

**Center for Regulatory Effectiveness' ("CRE") Comments on Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing—Acoustic Threshold Levels for Onset of Permanent and Temporary Threshold Shifts, National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.  
82 FR 24950 (May 31, 2017),  
<https://www.gpo.gov/fdsys/pkg/FR-2017-05-31/pdf/2017-11035.pdf>**

**Comments Filed July 16, 2017, at [www.regulations.gov](http://www.regulations.gov),  
NOAA-NMFS-2013-0177**

### ***I. Executive Summary***

NMFS' Use of the Acoustic Guidance Conflicts with Section 10 of Executive Order 13795 for the following and other reasons.

First, the Acoustic Guidance is unnecessary to ensure that oil and gas seismic is safe and environmentally responsible.

Second, the Acoustic Guidance will discourage energy exploration and production.

Third, the Acoustic Guidance has many other flaws that preclude its use. These flaws include

- violations of OMB's Peer Review Bulletin;
- violations of the Information Quality Act ("IQA") Guidelines;
- violations of President Trump's Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs;
- violations of OMB's Guidance Document Bulletin and implementing Memoranda; and
- violations of the Marine Mammal Protection Act ("MMPA") requirement that all mitigation requirements be "practicable."

NMFS cannot require use of the Acoustic Guidance for these and other reasons, including the fact that NMFS does not have an OMB-approved Information collection Request ("ICR") for it.

Consequently, NMFS should publicly and promptly state that no one has to use the Acoustic Guidance.

## ***II. 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.”<sup>1</sup>

The referenced “section 2 of this order” states:

“Policy. It shall be the policy of the United States to encourage energy exploration and production, including on the Outer Continental Shelf, in order to maintain the Nation's position as a global energy leader and foster energy security and resilience for the benefit of the American people, while ensuring that any such activity is safe and environmentally responsible.”<sup>2</sup>

In its Federal Register notice seeking comments on the Acoustic Guidance’s compliance with Section 10 of the Executive Order, “NMFS advises the public to focus comments on those relating to the purpose of the review of the Technical Guidance under section 10 of EO 13795, which is to ensure consistency with the policy in section 2 of the EO, cited above.”<sup>3</sup>

In response, CRE emphasizes that NMFS’ Acoustic Guidance violates Executive Order 13795 because the Guidance will provide no benefit over NMFS’ current

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<sup>1</sup><https://www.whitehouse.gov/the-press-office/2017/04/28/presidential-executive-order-implementing-america-first-offshore-energy> .

<sup>2</sup> *Id.*

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

standards for oil and gas seismic, which have for decades ensured that “that any such activity is safe and environmentally responsible.”<sup>4</sup>

For example, the U.S. Bureau of Ocean Energy Management (“BOEM”) has regulated offshore oil and gas exploration for decades. 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.”<sup>5</sup>

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.”<sup>6</sup>

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.”<sup>7</sup>

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<sup>4</sup> *E.g.*, CRE Comments to NMFS on ICR, 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_filed_nmfs_icr_comments.pdf).

<sup>5</sup> Bureau of Ocean Energy Management’s Environmental Impact Statement, for the Gulf of Mexico, Outer Continental Shelf (“OCS”), Eastern Planning Area (“EPA”) Lease Sales 225 and 226, page 2-22 (emphasis added), at <https://www.boem.gov/BOEM-2013-200-v1/>.

<sup>6</sup> *E.g.*, <https://www.boem.gov/FAQ-Atlantic-GandG-Activities> and <http://www.thecre.com/forum13/?p=1743>.

<sup>7</sup> 79 FR 13626, 13635 (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 <https://www.gpo.gov/fdsys/pkg/FR-2014-03-04/pdf/2014-04770.pdf>; 75 FR

NMFS has never produced any analysis or discussion of any benefits from using the Acoustic Guidance; probably because there are none.

Thus, there is no need for the Acoustic Guidance. The Guidance also violates Executive Order 13795 because its use would impede and discourage energy production and exploration.

NMFS will use its new Acoustic Guidance to determine the size of marine mammal exclusion zones and to estimate takes during the agencies' permitting under the Marine Mammal Protection Act ("MMPA"). MMPA permit applicants will be limited to how many and what kind of Takes they are allowed. The NMFS Application requires permittees to monitor and report on their compliance with these exclusion zones and Take requirements.

NMFS' Acoustic Guidance requires exclusion zones for some cetaceans that are too large to monitor reliably. The Acoustic Guidance will result in unrealistic and inaccurate marine mammal Take estimates that are likely to foster litigation by environmental groups who oppose any offshore (or onshore) exploration of oil and gas. Moreover, monitoring and reporting on these Acoustic Guidance-based permit requirements will be impracticable for oil and gas permittees, and may preclude offshore oil and gas exploration because the zones are too huge to comply with.

The oil and gas industry has repeatedly brought these crippling problems to NMFS' attention.<sup>8</sup>

To our knowledge, NMFS have never responded to these industry comments.

### ***III. The Acoustic Guidance Has Many Other Flaws that Preclude Its Use***

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

- violates OMB's Peer Review Bulletin;
- violates the Information Quality Act ("IQA") Guidelines;
- violates President Trump's Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs;

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49710, 49739 (Aug. 13, 2010), at <https://www.gpo.gov/fdsys/pkg/FR-2010-08-13/pdf/2010-19950.pdf> .

