

Center for Regulatory Effectiveness

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via email (arcticeis.comments@noaa.gov) and
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Mr. P. Michael Payne
Chief, Permits
Conservation and Education Division
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National Marine Fisheries Service
1315 East-West Hwy.
Silver Spring, MD 20190-3225

CRE Comments on Scoping in Response to the Notice of Intent to Prepare an Environmental Impact Statement on the Effects of Oil and Gas Activities in the Arctic Ocean, (75 Fed. Reg. 6175, Feb. 8, 2010)

Dear Mr. Payne:

Following are the comments of the Center for Regulatory Effectiveness ("CRE") on matters that should be considered in the preparation of this EIS.

NOAA, with MMS as a cooperating agency, plans to prepare a new Draft Environmental Impact Statement (DEIS) on the above subject. A Draft Programmatic EIS ("DPEIS") was previously prepared and made available for public comment in February 2007. That DPEIS incorporated much of the information and analysis from a Programmatic Environmental Assessment ("PEA") completed by NOAA and MMS in 2006.

We have reviewed the comments on the 2007 DPEIS and have attempted to avoid duplicating comments made at that time by other interested parties. In particular, due to our familiarity and experience with the requirements of the Information Quality Act ("IQA") and its guidance, we have included comments on the need to comply with the "utility," "objectivity," and independent, external, peer review requirements of the IQA and its guidance that were not addressed in either the DPEIS or previous comments.

I. A Supplemental or Revised Draft EIS Is More Appropriate Than a New Draft

The former Draft Programmatic EIS ("DPEIS") was withdrawn and NOAA has given notice of intent to prepare a new Draft EIS.¹ Very substantial effort was involved in preparation

¹ There is no explanation in the *Federal Register* notices for why this is planned as an EIS rather than a programmatic EIS, as previously. It appears that this should be a programmatic EIS because it will encompass numerous potential individual permit actions.

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of the previous draft EIS and its record. Ordinarily, deficiencies in a draft EIS or changes in the proposed action warrant a revised or supplemental draft, not a wholly new NEPA effort. The NEPA regulations provide only for supplemental drafts, and make no mention of withdrawal and preparation of a new draft. 40 CFR 1502.9(c)(1).² Historically, the few withdrawals of draft EISs that have occurred have been due to agency abandonment of the proposed action or passage of a much longer period of time since release of the DEIS than is involved here -- on the order of six to seven years. Assuming there is significant new information or some substantial change in the proposed action, the record established as the basis for the prior DPEIS process, and those parts of its analysis that are not affected by the new information or the changes in the proposed action should not be discarded; rather, the DPEIS should be supplemented.

Preparation of a wholly new DEIS will make it difficult for stakeholders and the public to sort out the revisions and to determine what changes are significant or are regarded as significant from the agency's point of view. A supplemental draft could explain the significant changes that have been made to the database supporting the DPEIS and to the analysis of impacts and alternatives, thereby greatly assisting the comments process. Alternatively, a revised DEIS (rather than a supplemental DEIS), should contain a similar explanation of the significant revisions.

II. MMS Should Continue to Be a Joint Lead Agency for the EIS rather than a Cooperating Agency.

Consistent with the CEQ regulations (40 CFR 1501.5(b)), the 2007 DPEIS was prepared by both NOAA and MMS as joint lead agencies. The Notice of Intent to prepare a new DEIS states that NOAA is the only lead agency and MMS is now a "cooperating agency." No explanation for this change is given. This change in the status of MMS appears to diminish its role in the process.

This change in the MMS role is not warranted. The key factors in determining a lead agency or agencies are legal responsibility for the proposed action and expertise that can contribute to the NEPA process. 40 CFR § 1501.5(c). MMS as well as NOAA has permitting responsibilities for the covered oil and gas exploration activities, and must comply with its statutory authority for such permitting under the Outer Continental Shelf Lands Act ("OCSLA"). NOAA, in turn, has responsibility for incidental harassment authorizations under the Marine Mammal Protection Act in connection with the MMS permits. However, neither authority is more pertinent to the EIS than the other. The exploration permits and IHAs go hand-in-hand.

