



May 17, 2016

VIA Email and U.S. Mail

Ms. Donna Wieting
Director, Office of Protected Resources (F/PR)
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Re: Applicant Status for ESA Section 7 Consultation for Incidental Take Regulations Governing Geophysical Surveys in the Gulf of Mexico

Dear Ms. Wieting:

We write on behalf of the American Petroleum Institute (“API”) and the International Association of Geophysical Contractors (“IAGC”) (together, the “Associations”) regarding the Endangered Species Act (“ESA”) Section 7 consultation for incidental take regulations governing geophysical surveys in the Gulf of Mexico. Specifically, as set forth below, the Associations are “applicants” for this consultation and, accordingly, we would appreciate, and hereby formally request, written confirmation of the Associations’ applicant status. We intend for the Associations’ participation as applicants to constructively inform the Section 7 process and ultimately contribute to a biological opinion that materially benefits from input by the operators who will actually obtain the authorizations and carry out the associated activities pursuant to terms and conditions that are evaluated in the consultation. Thank you for your attention to the points addressed in this letter, and we look forward to discussing next steps very soon.

THE ASSOCIATIONS

API is a national trade association representing over 625 member companies involved in all aspects of the oil and natural gas industry, particularly offshore exploration and development in the Gulf of Mexico. IAGC is the international trade association representing geophysical services companies that support and provide critical data to the oil and natural gas industry. IAGC members play an integral role in the successful exploration and development of offshore hydrocarbon resources through the acquisition and processing of geophysical data. Collectively, the Associations represent almost all of the stakeholders engaged in the exploration and development of offshore oil and gas resources in the Gulf of Mexico. As particularly relevant

here, these stakeholders are the regulated entities that will obtain authorizations under the incidental take regulations that are issued for geophysical surveys in the Gulf of Mexico.

THE ACTION AND ASSOCIATED CONSULTATION

We understand that the National Marine Fisheries Service (“NMFS”) will soon issue a notice in the Federal Register regarding the Bureau of Ocean Energy Management’s (“BOEM”) submission of a petition for regulations under Section 101(a)(5)(A) of the Marine Mammal Protection Act that address the authorization of incidental take associated with geophysical surveys on the outer continental shelf of the Gulf of Mexico (the “ITR”). If NMFS determines that issuance of the requested ITR is a federal action that may adversely affect ESA-listed species, NMFS is required under the ESA to initiate and complete Section 7 consultation to ensure that the effects of the requested ITR are not likely to jeopardize the continued existence of ESA-listed species or adversely modify their critical habitat (the “ITR Consultation”). See 16 U.S.C. § 1536(a)(2), (b); see generally 50 C.F.R. § 402.14 (requirements generally applicable to initiation and completion of Section 7 consultation on agency actions).

We also understand that NMFS has been engaged in the preparation of a biological opinion that will broadly evaluate the effects of various activities occurring in the Gulf of Mexico, including geophysical activities, and that NMFS may rely upon that biological opinion (the “Gulf BiOp”) in the ITR Consultation. The preparation of the Gulf BiOp, however, does not alter the requirement that NMFS must formally consult on the “action” to soon be formally noticed (*i.e.*, BOEM’s requested ITR) and issue a biological opinion as to whether that action is likely to jeopardize ESA-listed species or adversely modify critical habitat. Through this letter, the Associations request confirmation of their status as Section 7 applicants for the ITR Consultation.¹

REQUEST FOR CONFIRMATION OF APPLICANT STATUS

The ESA Section 7 regulations define an “applicant” as “any person ... who requires formal approval or authorization from a Federal agency as a prerequisite for conducting the action.” 50 C.F.R. § 402.02. Applicant status is to be “broadly conferred” and any person seeking “any other form of authorization or approval issued by a Federal agency as a prerequisite for carrying out the action” must be deemed an applicant. See *Haw. Longline Ass’n v. NMFS*, No. 01-765, 2002 U.S. Dist. LEXIS 7263, at *22-23 (D.D.C. Apr. 25, 2002) (“*HLA v. NMFS*”) (quoting 51 Fed. Reg. 19,926, 19,930 (June 3, 1986)), *report and recommendation adopted in relevant part* (D.D.C. Sept. 24, 2002) (slip op., Doc. No. 87). “Action,” in turn, is defined as “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by

¹ If NMFS has engaged in early consultation on the anticipated ITR petition, pursuant to 50 C.F.R. § 402.11, then “the prospective applicant [*i.e.*, the Associations] should be involved throughout the consultation process.” *Id.*

Federal agencies Examples include, but are not limited to . . . (b) the promulgation of regulations; [and] (c) the granting of . . . permits. . . .” *Id.* at *14 (quoting 50 C.F.R. § 402.02). The term “action” is also to be broadly construed. *See* ESA Section 7 Consultation Handbook at 2-12 (1998) (“Consultation Handbook”) (“[T]he Federal action involves the approval of a permit or license sought by the applicant, together with the activities resulting from such permission.”); *see also HLA v. NMFS*, 2002 U.S. Dist. LEXIS 7263, at *26-27.

