

Center for Regulatory Effectiveness

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Melanie Virtue
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UNEP/CMS Secretariat
Bonn, Germany
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RE: CMS Voluntary Commitment and Marine Noise EIA Guidelines

Ms. Virtue:

I am writing you on behalf of the Center for Regulatory Effectiveness (“CRE”). CRE previously sent you comments on the CMS UN Voluntary Commitment entitled “Addressing the adverse impact of underwater noise on migratory species.”¹

As part of this Voluntary Commitment CMS recently persuaded its Twelfth Session of the Conference Convention of Parties (“COP12”) to adopt the CMS Family Guidelines on Environmental Impact Assessment for Marine Noise-generating Activities Guidelines (“EIA Guidelines”).²

CMS and environmental NGOs are now reportedly engaged in a coordinated global effort to persuade governments and regulatory bodies to adopt and apply the EIA Guidelines.³ Any such effort should include the following CMS actions. These actions are necessary to avoid bias, assist transparency, and comply with other fundamental requirements of science-based regulation.

First, CMS should emphasize to all governments and regulatory bodies considering the EIA Guidelines that the Guidelines are not legally binding “Agreements.” Instead, they are resolutions, which are “non-binding instruments.”⁴ Consequently, no government or regulatory body is required to adopt or in any way use the CMS EIA Guidelines.

¹ CRE’s comments are available at <http://www.thecre.com/creipd/wp-content/uploads/2017/10/mmfileduncomments.pdf>.

² For a copy of the EIA Guidelines, See, *e.g.*, http://www.cms.int/sites/default/files/document/cms_cop12_doc.24.2.2_marine-noise_e_n.pdf.

³ See, *e.g.*, <http://cms.int/en/news/addressing-impact-underwater-noise-hydrocarbon-exploration-south-eastern-european-waters>.

⁴ Many documents demonstrate that the EIA Guidelines are non-binding. See, *e.g.*, Article V at <http://www.cms.int/en/node/3916> (guidelines for CMS Agreements don’t match EIA

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Second, CMS should emphasize to all governments and regulatory bodies considering the EIA Guidelines that the Technical Support Information CMS prepared for the Guidelines is not a legally binding agreement either. It wasn't even adopted at COP12.⁵

Third, CMS should emphasize the importance of applicable quality guidance to all governments and regulatory bodies considering the EIA Guidelines. For example, the UK has quality guidance that applies to any consideration of the Guidelines.⁶ As another example, the United States has Information Quality Act and peer review requirements that are binding on most U.S. government agencies.⁷

Fourth, CMS should establish and publicize an easily accessible Internet website dedicated to and containing the following:

Guidelines resolution);

http://www.ciesin.columbia.edu/repository/entri/docs/cop/CMS_COP09_res002.pdf

("recommends the use of nonbinding instruments such as resolutions of the Conference of the Parties on proposals submitted by Parties as a potential first step towards the conclusion of AGREEMENTS in accordance with articles IV and V of the Convention"); Page 32 of http://www.cms.int/sites/default/files/publication/COP2%20Proceedings_en_0.pdf (Resolution 2.6).

⁵ Many documents demonstrate that the Technical Information is not part of the CMS EIA Guidelines and was not adopted at COP12. See, *e.g.*, pages 3, 4, 9-10 at http://www.cms.int/sites/default/files/document/cms_cop12_doc.24.2.2_marine-noise_e_n.pdf; <http://www.cms.int/en/meeting/second-meeting-sessional-committee-cms-scientific-council-scc-sc2>. In-Session documents are generally defined as a "A meeting of a legislative or judicial body for the purpose of transacting business."

<https://www.thefreedictionary.com/session>. In other words, In-session documents are those that are acted upon by the decisional body in question. The Technical Information was not an in-session document. *E.g.*, <http://www.cms.int/en/meeting/second-meeting-sessional-committee-cms-scientific-council-scc-sc2>

⁶ See, *e.g.*, the Joint Code of Practice for Research (JCoPR), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/413154/pb13725-research-code-practice.pdf; the Centre for Ecology & Hydrology Quality Policy, <https://www.ceh.ac.uk/sites/default/files/Quality%20Policy%202017.pdf>; the National Environmental Council (NERC) Data Policy and the NERC Data Policy Guidance Notes, <http://www.nerc.ac.uk/research/sites/data/policy/datapolicy-guidance/>; NERC's Guidance on Preservation of NERC Model Code and Model Output, <http://www.nerc.ac.uk/research/sites/data/policy/modelcode-guidance/>; NERC Model Metadata - Guidance Document, <http://www.bgs.ac.uk/data/nercmodelmetadata/NERCmmdgv101.pdf>; The UK INSPIRE Regulations 2009, <http://www.legislation.gov.uk/ukxi/2009/3157/contents/made>; and JNCC Evidence Quality Assurance, <http://jncc.defra.gov.uk/page-6675>.

⁷ The U.S. Federal Government's Information Quality Act Guidelines are available at <https://www.gpo.gov/fdsys/pkg/FR-2002-02-22/pdf/R2-59.pdf>. The US Federal Government's peer review requirements are available at <https://www.gpo.gov/fdsys/pkg/FR-2005-01-14/pdf/05-769.pdf>.

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A) All comments on the EIA Guidelines and all responses to those comments (including all responses to this letter);

B) All records relating to the COP12 vote on the CMS EIA Guidelines; and

C) Contact information for all governments and regulatory bodies that are considering the CMS EIA Guidelines. This list of governments and regulatory bodies and contacts should be updated as necessary in order to stay current.

Fifth and finally, CRE is preparing an analysis of the EIA Guidelines and the Technical Information's noncompliance with the UK quality guidance, and the US Information Quality Act and peer review requirements. CRE's analysis and CMS' response should be included in the above referenced website.

I look forward to discussing these matters with you further.



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