

**Center for Regulatory Effectiveness (“CRE”)  
Comments on 90-day Finding (“Finding”) on a  
Petition to List Sperm Whales in the Gulf of Mexico (“GOM”) as a  
Distinct Population Segment (“DPS”)  
Under the Endangered Species Act (“Petition”),  
National Marine Fisheries Service (“NMFS”),  
National Oceanic and Atmospheric Administration (“NOAA”),  
<http://www.gpo.gov/fdsys/pkg/FR-2013-03-29/pdf/2013-07355.pdf> ,  
Filed at [www.regulations.gov](http://www.regulations.gov), RIN 0648–XA983, on May 28, 2013**

## **I. Introduction and Summary**

Congress intended “that the authority to list DPSs be used...sparingly.”<sup>1</sup> For the following and other reasons, that authority should not be used to list GOM sperm whales as a DPS under the ESA.

- There is no evidence of anthropogenic injury to any GOM sperm whale.
- There is no evidence that sperm whale populations are decreasing.
- Whaling caused sperm whale reduction, and whaling has been banned for years in the GOM and globally. The International Union for Conservation of Nature’s (“IUCN”) Red List of Threatened Species explains with regard to the sperm whale:

“The cause of the population reduction in this species (commercial whaling) is reversible, understood, and is not currently in operation. ... A peer-reviewed publication (Whitehead 2002) provides a model-based estimate of global trend that can be used to evaluate the population.... The results suggest little chance that the population would meet the criteria for Endangered or for Least Concern.”<sup>2</sup>

- The International Whaling Commission (“IWC”) does not recognize a DPS for GOM sperm whales.<sup>3</sup>

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<sup>1</sup> Petition, page 3, at [http://www.nmfs.noaa.gov/pr/pdfs/petitions/spermwhale\\_gom\\_dps.pdf](http://www.nmfs.noaa.gov/pr/pdfs/petitions/spermwhale_gom_dps.pdf) .

<sup>2</sup> <http://www.iucnredlist.org/details/41755/0> .

<sup>3</sup> NMFS’ ESA Section 7 Consultation Biological Opinion on the U.S. Navy Atlantic Fleet's conduct of active sonar training along the Atlantic Coast of the United States and in the Gulf of Mexico from January 2012 to January 2014, Page 93, [http://www.nmfs.noaa.gov/pr/pdfs/consultations/biop\\_navy\\_afast\\_loa2012.pdf](http://www.nmfs.noaa.gov/pr/pdfs/consultations/biop_navy_afast_loa2012.pdf) .

- The current data are too flawed and incomplete to support a DPS for GOM sperm whales.

- NMFS’ Sperm Whale Plan includes the investigations necessary to determine whether a GOM DPS for sperm whales is warranted. Those investigations are not complete.

- A DPS Listing for GOM sperm whales based on the current record would be premature and would not meet Information Quality Guidelines.

Our comments next address the data quality standards that apply to the Petition. As explained below, NMFS should follow the recent NAS report on ESA data quality when reviewing and deciding the Petition, and when applying “the best scientific and commercial data available” standard under the ESA.<sup>4</sup>

## **II. NMFS Should Follow the NAS Report on ESA Data Quality**

NMFS has stated that

“[S]pecies and populations are biological concepts that must be defined on the basis of the best scientific and commercial data available, just as the decision to list ‘species’ as endangered or threatened (see section 4(b)(1)(A) of the ESA).”<sup>5</sup>

In April 30, 2013, the National Academy of Sciences released its report *Assessing Risks to Endangered and Threatened Species from Pesticides* (“NAS Report”). The NAS prepared this report at the request of NMFS, the Environmental Protection Agency, the Fish and Wildlife Service, and the Department of Agriculture.

