

**Center for Regulatory Effectiveness' ("CRE") Comments on
Streamlining Regulatory Processes and Reducing Regulatory Burden;
National Marine Fisheries Service ("NMFS") and National Ocean Service;
82 FR 31576, 31577 (July 7, 2017),
<https://www.gpo.gov/fdsys/pkg/FR-2017-07-07/pdf/2017-14167.pdf> :**

**Comments on Marine Mammal Protection Act ("MMPA")
"Take" Authorizations.**

**Comments Filed August 21, 2017, at www.regulations.gov,
Docket No. NOAA- NMFS-2017-0067**

I. Executive Summary

These CRE comments address NMFS' regulation of MMPA Take Authorizations.¹ CRE is filing separate comments that address NMFS' Endangered Species Act Section 7 consultations for pesticides.²

CRE's MMPA comments focus on NMFS' development of regulations governing the incidental taking of marine mammals by oil and gas geophysical surveys in the Gulf of Mexico ("GOM Seismic Rules").³

GOM Seismic has occurred for decades. NMFS has not yet promulgated or proposed any MMPA rules for GOM Seismic, but the Bureau of Ocean Energy Management ("BOEM") has successfully regulated GOM Seismic under other statutes for decades. There is no evidence of harm to marine mammals under BOEM's long-standing regulation.

BOEM's regulation includes a 500-meter exclusion zone. This size zone is consistent with NMFS' proposed IHAs for Atlantic Seismic. This 500-meter zone should continue to be used in NMFS' GOM Seismic Rules.

NMFS' GOM Seismic Rules must comply with the requirements of Executive Orders 12866, 13563, 13211 and 13795. These requirements include submitting draft GOM Seismic Rules to OMB/OIRA for review, along with a cost benefit assessment of the Rules. NMFS has so far not complied with these and other requirements of the Executive Orders.

¹ See 82 FR 31576, 31577 (July 7, 2017, at <https://www.gpo.gov/fdsys/pkg/FR-2017-07-07/pdf/2017-14167.pdf>, where NMFS requests comments on MMPA Take authorizations.

² See 82 FR 31576, 31577 (July 7, 2017, at <https://www.gpo.gov/fdsys/pkg/FR-2017-07-07/pdf/2017-14167.pdf>, where NMFS requests comments on ESA Section 7 consultations.

³ See, e.g., http://www.nmfs.noaa.gov/pr/permits/incidental/oilgas.htm#boem_gulf

The GOM Seismic Rules are also subject to the requirements of OMB's Peer Review Bulletin. NMFS has so far not complied with these peer review requirements

CRE requests that NMFS take all actions necessary to ensure that any GOM Seismic Rules comply with Executive Orders 12866, 13563, 13211 and 13795, and with OMB's Peer Review Bulletin. The public should be allowed to comment on compliance before NMFS sends draft rules to OMB/OIRA for review.

CRE also requests that NMFS develop guidelines for preventing sue-and-settle litigation from subverting the rulemaking, congressional and OMB review processes that Congress has established for GOM Seismic Rules.

Executive Order 13795 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."⁴

CRE's requested actions are necessary to implement that policy.

II. Background and Related Filings

On January 27, 2016, CRE filed petitions with NMFS and BOEM. CRE's petitions asked the Agencies to comply with Executive Orders 12866 and 13563 during their development of GOM Seismic Rules. NMFS and BOEM have not responded to CRE's petitions, which are incorporated by reference into these CRE comments.⁵

On January 23, 2017, CRE filed comments on BOEM's revised application to NMFS for GOM Seismic Rules. NMFS and BOEM have not responded to CRE's comments, which are incorporated by reference into these CRE comments.⁶

Environmental groups sued BOEM over GOM Seismic Rules. This litigation is stayed until September 25, 2017, pursuant to a sue-and settle agreement with the enviros. If NMFS takes final action on GOM Seismic Rules by then, that litigation is dismissed,

⁴ Executive Order 13795, Section 2, at <https://www.whitehouse.gov/the-press-office/2017/04/28/presidential-executive-order-implementing-america-first-offshore-energy>.

⁵ CRE's petitions are at <http://www.thecre.com/forum13/?p=2348>.

⁶ CRE's comments on BOEM's revised application are at <http://www.thecre.com/forum13/?p=2924>.

but the environmental groups are free to challenge NMFS' final action in new litigation. As part of the settlement, BOEM agreed to several constraints on GOM Seismic during the stay.⁷ NMFS is going along with these constraints even though NMFS is not a party to the case.

