

Comments by Center for Regulatory Effectiveness (“CRE”) on Proposed Regulations Governing Takes of Marine Mammals Incidental to the U.S. Air Force 86 Fighter Weapons Squadron Conducting Long Range Strike Weapons System Evaluation Program at the Pacific Missile Range Facility at Kauai, Hawaii, 86 FR 21156 (May 5, 2017), at <https://www.gpo.gov/fdsys/pkg/FR-2017-05-05/pdf/2017-09137.pdf>.

**Comments filed June 5, 2017, with Jolie Harrison,
Chief, Permits and Conservation Division,
Office of Protected Resources,
National Marine Fisheries Service (“NMFS”),
www.Regulations.gov, 0648-BG65**

NMFS uses its new Acoustic Guidance in these proposed regulations. CRE opposes NMFS’ use of its Acoustic Guidance for this or any other purpose.¹

NMFS’ Use of the Acoustic Guidance Conflicts with Section 10 of Executive Order 13795

Section 10 of Executive Order 13795 (Implementing an America-First Offshore Energy Strategy) states:

“Review of National Oceanic and Atmospheric Administration (NOAA) Technical Memorandum NMFS-OPR-55. The Secretary of Commerce shall review NOAA’s Technical Memorandum NMFS-OPR-55 of July 2016 (Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing) [Acoustic Guidance] for consistency with the policy set forth in section 2 of this order and, after consultation with the appropriate Federal agencies, take all steps permitted by law to rescind or revise that guidance, if appropriate.”²

NMFS is seeking public comment on the Acoustic Guidance to assist the Commerce Secretary’s review. NMFS states that the Acoustic “Guidance will remain in use during this review.”³

NMFS should not use its Acoustic Guidance until the Commerce Secretary has completed his review. Given Executive Order 13795, it’s questionable whether

¹ For these proposed regulations’ use of the Acoustic Guidance, see, *e.g.*, 82 FR 21167 col. 2 (May 5, 2017). What NMFS calls its “Technical Guidance,” we call Acoustic Guidance.

² <https://www.whitehouse.gov/the-press-office/2017/04/28/presidential-executive-order-implementing-america-first-offshore-energy> .

³ 82 FR 24950, 24951 (May 31, 2017), at <https://www.gpo.gov/fdsys/pkg/FR-2017-05-31/pdf/2017-11035.pdf> .

NMFS has current authority to use the Acoustic Guidance. If and when the Secretary rescinds or revises the Acoustic Guidance, any IHA based on it will be indefensible on factual, scientific, legal and policy grounds.

There are many flaws in the Acoustic Guidance. For example, the Acoustic Guidance

- violates OMB's Peer Review Bulletin;
- violates the Information Quality Act ("IQA") Guidelines;
- violates Executive Order 12866 and President Trump's Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs;
- violates OMB's Guidance Document Bulletin and implementing Memoranda; and
- violates the Marine Mammal Protection Act ("MMPA") requirement that all mitigation requirements be "practicable." The Acoustic Guidance requires monitoring and reporting requirements and other mitigation requirements that are impossible to comply with.

These and other Acoustic Guidance flaws are discussed in CRE's comments on NMFS' Acoustic Guidance Information Collection Request ("ICR") to OMB. These prior CRE comments are incorporated by reference into CRE's comments on this proposed IHA, as if fully set forth herein.⁴

CRE's Incorporated ICR Comments also explain why there is no need for the Acoustic Guidance. NMFS has long regulated oil and gas seismic without the Guidance and without any adverse environmental effects.⁵

NMFS does not have an OMB-approved ICR for the Acoustic Guidance

NMFS' use of its Acoustic Guidance in IHAs and elsewhere depends on information collections. No one is required to comply with these information collections unless and until the collections are authorized by an ICR approved by OMB. OMB has never authorized an ICR for the Acoustic Guidance.

⁴ CRE's Incorporated ICR Comments are available at [http://www.thecre.com/creipd/wp-content/uploads/2017/03/mm filed nmfs icr comments.pdf](http://www.thecre.com/creipd/wp-content/uploads/2017/03/mm%20filed%20nmfs%20icr%20comments.pdf).

⁵ CRE's Incorporated ICR Comments, pages 10-11, at [http://www.thecre.com/creipd/wp-content/uploads/2017/03/mm filed nmfs icr comments.pdf](http://www.thecre.com/creipd/wp-content/uploads/2017/03/mm%20filed%20nmfs%20icr%20comments.pdf).

