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June 13, 2016

Mr. Zachary G. Goldstein
Chief Information Officer
National Oceanic and Atmospheric Administration
Herbert Hoover Building
14th Street and Constitution Avenue, NW
Washington, DC 20230

RE: Request for NOAA's Compliance with Data Quality Act ("DQA"); OMB Peer Review Bulletin; and Paperwork Reduction Act Information Collection Request ("ICR") Requirements for its Acoustic Guidance

Mr. Goldstein:

Background

I am writing with respect to the need for your agency to comply with the above-listed regulatory requirements. I am writing to you because your office has assumed responsibility for compliance with the DQA.

From the onset we are very pleased with the actions that NOAA has taken in the past to comply with the DQA. We followed the progress of the agency and give particular note to a precedent-setting action NOAA took some ten years ago regarding the DQA. More specifically, notwithstanding an outcry from non-science based groups, [NOAA](#) notified all affected parties that:

"As the CRE report points out, the NOAA Information Quality (IQ) Guidelines, developed pursuant to the Information Quality Act, specifically address the use of third party information such as reports of the IWC Scientific Committee. The NOAA IQ Guidelines recognize the use of third party information from both domestic and international sources is a common practice at NOAA. Although third party sources may not be directly subject to the DQA, information from such sources, when used by NOAA to develop information products or to form the basis of a decision or policy, must be of known quality and consistent with NOAA's IQA Guidelines"¹

The aforementioned decision by NOAA was precedent-setting because it established without a doubt the supremacy of the DQA over data submitted to federal agencies by third parties.

¹ William T. Hogarth letter, at http://www.thecre.com/pdf/NOAA-IWC_Letter.pdf.

In a like manner NOAA has an exemplary record in subjecting influential information to the pre-dissemination requirements of the DQA, as demonstrated [here](#).

By this letter we are requesting that NOAA continue its leadership role with respect to compliance with the DQA.

Issue

The transaction of interest involves the National Oceanic and Atmospheric Administration, National Marine Fisheries Service's compliance with the requirements of the DQA during development and peer review of their *Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammals* ("Acoustic Guidance").

NOAA intends that the Acoustic guidance be used to establish regulatory requirements in marine mammal "take authorizations" issued by NOAA under the Marine Mammal Protection Act for the oil and gas, shipping industries and other regulated entities. The new requirements proposed in the Acoustic Guidance are in some instances impracticable and much more stringent than those currently applied by NOAA, even though NOAA acknowledges there is no injury to marine mammals under the current requirements.²

NOAA has not published final Acoustic Guidance as of this letter's date. NOAA is currently on its second draft of this Guidance.³ In March 2016, NOAA proposed extensive and technically complex changes to this second draft, allowing only two weeks for public review and comment on the proposed changes. These proposed changes have not been peer reviewed.⁴

NOAA acknowledges that it has to comply with DQA requirements during development and peer review of the Acoustic Guidance. The draft Acoustic Guidance itself states:

*"In assessing potential acoustic effects on marine mammals, as with any such issue facing the agency, standards for determining applicable data need to be articulated. Specifically, NOAA has Information Quality Guidelines (IQG) for 'ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by the agency' (with each of these terms defined within the IQG). Furthermore, the IQG stipulate that 'To the degree that the agency action is based on science, NOAA will use (a) the best available science and supporting studies (including peer-reviewed science and supporting studies when available), conducted in accordance with sound and objective scientific practices, and (b) data collected by accepted methods or best available methods.'*⁵

² See, e.g., CRE's comments to OMB on this Acoustic Guidance issue at <http://thecre.com/pdf/mmguidancecomments.pdf>

³ The second draft of this Acoustic Guidance is available at <http://www.nmfs.noaa.gov/pr/acoustics/draft%20acoustic%20guidance%20July%202015.pdf>

⁴ The proposed changes to the Acoustic Guidance are at http://www.nmfs.noaa.gov/pr/acoustics/draft_guidance_march_2016_.pdf.

⁵ Draft Acoustic Guidance, page 6, at <http://www.nmfs.noaa.gov/pr/acoustics/draft%20acoustic%20guidance%20July%202015.pdf>

Noncompliance with OMB Peer Review Bulletin

The Acoustic Guidance must comply with “stricter quality standards” because OMB has classified the Guidance as a “Highly Influential Scientific Assessment” under the OMB Peer Review Bulletin.⁶ This classification results from the fact that the Guidance’s

“...dissemination could have a potential impact of more than \$500 million in any one year on either the public or private sector; or that the dissemination is novel, controversial, or precedent-setting; or that it has significant interagency interest (OMB 2005).”