On July 5, 2017, CRE filed comments on NMFS' proposed IHAs for Atlantic Seismic. CRE's comments agree with NMFS' proposed use of a 500-meter exclusion zone as a mitigation measure.⁸

CRE also agrees with NMFS' proposed compliance with the MMPA's "small numbers" requirement "through comparison of the estimated number of individuals expected to be taken to an estimation of the relevant species or stock size."⁹

CRE also agrees with NMFS that determination of "small numbers" should always take "into consideration the implementation of the proposed monitoring and mitigation measures."¹⁰

CRE also agrees with NMFS that Passive Acoustic Monitoring should be required.¹¹

CRE does not agree with NMFS' proposed use of its new Acoustic Guidance in the proposed Atlantic Seismic rules.

NMFS has not yet responded to CRE's Atlantic Seismic comments, which are incorporated by reference into these CRE comments.¹²

On July 15, 2017, CRE filed comments with NMFS, which explained that NMFS' Use of the Acoustic Guidance conflicts with Section 10 of Executive Order 13795. NMFS has not yet responded to CRE's Acoustic Guidance comments. In light of this previous and specific request for Acoustic Guidance comments, NMFS states, "the public does not need to provide comments on this topic in response to this

⁷ See *Natural Resources Defense Council Inc. et al v. U. S. Department of Interior et al*, No. 2:2010-cv-01882 (La ED Ct). This settlement is discussed at <http://www.thecre.com/forum13/?p=884> .

⁸ 82 FR 26244, 26252 (June 6, 2017), at <https://www.gpo.gov/fdsys/pkg/FR-2017-06-06/pdf/2017-11542.pdf> .

⁹ 82 FR 26244, 26295 (June 6, 2017), at <https://www.gpo.gov/fdsys/pkg/FR-2017-06-06/pdf/2017-11542.pdf> .

¹⁰ 82 FR 26244, 26307 (June 6, 2017), at <https://www.gpo.gov/fdsys/pkg/FR-2017-06-06/pdf/2017-11542.pdf> .

¹¹ 82 FR 26244, 26251 (June 6, 2017), at <https://www.gpo.gov/fdsys/pkg/FR-2017-06-06/pdf/2017-11542.pdf> .

¹² CRE's Atlantic Seismic comments are at <http://www.thecre.com/forum13/?p=4893> .

particular notice.” This “particular notice” is NMFS’ subsequent July 7th request for regulatory reform comments that CRE is responding to now.¹³

Despite this prior comment period, CRE’s previous Atlantic Seismic Comments are relevant to these CRE regulatory reform comments, and they are incorporated herein by reference.¹⁴

III. NMFS’ GOM Seismic Rules Must Comply with Executive Orders 12866, 13563 and 13795

NMFS agrees that GOM Seismic Rules are “significant” under Executive Orders 12866 and 13563; therefore, they are subject to the requirements of those Orders.¹⁵

Because they are “significant,” these two Executive Orders require that NMFS take the following actions, and NMFS has not yet taken these required actions.

A) Pre-Publication Submission to OMB/OIRA with Cost-Benefit Assessment

NMFS must submit draft proposed rules to OMB/OIRA for review before the rules are actually proposed.¹⁶ This submission must include a cost benefit assessment of the Rules regardless of whether the rules are economically significant under the Executive Orders.¹⁷

Executive Order 13563 emphasizes that this required pre-publication submission must

“(to the extent permitted by law): (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs, (2) tailor regulations to impose the least burden on society, and (3) select regulatory

¹³ 82 FR 31576, 31577 (July 7, 2017), at <https://www.gpo.gov/fdsys/pkg/FR-2017-07-07/pdf/2017-14167.pdf>.

¹⁴ CRE’s Acoustic Guidance comments are at <http://www.thecre.com/forum13/?p=5976>.

¹⁵ NMFS has for years listed the GOM seismic Rules as “significant” under these Executive Orders. *E.g.*, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201610&RIN=0648-BB38>. For a complete history, search for 0648-BB38 at <https://www.reginfo.gov/public/do/eAgendaSimpleSearch>.

¹⁶ *E.g.*, Executive Order 12866, Sections 2(e) and 6(a)(3), at https://www.reginfo.gov/public/jsp/Utilities/EO_Redirect.jsp.