With regard to expertise, MMS has expertise on key subjects such as the levels of exploration activity that can be expected in the future, technical aspects of seismic exploration and exploratory drilling, technical feasibility/practicability and safety, and economic and social impacts of oil and gas exploration and production. MMS is likely to have more expertise than NOAA on one of the two most prominent factors stated by NOAA as a basis for preparation of a new DEIS -- "changes in projections of level of activity." MMS is also responsible under the

² Agencies "[s]hall prepare supplements to either draft or final environmental impact statements if: (i) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."

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OCSLA for conducting environmental studies, ensuring that oil and gas activities do not cause undue environmental harm, ensuring technical feasibility and safety, and ensuring that other Federal laws are not violated. Indeed, the OCSLA provides that MMS will utilize the capabilities of the Department of Commerce (which includes NOAA), rather than vice versa. 43 U.S.C. §1346(f).³

A weakening of the MMS role in preparing the EIS might be viewed by some as politically motivated, and any such perceptions should not be allowed to tinge public perceptions concerning the objectivity of the NEPA analysis. The conclusion one might draw from the change in leadership is that marine mammals are regarded as more important than domestic oil and gas exploration and production, when the correct view should be that both are important and should be reconciled if possible, but that in the end Congress and the courts have been of the view that the "primary purpose" of the OCSLA is to ensure expeditious and orderly development of the OCS for energy purposes, consistent with other Federal laws. (See section VII, below, on the need for expeditious completion of the EIS).

MMS should be restored to the position of a joint lead agency. We are hereby requesting designation of MMS as a lead agency pursuant to the CEQ regulations, 40 CFR § 1501.5(d).⁴

III. NOAA and MMS Should Promptly Issue a *Federal Register* Notice of Data Availability Detailing the "new information" Asserted in the NOI to Warrant Starting Over the NEPA Process.

The NOI indicates that a decision to restart the NEPA process is warranted by "new information" that includes "scientific study results [and] changes in projections of level of activity." Particularly if there are significant new scientific study results, stakeholders will need adequate time to review and analyze those studies, and a limited comment period on the DEIS might not provide adequate time. (The original comment period on the withdrawn draft EIS was only about four weeks.) Moreover, simply in the interests of government openness and transparency, the details of this new information (including both the new scientific information and the changes in projected level of activity) should be provided as soon as possible through a *Federal Register* notice of data availability. Such action would also help expedite the EIS process.

IV. The EIS Must Have Regulatory "Utility" under the Information Quality Act ("IQA") by Analyzing Effects and Alternatives in Accordance with the Applicable Regulatory Standards.

The IQA (also called the Data Quality Act, or DQA) was enacted in 2000 as a supplement to the information dissemination and quality provisions of the Paperwork Reduction

³ In preparing the 2006 Programmatic Environmental Assessment that preceded the DPEIS and which provided much of the information for the DPEIS, NOAA was a cooperating agency while MMS was the lead agency.

⁴ "Any Federal agency, or any State or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated." 40 CFR § 1501.5(b).

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Act ("PRA") of 1995. 44 U.S.C. § 3516, note.⁵ The basic stated purpose of the Act was to maximize and ensure the quality, including the "objectivity," and "utility," of information disseminated by federal agencies. In accordance with the Act, OMB issued government-wide guidelines.⁶

Those IQA guidelines define "utility" as referring to "the usefulness of the information to its intended users, including the public." 67 Fed. Reg. 8452, 8459 2d col., Feb. 22, 2002. An EIS, which is undoubtedly an information dissemination subject to the IQA,⁷ is intended to provide useful information to regulatory decisionmakers.⁸ Therefore, it cannot have "utility" for that purpose if it is not prepared so as to provide information that is useful for applying the pertinent regulatory standards. For example, EIS alternatives that cannot meet the regulatory standards lack utility, as does scientific information that is not useful for applying those standards.

