



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

January 19, 2012

David Bernhart
Assistant Regional Administrator for Protected Resources
NOAA Fisheries Service, Southeast Regional Office
263 13th Avenue South
Saint Petersburg, Florida 33701

Re: Request for section 7 Endangered Species Act Informal Consultation for Deepwater
Horizon Oil Spill Phase I Early Restoration Plan

Dear David,

The National Oceanic and Atmospheric Administration (NOAA) Restoration Center requests informal consultation with your office, under section 7 of the Endangered Species Act (ESA), for impacts from the Phase I Early Restoration Plan for Deepwater Horizon Oil Spill. Phase 1 will involve projects in Florida, Alabama, Mississippi and Louisiana, and has the potential to affect the following federally-listed species administered by NOAA Fisheries:

Sea Turtles (Green-E/T, Hawksbill-E, Leatherback-E, Loggerhead-T, Kemp's Ridley-E)

Gulf Sturgeon-T plus critical habitat

Smalltooth Sawfish- E

Sperm Whale- E

The NOAA Restoration Center, a Lead Federal Agency, is requesting consultation on behalf of the Natural Resource Trustees for Deepwater Horizon Oil Spill. Enclosed please find a memorandum summarizing our Biological Assessment and Determinations of Effect on Threatened and Endangered Species or Critical Habitats for the Phase I Early Restoration Projects. It is our expectation that the proposed projects in Phase I of Early Restoration will have a significant net benefit to the Gulf of Mexico ecosystem.

For further questions about the project, please contact Jeff Shenot of our staff at 301-427-8689.

Thank you for your assistance.

Sincerely,

John Iliff
Supervisor, NOAA Damage Assessment, Remediation, and Restoration Program
NOAA Fisheries Office of Habitat Conservation

This consult incorporates by reference: Draft Phase I Early Restoration Plan and Environmental Assessment; available online at: <http://www.gulfspillrestoration.noaa.gov/restoration/early-restoration/>



Memorandum for the Deepwater Horizon Oil Spill Draft Phase I Early Restoration Plan Regarding NOAA's Endangered Species Act Compliance for its Jurisdictional Protected Resources

To: Southeast Region Office of Protected Resources, National Marine Fisheries Service

From: *Joe* Chris Doley, Director, NOAA Restoration Center *PAUL CAYWOOD*

Date: January 19, 2012

Subject: Biological Assessment and Determinations of Effect on Threatened and Endangered Species or Critical Habitats, for the Phase I Early Restoration Projects

Background

The NOAA Restoration Center (RC) and cooperating state and federal Trustees propose to conduct early restoration in the Gulf of Mexico, to restore marine and coastal resources that were potentially exposed to DWH oil or dispersants or otherwise injured during activities conducted in response to the disaster. The oil release occurred in deep Federal waters but spread to coastal areas and had impacts to marine and coastal resources in ecosystems along the coastal waters of Florida, Alabama, Mississippi, Louisiana and Texas.

Under the Oil Pollution Act of 1990 (OPA), several federal and five states (FL, AL, MS, LA, and TX) have been designated as natural resource trustees (Trustees) and include the Department of Commerce, represented by NOAA, the Department of Interior (DOI), the Department of Defense, represented by the Navy, and all five States mentioned above. Restoration to compensate the public for the injuries and losses will include both early and long term restoration, but would be phased. At this time, planning for Early Restoration projects is underway; eight projects have been specifically proposed for implementation as Phase I of that effort. The Trustees released the Draft Phase I Early Restoration Plan and Environmental Assessment (D-ERP) on December 14, 2011 for a 60-day public comment period. The comment period will end on February 14, 2012.

NOAA is conducting an informal consultation on federally protected species that it administers with the National Marine Fisheries Service's Southeast Region Office of Protected Resources. The DOI is conducting informal consultation with the various FWS offices in the states of FL, AL, MS and LA for federally protected species that it administers in those states respectively.

Phase I projects would be implemented beginning in 2012 after completing all consultation requirements and receipt of required permits. Phase II and subsequent early restoration phases may be concurrently planned during Phase I, but further details are not available yet, and separate NEPA assessments and determinations of effect for any federally protected and managed species will be completed for projects proposed in each future phase. To the extent possible and practicable, evaluations of cumulative impacts to federally protected species will be made in this assessment.

The eight proposed Phase I projects have the potential to affect the following federally-listed species administered by NOAA Fisheries:

- Sea Turtles (Green-E/T, Hawksbill-E, Leatherback-E, Loggerhead-T, Kemp's Ridley-E)
- Gulf Sturgeon-T (plus critical habitat)
- Smalltooth Sawfish- E
- Sperm Whale- E

The potential impacts to these species are described below.

