

Center for Regulatory Effectiveness’ (“CRE”) Comments on U.S. Bureau of Ocean Energy Management’s (“BOEM”) Request for Information and Comments on the Preparation of the 2017–2022 Outer Continental Shelf Oil and Gas Leasing Program (“OCS Program”):

<http://www.gpo.gov/fdsys/pkg/FR-2014-06-16/pdf/2014-14039.pdf> .

Comments filed at www.regulations.gov, BOEM–2014–0059, on July 29, 2014.

CRE’s comments emphasize one fact: under current regulation oil and gas seismic has negligible if any impact on marine mammals and on all other aspects of the OCS environment. BOEM should recognize this fact when it develops the OCS Program. Other involved agencies like the National Marine Fisheries Service (“NMFS”) should recognize this fact during their preparation of biological opinions under the Endangered species Act (“ESA”) and during NMFS’ long overdue publication of take authorization rules for seismic in the Gulf of Mexico.

This fact of no harm from seismic is summarized and discussed in greater detail below.

I. Executive Summary

BOEM and NMFS will conduct environmental reviews of the OCS Program. A recent court opinion and numerous agency studies correctly conclude that oil and gas seismic is safe under current regulation.

Marine mammal populations are increasing. BOEM and NMFS should consider these increasing marine mammal populations in making their Take determinations. Seismic under current regulation will always have a negligible impact on marine mammals. Behavioral responses to seismic (or lack thereof) should be factors in making seismic “small numbers” determinations. Negligible impact should be a factor in determining whether there is a Take at all.

BOEM and NMFS should allow and respond to public comment on how to make the ESA consultation and Marine Mammal Protection Act (“MMPA”) authorization processes more efficient. This public comment should focus on marine mammal effects, or lack thereof.

NMFS’ Biological Opinions and other environmental assessment documents include certifications and documentation of compliance with the Data Quality Act (“DQA”).

BOEM should do the same for its OCS Program environmental review documents, and for all its other environmental review documents.

II. No Harm from Seismic, and Marine Mammal Populations Are Increasing

In *Oceana v. BOEM*, Oceana and other environmental groups challenged two oil and gas lease sales in the Gulf of Mexico, including seismic airgun operations authorized by the leases.¹ The plaintiffs claimed that seismic and other aspects of the leases violated the National Environmental Policy Act (“NEPA”) and the ESA. The court rejected the plaintiffs’ claims and granted summary judgment motions filed by the Government and industry interveners. The court explained that with regard to seismic:

“BOEM took efforts to insure that Lease Sale 216/222 itself would not jeopardize any listed species, while it awaited (awaits) NMFS’s Biological Opinion.... And with respect to endangered species generally, BOEM included a list of six actions lessees must take to insure that its lease activities ‘prevent or minimize harm to the environment,’ including ‘maintain[ing] a distance of 90 meters or greater from whales,’ and ‘employ[ing] mitigation measures . . . for all seismic surveys.’ Such lease stipulations show that BOEM set out to minimize harm to the endangered species in the Gulf of Mexico, and therefore insure no-jeopardy.”

“[W]ith respect to ancillary activities, BOEM issued certain Notices to Lessees (“NTL”) to insure that protective measures are taken when engaging in ancillary activity. . . . Such measures include seismic survey mitigation measures and protected species observer programs. *See* JOINT NTL No. 2012-G02, January 1, 2012. Thus, BOEM has taken steps to insure that its actions do not cause harm to endangered species while it engages in interim consultation with NMFS on the updated Biological Opinion. It has therefore independently insured no-jeopardy and satisfied the requirements of section 7(a) of the ESA.”²

This court’s opinion reinforces BOEM and NMFS’ repeated statements that oil and gas seismic under current and long-standing regulation does not injure marine mammals or anything else. For example, BOEM recently stated:

“NTL 2012-JOINT-G02, ‘Implementation of Seismic Survey Mitigation Measures and Protected Species Observer Program,’ minimizes the potential of harm from seismic operations to marine mammals. These mitigations include onboard observers, airgun shut-downs for whales in the exclusion zone, ramp-up

¹ The court’s opinion is at <http://thecre.com/pdf/mmdcopinion.pdf> .

² *Id.*, at pages 51 and 54 (footnotes omitted).

procedures, and the use of a minimum sound source. Therefore, no significant cumulative impacts to marine mammals would be expected as a result of the proposed exploration activities when added to the impacts of past, present, or reasonably foreseeable oil and gas development in the area, as well as other ongoing activities in the area.

