identified sei, fin, or sperm whale, see PDC 4. Based on these considerations, it is extremely unlikely that any ESA-listed whale will be exposed to noise that could result in PTS.

Masking is the obscuring of sounds of interest to an animal by other sounds, typically at similar frequencies. Marine mammals are highly dependent on sound, and their ability to recognize sound signals amid other sounds is important in communication and detection of both predators and prey (Tyack 2000). Although masking is a phenomenon which may occur naturally, the introduction of loud anthropogenic sounds into the marine environment at frequencies important to marine mammals increases the severity and frequency of occurrence of masking. The components of background noise that are similar in frequency to the signal in question primarily determine the degree of masking of that signal. In general, little is known about the degree to which marine mammals rely upon detection of sounds from conspecifics, predators, prey, or other natural sources. In the absence of specific information about the importance of detecting these natural sounds, it is not possible to predict the impact of masking on marine mammals (Richardson et al., 1995). In general, masking effects are expected to be less severe when sounds are transient than when they are continuous. Masking is typically of greater concern for those marine mammals that utilize low-frequency communications, such as baleen whales, because of how far low-frequency sounds propagate. NMFS has previously concluded that marine mammal communications would not likely be masked appreciably by the sub-bottom profiler signals given the directionality of the signals for most HRG survey equipment types planned for use for the types of surveys considered here and the brief period when an individual mammal is likely to be within its beam (see for example, 86 FR 22160). Based on this, any effects of masking on ESA-listed whales will be insignificant.

For equipment that operates within the functional hearing range (7 Hz to 35 kHz) of baleen whales, the area ensonified by noise greater than 160 dB re: 1uPa rms will extend no further than 502 m from the source (sparkers; the distance for chirp (10 m) and boomers and bubble guns (224 m) is smaller (Table A.5)). For equipment that operates within the functional hearing range of sperm whales (150 Hz to 160 kHz), the area ensonified by noise greater than 160 dB re: 1uPa rms will extend no further than 369 m from the source (100 kHz Multi-beam echosounder; the distance for sparkers (502 m), boomers and bubble guns (224 m), and chirp (10 m) is smaller; Table A.5).

Given that the distance to the 160 dB re: 1 uPa rms threshold extends beyond the required Shutdown Zone, it is possible that ESA-listed whales will be exposed to potentially disturbing levels of noise during the surveys considered here. We have determined that, in this case, the exposure to noise above the MMPA Level B harassment threshold (160 dB re: 1uPa rms) will result in effects that are insignificant. We expect that the result of this exposure would be, at worst, temporary avoidance of the area with underwater noise louder than this threshold, which is a reaction that is considered to be of low severity and with no lasting biological consequences (e.g., Ellison et al. 2007). The noise source itself will be moving. This means that any co-occurrence between a whale, even if stationary, will be brief and temporary. Given that exposure will be short (no more than a few seconds, given that the noise signals themselves are short and intermittent and because the vessel towing the noise source is moving) and that the reaction to exposure is expected to be limited to changing course and swimming away from the noise source only far/long enough to get out of the ensonified area (502 m or less, depending on the noise source), the effect of this exposure and resulting response will be so small that it will not be able to be meaningfully detected, measured or evaluated and, therefore, is insignificant. Further, the potential for disruption to activities such as breeding, feeding (including nursing), resting, and migrating is extremely unlikely given the very brief exposure to any noise (given that the source is traveling and the area ensonified at any given moment is so small). Any brief interruptions of these behaviors are not anticipated to have any lasting effects. Because the effects of these temporary behavioral changes are so minor, it is not reasonable to expect that, under the NMFS' interim ESA definition of harassment, they are equivalent to an act that would "create the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering."

Sea Turtles

None of the equipment being operated for these surveys that overlaps with the hearing range (30 Hz to 2 kHz) for sea turtles has source levels loud enough to result in PTS or TTS based on the peak or cumulative exposure criteria (Table A.4). Therefore, physical effects are extremely unlikely to occur.

As explained above, we assume that sea turtles would exhibit a behavioral response when exposed to received levels of 175 dB re: 1 µPa (rms) and are within their hearing range (below 2 kHz). For boomers and bubble guns the distance to this threshold is 40 m, and is 90 m for sparkers and 2 m for chirps (Table A.5). Thus, a sea turtle would need to be within 90 m of the source to be exposed to potentially disturbing levels of noise. We expect that sea turtles would react to this exposure by swimming away from the sound source; this would limit exposure to a short time period, just the few seconds it would take an individual to swim away to avoid the noise.

The risk of exposure to potentially disturbing levels of noise is reduced by the use of PSOs to monitor for sea turtles. As required by the PDC 4, a Clearance Zone (500 m in all directions) for ESA-listed species must be monitored around all vessels operating equipment at a frequency of less than 180 kHz. At the start of a survey, equipment cannot be turned on until the Clearance Zone is clear for at least 30 minutes. This condition is expected to reduce the potential for sea turtles to be exposed to noise that may be disturbing. However, even in the event that a sea turtle is submerged and not seen by the PSO, in the worst case, we expect that sea turtles would avoid the area ensonified by the survey equipment that they can perceive. Because the area where increased underwater noise will be experienced is transient and increased underwater noise will only be experienced in a particular area for only seconds, we expect any effects to behavior to be minor and limited to a temporary disruption of normal behaviors, temporary avoidance of the ensonified area and minor additional energy expenditure spent while swimming away from the noisy area. If foraging or migrations are disrupted, we expect that they will quickly resume once the survey vessel has left the area. No sea turtles will be displaced from a particular area for more than a few minutes. While the movements of individual sea turtles will be affected by the sound associated with the survey, these effects will be temporary (seconds to minutes) and localized (avoiding an area no larger than 90 m) and there will be only a minor and temporary impact on foraging, migrating or resting sea turtles. For example, BOEM calculated that for a survey with equipment being towed at 3 knots, exposure of a turtle that was within 90 m of the source would last for less than two minutes. We also note that, to minimize disturbance to the Northwest Atlantic Ocean DPS of loggerhead sea turtles, a voluntary pause in sparker operation will be implemented for all vessels operating in nearshore critical habitat for loggerhead sea turtles if any loggerhead or other sea turtle is observed within a 100 m Clearance Zone during a survey. This will further reduce the potential for behavioral disturbance.

Given the intermittent and short duration of exposure to any potentially disturbing noise from HGR equipment, major shifts in habitat use or distribution or foraging success are not expected. Effects to individual sea turtles from brief exposure to potentially disturbing levels of noise are expected to be minor and limited to a brief startle, short increase in swimming speed and/or short displacement, and will be so small that they cannot be meaningfully measured, detected, or evaluated; therefore, effects are insignificant.

Marine Fish

Of the equipment that may be used for geophysical surveys, only equipment that operates at a frequency within the estimated hearing range of the ESA-listed fish that may occur in the action area (i.e., frequency less than 1 kHz; Lovell et al. 2005; Meyer et al. 2010) may affect these species. Generally, this includes sparkers, boomers, and bubble guns (see Table A.2). All other survey equipment operates at a frequency higher than the ESA-listed fish considered here are expected to hear; therefore, we do not expect any effects to ESA-listed fish exposed to increased underwater noise from the other higher frequency survey equipment. Due to their typically submerged nature, monitoring clearance or shutdown zones for marine fish is not expected to be effective. As required by PDC 4, the surveys will use a ramp up procedure; that is, noise producing equipment will not be used at full energy right away. This gives any fish in the immediate area a “warning” and an opportunity to leave the area before the full energy of the survey equipment is used.

As explained above, the available information suggests that for noise exposure to result in physiological impacts to the fish species considered here, received levels need to be at least 206 dB re: 1uPa peak sound pressure level (SPLpeak) or at least 187 dB re: u1Pa cumulative. The peak thresholds are exceeded only very close to the noise source (<3.2 m for the boomers/bubble guns and <9 m for the sparkers (see Table A.4); the cumulative threshold is not exceeded at any distance. As such, in order to be exposed to peak sound pressure levels of 206 dB re: 1uPa from any of these sources, an individual fish would need to be within 9 m of the source (Table A.4). This is extremely unlikely to occur given the dispersed nature of the distribution of ESA-listed fish in the action area, the use of a ramp up procedure, the moving and intermittent/pulsed characteristic of the noise source, and the expectation that ESA-listed fish will swim away, rather than towards the noise source. Based on this, no physical effects to any ESA-listed fish, including injury or mortality, are expected to result from exposure to noise from the geophysical surveys.

We use 150 dB re: 1 µPa root mean square (RMS) sound pressure level (SPL) as a threshold for examining the potential for behavioral responses to underwater noise by ESA-listed fish. This is supported by information provided in a number of studies (Andersson et al. 2007, Purser and Radford 2011, Wysocki et al. 2007). In the worst case, we expect that ESA-listed fish would completely avoid an area ensonified above 150 dB re: 1uPa rms for the period of time that noise in that area was elevated. The calculated distances to the 150 dB re: 1 uPa rms threshold for the boomers/bubble guns, sparkers, and sub-bottom profilers is 708 m, 1,996 m, and 32 m, respectively (Table A.5). It is important to note that BOEM has conservatively used the highest power levels for each sound source reported in Crocker and Fratantonio (2016) to calculate these distances; thus, they likely overestimate actual sound fields.

Because the area where increased underwater noise will be experienced is transient (because the survey vessel towing the equipment is moving), increased underwater noise will only be experienced in a particular area for a short period of time. Given the transient and temporary nature of the increased noise, we expect any effects to behavior to be minor and limited to a temporary disruption of normal behaviors, potential temporary avoidance of the ensonified area and minor additional energy expenditure spent while swimming away from the noisy area. If foraging, resting, or migrations are disrupted, we expect that these behaviors will quickly resume once the survey vessel has left the area (i.e., in seconds to minutes, given its traveling speed of 3 – 4.5 knots). Therefore, no fish will be displaced from a particular area for more than a few minutes. While the movements of individual fish will be affected by the sound associated with the survey, these effects will be temporary and localized and these fish are not expected to be excluded from any particular area and there will be only a minimal impact on foraging, migrating, or resting behaviors. Sustained shifts in habitat use or distribution or foraging success are not expected. Effects to individual fish from brief exposure to potentially disturbing levels of noise are expected to be limited to a brief startle or short displacement and will be so small that they cannot be meaningfully measured, detected, or evaluated; therefore, effects of exposure to survey noise are insignificant.

Acoustic Effects - Geotechnical Surveys

Geotechnical surveys generally do not use active acoustic sources, but may have some low-level ancillary sounds associated with them. As described in the BA, the loudest noises are from drilling associated with obtaining bore samples. Small-scale drilling noise associated with bore samples taken in shallow water has been measured to produce broadband sounds centered at 10 Hz with source levels at 71-89 dB re 1 µPa rms and 75-97 dB re 1 µPa peak depending on the water depth of the work site (Willis et al. 2010). Another study reported measured drilling noise from a small jack-up rig at 147 – 151 db re 1 µPa rms in the 1 Hz to 22 kHz range at 10 m from source (Erbe and McPherson 2017).

Noise associated with geotechnical surveys is below the level that we expect may result in physiological or behavioral responses by any ESA-listed species considered here. As such, effects to listed whales, sea turtles, or fish from exposure to this noise source are extremely unlikely to occur.

Meteorological Buoys

A meteorological buoy (met buoy) is designed to collect meteorological data for a period of four-five years. During this time, data will be collected and transmitted to onshore facilities. The operation of the meteorological data collection instrumentation (i.e., light detection and ranging remote sensing technology (LIDAR) and Acoustic Doppler Current Profilers (ADCP)) will have no effect on any listed species as it does not operate in any way that could result in effects to listed species. Bathymetric LIDAR uses water-penetrating green light to also measure seafloor and riverbed elevations. ADCP uses extremely high frequency sound (well above the hearing frequency of any species considered in this consultation) to measure water currents. No other acoustic effects from the deployment of the met buoys are anticipated.

Buoys will be deployed and retrieved by vessels; maintenance will also be carried out from vessels. Potential effects of vessel traffic for all activities considered in this consultation is addressed below. PDCs for siting the buoy will result in avoidance of anchoring buoys on any sensitive habitats (i.e., placement will occur on unconsolidated and uncolonized areas only, avoiding eelgrass, corals, etc.) (see PDC 1). Buoys will be anchored to a clump weight anchor and attached to the anchor with heavy chain. We have considered the potential for any listed species, including whales and/or sea turtles, to interact with the buoy and to become entangled in the buoy or mooring system and have determined that this is extremely unlikely to occur for the reasons outlined below.

In order for an entanglement to occur, an animal must first encounter the gear, which has an extremely low likelihood based on the number of buoys and total area where buoys may be deployed (Atlantic OCS). BOEM predicts that up to two met buoys could be deployed in any potential lease area, for a maximum of 60 buoys deployed in the entirety of the Atlantic OCS. Given the small number of buoys and their dispersed locations on the OCS, the potential for encounter between an individual whale or sea turtle and a buoy is extremely low. However even if there is co-occurrence between an individual animal and one or more buoys, entanglement is extremely unlikely to occur. This is because the buoy will be attached to the anchor with heavy gauge chain, which reduces the risk of entanglement due to the tension that the buoy will be under and the gauge of the chain, which prevents any slack in the chain that could result in an entanglement (see PDC 6). There have been no documented incidences of any listed species, including whales or sea turtles, entangled in United States Coast Guard navigational buoys, which have a similar mooring configuration to these met buoys, but also far outnumber the potential number of deployed met buoys (there are 1000s of navigational buoys within the range of ESA-listed whales and sea turtles and no recorded entanglements). Based on the analysis herein, it is extremely unlikely that any ESA-listed species will interact with the buoy and anchor system such that it becomes entangled. As such, effects are extremely unlikely to occur.

Effects to Habitat

Vibracores and grab samples may be used to document habitat types during geophysical and geotechnical survey activities. Both of these survey methods will result in temporary disturbance of the benthos and a potential temporary loss of benthic resources. Additionally, bottom disturbance will occur in the area where a met buoy is anchored.

The vibracores and grab samples will affect an extremely small area (approximately 0.1 to 2.7 ft^2) at each sampling location, with sampling locations several hundred meters apart. While the vibracore and grab sampler will take a portion of the benthos that will be brought onto the ship, because of the small size of the sample and the nature of the removal, there is little to no sediment plume associated with the sampling. While there may be some loss of benthic species at the sample sites, including potential forage items for listed species that feed on benthic resources, the amount of benthic resources potentially lost will be extremely small and limited to immobile individuals that cannot escape capture during sampling. As such a small area will be disturbed and there will be a large distance between disturbed areas, recolonization is expected to be rapid. The amount of potential forage lost for any benthic feeding species is extremely small, localized, and temporary. While the area of the bottom impacted by the anchoring of the met buoy is larger (i.e., several meters in diameter), as stated above, there will be a small number of buoys deployed along the entire Atlantic OCS. Any loss of benthic resources will be small, temporary, and localized.