As some commenters on the 2007 DPEIS have noted, the DPEIS was deficient in not clearly and completely stating the applicable regulatory standards, and then providing information that was in accordance with those standards. The DPEIS correctly cited and quoted the incidental harassment provisions of the Marine Mammal Protection Act ("MMPA") in stating that the Secretary of Commerce shall issue incidental harassment authorizations if he finds that such an authorization "will have a negligible impact on such species or stock, and ... will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses" 16 U.S.C. § 1371(a)(5)(A)(i) and (D)(i) (emphasis added). However, the DPEIS did not refer to the MMPA regulations defining "negligible impact" as "an impact from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival." 50 CFR §216.103 (emphasis added).⁹

⁵ The IQA is also sometimes cited as section 515 of Pub. L. 106-554 (which is not a precise citation).

⁶ The OMB guidance implementing the IQA and the underlying and incorporated statute, the Paperwork Reduction Act of 1995 ("PRA"), is legally binding on the agencies. 44 U.S.C. § 3506(a)(1)(B) states that "[t]he head of each agency shall be responsible for ... complying with the requirements of this subchapter and policies established by the Director."

⁷ See the definitions of "Information dissemination product" and "Dissemination" in the OMB guidelines. 67 Fed. Reg. at 8460. See also the June 10, 2002, letter from OIRA to the agencies at 33-34. Available at http://www.whitehouse.gov/omb/assets/omb/inforeg/iqg_comments.pdf. Environmental organizations, including ones that commented on the 2007 DPEIS, such as NRDC and EarthJustice, have submitted IQA petitions seeking correction of EISs. See, e.g., the petition for correction filed by EarthJustice on behalf of NRDC and the Greater Yellowstone Coalition to BLM and the Forest Service seeking correction of a final EIS, available at <http://www.fs.fed.us/qoi/documents/2008/EarthJustice.pdf>.

⁸ See the CEQ regulations § 1502.1.

⁹ The term "stock" is not defined in the MMPA regulations at 50 CFR §§ 216.1 *et seq.* In general, a marine "stock" is a species subpopulation that ranges in a particular ocean area and is likely to have some minor differences from other stocks of the same species in other ocean areas in terms of morphology, genetics, feeding and migration patterns, etc.

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The requirements for analysis of (1) "reasonably expected" or "reasonably likely" adverse impacts, (2) on the "species or stock," (3) "through effects on annual rates of recruitment or survival" are highly significant. Information on impacts, or potential/speculative impacts, that are transient and do not adversely affect species or stocks through recruitment or survival, and effects on individual or small numbers of mammals or impacts that do not affect the viability of the species or stock, is not relevant and lacks "utility" for the EIS and making the pertinent regulatory decisions. Nevertheless, quite likely as a result of not fully and clearly referencing the appropriate regulatory standards, the previous draft EIS, and both NGO and other federal agency commenters, provided information on minor impacts that they described as "potential" or that "may" or "could" occur. Such speculative impacts are not relevant under the regulatory standard of "reasonably likely" or "reasonably expected." A clear example is the repeated emphasis on the possibility that acoustic exploration methods might result in "avoidance" behavior by some mammals, or other temporary or occasional impacts on individual or small numbers of mammals that have no discernable relevance for determining negligible impacts on the species or stock through effects on annual rates of recruitment or survival, or availability of the species or stock for subsistence purposes.

The focus of the MMPA regulations on "reasonably expected" or "reasonably likely" adverse impacts is consistent with NEPA and the CEQ regulations and case law, which require an EIS to focus on "reasonably foreseeable," "probable," "anticipated," or "sufficiently likely" significant environmental effects.¹⁰

The assessment of cumulative effects is likely to be particularly sensitive to the requirement for a focus on "reasonably foreseeable significant" or "reasonably likely" effects on species or stocks through effects on recruitment or survival, and on the availability of the species for subsistence takes. The noise from exploration activities will be very transitory, and even then will occur mainly during only a small portion of the year (the "open water" season). Other sources of noise that might affect marine mammals, from sources such as icebreakers, other support craft, long-range commercial transport ships, or cruise ships, will also be transitory and usually non-localized, therefore making it highly likely that any assessment of cumulative effects will be very speculative rather than "reasonably foreseeable," "reasonably expected," "reasonably likely," or "probable."

