

**COMMENTS BY THE CENTER FOR REGULATORY EFFECTIVENESS (“CRE”) ON
NATIONAL MARINE FISHERIES SERVICE’S (“NMFS”) PROPOSED MARINE
MAMMAL PROTECTION ACT (“MMPA”) RULES AUTHORIZING THE TAKE OF
MARINE MAMMALS INCIDENTAL TO THE U.S. NAVY TRAINING AND TESTING
ACTIVITIES IN THE ATLANTIC FLEET TRAINING AND TESTING STUDY AREA,
83 FR 10954 (MARCH 13, 2018),**

**<https://www.gpo.gov/fdsys/pkg/FR-2018-03-13/pdf/2018-04517.pdf>
 (“NAVY TAKE RULES”).**

**COMMENTS FILED AT NOAA–NMFS–2018–0037,
<https://www.regulations.gov/docket?D=NOAA-NMFS-2018-0037>**

I. EXECUTIVE SUMMARY

The Navy Take Rules use and rely on “NMFS 2016 Acoustic Technical Guidance.”¹ This use and reliance is mistaken for the following and other reasons:

- NOAA is considering rescinding or revising the Acoustic Guidance;
- Several Industry groups have identified significant Data Quality flaws in the Acoustic Guidance;
- CRE has also identified significant Data Quality flaws in the Acoustic Guidance; and
- NMFS’ and /or Navy’s continued use of the Acoustic Guidance violates the Information Quality Act (“IQA”) and IQA Guidelines, and may result in an IQA Request for Correction.

¹ *E.g.*, 83 FR 10954, 10997 col. 1, 11020 col. 2 (March 13, 2018), at <https://www.gpo.gov/fdsys/pkg/FR-2018-03-13/pdf/2018-04517.pdf>.

II. DON'T USE THE ACOUSTIC GUIDANCE

No one should rely on or encourage use of the Acoustic Guidance because NOAA is in the process of rescinding or revising the Guidance. NOAA explains in its recent request for public comment that

“The Secretary of [the U.S. Department of] Commerce shall review NOAA’s [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

Section 2 of the referenced “order” states:

‘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.’³

Rescinding or revising the Acoustic guidance is necessary and appropriate because the Guidance contains many data quality flaws.

The American Petroleum Institute, the International Association of Geophysical Contractors, the Alaska Oil and Gas Association, and the National Ocean Industries Association submitted extensive and detailed combined Industry comments to NOAA that raise Data Quality questions about the Acoustic Guidance.⁴

For example, the Acoustic Guidance is based on non-impulsive U.S. Navy sonar, which is radically different from industry impulsive sound like oil and gas seismic airguns. Application of Navy sonar facts and science to non-impulsive industry sounds is too complex for practicable regulation, and overestimates sounds. The Acoustic Guidance cannot practicably and accurately be used to regulate seismic and other impulsive sound sources. The Industry Comments point out that “the one impulse sound source most used by the Navy—explosives” is not subject to the Acoustic Guidance but instead is instead “subject to a completely different (and

² NOAA’s Federal Register Request for Comments, at <https://www.gpo.gov/fdsys/pkg/FR-2017-05-31/pdf/2017-11035.pdf> (emphasis added).

³ *Id.*

⁴ These combined Industry Comments are available at <https://www.regulations.gov/document?D=NOAA-NMFS-2013-0177-0348> . They are incorporated by reference into the instant CRE comments as if fully set forth herein.

practicable)” explosive risk guidance.⁵ Industry impulsive sound would be far more appropriately assessed and regulated through an appropriate adaptation of the Navy’s explosive risk guidance than through NOAA’s Acoustic Guidance.

The Industry Comments raise many other Data Quality issues about the Acoustic Guidance.⁶

CRE has also identified significant data quality flaws in the Acoustic Guidance. Among other flaws, CRE’s comments to NOAA on the Acoustic Guidance point out that the Guidance uses of inaccurate and unvalidated computer models.

The Guidance also failed to pass peer review.⁷ One peer reviewer concluded that Acoustic Guidance’s requirements for industry impulsive sound are “questionable” and not “reliable.”⁸

A peer reviewer described NOAA’s defense of these Acoustic Guidance requirements for impulsive sound as “a circular argument [that] doesn’t add any credibility to the approach chosen by” NOAA.⁹

These Data Quality issues represent violations of the Information Quality Act (“IQA”) and the IQA Guidelines that apply to U.S. government agencies. This federal statute and these federal agency guidelines preclude U.S. government use of the Acoustic Guidance.¹⁰

⁵ Combined Industry Comments, pages 4-5, at <https://www.regulations.gov/document?D=NOAA-NMFS-2013-0177-0348>

⁶ See Industry Comments, pages 4-10, at <https://www.regulations.gov/document?D=NOAA-NMFS-2013-0177-0348> .

⁷ See, e.g., CRE’s comments to NMFS, page 5-6, at http://www.thecre.com/creipd/wp-content/uploads/2016/11/mm_cre_comments_nmfs_acoustic_icr_filed.pdf

⁸ *Id.*

⁹ *Id.*

¹⁰ These IQA and IQA Guidelines violations are discussed in more detail in CRE’s comments to NMFS, at <http://www.thecre.com/forum13/?p=2754> . These prior CRE comments are incorporated by reference into the instant CRE comments as if fully incorporated herein. We note that, as of the date these CRE Navy comments were filed, the U.S. Office of Management and Budget has not approved the Information Collection Request that NOAA/NMFS need to use the Acoustic Guidance. See <https://reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=0648-0151> .

III. RECOMMENDED ACTIONS

NMFS and the Navy should not use or rely on the Acoustic Guidance. NMFS and the Navy should delete any disseminated information that suggests they use or rely on the Acoustic Guidance.

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