These temporary, isolated reductions in the amount of benthic resources are not likely to have a measurable effect on any foraging activity or any other behavior of listed species; this is due to the small size of the affected areas in relation to remaining available habitat in the OCS and the temporary nature of any disturbance. As effects to listed species will be so small that they cannot be meaningfully measured, detected, or evaluated, effects are insignificant.

Other Considerations – Geotechnical Surveys
The PDCs include a seasonal prohibition on any activities involving disturbance of the bottom in areas where early life stages of Atlantic or shortnose sturgeon may occur (see PDC 2). The seasonal prohibition is designed to avoid any activity that could disturb potential spawning or rearing substrate during the time of year that spawning or rearing may occur in that river. This PDC will also ensure that no bottom disturbing survey activities will occur at a time that eggs or other immobile or minimally mobile early life stages of sturgeon are present. This will ensure that sampling activities will not result in the disturbance, injury, or mortality of any sturgeon. Based on this, any effects to sturgeon spawning habitat or early life stages are extremely unlikely to occur.

Atlantic Sturgeon Critical Habitat
Critical habitat has been designated for all five DPSs of Atlantic sturgeon (82 FR 39160; effective date September 18, 2017). While there is no Atlantic sturgeon critical habitat in the three Atlantic Renewable Energy Regions located on the Atlantic OCS, survey activities along potential cable routes, including vessel transits, may occur within Atlantic sturgeon critical habitat. While BOEM anticipates that activities would be limited to overlapping with critical habitat designated in the Hudson, Delaware, and James rivers for the New York Bight and Chesapeake Bay DPSs respectively, the conclusions reached here apply to critical habitat designated for all five DPSs.

The PDCs include a seasonal prohibition on any geophysical and geotechnical survey activities involving disturbance of the bottom in freshwater (salinity less than 0.5 parts per thousand (ppt)) areas designated as critical habitat for any DPS of Atlantic sturgeon (see PDC # 2 for more detail). The PDCs also require operation of vessels in a way that ensures that vessel activities do not result in disturbance of bottom habitat.

In order to determine if the proposed action may affect critical habitat, we consider whether it would impact the habitat in a way that would affect its ability to support reproduction and recruitment. Specifically, we consider the effects of the action on the physical features of the proposed critical habitat. The Physical and Biological Features (PBFs) essential for Atlantic sturgeon conservation identified in the final rule (82 FR 39160) are:

(1) Hard bottom substrate (e.g., rock, cobble, gravel, limestone, boulder, etc.) in low salinity waters (i.e., 0.0 to 0.5 ppt range) for settlement of fertilized eggs, refuge, growth, and development of early life stages;

(2) Aquatic habitat with a gradual downstream salinity gradient of 0.5 up to as high as 30 ppt and soft substrate (e.g., sand, mud) between the river mouth and spawning sites for juvenile foraging and physiological development;

(3) Water of appropriate depth and absent physical barriers to passage (e.g., locks, dams, thermal plumes, turbidity, sound, reservoirs, gear, etc.) between the river mouth and spawning sites necessary to support: (i) Unimpeded movement of adults to and from spawning sites; (ii) Seasonal and physiologically dependent movement of juvenile Atlantic sturgeon to appropriate salinity zones within the river estuary; and, (iii) Staging, resting, or holding of subadults or spawning condition adults. Water depths in main river channels must also be deep enough (e.g., at least 1.2 m) to ensure continuous flow in the main channel at all times when any sturgeon life stage would be in the river.

(4) Water, between the river mouth and spawning sites, especially in the bottom meter of the water column, with the temperature, salinity, and oxygen values that, combined, support: (i) Spawning; (ii) Annual and interannual adult, subadult, larval, and juvenile survival; and, (iii) Larval, juvenile, and subadult growth, development, and recruitment (e.g., 13 degrees Celsius [°C] to 26 °C for spawning habitat and no more than 30 °C for juvenile rearing habitat, and 6 milligrams per liter (mg/L) dissolved oxygen (DO) or greater for juvenile rearing habitat).

PBF 1: Hard bottom substrate (e.g., rock, cobble, gravel, limestone, boulder, etc.) in low salinity waters (i.e., 0.0–0.5 ppt range) for settlement of fertilized eggs, refuge, growth, and development of early life stages

In considering effects to PBF 1, we consider whether the proposed action will have any effect on areas of hard substrate in low salinity waters that may be used for settlement of fertilized eggs, refuge, growth, and development of early life stages; therefore, we consider effects of the action on hard bottom substrate and any change in the value of this feature in the action area.

Vessel operations during transits or surveys would not affect hard bottom habitat in the part of the river with salinity less than 0.5 ppt, because they would not impact the river bottom in any way or change the salinity of portions of the river where hard bottom is found. Similarly, geophysical surveys use acoustics to accurately map the seafloor, which would not impact any hard bottom that is present.

Grab samples, geotechnical surveys, and any other activity that may affect hard bottom is prohibited in areas with salinity less than 0.5 ppt during the time of year that these areas may be used for spawning or rearing (PDC 2). Given the very small footprint of all survey activities that may affect the hard bottom (3-4 inch diameter area would be disturbed during sampling) and the spacing of sampling several hundred meters apart, any effects to hard bottom substrate from survey activities outside of the time of year when these areas may be used for spawning and rearing would be small, localized, and dispersed. Given the dynamic nature of river sediments and the small area that will be disturbed, we expect that substrate conditions will recover to pre-survey conditions within days to weeks of sampling occurring. As such, any effects to hard bottom substrate and the value of this feature in the action area or to any of the critical habitat units as a whole are temporary and so small that they cannot be meaningfully measured, evaluated, or detected and, therefore, are insignificant.

PBF 2: Aquatic habitat with a gradual downstream salinity gradient of 0.5 up to as high as 30 ppt and soft substrate (e.g., sand, mud) between the river mouth and spawning sites for juvenile foraging and physiological development

In considering effects to PBF 2, we consider whether the proposed action will have any effect on areas of soft substrate within transitional salinity zones between the river mouth and spawning sites for juvenile foraging and physiological development; therefore, we consider effects of the action on soft substrate and salinity and any change in the value of this feature in the action area.

Project vessels (whether transiting or surveying) do not have the potential to effect salinity. Vessels are expected to maintain a minimum of 4-feet clearance with the river bottom (see PDC 2) and, therefore, effects to the soft substrate are extremely unlikely. The vessels' operations would not preclude or significantly delay the development of soft bottom habitat in the transitional salinity zone because they would not impact salinity or the river bottom in any way. Similarly, geophysical surveys use acoustics to accurately map the bottom, which would not affect any soft substrate that is present.

Grab samples and geotechnical surveys may impact soft substrate; however, given the very small footprint of any such activities (3-4 inch diameter area would be disturbed during sampling) and the spacing of sampling locations several hundred meters apart, any effects to soft substrate would be small, localized, and dispersed. Given the dynamic nature of river sediments and the small area that will be disturbed, we expect that substrate conditions will recover to pre-survey conditions within days to weeks of sampling occurring. As such, any effects to soft substrate and the value of this feature in the action area, are extremely unlikely or so small that they cannot be meaningfully measured, evaluated, or detected.

PBF 3: Water absent physical barriers to passage between the river mouth and spawning sites

In considering effects to PBF 3, we consider whether the proposed action will have any effect on water of appropriate depth and absent physical barriers to passage (e.g., locks, dams, thermal plumes, turbidity, sound, reservoirs, gear, etc.) between the river mouth and spawning sites necessary to support: unimpeded movements of adults to and from spawning sites; seasonal and physiologically dependent movement of juvenile Atlantic sturgeon to appropriate salinity zones within the river estuary, and; staging, resting, or holding of subadults or spawning condition adults. We also consider whether the proposed action will affect water depth or water flow, as if water is too shallow it can be a barrier to sturgeon movements, and an alteration in water flow could similarly impact the movements of sturgeon in the river, particularly early life stages that are dependent on downstream drift. Therefore, we consider effects of the action on water depth and water flow and whether the action results in barriers to passage that impede the movements of Atlantic sturgeon.

Survey activities, including vessel transits, will have no effect on this feature as they will not have any effect on water depth or water flow and will not be physical barriers to passage for any life stage of Atlantic sturgeon that may occur in this portion of the action area. As explained above, noise associated with the geotechnical surveys is below the threshold that would be expected to result in any disturbance of sturgeon; therefore, noise associated with geotechnical surveys will not affect the habitat in any way that would affect the movement of Atlantic sturgeon. Similarly, while HRG surveys may affect the movement of individual sturgeon, the effects are short-term and transient; noise is not expected to result in a barrier to passage. Based on this analysis, any effects to PBF 3 will be insignificant.

PBF 4: Water with the temperature, salinity, and oxygen values that, combined, provide for DO values that support successful reproduction and recruitment and are within the temperature range that supports the habitat function

In considering effects to PBF 4, we consider whether the proposed action will have any effect on water, between the river mouth and spawning sites, especially in the bottom meter of the water column, with the temperature, salinity, and oxygen values that, combined, support: spawning; annual and interannual adult, subadult, larval, and juvenile survival; and larval, juvenile, and subadult growth, development, and recruitment. Therefore, we consider effects of the action on temperature, salinity and DO needs for Atlantic sturgeon spawning and recruitment. These water quality conditions are interactive and both temperature and salinity influence the DO saturation for a particular area. We also consider whether the action will have effects to access to this feature, temporarily or permanently and consider the effect of the action on the action area's ability to develop the feature over time. Survey activities, including vessel transit, will have no effect on this feature as they will not have any effect on temperature, salinity or dissolved oxygen.

Summary of effects to Atlantic sturgeon critical habitat
We have determined that the effects of the activities considered here will be insignificant on PBFs 1, 2, and 3, and will have no effects to PBF 4. As such, the activities considered here are not likely to adversely affect Atlantic sturgeon critical habitat designated for any of the five DPSs.

Critical Habitat Designated for the Northwest Atlantic Ocean DPS of Loggerhead Sea Turtles
Critical habitat for the Northwest Atlantic Ocean DPS of loggerhead sea turtles was designated in 2014 (79 FR 39855). Specific areas for designation include 38 occupied marine areas within the range of the Northwest Atlantic Ocean DPS. These areas contain one or a combination of habitat

types: Nearshore reproductive habitat, winter area, breeding areas, constricted migratory corridors, and/or *Sargassum* habitat. There is no critical habitat designated in the North Atlantic Renewable Energy Region. Winter, breeding, and migratory habitat occur in the Mid-Atlantic and South Atlantic regions of the action areas; there is also a small amount of overlap with *Sargassum* critical habitat on the outer edges of the action area near the 100-m isobaths. Geophysical and geotechnical surveys and met buoy deployment may take place within this critical habitat. As explained below, the activities considered in this programmatic consultation are not likely to adversely affect critical habitat designated for the Northwest Atlantic Ocean DPS of loggerheads.

Nearshore Reproductive
The PBF of nearshore reproductive habitat is described as a portion of the nearshore waters adjacent to nesting beaches that are used by hatchlings to egress to the open-water environment as well as by nesting females to transit between beach and open water during the nesting season. The occurrence of designated nearshore reproductive habitat in the action area is limited to the area between the beach to 1 mile offshore along the Atlantic coast from Cape Hatteras, North Carolina to the southern extent of the South Atlantic planning area along the Florida coast.

As described in the final rule, the primary constituent elements (PCE) that support this habitat are the following: (1) Nearshore waters directly off the highest density nesting beaches and their adjacent beaches as identified in 50 CFR 17.95(c) to 1.6 km (1 mile) offshore; (2) Waters sufficiently free of obstructions or artificial lighting to allow transit through the surf zone and outward toward open water; and, (3) Waters with minimal manmade structures that could promote predators (i.e., nearshore predator concentration caused by submerged and emergent offshore structures), disrupt wave patterns necessary for orientation, and/or create excessive longshore currents.

Met buoys will only be deployed in federal waters; therefore, no met buoys will be deployed in nearshore reproductive habitat. HRG and geotechnical surveys and associated vessel transits could occur in this nearshore habitat. The intermittent noise associated with these activities will not be an obstruction to turtles moving through the surf zone; this is because the noise that can be perceived by sea turtles would dissipate to non-disturbing levels within 90 m of the moving source (see further explanation above) and the area with potentially disturbing levels of noise would be limited to one area within 90 m of the source at any given time. Therefore, given the small geographic area affected by noise and that these effects will be temporary (experienced for no more than 2 minutes in any given area), the effects to habitat are insignificant. Any lighting associated with the surveys would be limited to lights on vessels in the ocean, this lighting would not disorient turtles the way that artificial lighting along land can. Additionally, there are no mechanisms by which the HRG and geotechnical surveys and vessel activities would promote predators or disrupt wave patterns necessary for orientation or create excessive longshore currents.

Winter
The PBF of winter habitat is described as warm water habitat south of Cape Hatteras, North Carolina near the western edge of the Gulf Stream used by a high concentration of juveniles and adults during the winter months. The one area of winter critical habitat identified in the final rule extends from Cape Hatteras at the 20 m depth contour straight across 35.27° N. lat. to the 100 m (328 ft.) depth contour, south to Cape Fear at the 20 m (66 ft.) depth contour (approximately

33.47° N. lat., 77.58° W. long.) extending in a diagonal line to the 100 m (328 ft.) depth contour (approximately 33.2° N. lat., 77.32° W. long.). This southern diagonal line (in lieu of a straight latitudinal line) was chosen to encompass the loggerhead concentration area (observed in satellite telemetry data) and identified habitat features, while excluding the less appropriate habitat (e.g., nearshore waters at 33.2° N. lat.). PCEs that support this habitat are the following: (1) Water temperatures above 10°C from November through April; (2) Continental shelf waters in proximity to the western boundary of the Gulf Stream; and, (3) Water depths between 20 and 100 m.

Met buoy deployment/operation, HRG and geotechnical surveys, and vessel transits that may occur within the designated winter habitat will have no effect on this habitat because they will not: affect or change water temperatures above 10° C from November through April; affect continental shelf waters in proximity to the western boundary of the Gulf Stream; or, affect or change water depths between 20 and 100 m.

