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NATIONAL MARINE FISHERIES SERVICE  
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SERO-2022-02857

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Bureau of Ocean Energy Management

Mr. T.J. Broussard  
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Bureau of Safety and Environmental Enforcement

Ref.: Request for Informal Programmatic Consultation under Section 7(a)(2) of the Endangered Species Act for the “Gulf of Mexico Wind Energy Lease Issuance and Associated Site Characterization and Site Assessment Activities”

Dear Dr. Kaller and Mr. Broussard,

This letter responds to the Bureau of Ocean Energy Management (BOEM) request for informal programmatic consultation with us, the National Marine Fisheries Service (NMFS), pursuant to Section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. § 1531 et seq.) (ESA) for the Gulf of Mexico Wind Energy Lease Issuance and Associated Site Characterization and Site Assessment Activities (attached to this letter and referenced herein as **Appendix A**). This programmatic consultation has the NMFS tracking number SERO-2022-02857 and the project title, “GoMex OSW Programmatic Site Characterization and Site Assessment.” Please use the NMFS tracking number and this title in all future correspondence related to this consultation.

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 July 5 order vacating the 2019 Regulations. On November 16, 2022, the U.S. Court of Appeals for the Ninth Circuit granted a motion for remand without vacating the 2019 Regulations. As a result, the 2019 Regulations remain in effect, and we are applying the 2019 Regulations here. For purposes of this programmatic consultation, we considered whether the substantive analysis and conclusions articulated in this letter of concurrence would be any different under the pre-2019 Regulations. We determined that our analysis and conclusions would not be any different.

### **Coordination and Consultation History**

On June 15, 2021, NMFS Southeast Regional Office (SERO) attended the first Gulf of Mexico Intergovernmental Renewable Energy Task Force Meeting. NMFS SERO Task Force Members



presented our jurisdictional authorities under the Magnuson-Stevens Fishery Conservation and Management Act (Public Law 94-265), the ESA, the Marine Mammal Protection Act of 1972 (50 CFR 216), the Fish and Wildlife Coordination Act (16 U.S.C. § 661 et seq.), and the National Environmental Policy Act (40 CFR Parts 1500 through 1508).

On November 1, 2021, NMFS began providing technical assistance for the “Gulf of Mexico Wind Energy Lease Issuance and Associated Site Characterization and Site Assessment Activities” project, which includes all coordination up to the consultation request date. Technical assistance was completed under the NMFS tracking INQ-2021-00145.

On November 1, 2021, BOEM published a Call for Information and Nominations (Call) concerning wind energy development in the Gulf of Mexico (GoMex) that outlined a GoMex Call Area. NMFS SERO and the Southeast Fisheries Science Center (SEFSC) provided scoping comments on the GoMex Call Area on December 17, 2021.

In December 2021, NMFS SERO Protected Resources Division (PRD) began the effort to supply the NOAA National Centers for Coastal Ocean Science (NCCOS) with protected species data to inform marine spatial planning for offshore wind energy siting in the GoMex; this marine spatial planning effort is referred to as the “Gulf of Mexico Wind Atlas.”

On January 11, 2022, BOEM announced the preparation of an environmental assessment (EA) for offshore wind leasing in the GoMex Call Area.

On February 2, 2022, NMFS SERO attended the second Gulf of Mexico Intergovernmental Renewable Energy Task Force Meeting, during which NCCOS presented preliminary results from the Gulf of Mexico Wind Atlas. NMFS SERO Task Force Members provided feedback on the Gulf of Mexico Wind Atlas during the meeting.

On February 9, 2022, NMFS SERO and the SEFSC provided scoping comments on the preparation of an Environmental Assessment (EA) for offshore wind leasing in the GoMex Call Area.

On February 24, 2022, NMFS SERO PRD provided NCCOS with 23 protected species data layers for the Gulf of Mexico Wind Atlas.