In order to comply with the IQA and its guidelines, the EIS must have "utility" in the sense of providing information that is useful to the intended regulatory decisionmakers, who must employ the regulatory standards. Information on environmental impacts, and the analysis of alternatives in terms of those impacts, based on speculation or mere possibility is contrary to the MMPA regulations, the IQA, and NEPA.

¹⁰ CEQ regulations at 40 CFR § 1508.8(b). *And see, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989); *Ground Zero Center for Non-Violent Action v. U.S. Dept. of the Navy*, 383 F.3d 1082, 1089 (9th Cir. 2004) ("reasonably foreseeable" and "probable"); *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800 (9th Cir. 2003); *Churchill County v. Norton*, 276 F.3d 1060, 1071, 1072 (9th Cir. 2001) ("reasonably foreseeable," "probable," and "reasonable to anticipate"); *City of Dallas, Tex. v. Hall*, 562 F.3d 712, 719 (5th Cir. 2009) ("reasonably foreseeable" and "sufficiently likely to occur").

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The IQA guidelines also require "objectivity" in information disseminated to the public, and they define "objectivity" (as should be evident from its common meaning) as requiring an absence of bias.¹¹ The CEQ NEPA regulations also require objectivity and scientific integrity in analyzing "reasonably foreseeable significant effects,"¹² and the MMPA regulations require that incidental take authorizations be based on "the best scientific evidence available."¹³ Moreover, since the independent, external peer review required by the IQA guidelines (discussed below) must be devoid of policy bias, the peer reviewers cannot be asked to review scientific information and analyses that are influenced by policy bias.

Despite these requirements for objectivity and scientific integrity, the 2007 DPEIS introduced policy bias into its analysis of alternatives by applying a policy of precaution when there was a lack of sufficient information, rather than simply describing accurately the available information and its sufficiency or insufficiency with regard to "reasonably foreseeable significant adverse effects" as required by the CEQ regulations.¹⁴ For example, the DPEIS stated, in its analysis of the potential impacts of noise on whales, that because there is a lack of agreement and controversy in the scientific community on this subject, "our analyses are protective in that we have attempted to err on the side of overestimating potential effects rather than underestimating, and then building in mitigation measures to reduce such potential effects." DPEIS at III-127.¹⁵

Employing a precautionary policy approach to the analyses of effects in the EIS in order to substitute for incomplete or lack of evidence would be contrary to the mandatory "objectivity" standard of the IQA and its guidelines, and to the CEQ regulatory requirements for "scientific integrity," treatment of incomplete or unavailable information, and analysis of "reasonably foreseeable significant adverse effects."

V. The Scientific Information and Assessments in the Draft EIS Must Undergo Independent, External, Expert Peer Review, along with Adequate Opportunities for Public Participation, under the IQA Guidance.

Many of the conflicting views among stakeholders with regard to the EIS appear to be based on differing interpretations of the scientific evidence, in addition to the application of differing regulatory standards.

¹¹ 67 Fed. Reg. at 8459 3d col.

¹² The CEQ regulations state that in analyzing the alternatives to the proposed action in the EIS, which CEQ considers "the heart of the environmental impact statement," agencies "shall . . . objectively evaluate" the alternatives. 40 CFR § 1502.14. See footnote 16, below, regarding "scientific integrity."

¹³ 40 CFR § 216.102(a) and 216.104(c).

¹⁴ 40 CFR § 1502.22 ("Incomplete or unavailable information."). Acknowledging and explaining uncertainties and lack of information, rather than substituting policy positions for such uncertainties and lack, is an essential aspect of scientific objectivity.

¹⁵ See also, *e.g.*, the DPEIS at III-100 ("we believe that a precautionary approach . . . is warranted"), III-101 ("Where there is uncertainty on the status of the affected population . . . the analyses should be protective."), and III-106 ("This assumption errs on the side of caution Lacking more detailed knowledge . . . a cautious analysis is prudent.").