BIOLOGICAL ASSESSMENT

I. Sea Turtles

The DOI and NOAA share jurisdictional responsibility under the ESA for sea turtles, but have distinct differences with respect to administering federal compliance with the ESA for sea turtles. The DOI has jurisdiction over sea turtles when they are on land and also any designated critical habitat that is terrestrial (i.e., beach habitat which sea turtles use for nesting). The NOAA's National Marine Fisheries Service has jurisdiction over sea turtles when they are in the water in coastal or marine waters. The NOAA RC is assessing potential impacts to sea turtles from proposed in-water Phase I activities and will consult on these, and DOI is concurrently assessing potential impacts to turtles and habitats from the Phase I on-shore activities.

Although any of the five species of sea turtles could potentially be present in the marine or coastal waters during implementation of the proposed projects, any use of these areas by sea turtles would be transient, and only temporary. In coastal waters where there may be high potential for one to be present, workers would most likely be watching for them since they are already going to be watching for the presence of any manatees, to avoid a strike or other disturbance to them.

Short term increases in water column turbidity may occur, but sea turtles can easily detect construction activity and vehicles would be traveling slowly during construction. There may also be localized disruptions to epifaunal organisms, and brief noise or visual disturbances to any faunal organisms in the water column. Since sea turtles are highly mobile and the project construction activity is going to be very detectable to marine wildlife in the vicinity, it is likely that sea turtles would be able to avoid the temporary disturbance.

Assessment of Effects

The following Early Restoration projects will have no effect on sea turtles in the water column since these projects are located on shore:

1. Alabama Dune Restoration Cooperative Project; and
2. Florida (Pensacola Beach) Dune Restoration Project.

The NOAA RC is consulting on sea turtles for only the projects below, which are all proposed to be within marine or coastal waters. For the Phase I D-ERP, the following project components may affect, but are not likely to adversely affect sea turtles:

1. LA Oyster Cultch Project;

2. Lake Hermitage Marsh Creation Project;
3. Mississippi Oyster Cultch Restoration (MS Sound) Project;
4. Mississippi Artificial Reef Habitat Project;
5. Marsh Island (Portersville Bay) Marsh Creation Project; and
6. Florida Boat Ramp Enhancement and Construction Project.

Since sea turtles are highly mobile and generally do not inhabit the proposed project areas except in a transient use (just passing through), NOAA concludes that the proposed projects could potentially affect sea turtles, but the affects would be very brief and only minor, and are not likely to adversely affect them.

II. Gulf Sturgeon

Gulf Sturgeon are federally listed as threatened, and found in coastal rivers from Florida to Louisiana during the warm summer months, and in the Gulf of Mexico and its estuaries and bays in cooler months. They are bottom feeders that prefer soft sedimentary substrate habitats (sand, silt, clay) to forage for mollusks, worms and crustaceans. The adults return to their natal freshwater source to spawn, and prefer areas of rock and rubble for nesting habitat. They begin their movement up the rivers to do this between February and April, and migrate back out between September and November. There are designated geographic areas of critical habitat among rivers and tributaries of the Gulf of Mexico (refer to the NMFS web page at <http://www.nmfs.noaa.gov/pr/pdfs/criticalhabitat/gulfsturgeon.pdf>).

Assessment of Effects

The following Early Restoration projects will have no effect since these projects are located outside any areas of designated critical habitat, and due to the proposed activity having no potential to affect any individuals:

1. Alabama Dune Restoration Cooperative Project; and
2. Florida (Pensacola Beach) Dune Restoration Project.

Only the projects that are proposed in areas where the sturgeon occur and in the designated areas of critical habitat are being consulted on. The potential to adversely affect either individual sturgeon or to damage, destroy, or adversely modify any designated critical habitat will be evaluated below. For the Phase I D-ERP, the following project components may affect, but are not likely to adversely affect the sturgeon or its critical habitat:

1. LA Oyster Cultch Project (only the Three Mile Bay site; the 6 other sites will have "No Effect");
2. Lake Hermitage Marsh Creation Project;
3. Mississippi Oyster Cultch Restoration (MS Sound) Project;
4. Mississippi Artificial Reef Habitat Project;
5. Marsh Island (Portersville Bay) Marsh Creation Project; and
6. Florida Boat Ramp Enhancement and Construction Project (only at 2 of the 4 sites: Navy Point Park Public Boat Ramp/repair of an existing boat ramp in Pensacola Bay, and Mahogany Mill Public Boat Ramp/construct new boat ramp facility in Pensacola Bay; the 2 other sites are No Effect).

