

**CENTER FOR REGULATORY EFFECTIVENESS' ("CRE")  
COMMENTS ON BOEM's PRELIMINARY DRAFT MONITORING PLAN  
FRAMEWORK ("LTMP"); and**

**CRE'S PETITION TO BOEM AND NMFS TO COMPLY WITH  
EXECUTIVE ORDERS 13563 AND 12866.**

**COMMENTS AND PETITION SUBMITTED TO BOEM, NMFS AND OMB ON  
NOVEMBER 18, 2015, AT  
JENNIFER BOSYK , [jennifer.bosyk@boem.gov](mailto:jennifer.bosyk@boem.gov), and  
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**I. EXECUTIVE SUMMARY**

The Bureau of Ocean Energy Management ("BOEM") and National Marine Fisheries Service ("NMFS") should not proceed with the LTMP for the following reasons.

First, BOEM and NMFS lack statutory authority to require industry to develop an LTMP, pay for it, and/or comply with it.

Second, BOEM and NMFS have correctly concluded that seismic and other Geological and Geophysical ("G&G") activities in the Gulf of Mexico ("GOM") are not hurting marine mammals under current regulation. The Government has successfully regulated GOM G&G for decades without an LTMP. There is no need for one now.

Third, the LTMP cannot be implemented without an Information Collection Request ("ICR") approved by the Office of Management and Budget/Office of Information and Regulatory Affairs ("OIRA"). BOEM and NMFS do not have approved ICRs for the LTMP. OIRA should not approve ICRs for the LTMP because the LTMP is not the least burdensome alternative necessary for the proper performance of the Agencies' duties. Current monitoring requirements are less burdensome and adequate.

Fourth, The LTMP does not meet Information Quality Act ("IQA") Guidelines and other ICR requirements.

If BOEM and NMFS do continue with the LTMP, then CRE petitions the agencies to comply with Executive Orders 13563 AND 12866 by treating the LTMP as a significant rule under those Orders.

Regardless of whether BOEM and NMFS continue with the LTMP, CRE petitions the agencies to comply with Executive Orders 13563 and 12866 by treating any Marine Mammal Protection Act ("MMPA") Take Rules for GOM G&G ("GOM Take Rules") as significant rules under those Orders.

Regardless of whether BOEM and NMFS treat the LTMP and GOM Take Rules as significant rules, CRE petitions the agencies to comply with Executive Orders 13563 and 12866 by assessing the economic costs and benefits of the LTMP and GOM Take Rules, and by determining whether their benefits justify their costs.

## II. NMFS AND BOEM LACK STATUTORY AUTHORITY TO REQUIRE THE LTMP

Comments filed jointly by the American Petroleum Institute, the Offshore Operators Committee, and the International Association of Geophysical Contractors (collectively referred to as the “Associations”) correctly state that BOEM and NMFS are not required to develop an LTMP, that they have no authority to order industry to pay for any LTMP, and that they have no authority to order industry to comply with an LTMP. The relevant portion of the Associations’ comments read in part as follows:

*“As an initial matter, the Request states that BOEM’s contemplated long-term monitoring plan ‘is a required element of BOEM’s petition for rulemaking under the Marine Mammal Protection Act....’ However, this statement is demonstrably incorrect as there is no such requirement contained in the MMPA or in any other legal authority. In fact, every statutory and regulatory MMPA provision that refers to ‘monitoring’ does so in the context of the ‘site-specific’ monitoring plans that are required as a condition of incidental take authorizations issued pursuant to MMPA § 101(a)(5). None of those provisions refer to ‘long term’ monitoring. For example, the MMPA regulations require a petition for an incidental take authorization to include, among other things.*

*‘The suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species, the level of taking or impacts on populations of marine mammals that are expected to be present while conducting activities and suggested means of minimizing burdens by coordinating such reporting requirements with other schemes already applicable to persons conducting such activity. Monitoring plans should include a description of the survey techniques that would be used to determine the movement and activity of marine mammals near the activity site(s) including migration and other habitat uses, such as feeding. Guidelines for developing a sitespecific monitoring plan may be obtained by writing to the Director, Office of Protected Resources....’*

*50 C.F.R. § 216.104(a)(13) (emphases added).*

*Consistent with the requirement to include a ‘site-specific’ monitoring plan in a petition for an incidental take authorization, the MMPA simply requires incidental take regulations to include ‘requirements pertaining to the monitoring and reporting of such taking.’ 16 U.S.C. § 1371(a)(5)(A)(i)(II)(bb) (emphasis added); see also id. § 1371(a)(5)(D)(ii)(II) (same description for incidental harassment authorization). The MMPA regulations similarly refer only to monitoring that is limited to the specific incidental take authorized by the agency in a particular authorization. See 50 C.F.R. § 216.102(c) (NMFS must prescribe requirements or conditions ‘pertaining to the monitoring and reporting of such taking’) (emphasis added); 50 C.F.R. § 216.105(b)(3) (referring to monitoring and reporting requirements ‘for each allowed activity’).*