Breeding

The PBFs of concentrated breeding habitat are sites with high densities of both male and female adult individuals during the breeding season. Two units of breeding critical habitat are identified in the final rule. One occurs in the action area – a concentrated breeding site located in the nearshore waters just south of Cape Canaveral, Florida. The PCEs that support this habitat are the following: (1) High densities of reproductive male and female loggerheads; (2) Proximity to primary Florida migratory corridor; and, (3) Proximity to Florida nesting grounds.

Met buoys, HRG and geotechnical surveys, and vessel transits will not affect the habitat in the breeding units in a way that would change the density of reproductive male or female loggerheads. This is because (as explained fully above), any effects to distribution of sea turtles will be limited to intermittent, temporary disturbance limited to avoidance of an area no more than 90m from the survey vessel. The impacts to habitat from temporary increases in noise will be so small that they will be insignificant.

Constricted Migratory Corridors

The PBF of constricted migratory habitat is high use migratory corridors that are constricted (limited in width) by land on one side and the edge of the continental shelf and Gulf Stream on the other side. The final rule describes two units of constricted migratory corridor habitat. The constricted migratory corridor off North Carolina serves as a concentrated migratory pathway for loggerheads transiting to neritic foraging areas in the north, and back to winter, foraging, and/or nesting areas in the south. The constricted migratory corridor in Florida stretches from the westernmost edge of the Marquesas Keys (82.17° W. long.) to the tip of Cape Canaveral (28.46° N. lat.) and partially overlaps with the action area (i.e., the designated habitat extends further south than the action area). PCEs that support this habitat are the following: (1) Constricted continental shelf area relative to nearby continental shelf waters that concentrate migratory pathways; and, (2) Passage conditions to allow for migration to and from nesting, breeding, and/or foraging areas.

Noise associated with the survey activities considered here will have minor and temporary effects on winter habitat; however, as explained fully above, any effects to sea turtles will be limited to intermittent, temporary disturbance or avoidance of an area no more than 90m from the survey vessel. These temporary and intermittent increases in underwater noise will have insignificant effects on the conditions of the habitat that will not result in any decreased ability or availability of habitat for passage of sea turtles. No other activities will affect passage of loggerhead sea turtles in the wintering habitat.

Sargassum
The PBF of loggerhead *Sargassum* habitat is developmental and foraging habitat for young loggerheads where surface waters form accumulations of floating material, especially *Sargassum*. Two areas are identified in the final rule – the Atlantic Ocean area and the Gulf of Mexico area. The Atlantic Ocean area extends from the Gulf of Mexico along the northern/western boundary of the Gulf Stream and east to the outer edge of the U.S. EEZ. There is a small amount of overlap between the action area and the Atlantic Ocean *Sargassum* critical habitat unit on the outer edges of the action area near the 100-m isobaths. PCEs that support this habitat are the following: (i) Convergence zones, surface-water downwelling areas, the margins of major boundary currents (Gulf Stream), and other locations where there are concentrated components of the *Sargassum* community in water temperatures suitable for the optimal growth of *Sargassum* and inhabitance of loggerheads; (ii) *Sargassum* in concentrations that support adequate prey abundance and cover; (iii) Available prey and other material associated with *Sargassum* habitat including, but not limited to, plants and cyanobacteria and animals native to the *Sargassum* community such as hydroids and copepods; and, (iv) Sufficient water depth and proximity to available currents to ensure offshore transport (out of the surf zone), and foraging and cover requirements by *Sargassum* for post-hatchling loggerheads, i.e., >10 m depth.

Given the distance from shore, met buoy deployment is not anticipated in areas designated as *Sargassum* critical habitat. The occasional project vessel transits, HRG and geotechnical surveys that may occur within the designated *Sargassum* habitat will have no effect on: conditions that result in convergence zones, surface-water downwelling areas, the margins of major boundary currents (Gulf Stream), and other locations where there are concentrated components of the *Sargassum* community in water temperatures suitable for the optimal growth of *Sargassum* and inhabitance of loggerheads; the concentration of *Sargassum*; the availability of prey within *Sargassum*; or the depth of water in any area. This is because these activities do not affect hydrological or oceanographic processes, no *Sargassum* will be removed due to survey activities, and the intermittent noise associated with surveys will not affect the availability of prey within *Sargassum*.

Summary of effects to critical habitat
Any effects to designated critical habitat will be insignificant. Therefore, the survey activities considered in this programmatic consultation are not likely to adversely affect critical habitat designated for the Northwest Atlantic DPS of loggerhead sea turtles.

Vessel Traffic
The HRG and geotechnical surveys are carried out from vessels. Additionally, vessels will be used to transport met buoys to and from deployment sites and to carry out any necessary inspections. As described in BOEM's BA, survey operations involve slow moving vessels, traveling at no more than 3-4.5 knots. HRG and geotechnical surveys typically involve one to three survey vessels operating within the area to be surveyed; up to approximately 36 areas may be surveyed over the 10-year period considered here. During transits to or from survey locations,

these vessels would travel at a maximum speed of around 12 knots. Met buoy deployment, retrieval, and inspection will also involve one or two vessels at a time; a total of 60 buoys are considered in this consultation. These vessels will typically travel at speeds of 12 knots or less; however, service vessels (limited to one trip per month per buoy) may travel at speeds of up to 25 knots (BOEM 2021).

Marine Mammals

As detailed in Appendix B, a number of Best Management Practices (BMPs) (see PDC 5), designed to reduce the risk of vessel strike, will be implemented for all activities covered by this programmatic consultation, including the following requirements:

1. All vessel operators and crews will maintain a vigilant watch for marine mammals at all times, and slow down or stop their vessel to avoid any interaction.
2. PSOs monitoring a Vessel Strike Avoidance Zone during all vessel operations.
3. Complying with speed restrictions in North Atlantic right whale management areas including Seasonal Management Areas (SMAs), active Dynamic Management Areas (DMAs)/visually triggered Slow Zones.
4. Daily monitoring of the NMFS North Atlantic right whale reporting systems.
5. Reducing vessel speeds to ≤10 knots when mother/calf pairs, pods, or large assemblages of ESA-listed marine mammals are observed.
6. Maintaining >500 m separation distance from all ESA-listed whales or an unidentified large marine mammal; if a whale is sighted within 200 m of the forward path of the vessel, then reducing speed and shifting the engines into neutral, and must not be engaged until the whale has move outside of the vessel's path and beyond 500 m.

An examination of all known ship strikes from all shipping sources (civilian and military) indicates vessel speed is a principal factor in whether a vessel strike results in death of a whale (Kelley et al. 2020; Knowlton and Kraus 2001; Laist et al., 2001; Jensen and Silber 2003; Vanderlaan and Taggart 2007). In assessing records with known vessel speeds, Laist et al. (2001) found a direct relationship between the occurrence of a whale strike and the speed of the vessel involved in the collision. The authors concluded that most deaths occurred when a vessel was traveling in excess of 24.1 km/h (14.9 mph; 13 knots (kn)). Additionally, Kelley et al (2020) found that collisions that create stresses in excess of 0.241 megapascals were likely to cause lethal injuries to large whales and through biophysical modeling that vessels of all sizes can yield stresses higher than this critical level. Survey vessels will typically travel slowly (less than 4.5 knots) as necessary for data acquisition, will have PSOs monitoring for whales, and will adjust vessel operations as necessary to avoid striking whales during survey operations and transits. The only times that survey vessels will operate at speeds above 4 knots is during transit to and from the survey site where they may travel at speeds up to 12 knots (although several circumstances described below will restrict speed to 10 knots), a number of measures (see PDC 5) will be in place to minimize the risk of strike during these transits. Slow operating speeds mean that vessel operators have more time to react and steer the vessel away from a whale. The use of dedicated PSOs to keep a constant watch for whales and to alert vessel operators of any sightings also allows vessel operators to avoid striking any sighted whales.

As noted above, vessels used to inspect and maintain met buoys may travel at speeds up to 25 knots. This vessel traffic will be an extremely small increase in the amount of vessel traffic in the action area (i.e., if 60 buoys are deployed this would be a maximum of 60 trips per month spread out along the entire Atlantic OCS), which is transited by thousands of vessels each day. These vessels are subject to all of the vessel related BMPs (see PDC 5) noted above, including use of a dedicated lookout, vessel strike avoidance procedures, and requirements to slow down to 10 knots in areas where North Atlantic right whales have been documented (i.e., within SMAs, DMAs/visually triggered Slow Zones). Based on this analysis, it is extremely unlikely that a vessel associated with the survey activities considered here, when added to the environmental baseline, will strike an ESA-listed whale. We note that similar activities have taken place since at least 2012 in association with BOEM's renewable energy program and there have been no reports of any vessel strikes of marine mammals.

The frequency range for vessel noise (10 to 1000 Hz; MMS 2007) overlaps with the generalized hearing range for sei, fin, and right whales (7 Hz to 35 kHz) and sperm whales (150 Hz to 160 kHz) and would therefore be audible. Vessels without ducted propeller thrusters would produce levels of noise of 150 to 170 dB re 1 μPa-1 meter at frequencies below 1,000 Hz, while the expected sound-source level for vessels with ducted propeller thrusters level is 177 dB (RMS) at 1 meter (BOEM 2015, Rudd et al. 2015). For ROVs, source levels may be as high as 160 dB (BOEM 2021). Given that the noise associated with the operation of project vessels is below the thresholds that could result in injury, no injury is expected.

Marine mammals may experience masking due to vessel noises. For example, right whales were observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks et al. 2007) as well as increasing the amplitude (intensity) of their calls (Parks et al. 2011a; Parks et al. 2009). Right whales also had their communication space reduced by up to 84 percent in the presence of vessels (Clark et al. 2009). Although humpback whales did not change the frequency or duration of their vocalizations in the presence of ship noise, their source levels were lower than expected, potentially indicating some signal masking (Dunlop 2016).

Vessel noise can potentially mask vocalizations and other biologically important sounds (e.g., sounds of prey or predators) that marine mammals may rely on. Potential masking can vary depending on the ambient noise level within the environment, the received level and frequency of the vessel noise, and the received level and frequency of the sound of biological interest. In the open ocean, ambient noise levels are between about 60 and 80 dB re 1 μPa in the band between 10 Hz and 10 kHz due to a combination of natural (e.g., wind) and anthropogenic sources (Urick 1983), while inshore noise levels, especially around busy ports, can exceed 120 dB re 1 μPa. When the noise level is above the sound of interest, and in a similar frequency band, masking could occur. This analysis assumes that any sound that is above ambient noise levels and within an animal's hearing range may potentially cause masking. However, the degree of masking increases with increasing noise levels; a noise that is just detectable over ambient levels is unlikely to cause any substantial masking.

Vessel noise has the potential to disturb marine mammals and elicit an alerting, avoidance, or other behavioral reaction. These reactions are anticipated to be short-term, likely lasting the amount of time the vessel and the whale are in close proximity (e.g., Magalhaes et al. 2002; Richardson et al. 1995; Watkins 1981), and not consequential to the animals. Additionally, short-term masking could occur. Masking by passing ships or other sound sources transiting the action area would be short term and intermittent, and therefore unlikely to result in any substantial costs or consequences to individual animals or populations. Areas with increased levels of ambient noise from anthropogenic noise sources such as areas around busy shipping lanes and near harbors and ports may cause sustained levels of masking for marine mammals, which could reduce an animal's ability to find prey, find mates, socialize, avoid predators, or navigate.

Based on the best available information, ESA-listed whales are either not likely to respond to vessel noise or are not likely to measurably respond in ways that would significantly disrupt normal behavior patterns that include, but are not limited to, breeding, feeding or sheltering. Therefore, the effects of vessel noise on ESA-listed whales are insignificant (i.e., so minor that the effect cannot be meaningfully evaluated or detected).

Sea Turtles

As detailed in Appendix B, a number of BMPs (see PDC 5), designed to reduce the risk of vessel strike, will be implemented for all activities covered by this programmatic consultation, including dedicated lookouts on board all transiting vessels, reduced speeds and avoidance of areas where sea turtles are likely to occur (e.g., Sargassum patches), and required separation distances from any observed sea turtles.

Sea turtles are vulnerable to vessel collisions because they regularly surface to breathe and often rest at or near the surface. Sea turtles often congregate close to shorelines during the breeding season, where boat traffic is denser (Schofield et al. 2007; Schofield et al. 2010) which can increase vulnerability to vessel strike in such areas, particularly by smaller, fast moving vessels. Sea turtles, with the exception of hatchlings and pre-recruitment juveniles, spend a majority of their time submerged (Renaud and Carpenter 1994; Sasso and Witzell 2006). Although, Hazel et al. (2007) demonstrated sea turtles preferred to stay within the three meters of the water's surface, despite deeper water being available. Any of the sea turtle species found in the action area can occur at or near the surface in open-ocean and coastal areas, whether resting, feeding or periodically surfacing to breathe.

While research is limited on the relationship between sea turtles, vessel strikes and vessel speeds, sea turtles are at risk of vessel strike where they co-occur with vessels. Sea turtle detection is likely based primarily on the animal's ability to see the oncoming vessel, which would provide less time to react to vessels traveling at speeds at or above 10 knots (Hazel et al. 2007). Hazel et al. (2007) examined vessel strike risk to green sea turtles and suggested that sea turtles may habituate to vessel sound and are more likely to respond to the sight of a vessel rather than the sound of a vessel, although both may play a role in eliciting responses (Hazel et al. 2007). Regardless of what specific stressor associated with vessels turtles are responding, they only appear to show responses (avoidance behavior) at approximately 10 m or closer (Hazel et al. 2007). This is a concern because faster vessel speeds also have the potential to result in more serious injuries (Work et al. 2010). Although sea turtles can move quickly, Hazel et al. (2007) concluded that at vessel speeds above 4 km/hour (2.1 knots) vessel operators cannot rely on turtles to actively avoid being struck. Thus, sea turtles are not considered reliably capable of moving out of the way of vessels moving at speeds greater than 2.1 knots.

