

**Nikki C. Martin**

**On Behalf of the International Association of Geophysical Contractors (IAGC)**

Written Testimony on

**The Marine Mammal Protection Act (MMPA)**

Before the

United States House of Representatives Natural Resources Committee  
**Subcommittee on Oversight and Investigations**

*“Examining Impacts of Federal Natural Resources Laws Gone Astray, Part II”*

July 18, 2017

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Chairman Westerman, Ranking Member McEachin, and Members of the Subcommittee:

For the record, my name is Nikki Martin and I am the President of the International Association of Geophysical Contractors (IAGC). I have extensive experience and background in environmental regulation and legal and government affairs. I am an attorney and studied political science. Before becoming the President of the IAGC, I served as the Association’s Vice President for Government and Legal Affairs. I am the former Regulatory and Legal Affairs Manager at the Alaska Oil & Gas Association and previously practiced law in Anchorage, Alaska. Earlier in my career, I also served as staff to U.S. Senate President Pro Tempore Ted Stevens and as legislative aide to the Alaska State Senate President and Alaska State House Majority Leader.

On behalf of the IAGC, I appreciate the opportunity to voice to the Subcommittee on Oversight and Investigations our support for modernizing the Marine Mammal Protection Act (MMPA).

The IAGC is the international trade association representing all segments of the geophysical industry, essential to discovering and delivering the world’s energy resources. The IAGC member companies play an integral role in the successful exploration and development of hydrocarbon resources, onshore and offshore, through the acquisition and processing of geophysical data. For more than 45 years, IAGC has been the global voice of the geophysical industry and is the only trade organization solely dedicated to the industry. The IAGC represents more than 110-member companies from all segments of the geophysical industry. Our members help to shape industry priorities and positions through IAGC chapters, committees and workgroups.

Seismic and other geophysical surveys have been safely conducted in the U.S. and around the world for over 50 years. These geophysical surveys are the critical first step to better

understanding the resource base of the Outer Continental Shelf (OCS) and providing policy makers and regulators with the information they need to make informed decisions about oil and gas development based on the best available data. Surveys do not necessarily lead to oil and gas development. In fact, surveys determine both areas that are *and are not* likely to have recoverable oil and gas resources. However, unless the surveys can commence, that information will never be available to policy makers and the public. It is important to point out that seismic and other geophysical survey activities are temporary and transitory; they are the least intrusive way to explore the earth's geology and its dynamic processes which impact human lives.

The use of modern seismic technology is similar to ultrasound technology which is commonly used in the medical profession for imaging the human body. Today's advancements in seismic technology, which can pinpoint the most fruitful areas for hydrocarbon potential, have contributed to reducing the overall environmental footprint associated with oil and gas exploration. Seismic technology has also helped to decrease operational and safety risks associated with oil and gas development.

Seismic surveying is a well understood and safe industry practice, and informed policy decisions regarding offshore energy development can *only* be made with the evaluation provided by modern seismic survey technology. And it is for this very reason that environmental advocacy groups have actively worked to politicize the seismic survey permitting process, under the pretense of alleged harm to marine mammals.

As the Bureau of Ocean Energy Management (BOEM) and the National Marine Fisheries Service (NMFS) have continually stated time and time again—throughout changing political administrations—to date, *there has been no documented scientific evidence of noise from acoustic sources used in seismic activities adversely affecting marine animal populations or coastal communities*<sup>1</sup>. They note that this technology has been used for decades around the world, including in U.S. waters off of the Gulf of Mexico and Alaska with no known detrimental impact to marine animal populations or to commercial fishing.

Indeed, more than five decades of worldwide seismic surveying and scientific research demonstrate that the risk of direct physical injury to marine mammals is extremely low, and there is no scientific evidence demonstrating biologically significant negative impacts on marine life populations. Because survey activities are temporary and transitory, they are the least intrusive way to explore the earth's geology.

As an example, of the usefulness of geophysical data, the BOEM recently announced the public release of a 1.4-billion-pixel map that will help scientists from academia, environmental agencies, and governmental agencies further understand the prolific Gulf of Mexico region. This once-impossible feat was created by using more than 200 individual maps from geophysical companies, all of which are IAGC members. The maps cover 135,000 square miles of the Gulf of Mexico with datasets spanning more than 30 years. In the more than 50 years of seismic surveying in the Gulf of Mexico, there has not been a single reported incidence of sound from seismic operations injuring marine life.

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<sup>1</sup> BOEM stated in its August 22, 2014 Science Note

The seismic industry is committed to conducting its operations in an environmentally responsible manner, and utilizes mitigation measures, such as exclusion zones, soft-starts, and protected species observers to further reduce any possibility of potential impacts to marine life. The industry supports a process of developing and implementing effective mitigation measures that are proportionate to the level of potential risk and specific to the local population of marine animals.

The reality is the seismic industry has a long track record of safe, responsible operations around the world. Unfortunately, the permitting of this activity critical to identifying the nation's energy supplies is too often stalled or impeded by extreme environmental advocacy organizations exploiting existing regulatory and litigation processes.

In my capacity as President of the IAGC, I have experienced first-hand the detrimental impacts of non-transparent and delayed decision making on the geophysical industry stemming from an outdated law, the MMPA, which is currently being administered by agencies and exploited by advocacy groups in ways that were never envisioned by Congress.

### **MMPA Background**

When it was enacted in 1972 (and subsequently amended), the congressional intent behind the MMPA was cutting edge and forward-thinking. The MMPA was intended to address significant declines in some species of marine mammals caused by human activities such as overhunting, overfishing and unscrupulous trade. It was not originally designed to regulate sound in a marine ecosystem.

The MMPA established a prohibition on the "taking" of marine mammals in U.S. waters, unless the take is authorized by the designated U.S. regulatory authorities, the NMFS and the U.S. Fish and Wildlife Service (FWS). Congress defined "take" in the MMPA as "to harass, hunt, capture or kill" a marine mammal, or the attempt to do so. "Harassment" is defined as "any act of pursuit, torment, or annoyance" that either:

- A. "has the potential to injure a marine mammal or marine mammal stock in the wild" (referred to as a Level A harassment); or
- B. "has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering" (referred to as a Level B harassment).

Under the MMPA, NMFS and FWS administer a system of permitting authorities that allows for take in certain situations, such as for commercial fishing permits, scientific research permits, educational activities (e.g., science centers and aquaria) and subsistence hunting in Alaska. For many years, NMFS and FWS have authorized the incidental, but not intentional, taking of marine mammals for activities related to offshore seismic and offshore energy and minerals exploration. This is done through issuance of Incidental Take Regulations (ITRs), which are effective for a period up to five years, and through Incidental Harassment Authorizations (IHAs), which are effective for a period of no more than one year. The best available science and

information demonstrate that, whether individually or cumulatively, these authorizations have resulted in no detectable adverse impacts to marine mammal populations.

Current NMFS policy measures whether sound from a proposed activity, such as seismic surveying, has the potential to injure (Level A harassment) or has the potential to disrupt a behavioral pattern (Level B harassment) using agency guidance setting forth defined threshold decibel levels.

