



Center for Regulatory Effectiveness

Suite 500

1601 Connecticut Avenue, N.W.

Washington, D.C. 20009

Tel: (202) 265-2383 Fax: (202) 939-6969

secretary1@mbsdc.com www.TheCRE.com

February 24, 2012

SUBMITTED ELECTRONICALLY

National Ocean Council
722 Jackson Place NW
Washington, DC 20503

Re: Comments on Draft Implementation Plan, 77 Fed. Reg. 2514 (Jan 18, 2012)

Dear Sir or Madam:

The Center for Regulatory Effectiveness (CRE) would first like to applaud the National Ocean Council's (NOC) commitment to comply with the Data Quality Act (DQA) as evidenced by the webpage dedicated to data quality guidelines on ocean.data.gov.¹ The fact that NOC has dedicated an entire webpage to the DQA demonstrates that NOC is committed to full compliance with the Act. To assist these efforts, the CRE is pleased to submit these comments to the NOC regarding the Draft National Ocean Policy Implementation Plan ("Draft Implementation Plan").² Under the National Ocean Policy, access to Federal data and information has been widely identified as a critical need by ocean users, managers, and stakeholders. As a result, the Draft Implementation Plan seeks to create a "robust national information system dedicated to coastal and marine scientific data and information products." In order to do so, the National Ocean

¹ Available at <http://www.data.gov/communities/node/237/community-of-practice/data-quality> (see subsection on Data Quality Standards).

² National Ocean Council, *Draft National Ocean Policy Implementation Plan*, page 3, (January 12, 2012) available at http://www.whitehouse.gov/sites/default/files/microsites/ceq/national_ocean_policy_draft_implementation_plan_01-12-12.pdf

Council (NOC) has created the data web portal ocean.data.gov. The CRE offers the following recommendation for the effective management of the ocean.data.gov and to ensure and maximize “the quality, objectivity, utility and integrity of information (including statistical information) disseminated [in the portal]”³

I. THE PUBLIC SHOULD HAVE THE OPPORTUNITY TO COMMENT BEFORE THE NOC DISSEMINATES INFORMATION THROUGH OCEAN.DATA.GOV

Over the past year, the implementation of CMSP has been marked by a lack of transparency and participation by stakeholders. There has been extremely limited information on the source of funding for CMSP and the details of what CMSP will look like and how it will affect ocean users. Of more concern, is the limited transparency and participation by current ocean users in CMSP. Admittedly, NOC has identified the failure to include current ocean users and stakeholders in the process of developing CMSP. Specifically, NOC states, “Access to Federal data and information has been widely identified as a critical need by ocean users, managers, and stakeholders.”⁴ NOC responded by creating ocean.data.gov in order to give the public access to the data used in implementing CMSP. However, NOC must ensure that the public has the opportunity to provide input and feedback on the data disseminated by NOC at ocean.data.gov prior to being added to the portal.

Accordingly, NOC should provide the public with notice of its intention to disseminate any information or data through ocean.data.gov by publishing a notice in the Federal Register. In the Federal Register notice, NOC should state how and why it intends to use the data for CMSP and it should provide the public with 30 days to comment on the integrity of the data and determine its relevancy in implementing CMSP. After consideration of the public comments, NOC should then publish in the Federal Register its response to the public comments and whether the data is going to be included on ocean.data.gov. The need for public input on the quality of the underlying data is even more important given that non-federal planning bodies will be furnishing considerable information to the NOC. The “third-party” provisions of the DQA

³ Data Quality Act, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153 (2000).

⁴ National Ocean Council, *Draft National Ocean Policy Implementation Plan*, page 3, (January 12, 2012) available at http://www.whitehouse.gov/sites/default/files/microsites/ceq/national_ocean_policy_draft_implementation_plan_01-12-12.pdf

preclude federal agencies from using such data until it is demonstrated that the said data is DQA compliant.

