



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
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AUG - 6 2010

Mr. George P. Young, P.E.
Chief, Regulatory Branch
Department of the Army
U.S. Army Engineer District, Honolulu
Building 230
Ft. Shafter, Hawaii 96858-5440

Dear Mr. Young:

This letter responds to your July 23, 2010 letter regarding the implementation of Standard Local Operating Procedures for Endangered Species in the Central and Western Pacific Region (Pac-SLOPES). In your letter, you requested our concurrence under section 7 of the Endangered Species Act of 1973 (ESA), as amended (16 U.S.C. §1531 *et seq.*), with your determination that issuing Department of the Army (DOA) authorizations for activities that comply with Pac-SLOPES is not likely to adversely affect ESA-listed sea turtles and marine mammals.

Proposed Action/Action Area: As described in your letter and the enclosed biological evaluation (BE) (DOA 2010), the DOA has identified a suite of frequently repeated activity types with standardized conditions and best management practices (BMPs), collectively referred to as Pac-SLOPES, that would consistently and predictably result in insignificant or discountable impacts on ESA-listed sea turtles and marine mammals. The DOA is requesting a 5-year programmatic consultation under the ESA for the implementation of Pac-SLOPES to authorize actions that comply with its requirements. The DOA and NMFS PRD would meet annually to summarize the actions permitted under Pac-SLOPES and to make recommendations to improve the effectiveness of the program. If the Corps chooses to continue programmatic coverage for Pac-SLOPES, it will reinstate consultation with NMFS PRD within five years of the date of completion of the requested programmatic consultation.

Briefly, Pac-SLOPES includes a concise set of guidelines that would be used to determine whether or not proposed actions fit under the programmatic consultation. It also includes implementation procedures that require review and feedback by NMFS Protected Resources Division (PRD) to confirm that the proposed action complies with the programmatic. The DOA would: 1) Determine if ESA-listed marine species or designated critical habitat may be affected; 2) If the determination is other than "no effect", review the project for applicability under Pac-SLOPES based on the following criteria: a) The proposed project conforms with all applicable requirements and limitations; b) The general conditions can be applied; and c) All potential effects on ESA-listed marine species or critical habitats are within the range of effects considered in the programmatic consultation with NMFS; and 3) Before or during the comment period for the action, the DOA would inform NMFS PRD of its intention to permit the proposed action under Pac-SLOPES and request concurrence.



For actions that fall under this programmatic consultation, NMFS review would be followed with a brief confirmation electronic mail (e-mail) to the DOA. The DOA's obligation to consult under the ESA with NMFS would be satisfied by this programmatic, and no further consultation would be required for that action. Actions that do not initially fit would require individual consultations if they cannot be brought into compliance with the programmatic through technical assistance and pre-consultation between the DOA, NMFS, and the applicant.

Under the proposed programmatic consultation, the DOA would use Pac-SLOPES to issue permits for the following types of actions: 1) Site preparation for above- or over-water construction; 2) Survey activities; 3) Marina or harbor repair & improvement; 4) Piling repair & removal; 5) Buoy installation & repair; 6) Maintenance dredging; 7) Other minor discharges and dredging/excavation; 8) Utility line installation & repair; 9) Outfall structure repair & replacement; 10) Bank stabilization; 11) Stream clearing; 12) Road construction, repair, and improvement; 13) Bridge repair & replacement; and 14) Vessel removal.

Projects that are explicitly excluded from authorization under Pac-SLOPES, and as such would require individual consultation, are those projects in or near the marine environment that include any of the following: 1) Blasting; 2) Pile-driving, pre-drilling for pile-driving; 3) New construction dredging or in-water trenching; 4) Construction of new or expanded effluent discharge systems; 5) Construction of new bank stabilization structures; 6) Exploration or construction within estuaries or the marine environment that cannot be conducted from a work vessel or an existing bridge, dock, or wharf; and 7) Any use of treated wood in marine or aquatic habitats (other than pressure-treated).

The action area for this programmatic consultation is limited to in-water areas around actions that would take place, on nearshore lands and outward to within 3 miles of shore, on and around the Main Hawaiian Islands (MHI), the Northwest Hawaiian Islands (NWHI), American Samoa, Guam, the Commonwealth of the Northern Mariana Islands (CNMI), and the Pacific Remote Island Areas (PRIA)¹. With the exception of acoustic impacts, action-specific action areas are estimated to be the in-water area within 50-yard (46 m) radius arcs around the project sites, including around any work vessels. For actions that include an in-water acoustic footprint, the action areas are estimated to be the in-water area within a 1,500-yard (1,372 m) radius arcs around a project site, including around project related vessels as they transit to and from the site. The action area also includes the down-current extent of any plumes that may result from discharges of wastes or toxic chemicals such as fuels and/or lubricants associated with the machinery used for these covered activity types.