There are no verified injuries or deaths of marine mammals from exposure to seismic survey arrays. NMFS itself recognizes that “[t]o date, there is no evidence that serious injury, death or stranding by marine mammals can occur from exposure” to seismic air source arrays, even in the case of large arrays. In marked contrast, the greatest source of marine mammal takes today come from fisheries bycatch, and these take counts are based on direct observation of marine mammals killed or seriously injured during fishing.

While there will always be exceptions, such as the loss of the Chinese baiji river dolphin and the current peril of the vaquita in Mexico, both victims of illegal destructive fishing practices, the history of marine mammals since the MMPA was enacted has been a long list of successes: the recovery of California sea lions, Guadalupe fur seals and elephant seals from near-extinction, the de-listing of gray whales and humpback whales since the cessation of whaling, the end of massive losses of pelagic dolphins in the tuna purse seine fishery -- and more.

Even the story of the North Atlantic Right Whale is largely one of success, as the species has continued to slowly recover from near extinction. While seismic surveys off the US Atlantic coast have not been as common as at other sites where other right whale species have bounced back from whaling in more dramatic fashion, it still must be noted that the whales at those other sites made their dramatic recoveries in the presence of frequent and ongoing seismic surveys (South Africa, South America, Australia, New Zealand). And despite the relative infrequency of seismic surveys on our Atlantic coast in recent decades, the North Atlantic species is certainly no stranger to seismic surveys during their movements between the US Atlantic coast, Canada, and even as far as the North Sea where seismic survey activity has been common for decades.

All of this post-MMPA good news has taken place in a context of continuous use of seismic surveys around the world. Populations that were considered robust prior to the MMPA remain robust and species removed from commercial exploitation or high levels of fishery bycatch have bounced back as fast or faster than expected even as seismic survey activity went on all around them without any apparent difference from locations without seismic survey activity.

However, decades of regulation and litigation have exposed some significant flaws in the MMPA. Fixing these flaws would increase regulatory certainty, decrease inefficiencies, and ultimately benefit all stakeholders and implementing agencies.

The primary flaws stem from poorly written statutory language that creates (1) ambiguity and uncertainty in the application of the MMPA’s legal standards, and (2) procedural inefficiency. Fixing some of the most obvious flaws in the MMPA could result in tangible regulatory benefits.

The following addresses some of the key problematic areas, as well as potential solutions. Following the examples set forth below on the practical impacts to the geophysical industry, I will provide detailed recommendations on how the MMPA should be amended to bring the law into the 21<sup>st</sup> century. It is time to bring the MMPA back in line with its original intent.

### **Atlantic OCS**

Approximately 30 years have passed since seismic surveys assessed the potential hydrocarbon resource base of the U.S. Atlantic OCS. However, seismic surveys for ‘scientific research’ have been conducted fairly regularly in the Atlantic OCS, in addition to other geophysical surveys used to characterize the seabed and subsurface for suitability of offshore wind energy facilities. One recent ‘scientific research’ survey collected data along 3,000 miles of trackline in the area of the Outer Banks, of North Carolina, between September and October 2014. This survey used the same technology that is used for oil and gas exploration. Another recent research seismic survey to record sea level change and its impact on the coastline was completed in July 2015 off the New Jersey coast.

Currently, six IAGC member companies are pursuing issuance of permits to conduct seismic surveying in the Atlantic OCS, a process that started seven years ago when the first permit application was filed, with then-Minerals Management Service. These proposed surveys are essential to the potential “expeditious and orderly development” of the OCS, as mandated by Congress in the Outer Continental Shelf Lands Act (OCSLA).

After extensive environmental review at the programmatic level, the BOEM published a Record of Decision in July 2014, authorizing consideration of permits for geophysical surveys. Since then, pending permit applications have been subjected to a regulatory process plagued with continued delays and uncertainty. This inexplicable and inexcusable process was capped by the previous administration’s abrupt political decision, on the eve of a new Presidency, to summarily deny all permit applications. BOEM has since correctly reinstated the permit applications, which remain under agency review.

Needless to say, obtaining a permit to conduct a seismic survey in the Atlantic has been an extensive process that includes many environmental impact analyses, multiple opportunities for public comment and review, including additional and unprecedented public comment periods that are not required by statute or regulation, and reviews by bordering states. However, the most concerning and problematic delays beginning in July 2014 are primarily due to difficulties acquiring IHAs from NMFS for the incidental take of marine mammals pursuant to the MMPA. BOEM has indicated that they will not issue decisions on pending seismic survey permits until NMFS has also authorized IHAs for the proposed activities.

As part of the permitting process to move forward with data acquisition on the Atlantic OCS our members have applied for coverage, in the form of IHAs issued pursuant to the MMPA, for any incidental harassment of marine mammals. The MMPA establishes clear deadlines for the processing of IHA applications. MMPA Section 101(a)(5)(D) states that the “Secretary shall publish a proposed authorization not later than 45 days after receiving an [IHA] application” and request public comment. 16 U.S.C. § 1371(a)(5)(D)(iii) (emphasis added). After holding a 30-day comment period, the Secretary “shall issue” the IHA within 45 days of the close of the

comment period, so long as the required MMPA findings are made. *Id.* These deadlines are particularly important because IHAs are issued for a period of only one year and planning for offshore surveys is complicated and very time-sensitive. Here, the IHA applications were submitted in 2014 (with some of them updated in the summer of 2015), and the first 45-day statutory deadline has already been surpassed by a substantial period of time. NMFS's own website acknowledges that following an adequacy and completeness review of two to six weeks, a full application process should last six to nine months. Some of our members have now waited nearly two years for IHAs.

To further illustrate the inconsistencies present in the BOEM permit and NMFS IHA processes for the Atlantic, BOEM provided an unprecedented 45 and 60 day public comment period on pending geophysical permit applications and NMFS added an unprecedented 30 day comment period on IHA applications. To our knowledge, neither comment period has ever been required for a permitting process or IHA process before.

Many reasons have been speculated for the delays to issuing decisions on pending IHA applications, which now stand in excess of 700 days in some cases. According to NMFS, one such delay in issuing IHAs was due to an unpublished study from Duke University that was unavailable to the public while the agency stalled its review of IHA applications to consider it at the request of certain environmental advocacy organizations<sup>2</sup>. These organizations have a well-established history of using the regulatory and litigation processes as means to impede and ultimately attempt to prevent any activities from occurring because they are fundamentally opposed to all offshore oil and gas activities.

Additional delays were attributed to uncertainty over application of a series of drafts and final guidance addressing acoustic threshold levels for permanent and temporary auditory threshold shifts in marine mammals (Acoustic Guidance).

Much has been made by environmental groups and the media of the estimate for as many as 138,000 Level A (potentially injurious) "takes" in the BOEM's programmatic environmental impact statement (PEIS) addressing the potential effects of seismic activities in the Atlantic Ocean. Using a more realistic risk criterion based on the above peer-reviewed research, and taking into account standard monitoring and mitigation practices employed by the seismic industry, the more likely estimate of potential Level A takes is zero or a comparably small single digit number; again, consistent with past experience in the Gulf of Mexico and other locations globally. In fact, with successful mitigation the government acknowledges that all estimates of injury would be avoided.

