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Administrator Howard A. Shelanski
Office of Information and Regulatory Affairs
Office of Management and Budget
Eisenhower Executive Office Building
1650 Pennsylvania Ave., NW Room 262
Washington, DC 20503
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RE: Midnight ICRs

Administrator Shelanski:

I am sending you this letter on behalf of the Center for Regulatory Effectiveness. CRE commends you and your staff for the excellent job you do reviewing midnight regulations. We also want to alert you to the fact that you should also review midnight Information Collection Requests.

There are two forthcoming ICRs which are a crucial constraint on in process regulations that could shut down offshore oil and gas exploration without any corresponding benefit to the environment. These ICRs are for regulatory actions that violate OMB's Peer Review Bulletin, Executive Orders 12866 and 13563, and Information Quality Act Guidelines.

Two of these ICRs are coming from NOAA's National Marine Fisheries Service. The Department of Interior's Bureau of Ocean Energy Management may send another related ICR, if BOEM does not try to rely on NMFS' ICR instead.

These ICRs relate to new rules authorizing the offshore oil and gas industry to "take" marine mammals during their exploration for oil and gas using sound emitted by ships. BOEM requested that NMFS issue these "Take Rules" under the Marine Mammal Protection Act ("MMPA"). BOEM and NMFS are working on these new rules together.

These rules are significant under Executive Orders 12866 and 135763.¹ The most recent Unified Agenda states that an NPRM is planned for January 2017. The Executive Orders require NMFS to submit a prior draft for OIRA review, but we are not confident they will.

The first ICR is discussed below, followed by the other ICRs and the NPRM.

NMFS' Acoustic Guidance ICR

NMFS recently published a final new document (“Acoustic Guidance”) that NMFS will use to regulate anthropogenic sound in the ocean under the MMPA and the Endangered Species Act.² NMFS has proposed an Acoustic Guidance ICR and taken comments to itself on this ICR. NMFS has not yet sent an Acoustic Guidance ICR request to OIRA.³

NMFS’ Acoustic Guidance purports to address the risk of physical injury to marine mammals (*e.g.*, whales, seals, dolphins) from anthropogenic sound in the ocean. Effects on marine mammal hearing are the primary physical risk of concern. Regulated entities include offshore oil and gas exploration, the Navy and other federal agencies.

The offshore oil and gas industry depends on the emission of sound aimed at the ocean floor to discover oil and gas under the floor. This crucial process is often referred to as seismic exploration. NMFS issues MMPA authorizations to companies that allow them to cause non-lethal effects on specified numbers of marine mammals during seismic operations. These authorizations are often referred to as “Take” permits. They do not mean that the covered effects will actually occur. In fact, for oil and gas seismic there is no evidence of any actual physical injury from seismic in the Gulf of Mexico.⁴

NMFS’ seismic Takes permits have always included mitigation requirements that the permittee must meet in order to obtain and keep the permit. These mitigation requirements always include “exclusion zones.” Offshore oil and gas seismic exploration

¹ See, *e.g.*, Unified Agenda, RIN 0648-BB38, at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=20610&RIN=0648-BB38>.

² This NMFS document is titled “Technical Guidance for Assessing the Effects of This NMFS document is titled “Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing--Underwater Acoustic Standards for Onset of Permanent and Temporary Threshold Shifts” (“Acoustic Guidance”). at http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55_acoustic_guidance_tech_memo.pdf. The MMPA is available online at <http://www.nmfs.NMFS.gov/pr/laws/mmpa/text.htm>.

³ See OMB Control Number 0648-0151, 81 FR 67984 (Oct. 3, 2016), at <https://www.gpo.gov/fdsys/pkg/FR-2016-10-03/pdf/2016-23743.pdf>.

⁴ See CRE Comments, pages 6-9, at <http://www.thecre.com/forum13/?p=2752>.

must stop when a marine mammal enters this zone. NMFS' new Acoustic Guidance greatly enlarges the exclusion zones for offshore oil and gas seismic. These much larger zones cannot be met because they are too large to monitor accurately. Permittees will be unable to comply with them and may have to terminate their offshore exploration for oil and gas.⁵

This impossibility of compliance violates the MMPA requirement that all mitigation requirements imposed by NMFS be "practicable."⁶

The Acoustic Guidance ICR is necessary for implementation of these impossible new zones because companies have to collect and report their monitoring data to NMFS and BOEM.

These and many other procedural and substantive flaws are discussed in detail in CRE's comments to NMFS on the Acoustic Guidance ICR.⁷ These flaws should preclude OIRA's approving NMFS' ICR request. They include the following:

- NMFS' Acoustic Guidance was developed in violation of OMB's Peer Review Bulletin;
- Despite its name, NMFS' Acoustic Guidance is a mandatory, legally binding rule that was developed in violation of the regulatory review requirements of Executive Orders 12866 and 13563; and
- NMFS' Acoustic Guidance is riddled with Information Quality Act violations.

