

**Center for Regulatory Effectiveness (“CRE”) Comments on
National Marine Fisheries Service (“NMFS”) Proposed Information Collection
Request (“ICR”): Applications and Reporting Requirements for the Incidental
Take of Marine Mammals under the Marine Mammal Protection Act (“MMPA”),
OMB Control Number 0648-0151, 81 FR 67984 (Oct. 3, 2016) (“Acoustic ICR”),
<https://www.gpo.gov/fdsys/pkg/FR-2016-10-03/pdf/2016-23743.pdf> .
Comments filed November 29, 2016 at jjessup@doc.gov.**

I. INTRODUCTION AND SUMMARY

NMFS intends to use its new “Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing” (“*Acoustic Guidance*”) to establish exclusion zones and to estimate takes during NMFS’ permitting under the MMPA. NMFS’ *Guidance* will impose very burdensome new information collections on the oil and gas industry and on other parties subject to NMFS’ MMPA permitting. Consequently, NMFS intends to ask OMB’s OIRA to review and approve the *Acoustic ICR*, which would authorize these new and greatly expanded information collections.

OIRA cannot approve the *Acoustic ICR* unless it meets certain requirements under the Paperwork Reduction Act (“PRA”). OIRA’s “PRA Primer” explains what these PRA requirements are:

“What does OMB evaluate during its review of proposed collections?”

A central goal of OMB review is to help agencies strike a balance between collecting information necessary to fulfill their statutory missions and guarding against unnecessary or duplicative information that imposes unjustified costs on the American public. In this regard, OIRA evaluates whether the collection of information by the agency:

- is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;
- minimizes the Federal information collection burden, with particular emphasis on those individuals and entities most adversely affected; and
- maximizes the practical utility of and public benefit from information collected by or for the Federal Government.

OIRA also reviews the extent to which the information collection is consistent with applicable laws, regulations, and policies related to privacy, confidentiality, security, information quality, and statistical standards.”¹

OIRA should not approve NMFS’ *Acoustic ICR* because the *ICR* does not meet these PRA requirements. For example:

NMFS’ development of the *Acoustic Guidance* violates OMB’s Information Quality Bulletin for Peer Review.

NMFS’ *Acoustic Guidance* and *Acoustic ICR* violate IQA Guidelines and are not the Best Available Science.

NMFS’ *Acoustic Guidance* and *Acoustic ICR* have no practical utility.

NMFS’ development of the *Acoustic Guidelines* and *Acoustic ICR* violates Executive Orders 12866 and 13563.

NMFS’ *Acoustic Guidance* and *Acoustic ICR* are not necessary to perform NMFS’ duties under the MMPA or any other statute. In fact, they violate NMFS’ duties because, *e.g.*, the *Guidance*

- violates OMB’s Peer Review Bulletin;
- violates the Information Quality Guidelines;
- violates Executive Orders 12866 and 13563; and
- violates the MMPA requirement that all mitigation requirements be “practicable.” NMFS seeks OIRA approval of an *Acoustic ICR* that authorizes monitoring and reporting requirements that are impossible to comply with.

NMFS’ *Acoustic Guidance* will provide no benefit over NMFS’ current standards for oil and gas, which have adequately protected marine mammals and other organisms for decades.

NMFS’ *Acoustic Guidance* will not minimize the information collection burden. It will in fact greatly increase the burden on oil and gas, and could force closure of all offshore oil and gas exploration.

The information collections and other demands of the *Acoustic Guidance* will be impossible to comply with.

¹ *Information Collection under the Paperwork Reduction Act*, page 5 (OMB/OIRA April 7, 2010), at <https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRAPrimer>

They provide no additional benefit because current information collections are all that's necessary to properly perform NMFS' functions.

NMFS *Acoustic ICR* burden estimates are incomplete and inaccurate because they do not include the cost of shutting down offshore oil and gas exploration.

For these and other reasons, NMFS should not submit its *Acoustic ICR* to OIRA for review and approval. NMFS should instead withdraw both its *Acoustic ICR* and its *Acoustic Guidance*. They will impose unnecessary and unjustified costs on the American public.

These PRA failings are discussed in more detail below.

II. NMFS' ACOUSTIC GUIDANCE AND ACOUSTIC ICR ARE INCONSISTENT WITH APPLICABLE LAWS, REGULATIONS, AND POLICIES RELATED TO INFORMATION QUALITY

A) NMFS' Development of the Acoustic Guidance Violates OMB's Information Quality Bulletin for Peer Review, and OIRA Should Not Approve the Acoustic ICR

NMFS conducted four peer reviews of its *Acoustic Guidance*. All four peer reviews fail to meet the requirements of OMB's Peer Review Bulletin.

NMFS agrees that its *Acoustic Guidance* is a Highly Influential Scientific Assessment ("HISA") under OMB's Peer Review Bulletin.² However, NMFS' responses to CRE's comments, and other correspondence with CRE on the *Acoustic Guidance*, indicate NMFS' mistaken belief that it has complete "discretion" in selecting "an appropriate peer review mechanism" for this and any other HISA.

This position is irreconcilable with OMB's Peer Review Bulletin, which clearly "applies stricter minimum requirements for the peer review of highly scientific assessments."³ The Bulletin states unequivocally that it "requires a more rigorous form of peer review for highly influential scientific assessments,"⁴ such as the *Acoustic Guidance*.

NMFS's development of the *Acoustic Guidance* violates several of the Bulletin's "minimum requirements," and OIRA should not approve an ICR for its use.

² *Acoustic Guidance*, pages 2, 7 fn. 6, and 123 at http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55_acoustic_guidance_tech_memo.pdf.

³ OMB Peer Review Bulletin, page 2, at <https://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf>.

⁴*Id.*, page 23.

For example, NMFS released a March 2016 draft of its *Acoustic Guidance* for concurrent public comment and peer review.⁵ Submitting public comment to these peer reviewers was possible, feasible and practical. NMFS violated the HISA requirements in OMB's Peer Review Bulletin:

- by not allowing public comment to peer reviewers on the March 2016 draft and by not providing peer reviewers with the public comments submitted on the March 2016 draft;⁶ and

- by not informing peer reviewers of the applicable “objectivity, reproducibility and other quality standards under federal information quality laws.”⁷

The Appendix to these comments discusses these and other *Acoustic Guidance* violations of OMB's Peer Review Bulletin in more detail. This Appendix is part of CRE's comments on the *Acoustic ICR*.

B) NMFS' Acoustic Guidance and Acoustic ICR Violate IQA Guidelines and Are Not Based on the Best Available Science; Therefore, OIRA should Not Approve the Acoustic ICR

OMB's Information Quality Bulletin for Peer Review is based in large part on the Information Quality Act (“IQA”). Consequently, The *Acoustic Guidance's* violations of the Bulletin also violate the IQA.

