April 5, 2022

Dr. Richard W. Spinrad
NOAA Administrator
National Oceanic and Atmospheric Administration
1401 Constitution Avenue NW, Room 5128
Washington, DC 20230

Dear Dr. Spinrad,

The undersigned American Petroleum Institute (API), EnerGeo Alliance and National Ocean Industries Association (NOIA) (hereafter, Associations) write on behalf of their member companies seeking relief from unreasonable delays in permitting under the National Marine Fisheries Service's (NMFS) Incidental Take Regulation (ITR), covering oil and natural gas geological and geophysical (G&G) operations in the Gulf of Mexico (GOM).

Background

G&G operations are critical to maintain safe and efficient exploration, drilling, energy production, and pipeline transportation in the GOM at a time when our nation needs it the most. Modern G&G imaging lets geoscientists and engineers visualize the sub-surface to identify potential hazards and maximize resource recovery. Additionally, G&G information is instrumental in helping companies discover and develop new oil and natural gas resources.

G&G activities introduce sound into the marine environment and use data from the return of the sound signature. While this sound is focused on the subsurface, sound in the water column may be audible to marine species. Therefore, NMFS has determined that this sound requires special authorization under the Marine Mammal Protection Act (MMPA).

In April 2021, the final GOM ITR, under which individual operators may apply for a LOA for G&G survey activities, became effective. During the lengthy rulemaking process, industry repeatedly expressed concerns with the modeling NMFS employed to estimate the number of "takes" (i.e., exposures of a marine mammal to sound above a certain threshold). Put simply, industry identified shortcomings in

the modeling approach that led to exponential *overestimates* of take.[1] The GOM ITR also established annual and five-year allowable takes that NMFS will authorize for each species.

The GOM ITR has been in effect for less than a year, but already serious problems stemming from the flawed model and poor implementation have become apparent. Significant delays are occurring when the Associations' members seek LOAs from NMFS to conduct seismic surveying and other G&G activities in the GOM. These delays have commercial, operational, and safety implications.

The delays appear to stem from NMFS' reliance on faulty modeling that requires operators to *overestimate* potential incidental takes of marine mammals during industry G&G activity and a separate error in the GOM ITR that artificially *reduced* the annual and five-year allowable takes.[2]

Case Study of the Gulf of Mexico Incidental Take Regulation: Killer Whale

The problem is most acute regarding authorized takes of killer whales, even though killer whales were the least reported animal in protected species datasets for the past two decades[3,4] and are extremely rare in the GOM.

In most cases, the GOM ITR requires operators to use the flawed modeling to estimate the "takes" that would result from proposed surveys. This means that operators are forced to seek authorization for more takes of killer whales than are reasonably likely to occur. This issue is compounded by NMFS' policy of issuing take authorizations only for killer whale "groups." Where a killer whale take is indicated in a LOA request, NMFS authorizes take of a "group" of seven individual killer whales even if the modeled take is less than one. NMFS' policy of creating a density model for a species with no meaningful density is inappropriate and will not produce accurate results.

Because killer whales are extremely rare in the GOM, this policy of issuing seven killer whale takes any time killer whale take is indicated meant that NMFS rapidly approached the pre-established, artificially

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[1] The Associations also sent NMFS an Information Quality Act Correction Request in February 2020 to address the modeling errors that led to the exponential overestimates of takes. The letter explained that "NMFS's model adds substantial conservative margins to individual, independent inputs and then multiplies them together, causing exponential overestimates. Instead of calculating the 'best' available scientific estimate of the number of predicted marine mammal takes, as required by both the MMPA and Information Quality Act, and then adding a conservative margin to the estimate, NMFS's modeling, by multiplying the conservative margins at each and every stage, produces orders of magnitude more predicted takes than a best estimate would ever predict." To date, NMFS had not responded to the Correction Request.

[2] NMFS has stated that when the area of coverage for the GOM ITR was modified during the rulemaking to exclude areas where G&G would not be permitted, a different mathematical error in the process resulted in an underestimate of the takes that were used to define the annual and five-year caps on take.