While vessel struck sea turtles have been observed throughout their range, including in the action area, the regions of greatest concern for vessel strike are areas with high concentrations of recreational-boat traffic such as the eastern Florida coast, the Florida Keys, and the shallow coastal bays in the Gulf of Mexico (NRC 1990). In general, the risk of strike for sea turtles is considered to be greatest in areas with high densities of sea turtles and small, fast moving vessels such as recreational vessels or speed boats (NRC 1990). Similarly, Foley et al. (2019) concluded that in a study in Florida, vessel strike risk for sea turtles was highest at inlets and passes. Stetzar (2002) reports that 24 of 67 sea turtles stranded along the Atlantic Delaware coast from 1994-1999 had evidence of boat interactions (hull or propeller strike); however, it is unknown how many of these strikes occurred after the sea turtle died. There are no estimates of the total number of sea turtles struck by vessels in the Atlantic Ocean each year. Foley et al. (2019), estimated that strikes by motorized watercraft killed a mean of 1,326–4,334 sea turtles each year in Florida during 2000–2014 (considering the Atlantic and Gulf coasts of Florida). As described in NRC 1990, vessel strike risk for sea turtles in the Atlantic Ocean is highest in Florida.

The proposed survey activities will result in an increase in vessel traffic in the action area. Compared to baseline levels of vessel traffic in the action area (in its entirety and in any particular portion), the survey vessels, which will be likely two or three vessels operating in a particular survey area at a time (and spaced such that the sound fields of any noise producing equipment do not overlap), represent an extremely small fraction of total vessel traffic. For example, the U.S. Coast Guard's Atlantic Coast Port Access Route Study (ACPARS; USCG 2015), reports nearly 36,000 unique vessel transits through wind energy areas and lease areas along the Atlantic Coast. Those vessel transits represent only a fraction of the total coastal traffic as the wind energy areas and lease areas are located further offshore than most of the routes used by coastal tug traffic, for example. The U.S. Coast Guard's New Jersey PARS (USCG 2021) reports between 77,000 and 80,000 unique trips annual in the Atlantic Ocean off a portion of the coast of New Jersey in 2017-2019. This data is not wholly representative of all vessel traffic in this area as it only includes vessels carrying AIS systems, which is only required for vessels 65 feet in length or greater (although smaller vessels can utilize AIS and some do). Even if there were 3-boat surveys occurring in each of the four lease areas located in the New Jersey PARS study area, this would represent an increase of 12 vessels off New Jersey in a single year; this represents an approximately 0.01% increase in vessel traffic in that area. We expect that this increase is similar in other portions of the action area. If we assume that any increase in vessel traffic in the action area would increase the risk of vessel strike to sea turtles, then we could also assume that this would result in a corresponding increase in the number of sea turtles struck by vessels. However, it is unlikely that all vessels represent an equal increase in risk and the slow speeds (up to 4.5 knots) that the majority of vessels considered here will typically be moving, requirements to monitor for sea turtles during vessel transits, avoid or slowdown in areas where sea turtles are likely to occur, and to maintain distance from any sighted turtles, means that the risk to sea turtles from the survey vessels is considerably less than other vessels, particularly small, fast vessels operating in nearshore areas where sea turtle densities are high.

An analysis conducted by NMFS Southeast Regional Office (Barnette 2018) considered sea turtle vessel strike risk in Florida; the portion of the action area where risk is considered highest due to the concentration of sea turtles and vessels. Barnette (2018) concluded that, when using the conservative mean estimate of a sea turtle strike every 193 years (range of 135-250 years) per vessel, it would require approximately 200 new vessels introduced to an area to potentially result in a single sea turtle strike in any single year. Considering that the proposed action will introduce significantly fewer vessels in any particular area and that survey vessels will increase vessel traffic in the action area by less than 0.01%, and the measures that will be in place to reduce risk of vessel strike, as well as the slow speed of the survey vessels, we conclude that any increase in the number of sea turtles struck in the action area because of the increase in traffic resulting from survey vessels added to the environmental baseline is extremely unlikely. Therefore, effects of this increase in traffic are extremely unlikely.

The vessels used for the proposed project will produce low-frequency, broadband underwater sound below 1 kHz (for larger vessels), and higher-frequency sound between 1 kHz to 50 kHz (for smaller vessels), although the exact level of sound produced varies by vessel type.

ESA-listed turtles could be exposed to a range of vessel noises within their hearing abilities. Depending on the context of exposure, potential responses of green, Kemp's ridley, leatherback, and loggerhead sea turtles to vessel noise disturbance, would include startle responses, avoidance, or other behavioral reactions, and physiological stress responses. Very little research exists on sea turtle responses to vessel noise disturbance. Currently, there is nothing in the available literature specifically aimed at studying and quantifying sea turtle response to vessel noise. However, a study examining vessel strike risk to green sea turtles suggested that sea turtles may habituate to vessel sound and may be more likely to respond to the sight of a vessel rather than the sound of a vessel, although both may play a role in prompting reactions (Hazel et al. 2007). Regardless of the specific stressor associated with vessels to which turtles are responding, they only appear to show responses (avoidance behavior) at approximately 10 m or closer (Hazel et al. 2007).

Therefore, the noise from vessels is not likely to affect sea turtles from further distances, and disturbance may only occur if a sea turtle hears a vessel nearby or sees it as it approaches. These responses appear limited to non-injurious, minor changes in behavior based on the limited information available on sea turtle response to vessel noise.

For these reasons, vessel noise is expected to cause minimal disturbance to sea turtles. If a sea turtle detects a vessel and avoids it or has a stress response from the noise disturbance, these responses are expected to be temporary and only endure while the vessel transits through the area where the sea turtle encountered it. Therefore, sea turtle responses to vessel noise disturbance are considered insignificant (i.e., so minor that the effect cannot be meaningfully evaluated), and a sea turtle would be expected to return to normal behaviors and stress levels shortly after the vessel passes by.

Marine Fish

The only listed fish in the action area that are known to be at risk of vessel strike are shortnose and Atlantic sturgeon and giant manta ray. Vessel activities will have no effect on Atlantic salmon or smalltooth sawfish. There is no information to indicate that Atlantic salmon are struck by vessels; therefore, we have concluded that strike is extremely unlikely to occur. A vessel strike to smalltooth sawfish is extremely unlikely; smalltooth sawfish are primarily demersal and rarely would be at risk from moving vessels. PDC 5 requires vessels to maintain sufficient clearance above the bottom and to reduce speeds to 5 knots or less in waters with less than 4 feet of clearance. These conditions, combined with the low likelihood of vessels operating in nearshore coastal waters of Florida where sawfish occur, is expected to eliminate risk of vessel strikes with smalltooth sawfish.

Giant Manta Ray
Giant manta rays can be frequently observed traveling just below the surface and will often approach or show little fear toward humans or vessels (Coles 1916), which may also make them vulnerable to vessel strikes (Deakos 2010); vessel strikes can injure or kill giant manta rays, decreasing fitness or contributing to non-natural mortality (Couturier et al. 2012; Deakos et al. 2011). However, information about interactions between vessels and giant manta rays is limited. We have at least some reports of vessel strike, including a report of five giant manta rays struck by vessels from 2016 through 2018; individuals had injuries (i.e., fresh or healed dorsal surface propeller scars) consistent with a vessel strike. These interactions were observed by researchers conducting surveys from Boynton Beach to Jupiter, Florida (J. Pate, Florida Manta Project, pers. comm. to M. Miller, NMFS OPR, 2018) and it is unknown where the manta was at the time of the vessel strike. The giant manta ray is frequently observed in nearshore coastal waters and feeding at inlets along the east coast of Florida. As recreational vessel traffic is concentrated in and around inlets and nearshore waters, this overlap exposes the giant manta ray in these locations to an increased likelihood of potential vessel strike injury especially from faster moving recreational vessels. Yet, few instances of confirmed or suspected strandings of giant manta rays are attributed to vessel strike injury. This lack of documented mortalities could also be the result of other factors that influence carcass detection (i.e., wind, currents, scavenging, decomposition etc.); however, giant manta rays appear to be able to be fast and agile enough to avoid most moving vessels, as anecdotally evidenced by videos showing rays avoiding interactions with high-speed vessels.

While there is limited available information on the giant manta ray, we expect the circumstances and factors resulting in vessel strike injury are similar between sea turtles and the giant manta ray because these species are both found in nearshore waters (including in the vicinity of inlets where vessel traffic may also be concentrated) and may spend significant time at or near the surface. Therefore, consistent with Barnette 2018, we will rely on the more robust available data on sea turtle vessel strike injury to serve as a proxy for the giant manta ray. Because the activities considered here will result in far fewer than 200 new vessels, it is extremely unlikely that any giant manta rays will be struck by new or increased vessel traffic.

Sturgeon
Here, we consider whether the increase in vessel traffic is likely to increase the risk of strike for Atlantic or shortnose sturgeon in any part of the action area. Because the increase in traffic will be limited to no more than two or three survey vessels operating in an area being surveyed at one time, the increase in vessel traffic in any portion of the action area, as well as the action area as a whole, will be extremely small.

We do not expect shortnose sturgeon to occur along the survey routes in the Atlantic Ocean because coastal migrations are extremely rare. However, Atlantic sturgeon are present in this part of the action area. Both shortnose and Atlantic sturgeon may occur in nearshore waters and rivers and bays that may be surveyed for potential cable corridors and/or may be used for survey vessel transits to or from ports.

While we know that vessels and sturgeon co-occur in many portions of their range, we have no reports of vessel strikes outside of rivers and coastal bays. The risk of strike is expected to be considerably less in the Atlantic Ocean than in rivers. This is because of the greater water depth, lack of obstructions or constrictions and the more disperse nature of vessel traffic and more disperse distribution of individual sturgeon. All of these factors are expected to decrease the likelihood of an encounter between an individual sturgeon and a vessel and also increase the likelihood that a sturgeon would be able to avoid any vessel. While we cannot quantify the risk of vessel strike in the portions of the Atlantic Ocean that overlap with the action area, we expect the risk to be considerably lower than it is within the Delaware River, which is considered one of the areas with the highest risk of vessel strike for Atlantic sturgeon.

As evidenced by reports and collections of Atlantic and shortnose sturgeon with injuries consistent with vessel strike (NMFS unpublished data[8]), both species are struck and killed by vessels in the Delaware River. Brown and Murphy (2010) reported that from 2005-2008, 28 Atlantic sturgeon carcasses were collected in the Delaware River; approximately 50% showed signs of vessel interactions. Delaware Division of Fish and Wildlife has been recording information on suspected vessel strikes since 2005. From May 2005 – March 2016, they recorded a total of 164 carcasses, 44 of which were presumed to have a cause of death attributable to vessel interaction. Estimates indicate that up to 25 Atlantic sturgeon may be struck and killed in the Delaware River annually (Fox, unpublished 2016). Information on the number of shortnose sturgeon struck and killed by vessels in the Delaware River is currently limited to reports provided to NMFS through our sturgeon salvage permit. A review of the database indicates that of the 53 records of salvaged shortnose sturgeon (2008-2016), 11 were detected in the Delaware River. Of these 11, 6 had injuries consistent with vessel strike. This is considerably less than the number of records of Atlantic sturgeon from the Delaware River with injuries consistent with vessel strike (15 out of 33 over the same time period). Based on this, we assume that more Atlantic sturgeon are struck by vessels in the Delaware River than shortnose sturgeon.

Several major ports are present along the Delaware River. In 2014, there were 42,398 one-way trips reported for commercial vessels in the Delaware River Federal navigation channel (USACE 2014). In 2020, 2,195 cargo ships visited Delaware River ports[9]. Neither of these numbers include any recreational or other non-commercial vessels, ferries, tug boats assisting other larger vessels or any Department of Defense vessels (i.e., Navy, USCG, etc.).

If we assume that any increase in vessel traffic in the Delaware River would increase the risk of vessel strike to shortnose or Atlantic sturgeon, then we could also assume that this would result in

[8] The unpublished data are reports received by NMFS and recorded as part of the sturgeon salvage program authorized under ESA permit 17273.

[9] *https://ajot.com/news/maritime-exchange-reports-2020-ship-arrivals*; last accessed March 24, 2021

a corresponding increase in the number of sturgeon struck and killed in the Delaware River. However, it is unlikely that all vessels represent an equal increase in risk, the slow speeds (4.5 knots) and shallower drafts of the survey vessels may mean that the risk to sturgeon is not as greater as faster moving deep draft cargo or tanker vessels as sturgeon may be able to more readily avoid the survey vessels and may not even overlap in the same part of the water column. The survey activities considered here will involve up to three slow-moving (up to 4.5 knots) vessels operating in a similar area. Sets of survey vessels will be dispersed along the coast and not co-occur in time or space. Even if there were four surveys in a year that transited the Delaware River (equivalent to the number of BOEM leases that are proximal to the entrance of Delaware Bay), that would be an increase of 12 vessels annually. Considering only the number of commercial one way trips in a representative year (42,398), an increase of 12 vessels operating in the Delaware River represents an approximately 0.03% increase in vessel traffic in the Delaware River navigation channel in a particular year. The actual percent increase in vessel traffic is likely even less considering that commercial traffic is only a portion of the vessel traffic in the river. Even in a worst-case scenario that assumes that all 25 Atlantic sturgeon struck and killed in the Delaware River in an average year occurred in the portion of the Delaware River that will be transited by the survey vessels, and that any increase in vessel traffic results in a proportionate increase in vessel strikes, this increase in vessel traffic would result in a hypothetical additional 0.0075 Atlantic sturgeon struck and killed in the Delaware River in a given year. Assuming a maximum case that four, 3-boat surveys transit the Delaware River every year for the 10 years considered here, that would result in a hypothetical additional 0.075 Atlantic sturgeon struck and killed in the Delaware River. Because we expect fewer strikes of shortnose sturgeon, the hypothetical increase in the number of struck shortnose sturgeon would be even less. Given this very small increase in traffic and the similar very small potential increase in risk of strike and a calculated potential increase in the number of strikes that is very close to zero, we conclude that any increase in the number of sturgeon struck because of the increase in traffic resulting from survey vessels operating in the Delaware River or Delaware Bay is extremely unlikely. BOEM has indicated that survey vessels may also transit the lower Chesapeake Bay and New York Bight/lower Hudson River. The risk of vessel strike in these areas is considered to be lower than in the Delaware River; thus, any prediction of vessel strike for the Delaware River can be considered a conservative estimate of vessel strike risk in other areas. Even applying this hypothetical increased risk for all three areas, we would estimate that a hypothetical additional 0.2 Atlantic sturgeon would be killed coast-wide over a 10-year period. As noted above, this is likely an overestimate given the slower speed of survey vessels compared to other vessels which is anticipated to reduce risk. Based on this analysis, effects of this increase in traffic are extremely unlikely. In addition, given the very small increase in risk and the calculated increase in strikes is close to zero, the effect of adding the survey vessels to the baseline cannot be meaningfully measured, detected, or evaluated; therefore, effects are also insignificant.

