

**Comments by the Center for Regulatory Effectiveness (“CRE”) on
Bureau of Ocean Energy Management’s (“BOEM”)
Draft Environmental Impact Statement (“DEIS”), for the
Gulf of Mexico (“GOM”), Outer Continental Shelf (“OCS”),
Eastern Planning Area (“EPA”) Lease Sales 225 and 226,
<http://www.gpo.gov/fdsys/pkg/FR-2013-03-04/pdf/2013-04963.pdf> .**

**Comments filed electronically at
www.regulations.gov, ID BOEM-2013-0009-0001, and at
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I. EXECUTIVE SUMMARY

CRE recommends that BOEM’s preferred alternative be selected. CRE also believes that additional areas in the EPA should be part of the 2012-2017 Five-Year OCS Lease Sale Program.

The DEIS suggests that BOEM is considering expanding the current long-standing 500 meter exclusion zone for GOM seismic. There is no need to expand the exclusion zone or otherwise regulate GOM oil and gas seismic more stringently. BOEM has repeatedly and correctly pointed out that current regulation under JOINT NTL No. 2012-G02 (“NTL”) is adequate. This NTL requires a 500 meter exclusion zone. The record does not support any expansion of the exclusion zone or any more stringent regulation of GOM seismic than is provided by the NTL.

Any expansion of the exclusion zone or any otherwise more stringent regulation of GOM seismic would require a new Notice to Lessees, a new Protected Species Stipulation, a new Information Collection Request (“ICR”), and Office of Management and Budget (“OMB”) review and approval.

Any federal regulation of GOM seismic has to meet Information Quality Act (“IQA”) standards.

BOEM should allow public comment on draft Biological Assessments and on draft Biological Opinions (“BiOps”).

II. CRE SUPPORTS BOEM’S PREFERRED ALTERNATIVE

The DEIS states at page ix:

“Alternative A (Preferred Alternative)—The Proposed Action: This alternative would offer for lease all unleased blocks within the proposed EPA lease sale area for oil and gas operations. The proposed EPA lease sale area covers approximately 657,905 acres and includes those blocks previously included in the EPA Lease Sale 224 Area and a triangular-shaped area south of this area bordered by the CPA boundary on the west and

the Military Mission Line (86°41' W. longitude) on the east. The area is south of eastern Alabama and western Florida; the nearest point of land is 125 miles (201 kilometers) northwest in Louisiana. As of February 2013, approximately 465,200 acres of the proposed EPA lease sale area are currently unleased. The estimated amount of natural resources projected to be developed as a result of a proposed EPA lease sale is 0-0.071 billion barrels of oil (BBO) and 0-0.162 trillion cubic feet (Tcf) of gas.”

CRE recommends that BOEM select this alternative.

CRE also recommends believes that additional areas in the EPA be made part of the 2012-2017 Five-Year OCS Lease Sale Program. Further development of offshore oil and natural gas should be a federal Government priority.

III. NO NEED AND NO BASIS FOR MORE STRINGENT SEISMIC REGULATION IN THE GOM

For years, BOEM and the National Marine Fisheries Service (“NMFS”) have used a 500 meter exclusion zone to regulate oil and gas seismic in the GOM.¹

The DEIS suggests that BOEM is considering expanding the exclusion zone (“*the 180-dB radii*”) for GOM seismic:

“Recent work by Tolstoy et al. (2009) in the Gulf of Mexico suggests that, for deep water (~1,600 m; 5,249 ft), *the 180-dB radii would occur at less than 1 km* (0.6 mi) from the source; while in shallow waters (~50 m; 164 ft), *the 180-dB radii would be considerably larger* (e.g., ~1.1 km; 0.7 mi). The 180 dB re-1µPa-m level is an estimate of the threshold of sound energy that may cause hearing damage in cetaceans (U.S. Dept. of the Navy, 2001). Until further studies are completed, NMFS continues to use this estimated threshold.”²

There is no need to expand the exclusion zone or otherwise regulate GOM oil and gas seismic more stringently. BOEM has repeatedly and correctly pointed out that current regulation under the NTL is adequate. For example the DEIS states:

“NTL 2012-JOINT-G02, ‘Implementation of Seismic Survey Mitigation Measures and Protected Species Observer Program,’ minimizes the potential of harm from seismic operations to marine mammals. These mitigations include onboard observers, airgun shut-downs

¹ This regulation is implemented in part through JOINT NTL No. 2012-G02, Effective Date: January 1, 2012, Notice to Lessees and Operators (“NTL”) of Federal Oil, Gas, and Sulphur Leases in the OCS, Gulf of Mexico OCS Region, Implementation of Seismic Survey Mitigation Measures and Protected Species Observer Program, page 1, available at <http://www.bsee.gov/Regulations-and-Guidance/Notices-to-Lessees-and-Operators.aspx> .

