



January 4, 2018

VIA Email

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Chief, Permits and Conservation Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
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Mr. Gary Goeke
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Office of Environment (GM 623E)
Bureau of Ocean Energy Management
Gulf of Mexico OCS Region
1201 Elmwood Park Boulevard
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Re: Incidental Harassment Authorizations for Atlantic Seismic Surveys

Dear Ms. Harrison and Mr. Goeke:

On behalf of the International Association of Geophysical Contractors (“IAGC”) and the American Petroleum Institute (“API”), we provide this letter to address some of the public comments submitted in response to the National Marine Fisheries Service’s (“NMFS”) issuance of proposed incidental harassment authorizations for seismic surveys on the Atlantic Outer Continental Shelf (“Proposed IHAs”).¹ See 82 Fed. Reg. 26,244 (July 6, 2017). Specifically, this letter addresses certain comments submitted by the Marine Mammal Commission (“MMC”), the Natural Resources Defense Council and its collaborators (“NRDC”), and Oceana.

We provide the information below to the extent it may be useful to NMFS and the Bureau of Ocean Energy Management (“BOEM”) as they finalize their decision documents. We have organized the information below by topic and identified the comments to which our responses are relevant. This letter is not intended to comprehensively respond to each comment identified

¹ All applicants for the Proposed IHAs are members of IAGC.

below, but rather to highlight certain responsive points. If you have any questions, we would be happy to discuss at your convenience.

I. Small Numbers

Comment: In making its “small numbers” determinations, NMFS must use the Duke/CetMap density estimates to calculate the estimated take for each marine mammal stock and then compare those take estimates to the published Stock Assessment Report (“SAR”) population estimates for each stock. (NRDC at 29-30.)

Response: This comment recommends an approach that compares apples and oranges, and would be arbitrary and unlawful if implemented. NMFS cannot make a rational determination regarding the proportion of the stock affected if it compares take estimates that are based upon one dataset (Duke/CetMap density estimates) against population estimates based upon a very different dataset (SAR abundance values). For example, it would be arbitrary for NMFS to compare estimated takes based upon high density data (which implies a high abundance) against a low overall abundance value derived from a vessel-based survey (as reported in a SAR). Any “small number” calculations based upon such a method would be inaccurate and would greatly overestimate the proportion of the stock that may be affected. We recommend that NMFS retain the approach used in the Proposed IHAs. *See* 82 Fed. Reg. at 26,271.

Comment: NMFS cannot make a “small numbers” finding for any marine mammal stock whose population is listed as “unknown” in the SAR. (Oceana at 61.)

Response: NMFS must make an affirmative determination based upon the best *available* science. The Marine Mammal Protection Act (“MMPA”) does not prohibit the authorization of incidental take if a stock’s population estimate is not available. Instead, NMFS must use the best available information to make reasoned assumptions about the status of the stock and the likely effects of the activity, and ultimately determine whether “small numbers” will be taken. This determination need not be made quantitatively. *See Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 906-07 (9th Cir. 2012). With that said, for stocks with “unknown” population sizes, NMFS may want to perform a qualitative analysis of the stock’s status based upon the best available information.

II. Negligible Impact

Comment: NMFS must consider the effects of all five surveys cumulatively when making its “negligible impact” determination because (i) MMPA Section 101(a)(5)(D) says that the harassment from a “specified activity” must have a “negligible impact,” (ii) the legislative history says that “specified activity” includes all actions for which “the anticipated effects will be substantially similar,” and, therefore, (iii) the five applications must be evaluated as a single “specified activity.” (NRDC at 36-37.)

Response: There are many flaws with this comment. *First*, Section 101(a)(5)(D) expressly contemplates *individual* authorizations, whereas Section 101(a)(5)(A) expressly contemplates authorizations through five-year regulations covering multiple activities for which the “total taking” must be negligible. Section 101(a)(5)(D) contains no such “total taking” requirement or any language suggesting that individual IHA applications must be evaluated together. *Second*, the legislative history cited by NRDC refers to Section 101(a)(5)(A) (incidental take regulation (“ITR”)), not to Section 101(a)(5)(D) (IHA), and therefore has no bearing on the Proposed IHAs. *Third*, NMFS has already formally interpreted Section 101(a)(5)(D) through its implementing regulations in a manner that plainly treats IHAs as *individual* authorizations and contains no provisions requiring NMFS to evaluate the effects of individual IHA applications together. *Finally*, the MMPA does not require NMFS to conduct a cumulative impacts assessment when issuing any authorizations under Section 101(a)(5).²

III. Serious Injury and Morality

Comment: The authorized take levels unlawfully exceed the potential biological removal level (“PBR”) for some marine mammal stocks. (Oceana at 66.)