We emphasize that the Acoustic Guidance is not necessary or even useful in protecting marine mammals or any other part of the ecosystem. Offshore oil and gas has been regulated for over 50 years under other standards. NMFS and other federal agencies have repeatedly emphasized that there is no evidence of harm under this longstanding and current regulation.⁸

⁵ See, e.g., API *et al.*, Comments on Proposed Changes to Draft Acoustic Guidance (March 30, 2016), page 8, at <http://www.noia.org/wp-content/uploads/2016/03/API-et-al.-Comments-on-Proposed-Changes-to-Draft-Acoustic-Guidance.pdf>; API and IAGC, Proposed Changes to Draft Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (June 27, 2016), pages 2-3, at [http://thecre.com/pdf/160627%20-IAGC API Acoustic Guidelines Letter to NMFS-FINAL.pdf](http://thecre.com/pdf/160627%20-IAGC%20API%20Acoustic%20Guidelines%20Letter%20to%20NMFS-FINAL.pdf).

⁶ See, e.g., <http://www.boem.gov/Oil-and-Gas-Energy-Program/GOMR/BOEM-MMPA-Information-Sheet.aspx>.

⁷ CRE Acoustic Guidance ICR Comments, at <http://www.thecre.com/forum13/?p=2754>.

⁸ *Id.*

ICRs for the Gulf of Mexico Seismic Take Rules; and Regulatory Review Requirements for the Take Rules

NMFS and BOEM are developing new MMPA rules will impose burdensome new operating requirements on seismic in the Gulf of Mexico. The agencies agree that these new Seismic Take Rules must be reviewed and approved by OIRA because they are “significant” under the regulatory review Executive Orders.⁹ The agencies also agree that they will need new ICRs for them.¹⁰

It is not clear whether BOEM will submit its own proposed ICR for these new Seismic Take rules, or will try to rely on NMFS’ ICR for them. We take no position in this letter on whether BOEM could rely on NMFS’ ICR and not submit its own.

Neither BOEM nor NMFS have yet published proposed new Seismic Exploration Take Rules, or any ICRs for them. They have, however, published and taken comment on a draft programmatic environmental impact statement for these new Take Rules.¹¹

New Take Rules and this PEIS are not necessary to protect marine mammals or any other aspect of the environment. They are also fatally flawed by procedural and substantive violations. These and other points are discussed in detail in CRE’s comments on the draft PEIS.¹² Two examples follow.

First, BOEM and NMFS developed the PEIS in violation of the OMB Peer Review Bulletin.

Second, the PEIS relies on marine mammal acoustic effects models that lack practical utility and violate Information Quality Act Guidelines. BOEM and NMFS themselves

⁹ See, *e.g.*, Unified Agenda, RIN 0648-BB38, at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=20610&RIN=0648-BB38>.

¹⁰ See, *e.g.*, NMFS ICR supporting statement, page 9, at http://www.cio.noaa.gov/services_programs/prasubs.html, OMB Control Number: 0648-0151; BSEE ICR Supporting Statement A, page 4, at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201202-1014-004. For a more detailed discussion of this question, see pages 6-10, at http://www.thecre.com/forum13/wp-content/uploads/2013/03/State_of_Marine_Sound_Regulation1.pdf.

¹¹ Links to the relevant Government documents are contained in CRE’s comments on the draft PEIS, which are available at <http://www.thecre.com/forum13/?p=2752>.

¹² CRE’s comments are available at <http://www.thecre.com/forum13/?p=2752>.

admit that these models are inaccurate and unreliable.¹³ Yet the agencies nevertheless intend to use them for several purposes. These purposes include a statutorily required estimation of the number of marine mammal “takes” that will occur under NMFS’ MMPA authorization for seismic exploration.¹⁴


Using these inaccurate and unreliable models for this regulatory purpose will cause numerous problems, including grossly overestimating the number of marine mammals taken. The agencies themselves admit that that using these models will overestimate takes.¹⁵ BOEM and NMFS successfully regulated oil and gas seismic and counted takes for many years without using these indisputably bad models.¹⁶

Regulation of oil and gas marine sound is highly litigious. Environmental groups opposed to fossil fuels will use these misleading and incorrect take estimates to challenge offshore oil and gas exploration in court. In fact, the proposed new Take Rules are themselves the product of an ill-advised settlement in litigation between BOEM and environmental NGOs.¹⁷ NMFS is busy implementing this settlement even though NMFS is not a party to it and was never sued in the case.

We emphasize that NMFS and BOEM are consciously basing new rules on modeled data that they know are incorrect, and they will ask OIRA to approve ICRs for this illegitimate purpose.

I would appreciate your timely attention to a critical review of the aforementioned ICR’s. We hope that this letter helps prepare OIRA for what will be a contentious ICR and NPRM review.

Respectfully,

A handwritten signature in black ink, appearing to read "Paul Jozzi". The signature is stylized with a large, sweeping initial "P" and a long, thin vertical stroke for the letter "j".

Director

¹³ See, e.g., BOEM’s revised application for GOM Take Rules, page 93, at http://www.nmfs.noaa.gov/pr/permits/incidental/oilgas/boem_2016rule_app.pdf.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See CRE comments, pages 6 (discussion of Line Transect), at http://www.thecre.com/creipd/wp-content/uploads/2016/11/mm_cre_comments_NMFS_Arctic_FEIS_final.pdf

¹⁷ PEIS, page 1-9, at <https://www.boem.gov/BOEM-EIS-2016-049-v1/>.