The *Guidance* violates the IQA Guidelines in other ways. The *Acoustic Guidance* emphasizes that NMFS must comply with IQA Guidelines.⁸ The *Guidance* explains that compliance requires “that data underlying the decision-making and/or policy-

⁵ *E.g.*, *Acoustic Guidance*, pages 128 and 130 fn. 54 (“During this third public comment period, there was a concurrent follow-up peer review”), at http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55_acoustic_guidance_tech_memo.pdf; and 81 FR 51694, 51700 col. 2 (August 4, 2016) (peer review “concurrent” with public comment), at <https://www.gpo.gov/fdsys/pkg/FR-2016-08-04/pdf/2016-18462.pdf>.

⁶ OMB Peer Review Bulletin pages 25-26, 40, at <https://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf>, (requires public participation in peer review under these circumstances).

⁷*Id.*, page 25 (requires that peer reviewers be informed of the applicable “objectivity, reproducibility and other quality standards under federal information quality laws”).

⁸ NOAA/NMFS' IQA Guidelines are available at http://www.cio.noaa.gov/services_programs/info_quality.html.

setting process be: 1) relevant, 2) inclusive, 3) objective, 4) transparent and open, 5) timely, 6) verified and validated, and 7) peer reviewed.”⁹

NMFS will need to demonstrate IQA compliance for the *Guidance* in order to obtain ICR approval from OIRA.¹⁰ Given the flaws discussed above and below, the *Guidance* is not based on the Best Available Science, and violates IQA Guidelines because it is not objective, accurate, reliable, transparent, verified and validated.

The *Acoustic Guidance* flunked peer review. One peer reviewer emphasized that the *Guidance* needed additional peer review before it could be used:

“Given the importance of the modelled data..., it would seem justifiable to me to delay the revision of the NOAA Guidance in order to achieve peer-reviewed publication of those data.”¹¹

This peer reviewer further concluded that the *Guidance* is “questionable” and not “reliable”:

“The decision to omit important data rather than delaying the process and seeking a peer-review makes the NOAA Guidance for LF cetaceans questionable and less reliable.”¹²

Another peer reviewer commented that

“As a scientist and a rational person, I have essentially no confidence in table PC1” of the *Acoustic Guidance*.¹³

These comments all relate to the *Acoustic Guidance’s* new acoustic standards for Low Frequency Cetaceans. These new LF standards are impracticable and among the most burdensome of the *Guidance’s* requirements. The oil and gas industry cannot comply with them. One peer reviewer described NMFS’ defense of these new

⁹ *Acoustic Guidance*, page 9, at

http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55_acoustic_guidance_tech_memo.pdf.

¹⁰ *Information Collection under the Paperwork Reduction Act*, page 5 (OMB/OIRA April 7, 2010), at

https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf.

¹¹ NMFS’ Follow-up Peer Review, Review #3, page 4 (emphasis added), at

http://www.cio.noaa.gov/services_programs/prplans/pdfs/ID43_NAVY_FOLLOW-up_Peer_Review_Report2016.pdf.

¹² *Id.*, page 7.

¹³ *Id.*, page 8.

LF standards as “a circular argument [that] doesn’t add any credibility to the approach chosen by” NMFS.¹⁴

Much of the data used by NMFS for the *Guidance’s* new LF standards comes from models.¹⁵ NMFS cannot use modeled data in the *Acoustic Guidance* unless and until the models have been properly validated. Validation requires demonstrating that the model predictions correlate well with reality. This demonstration requires comparing model predictions with field data--comparing the model output with real-world observations to see if the model is accurate and reliable. This has not been done with the *Guidance* models.

The National Academy of Sciences (“NAS”) emphasizes that, “In all cases, field data must be collected to validate the model predictions.”¹⁶ NAS performed and rendered this study and conclusion at NOAA/NMFS’ request.

Another NAS report, “Models in Environmental Regulatory Decision Making (2007),” similarly explained that “[c]omparing model results with observations is a central component of any effort to evaluate models.”¹⁷

The NAS rendered this advice during its peer review of models guidance being developed by EPA’s Council for Regulatory Environmental Modeling (“CREM”). After NAS review, EPA published final CREM Guidance. The CREM Guidance explains that evaluation of model quality requires an answer to the following question: “How closely does the model approximate the real system of interest?”¹⁸

The CREM Guidance is the gold standard for using modeled data to regulate. NMFS and the Navy have previously had acoustic models peer reviewed to determine whether they meet the CREM Guidance model validation standards.¹⁹

¹⁴ *Id.*, page 6.

¹⁵ *Id.*, pages 4,5,7,8 and 9.

¹⁶ Ocean Noise and Marine Mammals (NAS 2003), page 126, at <https://www.nap.edu/read/10564/chapter/6#126>.

¹⁷ National Academy of Sciences, Models in Environmental Regulatory Decision Making (2007) (“NAS Report”), page 122, at http://www.nap.edu/download.php?record_id=11972#.

¹⁸ CREM Guidance, page vii, at https://www.epa.gov/sites/production/files/2015-04/documents/cred_guidance_0309.pdf.

¹⁹ Review of AIM Model, https://www.st.nmfs.noaa.gov/Assets/Quality-Assurance/documents/peer-review-reports/2006/2006_10_13%20Getz%20Acoustic%20integration%20modeling%20AIM%20review%20report.pdf; and Review of Naval Undersea Warfare Center (NUWC) Marine Mammal Acoustics Exposure Analysis Model 12-13 November 2008, at http://www.nmfs.noaa.gov/pr/pdfs/permits/navy_acoustics_model.pdf.

We have not found any administrative record demonstrating that all the models and modeled data used and relied on in the *Acoustic Guidance* have been validated in accord with the CREM Guidance. NMFS admits that it has not validated the data used for the *Acoustic Guidance's* LF Cetacean standards.²⁰

This lack of validation violates IQA Guidelines.²¹

Finally, the oil and gas industry submitted extensive comments that explain in detail the data quality problems in the *Acoustic Guidance*. These comments demonstrate that the *Acoustic Guidance* is not based on the Best Available Science. These industry comments are incorporated by reference into CRE's comments as if fully set forth herein.²²

IV. NMFS' ACOUSTIC GUIDANCE AND ACOUSTIC ICR HAVE NO PRACTICAL UTILITY, AND OIRA SHOULD NOT APPROVE THE ACOUSTIC ICR

OIRA's rules define the PRA's "practical utility" requirement for ICRs 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..."²³

As discussed above, NMFS has not demonstrated that the *Acoustic Guidance* is accurate and reliable, and crucial parts of it have not been validated. Therefore, the *Acoustic Guidance* violates OMB's Peer Review Bulletin and the IQA Guidelines.

Consequently, the *Acoustic Guidance* lacks practical utility, and OIRA should not approve an ICR for its use.

²⁰ See *Acoustic Guidance*, page 112, at http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55_acoustic_guidance_tech_memo.pdf.

²¹ E.g., *Acoustic Guidance*, page 9, at http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55_acoustic_guidance_tech_memo.pdf.

²² API *et al* Comments, pages 5-11, at <https://www.regulations.gov/document?D=NOAA-NMFS-2013-0177-0153>; and IAGC and API Comments to NMFS (June 27, 2016), at http://thecre.com/pdf/160627%20-IAGC_API_Acoustic_Guidelines_Letter_to_NMFS-FINAL.pdf.