After completing a set of new acoustic guidelines in July 2015, complete with external expert review and an extended public comment period, NMFS again failed to implement new guidelines. Then unexpectedly on March 16<sup>th</sup> 2016, NMFS released a third draft of proposed revised acoustic guidelines. The third draft did not receive external expert peer review before it was sent to the public and NMFS provided for only a 14-day public comment period while inexplicably denying all reasonable extension requests. Within the short time period allowed for review, the experts within the seismic industry concluded that there are egregious errors in how

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<sup>2</sup> IAGC, API, NOIA letter; *Atlantic Ocean Geological and Geophysical Applications* – December 9, 2015

NMFS calculated sound impacts on marine mammals. In an apparent attempt to appease special interest groups inside and outside the agency, NMFS created a biologically unrealistic ‘precautionary’ large whale hearing function and selectively removed data from the large whale and seal hearing literature to better support a modified hearing curve that specifically targeted low frequency sound sources like seismic survey sounds. The guidance was finalized in the Fall of 2016 with only minor changes and included a ‘short-cut’ workaround purposefully designed to be overly cautious.

IAGC applauded inclusion of the acoustic guidelines in the President’s executive order earlier this year and will work closely with the new Administration to ensure the guidance is amended to reflect the best and accurate scientific information. Currently, however, NMFS is using the flawed acoustic guidance to (over)estimate the amount of takes that may be authorized by the Atlantic IHAs. NMFS’s inability to issue new acoustic guidance on a timely or straightforward basis as resulted in substantial additional delay.

Excessive delays, in violation of statute, should not continue and we appreciate this Committee’s oversight in ensuring Federal agencies are making transparent decisions, relying on the best publicly available science in a manner that is faithful to federal law and policy, which mandates the “expeditious and orderly” development of the OCS “subject to environmental safeguards.” Approximately 80% of the Mid- and South Atlantic Planning areas that was originally included in the draft 2017-2022 Five-Year Plan for consideration of exploration leases, has never been evaluated with seismic surveys. Based only on the small portion of the Atlantic OCS that has previously been surveyed, the BOEM estimates 4.72 billion barrels of recoverable oil and 37.5 trillion cubic feet of recoverable natural gas are available. With the ability to survey the Atlantic OCS with more modern technology, it is likely these estimates will significantly increase.

Further delay from the agencies is unacceptable and has no support in the plain language of the MMPA or the mandate of OCSLA.

### **Gulf of Mexico OCS**

In 2016, BOEM—on behalf of oil and gas and geophysical industries—submitted to NMFS a revised Application for ITRs for geophysical survey activity in the Gulf of Mexico (GOM). Pursuant to the MMPA, the ITRs would establish a framework for authorization of incidental take of marine mammals over the course of five years. NMFS accepted public comments on the application in early 2017.

The GOM OCS is a significant source of oil and gas for the Nation’s energy supply. In 2014, the GOM OCS region was responsible for 16% of the total United States crude oil production and 5% of dry natural gas production. Likewise, GOM OCS leases are an important source of federal revenues, generating substantial bonuses, rentals, and royalties paid to the United States. Since 2008, lessees have paid over \$11 billion in bonus bids for lease sales in the GOM OCS.

Total oil and gas royalty revenues from the GOM OCS amounted to almost \$5 billion in fiscal year 2015 alone. Moreover, BOEM has recently estimated the net economic value of future GOM leasing to be as high as \$197 billion. Geological and geophysical survey activities are crucial to the discovery, development, and valuation of OCS resources that lead to such

production. This technology has been used for more than 50 years around the world. It is still used in U.S. waters in the GOM with no known detrimental impact to marine animal populations or to commercial fishing.

Industry members are committed to environmental protection and ensuring that geophysical activities in the Gulf of Mexico are carried out in a responsible manner. Industry's long-standing and ongoing research into these issues reflects those interests. We do not, however, support ineffective, unproductive, or unreasonable requirements.

### **Arctic OCS**

The oil and gas industry has routinely applied for and successfully received incidental take authorizations pursuant to the MMPA covering geophysical and other exploration activities in the Arctic OCS, by NMFS and the FWS on a project-by-project basis (*i.e.*, incidental harassment authorizations) or through the issuance of ITRs and related letters of authorization.

In the past decade, almost every MMPA ITR issued for Arctic oil and gas activities has been challenged by environmental advocacy organizations, and in every instance and on all counts, the authorizations have been upheld by the courts. Specifically, various advocacy organizations challenged the U.S. Fish & Wildlife Service's 2006 Beaufort Sea ITRs, 2008 Chukchi Sea ITRs, and 2013 Chukchi Sea ITRs. These lawsuits were litigated in the Alaska federal district court and each lawsuit was appealed to the Ninth Circuit Court of Appeals. The plaintiffs asserted claims under the Administrative Procedure Act (APA) alleging violations of the MMPA and other federal environmental statutes. The most recent lawsuit challenging the 2013 Chukchi ITR was an expressly admitted attempt by advocacy organizations to block Shell's Chukchi Sea exploration program.

In all three cases, neither the Alaska district court nor the Ninth Circuit found merit in any of the claims raised by the advocacy groups. The track record of MMPA ITR litigation in the Arctic strongly supports the notion that advocacy groups have leveraged their ability to challenge MMPA ITRs via the APA as a means to attempt to block or impede oil and gas operations. However, although these lawsuits have cost the courts, agencies, and applicants substantial time and money, they have accomplished no meaningful result (other than delay, as intended by the advocacy groups) because, as the courts expressly held on all counts, none of the claims raised had any merit.

The past and existing approach to implementing the MMPA in the Arctic has been relatively efficient, thorough, effective, and approved by the courts. Yet, advocacy organizations have continued to misuse the APA's litigation provisions to attempt—unsuccessfully—to impede Arctic oil and gas activities. The misguided intentions of these organizations have not only failed in court, but the allegations upon which they are supposedly based have not borne out in the scientific record.

After decades of oil and gas exploration activities in the Arctic, there is no information demonstrating that any of the activities have had anything more than a negligible impact on marine mammal. This finding has been repeatedly made by federal agency scientists in

numerous public documents. In fact, as just one example, the iconic Arctic bowhead whale has dramatically increased in abundance during this same period of time.

### **Specific Recommendations for Modernizing the MMPA**

The following recommendations focus on the areas of the MMPA that are ambiguous and unsuited for practical application to offshore activities, and have been misapplied by agencies in the regulatory process and exploited by environmental advocacy organizations in litigation.

To issue an incidental take authorization under Section 101(a)(5) of the MMPA, the agency must show that the authorization will have no more than a negligible impact on marine mammal populations and result in only small numbers of incidentally taken animals.