II. OCEAN.DATA.GOV SHOULD INCLUDE RESEARCH AND DATA FROM THE PRIVATE SECTOR

In the Draft Implementation Plan, NOC identifies the need for coordination and collaboration with state and local governments, regional governance structures, NGOs, and the private sector.⁵ The CRE applauds NOC for identifying the goal of “integrating data across the Federal Government, as well as creating the opportunity to extend this approach to State, local, Tribal, and territorial governments and to industry, academia, and nongovernmental.”⁶ This is essential, because NGOs and the private sector have compiled substantial data and research that will be crucial to CMSP.

One such organization that has made great research contributions to the understandings of the ocean uses and the impact of human activity on marine mammals is the International Association of Oil and Gas Producers Joint Industry Project (“JIP”). In addition to important research on oil spill response technology, JIP has conducted a great deal of research on the effect of ocean noises on marine life. Once such report includes the 2008 *Joint Industry Programme on Sound and Marine Life Review of Existing Data on Underwater Sounds Produced by the Oil and Gas Industry*.⁷ This is an extensive report analyzing the available data on noise in the ocean created by human activity and its impact on marine life. To effectively implement CMSP, CRE recommends that NOC and JIP explore procedures for utilizing the respective work products of both organizations.

Another key contribution of JIP has been PAMGUARD. PAMGUARD is open source software that has been developed and made freely available by JIP “for acoustic detection, localisation and classification for mitigation against harm to marine mammals, and for research into their abundance, distribution and behaviour.” PAMGUARD is a software package “that can

⁵ *Id.*

⁶ *Id.* at 90-91.

⁷ Roy Wyatt, *Joint Industry Programme on Sound and Marine Life Review of Existing Data on Underwater Sounds Produced by the Oil and Gas Industry*, Joint Industry Programme, (2008) available at http://www.soundandmarinelife.org/Site/Products/Seiche_Aug08.pdf

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.”⁸ 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.”⁹

PAMGUARD is an example of how the private sector has worked to minimize human impacts on the ocean and marine life. It would be beneficial for NOC to collaborate with JIP to integrate the work and data collected by JIP into ocean.data.gov to assist with the effective implementation of CMSP.

III. ALL DATA PUBLISHED ON OCEAN.DATA.GOV MUST COMPLY WITH THE DATA QUALITY ACT

The Data Quality Act (DQA) and its general government-wide guidance¹⁰ requires that information disseminated to the public shall be “accurate, clear, complete and unbiased,” shall be developed “using sound statistical and research methods,” and shall be useful for its intended purpose.¹¹ If the information is considered “influential,” it should be held to higher standards.¹² In particular, “influential” scientific information must be transparent with regard to the data and

⁸ *Id* at 1.

⁹ 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

¹⁰ After OMB issued the government-wide guidance, all agencies issued their own conforming guidance.

¹¹ 67 Fed. Reg. at 8459.

¹² *Id.* at 8452.

methodology used so that it is substantially reproducible.¹³ Information is “influential” if it would have a “clear and substantial impact on important public policies or important private sector decisions.”

If CMSP is to proceed as planned, the National Ocean Council must comply with the Data Quality Act (DQA). The data portal, ocean.data.gov, will be an information dissemination subject to the DQA. As stated by the NOC, to yield economic, ecological, and social benefits, CMSP “must incorporate the principles of *sound science* for ecosystem-based and adaptive management”¹⁴ as the concept of Ecosystem Based Management “is underpinned by sound science.” Full compliance with the DQA and its general government-wide guidance will ensure that the CMSP incorporates the principles of sound science.

It is encouraging that NOC has expressed its commitment to the DQA by listing the data quality guidelines on ocean.data.gov for each agency that has contributed data to ocean.data.gov. Although it is implied that the data will already be compliant with the DQA because the only data currently being derived is from agencies that already must comply with the DQA, it is nevertheless NOC’s responsibility to ensure that the data it receives from agencies for dissemination on ocean.data.gov is compliant with the DQA.