²³ https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=ffb5f827f8d6ad0d81fb55e674c7199a&term_occur=1&term_src=Title:5:Chapter:III:Subchapter:B:Part:1320:1320.1.

V. NMFS' ACOUSTIC GUIDANCE AND ACOUSTIC ICR ARE NOT NECESSARY FOR THE PROPER PERFORMANCE OF NMFS' FUNCTIONS, AND IN FACT VIOLATE THE STATUTES, EXECUTIVE ORDERS, AND POLICIES GOVERNING NMFS' PERFORMANCE OF ITS FUNCTIONS; CONSEQUENTLY, OIRA SHOULD NOT APPROVE THE ACOUSTIC ICR

The proper performance of NMFS's functions requires compliance with statutes, Orders and policies governing NMF's functions. NMNFS' *Acoustic Guidance* and *Acoustic ICR* do not have practical utility. Consequently, they do not satisfy this statutory requirement for ICRs, and compliance with the practical utility requirement is necessary for the proper performance of NMFS' functions. Other violations of governing statutes, Executive Orders, and policies are discussed below.

A) *The Acoustic Guidance and Acoustic ICR Are Not Necessary to Perform NMFS' Duties Under the MMPA or any Other Statute*

Sound from offshore oil and gas is adequately regulated without the *Acoustic Guidance*, and the *Acoustic Guidance* does not constitute the Best Available Science regarding this sound source. Given the data quality and peer review flaws in the *Guidance*, it should not be used for any sound source.

For decades, NMFS, BOEM, academics and NGOs have looked extensively for actual harm caused by sound from offshore oil and gas. They have found none. This extensive and endless study is a waste of time, energy and resources given the absence of any observed harm.

BOEM correctly stated with regard to oil and gas sound in the Gulf of Mexico

“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] 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.”²⁴

²⁴ Bureau of Ocean Energy Management's Draft Environmental Impact Statement (“DEIS”), for the Gulf of Mexico, Outer Continental Shelf (“OCS”), Eastern Planning Area (“EPA”) Lease Sales 225 and 226, page 2-22. The DEIS is available online at <https://www.boem.gov/Environmental-Stewardship/Environmental-Assessment/NEPA/nepaprocess.aspx>.

BOEM also correctly stated:

“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.”²⁵

BOEM’s Science Officer recently emphasized:

“To date, there has been no documented scientific evidence of noise from air guns used in geological and geophysical (G & G) seismic activities adversely affecting marine mammal populations or coastal communities.”²⁶

NMFS itself has repeatedly explained that “there is no evidence that serious injury, death, or stranding by marine mammals can occur from exposure to [oil and gas] airgun pulses, even in the case of large airgun arrays.”²⁷

B) NMFS’ Acoustic Guidance and Acoustic ICR Violate the Statutes, Executive Orders and Policies Governing NMFS’ Performance of Its Duties

OMB’s Peer Review Bulletin and the IQA Guidelines govern NMFS’ performance of its duties. Compliance with them is part of NMFS’ duties. As discussed above, the *Acoustic Guidance* violates OMB’s Peer Review Bulletin and the IQA Guidelines, and violates the PRA’s practical utility requirement. The *Acoustic Guidance*, and an ICR authorizing its use, cannot be necessary to perform NMFS’ duties because they violate those duties.

These duties include compliance with Executive Orders 12866 and 13563. The *Acoustic Guidance* is “significant” under Executive Orders 12866 and 13563 for the same reasons that the *Guidance* is HISA under the Peer Review Bulletin.²⁸ The *Acoustic Guidance* is “significant” under the Executive Orders because its economic impact exceeds

²⁵ 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 <https://www.boem.gov/Environmental-Stewardship/Environmental-Assessment/NEPA/nepaprocess.aspx>.

²⁶ <http://www.thecre.com/forum13/?p=1743>.

²⁷ *E.g.*, 79 FR 13626, 13635-36 (March 11, 2014), at <https://www.gpo.gov/fdsys/pkg/FR-2014-03-11/pdf/2014-05158.pdf>; 79 FR 12160, 12166 (March 4, 2014), at <http://www.gpo.gov/fdsys/pkg/FR-2014-03-04/pdf/2014-04770.pdf>; 75 FR 49759, 49795 (Aug. 13, 2010), at <http://edocket.access.gpo.gov/2010/2010-19962.htm>.

²⁸ Compare the Executive Orders’ definition of “significant,” at http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf with *Acoustic Guidance*’s explanation why they are HISA under the Peer Review Bulletin, pages 2,

\$ 100,000,000. Its requirements cannot be met, and it may shut down the offshore oil and gas industry, which will cost much more than \$100,000,000. The *Guidance* is precedent setting; has interagency interest; and has major economic impact.

Therefore, NMFS' development of the *Acoustic Guidance* has to comply with the Executive Orders' regulatory review and cost benefit analysis requirements. Yet NMFS did not comply with any of these requirements during its development of the *Acoustic Guidance*.

NMFS claims that its *Acoustic Guidance* is not a regulatory action or rule.²⁹ This statement is incorrect because the *Guidance* binds both regulators and regulated entities with new and impracticable regulatory requirements.

NMFS' Federal Register notice of its new *Acoustic Guidance* states that after a brief transition period, "all applications for MMPA incidental take authorization (ITA) and all requests for ESA section 7 consultations involving noise that may affect marine mammals **will include** full consideration of the" *Acoustic Guidance*.³⁰

The *Acoustic Guidance* meets the Executive Orders' definitions of "rule" and "regulatory action" because the *Guidance* must be used in MMPA and ESA permitting. The *Guidance* is "designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency." In this case, the "agency" includes NMFS and all other agencies regulating MMPA and ESA permitting and take authorizations.

The *Guidance's* new variance requirement is part of this new binding regulatory regime. Either you comply with the new specific standards, or you comply with the new variance procedure. One way or another, you have to comply.

This two-pronged regulatory scheme in the *Acoustic Guidance* is new and binding on the permit applicant. The applicant must comply with the *Guidance* in order to obtain and keep a Take Permit under the MMPA and ESA. This is a rule.

And none of this new binding regulatory regime has ever gone through the Executive Orders' required regulatory review process. That regulatory review process is necessary for the proper performance of NMFS' duties. By violating the Executive Orders, NMFS has not properly performed its duties.

7 fn. 6, and 123, at

http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55_acoustic_guidance_tech_memo.pdf.

²⁹ 81 FR 51694, 51723 col. 2 (Aug. 4, 2016), at <https://www.gpo.gov/fdsys/pkg/FR-2016-08-04/pdf/2016-18462.pdf>.

³⁰ Id., page 51695 col. 1 (emphasis added).

The Appendix to these comments discusses these *Acoustic Guidance* violations of the Executive Orders in more detail. This Appendix is incorporated in its entirety as part of CRE's comments on the Acoustic ICR as if fully set forth herein.