Within the [Gulf of Mexico Central Planning Area], which is directly adjacent to the [GOM Eastern Planning Area], 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. Therefore, in light of [the] proposed action and its impacts, the incremental effect of [the] proposed action on marine mammal populations is not expected to be significant when compared with non-OCS energy-related activities.”³

As another example, NMFS agrees that “to date, there is no evidence that serious injury, death, or stranding by marine mammals can occur from exposure to airgun pulses, even in the case of large airgun arrays.”⁴

NMFS recently received an application from Furie Operating Alaska LLC (Furie) for an Incidental Harassment Authorization (IHA) to take marine mammals incidental to a proposed 3D seismic survey in Cook Inlet, Alaska. NMFS’ Federal Register notice of this proposed seismic IHA states:

“Researchers have studied TTS in certain captive odontocetes and pinnipeds exposed to strong sounds (reviewed in Southall et al., 2007). However, there has been no specific documentation of TTS let alone permanent hearing damage, i.e., permanent threshold shift (PTS), in free-ranging marine mammals exposed to sequences of airgun pulses during realistic field conditions.”⁵

As one final example, NMFS recently issued an ESA biological opinion for BP’s seismic activities in the Beaufort.⁶ This BiOp used and relied on NMFS and BOEM’s

³ Volume I, page 2-22 of its Final Environmental Impact Statement for GOM Oil and Gas Lease Sales for the Eastern Planning Area Lease Sales 225 and 226, at <http://www.boem.gov/BOEM-2013-200-v1/> .

⁴ 75 FR 49760, 49795 (August 13, 2010), at <http://www.gpo.gov/fdsys/pkg/FR-2010-08-13/pdf/2010-19962.pdf> .

⁵ 79 FR 12160, 12165 (March 4, 2014), at <http://www.gpo.gov/fdsys/pkg/FR-2014-03-04/pdf/2014-04770.pdf> .

⁶ Issuance of Incidental Harassment Authorization under Section 101(a)(5)(D) of the Marine Mammal Protection Act to BP Exploration (Alaska), Inc. (BPXA) for Marine 3D Ocean Bottom Sensor Seismic Activities in the U.S. Beaufort Sea, Prudhoe Bay, Alaska,

longstanding acoustic effects criteria (*e.g.*, 160 and 180 dB), and on NMFS and BOEM’s long-standing mitigation measures (*e.g.*, safety radii based on 180 dB shutdown/power down for cetaceans and on 190 dB for pinnipeds). NMFS’ BiOp concluded that the proposed seismic when conducted in accordance with these long-time regulatory criteria and requirements:

“is not likely to jeopardize the continued existence of the endangered bowhead whale (*Balaena mysticetus*), threatened Arctic subspecies of ringed seal (*Phoca hispida hispida*), or the threatened Beringia DPS of bearded seal (*Erignathus barbatus barbatus*). In addition, the proposed action is not likely to adversely affect the endangered humpback whale (*Megaptera novaeangliae*).”⁷

Marine mammal populations are increasing under current regulation. The Marine Mammal Commission (“MMC”) discussed these increasing populations during the MMC’s 2014 meeting. One “theme” of this meeting was “Theme 5: Issues associated with increasing marine mammal stocks.”⁸

In its summary of this theme as discussed at the meeting, MMC explained:

“Theme 5 focused on the statutory standards for identifying ‘recovered’ stocks under the MMPA and the available options for managing those stocks. Since the enactment of the MMPA, several marine mammal stocks have increased in abundance to the point where they are considered by some to be ‘recovered.’ The MMPA specifies that the primary objective of marine mammal management is to maintain the health and stability of the marine ecosystem and to obtain an optimum sustainable population for each stock. A number of issues need to be considered in addressing recovering populations, starting with whether or not there is general agreement that achieving an optimum sustainable population (OSP) should be the statutory metric for determining when a stock is considered recovered. Among other things, management agencies need to consider whether there truly is an over abundance of marine mammals or identified problems stem from unrealistic expectations about human access to fishery resources and marine mammal habitats. There also is a related need to consider and agree on what it means for a marine mammal stock to be a significant functioning element of the ecosystem. Addressing issues associated with growing marine mammal populations should begin with determining how to assess carrying capacity for different species and stocks, compiling a list of which populations are considered to be at or near OSP, and identifying the social and political barriers that arise when implementing measures under the MMPA to minimize conflicts between marine mammal and human activities.”⁹

during the 2014 Open Water Season, at

http://www.nmfs.noaa.gov/pr/pdfs/permits/bp_prudhoebay_biop2014.pdf

⁷ http://www.nmfs.noaa.gov/pr/pdfs/permits/bp_prudhoebay_biop2014.pdf, page 104.