Vessel Noise

The vessels used for the proposed project will produce low-frequency, broadband underwater sound below 1 kHz (for larger vessels), and higher-frequency sound between 1 kHz to 50 kHz (for smaller vessels), although the exact level of sound produced varies by vessel type. In general, information regarding the effects of vessel noise on fish hearing and behaviors is limited. Some TTS has been observed in fishes exposed to elevated background noise and other white noise, a continuous sound source similar to noise produced from vessels. Caged studies on sound pressure sensitive fishes show some TTS after several days or weeks of exposure to increased background sounds, although the hearing loss appeared to recover (e.g., Scholik and Yan 2002; Smith et al. 2006; Smith et al. 2004a). Smith et al. (2004b) and Smith et al. (2006) exposed goldfish (a fish with hearing specializations, unlike any of the ESA-listed species considered in this opinion) to noise with a sound pressure level of 170 dB re 1 μPa and found a clear relationship between the amount of TTS and duration of exposure, until maximum hearing loss occurred at about 24 hours of exposure. A short duration (e.g., 10-minute) exposure resulted in 5 dB of TTS, whereas a three-week exposure resulted in a 28 dB TTS that took over two weeks to return to pre-exposure baseline levels (Smith et al. 2004b). Recovery times were not measured by researchers for shorter exposure durations, so recovery time for lower levels of TTS was not documented.

Vessel noise may also affect fish behavior by causing them to startle, swim away from an occupied area, change swimming direction and speed, or alter schooling behavior (Engas et al. 1998; Engas et al. 1995; Mitson and Knudsen 2003). Physiological responses have also been documented for fish exposed to increased boat noise. Nichols et al. (2015) demonstrated physiological effects of increased noise (playback of boat noise) on coastal giant kelpfish. The fish exhibited acute stress responses when exposed to intermittent noise, but not to continuous noise. These results indicate variability in the acoustic environment may be more important than the period of noise exposure for inducing stress in fishes. However, other studies have also shown exposure to continuous or chronic vessel noise may elicit stress responses indicated by increased cortisol levels (Scholik and Yan 2001; Wysocki et al. 2006). These experiments demonstrate physiological and behavioral responses to various boat noises that have the potential to affect species' fitness and survival, but may also be influenced by the context and duration of exposure. It is important to note that most of these exposures were continuous, not intermittent, and the fish were unable to avoid the sound source for the duration of the experiment because this was a controlled study. In contrast, wild fish are not hindered from movement away from an irritating sound source, if detected, so are less likely to subjected to accumulation periods that lead to the onset of hearing damage as indicated in these studies. In other cases, fish may eventually become habituated to the changes in their soundscape and adjust to the ambient and background noises.

All fish species can detect vessel noise due to its low-frequency content and their hearing capabilities. Because of the characteristics of vessel noise, sound produced from vessels is unlikely to result in direct injury, hearing impairment, or other trauma to ESA-listed fish. Plus, in the near field, fish are able to detect water motion as well as visually locate an oncoming vessel. In these cases, most fishes located in close proximity that detect the vessel either visually, via sound and motion in the water would be capable of avoiding the vessel or move away from the area affected by vessel sound. Thus, fish are more likely to react to vessel noise at close range than to vessel noise emanating from a greater distance away. These reactions may include physiological stress responses, or avoidance behaviors. Auditory masking due to vessel noise can potentially mask biologically important sounds that fish may rely on. However, impacts from vessel noise would be intermittent, temporary, and localized, and such responses would not be expected to compromise the general health or condition of individual fish from continuous exposures. Instead, the only impacts expected from exposure to project vessel noise for Atlantic sturgeon may include temporary auditory masking, physiological stress, or minor changes in behavior.

Therefore, similar to marine mammals and sea turtles, exposure to vessel noise for fishes could result in short-term behavioral or physiological responses (e.g., avoidance, stress). Vessel noise would only result in brief periods of exposure for fishes and would not be expected to accumulate to the levels that would lead to any injury, hearing impairment or long-term masking of biologically relevant cues. For these reasons, any effects of vessel noise on ESA-listed fish is considered insignificant (i.e., so minor that the effect cannot be meaningfully measured, detected, or evaluated).

Consideration of Effects of the Actions on Air Quality

In order to issue an OCS Air Permit for an activity considered in this consultation, EPA must conclude that the activity will not cause or contribute to a violation of applicable national ambient air quality standards (NAAQS) or prevention of significant deterioration (PSD) increments. The NAAQS are health-based standards that the EPA sets to protect public health with an adequate margin of safety. The PSD increments are designed to ensure that air quality in an area that meets the NAAQS does not significantly deteriorate from baseline levels. At this time, there is no information on the effects of air quality on listed species that may occur in the action area. However, as the PSD increments are designed to ensure that air quality in the area regulated by any OCS Air Permit do not significantly deteriorate from baseline levels, we conclude that any effects to listed species from these emissions will be so small that they cannot be meaningfully measured, detected, or evaluated and therefore are insignificant.

CONCLUSIONS

As explained above, we have determined that the actions considered here are not likely to adversely affect any ESA-listed species or critical habitat. The requirements for reviewing survey activities as they are developed will ensure that surveys carried out under this programmatic consultation do not have effects that exceed those considered here.

Reinitiation of consultation is required and shall be requested by BOEM or by NMFS where discretionary federal involvement or control over the action has been retained or is authorized by law and "(a) If the amount or extent of taking specified in the incidental take statement is exceeded; (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (d) If a new species is listed or critical habitat designated that may be affected by the identified action." For the activities considered here, no take is anticipated or exempted; take is defined in the ESA as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct." If there is any incidental take of a listed species, reinitiation would be required. As required by the PDCs outlined in Appendix B, all observations of dead or injured listed species should be reported to us immediately.

Should you have any questions regarding this consultation, please contact Julie Crocker of my staff at (978) 282-8480 or by e-mail (*Julie.Crocker@noaa.gov*).

Sincerely,

Jennifer Anderson

Jennifer Anderson
Assistant Regional Administrator
for Protected Resources

ec: Hooker, Baker - BOEM
Burns - GARFO HSED
Bernhart - SERO
Harrison, Daly, Carduner - OPR
DOE
EPA
USACE

File Code: Sec 7 BOEM OSW site assessment programmatic (2021)
ECO ID: GARFO-2021-0999

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Appendix A – Tables and Figures

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Figure 1. Action Area for this programmatic consultation.

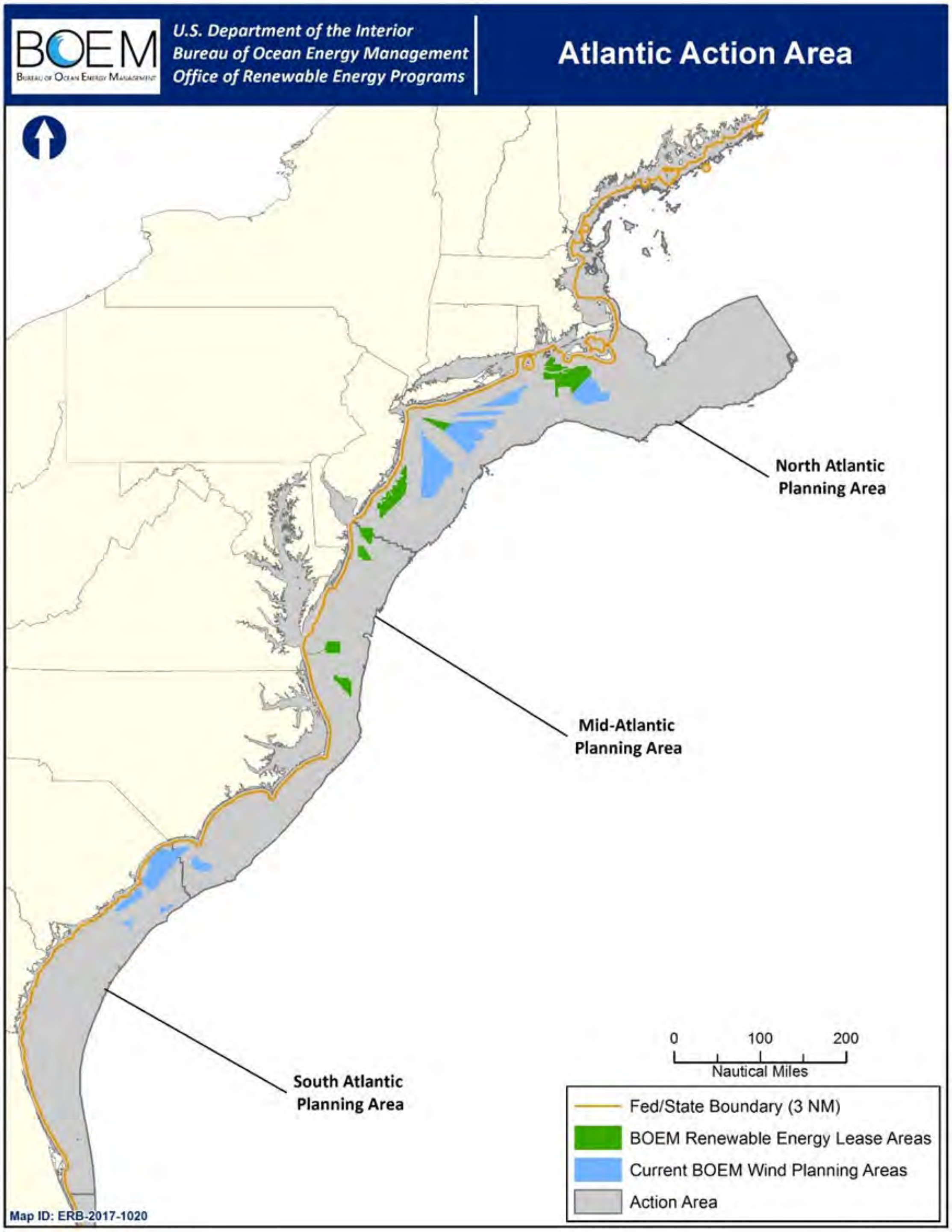

Table A.1 Description of Representative HRG Survey Equipment and Methods

Equipment Type	Data Collection and/or Survey Types	Description of the Equipment
Acoustic Corer^{TM} (https://www.pangeosubsea.com/acoustic-corer/)	Stationary acoustic source deployed on the seafloor with low and mid frequency chirp sonars to detect shallow (15 m to 40 m) subsea hazards such as boulders, cavities, and abandoned infrastructure by generating a 3D, 12-m diameter "acoustic core" to full penetration depth (inset above).	A seabed deployed unit with dual subsurface scanning sonar heads attached to a 12-m boom. The system is set on a tripod on the seafloor. Each arm rotates 180 degrees to cover a full 360 degrees. Chirp sonars of different frequencies can be attached to each arm providing for multi-aspect depth resolution. Acoustic cores supplement geophysical surveys such as bore holes and Cone Penetration Testing.
Bathymetry/ multi-beam echosounder	Bathymetric charting	A depth sounder is a microprocessor-controlled, high-resolution survey-grade system that measures precise water depths in both digital and graphic formats. The system would be used in such a manner as to record with a sweep appropriate to the range of water depths expected in the survey area.
Magnetometer	Collection of geophysical data for shallow hazards and archaeological resources assessments	Surveys would be used to detect and aid in the identification of ferrous or other objects having a distinct magnetic signature. A sensor is typically towed as near as possible to the seafloor and anticipated to be no more than approximately 20 ft. (6 m) above the seafloor.
Shallow and Medium (Seismic) Penetration Profilers (i.e. Chirps, Sparkers, Boomers, Bubble Guns)	Collection of geophysical data for shallow hazards and archaeological resources assessments and to characterize subsurface sediments	High-resolution CHIRP System sub-bottom profiler or boomers are used to generate a profile view below the bottom of the seabed, which is interpreted to develop a geologic cross-section of subsurface sediment conditions under the track line surveyed. Another type of sub-bottom profiler that may be employed is a medium penetration system such as a boomer, bubble pulser or impulse-type system. Sub-bottom profilers are capable of penetrating sediment depth ranges of 10 ft. (3 m) to greater than 328 ft. (100 m), depending on frequency and bottom composition.
Side-Scan Sonar	Collection of geophysical data for shallow hazards and archaeological resources assessments	This survey evaluates surface and near-surface sediments, seafloor morphology, and potential surface obstructions (MMS, 2007a). A typical side-scan sonar system consists of a top-side processor, tow cable, and towfish with transducers (or "pingers") located on the sides. Typically, a lessee would use a digital dual-frequency side-scan sonar system with 300 to 500 kHz frequency ranges or greater to record continuous planimetric images of the seafloor.

Table A.2. Acoustic Characteristics of Representative HRG Survey Equipment. Note list of equipment is representative and surveys may use similar equipment and actual source levels may be below those indicated.

	Highest Measured Source Level (Highest Power Setting)						
HRG Source	**Source Setting**	**PK**	**RMS**	**SEL**	**Pulse Width (s)**	**Main Pulse Frequency (kHz)**	**Inter-Pulse Interval (s) (1/PPS)**
Mobile, Impulsive, Intermittent Sources							
AA200 Boomer Plate	250 J (low)	209	200	169	0.0008	4.3	1.0 (1 pps)
AA251 Boomer Plate	300 J (high)	216	207	176	0.0007	4.3	1.0 (1 pps)
Applied Acoustic Delta Sparker	2400 J at 1 m depth, 0.5 kHz	221	205	185	0.0095	0.5	.33333 (1-3 pps)
Applied Acoustic Dura-Spark	2400 J (high), 400 tips	225	214	188	0.0022	2.7	.33333 (1-3 pps)
Applied Acoustics S-Boom (3 AA252 boomer plates)	700 J	211	205	172	0.0006	6.2	1.0 (1 pps)
Applied Acoustics S-Boom (CSP-N Source)	1000 J	209	203	172	0.0009	3.8	.33333 (3 pps)
ELC820 Sparker	750 J (high) 1m depth	214	206	182	0.0039	1.2	1.0 (1 pps)
FSI HMS-620D Bubble Gun	Dual Channel 86 cm	204	198	173	0.0033	1.1	8.0 (1 per 8 s)
Mobile, Non-Impulsive, Intermittent Sources							
Bathyswath SWATHplus-M	100%, 234 kHz	223	218	180	0.00032	≥200 kHz	0.2000 pps (unknown)
Echotrac CV100 Single-Beam Echosounder	Power 12, 80 cycles, 200 kHz	196	193	159	0.00036	≥200 kHz	0.0500 (20 pps)
EdgeTech 424 with 3200-XS topside processor (Chirp)	100% power, 4-20 kHz	187	180	156	0.0046	7.2-11	.12500 (8 pps)

EdgeTech 512i Sub-bottom Profiler, 8.9 kHz (Chirp)	100% power, 2-12 kHz	186	180	159	0.0087	6.3-8.9	.12500 (8 pps)
EdgeTech 4200 Side-Scan	100%, 100 kHz (also a 400 kHz setting)	206	201	179	0.0072	100 kHz	.03333 (30 pps)
Klein 3000 Side-Scan	132 kHz (also capable of 445 kHz)	224	219	184	0.000343	132 kHz	.03333 (30 pps)
Klein 3900 Side-Scan	445 kHz	226	220	179	0.000084	≥200 kHz	unreported
Knudsen 3202 Sub-bottom Profiler (2 transducers), 5.7 kHz	Power 4	214	209	193	0.0217	3.3-5.7	0.25000 (4 pps)
Reson Seabat 7111 Multibeam Echosounder	100 kHz	228	224	185	0.00015	100 kHz	0.0500 (20 pps)
Reson Seabat T20P Multibeam Echosounder	200, 300, or 400 kHz	221	218	182	0.00025	≥200 kHz	0.0200 (50 pps)

Source: Highest reported source levels reported in Crocker and Fratantonio (2016).