- **Problems:** (1) “Negligible impact” is not clearly defined; (2) “small numbers” is not defined at all; and (3) there is significant overlap between these two ambiguous standards. These problems have led to regulatory uncertainty, inconsistent application by agencies, and much litigation.
- **Solution:** Create a redefined unambiguous “negligible impact” standard, and eliminate the “small numbers” requirement. A single, clear standard for authorizations would result in regulatory efficiency and predictability.

To issue an incidental take authorization, the agency must require “other means of effecting the least practicable impact.” These “other means” typically take the form of mitigation measures included as conditions of the authorization.

- **Problem:** “Least practicable impact” is not defined in the statute or in the implementing regulations. As a result, it is not consistently applied by agencies, there is very little guidance for the regulated community, and, most recently, the phrase has been unreasonably interpreted by the Ninth Circuit Court of Appeals.
- **Solution:** Create a new, clear definition for “least practicable impact.” The definition should state that operational concerns and economic feasibility are primary factors in determining what mitigation is “practicable.”

The MMPA permits the authorization of incidental take by harassment.

- **Problem:** The definition of “harassment” is overly broad and ambiguous, and confusingly refers to “potential” harassment rather than actual harassment. This results in serious problems in the estimation of incidental take and unrealistic assumptions made by the implementing agencies.
- **Solution:** Redefine “harassment” to remove the word “potential” and to establish a more specific standard that provides better clarity for the agencies and the regulated community.

### **Procedural Recommendations for Implementing the MMPA**

The following recommendations are specifically intended to address the inexcusable delays and other regulatory implementation problems that have occurred in the past decade. These recommendations are intended to make the regulatory process more efficient and predictable for both the implementation agencies and the regulated community.

The process for issuing incidental take authorizations is routinely delayed by the implementing agencies. The current procedural requirements create little accountability for agencies because they are either ambiguous or establish no consequences or solutions for unreasonably delayed agency action.

- **Solution #1:** Revise the procedural requirements to set clear and firm deadlines for each stage of the permitting process, and establish consequences for when agency deadlines are not met (*e.g.*, default approvals).
- **Solution #2:** Create a streamlined authorization process for certain low-effect, but common, activities (similar to the nationwide permit process under the Clean Water Act).

The MMPA creates a 5-year limit on “incidental take regulations” that requires applicants to petition for a new set of regulations every 5 years. This results in unnecessary and burdensome administrative processes that create frequent opportunities for litigation.

- **Solution:** Remove the 5-year limit or, alternatively, create a simple and straightforward 5-year renewal process.

Issues involving the overlap of the MMPA, the Endangered Species Act (ESA), and the National Environmental Policy Act (NEPA) have proven difficult for the agencies, the courts, and the regulated community. Because the MMPA sets the most rigorous conservation-oriented standards of all these statutes, additional reviews and administrative processes under the ESA and NEPA are often unnecessary and redundant.

- **Solution:** Make statutory revisions to minimize or eliminate the need for duplicative ESA and NEPA review processes for certain MMPA authorizations. This would substantially increase regulatory efficiency.

### **Streamlining Environmental Approvals Act of 2017**

In an effort to begin to bring certainty and clarity to the MMPA and solve some of the problems outlined in my testimony above, Representative Johnson (LA) has introduced, the *Streamlining Environmental Approvals Act of 2017*, or the *SEA Act*. By reducing burdensome geophysical authorizations, the *SEA Act* will ensure improved access to and expanded production of domestic energy supplies.

Similar to many other laws, the MMPA has been expanded and interpreted beyond what the law was intended to regulate. After decades of regulation and litigation, the law as applied is significantly different than what was originally intended by Congress. This current, overly-

burdensome and duplicative process impacts numerous business and communities. For years, the U.S. Navy has experienced substantial delays and added costs in acquiring permits to conduct sonar activity in U.S. oceans.

The bill would set clear and firm deadlines for each stage of the authorizing process by establishing a consequence for default approvals when deadlines are not met. Because IHAs expire after one year, project proponents must re-apply over multiple years, even if there is little or no change in the best available science or the marine mammal population. The *SEA Act* will allow IHAs to be renewed without lengthy and needless agency review so long as there have been no significant changes to the underlying activity.

Additionally, the bill removes duplicative federal agency processes between the MMPA and the Endangered Species Act (ESA) to increase regulatory efficiency. Because the MMPA sets the most rigorous, conservation-oriented standards of the two statutes, additional review and administrative processes under the ESA are unnecessary, redundant, and add no additional protections.

#### Specific Provisions of the SEA Act:

- Technical changes are made through striking and adding new legislative language.
- The Secretary has 45 days to accept or deny the request for a permit. The Secretary also has the option to request additional information to complete the request, but may not make a second request for information. If the Secretary does not respond within 45 days, the request will be considered complete by default. Following the completeness determination period, a 30-day public comment period will be provided.
- Allows the option to extend an IHA for more than a year if there has been no substantial change to the marine mammal population. The holder may request this extension up to 90 days before the expiration of the permit and the Secretary has 14 days to respond.
- The Secretary has 120 days total after an initial application to issue the authorization allowing for activity to begin. Should the deadline not be met, the authorization will be deemed approved on the terms stated in the application.
- Marine mammals that are also listed as endangered or threatened under the ESA are regulated under both the MMPA and ESA. The final section would exempt marine mammals from the ESA's section 9 take prohibition and section 7 federal consultation requirement since any "take" would be regulated by more stringent requirements of the MMPA. This will greatly reduce duplicative actions by federal agencies with no negative impacts individual marine mammals or marine mammal species.

#### **Conclusion**

After more than 50 years of continuous seismic survey sound in many places around the world, including the Gulf of Mexico, and after a decade of intense scientific and environmental advocacy group scrutiny, there is still **no** scientific support for statements that seismic sound kills or injures marine mammals, causes them to beach themselves, or disrupts their behavior to the extent that it affects the health and well-being of the individuals or the populations of which those individuals are a part. This, however, does not mean that our industry plans to discontinue our active search for any and all potentially undetected risks through our support of independent,

third-party research, nor does it mean that we will reduce our diligence in monitoring, mitigation and documentation of our activities and their potential environmental effects.

The preponderance of evidence against the possibility of environmental effects from our activities does, however, mean that irresponsible and unsupported speculations of what “could, might, or may” potentially occur will be subjected to the same high standards of scientific verification and validation that would be expected of our own industry-funded research.

As BOEM stated in its August 22, 2014 Science Note, “To date, there has been no documented scientific evidence of noise from air guns used in geological and geophysical (G&G) seismic activities adversely affecting marine animal populations or coastal communities. This technology has been used for more than 30 years around the world. It is still used in U.S. waters off of the Gulf of Mexico with no known detrimental impact to marine animal populations or to commercial fishing.”