From June 9 to September 29, 2022, BOEM and NMFS SERO PRD worked together on draft pre-initiation material for the ESA consultation. We discussed the proposed action and potential routes of effects of the proposed action to ESA-listed species and critical habitat. We refined the mandatory Protocols designed to reduce and avoid the effects of the proposed action on ESA-listed species and critical habitat. Most importantly, BOEM agreed to limit the size of the proposed action area at the 100-meter bathymetric contour to further reduce potential effects to Rice’s whale.

On July 20, 2022, BOEM published for comment a draft EA on the Commercial and Research Wind Lease and Grant Issuance and Site Assessment Activities on the Outer Continental Shelf of the Gulf of Mexico (hereinafter referred to as the “draft EA”).

On July 20, 2022, BOEM announced the identification of 2 preliminary Wind Energy Areas (“WEAs”) in the GoMex. WEAs are areas that appear most suitable for commercial wind energy activities, while presenting the fewest apparent environmental and user conflicts. One WEA is located approximately 24 nautical miles off the coast of Galveston, Texas. The other WEA is located approximately 56 nautical miles off the coast of Lake Charles, Louisiana.

On July 27, 2022, NMFS SERO attended the third Gulf of Mexico Intergovernmental Renewable Energy Task Force Meeting. NMFS SERO Task Force Members provided initial feedback on the draft EA and the 2 preliminary WEAs in the GoMex. During this meeting, BOEM extended the comment period for the draft EA and preliminary WEAs from August 19 to September 2, 2022.

On September 9, 2022, NMFS SERO and the SEFSC provided 2 scoping comment letters, one for the draft EA and one for the preliminary WEAs in the GoMex.

On September 30, 2020, NMFS SERO PRD supplied BOEM with our final revisions to the pre-initiation material for the ESA consultation.

On October 31, 2022, BOEM published the final report related to the Gulf of Mexico Wind Atlas titled.

On October 31, 2022, BOEM announced that it had revised and finalized the 2 preliminary WEAs in the GoMex.

On November 7, 2022, NMFS SERO PRD received from BOEM its request for informal programmatic consultation under Section 7 of the ESA for the “Gulf of Mexico Wind Energy Lease Issuance and Associated Site Characterization and Site Assessment Activities” via electronic mail (hereafter, referred to as “the proposed action.”).

On November 23, 2022, NMFS SERO PRD requested additional information from BOEM related to how we would track the implementation and reporting for the proposed action. On November 30, 2022, BOEM and NMFS SERO PRD met to discuss this request.

On December 2, 2022, BOEM supplied additional information and updated the Protocols to address how BOEM and NMFS SERO PRD would track the implementation and reporting for the proposed action. As such, the ESA Protocols included as Appendix B to BOEM’s consultation request have been replaced in their entirety with the updated ESA Protocols (dated 12/02/22) attached to this letter and referenced herein as **Appendix B**. Having all the information needed, we initiated informal programmatic consultation that day.

## **Jurisdiction**

BOEM is the lead federal agency for the proposed action. The Outer Continental Shelf Lands Act (OCSLA), as amended, mandates the Secretary of the Interior, through BOEM, to manage the siting and development of the U.S. 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

(i.e., geophysical and geotechnical surveys and deployment of meteorological [met] buoys) that may be undertaken to support offshore wind development as part of the proposed action. BOEM regulations require that a lessee provide the results of shallow hazard, geological, geotechnical, biological, and archaeological surveys with its Site Assessment Plan (SAP) and Construction and Operations Plan (COP) (see 30 C.F.R. 585.610(b) and 30 C.F.R. 585.626(a)).

The Bureau of Safety and Environmental Enforcement (BSEE) is a co-action agency for the proposed action. BSEE coordinates with BOEM on OCSLA regulatory oversight and is responsible for promoting safety and conducting environmental compliance verification, inspections, and enforcement for operations as part of the proposed action.