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Independent external peer review could help resolve the scientific controversies. The IQA peer review guidelines require independent, external peer review of drafts of "influential scientific information" and all "highly influential scientific assessments" that are to be disseminated to the public. 70 Fed. Reg. 2664, 2670 1st & 3d cols. "Highly influential scientific assessments" require a higher degree of review rigor and public participation.¹⁶

"Influential scientific information" disseminated to the public is defined as "scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions . . ." 70 Fed. Reg. at 2675 1st col. A "scientific assessment" differs from "scientific information," and is defined as "an evaluation of a body of scientific or technical knowledge, which typically synthesizes multiple factual inputs, data, models, assumptions, and/or applies best professional judgment to bridge uncertainties in the available information. These assessments include, but are not limited to, ... ecological risk assessments ... or exposure assessments." *Id.* A "scientific assessment" is "highly influential" if the line agency or OMB determines that it "(i) Could have a potential impact of more than \$500 million in any year, or (ii) Is novel, controversial, or precedent-setting or has significant interagency interest."¹⁷ The assessment of acoustic impacts on marine mammals that will be incorporated into, and lies at the heart of, this EIS, appears to satisfy all of these "highly influential" factors, but if not the \$500 million threshold in (i), then certainly the "novel, controversial, or precedent-setting" and "has significant interagency interest" factors in (ii).

The EIS could be interpreted as incorporating both influential scientific information and highly influential scientific assessments with regard to different scientific issues. While some information such as stock populations and growth or decline rates, and technological feasibility of certain mitigation alternatives, could be regarded as "influential scientific information," assessment of the reasonably likely degree of impact, if any, of seismic exploration, exploratory drilling, and other noise sources on marine mammal species and stocks, and availability for subsistence takes, will surely qualify as "highly influential scientific assessment(s)."

The OMB IQA peer review guidance sets out different requirements for influential scientific information and highly influential scientific assessments, although the requirements for "highly influential scientific assessments" incorporate and are supplemental to those for "influential scientific information." In the case of both, there are requirements for independence of peer reviewers, absence of conflicts of interest, compliance with the basic IQA quality standards such as utility and objectivity, and including in the charge to the peer reviewers information concerning the requirements of the IQA and its guidance and admonitions against allowing any policy bias to influence the review. The main differences lie in the degree of public participation and transparency the agency must provide for. The provisions for public participation in highly influential scientific assessments state:

5. Opportunity for Public Participation: Whenever feasible and appropriate, the agency shall make the draft scientific assessment available to the public for

¹⁶ The CEQ regulations also emphasize the need for ensuring scientific accuracy, stating that "[a]gencies shall ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements." 40 CFR §1502.24.

¹⁷ 70 Fed. Reg. 2675 3d col.

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comment at the same time it is submitted for peer review (or during the peer review process) and sponsor a public meeting where oral presentations on scientific issues can be made to the peer reviewers by interested members of the public. When employing a public comment process as part of the peer review, the agency shall, whenever practical, provide peer reviewers with access to public comments that address significant scientific or technical issues. To ensure that public participation does not unduly delay agency activities, the agency shall clearly specify time limits for public participation throughout the peer review process.

70 Fed. Reg. at 2676 2d col. (emphasis added). In the case of this EIS, it is undoubtedly "feasible and appropriate" to make the draft EIS available for comment, and a public comment process will necessarily be a part of the peer review, since the public will be commenting on the draft EIS that incorporates the draft highly influential scientific assessment.

A necessary component of effective public participation will be posting of a draft charge to the peer reviewers and providing an opportunity for the public to comment on the draft charge. Any peer review will be influenced to a great degree by the specific wording of the charge to the reviewers. The charge is one of the most critical parts of the peer review process, and public participation with regard to the charge, and transparency in posting both the draft and final charge prior to the peer review, is needed for meaningful fulfillment of the public participation requirements. The preamble to the final OMB IQA peer review guidelines states that "[i]n general, an agency conducting a peer review of a highly influential scientific assessment must ensure that the peer review process is transparent by making available to the public the written charge to the peer reviewers" 70 Fed. Reg. at 2665. In addition, the public should have an opportunity to confirm that the charge contains the information required by the IQA guidelines to be provided to the peer reviewers with regard to the need for objectivity. The guidelines state:

Peer reviewers shall be charged with reviewing scientific and technical matters, leaving policy determinations for the agency. Reviewers shall be informed of applicable access, objectivity, reproducibility and other quality standards under the Federal laws governing information access and quality.