² DEIS, Page 3-25 (emphasis added). The DEIS is available online at <http://boem.gov/Environmental-Stewardship/Environmental-Assessment/NEPA/nepaprocess.aspx> .

for whales in the exclusion zone, ramp-up procedures, and the use of a minimum sound source. Therefore, no significant cumulative impacts to marine mammals would be expected as a result of the proposed exploration activities when added to the impacts of past, present, or reasonably foreseeable oil and gas development in the area, as well as other ongoing activities in the area. Within the CPA, which is directly adjacent to the EPA, there is a long-standing and well-developed OCS Program (more than 50 years); there are no data to suggest that activities from the preexisting OCS Program are significantly impacting marine mammal populations.”³

The DEIS correctly emphasizes the adequacy of the current regulatory scheme for GOM seismic. This regulatory scheme relies on the NTL and on the Protected Species Stipulation in leases, which requires compliance with the NTL:

“The lessee and its operators, personnel, and subcontractors, while undertaking activities authorized under this lease, must implement and comply with the specific mitigation measures outlined in...NTL No. 2012-JOINT-G02 (Implementation of Seismic Survey Mitigation Measures and Protected Species Observer Program)...”⁴

The DEIS correctly points out that the Protective Species Stipulation, which requires compliance with the NTL’s 500 meter exclusion zone, “provide[s] protection by ensuring the animals remain a safe distance from the operations or the activity ceases”:

“Effectiveness of the Lease Stipulation

The Protected Species Stipulation has been used on leases since 2001, and the resource agencies with the primary responsibility for the protection of the species [e.g., NMFS and FWS] helped to create it. The stipulation minimizes certain activities and stops others when those actions have the potential to impact marine mammals or sea turtles. These avoidance criteria provide protection by ensuring the animals remain a safe distance from the operations or the activity ceases.”⁵

The Government has repeatedly and consistently emphasized that the current and historical regulatory scheme, which relies on a 500 meter exclusion zone, adequately protects marine mammals during GOM oil and gas seismic. For example, BOEM recently stated in another GOM environmental impact statement that

“... NTL 2012-JOINT-G02, ‘Implementation of Seismic Survey Mitigation Measures and Protected Species Observer Program,’ minimizes the potential of harm from seismic operations to marine mammals. These mitigations include onboard observers, airgun shut-downs for whales in the exclusion zone, ramp-up procedures, and the use of a minimum sound source. Therefore, no significant cumulative impacts to marine mammals would be expected as a result of the proposed exploration activities when added to the impacts of past, present, or reasonably foreseeable oil and gas development in the area, as well as other ongoing activities in the area. Within the [GOM] WPA, there is a long-standing

³ DEIS, Page 2-22

⁴ E.g., Lease Stipulations, Consolidated Central Gulf of Mexico Planning Area, Oil and Gas Lease Sale 216/222, Final Notice of Sale, Stipulation No. 8 – Protected Species.

⁵ DEIS, Page 2-35.

and well-developed OCS Program (more than 50 years); there are no data to suggest that activities from the preexisting OCS Program are significantly impacting marine mammal populations. Therefore, in light of the above analysis for a WPA proposed action and its impacts, the incremental effect of a WPA proposed action on marine mammal populations is not expected to be significant when compared with non-OCS energy-related activities.”