The Section 7 consultation at issue in *HLA v. NMFS* addressed NMFS’s approval of a fisheries management plan (“FMP”) that was proposed by a federal fisheries management council. As here, NMFS consulted with itself regarding the effects of its approval of the FMP. NMFS denied applicant status to a trade association that represented the fishermen who would ultimately carry out the activities addressed by the FMP. HLA sued, and the court firmly rejected NMFS’s arguments, holding that the trade association was a Section 7 “applicant.” *See HLA v. NMFS*, 2002 U.S. Dist. LEXIS 7263 at *26-28. In so holding, the court found that the “clear intent of the Section 7 regulations is to allow input from those who are directly affected by ESA consultations.” *Id.* at *27 (emphasis added). “It would undermine this intent to deny a party such a voice based on a technical distinction over the scope of the agency action.” *Id.*; *see id.* (agency action includes all “regulations and measures affecting the fishery”); *HLA v. NMFS*, Case No. 01-765, Doc. No. 87, slip op. at 7-8 (rejecting NMFS’s contrary arguments); *see also Or. Nat. Desert Ass’n v. Tidwell*, 716 F. Supp. 2d 982, 1000-01 (D. Or. 2010) (invalidating NMFS’s biological opinion because it failed to allow livestock grazing permit holders an opportunity to participate in the consultation process).

The authorities outlined above establish that the Associations are applicants for the ITR Consultation. Just like the trade association in *HLA v. NMFS*, the Associations represent the operators who will be “directly affected” by the ITR and future letters of authorization (“LOAs”), the ITR Consultation, and the resulting biological opinion and incidental take statement. Those operators will carry out the activities for which LOAs will be requested and, consequently, will be required to comply with any terms and conditions of the biological opinion and incidental take statement that are incorporated into the ITR and related LOAs. As representatives of the directly affected operators, the Associations will provide operational and technical input during the consultation process that, respectfully, cannot be provided by BOEM or any other federal agency, as well as other information such as scientific data of which the agencies may not be aware. This is precisely the type of informed participation that the *HLA v. NMFS* court expressly recognized as critical to the Section 7 consultation process.

As applicants, the Associations respectfully request that NMFS afford them reasonable notice and opportunity to participate in the consultation process, including a timely and fair opportunity to review and comment on drafts of the biological opinion. *See HLA v. NMFS*, 2002 U.S. Dist. LEXIS 7263, at *12 (“The consultation regulations require that NMFS review all relevant information submitted by the applicant and discuss its analysis and grounds for the BiOp with the applicant.” (citing 50 C.F.R. § 402.14(d), (g))); *see also HLA v. NMFS*, 281 F. Supp. 2d 1, 16 (D.D.C. 2003) (applicant is “entitled to reasonable time to review and comment on” draft

biological opinions). Specifically, as emphasized by the Consultation Handbook, applicants, including the Associations, are entitled to at least the following rights:

- The action agency must provide the applicant an opportunity to submit information for consideration during the consultation;
- The applicant is entitled to review draft biological opinions obtained through the action agency, and to provide comments through the action agency;
- The consulting agency must discuss with the applicant its review and evaluation conducted pursuant to 50 C.F.R. § 402.14(g)(1)-(3);
- The consulting agency must discuss the basis of its biological determination with the applicant and seek the applicant's expertise in identifying reasonable and prudent alternatives to the action if likely jeopardy or adverse modification of critical habitat is determined; and
- The applicant must be provided with a copy of the final biological opinion.

Consultation Handbook at 2-13;² *see also HLA v. NMFS*, 2002 U.S. Dist. LEXIS 7263 at *29-40; 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(d), (e), (g)(5).

The Associations respectfully request that NMFS provide them with a copy of the draft biological opinion developed in the ITR Consultation (“ITR BiOp”) no later than 60 days before issuance of the final ITR BiOp. This will provide sufficient time for the Associations to review the draft ITR BiOp and provide comments, and for NMFS to consider and incorporate those comments in the final ITR BiOp. If NMFS intends to rely, in whole or in part, upon the Gulf BiOp for the ITR Consultation, then the Associations similarly request that NMFS provide the Associations with a copy of the relevant portions of the draft Gulf BiOp for comment no later than 60 days before the Gulf BiOp is finalized. *See* 51 Fed. Reg. at 19,952 (the release of draft opinions to applicants “facilitates a more meaningful exchange of information . . . [and] may result in the development and submission of additional data, and the preparation of more thorough biological opinions”).³

² Courts consider the Consultation Handbook as relevant instructive authority, particularly on the Section 7 “applicant” issue. *See HLA v. NMFS*, 2002 U.S. Dist. LEXIS 7263 at *23; *see also Tidwell*, 716 F. Supp. 2d at 1000.

³ As relevant here, the *HLA v. NMFS* court recognized that “[t]he merits of a mandatory release of the draft BiOp are all the more compelling in light of NMFS’ inherent split role as the action and the consulting agency.” 2002 U.S. Dist. LEXIS 7263, at *43.

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We look forward to productively working with NMFS throughout the ITR Consultation. As indicated above, we respectfully request that NMFS promptly confirm, in writing, the applicant status of the Associations for the ITR Consultation. We will follow up with you shortly to arrange a conference call so that we may begin the required exchange of information with NMFS and discuss the timeline for the consultation process.

Sincerely,



Andy Radford

American Petroleum Institute

Sr. Policy Advisor - Offshore



Nikki Martin

International Association of Geophysical Contractors

President

cc: Ms. Jolie Harrison, Chief, Permits and Conservation Division (F/PR1)
Ms. Cathy Tortorici, Chief, ESA Interagency Coordination (F/PR5)
Mr. David Bernhart, Asst. Regional Administrator, NMFS Southeast Region
Dr. Jill Lewandowski, BOEM, Division of Environmental Assessment Chief