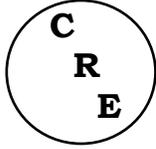


# Center for Regulatory Effectiveness



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January 6, 2011

## SUBMITTED ELECTRONICALLY

Mr. James F. Bennett  
Chief, Division of Environmental Assessment  
BOEM Headquarters  
381 Elden Street  
Herndon, VA 2017

Re: Draft Programmatic Environmental Impact Study (PEIS) for Proposed  
5-Year Outer Continental Shelf (OCS) Oil and Gas Leasing Program for 2012–2017, 76 FR  
70156 (November 10, 2011)

Dear Mr. Bennett:

The Center for Regulatory Effectiveness (CRE) is pleased to submit these comments to the Bureau of Ocean Energy Management (BOEM) regarding the Draft Programmatic Environmental Impact Study (PEIS) for Proposed 5-Year Outer Continental Shelf (OCS) Oil and Gas Leasing Program for 2012–2017.<sup>1</sup> CRE offers the following recommendations to BOEM: (1) BOEM should encourage the use of PAMGUARD as part of the protected species observer program; (2) the final PEIS should reflect the conclusion that seismic does not adversely affect marine mammals under current BOEM regulations; (3) any new seismic regulations issued by BOEM will require a new proposed Information Collection Request (ICR); and (4) Coastal and Marine Spatial Planning violates the Outer Continental Shelf Lands Act (OCSLA) and, accordingly, the primary emphasis of the Final PEIS should be on oil and gas leasing.

The following sections detail the aforementioned recommendations. CRE offers these recommendations to BOEM in order for it to fulfill the mandates of OCSLA and to remain committed to pursuing the development of oil and gas production in the Gulf of Mexico.

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<sup>1</sup> 76 FR 70156, November 10, 2011.

## I. BOEM SHOULD ENCOURAGE PAMGUARD USE

BOEM regulates offshore oil & gas seismic operations primarily through *Notice to Lessees and Operators* (“NTL”) 2007-G02. This NTL has a section which encourages, but does not require, the voluntary or “experimental” use of Passive Acoustic Monitoring (PAM):

### **Experimental Passive Acoustic Monitoring**

Whales, especially sperm whales, are very vocal marine mammals, and periods of silence are usually short and most often occur when these animals are at the surface and may be detected using visual observers. However, sperm whales are at the greatest risk of potential injury from seismic airguns when they are submerged and under the airgun array. Passive acoustic monitoring appears to be very effective at detecting submerged and diving sperm whales, and some other marine mammal species, when they are not detectable by visual observation. MMS strongly encourages operators to participate in an experimental program by including passive acoustic monitoring as part of the protected species observer program. Inclusion of passive acoustic monitoring does **not** relieve an operator of any of the mitigations (including visual observations) in this NTL **with the following exception**: Monitoring for whales with a passive acoustic array by an observer proficient in its use will allow ramp-up and the subsequent start of a seismic survey during times of reduced visibility (darkness, fog, rain, etc.) when such ramp-up otherwise would not be permitted using only visual observers. If you use passive acoustic monitoring, include an assessment of the usefulness, effectiveness, and problems encountered with the use of that method of marine mammal detection in the reports described in this NTL. A description of the passive acoustic system, the software used, and the monitoring plan should also be reported to MMS at the beginning of its use.<sup>2</sup>

The International Association of Oil and Gas Producers Joint Industry Project (“JIP”) has developed and made publicly and freely available a version of PAM which has been tried and tested. This open source method of monitoring marine mammals is called PAMGUARD.

CRE requests that BOEM revise NTL 2007-G02 to encourage the use of PAMGUARD “as part of the protected species observer program.” The PAMGUARD web site discusses PAMGUARD in considerable detail, and provides free, public access to PAMGUARD.<sup>3</sup> The site is worth quoting at some length:

### **Background**

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<sup>2</sup> NTL 2007-G02, [http://sero.nmfs.noaa.gov/sf/deepwater\\_horizon/Appendix\\_A\\_Seismic\\_NTL\\_2007-G02.pdf](http://sero.nmfs.noaa.gov/sf/deepwater_horizon/Appendix_A_Seismic_NTL_2007-G02.pdf) (emphasis in the original).