NOAA acknowledges that the Acoustic Guidance must be peer reviewed in accordance with DQA requirements that are set forth in the OMB peer review bulletin:

“The peer review of [the Draft Guidance must be] conducted in accordance with NOAA’s Information Quality Guidelines (IQG), which were designed for ‘ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by the agency’ (with each of these terms defined within the IQG). Furthermore, the IQG stipulate that ‘To the degree that the agency action is based on science, NOAA will use (a) the best available science and supporting studies (including peer-reviewed science and supporting studies when available), conducted in accordance with sound and objective scientific practices, and (b) data collected by accepted methods or best available methods. Under the IQG and consistent with OMB’s Final Information Quality Bulletin for Peer Review (OMB Peer Review Bulletin (OMB 2005), the Guidance was considered a Highly Influential Scientific Assessments (HISA), and peer review was required before it could be disseminated by the Federal Government”⁷

NOAA has conducted three peer reviews. NOAA explains:

*“The **first** external peer review, which was completed September 2013, focused on the scientific and technical studies used in the analysis for the development of proposed onset PTS and TTS acoustic threshold levels.”*

*“The **second** external peer review evaluates a U.S. Navy Technical paper provided to NOAA in January 2015 as part of the Navy’s Phase 3 Acoustic Effects Analysis. The paper describes the Navy’s proposed methodology for updating auditory weighting functions and subsequent numeric thresholds for predicting auditory effects (TTS/PTS thresholds) on marine animals exposed to active sonars and other active acoustic sources utilized during Navy training and testing activities.”*

*“The **third** external peer review evaluates NOAA’s proposed methodology for defining threshold usage for sources characterized as impulsive or non-impulsive. This methodology was modified using comments from the initial public comment period.”⁸*

⁶ See 67 Fed. Reg. at 8452, 8455 (“OMB guidelines apply stricter quality standards to the dissemination of information that is considered ‘influential.’”)

⁷ <http://www.nmfs.noaa.gov/pr/acoustics/draft%20acoustic%20guidance%20July%202015.pdf>

⁸ <http://www.nmfs.noaa.gov/pr/acoustics/guidelines.htm>

NOAA is to be complimented for conducting the aforementioned peer reviews. However, NOAA has not complied with DQA peer review requirements for Highly Influential Scientific Assessments that are set forth in the OMB Peer review Bulletin.

For example, the OMB Peer Review Bulletin requires that the Acoustic Guidance be peer reviewed during a public meeting where the public can comment directly to the peer reviewers:

“Opportunity for Public Participation: Whenever feasible and appropriate, the agency shall make the draft scientific assessment available to the public for 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.”⁹

NOAA’s peer review of the Acoustic Guidance did not comply with these requirements. There was no public meeting and no opportunity for the public to comment to the peer reviewers. NOAA never claimed that a public meeting peer review of the Acoustic Guidance would be infeasible and inappropriate, and there is no basis for making such a claim.

As another example of noncompliance with the OMB Peer Review Bulletin, NOAA’s March 16th changes have never been peer reviewed even though they significantly alter the Acoustic Guidance. In other words, the current draft of the Acoustic Guidance has in large part never been peer reviewed.

As one final example of non-compliance, the OMB Peer Review Bulletin requires:

“Certification in the Administrative Record if an agency relies on influential scientific information or a highly influential scientific assessment subject to the requirements of this Bulletin in support of a regulatory action, the agency shall include in the administrative record for that action a certification that explains how the agency has complied with the requirements of this Bulletin and the Information Quality Act. Relevant materials are to be placed in the administrative record.”¹⁰

CRE could find no evidence of the aforementioned certification in the administrative record. NOAA could not include this explanation and certification in the record because, as discussed throughout this letter and in CRE’s comments to NOAA, the Acoustic Guidance does not comply “with the requirements of this [OMB Peer Review] Bulletin and the Information Quality Act.”

Lastly NOAA, OMB and the Administration should consider the advisability of proceeding with a gigantic regulatory program directed toward marine sound which has been the subject of a multitude of studies which demonstrate that it imparts no injury to marine mammals. Another concern is at the

⁹ Peer Review Bulletin, page 40, at <https://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf>.

¹⁰ Peer Review Bulletin, page 31, at <https://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf>

same time NOAA is devoting its resources to a non-problem it is completely ignoring the injury to marine mammals caused by commercial shipping plowing through populations of marine mammals and by net entanglements associated with commercial fishing.