¹⁷ Cost-Benefit and Other Analysis Requirements in the Rulemaking Process (CRS 2014), page 4 at <https://fas.org/sgp/crs/misc/R41974.pdf>.

approaches that maximize net benefits. It also directs agencies to ‘use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.’”¹⁸

Executive Order 13563 also requires that

“Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.”¹⁹

Consequently, the public must be allowed an opportunity to comment on proposed rules and their cost benefit assessment before they are submitted to OMB/OIRA for review.

B) High Costs and No Benefits

For “economically significant” rules, these Executive Orders require that NMFS prepare a much more rigorous cost benefit analysis and send it to OMB/OIRA for review along with the draft proposed rules.²⁰

As currently known, the GOM Seismic Rules will be economically significant because companies will be unable to comply with them if, as threatened, BOEM and NMFS try to apply NMFS’ new Acoustic Guidance on a case by case basis.²¹ Impossibility of compliance could shut down GOM oil and gas exploration. This disastrous result would be “economically significant” as defined in the Executive Orders.²²

NMFS will be unable to justify the costs of significant additional regulation GOM seismic because there will be few if any benefits.

¹⁸ *Id.*, page 4, at <https://fas.org/sgp/crs/misc/R41974.pdf> .

¹⁹ Executive Order 13563, section 2(c), at https://www.reginfo.gov/public/jsp/Utilities/EO_Redirect.jsp .

²⁰ Cost-Benefit and Other Analysis Requirements in the Rulemaking Process (CRS 2014), pages 4-5, at <https://fas.org/sgp/crs/misc/R41974.pdf> . “Economically significant” is defined as having “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. *Id.*, pages 4-5, at <https://fas.org/sgp/crs/misc/R41974.pdf> .

²¹ See, *e.g.*, CRE Acoustic Guidance ICR Comments, page 11 at <http://www.thecre.com/forum13/?p=2754> . These previous CRE comments are incorporated by reference into CRE’s Revised Application comments in their entirety as if fully set forth herein.

²² See Cost-Benefit and Other Analysis Requirements in the Rulemaking Process (CRS 2014), pages 4-5 at <https://fas.org/sgp/crs/misc/R41974.pdf> .

BOM's Revised Application to NMFS acknowledges that there is no evidence that long-standing seismic in the GOM has caused mortality, serious injury or stranding.²³

NMFS agrees with BOEM on this lack of harm under BOEM's long-standing regulation of GOM seismic.²⁴

For decades, BOEM, NMFS, academics and NGOs have looked extensively for actual harm caused by seismic in the GOM. They have found none. This extensive and endless study is a waste of time, energy and resources given the absence of any observed harm.

BOEM correctly states with regard to GOM seismic:

“Within the [GOM] CPA, which is directly adjacent to the [GOM] 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.”²⁵

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.”²⁶

C) Have to Reconcile GOM Seismic Rules with Executive Order 13795

In addition to Executive orders 12866 and 13563, GOM Seismic rules must comply with Executive Order 13795, which states:

²³ *E.g.*, Revised Application, pages 90-91, at

http://www.nmfs.noaa.gov/pr/permits/incidental/oilgas/boem_2016rule_app.pdf

²⁴ *E.g.*, 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 49710, 49739 (Aug. 13, 2010), at <https://www.gpo.gov/fdsys/pkg/FR-2010-08-13/pdf/2010-19950.pdf>.

²⁵ 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/>

²⁶ *E.g.*, <https://www.boem.gov/FAQ-Atlantic-GandG-Activities> and <http://www.thecre.com/forum13/?p=1743>.

“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.”²⁷

NMFS should very carefully consider the need for any GOM Take rules given the absence of harm under current regulation, and the importance of GOM oil and gas to the nation.

IV. NMFS' GOM Seismic Rules Must Comply with Executive Order 13211

Executive Order 13211 requires covered agencies (to the extent permitted by law) to prepare and submit to OMB/OIRA a Statement of Energy Effects for significant energy actions. NMFS agrees that such a statement is required for GOM Seismic Rules.²⁸

This statement, which is to be published in the proposed and final Rule, is to include a detailed statement of any adverse effects on energy supply, distribution, or use for the action, and reasonable alternatives and their effects.²⁹

We are unaware of any analysis prepared by NMFS that complies with these Executive Order 13211 requirements.

This 13211 assessment must be included in the proposed rule package sent to OMB/OIRA for review before publication, and stakeholders should be involved in its preparation.

When NMFS does prepare and publish such a Statement of Energy Effects, it must consider the effects of shutting down oil and gas exploration in the Gulf of Mexico because that is the likely effect of the Rules if NMFS' uses its Acoustic Guidance.