The carrying out of geotechnical surveys and deployment of meteorological buoys (referred to as met buoys) may require authorization from the U.S. Army Corps of Engineers (USACE). The USACE has regulatory responsibilities under Section 10 of the Rivers and Harbors Act of 1899 to approve and 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 to prevent water pollution, obtain water discharge permits and water quality certifications, develop risk management plans, and maintain such records. The USACE has Nationwide Permits (NWPs) in place to regulate some activities in state and federal waters. NWP 6 *Survey Activities* (86 FR 73522) regulates geophysical surveys in state waters. NWP 5 *Scientific Measurement Devices* (82 FR 4) is required for devices and scientific equipment whose purpose is to record scientific data through such means as meteorological stations (which would include met buoys). The USACE is not a co-action agency for the proposed action; however, BOEM anticipates that the carrying out of geotechnical surveys and deployment of met buoys in state waters would be permitted by USACE under those existing NWPs, which have undergone separate consultation under the ESA.

### **Proposed Action**

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 the Services 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 multiple similar, frequently occurring, or routine actions expected to be implemented in a particular geographic region.

The proposed action for this programmatic consultation consists of BOEM’s issuance of commercial and/or research wind energy lease(s) within the GOM Call Area in waters no deeper than the 100-meter isobath and granting Rights-of-Use and Easements (RUEs) and Rights-of-Ways (ROWs) in support of wind energy development. Below is a summary of the activities expected to occur as part of the proposed action. A complete description of the proposed action and associated activities is included in Sections 1 and 2 of BOEM’s consultation request attached hereto as **Appendix A** and incorporated herein by reference.

The proposed action subject to this consultation is similar to the proposed action described in BOEM’s draft EA, but differs in three distinct ways. First, fishery-related biological surveys

(e.g., trawl surveys, gillnet surveys, or fish/crustacean trap surveys) are not included within the scope of this programmatic consultation's proposed action. Second, the proposed action for this consultation does not include ROWs that may be issued for a transmission backbone system (i.e., a shared transmission system that runs parallel to shore to connect multiple wind facilities to the onshore grid through a single cable landfall). Third, the geographic scope of the action area for the proposed action subject to this consultation extends seaward only to the 100-meter bathymetric contour and does not include the full Call Area, which was included in the proposed action for the draft EA (i.e., out to the 400-meter bathymetric contour). Limiting the action area to the 100-meter bathymetric contour greatly reduces the potential effects of the proposed action to Rice's whale, such as vessel strikes.

The survey activities considered in this consultation are geophysical and geotechnical surveys and the deployment, operation, and decommissioning of met buoys that are expected to take place within offshore wind lease areas following lease issuance for up to 18 leases to be issued over the next 10 years. These frequent, similar activities are proposed to occur in the GoMex Call Area from shore seaward to the 100-meter bathymetric contour. The geophysical and geotechnical surveys and met buoys are expected to occur after lease issuance in support of the potential future siting of offshore wind farm infrastructure (i.e., turbines, substations and service platforms, and cables routes). Site characterization and site assessment activities associated with the issuance of offshore wind energy leases are expected to occur between 2023 and 2040.

Specifically, the proposed action includes the following:

- 1) conducting high-resolution geophysical (HRG), geotechnical, and ship-based biological surveys within the lease sites (up to 18 lease sites may be surveyed),
- 2) conducting HRG, geotechnical, and ship-based, visual-only biological surveys along potential export cable corridors (up to 2 export cable corridors may be surveyed for each lease), and
- 3) the installation, operation, and decommissioning of up to 2 met buoys per lease site (a total of 36 buoys within 18 lease sites).

While performing surveys, vessels will travel at speeds no greater than 4.5 knots. While transiting, vessels will travel at speeds no greater than 10 knots. Plane-based and ship-based biological surveys are limited to visual surveys that may be concurrent with other biological surveys but would not be concurrent with any geophysical or geotechnical survey work. Ship-based, biological surveys shall not include trawls, gillnets, fish and crustacean traps, or any other gear that may take an ESA-listed species. *Take* is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct (ESA Section 2(19)).

The proposed action precludes the leasing of whole or partial OCS Blocks located within the exterior boundaries of any unit of the National Park System, National Wildlife Refuge System, National Marine Sanctuary System, or any National Monument, as provided in subsection 8(p)(10) of the OCSLA.