<sup>3</sup> The industry-sponsored PAMGUARD website is available online at <http://www.pamguard.org/home.shtml>

The PAMGUARD project was set up to provide the world standard software infrastructure for acoustic detection, localisation and classification for mitigation against harm to marine mammals, and for research into their abundance, distribution and behaviour. Many marine activities involve underwater sound emissions. These may be a by-product of the activity (e.g. piling or explosives), or a tool (e.g. air guns used for seismic surveys in oil and gas exploration, or military/commercial sonar). To mitigate against harm to marine mammals, observers are often employed to visually scan the sea surface for the presence of animals. In the event of a sighting, procedures such as suspension/delay of activities may be implemented to avoid harm.

### **Current Methods**

Visual observations play a vital role, but marine mammals are difficult to spot on the sea surface, especially when weather and light conditions are poor. However, many marine mammals produce loud and distinctive vocalisations, which can often be detected more reliably than visual cues. For these species, passive acoustic monitoring (PAM) offers an effective means of detection. Furthermore, the creatures do not need to be on the surface to be detected.

### **Why do we need PAMGUARD?**

While PAM software already exists, the source code is not freely available for others to help to expand and improve. This means that assumptions, and therefore margins for error, are not readily understood, that code evolves more slowly, or not at all, and source code improvements are at the mercy of the time and resources that the few responsible developers can commit. In the case of the military and some commercial organisations, detection, classification and localisation (DCL) technologies are in-house and protected. What is needed is an environment which raises the profile of PAM and creates a means of tapping into the intellectual resources of the research community. Industry and marine environmentalists are well aware of the need to upgrade and modernize.<sup>4</sup>

The Joint Industry Program Annual Report for 2009 also contains extensive, detailed documentation of PAMGUARD.<sup>5</sup> The report explains:

A software package called PAMGUARD has been released that can interpret and display calls of vocalising marine mammals, locate them by azimuth and range and identify some of them by species. These abilities are critical for detecting animals within safety zones and enabling shut-down.<sup>6</sup>

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<sup>4</sup> PamGuard site available at <http://www.pamguard.org/background.shtml>

<sup>5</sup> See 2009 Report, pages 1, 2, and 3, available online at <http://www.soundandmarinelife.org/Site/Basics/AnnRep3.pdf>.

<sup>6</sup> *Id* at 1.

PAMGUARD was discussed at a recent IAGC meeting, which strongly encouraged the industry to use PAMGUARD and explained its benefits.<sup>7</sup> One power point slide explains the “PAMGUARD Vision” and outlines why the software should be implemented on a widespread basis:

- Create an integrated real-time PAM software infrastructure
  - Open source
  - Platform independent
  - Freely available to all PAM users for the benefit of the marine environment.
  - Establish a reliable/robust industry standard interface tool in preparation for PAM being mandated.<sup>8</sup>

Further, there is precedent for CRE’s PAMGUARD request to BOEM. The 2010 seismic guidelines for the UK’s Joint Nature Conservation Committee (“JNCC”) include the following section encouraging the use of PAMGUARD:

In the last few years, software that processes and analyses cetacean sounds has been developed. PAMGUARD is open source software that has been developed as part of the International Association of Oil and Gas Producers Joint Industry Project (JIP). JNCC recognises that PAMGUARD is currently in a transition period between use as a research tool and widespread adoption as a monitoring technique. Moreover, JNCC recognises the need to balance proactive implementation of PAM with the need to further develop its capability, for example to include species recognition and baleen whale detection, and therefore encourages users of these systems to actively contribute to their development and refinement.”<sup>9</sup>

In addition, BOEM should encourage the use and support of PAMGUARD in BOEM’s NTLs and wherever else appropriate. BOEM should, however, recognize that there has been progress in the “development and refinement” of PAMGUARD since the JNCC issued its seismic guidelines.

