

Center for Regulatory Effectiveness

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February 13, 2018

Mr. James W. Uthmeier
Special Advisor to the Secretary
U.S. Department of Commerce
1401 Constitution Ave NW
Washington, D.C. 20230

Re: NOAA/NMFS' Use of the Acoustic Guidance Conflicts with Executive Orders and Other Regulatory Requirements

Dear Mr. Uthmeier:

NOAA/NMFS continue to use their Technical Memorandum NMFS-OPR-55 of July 2016 ("Acoustic Guidance") for several purposes. This continued regulatory use conflicts with several Presidential Executive Orders and other regulatory requirements such as the Paperwork Reduction Act. On behalf of the Center for Regulatory Effectiveness ("CRE"), I request that you bring these conflicts to the attention of the appropriate Commerce staff and officials so they can stop this improper use of the Acoustic Guidance.¹

President's Trump's Offshore Energy Executive Order 13795 requires the Secretary of Commerce to review the Acoustic Guidance. This Order further requires the Commerce Secretary to "take all steps permitted by law to rescind or revise that guidance, if appropriate."²

The Commerce Secretary has not yet completed his review of the Acoustic Guidance, yet NOAA/NMFS are using the Acoustic Guidance in their proposed Marine Mammal Protection Act ("MMPA") Take Authorizations for Atlantic oil and gas.³

¹ NOAA/NMFS' Acoustic Guidance is available at http://www.nmfs.noaa.gov/pr/acoustics/Acoustic%20Guidance%20Files/opr-55_acoustic_guidance_tech_memo.pdf.

² Executive Order 13795 is available at <https://www.federalregister.gov/documents/2017/05/03/2017-09087/implementing-an-america-first-offshore-energy-strategy>.

³ See <https://www.federalregister.gov/documents/2017/06/06/2017-11542/takes-of-marine-mammals-incident-to-specified-activities-taking-marine-mammals-incident-to>.

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We believe that NOAA/NMFS are also using the Acoustic Guidance in their proposed oil and gas Take Regulations for the Gulf of Mexico. These draft proposed regulations are currently being reviewed by OMB/OIRA under Executive Order 12866.⁴

For many reasons, NOAA/NMFS should not use the Acoustic Guidance for these or any other purposes until the Secretary completes his review required by Executive Order 13795. For example, Executive Order 13795 strongly suggests that the Acoustic Guidance will be rescinded or revised. In addition, OMB/OIRA has not approved the Information Collection Request that is necessary to use the Acoustic Guidance.⁵ Under these circumstances, NOAA/NMFS should not be using the Guidance to issue multi-year Take permits, or for any other purpose; yet they are.

The Acoustic Guidance also conflicts with Commerce's recently published report in response to Executive Order 13783: Promoting Energy Independence and Economic Growth. This Commerce report repeatedly criticizes the current delays in issuing MMPA Take permits and emphasizes the need to accelerate the Take permitting process.⁶ The Acoustic Guidance conflicts with Commerce's Energy Independence Report because the Guidance greatly complicates, impedes, and slows down MMPA Take permitting.

This is a multi-agency issue. The Department of Interior shares regulatory authority over offshore oil and gas. Interior also shares Commerce's concern over delays in MMPA Take permitting.⁷

Commerce's recent Energy Independence Report states, "The Department supports the Administration's efforts to promote the clean and safe development of our Nation's vast energy resources and is committed to taking the actions needed to appropriately suspend, revise, or rescind burdensome regulations that unduly hinder the American people and their economic opportunity."⁸

⁴ See <https://www.reginfo.gov/public/do/eoDetails?rrid=127603>.

⁵ See <https://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=0648-0151>.

⁶ For example, see pages 5-6, 8, 13-14 of Commerce's Energy Independence Report, at

https://www.commerce.gov/sites/commerce.gov/files/the_department_of_commerces_final_report_reviewing_agency_actions_as_required_by_executive_order_13783_promoting_energy_independence_and_economic_growth.pdf.

⁷ Page 2 at <https://www.doi.gov/sites/doi.gov/files/press-release/secretarial-order-3350-offshore-508.pdf>.

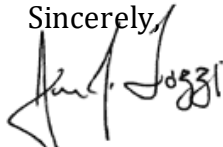
⁸ Page 1 of Commerce's Energy Independence Report, at https://www.commerce.gov/sites/commerce.gov/files/the_department_of_commerces_final_report_reviewing_agency_actions_as_required_by_executive_order_13783_promoting_energy_independence_and_economic_growth.pdf.

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Suspending, revising, or rescinding the unduly burdensome Acoustic Guidance is one of those actions necessary “to promote the clean and safe development of our nation’s vast energy resources.”⁹ NOAA/NMFS should not be using the Guidance.

I thank you for your time and attention. I would be pleased to discuss this matter further with you or other Commerce officials or staff.

Sincerely,



Jim J. Tozzi, PhD
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Cc: Hon. Neomi Rao

⁹ See CRE’s comments at <http://www.thecre.com/creipd/wp-content/uploads/2017/07/mmfiled17julycomments.pdf> and http://www.thecre.com/creipd/wp-content/uploads/2017/03/mmfiled_nmfs_icr_comments.pdf for detailed and documented discussions of reasons why the Acoustic Guidance should not be used at all.