Further, the proposed action does not include construction, operation, or decommissioning of future wind farm infrastructure (i.e., offshore wind turbines, cables, and associated offshore

facilities such as substations or service platforms) or port expansions and improvements necessary to support future wind farm infrastructure. Those activities will be evaluated in future project-specific regulatory processes (i.e., Construction and Operations Plan [COP] phase).

## **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, locations where met buoys will be deployed, areas where increased levels of noise will be experienced, and the vessel transit routes between potential ports and the survey areas. Below is a summary description of the action area for the proposed action. A complete description and depiction of the action area is included in Section 3 and Figure 1 of BOEM's consultation request attached hereto as **Appendix A** and incorporated herein by reference.

Site characterization and site assessment activities associated with lease issuance are expected to occur on the OCS seaward to the 100-meter bathymetric contour in the GoMex Call Area and along potential export cable corridors from the OCS to shore. Future landfalls for export cable corridors that may result from leases may occur anywhere along the coasts of Texas and Louisiana and, therefore, surveys in coastal waters of these 2 states are included in the action area. Met buoys will only be placed on the OCS within the action area in accordance with the updated mandatory Protocols (**Appendix B**).

Vessels are not are expected to originate from or travel to ports outside the GoMex. Therefore, waters outside of the GoMex are not part of the action area.

Only ports along the coasts of Texas and Louisiana are expected to be used for vessel-related activities. However, there may be emergency situations (e.g., when the safety of the vessel or crew is in doubt or the safety of life at sea is in question) in which ports as far east as Mobile, Alabama, could be used. Therefore, the action area extends eastward from the Call Area to include Mississippi Sound and Mobile Bay. Any potential vessel traffic using the Port of Pascagoula will use the Gulf Intracoastal Waterway and the major shipping channel, which are excluded from Gulf sturgeon critical habitat under Section 4(b)(2) of the ESA (see 68 FR 13370, at 13401, March 19, 2003).

Under the OCSLA, areas containing the Flower Garden Banks National Marine Sanctuary (FGBNMS) are not available for lease. Therefore, the FGBNMS is not part of the action area.

Because the action area does not include the Eastern Planning Area of the GoMex and does not extend past the 100-meter bathymetric contour on the OCS, the entirety of the Rice's whale Core Distribution Area (CDA) defined by Rosel and Garrison (2022) and the extended habitat between the 100-400 meter bathymetric contours based on Garrison et al. (in review) are outside of the action area. We note, however, that the Rice's whale CDA may be updated as new data becomes available.

## Endangered Species Act (ESA) Protocols

BOEM and BSEE will require the lessee or the lessee's representatives (e.g., operators) to follow all ESA Protocols (**Appendix B**, B.1-B.9) for every activity that falls within the scope of this programmatic consultation.

Because BOEM has limited the action area to the 100-meter bathymetric contour to avoid potential impacts to Rice's whale, particularly those associated with vessel traffic, the ESA Protocols included in **Appendix B**, namely Protocols B.5 (*Vessel Strike Avoidance and Injured/Dead Aquatic Protected Species Reporting Protocol*) and B.6 (*Transit Plan Protocol*), are designed to avoid and reduce the potential effects to all ESA-listed species from vessel traffic.

## Implementation Tracking and Reporting

All written correspondence from BOEM regarding this programmatic consultation will be transmitted to NMFS SERO via [nmfs.ser.esa.consultations@noaa.gov](mailto:nmfs.ser.esa.consultations@noaa.gov) and will include the following information in the subject line for identification and tracking purposes: GoMex OSW Programmatic Site Characterization and Site Assessment (the project title) and SERO-2022-02857 (the NMFS tracking number) with the exception of Protected Species Observer (PSO) reviews and approvals. PSO reviews and approvals will be coordinated through [nmfs.psoreview@noaa.gov](mailto:nmfs.psoreview@noaa.gov).

Protocol B.2 (*Pre-Initiation Survey Plan Submittal Protocol*) in **Appendix B** specifies the implementation tracking and reporting details related to all Survey Plans.