Species That May Be Affected: Based on the preferred habitats and sighting information, green sea turtles (*Chelonia mydas*), hawksbill sea turtles (*Eretmochelys imbricata*), Hawaiian monk seals (*Monachus schauinslandi*), and humpback whales (*Megaptera novaeangliae*) are the only ESA-listed species under NMFS jurisdiction that are known to occur, or could reasonably be

¹ The PRIA comprise Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Wake Island, Palmyra Atoll, and Midway Atoll. Although physically located in the Hawaiian Archipelago, administratively, Midway is considered part of the PRIA because it is not a part of the State of Hawaii. However, for the purposes of this document, the PRIA do not include Midway Atoll. Midway is considered as part of the Northwest Hawaiian Islands.

expected to occur in the vicinity of the proposed action area. Detailed information to describe the biology, habitat, and conservation status for sea turtles can be found in the recovery plans and other sources at <http://www.nmfs.noaa.gov/pr/species/turtles/>, and at <http://www.nmfs.noaa.gov/pr/species/mammals/> for marine mammals.

Critical Habitat: Critical habitat was designated under the ESA for the Hawaiian monk seal on May 26, 1988. Designated critical habitat extends from shore to a depth of 20 fathoms in ten areas of the NWHI. This is the only designated critical habitat within the action area. In response to a petition, NMFS issued a 12 month finding intent to undertake rulemaking to revise critical habitat in the NWHI and to designate critical habitat in the MHI. The potential impacts of Pac-SLOPES on designated critical habitat will be analyzed, as appropriate, following issuance of a final rule revising critical habitat.

Analysis of Effects: In order to concur that a proposed action is not likely to adversely affect listed species, NMFS must find that the effects of the proposed action are expected to be insignificant, discountable, or beneficial as defined in the joint USFWS-NMFS Endangered Species Consultation Handbook: (1) insignificant effects relate to the size of the impact and should never reach the scale where take occurs; (2) discountable effects are those that are extremely unlikely to occur; and (3) beneficial effects are positive effects without any adverse effects (USFWS & NMFS 1998). This standard, as well as consideration of the probable duration, frequency, and severity of potential interactions between the marine listed species and action types covered under the proposed programmatic, were applied during the analysis of effects of those action types on ESA-listed marine species, as is described in detail in the DOA BE. The analysis considered potential stressors and impacts to marine listed species, the most likely of which are:

1. Collision with vessels;
2. Direct physical impact;
3. Entanglement (w/moorings, cable, associated lines, etc.);
4. Disturbance from human activity and equipment operation;
5. Exposure to elevated noise levels;
6. Exposure to elevated turbidity;
7. Exposure to wastes and discharges; and
8. Loss of forage habitat.

The DOA specifically addressed all eight of these stressors in their BE (DOA 2010), providing detailed impact analyses to justify their determination. Based on the description of the covered activity types, the required conditions and BMPs, and the effects analyses provided in the BE, NMFS agrees that authorizing proposed actions that comply with Pac-SLOPES would result in insignificant impacts on ESA-listed sea turtles, marine mammals, and designated critical habitat, or the likelihood of impacts would be discountable.

Conclusion: NMFS concurs with your determination that implementation of Pac-SLOPES to authorize actions that comply with its requirements, in the Central and Western Pacific Region, is not likely to adversely affect ESA-listed marine species or their designated critical habitat. Our concurrence is based on the finding that the effects of the proposed action are expected to be

insignificant, discountable, or beneficial as defined in the joint USFWS-NMFS Endangered Species Consultation Handbook (USFWS-NMFS 1998) and summarized at the beginning of the Analysis of Effects section above. This programmatic consultation focused solely on compliance with the ESA. Additional compliance review that may be required of NMFS for actions covered under this programmatic (such as assessing impacts on Essential Fish Habitat) would be completed by NMFS Habitat Conservation Division in separate communications, if applicable.

This concludes your consultation responsibilities under the ESA for species under NMFS's jurisdiction. Consultation must be reinitiated if: 1) a take occurs; 2) new information reveals effects of the action that may affect listed species or designated critical habitat in a manner or to an extent not previously considered; 3) the identified action is subsequently modified in a manner causing effects to listed species or designated critical habitat not previously considered; 4) a new species is listed or critical habitat designated that may be affected by the identified action; or 5) the 5-year life of this programmatic consultation is exceeded.

If you have further questions please contact Donald Hubner on my staff at (808) 944-2233. Thank you for working with NMFS to protect our nation's living marine resources.

Sincerely,



Michael D. Tosatto
Acting Regional Administrator

Cc: Gerry Davis, Assistant Regional Administrator, Habitat Conservation Division,
NMFS/PIRO
Valerie Brown, Habitat Conservation Division, NMFS/PIRO, Guam Field Office
Andrew Torres, Sustainable Fisheries Division, NMFS/PIRO, Guam Field Office
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Paula Levin, Coastal Conservation, USFWS, Honolulu

NMFS File No. (PCTS): I/PIR/2010/03501
PIRO Reference No.: I-PI-10-835-LVA

References

Department of the Army (DOA). 2010. Letter from Honolulu District Regulatory Branch regarding the implementation of Standard Local Operating Procedures for Endangered Species in the Central and Western Pacific Region (Pac-SLOPES), including the enclosed Biological Evaluation – Effects of Implementing [Pac-SLOPES] on ESA-Listed Sea Turtles and Marine Mammals. July 23, 2010.