*Additionally, the settlement agreement reached by the parties in NRDC et al. v. Jewell et al., No. 2:10-cv-01882, Dkt. 118-2 (June 18, 2013, E.D. La.) (‘GOM Settlement Agreement’) does not require BOEM to develop a long-term monitoring plan. In the GOM Settlement Agreement, the Federal Defendants simply agreed ‘to analyze in any EIS or EA for BOEM’s MMPA Application the development of a long-term adaptive monitoring plan that addresses potential cumulative and chronic impacts from seismic surveys on marine mammal populations in the Gulf of Mexico.’ Id. § IX.B (emphasis added). In other words, BOEM did not agree to develop a plan, just to analyze the development of one. Moreover, as addressed above, the MMPA does not authorize (i) NMFS to require the development of a long-term monitoring plan as a condition of an incidental take authorization or (ii) BOEM to undertake development or implementation of a long-term monitoring plan as part of a MMPA § 101(a)(5) petition. The GOM Settlement Agreement does not and cannot legally authorize BOEM or NMFS to take actions that are not otherwise allowed by law. See United States v. Carpenter, 526 F.3d 1237, 1241-42 (9th Cir. 2008). Indeed, in the nearly two-decade history of the issuance of incidental take authorizations in the Beaufort and Chukchi Seas, no federal agency has ever imposed an obligation to prepare a long-term monitoring plan or to take any action related to such a plan.<sup>4</sup> 1241-42 (9th Cir. 2008) (terms in settlement agreement may not ‘violate the civil laws governing the agency’).*

*In sum, there is no requirement for a petitioner under MMPA § 101(a)(5) (BOEM, in this instance) to prepare a long-term monitoring plan and there is no legal authorization for NMFS, as the agency authorizing incidental take, to require as a condition of an authorization the preparation or development of a long-term monitoring plan or the performance of actions related to a long-term monitoring plan. Accordingly, although the Associations support efforts to improve the quantity and quality of information related to determining the nature and magnitude of the effects of geophysical exploration activities on marine mammals and use this information to make informed decisions, we are not*

*supportive of efforts that will impose requirements on the regulated community beyond the scope of the MMPA.”<sup>1</sup>*

In a recent webinar, BOEM and NMFS staff said that the agencies do not intend to respond to comments filed on the LTMP during this request for information. CRE thinks that BOEM and NMFS should publicly respond to the Associations’ ‘no-authority’ comments (and to all other comments) before BOEM proceeds any further on an LTMP. We think that the Associations are right in this argument. BOEM and NMFS responses now could prevent much wasted time, effort and expense later.

### **III. THE LTMP DOES NOT MEET PRA AND IQA GUIDELINES REQUIREMENTS**

BOEM and NMFS should not proceed with the LTMP.

If BOEM and NMFS nevertheless proceed with the LTMP, then they will have to demonstrate that the LTMP meets IQA Guidelines and the Paperwork Reduction Act’s (“PRA”) practical utility requirements. Any BOEM or NMFS’ statement that current monitoring requirements are inadequate, and that new more stringent requirements are necessary to protect marine mammals, would violate the IQA Guidelines and practical utility requirements because those statements would be inaccurate.

CRE has made and demonstrated this point several times in the recent past. The attachment to these comments, which is published online at <http://www.thecre.com/forum13/wp-content/uploads/2014/12/OMB-Comments.pdf>, is a recent CRE submission to OMB and BOEM that demonstrates in detail the IQA Guidelines and the PRA/ICR flaws in any LTMP.

If BOEM and NMFS nevertheless proceed with the LTMP, then they should perform pre-dissemination review of their compliance with the IQA Guidelines and practical utility requirements. The public should be allowed to comment on this pre-dissemination review before it is final.

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<sup>1</sup> Pages 2-4, at <http://www.regulations.gov/#!documentDetail;D=BOEM-2014-0075-0006> (footnotes omitted).

#### IV. CRE PETITIONS BOEM AND NMFS TO COMPLY EXECUTIVE ORDERS 13563 AND 12866

CRE petitions BOEM and NMFS to treat the LTMP and the rest of the GOM Take Rules as significant rules under Executive Order 13563, <http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf>, and Executive Order 12866, [https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866\\_10041993.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866_10041993.pdf).