Response: This comment confuses the potential to injure associated with Level A harassment with the serious injury and mortality of marine mammals. Level A harassment has the “potential to injure.” 16 U.S.C. § 1362(18). PBR refers to the number of animals “not including natural mortalities that may be *removed* from a marine mammal stock.” *Id.* § 1362(20) (emphasis added). Under the MMPA, NMFS is required to compare the amount of “serious injury and mortality” from commercial fisheries against a stock’s PBR to determine whether measures must be taken under the MMPA’s take reduction planning provisions to reduce the rate of serious injury and mortality by commercial fisheries. *See id.* §§ 1386, 1387. “Serious injury” is defined by regulation as “any injury that will likely result in mortality.” 50 C.F.R. § 216.3. By definition, Level A harassment does not include “serious injury” or “mortality” and, therefore, it is inappropriate to assess the merit of a Level A harassment authorization by comparing it against a metric (PBR) that is far more narrow, is not referenced in Section 101(a)(5), and has no applicability in the incidental take authorization context. Moreover, there is no evidence that oil and gas seismic surveys have ever resulted in the serious injury or mortality of marine mammals.

² *See, e.g.*, 75 Fed. Reg. 49,760, 49,783 (Aug. 13, 2010) (“Under section 101(a)(5)(D) of the MMPA, NMFS is required to determine whether the taking by the applicant’s specified activity will take only small numbers of marine mammals, will have a negligible impact on the affected marine mammal species or population stocks, and will not have an unmitigable impact on the availability of affected species or stocks for subsistence uses. Cumulative impact assessments are NMFS’ responsibility under the National Environmental Policy Act (NEPA), not the MMPA.”); *see also, e.g.*, 76 Fed. Reg. 34,157, 34,167 (June 13, 2011) (response to comment 7).

Additionally, Oceana mistakenly premises this comment on *Conservation Council for Hawaii v. NMFS*, 97 F. Supp. 3d 1210, 1228-29 (D. Haw. 2015). That case addressed the authorization for the Navy to *kill* marine mammals. The court compared those mortality estimates with the relevant PBRs and found that NMFS's failure to make that comparison in its decision document rendered the authorization unlawful. Here, in contrast, NMFS is authorizing harassment, not mortality.

Comment: The Atlantic surveys will cause serious injury and mortality of marine mammals and, therefore, take associated with those surveys must be permitted under an ITR, not an IHA. (NRDC at 80-81; Oceana at 72.)

Response: NMFS has not proposed to authorize take by serious injury or mortality, but rather by Level A and Level B harassment, both of which may be permitted with an IHA. Any disagreement that NRDC and Oceana may have with NMFS's acoustic guidance for Level A harassment is beyond the scope of the Proposed IHAs. NRDC and Oceana have provided no credible evidence or explanation for why any incidental take associated with the proposed surveys will supposedly cause serious injury or mortality, and no such evidence exists. Additionally, to the extent NRDC and Oceana claim that the surveys will cause ship strikes resulting in mortality, their concern is misplaced because NMFS is not proposing to authorize takes by ship strike, nor are any ship strikes by seismic vessels expected to occur.

IV. Least Practicable Impact

Comment: NMFS's least practicable impact analysis is not consistent with applicable law because it (i) focuses on "population-level" harm, (ii) "balances" species protection against practicability, and (iii) equates "practicality" with "practicability." (NRDC at 60-61.)

Response: This comment is mistaken for a number of reasons. *First*, the "population-level" issue arose in a much different context in *NRDC v. Pritzker* (the case cited by NRDC) that is not relevant here and, in any event, the Navy's proposed rule that is incorporated by reference in the Proposed IHAs states that NMFS "carefully reviewed" and "considered" *Pritzker*. 828 F.3d 1125, 1134 (9th Cir. 2016); 82 Fed. Reg. 19,460, 19,502 (Apr. 27, 2017). *Second*, NMFS is *required* to "balance" benefits and practicability of potential mitigation measures because the statute expressly requires mitigation measures to be "practicable." *Third*, NMFS's use of the word "practical" appears to be an inadvertent typographical error because NMFS also uses the correct word ("practicable" or "practicability") numerous times in the Navy's proposed rule that is incorporated by reference, and the word "practicality" is not mentioned at all in the Proposed IHAs. *See, e.g.*, 82 Fed. Reg. at 19,502-03.³

³ This response only addresses the comments made by NRDC and should not be taken as a suggestion that IAGC and API agree with the proposed mitigation measures or believe that NMFS appropriately balanced the benefits and practicability. As stated in our previous
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Comment: NMFS may not consider the practicability of possible mitigation measures for the applicant. (Oceana at 88.)