CRE will be pleased to work with BOEM and further assist the Agency’s incorporation of PAMGUARD into the NTL and elsewhere.

## **II. Seismic Under Current Regulation Causes No Harm**

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<sup>7</sup> See, beginning with slide 9, power point presentation at [http://iagc.org/attachments/contentmanagers/9530/6%207%20IAGC\\_HSESForum\\_pres\\_MarEnv\\_SMLWkgrpUpdate\\_V01\\_2011\\_09\\_27.pdf](http://iagc.org/attachments/contentmanagers/9530/6%207%20IAGC_HSESForum_pres_MarEnv_SMLWkgrpUpdate_V01_2011_09_27.pdf)

<sup>8</sup> *Id.* at Slide 11.

<sup>9</sup> JNCC Guidelines for Minimising the Risk of Injury and Disturbance to Marine Mammals from Seismic Surveys (August 2010), Section 4,1, available at [http://jncc.defra.gov.uk/pdf/JNCC\\_Guidelines\\_Seismic%20Guidelines\\_August%202010.pdf](http://jncc.defra.gov.uk/pdf/JNCC_Guidelines_Seismic%20Guidelines_August%202010.pdf)

On June 14, 2011, National Marine Fisheries Service (NMFS) published a Federal Register notice that BOEM had submitted to NMFS a revised application for Take authorizations under the Marine Mammal Protection Act.<sup>10</sup> This revised Take application applies to oil and gas seismic operations in the Gulf of Mexico.<sup>11</sup> Several NGO environmental and conservation groups filed joint comments on this revised Take application.<sup>12</sup> These NGO comments argue that current regulation does not adequately protect GOM marine mammals from oil and gas seismic. Their comments provide very little factual support for this argument. They do, however, claim that the Sperm Whale Synthesis Report shows adverse effects on sperm whale foraging.<sup>13</sup>

CRE assumes that the NGOs will file similar comments on the Draft PEIS because the Draft PEIS addresses seismic in the GOM as well as in other offshore areas subject to leasing.

CRE has prepared a response to these NGO comments. CRE's response is incorporated by reference into these comments by CRE on the Draft PEIS.<sup>14</sup> CRE's response demonstrates that the NGOs are incorrect with regard to harm. Seismic does not harm sperm whales or any other marine mammals under current regulation. Sperm Whale Synthesis Report does not support adverse foraging effects. A technical analysis of the foraging data reveals many flaws, and other sound studies show no effect on whale foraging.

NMFS recently issued a biological opinion for another seismic Take application under the Marine Mammal Protection Act. This BiOp concluded that the Synthesis Report and other studies suggest that seismic does NOT affect Sperm Whale foraging:

These studies suggest that sperm whales exhibit considerable tolerance of seismic sources (*e.g.*, no apparent disruption of behaviors such as foraging or calling), or possibly some degree of habituation.<sup>15</sup>

NMFS' biological opinion also concludes that:

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<sup>10</sup> 76 FR 34656, June 14, 2011, available at <http://www.gpo.gov/fdsys/pkg/FR-2011-06-14/html/2011-14742.htm>

<sup>11</sup> *Id.*

<sup>12</sup> The NGO comments are available at [http://www.nmfs.noaa.gov/pr/pdfs/permits/boemre\\_comments2011.pdf](http://www.nmfs.noaa.gov/pr/pdfs/permits/boemre_comments2011.pdf).