<sup>8</sup> *E.g.*, IAGC and API Comments to NMFS (June 27, 2016), pages 2-3, at [http://www.iagc.org/uploads/4/5/0/7/45074397/iagc\\_api\\_acoustic\\_guidelines\\_letter\\_to\\_nmfs\\_-\\_june\\_2016\\_-\\_final.pdf](http://www.iagc.org/uploads/4/5/0/7/45074397/iagc_api_acoustic_guidelines_letter_to_nmfs_-_june_2016_-_final.pdf) .

- violates OMB’s Guidance Document Bulletin<sup>9</sup> and implementing Memoranda; and

- violates the 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 these CRE comments on the Acoustic Guidance as if fully set forth herein.<sup>10</sup>

***IV. NMFS Cannot Require Use of the Acoustic Guidance For Many Reasons, Including the Fact That NMFS Does Not Have an ICR for It***

Use of the 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. NMFS does not have an OMB-approved ICR for the Acoustic Guidance. CRE’s ICR comments to OMB explain why OMB should not issue such an ICR.<sup>11</sup> 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.

NMFS’ IHA Application and Reporting Form website emphasizes NMFS’ “new” requirement that IHA applicants use the Acoustic Guidance to complete the Form and to comply with its reporting and other requirements.<sup>12</sup> NMFS’ website states,

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<sup>9</sup> *E.g.*, <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/executive-orders/m07-07.pdf> and <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/executive-orders/EO13422.pdf>.

<sup>10</sup> [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).

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

<sup>12</sup> 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>.

“Applicants are expected to use the new acoustic guidance when calculating take estimates for incidental take authorization requests.”<sup>13</sup>

NMFS’ IHA Application and Reporting Form website acknowledges that it needs an OMB-approved ICR to enforce these Acoustic Guidance and other requirements.

NMFS incorrectly claims to have such an OMB-approved ICR in the following statement on NMFS’ IHA Application and Reporting Form 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”<sup>14</sup>

This NMFS information dissemination can only be understood as incorrectly claiming that OMB ICR No. 0648-0151 authorizes all the information collection requirements, including use of the Acoustic Guidance, that are included on NMFS’ IHA Application and Reporting Form website.

Neither OMB ICR No. 0648-0151 nor any other OMB-approved ICR authorizes the Acoustic Guidance.<sup>15</sup> Consequently, NMFS’ claim is inaccurate, incorrect, and violates the IQA Guidelines’ Objectivity standard.

A NMFS Directive states: “It is the policy of NOAA’s National Marine Fisheries Service (NMFS) to comply with NOAA’s Information Quality Guidelines.”<sup>16</sup> NMFS’ IQA Guidelines state that the agencies “will comply with all applicable OMB, DOC, and...NOAA Information Quality Guidelines.”<sup>17</sup> These IQA Guidelines include “Objectivity,” which

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<sup>13</sup> Application Form: “Apply for an Industrial Take Authorization”: Question 6, Take Estimates for Marine Mammals, available and disseminated at <http://www.nmfs.noaa.gov/pr/permits/incidental/instructions.htm> .

<sup>14</sup> <http://www.nmfs.noaa.gov/pr/permits/incidental/instructions.htm> . Scroll to the bottom of the website.

<sup>15</sup> OMB’s history for this ICR control Number is available at <https://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=0648-0151> .

<sup>16</sup> 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> .

<sup>17</sup> [http://www.cio.noaa.gov/services\\_programs/IQ\\_Guidelines\\_103014.html](http://www.cio.noaa.gov/services_programs/IQ_Guidelines_103014.html) .

“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.”<sup>18</sup>

With regard to the Acoustic Guidance, 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; <sup>19</sup>

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 and incorrect, in violation of the IQA Objectivity standard.

***V. NMFS Should Publicly and Promptly State that  
No One Has to Use the Acoustic Guidance***

In its Federal Register notice seeking comment on the Acoustic Guidance, NMFS asks for comments on

“Implementation support: Recommendations regarding how NMFS can further aid in the application and implementation of the Technical Guidance (based on difficulties encountered and/or ways NMFS can facilitate and/or improve implementation for action proponents).”<sup>20</sup>

In response, CRE requests that NMFS publicly and promptly state that

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<sup>18</sup> NMFS IQA Guidelines, at <http://www.nmfs.noaa.gov/op/pds/documents/04/04-108.pdf> .

<sup>19</sup> See, e.g., 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>

<sup>20</sup> 82 FR 24950, 24951 (May 31, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-05-31/pdf/2017-11035.pdf>.

no one is required to use the Acoustic Guidance. NMFS cannot require use of the Guidance for many reasons, including the fact that NMFS does not have an OMB-approved ICR for the Acoustic Guidance.

We also note that any required use of the Acoustic Guidance would render the Guidance subject to President Trump's January 30, 2017 Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs. NMFS cannot require use of the Acoustic Guidance as a new regulatory requirement because NMFS has not complied with the 2-1 regulatory offsets required by Executive Order 13771.<sup>21</sup>

For the reasons provided above, CRE further requests that NMFS' state on the following and all other relevant websites that no one is required to use 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.html](http://www.fisheries.noaa.gov/mediacenter/2016/08_August/03_08_a.html) ;
- <http://www.nmfs.noaa.gov/pr/acoustics/faq.htm> ; and
- <https://www.gpo.gov/fdsys/pkg/FR-2017-05-31/pdf/2017-11035.pdf> .

We thank you for this opportunity to comment.

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<sup>21</sup> *E.g.*, Executive Order 13771, Section 2(a), at <https://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs> .