Table 1. Predicted isopleths for peak pressure (using 20 LogR) and cSEL using NOAA's general spreadsheet tool (December 2020 Revision) to predict cumulative exposure distances using the highest power levels were used for each sound source reported in Crocker and Fratantonio (2016).

HRG SOURCE	**PTS INJURY DISTANCE (m)**							
	Low Frequency Cetaceans		**Mid Frequency Cetaceans**		**High Frequency Cetaceans**		**Seals (Phocids)**	
	PK	**SEL**	**PK**	**SEL**	**PK**	**SEL**	**PK**	**SEL**
AA200 Boomer Plate	0	0.1	0	0	2.2	0.9	0	0.0
AA251 Boomer Plate	0	0.3	0	0	5.0	4.7	0.0	0.2
Applied Acoustics S-Boom (3 AA252 boomer plates)	0	0.1	0	0.0	2.8	5.6	0	0.1
Applied Acoustics S-Boom (CSP-N Source)	0	0.3	0	0	2.2	3.7	0	0.2
FSI HMS-620D Bubble Gun (impulsive)	0	0	0	0	1.3	0	0	0
ELC820 Sparker (impulsive)	0	3.2	0	0	4.0	0.7	0.0	0.7

HRG SOURCE	PTS INJURY DISTANCE (m)							
	Low Frequency Cetaceans		Mid Frequency Cetaceans		High Frequency Cetaceans		Seals (Phocids)	
	PK	SEL	PK	SEL	PK	SEL	PK	SEL
Applied Acoustics Dura-Spark (impulsive)	2.0	12.7	0	0.2	14.1	47.3	2.2	6.4
Applied Acoustics Delta Sparker (impulsive)	1.3	5.7	0	0	8.9	0.1	1.4	0.3
EdgeTech 424 Sub-bottom profiler 3200-XS, 7.2 kHz	—	0	—	0	—	0.0	—	0
EdgeTech 512i Sub-bottom Profiler, 6.39 kHz	—	0	—	0	—	0.0	—	0
Knudsen 3202 Chirp Sub-bottom profiler (2 transducers), 5.7 kHz	—	1.2	—	0.3	—	35.2	—	<1
Reson Seabat 7111 Multibeam Echosounder,100 kHz	—	0	—	0.5	—	251.4	—	0.0
Reson Seabat T20P Multibeam Echosounder	—	0	—	0	—	0	—	0
Bathyswath SWATHplus-M	—	0	—	0	—	0	—	0
Echotrac CV100 Single-Beam Echosounder	—	0	—	0	—	0	—	0
Klein 3000 Side-Scan, 132 kHz	—	0	—	0.4	—	193.6	—	0.0
Klein 3000 Side-Scan, 445 kHz	—	0	—	0	—	0	—	0
Klein 3900 Side-Scan, 445 kHz	—	0	—	0	—	0	—	0

Table A.4. PTS distance for sea turtles and listed fish for impulsive HRG sound sources (60 minutes duration using the highest power levels were used for each sound source reported in Crocker and Fratantonio (2016)).

HRG SOURCE		Sea Turtles*, ESA-listed Fish			
		PTS INJURY DISTANCE (m) for Impulsive HRG Sources			
	SEL Source level	Fish cSEL[a] Distance to 187 dB (m)	Turtle cSEL[a] Distance (m)	Peak Source Level	Fish Peak Distance to 206 dB (m)
AA200 Boomer Plate	169	0	0	209	1.4
AA251 Boomer Plate	176	0	0	216	3.2
Applied Acoustics S-Boom (3 AA252 boomer plates)	172	0	0	211	2.5
Applied Acoustics S-Boom (CSP-N Source)	172	0	0	209	1.4
FSI HMS-620D Bubble Gun (impulsive)	173	0	0	204	0
ELC820 Sparker (impulsive)	182	0	0	214	4.0

HRG SOURCE		Sea Turtles*, ESA-listed Fish			
		PTS INJURY DISTANCE (m) for Impulsive HRG Sources			
	SEL Source level	Fish cSEL[a] Distance to 187 dB (m)	Turtle cSEL[a] Distance (m)	Peak Source Level	Fish Peak Distance to 206 dB (m)
Applied Acoustics Dura-Spark (impulsive)	188	1.6	0	225	9.0
Applied Acoustics Delta Sparker (impulsive)	185	1.1	0	221	5.7
EdgeTech 424 Sub-bottom profiler 3200-XS, 7.2 kHz	156	NA	NA	187	NA
EdgeTech 512i Sub-bottom Profiler, 8.9 kHz	159	NA	NA	186	NA
Knudsen 3202 Chirp Sub-bottom profiler (2 transducers), 5.7 kHz	193	NA	NA	214	NA
Reson Seabat 7111 Multibeam Echosounder,100 kHz	185	NA	NA	228	NA
Reson Seabat T20P Multibeam Echosounder	182	NA	NA	221	NA
Bathyswath SWATHplus-M	180	NA	NA	223	NA
Echotrac CV100 Single-Beam Echosounder	159	NA	NA	196	NA
Klein 3000 Side-Scan, 132 kHz	184	NA	NA	224	NA
Klein 3000 Side-Scan, 445 kHz	179	NA	NA	226	NA
EdgeTech 4200 Side-Scan, 100 kHz	169	NA	NA	206	NA
EdgeTech 4200 Side-Scan, 400 kHz	176	NA	NA	210	NA

[a] = cSEL distances were calculated by 20 log(Source Level + 10 log(1800 sec) – Threshold Level)

NA = Frequencies are out of the hearing range of the sea turtles, sturgeon, and salmon

*Sea Turtle peak pressure distances for all HRG sources are below the threshold level of 232dB.

Table A.5. Disturbances distances for marine mammals (160 dB RMS), sea turtles (175 dB RMS), and fish (150 dB RMS) using 20LogR spherical spreading loss using the highest power levels were used for each sound source reported in Crocker and Fratantonio (2016).

HRG SOURCE	DISTANCE OF POTENTIAL DISTURBANCE (m)*		
	Marine Mammals	Sea Turtles	Fish
AA200 Boomer Plate	100	18	317
AA251 Boomer Plate	224	40	708
Applied Acoustics S-Boom (3 AA252 boomer plates)	178	32	563
Applied Acoustics S-Boom (CSP-N Source)	142	26	447

FSI HMS-620D Bubble Gun	80	15	252
ELC820 Sparker	200	36	631
Applied Acoustics Dura-Spark	502	90	1,996
Applied Acoustics Delta Sparker	178	32	563
EdgeTech 424 Sub-bottom Profiler, 7.2 and 11 kHz	10	2	32
EdgeTech 512i Sub-bottom Profiler	10	2	32
Knudsen 3202 Echosounder (2 transducers)	892	NA	NA
Reson Seabat 7111 Multibeam Echosounder[1]	NA	NA	NA
Reson Seabat T20P Multibeam Echosounder[1]	NA	NA	NA
Bathyswath SWATHplus-M	NA	NA	NA
Echotrac CV100 Single-Beam Echosounder[1]	NA	NA	NA
Klein 3000 Side-Scan, 132 kHz	NA	NA	NA
Klein 3000 Side-Scan, 445 kHz	NA	NA	NA
Klein 3900 Side-scan, 445 kHz	NA	NA	NA
EdgeTech 4200 Side-Scan, 100 kHz	NA	NA	NA
EdgeTech 4200 Side-Scan, 400 kHz	NA	NA	NA

NA = Not Audible
[1] These multi-beam echosounder and side-scan sonars are only audible to mid- and high-frequency hearing groups of marine mammals.
* Disturbance distances have been round up to the next nearest whole number.

Revision 1. September 2021.

APPENDIX B

Project Design Criteria (PDC) and Best Management Practices (BMPs) for Threatened and Endangered Species for Site Characterization and Site Assessment Activities to Support Offshore Wind Projects

Any survey plan must meet the following minimum requirements specified below, except when complying with these requirements would put the safety of the vessel or crew at risk.

PDC 1: Avoid Live Bottom Features

BMPs:

1. All vessel anchoring and any seafloor-sampling activities (i.e., drilling or boring for geotechnical surveys) are restricted from seafloor areas with consolidated seabed features.[1] All vessel anchoring and seafloor sampling must also occur at least 150 m from any known locations of threatened or endangered coral species. All sensitive live bottom habitats (eelgrass, cold-water corals, etc.) should be avoided as practicable. All vessels in coastal waters will operate in a manner to minimize propeller wash and seafloor disturbance and transiting vessels should follow deep-water routes (e.g., marked channels), as practicable, to reduce disturbance to sturgeon and sawfish habitat.

PDC 2: Avoid Activities that Could Affect Early Life Stages of Atlantic Sturgeon

BMP:

1. No geotechnical or bottom disturbing activities will take place during the spawning/rearing season within freshwater reaches of rivers where Atlantic or shortnose sturgeon spawning occurs. Any survey plan that includes geotechnical or other benthic sampling activities in freshwater reaches (salinity 0-0.5 ppt) of such rivers will identify a time of year restriction that will avoid such activities during the time of year when Atlantic sturgeon spawning and rearing of early life stages occurs in that river. Appropriate time of year restrictions include the following:

River	No Work Window	Area Affected
Hudson	April – July	Upstream of the Delaware Memorial Bridge
Delaware	April – July	Upstream of Newburgh, NY - Beacon Bridge/Rt 84

This table will be supplemented with additional rivers as necessary.

PDC 3: Marine Trash and Debris Awareness and Prevention

"*Marine trash and debris*" is defined as any object or fragment of wood, metal, glass, rubber, plastic, cloth, paper or any other solid, man-made item or material that is lost or discarded in the marine environment by the Lessee or an authorized representative of the Lessee (collectively, the

[1] Consolidated seabed features for this measure are pavement, scarp walls, and deep/cold-water coral reefs and shallow/mesophotic reefs as defined in the CMECS Geologic Substrate Classifications.

“Lessee”) while conducting activities on the OCS in connection with a lease, grant, or approval issued by the Department of the Interior (DOI). To understand the type and amount of marine debris generated, and to minimize the risk of entanglement in and/or ingestion of marine debris by protected species, lessees must implement the following BMPS.

BMPs:

1. Training: All vessel operators, employees, and contractors performing OCS survey activities on behalf of the Lessee (collectively, “Lessee Representatives”) must complete marine trash and debris awareness training annually. The training consists of two parts: (1) viewing a marine trash and debris training video or slide show (described below); and (2) receiving an explanation from management personnel that emphasizes their commitment to the requirements. The marine trash and debris training videos, training slide packs, and other marine debris related educational material may be obtained at https://www.bsee.gov/debris. The training videos, slides, and related material may be downloaded directly from the website. Lessee Representatives engaged in OCS survey activities must continue to develop and use a marine trash and debris awareness training and certification process that reasonably assures that they, as well as their respective employees, contractors, and subcontractors, are in fact trained. The training process must include the following elements:
    a. Viewing of either a video or slide show by the personnel specified above;
    b. An explanation from management personnel that emphasizes their commitment to the requirements;
    c. Attendance measures (initial and annual); and
    d. Recordkeeping and availability of records for inspection by DOI.

   By January 31 of each year, the Lessee must submit to DOI an annual report signed by the Lessee that describes its marine trash and debris awareness training process and certifies that the training process has been followed for the previous calendar year. You must send the reports via email to *renewable_reporting@boem.gov* and to *marinedebris@bsee.gov*.

2. Marking: Materials, equipment, tools, containers, and other items used in OCS activities which are of such shape or configuration that they are likely to snag or damage fishing devices, and could be lost or discarded overboard, must be clearly marked with the vessel or facility identification and properly secured to prevent loss overboard. All markings must clearly identify the owner and must be durable enough to resist the effects of the environmental conditions to which they may be exposed.

3. Recovery: Lessees must recover marine trash and debris that is lost or discarded in the marine environment while performing OCS activities when such incident is likely to: (a) cause undue harm or damage to natural resources, including their physical, atmospheric, and biological components, with particular attention to those that could result in the entanglement of or ingestion by marine protected species; or (b) significantly interfere with OCS uses (e.g., are likely to snag or damage fishing

equipment, or present a hazard to navigation). Lessees must notify DOI when recovery activities are (i) not possible because conditions are unsafe; or (ii) not practicable because the marine trash and debris released is not likely to result in any of the conditions listed in (a) or (b) above. The lessee must recover the marine trash and debris lost or discarded if DOI does not agree with the reasons provided by the Lessee to be relieved from the obligation to recover the marine trash and debris. If the marine trash and debris is located within the boundaries of a potential archaeological resource/avoidance area, or a sensitive ecological/benthic resource area, the Lessee must contact DOI for approval prior to conducting any recovery efforts.

Recovery of the marine trash and debris should be completed immediately, but no later than 30 days from the date in which the incident occurred. If the Lessee is not able to recover the marine trash or debris within 48 hours (*See* BMP 4. Reporting), the Lessee must submit a recovery plan to DOI explaining the recovery activities to recover the marine trash or debris ("Recovery Plan"). The Recovery Plan must be submitted no later than 10 calendar days from the date in which the incident occurred. Unless otherwise objected by DOI within 48 hours of the filing of the Recovery Plan, the Lessee can proceed with the activities described in the Recovery Plan. The Lessee must request and obtain approval of a time extension if recovery activities cannot be completed within 30 days from the date in which the incident occurred. The Lessee must enact steps to prevent similar incidents and must submit a description of these actions to BOEM and BSEE within 30 days from the date in which the incident occurred.