<sup>13</sup> The Sperm Whale Synthesis Report is available online at <http://www.gomr.boemre.gov/PI/PDFImages/ESPIS/4/4444.pdf>

<sup>14</sup> CRE's Response is available at <http://thecre.com/pdf/20111027.pdf>

<sup>15</sup> Pages 73-74 of NMFS biological opinion available online at [http://www.nmfs.noaa.gov/pr/pdfs/consultations/biop\\_usgs2011.pdf](http://www.nmfs.noaa.gov/pr/pdfs/consultations/biop_usgs2011.pdf)

The evidence available leads us to conclude that exposure to seismic pulse energy from the proposed seismic activities is not likely to cause a reduction in an individual whale's growth, survival, annual reproductive success, or lifetime reproductive success (i.e., fitness). As a result, we do not expect the proposed action to have an effect on the extinction risk of the population(s) these individuals represent or the whale species these population(s) comprise.<sup>16</sup>

These conclusions are consistent with other recent BOEM actions. For example, BOEM's Supplemental Environmental Impact Statement for proposed oil and gas Lease Sale 218 in the GOM Western Planning Area ("SEIS") contains an extensive discussion of sperm whales, other marine mammals, and sound. This SEIS correctly concludes:

"In addition, NTL 2007-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."<sup>17</sup>

This SEIS correctly concludes, "Marine mammals may exhibit some avoidance behaviors, but their behavioral or physiological responses to noise associated with the proposed action, however, are unlikely to have population-level impacts to marine mammals in the northern Gulf of Mexico."<sup>18</sup>

MMS/BOEM and the National Research Council have similarly concluded:

[T]here have been no known instances of injury, mortality, or population level effects on marine mammals from seismic exposure but... the potential for these types of impacts may exist without appropriate mitigation measures. The MMS-approved seismic surveys include mitigation measures designed to reduce the potential for effects to occur.<sup>19</sup>

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<sup>16</sup> *Id.* at 86.

<sup>17</sup> Page 4-150, <http://www.gomr.boemre.gov/PDFs/2011/2011-034-v1.pdf>

<sup>18</sup> Page 4-145, <http://www.gomr.boemre.gov/PDFs/2011/2011-034-v1.pdf>

<sup>19</sup> See, e.g., Outer Continental Shelf Oil & Gas Leasing Program, 2007-2012 Final

Environmental Impact Statement, page V-64 (MMS April 2007), available at

<http://www.boemre.gov/5-year/2007-2012DEIS/VolumeII/5and6-ConsultationPreparers.pdf>

NMFS has emphasized 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.”<sup>20</sup>

NMFS’ conclusions are supported by the results of recent controlled sound exposure experiments on a sperm whale, which concluded:

In neither CEE [controlled sound exposure experiment] did this individual appear to demonstrate obvious behavioral responses, as seen in the dive profiles below; no clear changes in the production of echolocation clicks were observed in either case.<sup>21</sup>

These correct findings by BOEM and NMFS in similar contexts are consistent with the following conclusions in the Draft PEIS:

[T]here is no evidence to suggest that routine seismic surveys may result in population-level effects for any of the marine mammal species. There have been no documented instances of deaths, physical injuries, or physiological effects on marine mammals from seismic surveys (MMS 2004c)...

...As discussed for the GOM (Section 4.4.7.1.1), it is assumed that BOEM will continue to require ramp-up of seismic activities coupled with visual monitoring and clearance within an exclusion zone around a seismic array. These actions would reduce the potential for cetaceans to be exposed to sound levels that could affect hearing or behavior. The avoidance reactions of whales to approaching seismic vessels would normally prevent exposure to potentially injurious noise pulses (NMFS 2001b). The geographic scale of any potential noise effect is probably relatively small compared to the total habitat used by whales in the Chukchi and Beaufort Seas (MMS 2004c). For example, in the Chukchi Sea, fall migrating bowhead whales are commonly seen from the coast to about 150 km (93 mi) offshore (MMS 2004c), while fall migration in the Beaufort Sea occurs over a 100 km (62 mi) wide corridor (Malme et al. 1989).<sup>22</sup>

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<sup>20</sup> 75 FR 49795-96 (Aug. 13, 2010), page 49795, available at <http://edocket.access.gpo.gov/2010/2010-19962.htm>

<sup>21</sup> Biological and Behavioral Response Studies of Marine Mammals in Southern California, 2010 (“SOCAL-10”), Project Report, 26 February 2011, page 24, available online at [http://www.cascadiaresearch.org/reports/SOCAL10\\_final\\_report-2010.pdf](http://www.cascadiaresearch.org/reports/SOCAL10_final_report-2010.pdf).