Response: This argument impermissibly writes the word “practicable” out of the MMPA. The MMPA’s “least practicable impact” requirement considers whether the activity causing the take can be mitigated to achieve the smallest impact to the species that is “practicable.” Since the *applicant* performs the activity, the relevant question is whether the *applicant* can practicably accomplish the activity when certain measures are required. Indeed, even the Ninth Circuit in *NRDC v. Pritzker* discussed this requirement in terms of the practicability for the applicant (the Navy). *See* 828 F.3d at 1134-35 (“greatest extent practicable *in light of military readiness needs*”; measures may not be “so restrictive of military activity as to unduly interfere with the government’s legitimate needs” (emphasis added)).⁴

Comment: NMFS must require measures that either directly reduce the scope of the surveys or require the applicants to share their data, thus reducing the scope of the surveys. (MMC at 13-14; NRDC at 70.)

Response: For the reasons we have previously explained to NMFS in our comments, this comment is misplaced.⁵ MMC’s and NRDC’s comments are based upon a fundamental misunderstanding of important technical, operational, and economic aspects of seismic surveying. The proposed surveys are not “duplicative,” and it is not commercially or economically feasible to require the applicants to “collaborate” and share information.⁶ These

(. . . continued)

comments, IAGC and API object to some of the mitigation measures because, *inter alia*, they are not practicable.

⁴ NMFS has addressed a similar argument in past IHAs. *See, e.g.*, 80 Fed. Reg. 35,744, 35,750 (June 22, 2015) (“Response to Comment 17”—“Regarding the mitigation measures recommended by the panel, Shell advised, and we agree, that the measures would not be practicable.”); *id.* at 35,751 (“Response to Comment 25” —“On balance, when the limited benefits of the measure are compared against the negative impacts to Shell’s activities . . . , NMFS considers it impracticable for the company to implement.”); *id.* at 35,759 (“Our evaluation of potential measures included consideration of the following factor in relation to one another[:]. . . the practicability of the measure for applicant implementation.”).

⁵ *See* IAGC and API’s July 21, 2017 comment letter, page 5 and Attachment B.

⁶ BOEM recently completed a study regarding “duplicative” seismic surveys, which is described in the Final Programmatic Environmental Impact Statement for Gulf of Mexico Geophysical and Geological Activities, Appendix L, pages L-11 to L-39 (the “Duplicate Panel Report,” available at <https://www.boem.gov/BOEM-2017-051-v3/>). None of the surveys currently proposed for the Atlantic OCS meet the definition of a “duplicate” survey, as set forth in the Duplicate Panel Report.

suggested measures are therefore not “practicable.” For the same reasons, NMFS and BOEM need not, and should not, evaluate these suggested measures as part of an alternative in their respective NEPA documents. Instead, a reduced-survey scenario should be addressed (if at all) in the “alternatives considered but rejected” section of the relevant NEPA documents. Such a scenario is not feasible and does not meet the purpose and need of the proposed surveys.⁷

V. Precautionary Principle

Comment: The MMPA requires NMFS to err on the side of being conservative (*i.e.*, to act precautionarily) when making determinations under Section 101(a)(5). (MMC, NRDC, and Oceana, generally.)

Response: The plain language of the MMPA contains no requirement for NMFS to err on the side of being conservative when making Section 101(a)(5) determinations. Instead, NMFS is required to objectively use the best available scientific information, applying the standards of Section 101(a)(5). 16 U.S.C. § 1371(a)(3)(A); 50 C.F.R. § 216.104(c). Although Congress arguably intended the MMPA to conservatively protect marine mammals, it did so by establishing the Section 101(a)(5) standards themselves (*e.g.*, “negligible impact”)—not by establishing an implied assumption that the MMPA’s standards would be applied with an additional layer of bias in favor of marine mammal protection. *See* H.R. Rep. No. 92-907 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144, 4148 (stating that Congress “endeavored to build such a conservative bias into the legislation” (emphasis added)). The standards are therefore already biased in favor of marine mammal protection, and Congress intended for NMFS to apply those standards objectively, based upon the best available science.