“Although there will always be some level of incomplete information on the effects from routine activities under a [GOM] CPA proposed action on marine mammals, there is credible scientific information, applied using acceptable scientific methodologies, to support the conclusion that any realized impacts would be sublethal in nature and not in themselves rise to the level of reasonably foreseeable significant adverse (population-level) effects. Also, routine activities will be ongoing in the CPA proposed action area as a result of active leases and related activities. As of May 2012, there are 4,377 active leases in the CPA. Within the CPA, there is a long-standing and well-developed OCS Program (more than 50 years); there are no data to suggest that routine activities from the preexisting OCS Program are significantly impacting marine mammal populations.”⁶

The National Academy of Sciences/National Research Council has agreed with the Department of Interior that “there are no documented or known population-level effects due to sound,” and has concluded with regard to the entire OCS that “[T]here have been no known instances of injury, mortality, or population level effects on marine mammals from seismic exposure....”⁷

NMFS agrees that “to date, there is no evidence that serious injury, death, or stranding by marine mammals can occur from exposure to airgun pulses, even in the case of large airgun arrays.”⁸

In sum, the record does not contain any reason or basis for changing the Government’s regulation of GOM seismic.

⁶ Gulf of Mexico OCS Oil and Gas Lease Sales: 2012-2017; Western Planning Area Lease Sales 229, 233, 238, 246, and 248; Central Planning Area Lease Sales 227, 231, 235, 241, and 247; Final Environmental Impact Statement; Volume I, page 4-215; Volume II, page 4-710; available online at <http://www.boem.gov/Environmental-Stewardship/Environmental-Assessment/NEPA/nepaprocess.aspx>. BOEM reiterated these conclusions in its Gulf of Mexico OCS Oil and Gas Lease Sales: 2013-2014, Western Planning Area Lease Sale 233, Central Planning Area Lease Sale 231 ; Final Supplemental Environmental Impact Statement; BOEM Gulf of Mexico OCS Region, pages 4-30 and 4-130, available online at http://www.boem.gov/uploadedFiles/BOEM/BOEM_Newsroom/Library/Publications/2013/BOEM%202013-0118.pdf.

⁷ See, e.g., Outer Continental Shelf Oil & Gas Leasing Program, 2007-2012 Programmatic Environmental Impact Statement, page V-64 (MMS April 2007), available online at <http://www.boem.gov/Oil-and-Gas-Energy-Program/Leasing/Five-Year-Program/2007-2012-Draft-Environmental-Impact-Statement.aspx>.

⁸ 75 FR 49759, 49795 (Aug. 13, 2010), available online at <http://edocket.access.gpo.gov/2010/2010-19962.htm>

In particular,

- the record does not include any evidence of harm from GOM seismic in compliance with current and long-standing regulation;
- the record does not discuss what if any benefits would result from more stringent regulation; and
- the record does not discuss the costs and other burdens to the industry from more stringent regulation.

CRE has prepared a Memorandum entitled “The State of Seismic Regulation in the Gulf of Mexico,” which discusses in detail the Government’s long-standing and successful reliance on the NTL and the 500 meter exclusion zone. This memorandum is incorporated by reference into these CRE comments on the DEIS.⁹

IV. MORE STRINGENT SEISMIC REGULATION IN THE GOM WOULD REQUIRE A NEW NTL, A NEW PROTECTED SPECIES STIPULATION, NEW ICR REVIEW, AND OMB APPROVAL

BOEM would have to revise the NTLs and the Protected Species Stipulation before BOEM could change the exclusion zone or otherwise regulate oil and gas seismic in the GOM more stringently. We know of no such public-notice-and-comment proceeding that is currently ongoing or planned.

In addition, BOEM would need a new ICR that has been reviewed and approved by OMB under the Paperwork Reduction Act (“PRA”). OMB-approved ICRs are necessary for the agencies’ regulation of offshore seismic because that regulation depends in large part on the monitoring and compliance reports sent by operators to federal agencies.

Before it split into BOEM and BSEE, BOEMRE responded to CRE’s comments on BOEMRE’s seismic regulation ICR 1010–0151. BOEMRE’s response stated that BOEMRE would need and request a new ICR if it ever intends to regulate offshore seismic activities in a manner more burdensome than required at the time it responded to the comments. BOEMRE’s response defines the burden and scope of seismic information collection authorized by ICR 1010–0151, which was approved by OMB after and based on BOEMRE’s response to CRE.