Finally, the MMPA requires that any mitigation requirements imposed as a result of the Acoustic Guidance be "practicable."³¹ The *Acoustic Guidance* imposes much larger exclusion zones on oil and gas seismic operations than are imposed under current, long-standing regulations.³² The current exclusion zones have adequately protected marine mammals and other organisms for 50 years.³³ The much larger *Acoustic Guidance* exclusion zones are unnecessary to protect anything. They will also be impossible to meet. There is no way to reliably monitor compliance with them because they are so large. Industry comments explain to NMFS that

"the Guidance is unable to produce realistic metrics of impact and mitigation threshold ranges or exclusion zones. Based on preliminary results to date, industry analyses predicts exclusion zones under the revised guidance exponentially greater than the size of current exclusion zones and 5 to 10 times the size of zones calculated under the July 2015 draft guidance, representing a significant departure from current scientific knowledge and which would be impractical and almost impossible to implement with current and effective mitigation measures, such as marine mammal observers."³⁴

³¹ See, e.g., <http://www.boem.gov/Oil-and-Gas-Energy-Program/GOMR/BOEM-MMPA-Information-Sheet.aspx>.

³² E.g., BOEM's Draft PEIS, page 1-19, at <https://www.boem.gov/BOEM-EIS-2016-049-v1/>; IAGC and API Comments to NMFS (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).

³³ E.g., Bureau of Ocean Energy Management's Draft Environmental Impact Statement ("DEIS"), for the Gulf of Mexico, Outer Continental Shelf ("OCS"), Eastern Planning Area ("EPA") Lease Sales 225 and 226, page 2-22. The DEIS is available online at <https://www.boem.gov/Environmental-Stewardship/Environmental-Assessment/NEPA/nepaprocess.aspx>.

³⁴ IAGC and API Comments to NMFS (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).

**VI. NMFS' ACOUSTIC ICR DOES NOT MINIMIZE THE FEDERAL
INFORMATION COLLECTION BURDEN, AND IT DOES NOT MAXIMIZE THE
PRACTICAL UTILITY AND PUBLIC BENEFIT OF INFORMATION
COLLECTED; CONSEQUENTLY, OIRA
SHOULD NOT APPROVE THE ACOUSTIC ICR**

The *Acoustic Guidance* and *Acoustic ICR* increase the information collection burden because, e.g., it will be impossible to accurately monitor the much larger and impracticable exclusion zones imposed by the *Guidance*. Industry comments explain that the new *Acoustic Guidance* will require for oil and gas seismic

“a 1,500 kilometer exclusion zone from the nearest high frequency cetacean. This would result in an exclusion zone nearly three-thousand times greater than the 500 m exclusion zones that have been implemented with success in the Gulf of Mexico and globally, a clear sign that the revised guidance does not serve as a realistic benchmark let alone agree with the best available science.”³⁵

Monitoring and reporting on “a 1,500 kilometer exclusion zone” cannot be done. Yet this is what NMFS’ *Acoustic ICR* and *Guidance* require.

NMFS’ *Acoustic Guidance* and *Acoustic ICR* do not maximize practical utility because they have no practical utility. They do not maximize the public benefit of the information collected because they add no additional benefit to the information that has been collected for decades under the current acoustic standards and exclusion zones. That information is all that’s necessary to protect marine mammals and other organisms.

NMFS’ MMPA authorizations require the permittees to monitor compliance with these required exclusion zones, and report their monitoring data to regulators.³⁶ The impracticability and impossibility of monitoring and reporting on these huge exclusion zones make these information collections a potential deathblow to the offshore oil and gas industry. We do not think that OIRA should or would approve an ICR that prohibits offshore oil and gas without any benefits and with numerous violations of the governing statutes, policies and Orders.

NMFS’ vaunted “Optional Alternative Methodology” does not solve these problems because, as the industry comments point out, it will “result in higher calculated numbers of takes and even larger exclusion zones.”³⁷

³⁵ *Id.*, page 3.

³⁶ E.g., <https://www.law.cornell.edu/cfr/text/50/18.128>; and <https://books.google.com/books?id=DyU3AQAAMAAJ&pg=SA1-PA84&lpg=SA1-#v=onepage&q&f=false>, pages k-2 through k-3.

³⁷ IAGC and API Comments to NMFS (June 27, 2016), pages 2-3, at http://thecre.com/pdf/160627%20-IAGC_API_Acoustic_Guidelines_Letter_to_NMFS-FINAL.pdf.

The *Acoustic Guidance*'s variance provision also doesn't salvage this ICR. Variances are left to NMFS' discretion, NMFS says they will be hard to get, and there's no guarantee anyone will ever get one.³⁸ There is also no guarantee that any variance approved by NMFS will be practicable. Moreover, variances do not obviate or atone for the *Guidance*'s violations of OMB's Peer Review Bulletin, Executive Orders 12866 and 13563, the IQA Guidelines, and the PRA. In fact, this variance provision like the rest of the *Guidance* was promulgated in violation of these requirements.

We have been unable to find an administrative record supporting NMFS' burden estimates. NMFS does not provide any analysis of the benefits from applying NMFS' *Acoustic Guidance*, perhaps because there aren't any. NMFS' burden estimates for the *Acoustic ICR* are incomplete and inaccurate because they do not include the cost of shutting down the industry.³⁹

CONCLUSION AND RECOMMENDED ACTION: OIRA should not approve the *Acoustic ICR* because it fails all the PRA tests for approval. Consequently, NMFS should not submit the *Acoustic ICR* to OIRA for approval. NMFS should withdraw both the *ICR* and the *Acoustic Guidance*.

We thank you for this opportunity to comment. CRE's Comment Appendix follows. Simultaneous with these *Acoustic ICR* comments, CRE filed comments with BOEM on BOEM's draft Programmatic Environmental Impact Statement for Oil and Gas G&G in the Gulf of Mexico (PEIS). We are also filing our PEIS comments with NMFS as part of our *Acoustic ICR* comments. CRE's PEIS comments are incorporated by reference as if fully set forth herein.

Respectfully submitted,

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³⁸ *Acoustic Guidance*, page 6 fn. 2, at http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55_acoustic_guidance_tech_memo.pdf; 81 FR 51694, 51723 cols 2-3 (Aug. 4, 2016) at <https://www.gpo.gov/fdsys/pkg/FR-2016-08-04/pdf/2016-18462.pdf>

³⁹ See 83 FR 67984, 67985 (Oct. 3, 2016), at <https://www.gpo.gov/fdsys/pkg/FR-2016-10-03/pdf/2016-23743.pdf>.

Appendix

The Issue

Oil and gas companies use seismic airguns and other acoustic devices to explore for oil and gas offshore. There is no other way to discover offshore oil and gas. NMFS recently published a final new document (“*Acoustic Guidance*”) that NMFS will use to regulate anthropogenic sound in the ocean under the Marine Mammal Protection Act (“MMPA”) and under the Endangered Species Act (“ESA”). The *Acoustic Guidance* will also be used by NMFS to issue so-called ‘Take Permits’ under those statutes.⁴⁰ Regulated entities include offshore oil and gas exploration, the Navy and other federal agencies.