CRE's ICR comments to OMB explain why OMB should not issue such an ICR. Once again, CRE's OMB ICR comments are incorporated by reference into CRE's comments on this proposed IHA, as if fully set forth herein.⁶

NMFS Is Violating the Information Quality Act ("IQA") by Claiming that NMFS Has an OMB-Approved ICR for the Acoustic Guidance

NMFS' IHA Application and Reporting Form website emphasizes the "new" requirement that IHA applicants use the Acoustic Guidance to complete the Form and to comply with its reporting and other requirements.⁷

NMFS' IHA Application and Reporting Form website acknowledges that NMFS needs an OMB-approved ICR to enforce these Acoustic Guidance and other requirements--and NMFS claims to have one in the following statement on the website:

"Paperwork Reduction Act... Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number. OMB No. 0648-0151 Expires: March 31, 2017"⁸

This NMFS information dissemination on NMFS' IHA Application and Reporting Form website can only be understood as claiming that OMB has approved all the information collection requirements, including use of the Acoustic Guidance, that are included on the website. This claim is incorrect, and it violates the IQA Guidelines' Objectivity standard.

A NMFS Directive states that "It is the policy of NOAA's National Marine Fisheries Service (NMFS) to comply with NOAA's Information Quality Guidelines."⁹

NOAA/NMFS' IQA Guidelines state that the agencies "will comply with all applicable OMB, DOC, and...NOAA Information Quality Guidelines."¹⁰

⁶ CRE's Incorporated ICR Comments are available at http://www.thecre.com/creipd/wp-content/uploads/2017/03/mm_filed_nmfs_icr_comments.pdf.

⁷ See Application Form: "Apply for an Industrial Take Authorization"; "What do I Include in my Application"; and Question 6, available and disseminated at <http://www.nmfs.noaa.gov/pr/permits/incidental/instructions.htm>.

⁸ <http://www.nmfs.noaa.gov/pr/permits/incidental/instructions.htm>. Scroll to the bottom of the website.

⁹ National Marine Fisheries Service Policy Directive PD 04-108 (June 27, 2012), at <http://www.nmfs.noaa.gov/op/pds/documents/04/04-108.pdf>.

¹⁰ http://www.cio.noaa.gov/services_programs/IQ_Guidelines_103014.html.

These IQA Guidelines include “Objectivity,” which

“consists of two distinct elements: presentation and substance. The presentation element includes whether disseminated information is presented in an accurate, clear, complete, and unbiased manner and in a proper context. The substance element involves a focus on ensuring accurate, reliable, and unbiased information.”¹¹

NMFS violates the IQA Objectivity standard because:

A) NMFS’ IHA Application and Reporting Form website is an information dissemination which requires that IHA applicants use the Acoustic Guidance to complete the IHA Application and Reporting Form;

B) IHA monitoring and reporting requirements are to a great extent determined by the Acoustic Guidance;

C) NMFS’ IHA Application and Reporting Form website claims that all the IHA application, monitoring and reporting requirements--including the Acoustic Guidance--are authorized by OMB approved ICR “OMB No. 0648-0151”; and

D) This claim is inaccurate, in violation of the IQA Objectivity standard.¹²

Recommended NMFS Actions

NMFS should not use the Acoustic Guidance for any regulatory purpose pending the Commerce Secretary’s review of it.

NMFS should repudiate, remove and retract any claim or indication that OMB has approved an ICR for the Acoustic Guidance, including by way of example and without limitation such claim or indication at <http://www.nmfs.noaa.gov/pr/permits/incidental/instructions.htm> .

NMFS should correct all NMFS information disseminations that require or suggest that the Acoustic Guidance may be used for any regulatory purpose. These information disseminations include by way of example and without limitation:

¹¹ NOAA/NMFS IQA Guidelines, at <http://www.nmfs.noaa.gov/op/pds/documents/04/04-108.pdf> .

¹² OMB No. 0648-0151 expired March 31, 2017. For purposes of these comments, we assume that NMFS’ application for a new ICR (that includes the Acoustic Guidance) continued NMFS’ authority under the old ICR terms and conditions until OMB takes final action on NMFS’ application, but without authorizing new ICR authority for the Acoustic Guidance, which is not covered under the old ICR. OMB No. 0648-0151 does not authorize the Acoustic Guidance.

- <http://www.nmfs.noaa.gov/pr/permits/incidental/instructions.htm> ;
- <http://www.nmfs.noaa.gov/pr/acoustics/guidelines.htm> ;
- [http://www.fisheries.noaa.gov/mediacenter/2016/08 August/03 08 a.htm](http://www.fisheries.noaa.gov/mediacenter/2016/08_August/03_08_a.htm) ;
- <http://www.nmfs.noaa.gov/pr/acoustics/faq.htm> ; and
- <https://www.gpo.gov/fdsys/pkg/FR-2017-05-31/pdf/2017-11035.pdf>.

These and all other information disseminations should be corrected to delete any claim or suggestion that the Acoustic Guidance can be used for any regulatory purpose. As discussed above, the Acoustic Guidance is fatally flawed in many ways. For example, NMFS has no ICR authority to require use of the Acoustic Guidance. NMFS should state this fact publicly.

We thank you for the opportunity to submit these comments.

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