

**Supplement To The Center For Regulatory Effectiveness (“CRE”)
Information Quality Act (“IQA”) Alert:**

**NMFS’ PROPOSED GULF OF MEXICO TAKE RULES
FOR OIL AND GAS EXPLORATION DO NOT COMPLY WITH
OMB’s IQA IMPLEMENTATION MEMORANDUM**

The National Marine Fisheries Service (“NMFS”) has proposed rules under the Marine Mammal Protection Act (“MMPA”) for oil and gas geophysical activities in the Gulf of Mexico (“GOM Take Rules”).¹ These proposed rules authorize and regulate the number of marine mammal “Takes” that companies are allowed when they explore for oil and gas in the GOM. NMFS currently intends to publish final GOM Take Rules in November 2019.

On March 4, 2019, the CRE filed with NMFS an IQA Alert on NMFS’ proposed GOM Take Rules. CRE’s Alert identified and discussed several IQA errors and omissions in the proposed Rules. CRE requested that NMFS take specified actions necessary to correct these errors and omissions and to comply with the IQA.²

On April 24, 2019, the Office of Management and Budget’s (“OMB”) Office of Information and Regulatory Affairs (“OIRA”) published a “Memorandum for the Heads of Executive Departments and Agencies” entitled *Improving Implementation of the Information Quality Act*.³ OMB’s IQA Implementation Memorandum supports the claims and corrective actions requested in CRE’s IQA Alert on NMFS’ proposed GOM take rules. Consequently, CRE is filing this brief supplement to its IQA Alert.

NMFS’ GOM Take Rules have to comply with OMB’s IQA Implementation Memorandum. They do not comply for the following and other reasons:

- NMFS did not perform the required pre-dissemination review for IQA compliance;
- NMFS did not perform the IQA-required pre-dissemination peer review; and
- NMFS’ use of proprietary models does not meet IQA reproducibility and

¹ NMFS’ proposed GOM Take Rules are available at <https://www.federalregister.gov/documents/2018/06/22/2018-12906/takingand-importing-marine-mammals-taking-marine-mammals-incidentaltogeophysical-surveys-related>.

² For CRE’s IQA Alert, see <http://www.thecre.com/forum13/wp-content/uploads/2019/03/mm-iqa-alert-posting-1-1.pdf>.

³ For OMB’s IQA Memorandum, see <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-15.pdf>.

transparency requirements because, *inter alia*, the models were not peer reviewed.

These IQA errors and omissions are briefly discussed below.

NMFS Did Not Perform the Required Pre-Dissemination Review for IQA Compliance

OMB's IQA Implementation Memorandum states, "The IQA requires agencies [to] conduct pre-dissemination review of their information products."⁴ NMFS' GOM Take Rules do not contain any record showing compliance with the IQA's pre-dissemination review requirements. The Rules do not even mention the IQA.⁵ CRE's IQA Alert contains a detailed discussion of the GOM Take Rules' failure to comply with IQA pre-dissemination review requirements.⁶

NMFS' IQA Pre-Dissemination Review Errors and Omissions Include Failure to Perform the Required Peer review

The IQA's pre-dissemination review requirements include peer review of "influential information." The OMB IQA Implementation Memorandum states:

"The [IQA] Guidelines emphasize the importance of peer review as a tool for determining fitness of scientific information for policy purposes. For the subset of scientific information that is 'influential,' peer review is a required component of pre-dissemination review, as described in OMB's Final Information Quality Bulletin for Peer Review (Bulletin)....Proper peer review includes, *inter alia*, that agencies peer review complex models underlying economically significant regulations before submitting those draft regulations to OIRA under Executive Order 12866."⁷

⁴ OMB IQA Implementation Memorandum, pages 2-4, at

<https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-15.pdf>.

⁵ For failure to mention pre-dissemination review or the IQA, see, *e.g.*, NMFS' *Federal Register* publication at <https://www.govinfo.gov/content/pkg/FR-2018-06-22/pdf/2018-12906.pdf>.

⁶ See, *e.g.*, CRE's IQA Alert, pages 1, 2-3 and 6, at

<http://www.thecre.com/forum13/wp-content/uploads/2019/03/mm-iqa-alert-posting-1-1.pdf>.

⁷ OMB IQA Memorandum, page 4, at <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-15.pdf>.