IV. NOC MUST ENSURE DQA COMPLIANCE WITH NON-FEDERAL DATA

NOC’s oversight of DQA compliance for CMSP is especially important as NOC begins receiving data from non-Federal entities. For example, the Gulf of Mexico Geospatial Assessment of Marine Ecosystems (GAME) has been creating datasets for use in marine spatial planning. The purpose of the GAME is “to identify, inventory, and catalog existing data sets and information related to coastal and marine habitats of the Gulf of Mexico, both in U.S. and Mexican waters” for the purpose of the Gulf of Mexico Alliance Governors' Action Plan and

¹³ *Id.* at 8460.

¹⁴ National Ocean Council, *Coastal and Marine Spatial Planning Strategic Action Plan: Full Content Outline*, p. 2, June 2, 2011, available at http://www.whitehouse.gov/sites/default/files/microsites/ceq/sap_2_cmsp_full_content_outline_06-02-11_clean.pdf (emphasis added).

federal agencies.¹⁵ Although some of the data GAME works with is collected from Federal agencies, most of the data is created by the organization itself or comes from state agencies, such as the Florida Water Management Districts.¹⁶ Thus, much of the data collected by GAME is not derived from Federal agencies and consequently there is no assurance that it is compliant with the DQA.

GAME has conducted some important research on ocean uses and it is presumable that its data and GIS mapping will be integrated into ocean.data.gov and CMSP more generally.¹⁷ For example, the Marine Resource GIS (MRGIS) dataset can, and most likely will, contribute greatly to CMSP. However, the integrity of the data has not been verified to be compliant with the DQA. More specifically, the dataset on the Coastal and Marine Wildlife Habitat, Environmental Sensitivity Index updates the shoreline habitat component of the Environmental Sensitivity Index (ESI) and Gulf-Wide Information System (G-WIS) databases.¹⁸ The use of this dataset for CMSP has the potential to have far-reaching consequences. However, since its not published by a Federal Agency but rather the Florida Marine Research Institute (FMRI), Florida Fish and Wildlife Conservation Commission (FFWCC), there is no evidence that this dataset has been peer reviewed, subject to a determination that it is DQA compliant, or has an Integrated Error Correction Process. Thus, it is essential that when NOC incorporates datasets such as this into ocean.data.gov and CMSP, NOC ensures the data's compliance with the DQA.

¹⁵ Florida Fish and Wildlife Conservation Commission, *Geospatial Assessment of Marine Ecosystems: Gulf GAME* available at <http://myfwc.com/research/gis/game/>.

¹⁶ Florida Fish and Wildlife Conservation Commission, *GIS Mapping, Data and Maps, FAQs and Links*, available at <http://myfwc.com/research/gis/data-maps/faq-links/faq/>.

¹⁷ See Paper produced by GAME emphasizing the collaboration between federal, state, and local governments for Ecosystem-based management. [Ecosystem-based management institutional design: Balance between federal, state, and local governments within the Gulf of Mexico Alliance](http://myfwc.com/research/gis/game/gulf/publications/), available at <http://myfwc.com/research/gis/game/gulf/publications/>.

¹⁸ Florida Fish and Wildlife Conservation Commission: Fish and Wildlife Research Institute, *MRGIS Data: Coastal and Marine Habitats: Environmental Sensitivity Index*, available at http://ocean.floridamarine.org/mrgis/Description_Layers_Marine.htm#benthic. For the specific Environmental Sensitivity Index dataset see http://atoll.floridamarine.org/Data/Metadata/SDE_Current/esi_classification_fl_arc.htm

V. NOC SHOULD ISSUE AN ICR FOR PUBLIC INPUT ON NON-FEDERAL DATASETS TO BE INCLUDED ON OCEAN.DATA.GOV AS WAS THE CASE WITH HHS ON HEALTHDATA.GOV

NOC should seek public input on which non-Federal datasets to use on ocean.data.gov. Accordingly, NOC should obtain an Information Collection Request (ICR) for the public input on non-Federal datasets to be included, and provide the public with a public comment period on the ICR.

This is the precise procedure followed by the Department of Health and Human Service (HHS) when HHS sought “Public Input to Nominate Non-Federal Health and Health Care Data Sets and Application for Listing on Healthdata.gov.”¹⁹ HHS set an important precedent for incorporating non-Federal data into federal databases, specifically data.gov. NOC should closely follow the process established by HHS by seeking an ICR.