4. Reporting: The Lessee must report all marine trash and debris lost or discarded to DOI (using the email address listed on DOI's most recent incident reporting guidance). This report applies to all marine trash and debris lost or discarded, and must be made monthly, no later than the fifth day of the following month. The report must include the following:

    a. Project identification and contact information for the lessee, operator, and/or contractor;
    b. The date and time of the incident;
    c. The lease number, OCS area and block, and coordinates of the object's location (latitude and longitude in decimal degrees);
    d. A detailed description of the dropped object to include dimensions (approximate length, width, height, and weight) and composition (e.g., plastic, aluminum, steel, wood, paper, hazardous substances, or defined pollutants);
    e. Pictures, data imagery, data streams, and/or a schematic/illustration of the object, if available;
    f. Indication of whether the lost or discarded item could be a magnetic anomaly of greater than 50 nanoTesla (nT), a seafloor target of greater than 0.5 meters (m), or a sub-bottom anomaly of greater than 0.5m when operating a magnetometer or gradiometer, side scan sonar, or sub-bottom profile in accordance with DOI's applicable guidance;
    g. An explanation of how the object was lost; and

h. A description of immediate recovery efforts and results, including photos.

In addition to the foregoing, the Lessee must submit a report within 48 hours of the incident ("48-hour Report") if the marine trash or debris could (a) cause undue harm or damage to natural resources, including their physical, atmospheric, and biological components, with particular attention to those that could result in the ingestion by or entanglement of marine protected species; or (b) significantly interfere with OCS uses (e.g., are likely to snag or damage fishing equipment, or present a hazard to navigation). The information in the 48-hour Report would be the same as that listed above, but just for the incident that triggered the 48-hour Report. The Lessee must report to DOI if the object is recovered and, as applicable, any substantial variation in the activities described in the Recovery Plan that were required during the recovery efforts. Information on unrecovered marine trash and debris must be included and addressed in the description of the site clearance activities provided in the decommissioning application required under 30 CFR § 585.906. The Lessee is not required to submit a report for those months in which no marine trash and debris was lost or discarded.

PDC 4: Minimize Interactions with Listed Species during Geophysical Survey Operations
To avoid injury of ESA-listed species and minimize any potential disturbance, the following measures will be implemented for all vessels operating impulsive survey equipment that emits sound at frequency ranges <180 kHz (within the functional hearing range of marine mammals)[2] as well as CHIRP sub bottom profilers. The Clearance Zone is defined as the area around the sound source that needs to be visually cleared of listed species for 30 minutes before the sound source is turned on. The Clearance Zone is equivalent to a minimum visibility zone for survey operations to begin (*See* BMP 6). The Shutdown Zone is defined as the area around the sound source that must be monitored for possible shutdown upon detection of protected species within or entering that zone. For both the Clearance and Shutdown Zones, these are minimum visibility distances and for situational awareness PSOs should observe beyond this area when possible.

BMPs:

1. For situational awareness a Clearance Zone extending at least (500 m in all directions) must be established around all vessels operating sources <180 kHz.
    a. The Clearance Zone must be monitored by approved third-party PSOs at all times and any observed listed species must be recorded (see reporting requirements below).
    b. For monitoring around the autonomous surface vessel (ASV) where remote PSO monitoring must occur from the mother vessel, a dual thermal/HD camera must be installed on the mother vessel facing forward and angled in a direction so as to provide a field of view ahead of the vessel and around the ASV. PSOs must be able to monitor the real-time output of the camera on hand-held computer tablets. Images from the cameras must be able to be captured and reviewed to assist in verifying species identification. A monitor must also be installed in the bridge displaying the real-time images from the thermal/HD camera installed on

[2] Note that this requirement does not apply to Parametric Subbottom Profilers, Ultra Short Baseline, echosounders or side scan sonar; the acoustic characteristics (frequency, narrow beam width, rapid attenuation) are such that no effects to listed species are anticipated.

the front of the ASV itself, providing a further forward view of the craft. In addition, night-vision goggles with thermal clip-ons and a handheld spotlight must be provided and used such that PSOs can focus observations in any direction around the mother vessel and/or the ASV.

2. To minimize exposure to noise that could be disturbing, Shutdown Zone(s) (500 m for North Atlantic right whales and 100 m for other ESA-listed whales visible at the surface) must be established around the sources operating at <180 kHz being towed from the vessel .
    a. The Shutdown Zone(s) must be monitored by third-party PSOs at all times when noise-producing equipment (<180 kHz) is being operated and all observed listed species must be recorded (see reporting requirements below).
    b. If an ESA-listed species is detected within or entering the respective Shutdown Zone, any noise-producing equipment operating below 180 kHz must be shut off until the minimum separation distance from the source is re-established (500 m for North Atlantic right whales and 100 m for other ESA-listed species, including other ESA-listed marine mammals) and the measures in (5) are carried out.
        i. A PSO must notify the survey crew that a shutdown of all active boomer, sparker, and bubble gun acoustic sources below 180 kHz is immediately required. The vessel operator and crew must comply immediately with any call for a shutdown by the PSO. Any disagreement or discussion must occur only after shutdown.
    c. If the Shutdown Zone(s) cannot be adequately monitored for ESA-listed species presence (i.e., a PSO determines conditions, including at night or other low-visibility conditions, are such that listed species cannot be reliably sighted within the Shutdown Zone(s), no equipment operating at <180 kHz can be deployed until such time that the Shutdown Zone(s) can be reliably monitored.
3. Before any noise-producing survey equipment (operating at <180 kHz) is deployed, the Clearance Zone (500 m for all listed species) must be monitored for 30 minutes of pre-clearance observation.
    a. If any ESA-listed species is observed within the Clearance Zone during the 30-minute pre-clearance period, the 30-minute clock must be paused. If the PSO confirms the animal has exited the zone and headed away from the survey vessel, the 30-minute clock that was paused may resume. The pre-clearance clock will reset to 30 minutes if the animal dives or visual contact is otherwise lost.
4. When technically feasible, a “ramp up” of the electromechanical survey equipment must occur at the start or re-start of geophysical survey activities. A ramp up must begin with the power of the smallest acoustic equipment for the geophysical survey at its lowest power output. When technically feasible the power will then be gradually turned up and other acoustic sources added in a way such that the source level would increase gradually.
5. Following a shutdown for any reason, ramp up of the equipment may begin immediately only if: (a) the shutdown is less than 30 minutes, (b) visual monitoring of

the Shutdown Zone(s) continued throughout the shutdown, (c) the animal(s) causing the shutdown was visually followed and confirmed by PSOs to be outside of the Shutdown Zone(s) (500 m for North Atlantic right whales and 100 m for other ESA-listed species, including other ESA-listed marine mammals) and heading away from the vessel, and (d) the Shutdown Zone(s) remains clear of all listed species. If all (a, b, c, and d) the conditions are not met, the Clearance Zone (500 m for all listed species) must be monitored for 30 minutes of pre-clearance observation before noise-producing equipment can be turned back on.

6. In order for geophysical surveys to be conducted at night or during low-visibility conditions, PSOs must be able to effectively monitor the Clearance and Shutdown Zone(s). No may occur if the Clearance and Shutdown Zone(s) cannot be reliably monitored for the presence of ESA-listed species to ensure avoidance of injury to those species.
    a. An Alternative Monitoring Plan (AMP) must be submitted to BOEM (or the federal agency authorizing, funding, or permitting the survey) detailing the monitoring methodology that will be used during nighttime and low-visibility conditions and an explanation of how it will be effective at ensuring that the Shutdown Zone(s) can be maintained during nighttime and low-visibility survey operations. The plan must be submitted 60 days before survey operations are set to begin.
    b. The plan must include technologies that have the technical feasibility to detect all ESA-listed whales out to 500 m and sea turtles to 100 m.
    c. PSOs should be trained and experienced with the proposed alternative monitoring technology.
    d. The AMP must describe how calibration will be performed, for example, by including observations of known objects at set distances and under various lighting conditions. This calibration should be performed during mobilization and periodically throughout the survey operation.
    e. PSOs shall make nighttime observations from a platform with no visual barriers, due to the potential for the reflectivity from bridge windows or other structures to interfere with the use of the night vision optics.
7. To minimize risk to North Atlantic right whales, no surveys may occur in Cape Cod Bay from January 1 - May 15 of any year (in an area beginning at 42°04′56.5″ N-070°12′00.0″ W; thence north to 42°12′00.0″ N-070°12′00.0″ W; thence due west to charted mean high water line; thence along charted mean high water within Cape Cod Bay back to beginning point).
8. Sound sources used within the North Atlantic right whale Critical Habitat Southeastern U.S. Calving Area (i.e., Unit 2) during the calving and nursing season (December-March) shall operate at frequencies <7 kHz and >35 kHz (functional hearing range of right whales) at night or low visibility conditions.
9. At times when multiple survey vessels are operating within a lease area, adjacent lease areas, or exploratory cable routes, a minimum separation distance (to be determined on a survey specific basis, dependent on equipment being used) must be maintained between survey vessels to ensure that sound sources do not overlap.
10. To minimize disturbance to the Northwest Atlantic Ocean DPS of loggerhead sea turtles, a voluntary pause in sparker operation should be implemented for all vessels

operating in nearshore critical habitat for loggerhead sea turtles. These conditions apply to critical habitat boundaries for nearshore reproductive habitats LOGG N-3 through LOGG N-16 (79 FR 39855) from April 1 to September 30. Following pre-clearance procedures, if any loggerhead or other unidentified sea turtles is observed within a 100 m Clearance Zone during a survey, sparker operation should be paused by turning off the sparker until the sea turtle is beyond 100 m of the survey vessel. If the animal dives or visual contact is otherwise lost, sparker operation may resume after a minimum 2-minute pause following the last sighting of the animal.

11. Any visual observations of listed species by crew or project personnel must be communicated to PSOs on-duty.
12. During good conditions (e.g., daylight hours; Beaufort scale 3 or less) when survey equipment is not operating, to the maximum extent practicable, PSOs must conduct observations for protected species for comparison of sighting rates and behavior with and without use of active geophysical survey equipment. Any observed listed species must be recorded regardless of any mitigation actions required.

PDC 5: Minimize Vessel Interactions with Listed Species

All vessels associated with survey activities (transiting [i.e., travelling between a port and the survey site] or actively surveying) must comply with the vessel strike avoidance measures specified below. The only exception is when the safety of the vessel or crew necessitates deviation from these requirements. If any such incidents occur, they must be reported as outlined below under Reporting Requirements (PDC 8). The Vessel Strike Avoidance Zone is defined as 500 m or greater from any sighted ESA-listed species or other unidentified large marine mammal.

BMPs:

1. Vessel captain and crew must maintain a vigilant watch for all protected species and slow down, stop their vessel, or alter course, as appropriate and regardless of vessel size, to avoid striking any listed species. The presence of a single individual at the surface may indicate the presence of submerged animals in the vicinity; therefore, precautionary measures should always be exercised. If pinnipeds or small delphinids of the following genera: Delphinus, Lagenorhynchus, Stenella, and Tursiops are visually detected approaching the vessel (i.e., to bow ride) or towed equipment, vessel strike avoidance and shutdown is not required.
2. Anytime a survey vessel is underway (transiting or surveying), the vessel must maintain a 500 m minimum separation distance and a PSO must monitor a Vessel Strike Avoidance Zone (500 m or greater from any sighted ESA-listed species or other unidentified large marine mammal visible at the surface) to ensure detection of that animal in time to take necessary measures to avoid striking the animal. If the survey vessel does not require a PSO for the type of survey equipment used, a trained crew lookout may be used (see #3). For monitoring around the autonomous surface vessels, regardless of the equipment it may be operating, a dual thermal/HD camera must be installed on the mother vessel facing forward and angled in a direction so as to provide a field of view ahead of the vessel and around the ASV. A dedicated operator must be able to monitor the real-time output of the camera on hand-held computer tablets. Images from the cameras must be able to be captured and reviewed to assist in verifying species identification. A monitor must also be

installed in the bridge displaying the real-time images from the thermal/HD camera installed on the front of the ASV itself, providing a further forward view of the craft.

a. Survey plans must include identification of vessel strike avoidance measures, including procedures for equipment shut down and retrieval, communication between PSOs/crew lookouts, equipment operators, and the captain, and other measures necessary to avoid vessel strike while maintaining vessel and crew safety. If any circumstances are anticipated that may preclude the implementation of this PDC, they must be clearly identified in the survey plan and alternative procedures outlined in the plan to ensure minimum distances are maintained and vessel strikes can be avoided.
b. All vessel crew members must be briefed in the identification of protected species that may occur in the survey area and in regulations and best practices for avoiding vessel collisions. Reference materials must be available aboard all project vessels for identification of listed species. The expectation and process for reporting of protected species sighted during surveys must be clearly communicated and posted in highly visible locations aboard all project vessels, so that there is an expectation for reporting to the designated vessel contact (such as the lookout or the vessel captain), as well as a communication channel and process for crew members to do so.
c. The Vessel Strike Avoidance Zone(s) are a minimum and must be maintained around all surface vessels at all times.
d. If a large whale is identified within 500 m of the forward path of any vessel, the vessel operator must steer a course away from the whale at 10 knots (18.5 km/hr) or less until the 500 m minimum separation distance has been established. Vessels may also shift to idle if feasible.
e. If a large whale is sighted within 200 m of the forward path of a vessel, the vessel operator must reduce speed and shift the engine to neutral. Engines must not be engaged until the whale has moved outside of the vessel's path and beyond 500 m. If stationary, the vessel must not engage engines until the large whale has moved beyond 500 m.
f. If a sea turtle or manta ray is sighted within the operating vessel's forward path, the vessel operator must slow down to 4 knots (unless unsafe to do so) and steer away as possible. The vessel may resume normal operations once the vessel has passed the individual.
g. During times of year when sea turtles are known to occur in the survey area, vessels must avoid transiting through areas of visible jellyfish aggregations or floating vegetation (e.g., sargassum lines or mats). In the event that operational safety prevents avoidance of such areas, vessels must slow to 4 knots while transiting through such areas.
h. Vessels operating in water depths with less than 4 ft. clearance between the vessel and the bottom should maintain speeds no greater than 4 knots to minimize vessel strike risk to sturgeon and sawfish.