BSEE subsequently asked OMB to approve a new seismic regulation ICR which, according to BSEE “does not change the burden hours or make any other modifications to what was previously approved [under ICR 1010–0151], other than to remove the collections under the

⁹ This Memorandum is available online at http://www.thecre.com/forum13/wp-content/uploads/2013/03/State_of_Marine_Sound_Regulation1.pdf, and it is incorporated by reference herein.

purview of BOEM” in order to accommodate the split of regulations from the Bureau of Ocean Energy Management, Regulation and Enforcement (“BOEMRE”) to BOEM and BSEE.”¹⁰

BSEE’s ICR Supporting Statement to OMB for this new seismic ICR reads in part as follows:

“Another commenter [CRE] requested that we [BSEE] should state that we are not submitting any ICRs for seismic regulations that are more stringent than current regulations, including NTL 2007-G02.

We believe that this comment is not germane to current BSEE regulatory requirements because when BOEMRE split into the new bureaus of BOEM and BSEE, the regulatory requirements pertaining to seismic requirements are now under BOEM purview. Nonetheless, we agree with BOEM’s response that the public will be given the opportunity to comment on modifications made to any information collections as a result of changes to NTL 2007-G02 and 30 CFR 250, subpart B regulations. BOEM’s actual reply was:

Response: For the renewal of this ICR, we are not requesting anything more stringent than in current NTL 2007-G02 and 30 CFR 250, subpart B regulations, which are covered under OMB Control Number 1010-0151. We have no plans, at this time, to change the content of or the resultant burdens imposed by NTL 2007-G02. Therefore, BOEMRE should move forward with the required information collection to ensure compliance with OMB deadlines. If the lawsuit settlement or resulting decree requires changes to the NTL and/or DOI regulations, information collection coordination and OMB approval will occur before any NTL is reissued or regulations are promulgated.¹¹

OMB’s approval of this BSEE ICR states:

Terms of Clearance: The public will be given the opportunity to comment on substantive modifications made to any information collections as a result of changes to NTL 2007-G02 and 30 CFR 250, subpart B regulations.¹²

Consequently, any “substantive modifications” to the NTLs would have to be preceded by public notice and comment as well as OMB review and approval, and may not be approved by OMB.

¹⁰ 77 FR 58858 (Sept. 24, 2012), available online at <http://www.gpo.gov/fdsys/pkg/FR-2012-09-24/html/2012-23386.htm>.

¹¹ Click on Supporting Statement A at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201202-1014-004, and read BSEE’s response to Question 8 in the Supporting Statement.

¹² Available online at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201202-1014-004. There are no substantive differences between NTL 2007-G02 and its successor NTL 2012-JOINT-G02.

V. REGULATION OF GOM SEISMIC HAS TO MEET IQA STANDARDS

The Information Quality Act (“IQA”) requires that NMFS, BOEM, BSEE and most other U.S. federal agencies meet specified quality standards before they make scientific or other information publicly available. This statutory requirement means that the agencies must ensure that all scientific information they use or rely on meets the IQA standards. These quality standards are implemented first by Government-wide guidelines developed and published by OMB. The IQA requires that the other federal government agencies develop and publish their own, agency-specific quality guidelines. The agency-specific guidelines must be approved by OMB and must be consistent with OMB’s Government-wide guidelines.¹³

OMB will review any ICR for more stringent GOM seismic regulation to determine whether the ICR complies with IQA Guidelines. For example, the U.S. Department of Commerce, which includes NMFS, has Department-wide procedures for developing and submitting ICRs. These procedures state in part:

“What is required for an information collection request?”

Form OMB 83-I, Paperwork Reduction Act Submission, is used to request OMB clearance for an information collection from the public. The package, including the collection instrument, instructions, and all attachments, is prepared by the operating unit...The submission package must include:

- A Supporting Statement that includes narrative information explaining the purpose, scope, and benefits(s) of the collection.
- The Supporting Statement must include an explicit reference to the operating unit’s information quality guidelines, as required by the Data Quality Act (addressed in question 2 of Supporting Statement).¹⁴

OMB’s guidance to the federal agencies clearly states that ICRs must meet IQA requirements in order to be approved:

“In this light, we note that each agency is already required to demonstrate the practical utility of a proposed collection of information in its PRA submission, i.e., for draft information collections designed to gather information that the agency plans to disseminate. Thus, we think it important that each agency should declare in its [IQA] guidelines that it will demonstrate in its PRA clearance packages that each such draft information collection will result in information

¹³ Supporting citations for this discussion, and a more detailed discussion, are available beginning at page 4 of the document at <http://thecre.com/pdf/20051228.pdf>. The IQA is often referred to as the Data Quality Act (“DQA”), and these two acronyms will be used interchangeably in these comments.