<sup>22</sup> Draft PEIS, page 4-269 - 4-271, available online at [http://www.boem.gov/uploadedFiles/BOEM/5-Year/2012-2017/PEIS/04\\_Chapter.pdf](http://www.boem.gov/uploadedFiles/BOEM/5-Year/2012-2017/PEIS/04_Chapter.pdf)

Thus, CRE recommends that the final PEIS be strengthened to include the additional support cited in this comment for the correct conclusion that seismic does not adversely affect marine mammals under current BOEM regulation.

### **III. A New ICR Would be Necessary for Any Significant Change from Current Seismic Regulation**

CRE has previously filed two comments that are relevant to the Draft PEIS and seismic. BOEM's response to these comments agrees with CRE on an important point—BOEM will have to prepare a new Information Collection Request (“ICR”) for public comment and Office of Management and Budget (“OMB”) review before BOEM could regulate seismic in a manner that is significantly different than current regulation under NTL No. 2007-G02.

First, on September 30, 2011, BOEM published Federal Register notice that BOEM was submitting an ICR to OMB for review. This FR notice also responds to comments that CRE submitted on BOEM's draft ICR. This ICR is for regulations that apply to offshore seismic.<sup>23</sup>

Second, on October 21, 2011, BOEM published Federal Register notice that BOEM was submitting another ICR to OMB for review. This FR notice responds to comments that CRE submitted on BOEM's draft ICR. This ICR is also for regulations that apply to offshore seismic.<sup>24</sup> BOEM's September 30<sup>th</sup> FR notice explains:

We received two comments in response to the Federal Register notice. The first comment, from the Marine Mammal Commission, supported our request to OMB. The second comment, from the Center for Regulatory Effectiveness, requested that we should state that we are not submitting any ICRs for seismic regulations that are more stringent than current regulations, including NTL 2007-G02. 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

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<sup>23</sup> BOEM, September 30, 2011 Federal Register notice of the ICR's submission to OMB is available online at <http://www.gpo.gov/fdsys/pkg/FR-2011-09-30/html/2011-25262.htm>. The OMB file for this ICR is available online at [http://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=200803-1010-004](http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=200803-1010-004)

<sup>24</sup> BOEM, October 21, 2011 Federal Register notice of the ICR's submission to OMB is available online at <http://www.gpo.gov/fdsys/pkg/FR-2011-10-21/html/2011-27331.htm>. The OMB file for this ICR is available online at [http://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=200908-1010-002](http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=200908-1010-002)

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."<sup>25</sup>

Similarly, BOEM's October 21<sup>st</sup> Federal Register Notice explains:

We received two comments in response to the Federal Register notice. The first commenter, the Marine Mammal Commission stated that it was in support of our submission to OMB. The second commenter, Center for Regulatory Effectiveness, requested two actions. One, that we should state that we are not submitting any ICR for seismic regulations that is more stringent than current regulations, including NTL 2007-G02. Response: For the renewal of this ICR, we are not requesting anything more stringent than in current 30 CFR 551 regulations; NTL 2007-G02 is covered under OMB Control Number 1010-0151. Second, that we wait to submit the ICR to OMB. There is current on-going litigation pertaining to seismic regulations (BOEM vs environmental plaintiff(s)). Response: This particular ICR renewal pertains mostly to revising the form currently in use due to new developments in technology; we are not requesting any new requirements. If the lawsuit settlement or decree requires changes to the form and/or DOI regulations, information collection coordination and OMB approval will occur before the form is reissued or regulations are promulgated.<sup>26</sup>

The referenced NTL No. 2007-G02 is entitled "Implementation of Seismic Survey Mitigation Measures and Protected Species Observer Program." This NTL states:

[It] clarifies how you should implement seismic survey mitigation measures, including ramp-up procedures, the use of a minimum sound source, airgun testing and protected species observation and reporting. The measures contained herein apply to all on-lease surveys you conduct under 30 CFR 250 and all off-lease surveys you conduct under 30 CFR 251."<sup>27</sup>

In the above-quoted FR notices, BOEM responds to CRE comments which explain in greater detail that environmental group plaintiffs are suing BOEM in New Orleans federal court over regulation of seismic in the GOM. At the request of the parties, this litigation is currently stayed until February 2, 2012, in order to allow the parties "to conclude settlement negotiations."

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<sup>25</sup> <http://www.gpo.gov/fdsys/pkg/FR-2011-09-30/html/2011-25262.htm>

<sup>26</sup> <http://www.gpo.gov/fdsys/pkg/FR-2011-10-21/html/2011-27331.htm>

<sup>27</sup> Available online at

<http://www.gomr.boemre.gov/homepg/regulate/regs/ntls/2007NTLs/07-g02.pdf>. This NTL has OMB Control Number: 1010-0151, and OMB Expiration Date: December 31, 2011. *Id.*

Based on the parties' pleadings, any settlement acceptable to the plaintiffs could dramatically change current regulation of seismic in the GOM, including ICRs, and could significantly increase the costs, burden and efficacy of that regulation, including ICRs.

Therefore, BOEM's current ICR burden estimates are likely inaccurate if the New Orleans litigation settles, and that won't be known until after the close of the comment period for the two ICRs. The burden estimate won't be known until after the close of the Draft PEIS comment period. Consequently, many of the concerns that CRE's ICR comments stated regarding the regulatory impact of any settlement, and the need for public comment on and OMB review of any such impact, also apply to the Draft PEIS.

CRE's ICR comments further stated that whether the settlement occurs, for at least two reasons, BOEM should not send OMB any revised ICRs for seismic regulation that is more stringent than currently imposed. First, BOEM has repeatedly and correctly stated that current regulation of seismic adequately protects the environment. In other words, current regulation of seismic is all that's necessary for the proper performance of BOEM's functions. Therefore, under the Paperwork Reduction Act ("PRA") BOEM should not submit, and OMB should not approve, ICRs for more stringent seismic regulation. Such ICRs would violate the PRA because they would be unnecessary for proper performance of BOEM's functions.

Second, any ICRs for more stringent seismic regulation would violate the accuracy requirement of BOEM's Data Quality Act ("DQA") Guidelines. The PRA requires that BOEM certify that ICRs are necessary for the proper performance of BOEM's functions. That certification would be inaccurate in the case of ICRs for more stringent seismic regulation. Current regulation of seismic, and ICRs based on current regulation, are all that is necessary for proper performance of BOEM's functions.

CRE's comments on these two ICRs are incorporated by reference into these comments by CRE on the Draft PEIS.<sup>28</sup> Accordingly, CRE recommends that BOEM should strengthen the PEIS by stating more clearly that current regulation of seismic prevents harm and that any significant change to current regulation will be preceded by a new proposed ICR, public comment, and OMB review.

#### **IV. The Primary Emphasis under OCLSA is the Expedious But Orderly Development of OCS Resources**

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<sup>28</sup> CRE's comments on the September 30<sup>th</sup> ICR are available in [www.regulations.gov](http://www.regulations.gov), Docket ID # BOEM-2011-0011-0003, <http://www.regulations.gov/#!documentDetail;D=BOEM-2011-0011-0003>. CRE's comments on the October 21<sup>st</sup> ICR are available in [www.regulations.gov](http://www.regulations.gov), Docket ID # BOEM-2011-0036-0003, <http://www.regulations.gov/#!documentDetail;D=BOEM-2011-0036-0003>

BOEM's oil and gas leasing program is conducted pursuant to OCSLA. OCSLA directs the Secretary of the Interior to prepare and maintain an oil and gas leasing program to develop the "vital national resource reserve[s]" located in the Outer Continental Shelf.<sup>29</sup> "In order to ensure 'the expeditious but orderly development of OCS resources,' OCSLA provides that Interior undertake a four-stage process in order to develop an offshore oil well."<sup>30</sup> The first stage is the "preparation stage, [where] Interior creates a leasing program by preparing a five-year schedule of proposed lease sales."<sup>31</sup> The second stage is the lease-sale stage.<sup>32</sup> In the third stage, the exploration stage, the Department of Interior reviews and determines whether to approve the lessees' more extensive exploration plans. The final stage is the development and production stage.