⁸ MMC 2014 Meeting Abstracts at http://www.mmc.gov/2014_meeting_summary.shtml.

⁹ Theme 5 summary at http://www.mmc.gov/pdf/theme5_summary.pdf.

BOEM representatives explained at the 2014 MMC meeting that, with regard to the Chukchi and Beaufort, there are “[i]ncreasing North Pacific populations of whale species,” and “[m]ore frequent occurrence of humpback, fin, minke, and killer whales”¹⁰

BOEM and NMFS cannot address all recovered-populations issues in the OCS Plan. However, as discussed briefly in the following section of CRE’s comments, BOEM and NMFS should consider Take Determinations in light of the recovered populations.

III. BOEM and NMFS Should Consider the Increasing Marine Mammal Populations In Making Their Take Determinations

Under the MPA, marine-mammal Takes can be authorized providing certain conditions are met. These conditions include:

(i) NMFS’ authorizations must result in the incidental Take of only "small numbers of marine mammals of a species or population stock"; and

(iii) authorized Takes can have no more than a "negligible impact" on species and stocks.¹¹

NMFS’s current regulations define “small numbers” as:

“a portion of a marine mammal species or stock whose taking would have a negligible impact on that species or stock.”¹²

NMFS’s current regulations define “negligible impact” as:

“an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.”¹³

¹⁰ Jim Kendall, “Current outlook for oil and gas development and environmental studies in the U.S. Arctic,” MMC 2014 Meeting Abstracts at http://www.mmc.gov/2014_meeting_summary.shtml.

¹¹ 16 USC §§ 1371 (a)(5)(A)(i), (D)(i) (emphasis added).

¹² 50 CFR § 216.103 (“General Regulations Governing Small Takes of Marine Mammals Incidental to Specified Activities, at http://www.nmfs.noaa.gov/pr/pdfs/laws/mmpa_regs_216.pdf). The FWS’ definition of “small numbers,” is identical to NMFS’. 50 CFR § 18.27(c), at <http://cfr.vlex.com/vid/governing-takes-incidentally-specified-19894445>.

¹³ 50 CFR 216.103 (“General Regulations Governing Small Takes of Marine Mammals Incidental to Specified Activities, at http://www.nmfs.noaa.gov/pr/pdfs/laws/mmpa_regs_216.pdf). The FWS’ definition of

The Government's current interpretation of these regulations includes the following components:

- NMFS/FWS have to make separate “small numbers” and “negligible impact” determinations.
- NMFS/FWS do not have to produce an absolute numerical limitation in order to satisfy the “small numbers” requirement.
- NMFS/FWS can analyze “small numbers” as a percentage of a larger population.
- There is no pre-determined, absolute, not-to-be-exceeded standard or limit on what an acceptable “small numbers” population percentage can be.
- NMFS/FWS can rely on many of the same factors in making “small numbers” and “negligible impact” determinations, and there will inevitably be ‘some overlap’ between the two standards.

The Government argued this interpretation of “small numbers” in a recent Ninth circuit case, and the court upheld it.¹⁴

Increasing marine mammal populations should affect Take small number determinations. The greater the population, the more likely a particular number of Takes will be a “small number” based on its percentage of that larger population.

Moreover, as noted above, NMFS/FWS can rely on many of the same factors in making “small numbers” and “negligible impact” determinations; and there will inevitably be some overlap between the two standards.” The Government's brief in *Salazar* successfully argued:

“While there is some overlap between the Service's analysis of small numbers and the finding of negligible impacts, that simply reflects that the overall goal of this part of the MMPA is to assure that any authorized takings will have only

“negligible impact,” 50 CFR 18.27, is identical to NMFS'. 50 CFR 18.27(c), at <http://cfr.vlex.com/vid/governing-takes-incident-specified-19894445>.