Protocol B.3 (*Site Characterization Surveys Using Acoustic Source Protocol*) in **Appendix B** specifies the implementation tracking and reporting details related to Alternative Monitoring Plans and Monthly Acoustic Survey Reports.

Protocol B.5 (*Vessel Strike Avoidance and Injured/Dead Aquatic Protected Species Reporting Protocol*) in **Appendix B** specifies the implementation tracking and reporting details related to protected species incidents requiring immediate reporting and post-incident reporting.

Protocol B.9 (*Moon Pool Monitoring Protocol*) in **Appendix B** specifies the implementation tracking and reporting details related to any activities entailing the use of a moon pool.

## Supersede Process

NMFS, BOEM, and BSEE worked collaboratively to develop this programmatic consultation and recognize that instances may arise where the type of equipment for a proposed activity may differ from the equipment described in BOEM's consultation request (**Appendix A**), and thus may fall outside the scope of activities included within the proposed action. Similarly, there may be instances where it may be appropriate to modify the ESA Protocols (**Appendix B**) for a particular proposed activity. The Supersede Process outlined below provides a process to address

these instances within the scope of this programmatic consultation, with written concurrence from NMFS.

For any activity that either BOEM or NMFS determines to be outside the scope of this programmatic consultation, BOEM may modify the proposed activity to bring it within the scope, or BOEM can request a stand-alone ESA Section 7 consultation outside of this informal programmatic consultation.

#### *Equipment Modification Request*

BOEM may identify equipment different from those described in the proposed action of this programmatic consultation. If BOEM determines that the different equipment it wishes to be utilized will have effects on ESA-listed or critical habitat species that are substantially similar to the effects considered in this programmatic consultation, BOEM may seek NMFS's concurrence. After BOEM makes such a preliminary determination, it must provide that rationale to NMFS in writing via email and request NMFS's concurrence that it may rely on the most recent consultation to satisfy its ESA Section 7 consultation obligations. This type of request is intended to allow for limited equipment modifications, while ensuring that all effects to ESA-listed species and critical habitat have been considered and remain consistent with those analyzed in this programmatic consultation. NMFS will consider effects to be substantially similar if the effects of the proposed equipment modification are consistent with the effects analyzed in this programmatic consultation (i.e., the equipment does not result in effects to an ESA-listed species or critical habitat not considered here or in a manner that has not been considered). NMFS will not concur with equipment modification requests under this Supersede Process if we determine the effects are expected be greater in magnitude or scale than those analyzed in this programmatic consultation, or where reinitiation is warranted.

Each "Equipment Modification Request" email will have the subject "Supersede Process Request for Equipment Modification: GoMex OSW Programmatic Site Characterization and Site Assessment, SERO-2022-02857" for tracking purposes. Each request should include sufficient information and rationale to describe and support how the equipment has similar survey characteristics to the representative equipment described in Tables 5-6 of the incoming request (**Appendix A**). Following receipt of a "Equipment Modification Request," NMFS will review the information included and send a written concurrence or denial via email to BOEM. Typically, this will occur within 15 business days; however, BOEM must await written concurrence from NMFS before authorizing the use of any different equipment.

#### *ESA Protocol Modification Request*

Similarly, BOEM may identify modifications to the ESA Protocols for a particular proposed activity. If BOEM determines that such a modification will result in at least the same conservation benefit or risk reduction as the ESA Protocols contained in **Appendix B**, BOEM may seek NMFS's concurrence. After BOEM makes such a preliminary determination, it must provide that rationale to NMFS in writing via email and request NMFS's concurrence that it may rely on the most recent consultation to satisfy its ESA Section 7 consultation obligations. This type of request is intended to allow for limited ESA Protocol modifications, while ensuring that



effects to ESA-listed species and critical habitat have been considered and remain consistent with those analyzed in this programmatic consultation. NMFS will consider a modified ESA Protocol to have at least same conservation benefit or risk reduction if the modification does not reduce or minimize the conservation benefit or increase the risk of adverse effects to ESA-listed species or critical habitat. NMFS will not concur with ESA Protocol modification requests under this Supersede Process if we determine the modification is expected to have effects greater in magnitude or scale than those analyzed in this programmatic consultation, or where reinitiation is warranted.

