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VIA Email and Hand Delivery

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Room 5128
Washington, D.C. 20230

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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impede and delay the permitting processes for the proposed Atlantic OCS surveys.¹ Specifically, NRDC has identified an unpublished study, which is premised upon models developed by Duke University scientists and which has not been made available to the public, as a basis for substantially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.² 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),

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

² 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.³ 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.”⁴ 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”).

³ 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.

⁴ 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.⁵ 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.⁶ 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.⁷ The Acoustic Guidance is similarly

⁵ 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.

⁶ 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.

⁷ 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.⁹ 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.¹⁰ However, NRDC

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

⁹ 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).

¹⁰ 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.¹¹ 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.¹² See 40 C.F.R. § 1508.28.

“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.

¹¹ 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*).

¹² 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,



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cc: The Honorable John Thune, Chairman, Senate Committee on Commerce
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The Honorable Rob Bishop, Chairman, House Committee on Natural Resources
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