NOAA's restricted vision described above would not exist if NOAA were to follow the transparency requirements of the Data Quality Act. More specifically, the OMB peer review guidelines state:

"In 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, the peer reviewers' names, the peer reviewers' report(s)¹¹, and the agency's response to the peer reviewers' report(s). ... This Bulletin requires agencies to adopt or adapt the committee selection policies employed by the National Academy of Sciences (NAS)."

There is not one iota of evidence that suggests NOAA has given the slightest attention to the peer review requirements of the Data Quality Act; failure to do so is an open invitation for forceful intervention by any of a number of stakeholders.

One such intervention might be an investigation by the Inspector General of the Department of Commerce. Such was the case when EPA ignored its peer review requirements when it prepared its endangerment finding only to force the issuance of a landmark report¹² by its Inspector General.

If NOAA continues with its current actions not to comply with the peer review requirements of the Data Quality Act and in the event the Department of Commerce Inspector General reviews NOAA actions, it is likely that the Inspector General will arrive at conclusions identical to that of the EPA IG which was sent to EPA as set forth below:

OIG Response 57: The statement has been revised to say "the federal climate change expert review of the TSD did not follow all recommended procedures outlined in the Peer Review Handbook or OMB's guidelines for peer review of influential scientific information or highly influential scientific assessments." This statement concerns whether EPA followed procedures for the peer review of influential scientific information and highly influential scientific assessments as outlined in the EPA Peer Review Handbook and OMB peer review bulletin. The handbook outlines recommended procedures for planning (e.g., create peer review record), conducting (e.g., ask reviewers to prepare peer review report), and completing (e.g., prepare Agency response to reviewer comments) a peer review for influential scientific information and highly influential scientific assessments. The federal climate change expert review of the TSD did not follow all recommended procedures in the handbook for influential scientific information or highly influential scientific assessments. For example, as noted in the draft report, the following items specified in the handbook were not developed or obtained:

- Formal peer review record
- Peer review report
- EPA's response to the reviewers' comments on the TSD versions that accompanied the proposed and final rules

¹¹ https://www.whitehouse.gov/sites/default/files/omb/infoeg/peer_review041404.pdf

¹² <https://www.epa.gov/office-inspector-general/report-procedural-review-epas-greenhouse-gases-endangerment-finding-data>

- Written management approval of EPA’s response to the reviewers’ comments on the TSD that eventually accompanied the ANPR

“Similarly, the bulletin outlines procedures/requirements for the selection of reviewers (e.g., independence from sponsoring agency), providing reviewers with sufficient background information, public participation in peer review, preparation of a peer review report, and authorization to have a separate entity carry out peer review. The federal climate change expert review of the TSD did not follow all procedures/requirements in the bulletin for highly influential scientific assessments. For example, the Agency did not consider asking the public to nominate reviewers nor did it ask the reviewers to prepare a peer review report.”

The Department of Justice continues to oppose judicial review of actions taken pursuant to the Data Quality Act; inaction on the part of NOAA could be a clarion call for action.

The fact that the current draft Acoustic Guidance does not comply with NOAA’s DQA Guidelines is well known and well documented.

For example, a number of stakeholders state that the Guidance has not been developed in an open and transparent manner; consider for example the following comment that is contained in the docket:

“NOAA has suddenly proposed to incorporate changes to the Draft Guidance in a manner that is not comprehensive, transparent, or consistent with the best available science. These proposed changes, if finalized, will also not be meaningfully informed by the public. NOAA’s proposed changes are substantial, significant, and result in very different criteria than were proposed in the 2015 version of the Draft Guidance. Despite the magnitude of these proposed changes, NOAA has provided little or no supporting scientific analyses or explanations, has not yet subjected the proposed changes to peer review, and has offered the public an insufficient 14 days to evaluate the proposed changes and provide comments.”¹³

Specific substantive flaws and errors in the current draft of the Acoustic Guidance, as amended in March 2016, include the following:

- 1) The proposed changes applicable to LF cetaceans are arbitrary and contrary to the best available science
- 2) The proposed changes applicable to phocid pinnipeds are arbitrary and unexplained.
- 3) The proposed changes applicable to peak sound pressure acoustic threshold levels contain serious flaws.
- 4.) NOAA’s proposal to move white-beaked dolphins from the MF cetacean Group to the HF cetacean group lacks sufficient supporting data and analysis.

¹³ Comments on Proposed Changes to Draft Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing—NOAA-NMFS-2013-0177, submitted jointly by API, IAGC, AOGA and NOIA, on March 30, 2016, page 2, at <https://www.regulations.gov/#!documentDetail;D=NOAA-NMFS-2013-0177-0153>

5) NOAA's proposed update of the HF cetacean audiogram lacks a sufficient explanation.¹⁴

Finally, NOAA has not complied with the DQA requirement that NOAA ensure, demonstrate and certify compliance with DQA requirements before NOAA disseminate documents to the public.¹⁵ More specifically the record does not include the pre-dissemination review documentation required by the DQA.

