

authorized with a letter of authorization (“LOA”). 50 C.F.R. §§ 216.105, 216.106. When issuing ITRs and IHAs, NMFS must find, among other things, that the authorization will (i) have a negligible impact on marine mammal stocks; (ii) not have an unmitigable adverse impact on subsistence needs for marine animals; and (iii) minimize effects through implementation of appropriate mitigation. *See* 16 U.S.C. § 1371(a)(5)(D).

In addition, federal “agency actions” that are likely to adversely affect an ESA-listed species or its critical habitat are subject to consultation under Section 7 of the ESA, in which the consulting agency (NMFS or FWS) issues a biological opinion as to whether the action is likely to jeopardize the continued existence of the listed species or to destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2). Section 7 consultation may result in the issuance of an incidental take statement (“ITS”) that includes “reasonable and prudent measures” to minimize the effects of the proposed action. *Id.* § 1536(b)(3)(A), (b)(4)(C). For MMPA incidental take authorizations that involve ESA-listed species, NMFS (or FWS) typically issues a biological opinion containing an ITS and reasonable and prudent measures applicable to the activity that may cause incidental take.

Congress has mandated that decisions made under both the MMPA and the ESA must be based on the best scientific information available. *Id.* §§ 1373(a), 1536(a)(2). The U.S. Supreme Court has explained that Congress intended this requirement to both (i) serve the goal of species preservation and (ii) prevent unnecessary economic impacts caused by the precautionary application of incomplete or speculative information. *See Bennett v. Spear*, 520 U.S. 154, 176-77 (1997).<sup>1</sup>

### **III. DETAILED COMMENTS**

#### **A. NMFS Should Provide More Clarity and Explanation Regarding the Implementation of the Proposed Criteria**

---

<sup>1</sup> The National Marine Sanctuaries Act (“NMSA”) requires federal agencies whose actions are likely to destroy, cause the loss of, or injure a sanctuary resource to consult with the Office of National Marine Sanctuaries (“ONMS”) before taking any action. *See* 16 U.S.C. § 1434(d)(1). The term “injure” is defined as to “change adversely, either in the short or long term, a chemical, biological or physical attribute of, or the viability of.” 15 C.F.R. § 922.3. Through the sanctuary consultation process, ONMS may recommend reasonable and prudent alternatives to protect sanctuary resources, as well as monitoring. *See* 16 U.S.C. § 1434(d)(2). The Draft Guidance does not address whether NMFS will apply the acoustic criteria any differently in the NMSA context (compared to the MMPA and ESA contexts). If NMFS plans to apply the acoustic criteria differently in the NMSA context, it should provide an explanation for the public’s consideration and comment.

The Draft Guidance should provide an explanation of the anticipated impact of the proposed acoustic criteria on the regulated community and a clear discussion of the regulatory implications of the proposed changes. In addition, to eliminate uncertainty and potential future complications, it would be helpful if the Draft Guidance contained a specific analysis of how the implementation of the proposed criteria will affect existing offshore activities, monitoring protocols, estimated incidental take assessment, and the development of mitigation measures.<sup>2</sup> These explanations and clarifications would increase transparency, allow for more informed public review and comment, and help to “ensur[e] and maximiz[e] the quality, objectivity, utility, and integrity” of the information provided in the Draft Guidance, as required by the Information Quality Act. *See* Pub. Law No. 106-554, § 515 (2000); *see also* 67 Fed. Reg. at 8,456 (“The more important benefit of transparency is that the public will be able to assess how much an agency’s analytic result hinges on the specific analytic choices made by the agency. Concreteness about analytic choices allows, for example, the implications of alternative technical choices to be readily assessed.”).<sup>3</sup>

We offer the following suggestions and examples to identify specific improvements that could be made to the Draft Guidance and topics for which additional explanation would be helpful.

1. We recommend that NMFS undertake a study comparing the assessment approach described in the Draft Guidance with the current assessment approach using case studies of various sources, both impulsive and non-impulsive, in different OCS regions, to demonstrate the regulatory and technical implications of the proposed criteria. Although the proposed criteria are not directly comparable to the criteria currently used, we believe the results of such a study

---

<sup>2</sup> *See* 67 Fed. Reg. 8,452, 8,459 (Feb. 22, 2012) (“In assessing the usefulness of information that the agency disseminates to the public, the agency needs to consider the uses of the information not only from the perspective of the agency but also from the perspective of the public.”). We also recommend that the Draft Guidance include a summary of the additional costs that are expected to result from implementation of the new criteria, with a comparison of the expected benefits.

<sup>3</sup> NMFS considers the Draft Guidance to be a “highly influential scientific assessment” subject to the *National Oceanic and Atmospheric Administration Information Quality Guidelines* (“NOAA IQG”). “[I]nfluential scientific, financial, or statistical information” is specifically held to higher information quality standards. *See* 67 Fed. Reg. at 8,452, 8,455 (“OMB guidelines apply stricter quality standards to the dissemination of information that is considered ‘influential.’”). These standards further counsel in favor of more information addressing the implications and implementation of the proposed criteria. *See generally* NOAA IQG at 1-2.