¹⁴ This case is *CBD v. Salazar*, 695 F.3d 893, 902-07 (9th Cir. 2012), at http://scholar.google.com/scholar_case?case=11653153767736002994&q=center+for+biological+diversity+v.+salazar,+695+f.3d+893&hl=en&as_sdt=20000006&as_vis=1. *Salazar* is discussed in more detail later in this memorandum. See also a CRE website article on NMFS' interpretation of “small numbers” at <http://www.thecre.com/forum13/?p=1513>. Another CRE website article discusses *Native Village of Chickaloon v. National Marine Fisheries Service v. (D. AK 2013)*, at <http://www.thecre.com/forum13/?p=606>. This is a federal district court case that follows *Salazar* and upholds NMFS on this issue.

negligible effects. The protective purpose of the statute would not be furthered by requiring the Service to make its small numbers inquiry without any consideration of impacts, or its impact inquiry without any consideration of numbers. The Service's negligible impact finding here was not in any way compromised by the fact that there was some overlap between the Service's analysis of the two issues....¹⁵

The overwhelming number of estimated seismic Takes are alleged behavior responses that have no effect on the survival of any individual marine mammal, much less any marine mammal population. Under the *Salazar*/Government interpretation of "small numbers," behavioral responses to seismic (or lack thereof) can and should be factors in making seismic "small numbers" determinations.¹⁶ Indeed, negligible impact should be a factor in determining whether there is a Take to begin with.¹⁷

Any number of seismic takes under current regulation will likely have a negligible impact on marine mammals, if any impact at all.

IV. BOEM and the Services Should Make Permitting More Efficient

At the 2014 MMC meeting, the U.S. Navy discussed unnecessary delay and expense during the MMPA permitting process.¹⁸ ESA consultations during MMPA authorizations, NEPA review, and OCSLA leasing, often compound delay and expense. ESA delay was one of the issues the plaintiffs lost in the *Oceana* case discussed above.¹⁹

BOEM and NMFS should solicit public comment on how to improve the efficiency of the OCS permitting and ESA consultation process, focusing on marine mammal effects, or lack thereof. The Navy issues discussed at the MMC 2014 meeting should be part of this public discussion.²⁰ Other efficiency issues affecting seismic should also be included. Part of this public discussion could occur during comment and meetings on the OCS Program.

¹⁵ Answering Brief of Federal Appelles, *CBD v. Salazar*, page 27, at <http://www.thecre.com/pdf/salazargovbrief.pdf>.

¹⁶ *CBD v. Salazar*, 695 F.3d 893, 907 (9th Cir. 2012), at http://scholar.google.com/scholar_case?case=11653153767736002994&q=center+for+biological+diversity+v.+salazar,+695+f.3d+893&hl=en&as_sdt=20000006&as_vis=1.

¹⁷ NMFS' current definition of Level B "Takes" is complex and context specific, and it depends on several variables in addition to the received level of the sound by the animals. See, e.g., 78 FR 4795 (August 5, 2013), at <http://www.gpo.gov/fdsys/pkg/FR-2013-08-05/pdf/2013-18822.pdf>.

¹⁸ Department of Navy Perspectives on the Marine Mammal Protection Act, at http://www.mmc.gov/pdf/schregardus_mmc_0514.pdf.

¹⁹ The *Oceana* court's opinion is available at <http://thecre.com/pdf/mmdcopinion.pdf>.

²⁰ Department of Navy Perspectives on the Marine Mammal Protection Act, at http://www.mmc.gov/pdf/schregardus_mmc_0514.pdf.

V. BOEM Should Certify and Document DQA Compliance

NMFS' BiOp for Beaufort seismic includes a section entitled: "Data Quality Act Documentation and Pre-Dissemination Review." This DQA Section of the BiOp explains:

"Section 515 of the Treasury and General Government Appropriations Act of 2001 (Public Law 106-554) (Data Quality Act (DQA)) specifies three components contributing to the quality of a document. They are utility, integrity, and objectivity. This section of the opinion addresses these DQA components, documents compliance with the DQA, and certifies that this opinion has undergone pre-dissemination review."²¹

BOEM should do the same with its environmental assessment of the OCS Program. The DQA applies to BOEM too.

We thank you for the opportunity to submit these comments, and we look forward to BOEM's response to them. We also look forward to working with the agencies on the issues addressed in our comments.

The Center for Regulatory Effectiveness
www.TheCRE.com

²¹ http://www.nmfs.noaa.gov/pr/pdfs/permits/bp_prudhoebay_biop2014.pdf, page 112.