IAGC finds it unacceptable for seismic permit applicants to have to wait over two years for issuance of a simple IHA when all the requisite environmental analysis, based on the best available science, has long since been completed. We ask this Committee to urge NMFS to adhere to required timelines set forth in the MMPA. Further, we urge the full Committee on Natural Resources to support and pass legislation to modernize the MMPA, including passage of the SEA Act without delay. The development of regulatory mechanisms for the Atlantic OCS and the Gulf of Mexico by the Department of Interior and related agencies such as NMFS has become a regulatory abyss in which the necessary and sufficient conditions for obtaining a permit are obscure and constantly changing without sufficient notice or adequate review. The lack of transparency and reliance upon scientifically questionable regulation and policy cannot continue if the United States intends to chart a sustainable energy future.

According to a recent report<sup>3</sup> from the U.S. Energy Information Administration, within the Department of Energy, global energy will grow by 48 percent by 2040. Many experts have explained that even the most ambitious schedule of renewable energy development will still require substantial supplies of oil and gas for at least the next 30-40 years, if not longer.

We urge congress to review the MMPA and pass meaningful reform, including the SEA Act, that will rectify the existing limbo for pending seismic survey IHA applications. Streamlining the permitting process along with reducing the ability for outside special interest groups to obstruct energy exploration is a necessary first step to ensure our continued development for future generations.

Thank you for the opportunity to testify today.

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<sup>3</sup> U.S. Energy Information Administration’s *International Energy Outlook 2016*



December 9, 2015

**VIA Email and Hand Delivery**

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**RE: Atlantic Ocean Geological and Geophysical Survey Applications**

Dear Dr. Sullivan and Ms. Hopper:

We would first like to thank the National Marine Fisheries Service (“NMFS”) and the Bureau of Ocean and Energy Management (“BOEM”) for their continuing attention to the applications that have been submitted for the conduct of geological and geophysical surveys in the Atlantic Ocean. As you know, these proposed surveys are essential to the potential development of the Outer Continental Shelf (“OCS”) resources of the Atlantic Ocean. Through the Outer Continental Shelf Lands Act (“OCSLA”), Congress mandated the “expeditious and orderly development” of the OCS “subject to environmental safeguards.” 43 U.S.C. § 1332(3). The Administration has furthered this goal by appropriately including the Mid-Atlantic and South Atlantic Planning Areas in the Draft Proposed OCS Oil and Gas Leasing Program for 2017-2022. The proposed surveys will facilitate the orderly development of the OCS, and significantly reduce environmental risk, by increasing the likelihood that exploratory wells will tap hydrocarbons, decreasing the number of wells that need to be drilled in a given area. We appreciate BOEM and NMFS’s efforts to ensure that the necessary permitting for these surveys is carried out in a thorough, thoughtful, and prompt manner, consistent with statutory timelines and with OCSLA’s mandate.

We also write to express serious concerns in response to recent efforts that have been made by certain advocacy organizations (referred to collectively in this letter as “NRDC”) to impede and delay the permitting processes for the proposed Atlantic OCS surveys.<sup>1</sup> Specifically, NRDC has identified an unpublished study, which is premised upon models developed by Duke University scientists and which has not been made available to the public, as a basis for substantially delaying the permitting processes.<sup>2</sup> Relatedly, our organizations have been informed by NMFS that it is planning to delay the issuance of proposed incidental harassment authorizations (“IHAs”) under the Marine Mammal Protection Act (“MMPA”) for many months as a result, in part, of the NRDC Letter and meetings with NRDC.

Our concerns with these developments are addressed below. In addition to conveying our concerns in this letter, we respectfully request an in-person meeting to discuss these pressing issues as soon as possible. Thank you for considering the comments below as well as our request for a meeting.

**I. NMFS may not delay the IHA permitting process based upon an unpublished study that has not been made available to the public.**

We agree with the premise that MMPA decisions must be based upon the best available scientific information. However, it is inappropriate, and contrary to the MMPA, for NMFS to delay pending IHA applications based upon an unpublished study that has not been made available to the public. Three undisputed principles are particularly relevant here.

*First*, the MMPA establishes clear deadlines for the processing of IHA applications. MMPA Section 101(a)(5)(D) states that the “Secretary shall publish a proposed authorization not later than 45 days after receiving an [IHA] application” and request public comment. 16 U.S.C. § 1371(a)(5)(D)(iii) (emphasis added). After holding a 30-day comment period, the Secretary “shall issue” the IHA within 45 days of the close of the comment period, so long as the required MMPA findings are made. *Id.* These deadlines are particularly important because IHAs are issued for a period of only one year and planning for offshore surveys is complicated and very time-sensitive. Here, the IHA applications were submitted in 2014 (with some of them updated in the summer of 2015),

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<sup>1</sup> See October 26, 2015 letter from NRDC et al. to Gary D. Goeke, BOEM (“NRDC Letter”).

<sup>2</sup> The Duke University models are referred to by NRDC as the “Atlantic CetMap” models. We understand that the models may be published in a paper authored by Duke University scientists. We refer to this unpublished paper in this letter as the “Duke Study.” The NRDC Letter also references an August 27, 2015 letter from Jason J. Roberts and Patrick N. Halpin (Duke University) to Jolie Harrison (NMFS). We understand that some of the information cited in Duke’s August 27, 2015 letter was provided to BOEM and to at least three of the Atlantic IHA applicants in February 2015.

and the first 45-day statutory deadline has already been surpassed by a substantial period of time. Further delay is unacceptable and has no support in the plain language of the MMPA.

*Second*, NMFS is required to utilize the best available scientific information, not the best possible information. *See Bldg. Indus. Ass'n of Superior Cal. v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001) (“the Service must utilize the ‘best scientific ... data available,’ not the best scientific data possible”); *Blue Water Fishermen’s Ass’n v. NMFS*, 226 F. Supp. 2d 330, 338 (D. Mass. 2002) (“[I]mperfections in the available data do not doom any agency conclusion...”); *see also, e.g., Brower v. Evans*, 257 F.3d 1058, 1070-1071 (9th Cir. 2001) (“Scientific findings in marine mammal conservation area are often necessarily made from incomplete or imperfect information.”). At this point, because the Duke Study is unpublished, has not been peer-reviewed or otherwise rigorously vetted, and is unavailable to the public, it is best characterized as “possible” scientific information for regulatory purposes, not “available,” let alone the “best,” scientific information. The MMPA provides no basis for delaying the processing of an IHA application so that NMFS can wait for the best “possible” information to become the best “available” information.

*Third*, if NMFS determines the Duke Study to be part of the “best available” information, then the study must immediately be made available to the public (otherwise, it is not “available”). NOAA’s Scientific Integrity Policy states that NOAA must “ensure public access to . . . information and supporting data” used in decision-making.<sup>3</sup> Additionally, the President has directed that “if scientific and technological information is developed and used by the Federal Government, it should ordinarily be made available to the public” and that “there should be transparency in the preparation, identification, and use of scientific and technological information in policymaking.”<sup>4</sup> In the NEPA and ESA contexts, courts also mandate the public disclosure of important decision documents and data. *See, e.g., Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998) (EIS arbitrary and capricious because “NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion”); *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1403 (9th Cir. 1995) (setting aside listing of hot spring snail because “provisional draft [report] should have been available for public review so that its accuracy could have been verified before the FWS made a decision relying, to a large extent, on information contained in the report”).