The first stage is of relevance here, because with the Proposed 5-year OCS Oil and Gas Program and the Draft PEIS, BOEM is currently in the initial preparation stage. During this first stage, OCSLA requires the Secretary of the Interior to "prepare and periodically revise, and maintain an oil and gas leasing program. This Program creates a basis for future decisions made by the Secretary and is the beginning of the analytical process required by statute. Importantly, "prospective lease purchases acquire no rights to explore, produce, or development at the first of OCSLA planning."<sup>33</sup>

In the first stage, Section 18 of OCSLA specifically requires the Secretary to "prepare, maintain, and periodically revise a leasing program consisting of a schedule of proposed lease sales."<sup>34</sup> The purpose of this 5-year program is to identify sections of the OCS for potential oil and gas development. In developing the 5-year Program:

The Secretary [of the Interior] shall select the timing and location of leasing, to the maximum extent practicable, so as to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone.<sup>35</sup>

While OCSLA provides little guidance on how the Secretary should strike the "proper balance" between oil and gas development and environmental concerns, the U.S. Court of Appeals for the DC Circuit does in *State of California ex rel. Brown v. Watt*.<sup>36</sup>

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<sup>29</sup> 43 U.S.C. § 1331

<sup>30</sup> Center for Biological Diversity v. U.S. Dept. of Interior 563 F.3d 466, 473-74 (DC Cir. 2009) (citing 43 U.S.C. § 1331) (emphasis in original).

<sup>31</sup> *Id.* at 474.

<sup>32</sup> 43 U.S.C. § 1337(a).

<sup>33</sup> *Sec'y of the Interior v. California*, 464 U.S. 312, 338 (1984).

<sup>34</sup> 43 U.S.C. § 1344.

<sup>35</sup> 43 U.S.C. § 1344(a)(3).

<sup>36</sup> *State of California ex rel. Brown v. Watt*, 668 F.2 1290 (D.C. Cir. 1981).

In defining the “proper balance,” the court in *State of California ex rel. Brown v. Watt* looked to the Congress’ declared policy as provided in the 1978 Amendments to the Act<sup>37</sup> and held that “the end is to develop the oil and natural gas resources of the OCS... [and the] primary emphasis on expeditious development of the OCS.”<sup>38</sup> The court further found, “Petitioner’s objection to this view is essentially that it allows even significant environmental costs and coastal zone impacts to be overridden [sic]. Yet this is precisely what the Act intends, provided that the potential oil and gas benefits exceed those potential costs.”<sup>39</sup> Notably, the holding that the primary purpose of the Act is “to ensure ‘the expeditious but orderly development of OCS resources,’” was reaffirmed recently by the DC Circuit.<sup>40</sup>

As referenced in the Draft PEIS, on July 19, 2010, the President signed Executive Order (EO) 13547 *Stewardship of the Ocean, Our Coasts, and the Great Lakes*, establishing the National Ocean Policy and Coastal and Marine Spatial Planning.<sup>41</sup> As admitted by BOEM, despite the enormous resources dedicated to CMSP, there is not yet “a standard, universally accepted of definition of [C]MSP...most existing definition are phrased in broad terms and definition.”<sup>42</sup> The President’s Executive Order defines CMSP as a program that “identifies areas most suitable for various types or classes of activities in order to reduce conflicts among uses, reduce environmental impacts, facilitate compatible uses, and preserve critical ecosystem services to meet economic, environmental, security, and social objectives.”<sup>43</sup>