Noncompliance with PRA ICR Requirements

NOAA does not have an OMB approved ICR for the Acoustic Guidance. Until and unless NMFS obtains an OMB approved ICR, NOAA cannot make anyone comply with information requests, and the Acoustic Guidance is not enforceable without OMB-approved information requests.

CRE and NOAA have already discussed this lack of an ICR with OMB. NOAA's Supporting Statement to OMB agrees with CRE that NOAA will have to conduct a new PRA/ICR burden analysis and review if and when NOAA asks OMB to approve an ICR for the final Acoustic Guidance.¹⁶

Based on the current flawed record and as discussed above, OMB/ should not grant NOAA an ICR for the Acoustic Guidance. The Guidance does not comply with the OMB Peer Review Bulletin requirements for Highly Influential Scientific Assessments. The Guidance does not comply with other DQA Guideline requirements: *e.g.*, those requiring accuracy and reliability. For these and other reasons, the Acoustic Guidance does not have "practical utility" under the PRA.

OMB cannot approve an ICR unless the sponsoring agency demonstrates that the ICR has "practical utility." OMB's PRA rules define "practical utility" in part as "the actual, not merely the theoretical or potential, usefulness of information to or for an agency, taking into account its accuracy, validity, adequacy, and reliability...."¹⁷

The Acoustic Guidance does not meet these PRA "practical utility" standards for the reasons stated in this letter.

¹⁴ These specific flaws and errors are discussed in detail in Comments on Proposed Changes to Draft Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing—NOAA-NMFS-2013-0177, submitted jointly by API, IAGC, AOGA and NOIA, on March 30, 2016, pages 5-10, at <https://www.regulations.gov/#!documentDetail;D=NOAA-NMFS-2013-0177-0153> <https://www.regulations.gov/#!documentDetail;D=NOAA-NMFS-2013-0177-0153> .

¹⁵ These IQA pre-dissemination review requirements are available at, *e.g.*, <http://www.nmfs.noaa.gov/op/pds/documents/04/108/04-108-02.pdf> ; and <http://www.nefsc.noaa.gov/publications/crd/crd0301/pdfs/dqacertguide.pdf> ; and http://www.cio.noaa.gov/services_programs/info_quality.html.

¹⁶ CRE's comments to OMB on this Acoustic Guidance issue are at <http://thecre.com/pdf/mmguidancecomments.pdf> . CRE's comments to NOAA on the Acoustic Guidance needing a new ICR are at <http://www.thecre.com/pdf/CRE-ICR.0648-0515.pdf> ; and at <http://www.thecre.com/forum13/wp-content/uploads/2015/09/mmacousticguidancecomments15.pdf> . NOAA's Supporting Statement to OMB, which basically agrees with CRE, is at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201312-0648-015 (see page 5).

¹⁷ 5 CFR 1320.3.

Recommendation

NOAA has repeatedly said that there is no injury to marine mammals under current acoustic guidelines, which have been successfully applied for decades.

Nevertheless, NOAA is proposing new draft Acoustic Guidance that is much more stringent and impracticable.

NOAA's proposed new draft Acoustic Guidance does not meet OMB Peer Review Bulletin requirements for Highly Influential Scientific Assessments.

NOAA's proposed new draft Acoustic Guidance does not meet the DQA Guidelines quality requirements.

NOAA's proposed new draft Acoustic Guidance does not meet the PRA's practical utility requirements.

NOAA's proposed new draft Acoustic Guidance is not covered by an OMB-approved ICR. OMB should not approve an ICR for the NOAA's proposed new draft Acoustic Guidance because of the flaws discussed above.

In order to remedy this DQA noncompliance, NOAA should subject the March 2016 proposed changes in the Acoustic Guidance to the peer review process applicable to highly influential scientific assessments.

Once that peer review process is completed, NOAA should re-propose the resulting draft Guidance and provide for a sufficient public review and comment period.

During this process, and before disseminating another draft (or a final) Acoustic Guidance, NOAA should document and demonstrate in the public record their compliance with all of NOAA's DQA and ICR requirements with a particular emphasis on pre-dissemination review and the structured peer review required by the DQA.

We look forward to your considered response.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jim J. Tozzi". The signature is stylized and written in a cursive-like font.

[Jim J. Tozzi](#), Ph.D.
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