NMFS’ *Acoustic Guidance* only claims 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. The *Acoustic Guidance* originally applied to behavioral effects also, but NMFS dropped the behavioral effects sections because initial peer review was so negative.⁴¹

NMFS’ Take Permits always include mitigation requirements that the permit applicant must meet in order to obtain and keep the permit. These mitigation requirements always include “exclusion zones.” Oil and gas vessels must stop using their seismic airguns when a marine mammal enters the exclusion zone specified in the vessels’ permit. The size of the zone is in large part based on acoustic standards for physical harm selected by NMFS. These standards establish the outer boundaries of the zones. The *Acoustic Guidance* will now determine these standards.

Exclusion zones are monitored by Marine Mammal Observers (“MMOs”) who travel on seismic airgun vessels and watch to see if any marine mammals enter the zones. There is a distance limit on the effectiveness of MMOs and visual surveillance.

Industry expects exclusion zones as large as 1500 kilometers if the *Acoustic Guidance* is used.⁴² NMFS and the Bureau of Ocean Energy Management (“BOEM”) admit that the

⁴⁰ This NMFS document is titled “Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing--Underwater Acoustic Guidance 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>.

⁴¹ See http://www.cio.NMFS.gov/services_programs/prplans/ID43.html.

⁴² IAGC and API Comments to NMFS (June 27, 2016), pages 2-3, at http://thecre.com/pdf/160627%20-IAGC_API_Acoustic_Guidelines_Letter_to_NMFS-FINAL.pdf.

Acoustic Guidance will cause large increases in exclusion zone size for offshore oil and gas operations.⁴³

The *Acoustic Guidance* imposes exclusion zones on offshore oil and gas that are impracticable. The *Guidance* expands the existing exclusion zones so greatly that the zones cannot be monitored and reported on accurately. The size of the zones will force constant shut downs that will preclude effective operations. The *Guidance* greatly increases the cost and burden of offshore oil and gas exploration and may preclude it entirely, with no benefit to marine mammals or any other organism.

There Is No Need for Additional Regulation

The only purpose of the *Acoustic Guidance* is to prevent physical injury to marine mammals. Yet NMFS itself admits that

“There is no specific evidence that exposure to pulses of airgun sound can cause PTS [physical injury] in any marine mammal, even with large arrays of airguns.”

“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.”

“NMFS does not expect any marine mammals will incur serious injury or mortality in the Arctic Ocean or strand as a result of the proposed seismic survey.”⁴⁴

The *Acoustic Guidance* is intended to prevent injury to marine mammals’ hearing. These injuries are known as TTS and PTS. NMFS itself admits that even without the new *Acoustic Guidance*,

“there has been no specific documentation of TTS let alone permanent hearing damage, i.e., permanent threshold shift (PTS), in free-ranging marine mammals exposed to sequences of airgun pulses during realistic field conditions.”⁴⁵

Current and long-standing regulation requires exclusion zones much, much smaller than those required by NMFS’ *Acoustic Guidance*. NMFS agrees that current regulation and its smaller exclusion zones are adequate and protective. For example, NMFS recently

⁴³ PEIS, page 1-19, at <https://www.boem.gov/BOEM-EIS-2016-049-v1/>.

⁴⁴ 77 FR 25830, 25837 col. 2, 25838 col. 3 (May 1, 2012), at <https://www.gpo.gov/fdsys/pkg/FR-2012-05-01/pdf/2012-10386.pdf>.

⁴⁵ 79 FR 12160, 12165 col. 1 (March 4, 2014), at <https://www.gpo.gov/fdsys/pkg/FR-2014-03-04/pdf/2014-04770.pdf>.

issued an MMPA Take Permit for offshore oil and gas seismic in the Arctic. This permit requires exclusion zones based on NMFS' current acoustic standards. These NMFS-permitted exclusion zones are much smaller than the ones that will be required by NMFS' new *Acoustic Guidance*. NMFS's Environmental Assessment ("EA") for this permit concludes,

“[T]here is no evidence that SAE's planned activities would result in injury, serious injury, or mortality within the action area.”⁴⁶

NMFS has consistently reached this conclusion regarding its pre-*Guidance* standards regulating offshore oil and gas seismic. NMFS has consistently and correctly concluded that there is no evidence that offshore oil and gas seismic operations ever cause the injuries that the *Acoustic Guidance* aims to prevent.⁴⁷

Nevertheless, in order to prevent **nonexistent** injury, NMFS' new *Acoustic Guidance* imposes exclusion zones on offshore oil and gas that cannot be met because they are much too large to monitor accurately. Even if they could be reliably monitored, NMFS' new *Acoustic Guidance* increases the size of the exclusion zones to such a degree that oil and gas operations will be shut down and restarted continuously, rendering such operations economically infeasible.

NMFS' Acoustic Guidance Violates the MMPA's Practicability Requirement

The MMPA requires that exclusion zones be “practicable.”⁴⁸ NMFS does not claim that all of its new *Acoustic Guidance* exclusion zones are practicable. In fact, the huge exclusion zones required by NMFS' acoustic guidance are impossible.⁴⁹ Consequently, NMFS' *Acoustic Guidance* violates the MMPA's practicability requirement.

NMFS' *Acoustic Guidance* includes a variance provision for exclusion zones that did not exist under previous regulation. This variance requires peer review commissioned by the variance applicant. This variance process will be expensive and time-consuming, and its

⁴⁶ Issuance of Incidental Harassment Authorization to SAExploration Inc. for the Take of Marine Mammals Incidental to Seismic Surveys in Cook Inlet, Alaska, Environmental Assessment (NMFS May 2015), Pages 38-39, at

http://www.nmfs.gov/pr/permits/incidental/oilgas/sae_2015_ea.pdf.

⁴⁷ *E.g.*, 81 FR 53443, 53449, 53452 col. 2, 53460, 53462 (August 12, 2016), at

<https://www.gpo.gov/fdsys/pkg/FR-2016-08-12/pdf/2016-19145.pdf>.

⁴⁸ See, *e.g.*, <http://www.boem.gov/Oil-and-Gas-Energy-Program/GOMR/BOEM-MMPA-Information-Sheet.aspx> (mitigation requirements have to be “practicable”).

⁴⁹ See, *e.g.*, 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.

outcome is entirely within NMFS' discretion.⁵⁰ Regulated entities have no reasonable expectation that NMFS will use this variance to impose practicable exclusion zones. NMFS' new *Acoustic Guidance* suggests just the opposite. NMFS itself "believes this [new variance provision] sets a fairly high bar as to what type of data/alternative approach would justify a departure from the Guidance's auditory weighting functions and/or acoustic thresholds...."⁵¹

The threat of wasteful and disruptive litigation by environmentalist NGOs is very real in this context. Litigation over NMFS' action on MMPA or ESA Take Permit applications and variances would cause disastrous delay, business losses, and tremendous Government expense.