The oyster cultch projects (#1 and #3 listed above) would place oyster cultch onto areas of public oyster seed grounds throughout coastal Louisiana and Mississippi. The objective of the project is to produce seed- and sack-sized oysters to begin compensating the public for impacts to oyster areas exposed to oil, dispersant, and response activities. The states would contract for the placement of cultch material consisting of limestone rock, crushed concrete, oyster shell or other similar material that when placed in oyster spawning areas, provides a substrate on which free floating oyster larvae can attach and grow into oysters. These methods for enhancing or restoring existing seed grounds have been used by LDWF since 1917.

Populations of Gulf sturgeon are known to be in the Pearl River system (including the Pearl and Bogue Chitto Rivers) in Louisiana (Kirk, 2008). The Pearl River system and coastal waters extending from its outflow toward Mississippi are included within the designated critical habitat areas for the Gulf sturgeon (68 FR 13370; see: <http://www.nmfs.noaa.gov/pr/pdfs/criticalhabitat/gulfsturgeon.pdf>). The only proposed LA cultch placement location in this area is 3-Mile Bay.

Ross et al. (2008) performed telemetry studies which indicated that Gulf sturgeon were present in Mississippi Sound habitats from October through March. These telemetry studies showed that once Gulf sturgeon left the freshwater riverine spawning habitats they typically are found in the shallow water habitats of the barrier island passes, with no occurrences observed in the nearshore habitats. This suggests that sturgeon presence in the project area would only occur during seasonal migrations to barrier island shallow waters. Since the foraging habitat of sturgeon is mainly soft, sandy substrate and not the hard substrate of existing oyster reef, it is unlikely that sturgeon would use the existing seed beds within the project area to forage in. A limited amount of soft substrate and potential sturgeon foraging habitat could possibly be lost during and after deployment. Based on currently available information regarding the behavior and life cycle of the Gulf sturgeon, and the locations and timing of cultch deployment, it is unlikely that the Gulf sturgeon would be adversely impacted by the proposed oyster cultch projects in LA and MS. Further, it is unlikely that cultch placement at the Three Mile Bay site or MS Sound sites would damage, destroy, or adversely modify any designated critical habitat since the sites proposed to be enhanced are all existing oyster seed beds.

It is anticipated that placement of the cultch material will be brief (likely to be only days, not weeks at any given site), so the duration and extent of disturbance will not significantly interfere with migration. If sturgeon are present, they are highly mobile and adjacent areas of similar habitat will be available and undisturbed, so they could easily move away from any disturbance activity into these adjacent areas and avoid impacts. Turbidity in the water column may temporarily increase during deployment (very short term due to tidal flushing, likely to be hours not days). The material may displace or cover some infauna and epifauna. However, many epifaunal organisms are mobile and would be minimally affected by the settling material. Overall, the completed project would result in an improved benthic and marine ecosystem especially for oysters. All effort would be made for cultch transportation and placement to avoid existing environmentally sensitive areas, such as viable productive oyster reefs, emergent and submerged aquatic vegetation, and other live bottom communities.

Regarding the marsh and artificial reef creation projects (#2, #4 and #5 listed above), it is possible that adult sturgeon could be present during their seasonal migration. However, for #2 (Lake Hermitage Project) it is not likely since the location is not within a migratory route, and it is not known to be an area of use for the sturgeon during either summer or winter. It is very unlikely the Lake Hermitage Project would adversely affect any individuals, and it is also not within an area of designated critical habitat. It is also not located within any area of designated critical habitat.

For the Mississippi Artificial Reef Project, the D-ERP states that a Gulf Sturgeon consultation for ESA was completed as part of the USACE Section 10 permitting process. NOAA is trying to obtain a copy of this permit, and will document whether it is necessary to re-consult or not.

The Marsh Island (Portersville Bay) Marsh Creation Project is not located within any area of designated critical habitat.

III. Smalltooth Sawfish

This species is primarily found along peninsular Florida only, and occurs very rarely in the panhandle region of Florida.

Assessment of Effects

It is potentially feasible for a transient individual to be present in the vicinity of the Florida Boat Ramp Project, but it would be highly unlikely that it would be adversely affected, since the species is highly mobile and generally does not inhabit this area except in a transient use (just passing through).

IV. Sperm Whale

This species is highly pelagic and inhabits offshore marine environments in the Gulf of Mexico, and not present within the proposed project areas.

Assessment of Effects

There would be no effect to sperm whales.

Cumulative Effects

Cumulative effects include the effects of current and future similar actions that are reasonably certain to occur in the action area considered in this Biological Assessment and in the D-ERP. There are no known current similar actions proposed or being conducted within the area of potential effect. Any future actions that are proposed in subsequent phases of Early Restoration, or similar Long Term Restoration Plan actions, would need to be considered and identified by the Trustees. It is not feasible to evaluate such actions until they are identified and proposed.