[3] Milne, S. et al. (2019). International Protected Species Observer Data Analysis Report. Prepared under contract for the International Association of Oil & Gas Producers. Houston, TX, USA, reported only five groups and a total of 21 individuals sighted by protected species observers in the US Gulf of Mexico between 2009 and 2017, with a mean group size of 4.2 individuals.

[4] Barkaszi, M.J. and C.J. Kelly. 2018. Seismic survey mitigation measures and protected species observer reports: synthesis report. U.S. Dept. of the Interior, Bureau of Ocean Energy Management, Gulf of Mexico OCS Region, New Orleans, LA. Contract No.: M17PD00004. OCS Study BOEM 2019-012. 220p., reported 10 groups totaling 49 individuals with a mean group size of 5.44 between 2002-2015 in the delphinid data deemed acceptable for statistical analysis.

reduced limit on takes of killer whales. It appears NMFS significantly slowed LOA issuance because the modeled number of authorized killer whale incidental takes nearly exceeded the number of killer whale takes authorized for the first year. While the implementation problem has first presented with killer whales, it's likely to reoccur with other rare species, creating further delays in issuing LOAs.

The situation for the second year of the GOM ITR is even worse. Several LOAs were issued during the first year, with the possibility of completion during Year 1 or Year 2 – when effective dates extended past the end of the ITR year (mid-April). With Year 2 starting in April 2022, all possible takes for Year 2 already have been issued.

While NMFS appears to be returning takes for killer whales to the "pool" for the year following the conclusion of the requested activity with no killer whale observations or once the effective date passes, this does little to alleviate the serious authorization bottleneck in Year 2. At best this creates a "one in, one out" authorization process. More importantly, no other authorizations can be issued until one of the existing activities is completed without a killer whale take, or the authorization expires. This will cause severe disruptions in exploration and production in the GOM, created by concern for a species that is only very rarely present in the GOM.

Resolution of the Gulf of Mexico Incidental Take Regulation Bottleneck

NMFS recognizes there is a problem and has announced its intent to issue a new proposed rule for public comment in November 2022, with implementation in 2023.[5] Respectfully, the Associations assert that this simply adds more delay to a situation where a problem has been evident for some time. NMFS should expedite the rulemaking, because this situation only worsens with each passing day as more and more companies seeking LOAs will be shuttled to the back of the queue. Additionally, we request that NMFS actively work with industry on implementing the new rule, to facilitate LOA issuances so that critical G&G activities are not halted or delayed while regulatory processes play out.

Unfortunately, addressing LOA delays will not entirely fix the problem. API and the EnerGeo Alliance have sent NMFS two memos outlining additional problems associated with the agency's overly conservative modelling and potential solutions to remedy these issues. These recommendations include: 1) appropriately accounting for the likelihood that the same animals will be encountered multiple times, due to the typical pattern of G&G survey operations; and 2) issuing LOAs for rare species in an alternative manner, consistent with methods used by the agency previously in other regions. This second recommendation would immediately resolve the LOA issuance delays associated with killer whales. To-date, NMFS has not provided any feedback on these recommendations.

Conclusion

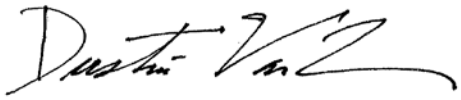
World events are particularly unsettled and developing future energy supplies to strengthen U.S. energy security should be a primary focus of the administration. These G&G permitting delays – when coupled with the lack of progress on a new five-year offshore leasing program and the possibility that there will be no new offshore lease sales for years to come – undermine the predictability companies have relied on to make multi-billion-dollar investment decisions in the GOM.

[5] https://media.fisheries.noaa.gov/2022-02/GOM_RevisedRuleStatement_OPR1_0.pdf

NMFS should address the problems described in this letter as quickly as possible, so that companies can continue to explore for and develop hydrocarbon resources in the GOM.

Should you have any questions, please contact Erik Milito (milito@noia.org, 202-347-6900), Dustin Van Liew (dvanliew@energeoalliance.org, 713-957-8080), Alex Loureiro (aloureiro@energeoalliance.org, 713-957-8080), or Andy Radford (radforda@api.org, 703-447-2297).

Sincerely,



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Cc: Janet Coit, Assistant Administrator, National Marine Fisheries Service
Sam Rauch, Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service