VI. NEPA Compliance

Comment: NMFS may not rely upon BOEM’s Programmatic Environmental Impact Statement for Atlantic Geological and Geophysical Activities (“Atlantic PEIS”) because NMFS has a different “purpose and need” than BOEM. (NRDC at 81-82.)

Response: To the extent NMFS will rely upon the Atlantic PEIS, such reliance is permissible. NEPA regulations provide that “[a]n agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under [NEPA] regulations.” 40 C.F.R. § 1506.3(a). Insofar as we are aware, there are no cases in which a court has rejected an incorporated NEPA document on the grounds that the involved agencies had different purposes and needs. Moreover, the case relied upon by NRDC for this comment did *not* reject the

⁷ For similar reasons (infeasible, uneconomic, and impracticable), an “alternative technology” scenario should be addressed (if at all) in the “alternatives considered but rejected” portion of the relevant NEPA documents. Such a scenario also would not meet the purpose and need of the proposals.

environmental impact statement (“EIS”) at issue because it incorporated another EIS with a different purpose and need. *See Conservation Council*, 97 F. Supp. 3d at 1236-38. Here, NMFS should provide a clear explanation of the basis for its reliance on the Atlantic PEIS and how that analysis informs its future MMPA determinations.

Comment: BOEM must prepare a supplement to the Atlantic PEIS before BOEM or NMFS may tier from it. (NRDC at 81-82; Oceana at 73-78.)

Response: An EIS must be supplemented when “there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii). Formal Council on Environmental Quality (“CEQ”) guidance expands upon the requirements for supplementation of a programmatic EIS as follows:

When an agency determines there is a need to supplement a NEPA review, programmatic NEPA reviews provide alternative ways to complete that supplementation. The traditional approach would be to supplement the base document, the original PEA or PEIS. Alternatively, if a new tiered NEPA review can include consideration of the programmatic issues, then the tiered review can also serve as the vehicle for supplementing the PEA or PEIS. When the new information’s effects are limited to potential impacts or alternatives associated with the next stage, or project- or site-specific decision, then the tiered analysis can address the new information without having to supplement the PEA or PEIS.

CEQ, *Guidance on Effective Use of Programmatic NEPA Reviews* (Dec. 18, 2014). Whether new information requires supplemental analysis is a “classic example of a factual dispute the resolution of which implicates substantial agency expertise.”⁸

As applied here, if the new information does not constitute “significant new information,” no supplementation is required. If the new information is significant, then BOEM (or NMFS) may address the new information in the survey-specific (or IHA-specific) environmental assessments (“EAs”) so long as the new information (i) involves programmatic issues that can capably be addressed in the EAs *or* (ii) is relevant only to the site-specific EAs. There is no apparent reason why any new relevant information cannot be capably addressed in survey-specific (or IHA-specific) EAs. Because an agency’s evaluation of cumulative effects is typically an element of NEPA that is exploited by environmental advocates, any such site-

⁸ *Tri-Valley CAREs v. U.S. Dep’t of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012) (citing *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373-74 (1989)).

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specific EAs should reasonably address any cumulative effects that are not already addressed in the PEIS.⁹

Thank you for considering this information. Should you have any questions, please do not hesitate to contact Nikki Martin (713.957.5068) or Andy Radford (202.682.8584).

Sincerely,



Nikki Martin
International Association of Geophysical Contractors
President



Andy Radford
American Petroleum Institute
Sr. Policy Advisor – Offshore

cc: Mr. Chris Oliver, Assistant Administrator for Fisheries, NOAA
Ms. Kate MacGregor, Acting Assistant Secretary, Land and Minerals Management, DOI
Dr. Jill Lewandowski, Chief, Division of Environmental Assessment, BOEM

⁹ Additionally, we are aware of no cases in which a court has held that issuance of an IHA required the preparation of an EIS. In fact, multiple cases have held that preparation of an EA is sufficient for issuance of an IHA. See *Native Village of Point Hope v. Minerals Mgmt. Serv.*, 564 F. Supp. 2d 1077, 1083-84 (D. Alaska 2008); *CBD v. Kempthorne*, 588 F.3d 701, 711-12 (9th Cir. 2009); *Native Village of Chickaloon v. NMFS*, 947 F. Supp. 2d 1031, 1070-76 (D. Alaska 2013); *Alaska Wilderness League v. Jewell*, 116 F. Supp. 3d 958, 970-71 (D. Alaska), *vacated as moot*, 637 F. App'x 976 (9th Cir. 2015).