This NAS report reviews and discusses the “the best scientific and commercial data available” standard under the ESA.<sup>6</sup>

In reviewing and discussing this standard, the NAS Report at page 31 explains that “all federal agencies are expected to comply with the Office of Management and Budget (OMB) guidelines on objectivity, utility, and integrity of disseminated information”:

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<sup>4</sup>*Assessing Risks to Endangered and Threatened Species from Pesticides* (“NAS Report”), pages 6, 31, 34. A prepublication copy of the complete NAS Report is available on CRE’s website at [http://thecre.com/pdf/NAS--Assessing\\_Risks.pdf](http://thecre.com/pdf/NAS--Assessing_Risks.pdf) .

<sup>5</sup> 56 FR 58612, 58613 (Nov. 20, 1991), at <http://www.nmfs.noaa.gov/pr/pdfs/fr/fr56-58612.pdf> .

<sup>6</sup>*E.g.*, NAS Report, pages 6, 31, 34, available online at <http://www.thecre.com/forum1/?p=6116>

“OMB (67 Fed. Reg. 8452 [2002]) describes those attributes as follows:

‘Objectivity’ focuses on the extent to which information is presented in an accurate, clear, complete and unbiased manner; and, as a matter of substance, the extent to which the information is accurate, reliable and unbiased. ‘Utility’ refers to the usefulness of the information to the intended users. ‘Integrity’ refers to security, such as the protection of information from unauthorized access or revision, to ensure the information is not compromised through corruption or falsification.

The Services and EPA (EPA 2002; FWS 2007) have separately published information quality guidelines (IQGs) that follow closely the government-wide OMB guidelines. Similar basic principles for achieving a scientifically credible assessment are prescribed in the IQGs from the agencies; the agencies are committed to ensuring the quality of evaluations and the transparency of information from external sources used in their disseminated assessments and actions (EPA 2003; NMFS 2005). They also recognize that a high level of transparency and scrutiny is needed for influential information that is expected to have a substantial effect on policies and decisions (EPA 2002; NMFS 2004; FWS 2007) [citing the Agencies’ DQA Guidelines].”

The NAS report at page 34 provides the following additional guidance on data quality:

“● Given that stakeholders are aware of and can provide valuable and relevant data, the committee encourages provision for their involvement at the early stage and throughout the ERA process. Stakeholder data are expected to meet the same data relevance and quality standards as all other data.

● To ensure that the best data available are used, information should first be screened for relevance and then subjected to quality review.

● The agencies should, at a minimum, subject all information to a review based on OMB criteria of ‘objectivity, utility and integrity.’ Information sources that fail any of the criteria can be used at the discretion of the risk assessor, provided that their limitations are clearly described.

● Comparisons of all information sources with the relevance and quality attributes should be documented in the risk assessment and described in the overall characterization of uncertainties.”

NMFS should follow the NAS Report, OMB’s Information Quality Guidelines and NMFS’ own Information Quality Guidelines when reviewing and deciding the Petition.

### **III. A DPS Listing for GOM Sperm Whales Based on the Current Record Would Be Premature and Would Not Meet Data Quality Standards**

NMFS recently concluded, “Existing knowledge of the population structure of sperm whales is insufficient, and a more comprehensive understanding is essential for determining populations status and trends and developing strategies to promote recovery.”<sup>7</sup>

NMFS’ Sperm Whale Plan also stated, “It is possible that sperm whales could be more appropriately listed as DPSs, which would require an evaluation of discreteness and significance among populations.”<sup>8</sup>

NMFS’ Sperm Whale Plan explains what is necessary before sperm whales could be listed as a DPS:

“To the maximum extent possible, data should be collected in such a way that comparisons with historical data are practicable. It may be necessary to develop calibration methods so that results of studies, using new or recent techniques, can be compared with those obtained using more traditional ones. Analyses should be directed at examining trends over time, and attempts should be made to correlate observed changes in sperm whale populations with physical, biological, or human-induced changes in the environment. Data collected through any research outlined in this Recovery Plan should be analyzed and reported in a timely manner. Reports should be thoroughly referenced and follow standards of organization to facilitate comparison with other reports. As much as possible, data should be presented in peer-reviewed journals and other open publications to ensure that research programs benefit from regular peer scrutiny. Models of sperm whale movement (3.2 below) are necessary to understand population structure, both genetically (3.1 below) and socially (3.3 below), and to manage the effects of human activities on this species (Dufault *et al.* 1999; Whitehead *et al.* 2008). NMFS proposes three interrelated research initiatives to assess population structure described in detail below: the first, 3.1, uses genetic analysis to determine population structure and discreteness; the second, 3.2, uses telemetry and photo-identification to assess movement; and the third 3.3, investigates the complex social structure of sperm whales.”<sup>9</sup>

NMFS’ Sperm Whale Plan provides a detailed discussion of the actions that NMFS is taking to develop the data necessary to determine whether a DPS sperm whale listing is warranted and proper.<sup>10</sup>

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<sup>7</sup> FINAL RECOVERY PLAN FOR THE SPERM WHALE (NMFS, December 2010)(“Sperm Whale Plan”), page IV-7, at

[http://www.nmfs.noaa.gov/pr/pdfs/recovery/final\\_sperm\\_whale\\_recovery\\_plan\\_21dec.pdf](http://www.nmfs.noaa.gov/pr/pdfs/recovery/final_sperm_whale_recovery_plan_21dec.pdf)

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*, pages IV-7 to IV-20.

These necessary actions will not be completed until FY 2016.<sup>11</sup>

NMFS' Sperm Whale Plan explains some of the problems with the current data on sperm whales and DPSs:

“Several factors complicate these studies, such as low sample sizes, low mtDNA haplotypic diversity, and sex biased patterns of dispersal, which alone and together reduce the power to detect population structure.

The low mtDNA diversity in sperm whales requires that studies using this marker have large sample sizes.”<sup>12</sup>

Until and unless NMFS' ongoing investigation solves these and other data problems and information gaps, any sperm whale DPS would be premature and would violate NMFS' and OMB's Information Quality Guidelines.

#### **IV. No Evidence of Harm under Current Regulation**

The Petition claims that GOM oil and gas operations generate sound which threatens sperm whales and requires special protection. There is no evidence supporting this claim. In fact, NMFS recently explained

“There is no specific evidence that exposure to pulses of airgun sound can cause PTS in any marine mammal, even with large arrays of airguns.”

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“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.”

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“Although current NMFS' noise exposure standards state that Level B harassment occurs at exposure levels  $\geq 160$  dB (rms) re 1  $\mu$ Pa by impulse sources and exposure levels  $\geq 120$  dB (rms) re 1  $\mu$ Pa by non-impulse sources, there is no evidence that avoidance at these received sound levels would have significant biological effects on individual animals. Any changes in behavior caused by sounds at or near the specified received levels would likely fall within the normal variation in such activities that would occur in the absence of the planned operations.”<sup>13</sup>

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<sup>11</sup> *Id.*, page V-4 to V-5.

<sup>12</sup> *Id.*, page I-4.

<sup>13</sup> <http://www.gpo.gov/fdsys/pkg/FR-2013-05-14/pdf/2013-11406.pdf>

Notably missing from the Petition is any evidence of actual harm to sperm whales under the current regulatory scheme, which does not include a GOM DPS.

CRE has prepared a paper which explains that the current regulatory scheme in the GOM adequately protects marine mammals. This paper is incorporated by reference into these comments on the Petition.<sup>14</sup>

We thank you for the opportunity to submit these comments.

**THE CENTER FOR REGULATORY EFFECTIVENESS**

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<sup>14</sup> This CRE paper is entitled *State of Marine Sound Regulation*. It is available online at [http://www.thecre.com/forum13/wp-content/uploads/2013/03/State\\_of\\_Marine\\_Sound\\_Regulation1.pdf](http://www.thecre.com/forum13/wp-content/uploads/2013/03/State_of_Marine_Sound_Regulation1.pdf)