NOC should establish “rules of governance” for allowing non-federal parties to have a link to the NOC website. The rules governing the family of CRE’s Interactive Public Dockets should be considered when establishing such rules:

- 1 *No Barrier to Entry:* Any person or organization can post on a CRE IPD as long as the posts do not contain profanity and do not include personal attacks on federal employees.
- 2 *Interactive:* All posts on CRE IPD’s have the capability for a reader to either post comments on an existing post or initiate a new post.
- 3 *Accept Criticism:* The host of the IPD must allow dissenting opinions to be expressed on the IPD.
- 4 *Hassle Free:* CRE IPD’s require no registration, no personal information including email address and will accept anonymous posts and with large attachments.

VI. THE CRE WOULD NOMINATE ITS OCEAN ZONING IPD FOR INCLUSION ON OCEAN.DATA.GOV

The CRE would nominate its Ocean Zoning Interactive Public Docket²⁰ (IPD) , which is available at <http://www.thecre.com/creipd/>, for inclusion on ocean.data.gov.

¹⁹ 76 Fed. Reg. 4904, January 27, 2011.

²⁰ See http://en.wikipedia.org/wiki/Interactive_Public_Docket

An IPD is a mechanism that allows the public to communicate with regulators on a 24 hour, 7 days a week basis. An IPD continues throughout the life of a proceeding, and allows the public the opportunity to provide meaningful comments beyond the formal public comment period. Although NOC is not required to respond to the public's comments on the IPD, the IPD will enable NOC to draw upon the collective wisdom of industry, academia, state and local governments, and affected citizens as NOC proceeds to implement CMSP.

The CRE encourages the NOC and ocean users to participate on the IPD. The IPD provides an invaluable resource of analysis and comments for NOC to continue to draw from as developments occur beyond this public comment period. The IPD provides the public with the opportunity to agree or question NOC data, present differing views, and offer relevant analysis on a continuous basis. The IPD will be a particularly useful tool, because there are a substantial number of parties, across government and private sector lines, which will be affected by CMSP. The IPD will function to keep all parties apprised of developments, while also providing a collective resource of information for NOC and policymakers to make well-informed decisions regarding ocean uses. Most importantly, the CMSP IPD will create a dialogue between the federal government, local and state governments, and the public to ensure that ocean.data.gov only contains data that is "clear, complete and unbiased." CRE does not modify any posts to the IPD with the exception when there is profanity or objectionable material.

Moreover, the President's Open Government Directive charges Agencies that in order "To increase accountability, promote informed participation by the public....Agencies shall respect the presumption of openness by publishing information online."²¹ Accordingly, **CRE recommends that the NOC publish on its website the availability of the IPD** as a discussion forum for ocean data. One of the great strengths of the IPD is the government's and the public's unfettered access to comments by stakeholders, and it is an existing tool that the NOC could benefit greatly from.

²¹ Peter Orzag, Office of Management and Budget, *Memorandum For the Heads of Executive Departments And Agencies: Open Government Initiative*, December 8, 2009, available at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf

VII. CONCLUSIONS

To ensure public involvement in the implementation of CMSP and to ensure that CMSP is based on sound science, CRE recommends that:

- (1) NOC publishes in the Federal Register a notice of its intentions to include non-federal datasets on ocean.data.gov, thereby giving the public an opportunity to provide meaningful data to the NOC on a 24/7 basis.
- (2) NOC continue to emphasize that no data from a non-federal database can be utilized by the NOC unless it determines that such data is DQA compliant.
- (3) NOC submit and obtain approval from OMB of an Information Collection Request (ICR) for public input on the use of non-federal data for ocean.data.gov.

In this era of tight fiscal constraints, it is important for the NOC to have the ability to use data from a wide range of non-federal sources.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jim Tozzi". The signature is stylized with a large, sweeping initial "J" and "T".

Jim Tozzi
Member, Board of Advisors