3. To monitor the Vessel Strike Avoidance Zone, a PSO (or crew lookout if PSOs are not required) must be posted during all times a vessel is underway (transiting or surveying) to monitor for listed species in all directions.

   a. Visual observers monitoring the vessel strike avoidance zone can be either PSOs or crew members (if PSOs are not required). If the trained lookout is a vessel crew member, this must be their designated role and primary responsibility while the vessel is transiting. Any designated crew lookouts must receive training on protected species identification, vessel strike minimization procedures, how and when to communicate with the vessel captain, and reporting requirements. All observations must be recorded per reporting requirements.
   b. Regardless of monitoring duties, all crew members responsible for navigation duties must receive site-specific training on ESA-listed species sighting/reporting and vessel strike avoidance measures.
4. Regardless of vessel size, vessel operators must reduce vessel speed to 10 knots (18.5 mph) or less while operating in any Seasonal Management Area (SMA), Dynamic Management Area (DMA)/Slow Zones triggered by visual detection of North Atlantic right whales. The only exception to this requirement is for vessels operating in areas within a DMA/visually triggered Slow Zone where it is not reasonable to expect the presence of North Atlantic right whales (e.g. Long Island Sound, shallow harbors). Reducing vessel speed to 10 knots or less while operating in Slow Zones triggered by acoustic detections of North Atlantic right whales is encouraged.
5. Vessels underway must not divert their course to approach any listed species.
6. All vessel operators must check for information regarding mandatory or voluntary ship strike avoidance (SMAs, DMAs, Slow Zones) and daily information regarding North Atlantic right whale sighting locations. These media may include, but are not limited to: NOAA weather radio, U.S. Coast Guard NAVTEX and channel 16 broadcasts, Notices to Mariners, the Whale Alert app, or WhaleMap website.
   a. North Atlantic right whale Sighting Advisory System info can be accessed at: https://apps-nefsc.fisheries.noaa.gov/psb/surveys/MapperiframeWithText.html
   b. Information about active SMAs, DMAs, and Slow Zones can be accessed at: https://www.fisheries.noaa.gov/national/endangered-species-conservation/reducing-vessel-strikes-north-atlantic-right-whales

PDC 6: Minimize Risk During Buoy Deployment, Operations, and Retrieval
Any mooring systems used during survey activities prevent any potential entanglement or entrainment of listed species, and in the unlikely event that entanglement does occur, ensure proper reporting of entanglement events according to the measures specified below.

BMPs:

1. Ensure that any buoys attached to the seafloor use the best available mooring systems. Buoys, lines (chains, cables, or coated rope systems), swivels, shackles, and anchor designs must prevent any potential entanglement of listed species while ensuring the safety and integrity of the structure or device.
2. All mooring lines and ancillary attachment lines must use one or more of the following measures to reduce entanglement risk: shortest practicable line length, rubber sleeves, weak-links, chains, cables or similar equipment types that prevent lines from looping, wrapping, or entrapping protected species.
3. Any equipment must be attached by a line within a rubber sleeve for rigidity. The length of the line must be as short as necessary to meet its intended purpose.

4. During all buoy deployment and retrieval operations, buoys should be lowered and raised slowly to minimize risk to listed species and benthic habitat. Additionally, PSOs or trained project personnel (if PSOs are not required) should monitor for listed species in the area prior to and during deployment and retrieval and work should be stopped if listed species are observed within 500 m of the vessel to minimize entanglement risk.
5. If a live or dead marine protected species becomes entangled, you must immediately contact the applicable NMFS stranding coordinator using the reporting contact details (see Reporting Requirements section) and provide any on-water assistance requested.
6. All buoys must be properly labeled with owner and contact information.

PDC 7: Protected Species Observers
Qualified third-party PSOs to observe Clearance and Shutdown Zones must be used as outlined in the conditions above.

BMPs:
1. All PSOs must have completed an approved PSO training program and must receive NMFS approval to act as a PSO for geophysical surveys. Documentation of NMFS approval for geophysical survey activities in the Atlantic and copies of the most recent training certificates of individual PSOs' successful completion of a commercial PSO training course with an overall examination score of 80% or greater must be provided upon request. Instructions and application requirements to become a NMFS-approved PSO can be found at: *www.fisheries.noaa.gov/national/endangered-species-conservation/protected-species-observers*.
2. In situations where third-party party PSOs are not required, crew members serving as lookouts must receive training on protected species identification, vessel strike minimization procedures, how and when to communicate with the vessel captain, and reporting requirements.
3. PSOs deployed for geophysical survey activities must be employed by a third-party observer provider. While the vessel is underway, they must have no other tasks than to conduct observational effort, record data, and communicate with and instruct relevant vessel crew to the presence of listed species and associated mitigation requirements. PSOs on duty must be clearly listed on daily data logs for each shift.
    a. Non-third-party observers may be approved by NMFS on a case-by-case basis for limited, specific duties in support of approved, third-party PSOs.
4. A minimum of one PSO (assuming condition 5 is met) must be on duty observing for listed species at all times that noise-producing equipment <180 kHz is operating, or the survey vessel is actively transiting during daylight hours (i.e. from 30 minutes prior to sunrise and through 30 minutes following sunset). Two PSOs must be on duty during nighttime operations. A PSO schedule showing that the number of PSOs used is sufficient to effectively monitor the affected area for the project (e.g., surveys) and record the required data must be included. PSOs must not be on watch for more than 4 consecutive hours, with at least a 2-hour break after a 4-hour watch. PSOs must not be on active duty observing for more than 12 hours in any 24-hour period.
5. Visual monitoring must occur from the most appropriate vantage point on the associated operational platform that allows for 360-degree visual coverage around the vessel. If

360-degree visual coverage is not possible from a single vantage point, multiple PSOs must be on watch to ensure such coverage.

6. Suitable equipment must be available to each PSO to adequately observe the full extent of the Clearance and Shutdown Zones during all vessel operations and meet all reporting requirements.
    a. Visual observations must be conducted using binoculars and the naked eye while free from distractions and in a consistent, systematic, and diligent manner.
    b. Rangefinders (at least one per PSO, plus backups) or reticle binoculars (e.g., 7 x 50) of appropriate quality (at least one per PSO, plus backups) to estimate distances to listed species located in proximity to the vessel and Clearance and Shutdown Zone(s).
    c. Digital full frame cameras with a telephoto lens that is at least 300 mm or equivalent. The camera or lens should also have an image stabilization system. Used to record sightings and verify species identification whenever possible.
    d. A laptop or tablet to collect and record data electronically.
    e. Global Positioning Units (GPS) if data collection/reporting software does not have built-in positioning functionality.
    f. PSO data must be collected in accordance with standard data reporting, software tools, and electronic data submission standards approved by BOEM and NMFS for the particular activity.
    g. Any other tools deemed necessary to adequately perform PSO tasks.

PDCs 8: Reporting Requirements

To ensure compliance and evaluate effectiveness of mitigation measures, regular reporting of survey activities and information on listed species will be required as follows.

BMPs:

1. Data from all PSO observations must be recorded based on standard PSO collection and reporting requirements. PSOs must use standardized electronic data forms to record data. The following information must be reported electronically in a format approved by BOEM and NMFS:

    Visual Effort:
    a. Vessel name;
    b. Dates of departures and returns to port with port name;
    c. Lease number;
    d. PSO names and affiliations;
    e. PSO ID (if applicable);
    f. PSO location on vessel;
    g. Height of observation deck above water surface (in meters);
    h. Visual monitoring equipment used;
    i. Dates and times (Greenwich Mean Time) of survey on/off effort and times corresponding with PSO on/off effort;
    j. Vessel location (latitude/longitude, decimal degrees) when survey effort begins and ends; vessel location at beginning and end of visual PSO duty shifts; recorded at 30 second intervals if obtainable from data collection software, otherwise at practical regular interval;

k. Vessel heading and speed at beginning and end of visual PSO duty shifts and upon any change;
l. Water depth (if obtainable from data collection software) (in meters);
m. Environmental conditions while on visual survey (at beginning and end of PSO shift and whenever conditions change significantly), including wind speed and direction, Beaufort scale, Beaufort wind force, swell height (in meters), swell angle, precipitation, cloud cover, sun glare, and overall visibility to the horizon;
n. Factors that may be contributing to impaired observations during each PSO shift change or as needed as environmental conditions change (e.g., vessel traffic, equipment malfunctions);
o. Survey activity information, such as type of survey equipment in operation, acoustic source power output while in operation, and any other notes of significance (i.e., pre-clearance survey, ramp-up, shutdown, end of operations, etc.);

Visual Sighting (all Visual Effort fields plus):

a. Watch status (sighting made by PSO on/off effort, opportunistic, crew, alternate vessel/platform);
b. Vessel/survey activity at time of sighting;
c. PSO/PSO ID who sighted the animal;
d. Time of sighting;
e. Initial detection method;
f. Sightings cue;
g. Vessel location at time of sighting (decimal degrees);
h. Direction of vessel's travel (compass direction);
i. Direction of animal's travel relative to the vessel;
j. Identification of the animal (e.g., genus/species, lowest possible taxonomic level, or unidentified); also note the composition of the group if there is a mix of species;
k. Species reliability;
l. Radial distance;
m. Distance method;
n. Group size; Estimated number of animals (high/low/best);
o. Estimated number of animals by cohort (adults, yearlings, juveniles, calves, group composition, etc.);
p. Description (as many distinguishing features as possible of each individual seen, including length, shape, color, pattern, scars or markings, shape and size of dorsal fin, shape of head, and blow characteristics);
q. Detailed behavior observations (e.g., number of blows, number of surfaces, breaching, spyhopping, diving, feeding, traveling; as explicit and detailed as possible; note any observed changes in behavior);
r. Mitigation Action; Description of any actions implemented in response to the sighting (e.g., delays, shutdown, ramp-up, speed or course alteration, etc.) and time and location of the action.
s. Behavioral observation to mitigation;
t. Equipment operating during sighting;
u. Source depth (in meters);

   v. Source frequency;
   w. Animal's closest point of approach and/or closest distance from the center point of the acoustic source;
   x. Time entered shutdown zone;
   y. Time exited shutdown zone;
   z. Time in shutdown zone;
   aa. Photos/Video
2. The project proponent must submit a final monitoring report to BOEM and NMFS (to *renewable_reporting@boem.gov* and *nmfs.gar.incidental-take@noaa.gov*) within 90 days after completion of survey activities. The report must fully document the methods and monitoring protocols, summarizes the survey activities and the data recorded during monitoring, estimates of the number of listed species that may have been taken during survey activities, describes, assesses and compares the effectiveness of monitoring and mitigation measures. PSO sightings and effort data and trackline data in Excel spreadsheet format must also be provided with the final monitoring report.
3. Reporting sightings of North Atlantic right whales:
   a. If a North Atlantic right whale is observed at any time by a PSO or project personnel during surveys or vessel transit, sightings must be reported within two hours of occurrence when practicable and no later than 24 hours after occurrence. In the event of a sighting of a right whale that is dead, injured, or entangled, efforts must be made to make such reports as quickly as possible to the appropriate regional NOAA stranding hotline (from Maine-Virginia report sightings to 866-755-6622, and from North Carolina-Florida to 877-942-5343). Right whale sightings in any location may also be reported to the U.S. Coast Guard via channel 16 and through the WhaleAlert App (http://www.whalealert.org/).
   b. Further information on reporting a right whale sighting can be found at: *https://apps-nefsc.fisheries.noaa.gov/psb/surveys/documents/20120919_Report_a_Right_Whale.pdf*
4. In the event of a vessel strike of a protected species by any survey vessel, the project proponent must immediately report the incident to BOEM (*renewable_reporting@boem.gov*) and NMFS (*nmfs.gar.incidental-take@noaa.gov*) and for marine mammals to the NOAA stranding hotline: from Maine-Virginia, report to 866-755-6622, and from North Carolina-Florida to 877-942-5343 and for sea turtles from Maine-Virginia, report to 866-755-6622, and from North Caroline-Florida to 844-732-8785. The report must include the following information:
   a. Name, telephone, and email or the person providing the report;
   b. The vessel name;
   c. The Lease Number;
   d. Time, date, and location (latitude/longitude) of the incident;
   e. Species identification (if known) or description of the animal(s) involved;
   f. Vessel's speed during and leading up to the incident;
   g. Vessel's course/heading and what operations were being conducted (if applicable);
   h. Status of all sound sources in use;

i. Description of avoidance measures/requirements that were in place at the time of the strike and what additional measures were taken, if any, to avoid strike;
j. Environmental conditions (wave height, wind speed, light, cloud cover, weather, water depth);
k. Estimated size and length of animal that was struck;
l. Description of the behavior of the species immediately preceding and following the strike;
m. If available, description of the presence and behavior of any other protected species immediately preceding the strike;
n. Disposition of the animal (e.g., dead, injured but alive, injured and moving, blood or tissue observed in the water, last sighted direction of travel, status unknown, disappeared); and
o. To the extent practicable, photographs or video footage of the animal(s).

5. Sightings of any injured or dead listed species must be immediately reported, regardless of whether the injury or death is related to survey operations, to BOEM (*renewable_reporting@boem.gov*), NMFS (*nmfs.gar.incidental-take@noaa.gov*), and the appropriate regional NOAA stranding hotline (from Maine-Virginia report sightings to 866-755-6622, and from North Carolina-Florida to 877-942-5343 for marine mammals and 844-732-8785 for sea turtles). If the project proponent's activity is responsible for the injury or death, they must ensure that the vessel assist in any salvage effort as requested by NMFS. When reporting sightings of injured or dead listed species, the following information must be included:
    a. Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
    b. Species identification (if known) or description of the animal(s) involved;
    c. Condition of the animal(s) (including carcass condition if the animal is dead);
    d. Observed behaviors of the animal(s), if alive;
    e. If available, photographs or video footage of the animal(s); and
    f. General circumstances under which the animal was discovered.
6. Reporting and Contact Information:
    a. Dead and/or Injured Protected Species:
        1. NMFS Greater Atlantic Region's Stranding Hotline: 866-755-6622
        2. NMFS Southeast Region's Stranding Hotline: 877-942-5343 (marine mammals), 844-732-8785 (sea turtles)
    ii. Injurious Takes of Endangered and Threatened Species:
        1. NMFS Greater Atlantic Regional Office, Protected Resources Division (*nmfs.gar.incidental-take@noaa.gov*)
        2. BOEM Environment Branch for Renewable Energy, Phone: 703-787-1340, Email: *renewable_reporting@boem.gov*