Each “ESA Protocol Modification Request” email will have the subject “Supersede Process Request for ESA Protocol Modification: GoMex OSW Programmatic Site Characterization and Site Assessment, SERO-2022-02857” for tracking purposes. Each request should include sufficient information and rationale to describe and support how the proposed modification will not diminish the intent of the ESA Protocols (**Appendix B**). Following receipt of a “ESA Protocol Modification Request,” NMFS will review the information included and send written concurrence or denial via email to BOEM. Typically, this will occur within 15 business days; however, BOEM must await written concurrence from NMFS before authorizing any modification to the ESA Protocols.

### Annual Comprehensive Review

NMFS and BOEM will conduct an annual review of the activities conducted under this programmatic consultation no later than February 15 of each year, starting in 2024. The review will evaluate, among other things, whether the activities being conducted are consistent with the description of the activities as proposed; whether the nature and scale of the anticipated effects to ESA resources continue to be valid; whether the ESA Protocols are being complied with consistently and continue to be appropriate; and whether the project-specific consultation procedures are being complied with and are effective.

### Effects Determinations for ESA-Listed Species

We have assessed the ESA-listed species that may occur in the action area. Our determination of the proposed action’s potential effects to these species is shown in **Table 1** below. Please note the following abbreviations: DPS = distinct population segment, FR = Federal Register, NE = no effect, and NLAA = not likely to adversely affect.

**Table 1.** ESA-listed Species in the Action Area and Effect Determinations

Species (DPS)	ESA Listing Status	Listing Rule/Date	Most Recent Recovery Plan (or Outline) Date	BOEM/BSEE Effect Determination	NMFS Effect Determination
<b>Sea Turtles</b>					
Green sea turtle (North Atlantic DPS)	T	81 FR 20057/ April 6, 2016	October 1991	<u>NLAA</u>	<u>NLAA</u>

Species (DPS)	ESA Listing Status	Listing Rule/Date	Most Recent Recovery Plan (or Outline) Date	BOEM/BSEE Effect Determination	NMFS Effect Determination
Green sea turtle (South Atlantic DPS)	T	81 FR 20057/ April 6, 2016	October 1991	<u>NLAA</u>	<u>NLAA</u>
Hawksbill sea turtle	E	35 FR 8491/ June 2, 1970	December 1993	<u>NLAA</u>	<u>NLAA</u>
Kemp's ridley sea turtle	E	35 FR 18319/ December 2, 1970	September 2011	<u>NLAA</u>	<u>NLAA</u>
Leatherback sea turtle	E	35 FR 8491/ June 2, 1970	April 1992	<u>NLAA</u>	<u>NLAA</u>
Loggerhead sea turtle (Northwest Atlantic DPS)	T	76 FR 58868/ September 22, 2011	December 2008	<u>NLAA</u>	<u>NLAA</u>
<b>Fishes</b>					
Giant manta ray	T	83 FR 2916/ January 22, 2018	2019 (Outline)	<u>NLAA</u>	<u>NLAA</u>
Gulf sturgeon (Atlantic sturgeon, Gulf subspecies)	T	56 FR 49653/ September 30, 1991	September 1995	<u>NLAA</u>	<u>NLAA</u>
<b>Marine Mammals</b>					
Rice's whale	E	84 FR 15446/ April 15, 2019 and 86 FR 47022/ August 23, 2021 (name change)	2020 (Outline)	<u>NLAA</u>	<u>NLAA</u>
Sperm whale	E	35 FR 12222/ December 2, 1970	December 2010	<u>NLAA</u>	<u>NLAA</u>
<b>Invertebrates</b>					
Boulder star coral ( <i>Orbicella franksi</i> )	T	79 FR 53852/ September 10, 2014	N/A	<u>NE</u>	<u>NLAA</u>
Elkhorn coral ( <i>Acropora palmata</i> )	T	71 FR 26852/ May 9, 2006	March 2015	<u>NE</u>	<u>NLAA</u>