²⁷ Executive Order 13795, Section 2, at <https://www.whitehouse.gov/the-press-office/2017/04/28/presidential-executive-order-implementing-america-first-offshore-energy>.

²⁸

<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201610&RIN=0648-BB38>

²⁹ <https://www.gpo.gov/fdsys/pkg/FR-2001-05-22/pdf/01-13116.pdf>.

V) The GOM Seismic Rules Must Comply with OMB's Peer Review Bulletin

The GOM Seismic Rules are a Highly Influential Scientific Assessment ("HISA") under OMB's Peer Review Bulletin. They are also "Influential Scientific Information" under the Peer Review Bulletin. They have not complied with the Peer Review Bulletin's requirements.

The GOM Seismic Rules are subject to the OMB Peer Review Bulletin because they will be based on, contain, and be "factual inputs, data, models, analyses, technical information, or scientific assessments related to such disciplines as the behavioral and social sciences, public health and medical sciences, life and earth sciences, engineering, or physical sciences."³⁰

The GOM Seismic Rules are also subject to the OMB Peer Review Bulletin because they will be based on, contain, and be

"an evaluation of a body of scientific or technical knowledge, which typically synthesizes multiple factual inputs, data, models, assumptions, and/or applies best professional judgment to bridge uncertainties in the available information. These assessments include, but are not limited to, state-of-science reports; technology assessments; weight-of-evidence analyses; meta-analyses; health, safety, or ecological risk assessments; toxicological characterizations of substances; integrated assessment models; hazard determinations; or exposure assessments."³¹

The GOM Seismic Rules are HISA under OMB's Peer Review Bulletin because they meet the economic impact criterion for HISA: *e.g.*, they could preclude oil and gas exploration in the GOM.³²

Regardless of economic impact, the GOM Seismic Rules qualify as HISA because they are "novel, controversial, or precedent-setting, or [have] significant interagency interest."³³

³⁰ OMB Peer Review Bulletin, pages 10-11, at http://www.cio.noaa.gov/services_programs/pdfs/OMB_Peer_Review_Bulletin_m05-03.pdf

³¹ *Id.* page 11 at http://www.cio.noaa.gov/services_programs/pdfs/OMB_Peer_Review_Bulletin_m05-03.pdf.

³² The definitions of HISA are at pages 11 and 23 of OMB's Peer Review Bulletin, at http://www.cio.noaa.gov/services_programs/pdfs/OMB_Peer_Review_Bulletin_m05-03.pdf.

³³ *Id.*

At the very least, the Rules are “Influential Scientific Information” and therefore subject to the OMB Bulletin’s peer review requirements for that type of information.³⁴

We are unaware of any peer review of the GOM Seismic Rules. Prior CRE comments on this Peer Review Bulletin issue are incorporated by reference in their entirety as if fully set forth herein.³⁵

VI. NMFS Should Develop Settlement Guidelines

NMFS should consider the letter from the House Committee on Energy and Commerce to Attorney General Sessions and EPA Administrator Pruitt.³⁶ This congressional letter advises EPA to develop “written guidelines” that prevent sue-and-settle consent decrees from subverting the rulemaking, congressional and OMB review processes that Congress has established. CRE recommends that NMFS also develop such written guidelines, and allow public comment on them.

VII. Requested Actions

NMFS should take all actions necessary to assure that any GOM Seismic Rules comply with the requirements of Executive Orders 12866, 13563, 13211 and 13795. These requirements include but are not limited to submitting draft GOM Seismic Rules to OMB/OIRA for review, along with a cost benefit assessment for the Rules.

NMFS should take all actions necessary to ensure the GOM Seismic Rules comply with the requirements of OMB’s Peer Review Bulletin.

NMFS should develop “written guidelines” that prevent sue-and-settle consent decrees from subverting the rulemaking, congressional and OMB review processes that Congress has established.

³⁴ See OMB Peer Review Bulletin, page 11 at http://www.cio.noaa.gov/services_programs/pdfs/OMB_Peer_Review_Bulletin_m05-03.pdf

³⁵ These prior CRE comments are available at <http://www.thecre.com/forum13/?p=2752> .

³⁶This letter is available at <https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/114/letters/20170629EPADOJ.pdf> .

The public should be allowed to comment on compliance before draft proposed GOM Seismic Rules are sent to OMB/OIRA for review.

We thank you for this opportunity to comment.

Respectfully submitted,

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