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<sup>3</sup> NOAA Scientific Integrity Policy, NAO 202-735D (Dec. 7, 2011), available at [http://www.corporateservices.noaa.gov/ames/administrative\\_orders/chapter\\_202/202-735-D.html](http://www.corporateservices.noaa.gov/ames/administrative_orders/chapter_202/202-735-D.html).

<sup>4</sup> President Obama, Memorandum for the Heads of Executive Departments and Agencies (Mar. 9, 2009), available at <https://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-3-9-09>.

Public disclosure of the Duke Study (should it be used by NMFS) is particularly important because, at this point, it is unknown whether, how, and to what degree the information in the Duke Study is accurate and relevant to the analyses of the potential effects of the proposed actions. Based on the limited information we do have, there appear to be certain important areas of the study that are based on opinion—as opposed to scientific data—and inconsistencies with existing information.<sup>5</sup> Moreover, we understand that the information supporting the Duke Study has been modified at least four times since it was provided to BOEM and the IHA applicants. We also understand that the first submission of the Duke Study for peer-reviewed publication was rejected, and that a new version is currently being prepared for review in a different journal. It is therefore far from certain whether the Duke Study has been sufficiently vetted for use in important regulatory decision-making processes.

In sum, if the Duke Study was appropriately vetted, peer reviewed, available to the public, and determined to be relevant, then we agree that NMFS should take the study into account as part of the “best available science” when considering the Atlantic IHA applications.<sup>6</sup> However, until these steps occur, it is not appropriate or lawful to use the Duke Study in the permitting process or to delay the permitting process until these steps occur. NMFS must proceed as required by the timelines set forth in the MMPA.

## **II. NMFS must ensure that it takes a consistent approach to its use of the “best available science.”**

As detailed above, to avoid engaging in arbitrary agency action, NMFS must apply a consistent approach in determining what constitutes the “best available science.” Two specific examples stand out as critical considerations in this respect.

*First*, if NMFS is going to consider an unpublished study that has not been peer-reviewed and is not available to the public to be the “best available science,” then it must also allow applicants to base their projected incidental take estimates, in whole or in part, on the draft guidance addressing acoustic threshold levels for permanent and temporary auditory threshold shifts in marine mammals (“Acoustic Guidance”), as well as the information set forth in the Acoustic Guidance.<sup>7</sup> The Acoustic Guidance is similarly

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<sup>5</sup> Some of the few scientists who have reviewed the unpublished models used in the Duke Study have reported differences in opinion regarding Duke’s selective use of the available data as well as the interpretation of the selected data.

<sup>6</sup> Arguably the Duke Study does not contain the most current marine mammal density data. That data is contained in the NMFS AMAPPS surveys, which we understand are not used in the Duke Study. The Duke Study may also not provide the best information available to support specific aspects of the proposed activities for which better information may be available.

<sup>7</sup> See NOAA, Draft Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing, Underwater Acoustic Threshold Levels for Onset of

unpublished but, unlike the Duke Study, it has been made available for public review and commented upon—twice—by the public. It has also been subjected to rigorous agency review. Moreover, the Acoustic Guidance is based upon many scientific papers that, unlike the Duke Study, have been peer-reviewed and published.

*Second*, NRDC asserts that the Duke Study contains new information regarding the density of certain marine mammal species in certain parts of the Atlantic Ocean. NRDC further asserts that application of this density data would result in take estimates that are three to fifteen times higher than the estimates provided in BOEM’s Programmatic Environmental Impact Statement for Atlantic OCS Proposed Geological and Geophysical Activities (“PEIS”), which NRDC claims are “grossly underestimated.” We cannot speculate on the actual effect of applying the data contained in the Duke Study because we have not seen it and because it has apparently not been subjected to a rigorous review for accuracy and applicability. However, if the Duke Study’s density data and models are used for estimating the amount of incidental take by the IHA applicants, then they must equally be used to prepare updated marine mammal population estimates. Those updated population estimates must, in turn, be used for NMFS’s “negligible impact” and “small numbers” evaluations.<sup>9</sup> It would be arbitrary (and a violation of the Administrative Procedure Act) for NMFS to use the Duke Study’s density data and models for one purpose—take estimation—and to not use the same data and models for another purpose—population estimation. This would be particularly arbitrary because these factors are very related and relevant for purposes of NMFS’s negligible impact and small numbers determinations.

### **III. Supplementation of the PEIS is not required or appropriate.**

The NRDC Letter asserts that BOEM must prepare a new EIS to supplement the PEIS based upon the Duke Study and a Nowacek et al. (2015) paper.<sup>10</sup> However, NRDC

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Permanent and Temporary Threshold Shifts (July 23, 2015), available at: <http://www.nmfs.noaa.gov/pr/acoustics/draft%20acoustic%20guidance%20July%202015.pdf>.

<sup>9</sup> For example, because the “small numbers” determination is based on an analysis of the estimated take in proportion to the size of the marine mammal population, an increased density assumption may result in a higher number of estimated takes, but those takes would be compared against a larger population estimate (derived from higher density estimates). *See Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 905-907 (9th Cir. 2012) (holding that “small numbers” is to be determined relative to the size of the marine mammal population).

<sup>10</sup> Nowacek, D.P., Clark, C.W., Mann, D., Miller, P.J.O, Rosenbaum, H.C., Golden, J.S., Jasney, M., Kraska, J., and Southall, B.L., Marine seismic surveys and ocean noise: Time for coordinated and prudent planning, *Frontiers in Ecology and the Environment* 13: 378-386 (2015). Notably, *Frontiers in Ecology and the Environment* does not provide a platform for the publication of scientific studies. Rather, it contains

misunderstands the purpose of the PEIS and the application of NEPA in this instance. Supplementation of the PEIS is not required for at least the reasons described below.

Even if the Duke Study is determined to be reliable, “available,” and appropriate for use in permitting processes, supplementation of the PEIS is not required because the information from the Duke Study (and any other new “available” information) can be integrated into project-specific NEPA reviews for the IHAs and BOEM permits. Supplementation is only required in instances in which there are remaining federal actions that are subject to an EIS.<sup>11</sup> Here, the PEIS “does not authorize any particular G&G activities,” but rather “provides a higher level analysis of impacts from which site-specific NEPA evaluations will draw, or be ‘tiered.’” PEIS at vii. Accordingly, there is no federal action left to occur under the PEIS and, consequently, no legal basis for supplementation of the PEIS. Project-specific NEPA reviews will effectively, and appropriately, address the effects of the proposed activities, including all relevant cumulative effects.<sup>12</sup> See 40 C.F.R. § 1508.28.

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“synthetic review articles on all aspects of ecology, the environment, and related disciplines, as well as short, high-impact research communications of broad interdisciplinary appeal. Additional features include editorials, breaking news (domestic and international), a letters section, job ads, and special columns.” See <http://www.frontiersinecology.org/fron/>. The Nowacek et al. (2015) simply offers opinions about possible alternatives to current practices—not new scientific data and analyses subject to the type of reviews that were applied to the Acoustic Criteria or to other acoustic criteria standards. Moreover, the Nowacek et al. (2015) paper does not suggest an alternative Level B threshold of 140 dB—that suggestion is merely added as supplemental “WebPanel” information available only in the internet version of the paper.