Species (DPS)	ESA Listing Status	Listing Rule/Date	Most Recent Recovery Plan (or Outline) Date	BOEM/BSEE Effect Determination	NMFS Effect Determination
Lobed star coral ( <i>Orbicella annularis</i> )	T	79 FR 53852/ September 10, 2014	N/A	<u>NE</u>	<u>NLAA</u>
Mountainous star coral ( <i>Orbicella faveolata</i> )	T	79 FR 53852/ September 10, 2014	N/A	<u>NE</u>	<u>NLAA</u>
Pillar coral ( <i>Dendrogyra cylindrus</i> )	T	79 FR 53852/ September 10, 2014	N/A	<u>NE</u>	<u>NLAA</u>
Rough cactus coral ( <i>Mycetophyllia ferox</i> )	T	79 FR 53852/ September 10, 2014	N/A	<u>NE</u>	<u>NLAA</u>
Staghorn coral ( <i>Acropora cervicornis</i> )	T	71 FR 26852/ May 9, 2006	March 2015	<u>NE</u>	<u>NLAA</u>

### Effects Analysis for ESA-listed Species Not Likely to be Adversely Affected

Potential effects of the proposed action on species listed in Table 1 are as follows: (1) underwater noise from surveys, (2) vessel traffic; (3) seafloor disturbance, and (4) physical presence of met buoys. Based on our knowledge, expertise, and the information contained in BOEM’s consultation request (**Appendix A**), particularly the analysis of routes of effects contained in Section 6, which is incorporated herein by reference, and the updated ESA Protocols (**Appendix B**), we concur with BOEM’s conclusions that the proposed action is not likely to adversely affect the ESA-listed species listed above.

We provide the following analysis for ESA-listed coral species, for which BOEM made a *No Effect* determination. ESA-listed coral species may be affected by seafloor-sampling activities (e.g., drilling or boring for geotechnical surveys); however, we believe this effect is extremely unlikely to occur. The FGBNMS is one of the 3 primary locations of ESA-listed coral species in the Gulf of Mexico. As explained above, under the OCSLA the FGBNMS is not available for leasing and, therefore, no aspect of proposed action may occur there. In addition, all vessel anchoring and any seafloor-sampling activities will be limited to unconsolidated and uncolonized areas (i.e., sand areas lacking coral hardbottom and uncolonized by corals) and must occur at a distance that is at least 1,000-ft from any National Marine Sanctuary boundary and 500-ft from any sensitive benthic features (**Appendix B, B.1 Avoiding Sensitive, Benthic Habitat Protocol**). This protocol also requires that a minimum 15-ft vertical clearance be maintained for mooring or anchoring lines, chains and/or cables that cross sensitive benthic features.

## Effects Determination for Critical Habitat

We have assessed the critical habitat that overlaps with the action area and may be affected by the proposed action. Our determination of the proposed action’s potential effects to critical habitat is shown in **Table 2** below. Please note the following abbreviations: FR = Federal Register, and NLAA = not likely to adversely affect.

**Table 2.** Critical Habitat in the Action Area and Effect Determinations

Species (DPS)	Critical Habitat Unit in the Action Area	Critical Habitat Rule/Date	BOEM Effect Determination	NMFS Effect Determination
<b>Fishes</b>				
Gulf sturgeon	<u>Unit 8</u>	68 FR 13370/ March 19, 2003	<u>NLAA</u>	<u>NLAA</u>

While Table 15 in BOEM’s consultation request (**Appendix A**) inadvertently omitted an effects determination for Gulf sturgeon critical habitat (Unit 8), BOEM’s analysis of effects to Gulf sturgeon critical habitat contained in Section 7 of its consultation request is consistent with a *Not Likely to Adversely Affect* determination.