Moreover, variances do not obviate or compensate for the *Guidance's* violations of OMB's Peer Review Bulletin, Executive Orders 12866 and 13563, IQA Guidelines, and the Paperwork Reduction Act ("PRA"). In fact, the variance provision like the rest of the *Guidance* was promulgated in violation of these requirements.

NMFS' Peer Reviews Violate the Binding Requirements of OMB's Peer Review Bulletin

There have been three draft versions of NMFS' new *Acoustic Guidance*: one in 2013; one in 2015; and one in March 2016.

The March 2016 draft is the most problematic. NMFS allowed only two weeks public comment on this technically complex document. NMFS denied multiple requests for more time to comment on the March 2016 draft. NMFS' March 2016 draft imposes new, complex and impracticable acoustic standards for Low Frequency cetaceans (*i.e.*, large whales that hear and communicate in the low frequencies). These LF cetacean requirements were not in the previous draft versions of the new *Acoustic Guidance*.

NMFS agrees⁵² that the *Acoustic Guidance* is a Highly Influential Scientific Assessment ("HISA") under OMB's Peer Review Bulletin. Consequently, it is subject to the Peer

⁵⁰ *Acoustic Guidance*, page 6 fn. 2, at http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55_acoustic_guidance_tech_memo.pdf; 81 FR 51694, 51723 cols 2-3 (Aug. 4, 2016), at <https://www.gpo.gov/fdsys/pkg/FR-2016-08-04/pdf/2016-18462.pdf>.

⁵¹ 81 FR 51694, 51723 cols 2-3 (Aug. 4, 2016), at <https://www.gpo.gov/fdsys/pkg/FR-2016-08-04/pdf/2016-18462.pdf>.

⁵² *Acoustic Guidance*, pages 2, 7 fn. 6, and 123, at http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55_acoustic_guidance_tech_memo.pdf.

OMB's Peer Review Bulletin is available at <https://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf>.

Review Bulletin's most stringent requirements. NMFS did not comply with those requirements when NMFS developed the *Acoustic Guidance*.

All of the *Acoustic Guidance* peer reviews violate HISA requirements because NMFS did not allow public participation in any of the peer reviews.⁵³ This HISA violation is particularly egregious for the March 2016 draft of the new *Guidance*.

NMFS released a March 2016 draft of the *Acoustic Guidance* for concurrent public comment and peer review.⁵⁴ Public comment to the peer reviewers was possible, feasible and practical. NMFS violated OMB's Peer Review Bulletin's HISA requirements by not allowing public comment to the peer reviewers, and by not providing peer reviewers with the public comments submitted on the March 2016 draft.⁵⁵

NMFS' own discussions of its HISA peer review responsibilities emphasize the need to provide opportunity for public comment to the peer reviewers. For example, NMFS' power point on OMB Peer Review Guidelines states that OMB's Peer Review Bulletin "establishes...opportunity for public input," and that HISA standards include "opportunity for public participation."⁵⁶

Another recent NMFS power point similarly states, "OMB Peer Review Bulletin Guidelines...provide opportunity for public input."⁵⁷

In addition to denying public participation in all of the peer reviews, NMFS violated the HISA standards by not informing any of the peer reviewers of Data Quality requirements governing their peer review of the various draft versions of the *Acoustic Guidance*. The OMB Peer Review Bulletin states that:

⁵³ See OMB Peer Review Bulletin, pages 25-26, 40, at

<https://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf>.

⁵⁴ E.g., *Acoustic Guidance*, pages 128 and 130 fn. 54 ("During this third public comment period, there was a concurrent follow-up peer review"), at

http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55_acoustic_guidance_tech_memo.pdf; and 81 FR 51694, 51700 col. 2 (Aug. 4, 2016)(peer review was "concurrent" with public comment), at <https://www.gpo.gov/fdsys/pkg/FR-2016-08-04/pdf/2016-18462.pdf>.

⁵⁵ See OMB Peer Review Bulletin pages 25-26,40, at

<https://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf>, for required public participation in peer review, and for submission of public comments to the reviewers, under these circumstances.

⁵⁶ OMB Peer Review Guidelines, NMFS (April 19, 2006), at

https://www.st.nmfs.noaa.gov/st5/workshop/2006/documents/Fish_of_the_day/OMB_peer_review_guidelines_revised.pdf.

⁵⁷ Science Quality: National Standard 2, Peer Review, and the Center for Independent Experts, NMFS (September 9-12, 2014), at

https://www.st.nmfs.NMFS.gov/Assets/science_program/09_Science%20Quality_Brown.pdf.

“Reviewers shall be informed of applicable access, objectivity, reproducibility and other quality standards under federal information quality laws.”⁵⁸

The *Acoustic Guidance* peer reviewers were not informed of applicable “objectivity, reproducibility and other quality standards under federal information quality laws.” The charge letter to the peer reviewers contains a section entitled “Requirements of the Peer Review.” Here NMFS discusses access and conflict of interests requirements, but does not mention “objectivity, reproducibility and other quality standards under federal information quality laws.”⁵⁹

We are not alone in criticizing NMFS’ *Acoustic Guidance* peer review process. During their peer review of NMFS’ March 2016 draft *Acoustic Guidance*, NMFS’ reviewers criticized NMFS’ *Guidance* for being based on “a scientifically questionable status.”

The March 2016 peer reviewers emphasized that NMFS’ “decision to omit important data rather than delaying the process and seeking a peer-review makes the NOAA Guidance for Low Frequency cetaceans questionable and less reliable.”⁶⁰ The Low Frequency cetaceans part of the *Acoustic Guidance* is of most concern to the offshore oil and gas industry because it is impossible to comply with and could bar offshore oil and gas exploration.

NMFS’ peer reviewers also recommended that NMFS not issue its new *Acoustic Guidance* as final without new data and further peer review.⁶¹

NMFS denied its own peer reviewers’ recommendation. March 2016 was the last peer review that NMFS allowed, and NMFS violated OMB’s Peer Review Bulletin in that one.

⁵⁸ OMB Peer Review Bulletin, page 25, at <https://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf>.

⁵⁹ See, e.g., http://www.cio.nmfs.gov/services_programs/prplans/pdfs/ID43_Charge_Au.pdf.

⁶⁰ NMFS’ Follow-up Peer Review, pages 4-8, at http://www.cio.noaa.gov/services_programs/prplans/pdfs/ID43_NAVY_FOLLOW-up_Peer_Review_Report2016.pdf.

⁶¹ NMFS’ Follow-up Peer Review, pages 4-8, at http://www.cio.noaa.gov/services_programs/prplans/pdfs/ID43_NAVY_FOLLOW-up_Peer_Review_Report2016.pdf.

The Acoustic Guidance Is a Rule, and NMFS Has Not Complied with the Rulemaking Requirements of Executive Orders 12866 and 13563

The costs of the *Acoustic Guidance* could exceed \$500,000,000 to the oil industry alone because the *Guidance* imposes impracticable restrictions that could shut down all offshore oil and gas exploration.

There are no benefits because NMFS itself has repeatedly concluded that offshore oil and gas exploration does not injure anything under current and much less stringent regulation.