70 Fed. Reg. at 2675. In explaining this requirement, the preamble to the final guidelines states:

[T]he charge should make clear that the reviewers are not to provide advice on the policy (e.g., the amount of uncertainty that is acceptable or the amount of precaution that should be embedded in an analysis). Such considerations are the purview of the government.¹⁸

¹⁸ 70 Fed. Reg. at 2669 1st col. (footnote omitted). The statement that "[s]uch considerations are the purview of the government" is clearly a reference to any statutory discretion allowed an agency in making a final regulatory determination based on the scientific information or analysis; it does not in any way negate the requirements for "objectivity," "scientific integrity," and consideration of "reasonably foreseeable significant adverse effects" in the EIS scientific analysis informing a regulatory decision.

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With regard to selection of the peer reviewers, the guidelines state that "[a]gencies shall consider requesting that the public, including scientific and professional societies, nominate potential reviewers." *Id.* 1st col.

As an important accessory to the public participation requirements, the IQA peer review guidelines require that agencies publish their peer review agendas and detailed peer review plans, and that they "shall establish a mechanism for allowing the public to comment on the adequacy of the peer review plans. [And] [a]gencies shall consider public comments on peer review plans." 70 Fed. Reg. at 2676-77.

The NOAA peer review agenda and plans already include a plan for a peer review of "Proposed Noise Exposure Criteria for Marine Mammals."¹⁹ That upcoming assessment is described as follows:

The National Marine Fisheries Service (NMFS) will be proposing new acoustic criteria to replace current criteria to determine what constitutes an acoustic 'take' as defined under the Marine Mammal Protection Act. These criteria will identify exposure levels and durations that may produce temporary or permanent shifts in hearing sensitivity of marine mammals, as well as significant behavioral modification.²⁰

The peer review plan for this assessment contains an agency determination that the document is a "highly influential scientific assessment" (a "HISA"), but its provisions concerning public participation are not adequate under the OMB guidelines, and the timeframe appears outdated and unrealistic. For example, the plan does not provide for a public meeting where the public can provide scientific comments to the reviewers, does not provide that written comments will be given to the reviewers, and does not provide a clear mechanism for commenting on the peer review plan. The plan does, however, acknowledge that the peer review requirements apply to NEPA documents in stating that the public will have an opportunity to comment on the draft assessment by filing comments during the "Comment period on NEPA documents." However, such an opportunity for comment is not adequate under the peer review requirements for "highly influential scientific assessments" because it appears that such comments would be made to the agency rather than to the peer reviewers, and there would be no opportunity for comments at a public meeting with the reviewers.

Since this planned assessment and peer review appears to be generic -- that is, applicable to all marine mammals in all marine and coastal areas -- it cannot take the place of a peer review of the influential and highly influential scientific information in the upcoming draft EIS, which will focus on specific marine and coastal areas and the species and stocks available in those areas. Thus, there is no need to await preparation of a draft of this generic criteria document, and peer review of that draft. The draft EIS and peer review of the draft EIS can inform the generic document and its peer review at a later time.

¹⁹ Available at http://www.cio.noaa.gov/Policy_Programs/prplans/ID43.html.

²⁰ It is noteworthy that this description appears to conflict with the MMPA in some of the same respects as the withdrawn DPEIS because it refers, for example, to "temporary" "shifts in hearing sensitivity" as well as "behavioral modification" without reference to the statutory and regulatory standards for incidental harassment, which focus on impacts on species and stocks.