<sup>11</sup> See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989) (supplemental EIS need only be prepared “[i]f there remains ‘major Federal actio[n]’ to occur.”); *id.* at 373 (“An agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable”); see also *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 72 (2004) (citing *Marsh*).

<sup>12</sup> The NEPA reviews performed for each IHA must evaluate only the effects of the take authorization, not the effects of the underlying activity. See *Salazar*, 695 F.3d at 916-17 (noting that environmental assessment’s scope of analysis was “narrow” because the federal action in question was promulgation of MMPA incidental take regulations and not, more broadly, the authorization of oil and gas exploration or development). Because IHAs must, by definition, have no more than a “negligible impact,” the IHAs will not have a “significant impact” for NEPA purposes, and are appropriately reviewed with environmental assessments. See *id.*; see also *Ctr. for Biological Diversity v. Kempthorne*, No. 3:07-cv-00141-RRB, 2008 U.S. Dist. LEXIS 109152 at \*15-16 (D. Alaska Apr. 22, 2008) (“because an EIS is only required when an agency finds that its proposed actions(s) [sic] will have a ‘significant’ impact on the environment, ... an EIS was not necessary to analyze the ‘negligible’ impacts of the incidental take regulations at issue”).

Aside from the fact that supplementation of the PEIS is not required, it bears emphasis that, at this point, it is not known whether the Duke Study constitutes “significant new information relevant to environmental concerns and bearing on the proposal or its impacts” because the public has not had the opportunity to review the study and it has not otherwise been subjected to a rigorous assessment. 40 C.F.R. § 1502(9)(c). It is also unknown whether the Duke Study and the underlying data, if relevant, would result in an effects assessment that is significantly different than the assessment presented in the PEIS. *See Hammond v. Norton*, 370 F. Supp. 2d 226, 254 (D.D.C. 2005) (“Not every change requires [a supplemental EIS]; only those changes that cause effects which are significantly different from those already studied require supplementary consideration.”) (internal citations omitted).

Contrary to NRDC’s assertion, the PEIS’s analysis of marine mammal impacts was purposefully constructed to dramatically overestimate levels of incidental take. In the PEIS, BOEM explains:

The acoustic and impact modeling conducted to develop these [incidental take] estimates is by its very nature complex and demands numerous specific details be identified and used during calculations[.] However, it must be emphasized that each of these assumptions are purposely developed to be conservative and accumulate throughout the analysis (e.g., representative sound source is modeled at highest sound levels and always at maximum power and operation, sound levels received by an animal are calculated at highest levels, marine mammal density values used likely exceed actual densities, and models do not include the effect of all mitigations in reducing take estimates). Therefore, the results of the modeling predictions will overestimate take.

PEIS at 1-5; *see also* PEIS at 4-62 (“BOEM emphasizes that these estimates should be seen as highly conservative of potential take without the consideration of most mitigation with the exception of the time-area closure described in Alternative A.”). Accordingly, even if the data and models from the Duke Study were to result in different incidental take estimates, those estimates may very well fall within the broad range of overestimated effects already considered in the PEIS.

In sum, supplementation of the PEIS is not required or appropriate. Substantively, there is insufficient information available about the Duke Study to make an informed determination whether it is relevant at all and, if so, presents effects that are beyond the broad range of effects already considered. Even if the Duke Study is considered, it is appropriately addressed in project-specific NEPA reviews because there are no federal actions to specifically occur under the PEIS and, therefore, there is no legal basis to supplement the PEIS. We respectfully submit that valuable agency time is better

spent on the thoughtful preparation of analyses to support the findings required for the requested authorizations than on the unwarranted NEPA process that has been suggested by advocacy organizations.

#### **IV. Conclusion.**

Our organizations remain ready and willing to work productively with both NMFS and BOEM to do what we can to help ensure that the proposed surveys are carried out in a responsible manner, consistent with the mandates of OCSLA, the MMPA, NEPA, and other applicable statutes. However, we cannot support the unwarranted and unlawful delay of the pending applications. The primary organizations advocating for this delay have a well-established history of using the regulatory and litigation processes as means to impede and ultimately attempt to prevent any activities from occurring because they are fundamentally opposed to all offshore oil and gas activities. These motivations are contrary to federal law and policy, which mandates the “expeditious and orderly” development of the OCS “subject to environmental safeguards.” We sincerely hope that NMFS and BOEM will proceed in a manner that is faithful to federal law and policy, without further delay.

Sincerely,



Erik Milito  
Group Director, Upstream & Industry Operations  
American Petroleum Institute



Nikki Martin  
President  
International Association of Geophysical Contractors



Randall Luthi  
President  
National Ocean Industries Association

cc: The Honorable John Thune, Chairman, Senate Committee on Commerce  
The Honorable Bill Nelson, Ranking Member, Senate Committee on Commerce  
The Honorable Rob Bishop, Chairman, House Committee on Natural Resources  
The Honorable Raul Grijalva, Ranking Member, House Committee on Natural  
Resources  
Mr. Mike Celata, BOEM, Gulf of Mexico Region Director  
Dr. Jill Lewandowski, BOEM, Division of Environmental Assessment Chief  
Ms. Donna Wieting, NMFS, Director of Protected Resources  
Ms. Jolie Harrison, NMFS-PR, Permits and Conservation Division Chief  
Mr. Gary Goeke, BOEM, GOM Region, Environmental Assessment Section  
Chief



February 2, 2017

**VIA Email**

Mr. Samuel D. Rauch, III  
Acting Assistant Administrator for Fisheries  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910

**Re: Applications for MMPA Incidental Harassment Authorizations for Geophysical Surveys in the Atlantic Ocean**

Dear Mr. Rauch:

We write on behalf of the International Association of Geophysical Contractors (IAGC), the American Petroleum Institute (API), and, specifically, IAGC members who have applied to the National Marine Fisheries Service (“NMFS”) for incidental harassment authorizations (“IHAs”) under Section 101(a)(5)(D) of the Marine Mammal Protection Act (“MMPA”) for geophysical surveys in the Atlantic Ocean.<sup>1</sup> These IHA applicants received letters from NMFS, on or about January 13, 2017, stating that “NMFS does not intend to continue processing” their IHA applications. The letter states that NMFS’s stoppage of these regulatory processes is due to “BOEM’s denial [of survey permit applications] and the related fact that there is no reasonably foreseeable start date for [the] specific activity.” As explained below, NMFS’s unilateral and indefinite stoppage of these regulatory processes is unwarranted and unlawful.

First, NMFS has no authority under the MMPA or its implementing regulations to halt the processing of IHA applications simply because the permits for the underlying activities have been denied. Those permits—which are the subject of an entirely separate permitting process, involving a different statute and a different agency—may be administratively appealed, and it is far from certain that those permits will not ultimately be issued to the applicants. Indeed, applicants often apply for IHAs while the permitting of their underlying activities is in a state of incompleteness and uncertainty.

