

## **Update 2.15.22**

This is to provide notice that NMFS will conduct a rulemaking to revise its Regulations Governing Taking Marine Mammals Incidental to Geophysical Survey Activities in the Gulf of Mexico (50 CFR Part 217, Subpart S), effective as of April 19, 2021, and issued pursuant to the Marine Mammal Protection Act (MMPA). The rulemaking will, among other things, address an erroneous estimate of the total amount of incidental take of marine mammals that was anticipated to result from the activities that were analyzed in NMFS' incidental take rule.

In particular, while processing requests for individual letters of authorization (LOAs) under the incidental take rule using the methodology for developing LOA-specific take numbers presented in the rule, NMFS has discovered that the estimated maximum annual incidental take from the proposed survey activities and the total take from all activities that BOEM projected in its revised incidental take rule application were miscalculated, and are therefore likely to be reached much sooner than was anticipated for some species. NMFS contacted BOEM regarding this, and BOEM determined that, when it reduced its scope of specified activity in March 2020 by removing the Gulf of Mexico Energy Security Act (GOMESA) moratorium area from the proposed action, it underestimated the level of take by inadvertently factoring species density estimates into its revised exposure estimates twice. Generally, this miscalculation caused BOEM to underestimate the total predicted exposures of species from all survey activities in its revision to the incidental take rule application, most pronouncedly for those species with the lowest densities (e.g., killer whales).

The practical effect of this miscalculation is that the full amount of activity for which BOEM sought incidental take coverage in its application cannot be authorized under the existing incidental take rule. NMFS is currently unable to issue additional LOAs for any survey activities that are expected to cause incidental take of killer whales, as the annual take authorizations for killer whales has already approached the maximum amount that NMFS analyzed for, and is therefore allowable under, the rule. Though the incidental take rule remains valid and NMFS continues to issue LOAs under its authority, where appropriate, for survey activities that are not expected to result in take of killer whales, the same situation regarding killer whales could occur with regard to other species.

BOEM has provided NMFS with an explanation of the miscalculation with regard to its incidental take estimate and revised take estimates. NMFS has determined it will conduct a notice and comment rulemaking to analyze the revised take estimates and revise its incidental take rule, as appropriate and provided the necessary findings can be made. NMFS expects that the revised rule will analyze the same activities and activity levels of the current rule, extend for the remaining period of effectiveness of the current rule, and utilize the same modeling methodology described in the current rule. The rulemaking will incorporate the best available science, to include consideration of specific new information that has become available since the current rule was published, including pending updates to currently available marine mammal density information. The revised rule also will incorporate expanded modeling results that estimate take utilizing the existing methodology but considering the effects of using the smaller airgun sizes that the industry is currently using in its surveys, as evidenced by LOA applications received to date.