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**COMMENTS BY THE CENTER FOR REGULATORY
EFFECTIVENESS (“CRE”) ON PROPOSED INFORMATION
COLLECTION REQUEST (“ICR”), APPLICATIONS AND
REPORTING REQUIREMENTS FOR THE INCIDENTAL TAKE OF
MARINE MAMMALS BY SPECIFIED ACTIVITIES (OTHER THAN
COMMERCIAL FISHING OPERATIONS) UNDER THE MARINE
MAMMAL PROTECTION ACT (“MMPA”),
OMB CONTROL NUMBER 0648-0151, 78 FR 58446 (SEPT. 6, 2013).
FILED ELECTRONICALLY ON NOVEMBER 4, 2013, at
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I. Executive Summary

The proposed extension ICR contains burden estimates that are inconsistent with the burden estimates in the current ICR.

Neither the current ICR nor the proposed extension ICR could possibly cover MMPA Take rules for oil and gas seismic in the Gulf of Mexico because there are no such rules yet. NMFS will need to allow additional public comment on a new ICR for any such rules.

Neither the current ICR nor the proposed extension ICR could possibly cover new MMPA acoustic criteria for oil and gas seismic because there are no such new criteria yet. NMFS will need to allow additional public comment on a new ICR for any new criteria.

NMFS will have to demonstrate that ICRs for GOM Take Rules and for new acoustic criteria comply with Information Quality Act (“IQA”) Guidelines.

NMFS should take the actions set forth below in section VI of these comments.

II. The Proposed Extension ICR's Burden Estimates are Inconsistent with the Current ICR's Burden Estimate

The Federal Register notice for this ICR states, “This request is for an extension of a currently approved information collection.”¹ Yet the burden estimates for the proposed extension ICR differ significantly from the burden estimates for the current ICR. The Supporting Statement for the current ICR estimates 71 respondents and contains the following burden estimates:

“NMFS estimates the total annual burden hours at 26,410 hours, as shown in Table 1 and Table 2. NMFS based these estimates on discussions with nine current ITA holders (oil and gas companies, a research institution, a non-profit organization, and state/local governments).”²

By contrast, the proposed extension ICR estimates 95 total respondents and only 14,109 estimated total annual burden hours.³

NMFS does not explain why burden estimates are less for the proposed extension ICR, even though the total number of respondents is greater for the proposed extension ICR.

III. NMFS Will Need a New ICR for Gulf of Mexico Take Rules

NMFS is developing MMPA rules for marine mammal takes by the oil and gas industry in the Gulf of Mexico.⁴ Neither the current ICR nor the proposed extension ICR could possibly cover these new GOM Take rules because NMFS has not even proposed the new rules yet. NMFS could not estimate the burden of these GOM take rules until they are final.

When and if NMFS does promulgate final GOM Take rules under the MMPA, then NMFS will have to propose a new ICR to cover the requirements of the new Take rules, and NMFS will have to allow public comment on that new ICR.

¹ Page 54866, at <http://www.gpo.gov/fdsys/pkg/FR-2013-09-06/pdf/2013-21660.pdf>.

² Supporting Statement, page 8 at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201009-0648-008.

³ Page 54866, at <http://www.gpo.gov/fdsys/pkg/FR-2013-09-06/pdf/2013-21660.pdf>.

⁴ See, e.g., BOEM's petition for GOM take rules under the MMPA, at http://www.nmfs.noaa.gov/pr/pdfs/permits/boemre_application2011.pdf.

IV. NMFS Will Need a New ICR for New Acoustic Criteria

NMFS is developing new acoustic criteria to apply to oil and gas offshore seismic operations that are regulated as Takes under the MMPA.⁵ NMFS' information collection requirements under the MMPA will depend and be based on compliance with these new acoustic criteria. Consequently, the new acoustic criteria will affect ICR burden estimates.

Neither the current ICR nor the proposed extension ICR could possibly cover these new acoustic criteria because NMFS has not even proposed the new criteria yet. NMFS could not estimate the burden of these new acoustic criteria until they are final.

When and if NMFS does promulgate final new acoustic criteria under the MMPA, then NMFS will have to propose a new ICR to cover the requirements of the new acoustic criteria, and NMFS will have to allow public comment on that new ICR.

We note that BOEM and OMB agree that when BOEM changes its acoustic criteria and other offshore oil and gas seismic requirements, then BOEM has to prepare a new ICR and allow public comment on an ICR for the new requirements.⁶ There is no reason for NMFS to act differently.

V. NMFS will have to Demonstrate that ICRs for GOM Take Rules and for New Acoustic Criteria Comply with Information Quality Act Guidelines

NMFS' Supporting Statement for the current ICR states that NMFS will ensure that the covered information meets IQA Guidelines:

“Before disseminating information in any format, data are reviewed internally (pursuant to [Section 515 of Public Law 106-554](#)) to ensure that they are scientifically sound and meet standards for data quality. The review process for ITAs includes review of the application by the principal drafter of the ITA to ensure that the applicant has met the requirements under section 101(a)(5) of the MMPA. The principal drafter's supervisor and NOAA's Office of General Counsel review the proposed and final Federal Register notices for the ITA, as

⁵ NMFS discusses its development of these new MMPA acoustic criteria at <http://www.nmfs.noaa.gov/pr/acoustics/guidelines.htm> .

⁶ See, *e.g.*, pages 4-6 at <http://www.thecre.com/creipd/wp-content/uploads/2009/06/GOM.Scoping.pdf> . These prior CRE comments are incorporated by reference into CRE's comments on the extension ICR.

well as the actual ITA. If applicable, a NMFS biologist also conducts an independent review of the action's effects on ESA-listed species under Section 7 of the ESA.”⁷

We commend NMFS for ensuring IQA Guidelines compliance. We ask that NMFS publicly commit to ensuring IQA compliance for the proposed extension ICR and for any new ICRS that are necessary for, *e.g.*, GOM Take rules or new acoustic criteria.

VI. Recommended Actions

In its Supporting Statement to OMB for the proposed extension ICR, NMFS should revise its burden estimates to eliminate or satisfactorily explain the discrepancy between the current ICR burden estimates and the proposed extension ICR burden estimates.

In its Supporting Statement to OMB for the proposed extension ICR, NMFS should include the following statements:

This ICR does not cover MMPA Take rules for oil and gas seismic in the Gulf of Mexico, and it does not cover new MMPA acoustic criteria for offshore oil and gas seismic.

If NMFS publishes new MMPA Take rules for oil and gas seismic in the Gulf of Mexico, and/or NMFS publishes new MMPA acoustic criteria for offshore oil and gas seismic, then NMFS will publish a new proposed ICR(s) to cover those actions. NMFS will allow public comment on the new proposed ICR(s) before NMFS sends the ICR(s) to OMB for review.

NMFS will not require compliance with MMPA GOM Take rules and/or new MMPA acoustic criteria for offshore oil and gas until and unless OMB approves the new ICR(s) for them.

We thank you for the opportunity to submit these comments, and we look forward to NMFS' response to them.

The Center for Regulatory Effectiveness

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⁷ Supporting Statement, page 5, at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201009-0648-008