Yet NMFS has not prepared any cost benefit analysis of the *Acoustic Guidance*, in violation of Executive Orders 12866 and 13563.

The Executive Orders establish regulatory review requirements that apply to “significant” rules. The *Acoustic Guidance* is “significant” under Executive Orders 12866 and 13563 for the same reasons that the *Guidance* is HISA under the Peer Review Bulletin.⁶² NMFS and OMB have already classified NMFS’ new *Acoustic Guidance* as HISA, which is based on criteria similar to but more stringent than those that govern the Executive Orders’ “significant” classification. The major difference is that in order to be HISA because of economic impact, the agency action has to have a \$500 million impact. By contrast, to be significant under the Executive Orders, the agency action only has to have a \$100 million economic impact. Therefore, if the new *Acoustic Guidance* is HISA, which everyone agrees it is, then it is also “significant” under the Executive Orders.⁶³ Yet NMFS has not complied with any of the Orders’ regulatory review requirements for significant regulatory actions, including but not limited to a cost benefit analysis

In addition, the *Acoustic Guidance* is HISA because it is precedent setting, affects other agencies, and has major economic impact.⁶⁴ Yet NMFS has not complied with any of the Executive Orders’ regulatory review requirements for its new *Acoustic Guidance*.

⁶² Compare the Executive Orders’ definition of “significant,” at http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf with *Acoustic Guidance* explanation why they are HISA, pages, 2, 7 fn. 6, and 123, at http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55_acoustic_guidance_tech_memo.pdf.

⁶³ Compare Executive Orders’ definition of “significant,” at http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf with *Acoustic Guidance*, pages, 2, 7 fn. 6, and 123, at http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55_acoustic_guidance_tech_memo.pdf.

⁶⁴ See the Executive Orders’ definition of “significant,” at http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.

NMFS claims that its new *Acoustic Guidance* is not a regulatory action or rule.⁶⁵ This claim is incorrect because the *Guidance* binds both regulators and regulated entities with new and impracticable regulatory requirements. NMFS' *Acoustic Guidance* promulgates new standards and procedures that are rules. These new standards and procedures are binding on the public. Regulated entities must use and comply with them before NMFS will issue a Take Permit under the MMPA, or a Take Permit under Section 7 of the ESA. These new standards and procedures always require "exclusion zones."

The Executive Orders define "rule" as:

"an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency...."⁶⁶

OMB's Guidance on Executive Order 12866 explains:

"The Order is intended to cover any policy document of general applicability and future effect, which the agency intends to have the force and effect of law, such as **guidances**, funding notices, manuals, implementation strategies, or other public announcements, designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency. Such documents are normally published in the Federal Register, but can also be made available to the affected public directly."⁶⁷

The *Acoustic Guidance* meets the Executive Orders' definitions of "rule" and "regulatory action" because it must be used in MMPA and ESA Take permitting. The *Guidance*'s requirements are "designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency." In this case, the "agency" is NMFS and all other agencies regulating MMPA and ESA Take permitting.

The *Acoustic Guidance* is a rule because, e.g., NMFS' Federal Register notice of the new *Guidance* states that after a brief transition period, "all applications for MMPA incidental take authorization (ITA) and all requests for ESA section 7 consultations involving noise that may affect marine mammals **will include** full consideration of the" *Guidance*.⁶⁸

⁶⁵ 81 FR 51723 col. 2 at <https://www.gpo.gov/fdsys/pkg/FR-2016-08-04/pdf/2016-18462.pdf>.

⁶⁶ http://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf.

⁶⁷ "Guidance for Implementing E.O. 12866," page 5 fn. 3 (OMB 1993), at https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/EO12866_implementation_guidance.pdf (emphasis added).

⁶⁸ 81 FR 51694, 51695 col. 1 (emphasis added), at <https://www.gpo.gov/fdsys/pkg/FR-2016-08-04/pdf/2016-18462.pdf>.

In *Croplife America v. EPA*, 329 F. 3rd 876 (D.C. Cir. 2003) (emphasis added), the court held that an EPA press release is a rule because the press release states that “the Agency will not *consider* or rely on any [third-party] human studies in its regulatory decision making.”⁶⁹

The EPA press release in the *Croplife* case is a rule because it prohibits consideration.

For the same reasons, NMFS’ new *Acoustic Guidance* is a rule because it requires consideration. The *Acoustic Guidance* is binding just like the *Croplife* press release.

Oil and gas companies and other regulated entities--and their regulators--have to comply with the *Acoustic Guidance* in order to:

- Determine the exclusion-zone mitigation and monitoring requirements in Take Permits issued by NMFS;
- Obtain Take Permits issued by NMFS under the MMPA; and
- Obtain Take Permits issued by NMFS under the ESA.

In all three of these proceedings, NMFS’ new *Acoustic Guidance* requires that regulated entities:

- 1) Comply with the primary standards specified in the text of the *Acoustic Guidance*; or
- 2) Comply with the alternative standards specified by Appendix D of the *Acoustic Guidance*; or
- 3) Comply with the new variance provision specified in the text of the *Guidance*, which requires peer review by the regulated entity.

This new variance provision demonstrates that the *Acoustic Guidance* is binding. You wouldn’t need a variance if you weren’t otherwise bound by the new acoustic standards set forth in the text of the new *Guidance*. Moreover, the *Guidance* prescribes the procedures for obtaining a variance, including the requirement of peer review commissioned by the permit applicant. In other words, the variances are part of the new regulatory scheme and requirements imposed by NMFS’ *Acoustic Guidance*. The new scheme, new requirements, and new variance did not exist before NMFS’ *Acoustic Guidance*.⁷⁰

⁶⁹ See *Croplife*, at <http://www.freelawreporter.org/flr3d/f3d/329/329.F3d.876.02-1057.html>.

⁷⁰ See 81 FR 51694, 51723 cols 2-3 (Aug. 4, 2016), at <https://www.gpo.gov/fdsys/pkg/FR-2016-08-04/pdf/2016-18462.pdf> (NMFS says either

NMFS argues that its new *Acoustic Guidance* is not subject to the Executive Orders' regulatory review requirements because the *Standards* do not "bind the public."⁷¹ This argument is incorrect. Compliance with NMFS' new *Acoustic Guidance* is the only way that regulated entities can obtain MMPA and ESA Take Permits.

In a footnote, NMFS "acknowledges that exclusion zones and monitoring zones have often corresponded to acoustic thresholds [aka *Acoustic Guidance*] but that is not a legal requirement."⁷²

This argument is also incorrect. Exclusion and monitoring zones that comply with NMFS' *Acoustic Guidance* are "a legal requirement." NMFS' Take Permits always require exclusion zones based on NMFS' acoustic standards, which is now the new *Acoustic Guidance*.⁷³

For example, the Department of Interior requires exclusion and monitoring zones based on NMFS' current acoustic standards. These zones and standards are legal requirements for obtaining a federal government lease and permission to perform offshore seismic in the Gulf of Mexico.⁷⁴ BOEM explains:

"Acoustic exclusion zone around vessels. All airgun seismic activities will be subject to an acoustic exclusion zone around vessels that will not allow those activities if marine mammals and sea turtles are present within the zone. This ensures that those animals are not exposed to sound pressure levels of 180 decibels or more -- the level that NOAA Fisheries [aka NMFS] has concluded may damage marine mammal hearing."⁷⁵

The former NMFS standard of 180 decibels is now replaced by NMFS' *Acoustic Guidance*, making the new *Guidance* the new legal requirements for leases and operating permits.