CMSP, as proposed, conflicts with the “proper balance” of oil and gas development with environmental concerns required by OCSLA. Specifically, CMSP requires that all ocean uses be considered equally, while OCSLA requires BOEM to give more weight to the development of oil and gas. This is conflict is clearly acknowledged by BOEM in the Draft PEIS:

a major distinction between the two planning approaches is that the PEIS perspective focuses on the single use of the OCS for hydrocarbon exploration, extraction, and transportation, whereas the CMSP focuses on reconciling all economic, social, and ecosystem uses of an area in developing a CMS.

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<sup>37</sup> *Id.* at 1315 (citing OCLA at 43 U.S.C. § 1332(3): “the outer Continental Shelf is a vital national resource ... which should be made available for orderly and expeditious development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs.”)

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 318.

<sup>40</sup> *Center for Biological Diversity v. U.S. Dept of the Interior*, 563 F.3d 466, 472 (D.C. Cir. 2009).

<sup>41</sup> Bureau of Ocean Energy Management, *2012-2017 OCS Oil and Gas Leasing Program Draft Programmatic EIS*, p4-57 (November 2011).

<sup>42</sup> *Id.*

<sup>43</sup> Exec. Order No. 13547, 76 Fed. Reg. 43023 (July 22, 2010) available at <http://www.whitehouse.gov/files/documents/2010stewardship-eo.pdf>

Despite the efforts to implement CMSP, it essential the BOEM does not confuse its current mandate under OCSLA to ensure “the expeditious but orderly development of OCS resources.”<sup>44</sup>

## V. CMSP Directly Conflicts with the Congressionally Established OCSLA

CMSP is being implemented by an executive order and without legislation. As discussed above, there is currently an existing statutory framework for managing ocean uses on the OCS. The implementation of CMSP will interfere with Congressionally and Judicially established mandates. Moreover, Congress made its intent clear that OCSLA governs the use of the ocean Outer Continental Shelf:

- (1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter;
- (2) this subchapter shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected;
- (3) 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, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs.<sup>45</sup>

CMSP has been established by an Executive Order. Generally, Executive Orders may enforce a law, but it cannot infringe upon Congress’ exclusive power to enact legislation. Thus, an Executive Order cannot conflict with a clear Congressional mandate. As implemented, CMSP will be in direct conflict with the statutory framework created under OCSLA. Importantly, the Environmental Law Institute recommended that it is advisable to proceed with the implementation CMSP via federal legislation.<sup>46</sup> However, CMSP is not being implemented through legislation. Thus, BOEM is bound by existing legislation—in this case, OCSLA which requires primary emphasis be given to the development of natural resources on the OCS.

## VI. Conclusion

For the foregoing reasons, CRE recommends that BOEM remains firmly committed “to ensure the expeditious but orderly development of OCS resources.” This can be achieved by (1) encouraging the use of PAMGUARD; (2) stating more clearly that current seismic regulations do not cause harm; (3) creating a proposing a new ICR if BOEM does change Seismic regulations;

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<sup>44</sup> 43 U.S.C. § 1332(3).

<sup>45</sup> 43 U.S.C. § 1332(a)(1)

<sup>46</sup> Environmental Law Institute, *Marine Spatial Planning in US Waters: An Assessment and Analysis of Existing Legal Mechanisms, Anticipated Barriers, and Future Opportunities*, p 63 (2009) available at <http://www.policyarchive.org/handle/10207/bitstreams/22069.pdf>

and (4) continue to adhere to OCSLA “proper balance” requirement and not implementing CMSP.

If you need further information regarding any issue discussed in this comment letter, please do not hesitate to contact me at [secretary1@mbsdc.com](mailto:secretary1@mbsdc.com) or (202) 265-2383.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jim Tozzi". The signature is written in a cursive style with a large, stylized initial "J".

Jim Tozzi  
Member, Board of Advisors