NMFS recently summarized Executive Order 12866's application to the MMPA:

“In 1993, Executive Order 12866, ‘Regulatory Planning and Review,’ was signed by President Clinton in response to public concerns that the regulatory system was imposing unacceptable and unreasonable costs on society. In addition, E.O. 12866 stated that regulatory policies should recognize that the private sector and private markets are the best means for economic growth and that the regulations themselves should be effective, consistent, sensible, and understandable.... Executive Order 12866 applies to all executive branch agencies, such as NMFS. Therefore, before a regulation can become law, NMFS must comply with several mandated procedures. First, the agency must assess the general economic costs and benefits of the proposed regulation. Second, for any “significant” rules (e.g., those with an impact of \$100 million or more), a Regulatory Impact Analysis (RIA) must be completed that describes the costs and benefits of the proposed rule and alternative approaches, and justifies the chosen approach. Third, if a rule is determined to be “significant,” the agency must submit it to OMB for review and wait until OMB clears the action before filing for publication in the Federal Register. Fourth, the agency must submit an annual plan to OMB in order to establish regulatory priorities and improve coordination of the Administration's regulatory program.....”<sup>2</sup>

Executive Order 13563 adopts and expands on the principles and requirements of 12866:

“This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993. As stated in that Executive Order and to the extent permitted by law, each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking

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<sup>2</sup> Page 7,

<http://www.nmfs.noaa.gov/pr/interactions/fkwtrt/orientation/other/summary.pdf>.

into account, among other things, and to the extent practicable, the costs of cumulative regulations....<sup>3</sup>

The LTMP and the GOM Take Rules in general are significant because they meet one or more of the following criteria:

“(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.”<sup>4</sup>

With regard to the LTMP, there are multiple agencies involved; BOEM/NMFS have never before required an LTMP; the LTMP conflicts with BOEM/NMFS’ repeated conclusions that there is no harm under current regulation (which includes monitoring); and the LTMP would be part of the GOM Take Rules, which are themselves significant for the following reasons:

- ***Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.*** There are multiple agencies involved. Any GOM Take Rules that are more stringent than current BOEM regulation would be seriously inconsistent with BOEM and NMFS’ repeated, recent and correct conclusions that there is no harm under current BOEM regulation.

- ***Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.*** BOEM/NMFS have never before published GOM Take Rules, and the Rules will be precedent setting. The GOM Take Rules may be the first application of NMFS new Acoustic Guidance. NMFS has already admitted that its new Acoustic Guidance is highly influential under OMB criteria that are similar to but even more stringent than the Executive Order criteria for significant regulatory actions. See page 3 and footnote 2 at <http://www.nmfs.noaa.gov/pr/acoustics/draft%20acoustic%20guidance%20July%202015.pdf>, where NMFS explains

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<sup>3</sup> <http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf>

<sup>4</sup> Executive Order 12866, [https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866\\_10041993.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866_10041993.pdf).

“This Guidance is classified as a Highly Influential Scientific Assessments by the President’s Office of Management and Budget (OMB) [because] Its dissemination could have a potential impact of more than \$500 million in any one year on either the public or private sector; or that the dissemination is novel, controversial, or precedent-setting; or that it has significant interagency interest (OMB 2005).”

Given the similarity of these criteria, GOM Take rules using the Acoustic Guidance meet the Executive Order 12866 criteria for significance too.

- ***Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.*** NMFS has stated publicly that the GOM Take Rules are the most difficult risk assessment that NMFS has ever performed. In addition, the GOM Take Rules may impose significant new costs and other regulatory burdens (*e.g.*, the LTMP) on GOM oil and gas without any benefits. Yet BOEM and NMFS have given no indication that they intend to assess the costs and benefits cost of GOM Take Rules.

- ***Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities .*** The GOM Take Rules could impede a GOM oil and gas supply that is essential to the nation’s energy use and independence. The economic impact of that dire impact could be enormous but is impossible to ascertain now because BOEM and NMFS have not even begun to consider it.

Finally, Executive Order 12866 and 13563 require that BOEM and NMFS “assess the general economic costs and benefits of the” GOM Take rules and the LTMP, which would be part of the Rules, regardless of whether they are significant under the Order. Moreover, BOEM and NMFS must determine that the LTMP and GOM Take Rules “benefits justify their costs.”

For reasons stated elsewhere in these comments, BOEM and NMFS cannot rationally make this determination.

## V. REQUESTED ACTIONS

BOEM and NMFS should not continue with the LTMP.

If BOEM and NMFS continue with the LTMP, then the agencies should treat the LTMP as significant under Executive Orders 13563 and 12866.

BOEM and NMFS should treat the GOM Take Rules as significant under Executive Orders 13563 and 12866.

BOEM and NMFS should “assess the general economic costs and benefits of the” of GOM Take Rules and the LTMP regardless of whether they are significant rules under Executive Orders 13563 and 12866, and the agencies should determine whether the benefits of the Rules and LTMP justify their costs.

BOEM and NMFS should respond publicly to all comments filed on the LTMP, and to CRE’s Petition.

We thank you for the opportunity to submit these comments.

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