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The current peer review plan for the generic noise criteria document currently appears to be solely a NOAA plan. In view of their cooperating roles in developing the EIS, NOAA and MMS should consult on a peer review plan for the supplemental or revised draft EIS and publish that plan for public comment in both of their IQA peer review agendas. In view of the lack of attention to this aspect of the review to date, they should also publish a *Federal Register* notice of availability when the new peer review plan is posted.

VI. The EIS Must Consider the Economic Benefits of Oil and Gas Exploration Activities

The withdrawn DPEIS did not consider the beneficial economic and social effects of reasonably foreseeable increased oil and gas production that will result from exploration activities in the Chukchi and Beaufort Seas, and from the exploration activities themselves (e.g., jobs, better data, improvements in exploration techniques). The revised or supplemental draft should. NEPA is directed at "major Federal actions significantly affecting the quality of the human environment."²¹ The CEQ regulations explicitly address the need to consider economic impacts in their definitions of the "human environment" and the "effects" that must be considered in an EIS.

The CEQ regulatory definition of "Human environment" states:

"Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (Sec. 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

40 CFR §1508.14 (emphasis added).

The definition of "effects" in the CEQ regulations also covers economic effects that are both direct and indirect. The definition states that "effects" includes "indirect effects, which are caused by the action and are later in time or farther removed in distances, but are still reasonably foreseeable," and that "effects" includes "economic" and other "social" effects. 40 CFR §1508.8.

VII. The EIS Must Be Completed Expeditiously, with Definite Time Limits

The current EIS process has been going on for almost five years, and now it is starting over again. A PEA was begun in 2005 and completed in 2006. The first notice of intent for this EIS was issued in 2006, and the DPEIS was completed and issued for public comment in 2007. A new notice of intent was issued just this February 2010. The delays involved have been lengthy, and the re-start of the whole process rather than preparing a supplemental or revised DPEIS is very unusual. One has to wonder when the EIS will be completed.

²¹ 42 U.S.C. § 4332(2)(C).

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The oil and gas companies and their support organizations must plan well in advance in order to take advantage of the short open water seasons in the Chukchi and Beaufort Seas. Oil and gas exploration is going on around the world, and the availability of the specialized vessels, specialized equipment, and expert personnel required must be allocated and committed to. The development of the actual exploration plan and submission of applications for the necessary permits are complex projects. If the current EIS is not completed in a timely manner, with a time frame that allows for commitment of resources to planning sufficiently in advance, much time and money, and the potential for timely new discoveries, could be wasted.

Both the Outer Continental Shelf Lands Act ("OCSLA") and the CEQ NEPA regulations express the intent that permitting and the EIS process should proceed expeditiously. The OCSLA states, as one of its first formal declarations of policy, that the outer Continental Shelf is "a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development. . . ." 43 U.S.C. §1332(3) (emphasis added). This "primary purpose" of the OCSLA has been emphasized repeatedly in federal court opinions.²² The CEQ NEPA regulations also emphasize the need to avoid or reduce delay. A whole section of the regulations, titled "Reducing Delay," CFR § 1500.5, details ways for reducing delay, which include "[e]stablishing appropriate time limits for the environmental impact statement process." 40 CFR § 1500.5(e). Section 1501.8 of the CEQ regulations also encourages agencies to set time limits for the EIS process, and provides that they "shall" set time limits if an applicant requests, and that an agency may "[d]esignate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process." Sec. 1501(b)(3).

NOAA and MMS should set time limits for this EIS, particularly in view of the delays that have occurred so far and the expectations for continuing exploratory activities in the Arctic, and should formally designate an official to be responsible for expediting the process and ensuring that the time limits are met. The designation and identity of this person should also be made public.

Thank you for considering these comments.

Respectfully,

/s/

Jim J. Tozzi
Member, CRE Advisory Board

cc: Chief, Environment Division, Offshore Energy & Minerals Management, MMS

²² See *State of California ex rel. Brown*, 668 F.2d 1290, 1315 (D.C. Cir. 1981); *Natural Res. Def. Council v. Hodel*, 865 F.2d 288, 302 (D.C. Cir. 1988); *Center for Biological Diversity v. U.S. Dept. of the Interior*, 563 F.3d 466, 472 (D.C. Cir. 2009).