Second, after the submittal of an IHA application, NMFS is required to “determine the adequacy and completeness of a request.” *Id.* § 216.104(a) and (b)(1). If the application is determined to be adequate and complete, then NMFS must begin the public review process by publishing notice of a proposed IHA in the Federal Register. *Id.* § 216.104(b)(1). Conversely, if the application is determined to be incomplete, it “will be returned to the applicant with an

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<sup>1</sup> These members are ION GeoVentures, Spectrum Geo Inc., TGS-NOPEC Geophysical Company, and WesternGeco, LLC.

explanation of why the application is being returned.” *Id.* § 216.104(b)(3). NMFS has not determined that the Atlantic IHA applications are inadequate or incomplete, and it has not returned the applications. Because NMFS has not taken action under § 216.104(b)(3), the only lawful option for NMFS is to proceed with the publication process stated in § 216.104(b)(1).

Third, NMFS continues to violate its statutory obligation to publish a proposed authorization, in response to each IHA application, “not later than 45 days after receiving” the applications. 16 U.S.C. § 1371(a)(5)(D)(iii) (emphasis added). As of the date of this letter, it has now been 554 days (and counting) since NMFS published notice of its receipt of the Atlantic IHA applications. 80 Fed. Reg. 45,195 (July 29, 2015). This delay is inexcusable.

For these reasons, we demand that NMFS immediately complete the processing of each of the four lawfully submitted Atlantic IHA applications and promptly publish proposed authorizations in the Federal Register, as it was required to do well over a year ago.

Sincerely,



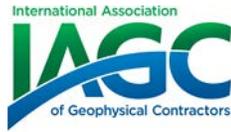
Nikki Martin  
International Association of Geophysical Contractors  
President



Andy Radford  
American Petroleum Institute  
Sr. Policy Advisor – Offshore

CC:

Donna Wieting, Director, Office of Protected Resources, NOAA  
Senate Commerce Committee Chairman John Thune  
House Natural Resources Committee Chairman Rob Bishop



May 19, 2017

**VIA Email**

Jolie Harrison  
Chief, Permits and Conservation Division  
Office of Protected Resources  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910

**Re: Applications for MMPA Incidental Harassment Authorizations for Geophysical Surveys in the Atlantic Ocean**

Dear Ms. Harrison:

We write on behalf of the International Association of Geophysical Contractors (IAGC), the American Petroleum Institute (API), and, specifically, IAGC members who have applied to the National Marine Fisheries Service (NMFS) for incidental harassment authorizations (IHAs) under Section 101(a)(5)(D) of the Marine Mammal Protection Act (MMPA) for geophysical surveys in the Atlantic Ocean.<sup>1</sup> These IHA applicants received letters from NMFS, on or about January 13, 2017, stating that “NMFS does not intend to continue processing” their IHA applications. The letters state that NMFS’s stoppage of these regulatory processes is due to the Bureau of Ocean Energy Management’s (BOEM) “denial [of survey permit applications] and the related fact that there is no reasonably foreseeable start date for [the] specific activity.” The letters further instruct the applicant to contact NMFS “[i]f circumstances arise such that [the applicant] may lawfully conduct the seismic survey activity described in its MMPA application.” As explained below, circumstances for applicant companies have changed. Further, as stated in IAGC and API’s February 2, 2017 letter to the Acting Assistant Administrator for Fisheries (incorporated by reference), we maintain that the current, and any further, suspension of processing IHAs is unlawful and that processing of the IHAs must resume without further delay.

First, on April 28<sup>th</sup>, President Trump signed Executive Order 13795, entitled “Implementing an America-First Offshore Energy Strategy,” which directs the Secretaries of Interior and Commerce to coordinate the development and implementation of a “streamlined permitting approach for privately funded seismic data research and collection aimed at expeditiously determining the offshore energy resource potential of the United States within the Planning Areas.” (Sec. 2). This provision has direct relevance to the current and unwarranted

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<sup>1</sup> These members are ION GeoVentures, Spectrum Geo Inc., TGS-NOPEC Geophysical Company, and WesternGeco, LLC.

permitting delays for geophysical and geological (G&G) activities on the Atlantic Outer Continental Shelf (OCS), where applications have been pending for as long as nine years.

Second, the Executive Order directs, “the Secretary of the Interior and the Secretary of Commerce shall, to the maximum extent permitted by law, expedite all stages of consideration of Incidental Take Authorization requests, including Incidental Harassment Authorizations and Letters of Authorization, and Seismic Survey permit applications under the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 et seq., and the Marine Mammal Protection Act, 16 U.S.C. 1361 et seq.” (Sec. 9). As previously mentioned in our February 2, 2017 letter, NMFS continues to violate its statutory obligation to publish a proposed IHA in response to each application “not later than 45 days after receiving” the applications. 16 U.S.C. § 1371(a)(5)(D)(iii) (emphasis added). As of the date of this letter, it has now been 661 days (and counting) since NMFS published notice of its receipt of the Atlantic IHA applications. 80 Fed. Reg. 45,195 (July 29, 2015). This delay is inexcusable, and in light of the agency’s statutory obligation and the President’s specific direction in the Executive Order, NMFS must process the pending IHA applications without delay.

Third, on May 10, 2017, the BOEM’s Acting Director issued a memorandum rescinding the previous decision to deny Atlantic G&G permit applications and subsequently the Interior Board of Land Appeals remanded the appealed denials back to BOEM – effectively reinstating the G&G permit applications for BOEM’s consideration. In the May 10, 2017 Memorandum, the Acting Director states that in directing the review of permit applications already on file, it is his intent to “allow the process governing the issuance of IHAs to resume relatively unimpeded.” The permit applicants are now in the same position they were on January 4, prior to their denial, only with an additional four and a half months of delay without agency action on proposed MMPA authorizations.

For the reasons stated above, along with the invitation included in the January 13 letter to applicants to contact NMFS if new circumstances arise, we are contacting NMFS to identify the new circumstances and urge you to immediately complete the processing of each of the lawfully submitted Atlantic IHA applications and promptly publish proposed authorizations in the Federal Register, as the agency was statutorily required to do well over a year ago. Based on conversations with NMFS staff, we understand the processing of IHA applications was effectively complete at the time of the January 13 suspension was announced, further leading us to conclude that agency action publishing proposed authorizations should be imminent.

Sincerely,



Nikki Martin  
International Association of Geophysical Contractors  
President

A handwritten signature in blue ink that reads "Andy Radford". The signature is cursive and fluid.

Andy Radford  
American Petroleum Institute  
Sr. Policy Advisor – Offshore

CC:

Mr. Samuel D. Rauch, III, Acting Assistant Administrator for Fisheries  
Donna Wieting, Director, Office of Protected Resources, NOAA  
Senate Commerce Committee Chairman, John Thune  
House Natural Resources Committee Chairman, Rob Bishop