¹⁴ Available online at http://ocio.os.doc.gov/ITPolicyandPrograms/Information_Collection/dev01_003742.

that will be collected, maintained, and used in a way consistent with the OMB and agency information quality standards. It is important that we make use of the PRA clearance process to help improve the quality of information that agencies collect and disseminate. Thus, OMB will approve only those information collections that are likely to obtain data that will comply with the OMB and agency information quality guidelines.”¹⁵

OMB further explains that “if an agency, as an institution, disseminates information prepared by an outside party in a manner that reasonably suggests that the agency agrees with the information, this appearance of having the information represent agency views makes agency dissemination of the information subject to these [IQA] guidelines.”¹⁶

NMFS acknowledges that both the OMB Government-wide and NMFS’ own IQA guidelines apply to outside or third-party information if NMFS uses or relies on that information.¹⁷

In sum, any change in the existing U.S. regulation of GOM seismic would be reviewed by OMB for their compliance with the IQA. So would the ICRs necessary for any such changes.

VI. BOEM SHOULD ALLOW PUBLIC COMMENT ON DRAFT BIOLOGICAL ASSESSMENTS AND ON DRAFT BiOps

The DEIS says this about the ESA consultation process for this lease sale:

“5.5. ENDANGERED SPECIES ACT

The Endangered Species Act of 1973 (ESA) (16 U.S.C. 1631 et seq.), as amended (43 U.S.C. 1331 et seq.), establishes a national policy designed to protect and conserve threatened and endangered species and the ecosystems upon which they depend. BOEM is currently undergoing an ESA consultation with NMFS and FWS to consider future lease sales over a 10-year period, including those in the 2012-2017 Five-Year Program (e.g., CPA Lease Sale 227). This consultation also considers any changes in baseline environmental conditions following the *Deepwater Horizon* explosion, oil spill, and cleanup. BOEM is finalizing the Biological Assessment (BA) for this consultation, which underwent significant changes resulting from extensive information requests following the NMFS’s May 31 Draft Biological Assessment review. We expect to send the Final Biological Assessment to NMFS in Spring 2013 and a separate Final Biological Assessment to FWS shortly afterward. BOEM will then work with NMFS and FWS to (1) identify timelines for completing this ESA consultation and (2) establish procedures to ensure consideration of any on-the-water activities resulting from new lease sales that may be requested prior to completion of the new consultation (i.e., expanding the current

¹⁵ John D. Graham, *Memorandum for the President’s Management Council*, p. 12, June 10, 2002, available at

http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/iqg_comments.pdf.

¹⁶ Page 8454 of OMB’s Federal Register notice available online at

<http://www.whitehouse.gov/sites/default/files/omb/assets/omb/fedreg/reproducible2.pdf>.

¹⁷ See, e.g., NMFS’ letter available online at http://thecre.com/pdf/NOAA-IWC_Letter.pdf.

ESA interim process with NMFS to include actions resulting from the 2012-2017 Five-Year Program).”¹⁸

There should be an opportunity for public comment on any BOEM Biological Assessment and on any NMFS Biological Opinion (“BiOp”). NMFS usually does not allow public comment on its BiOps. Consequently, we ask BOEM to provide an opportunity for public comment on any draft BOEM Biological Assessments--and on any draft BiOps that BOEM receives from NMFS-- regarding regulation of GOM oil and gas. We note that the U.S. Environmental Protection Agency (“USEPA”) has established a public comment process for its ESA pesticide consultations including draft NMFS BiOps.¹⁹

We thank you for the opportunity to submit these comments, and look forward to the Agency’s response.

The Center for Regulatory Effectiveness

¹⁸ DEIS, page 5-14.

¹⁹ The USEPA posts draft BiOps and other ESA consultation documents for comment at <http://www.epa.gov/espp/>.