NMFS' ESA Biological Opinions and Take Authorizations for offshore oil and gas seismic are another example of how compliance with NMFS' new *Guidance* is a "legal requirement." NMFS' Opinions and Authorizations always contain "Terms and

comply with the standards in the text, or apply for a variance using procedures that must include applicant peer review).

⁷¹ 81 FR 51694 col. 3 (Aug. 4, 2016), at <https://www.gpo.gov/fdsys/pkg/FR-2016-08-04/pdf/2016-18462.pdf>.

⁷² *Acoustic Guidance*, page 7 fn. 5, at http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55_acoustic_guidance_tech_memo.pdf.

⁷³ E.g., *Incidental Harassment Authorization (May 2015 NMFS)*, at http://www.nmfs.noaa.gov/pr/permits/incidental/oilgas/sae_2015_iha.pdf.

⁷⁴ See, e.g., page 6, at <https://www.boem.gov/BOEM-NTL-2016-G02/>.

⁷⁵ <http://www.boem.gov/Typical-Mitigation-Details/>.

Conditions” that include “Non-discretionary” exclusion zones based on NMFS’ acoustic standards.⁷⁶

NMFS explains in these ESA Opinions and Authorizations that NMFS’ acoustic standards, which are now determined by the new *Acoustic Guidance*, “**will be used as the exclusion zone (EZ) for marine mammals, as required by NMFS**”:

“The 180 dB re 1 μ Parms distance [*the current NMFS acoustic standard*] is the safety criteria as specified by NMFS (1995) as applicable to cetaceans under the MMPA. The 180 dB ***will be used as the exclusion zone (EZ) for marine mammals, as required by NMFS*** during most other recent L-DEO seismic projects (Holst and Beland 2008; Holst and Smultea 2008b; Holst et al. 2005a; Holt 2008; Smultea et al. 2004).⁷⁷

CRE’s Comments to NOAA/NMFS On the Acoustic Guidance

CRE made repeated attempts to convince NMFS of the disastrous impact the new *Acoustic Guidance* will have on oil and gas production in the Gulf of Mexico, and of NMFS’ violations of the OMB Peer Review Bulletin, Executive Orders 12866 and 13563, and other requirements.

CRE’s prior comments to NMFS include the following:

CRE Comments on NOAA/NMFS OMB Paperwork Clearance --November 4, 2013⁷⁸

These CRE Comments on NMFS’ current ICR for oil and gas seismic regulation include the following points:

Neither the current ICR nor the proposed extension ICR could possibly cover new MMPA *Acoustic Guidance* for oil and gas seismic because there are no such new standards as of this time.

NMFS will need to allow additional public comment on a new ICR for any new *Acoustic Guidance*.

⁷⁶ National Marine Fisheries Service Endangered Species Act Section 7 Biological Opinion, page 7, at http://www.nmfs.noaa.gov/pr/consultation/opinions/fpr-2015-9142_nsf_south_atlantic_seismic_survey_bo_final_12.31.2015_1_.pdf.

⁷⁷ *Id.* page 10 (emphasis added).

⁷⁸ CRE Comments at <http://thecre.com/pdf/CRE-ICR.0648-0515.pdf>.

NMFS will have to demonstrate that ICRs for GOM Take Rules and for the new *Acoustic Guidance* comply with Information Quality Act (“IQA”) Guidelines.

CRE Comments on NOAA/NMFS Draft Acoustic Guidance--March 13, 2014⁷⁹

These CRE comments include the following points:

There is no physical harm from oil and gas seismic as currently and historically regulated by NMFS and by other U.S. Government agencies.

With regard to PTS and TTS, NMFS has correctly explained: “Researchers have studied TTS in certain captive odontocetes and pinnipeds exposed to strong sounds (reviewed in Southall et al., 2007). However, there has been no specific documentation of TTS let alone permanent hearing damage, i.e., permanent threshold shift (PTS), in free-ranging marine mammals exposed to sequences of airgun pulses during realistic field conditions.”

NMFS’ explanation is consistent with the Finneran controlled studies, which show no TTS in mid-frequency (“MF”) dolphins from low frequency (“LF”) seismic. The draft *Acoustic Guidance* only applies to PTS and TTS, and seismic does not cause PTS and TTS “during realistic field conditions.”

Consequently, there is no need to apply the new PTS and TTS criteria in the draft *Acoustic Guidance* to oil and gas seismic.

If NMFS does change the current acoustic standards for seismic, then they should make those standards less stringent because there is no evidence of harm.

The draft *Acoustic Guidance* should not be used for any sound source until and unless NMFS changes the *Guidance* to satisfy the Peer Review Report’s many criticisms of and objections to the *Guidance*.

NMFS needs to prepare and obtain Office of Management and Budget (“OMB”) approval of a new Paperwork Reduction Act (“PRA”) Information Collection Request (“ICR”) before they can use the draft *Acoustic Guidance* for any sound source. This new ICR has to demonstrate that the *Guidance* complies with Information Quality Act (“IQA”) Guidelines.

⁷⁹ CRE Comments at <http://thecre.com/pdf/mmguidancecomments.pdf>.

NMFS needs to perform a cost benefit analysis of their draft *Acoustic Guidance* if they or any other agency intends to use it in rules or regulatory actions.

CRE Comments on NOAA/NMFS Draft Acoustic Guidance—September 14, 2015⁸⁰

These CRE comments include the following points:

NMFS needs to clearly state whether use of the Draft *Acoustic Guidance* is mandatory during regulation of offshore oil and gas seismic. If use is mandatory then the Draft *Guidance* is a rule and should be treated as such.

NMFS should perform a cost benefit analysis of the Draft *Acoustic Guidance*. The Draft *Guidance* is much more cumbersome, burdensome and complex than current regulation without any apparent need or justification.

NMFS and the U.S. Bureau of Ocean Energy Management (“BOEM”) have repeatedly and correctly emphasized that there is no adverse impact from oil and gas seismic under current regulation. Consequently, there are few if any benefits from using the Draft *Acoustic Guidance*.

No current Information Collection Request (“ICR”) authorizes the Draft *Acoustic Guidance*, and any new ICR will have to demonstrate compliance with IQA Guidelines, which NMFS has not yet done. Demonstrating IQA Compliance is unlikely because peer review and public comment raise significant questions about the Draft *Acoustic Guidance*.

The Draft *Acoustic Guidance* should not be classified as Best Available Science given critical peer reviews of it, and the critical public comments on it.

⁸⁰ CRE Comments at <http://www.thecre.com/forum13/wp-content/uploads/2015/09/mmacousticguidancecomments15.pdf>.