## Effects Analysis for Critical Habitat

The primary constituent elements (PCEs) essential for the conservation of Gulf sturgeon are those habitat components that support feeding, resting and sheltering, reproduction, migration, and physical features necessary for maintaining the natural processes that support these habitat components. The PCEs in Unit 8 of Gulf sturgeon critical habitat relevant to estuarine and marine areas are:

- (1) Abundant prey items within estuarine and marine habitats and substrates for juvenile, subadult, and adult life stages;
- (2) Water quality, including temperature, salinity, pH, hardness, turbidity, oxygen content, and other chemical characteristics, necessary for normal behavior, growth, and viability of all life stages;
- (3) Sediment quality, including texture and other chemical characteristics, necessary for normal behavior, growth, and viability of all life stages; and
- (4) Safe and unobstructed migratory pathways necessary for passage within and between riverine, estuarine, and marine habitats (e.g., a river unobstructed by any permanent structure, or a dammed river that still allows for passage).

The only aspect of the proposed action that may occur within Unit 8 of Gulf sturgeon critical habitat is vessel traffic using Port of Gulfport. Under this programmatic consultation, no HRG, geotechnical, and ship-based biological surveys may occur and no met buoys may be placed in Unit 8 of Gulf sturgeon critical habitat.

We concur with, and incorporate by reference, BOEM's analysis that there are no potential routes of effects to PCE 1 (abundant prey) or PCE 3 (sediment quality) from vessel traffic using Port of Gulfport as vessel operation to and from this port will not affect Gulf sturgeon prey abundance or the necessary sediment quality characteristics for Gulf sturgeon viability at any life stage in any way.

PCE 2 (water quality) may be affected by accidental vessel discharges (i.e., fuel, hazardous materials, or waste) by vessels using Port of Gulfport; however, we believe this route of effect would be so small that it could not be meaningfully measured, detected, or evaluated, and therefore, is insignificant. Project vessels are expected to comply with all applicable U.S. Coast Guard requirements, including the prevention and control of oil and fuel spills. Compliance with these regulations is expected to minimize any effects associated with accidental vessel discharges such that any changes to water quality.

PCE 4 (unobstructed migratory pathways) may be affected by vessel traffic using Port of Gulfport; however, we believe this route of effect will be insignificant due to the temporary nature of this effect and the availability of other unobstructed migratory pathways. Vessels using Port of Gulfport are expected to stay within shipping channels. During vessel passage within shipping channels, a relatively small fraction of the total area of any potential migratory pathway may be temporarily traversed over a relatively short time. Gulf sturgeon would be able to move around these vessels safely using estuarine and marine habitat located inside and outside of shipping channels.

## **Conclusion**

This concludes your consultation responsibilities under the ESA for listed species and designated critical habitat under NMFS's purview.

Reinitiation of consultation is required and shall be requested by the action agency or by NMFS where discretionary Federal involvement or control over the action has been retained or is authorized by law and: (a) take occurs; (b) 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 in this consultation; (c) the action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not previously considered in this consultation; or (d) if a new species is listed or critical habitat designated that may be affected by the action.

We look forward to further cooperation with BOEM on other projects to ensure the conservation of our threatened and endangered marine species and designated critical habitat. If you have any questions on this consultation, please contact Dana M. Bethea, Consultation Biologist, by email at [Dana.Bethea@noaa.gov](mailto:Dana.Bethea@noaa.gov).

Sincerely,

Kelly Shotts  
Acting Assistant Regional Administrator  
for Protected Resources

Enclosure(s):

Appendix A – BOEM’s Consultation Request, dated 11/07/2022

Appendix B – Updated ESA Protocols for Activities Associated with SERO-2022-02857, dated 12/02/2022

cc:

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## **Literature Cited**

Garrison, L.P., A. Martninez, M.S. Soldevilla, J. Ortega-Ortiz, K.D. Mullin. In Review. The habitat of the critically endangered Rice's whale, *Balaenoptera ricei*, in the Gulf of Mexico.

Rosel, P. and Garrison, L. 2022. Rice's whale core distribution map Version: 7 June 2019. NOAA. Southeast Fisheries Science Center Reference Document MMTD-2022-01. 4 pp.