OMB has classified the GOM Take Rules as “economically significant” under Executive Order 12866.⁸ OMB states that Regulatory Impact Analyses (“RIA”) are “required for economically significant rules by Executive Order 14563, Executive Order 12866, and OMB Circular A-4.”⁹ Consequently, EPA performed a RIA for the proposed GOM Take rules, but EPA did not perform the requisite peer review of the “complex models” underlying the rules.¹⁰

NOAA/NMFS’ IQA Guidelines define “influential” information as information that “the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions.”¹¹ NMFS’ GOM Take Rules tell companies where, when, and how they can explore for oil and gas in the Gulf of Mexico. These Rules indisputably will have or do have “a clear and substantial impact on important...private sector decisions.” They are influential.

Moreover, significance under EO 12866 is a demanding standard.¹² It should be presumed to include influential, which is less demanding.

CRE’s IQA Alert explains in considerable detail that NMFS’ GOM Take Rules depend on “complex models” that have not been peer reviewed.¹³ Consequently,

⁸ *OIRA Conclusion of EO 12866 Regulatory Review* (Executive Order 12866 classification of the GOM Take Rules as “economically significant”), at <https://www.reginfo.gov/public/do/eoDetails?rrid=127604>.

⁹ OMB/OIRA, *Circular-4, Regulatory Impact Analysis: A Primer*, page 1, which states, “With this document, the Office of Information and Regulatory Affairs is providing a primer to assist agencies in developing regulatory impact analyses (RIAs), as required for economically significant rules by Executive Order 13563, Executive Order 12866, and OMB Circular A-4,” at https://www.reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf. Accord, OMB/OIRA, *Agency Checklist: Regulatory Impact Analysis*, page 1, at

https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/regpol/RIA_Checklist.pdf.

¹⁰ See, e.g., 83 FR 29212, 29263 (June 22, 2018) (“This proposed rule has been designated as significant under Executive Order 12866. Accordingly, a draft regulatory impact analysis (RIA) has been prepared...”), at <https://www.govinfo.gov/content/pkg/FR-2018-06-22/pdf/2018-12906.pdf>

¹¹ NOAA/NMFS’ IQA Guidelines, “Definitions,” at https://www.cio.noaa.gov/services_programs/IQ_Guidelines_103014.html.

¹² For EO 12866 definition of “significant,” See Section 3(f) at <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>.

¹³ See OMB IQA Memorandum, page 4, at <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-15.pdf>. For further discussion of these peer review issues, see e.g. CRE’s IQA Alert, pages 1, 10-11, at

for the above and other reasons, these “influential” models and their output are subject to and violate the IQA and OMB’s IQA Implementation Memorandum.

NMFS’ Use of Proprietary Models Does Not Meet IQA Reproducibility and Transparency Requirements

OMB’s IQA Implementation Memorandum emphasizes the IQA requirements of transparency and reproducibility.¹⁴ The OMB Memorandum states a “preference for the use of nonproprietary models to facilitate transparency and secondary use by the public.”¹⁵

NMFS’ GOM Take Rules use and depend on proprietary models. NMFS’ heavy use of these models violates the IQA Transparency and Reproducibility requirements because the models have never been subject to the peer review and other especially rigorous robust checks required by the IQA and by NOAA/NMFS’ own IQA Guidelines, which state:

“Confidential and proprietary data, and other supporting information which cannot be disclosed. Where confidentiality or other considerations preclude full transparency, then especially rigorous robustness checks will be applied. They may take many forms, **ranging from the use of outside review panels** to the use of an array of specific checks to ensure objectivity. The nature and a description of these checks will be disclosed upon request.”¹⁶

CRE’s IQA Alert discusses this issue in more detail. ¹⁷

Finally, We note that the OMB IQA Implementation Memorandum emphasizes the importance of peer review in supporting NMFS’ response to any IQA

<http://www.thecre.com/forum13/wp-content/uploads/2019/03/mm-iqa-alert-posting-1-1.pdf>.

¹⁴ See OMB IQA Implementation Memorandum, pages 7-9, at

<https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-15.pdf>.

¹⁵ OMB IQA Implementation Memorandum, page 5 n.16, at

<https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-15.pdf>.

¹⁶ NOAA/NMFS’ IQA Guidelines, “PART II: INFORMATION QUALITY STANDARDS AND PRE-DISSEMINATION REVIEW” (emphasis part in the original and part added), at https://www.cio.noaa.gov/services_programs/IQ_Guidelines_103014.html.

¹⁷ CRE’s IQA Alert, pages 5-11, at <http://www.thecre.com/forum13/wp-content/uploads/2019/03/mm-iqa-alert-posting-1-1.pdf>.

Request for Correction.¹⁸ NMFS will not have this defense if CRE or anyone else files an IQA Request for Correction on NMFS' GOM Take rules.

In conclusion, we look forward to discussing the above with relevant Government representatives.

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¹⁸ OMB IQA Implementation Memorandum, page 10, at <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-15.pdf>.