

**Comments by the Center for Regulatory Effectiveness on  
ICR 1010-0151,  
<http://www.gpo.gov/fdsys/pkg/FR-2011-07-06/html/2011-16745.htm> .  
Comments Submitted August 30, 2011,  
on <http://www.regulations.gov> , ID BOEM-2011-0011;  
By e-mail to [cheryl.blundon@boemre.gov](mailto:cheryl.blundon@boemre.gov) ; and  
By first class mail to Department of the Interior,  
Bureau of Ocean Energy Management, Regulation and Enforcement,  
Attention: Cheryl Blundon, 381 Elden Street, MS-4024,  
Herndon, Virginia 20170-4817.**

### **Executive Summary**

CRE's comments focus on the seismic aspects of this Information Collection Request ("ICR"). BOEMRE has successfully regulated offshore seismic for years. The costs, burden and efficacy of that regulation, including information collections, are well known. That may soon change.

In New Orleans federal court, environmental group plaintiffs are suing BOEMRE over regulation of seismic in the Gulf of Mexico ("GOM"). At the request of the parties, this litigation is currently stayed until October 1, 2011. The purpose of the stay is settlement negotiations. Based on the parties' pleadings, any settlement acceptable to the plaintiffs could dramatically change current regulation of seismic in the GOM, including information collections, and could significantly increase the costs, burden and efficacy of that regulation, including information collections.

The current ICR burden estimates are likely inaccurate if the New Orleans litigation settles, and that won't be known until after the close of the current ICR comment period. Consequently, CRE requests that BOEMRE defer submitting this ICR to OMB until a reasonable time after the end of the settlement stay in the New Orleans litigation. If there is any settlement, then BOEMRE should prepare a new ICR/burden estimate that addresses the settlement, and allow public comment on them, before sending the ICR/burden estimates to OMB.

Settlement or no, for at least two reasons BOEMRE should not send OMB any revised ICRs for seismic regulation that is more stringent than currently imposed.

First, BOEMRE has repeatedly and correctly stated that current regulation of seismic adequately protects the environment. In other words, current regulation of seismic is all that's necessary for the proper performance of BOEMRE's functions. Therefore, under the Paperwork Reduction Act ("PRA") BOEMRE should not submit, and OMB should not approve, ICRs for more stringent

seismic regulation. Such ICRs would violate the PRA because they would be unnecessary for proper performance of BOEMRE's functions.

Second, any ICRs for more stringent seismic regulation would violate the accuracy requirement of BOEMRE's Information Quality Act ("IQA") Guidelines. The PRA requires that BOEMRE certify that ICRs are necessary for the proper performance of BOEMRE's functions. That certification would be inaccurate in the case of ICRs for more stringent seismic regulation. Current regulation of seismic, and ICRs based on current regulation, are all that is necessary for proper performance of BOEMRE's functions.

Consequently, BOEMRE should clearly state that it is not submitting any ICRs for seismic regulation that is more stringent than required by current regulation, including NTL 2007-G02.

### **This ICR Includes Offshore Seismic**

Information from offshore scientific, and oil and gas seismic operations is clearly encompassed by this ICR. For example, BOEMRE's Federal Register notice soliciting comment on this ICR states that the ICR includes the information collection requirements of "30 CFR Part 250, Subpart B, Plans and Information."

For example, these rules require that a company submit an "Exploration Plan" to BOEMRE before the company "conduct[s] any exploration activities on a lease or unit."<sup>1</sup>

For purposes of this requirement,

*"Exploration means the commercial search for oil, gas, or sulphur. Activities classified as exploration include but are not limited to:*

*(1) Geophysical and geological (G&G) surveys using ... seismic reflection, seismic refraction...."*<sup>2</sup>

As another example, BOEMRE's Part 250 rules state that BOEMRE

"may issue Notices to Lessees and Operators (NTLs) that clarify, supplement, or provide more detail about certain requirements. NTLs may also outline what you must

---

<sup>1</sup> 30 CFR 250.201, available online at <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=e1cdcc5b0f418a1ea6c08fb41d8d30cf&rgn=div8&view=text&node=30:2.0.1.2.3.2.79.2&idno=30>

<sup>2</sup> 30 CFR 250.105, available online at <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=ac7360c0ddc1ec84c1f77cd99b77ab80&rgn=div8&view=text&node=30:2.0.1.2.3.1.67.5&idno=30>

provide as required information in your various submissions to [BOEMRE].”<sup>3</sup>

The Federal register notice soliciting comment on this ICR similarly states,

“This request also covers the related Notices to Lessees and Operators (NTLs) that BOEMRE issues to clarify, supplement, or provide additional guidance on some aspects of our regulations.”<sup>4</sup>

One of those NTLs is 2007-G02, which states in part:

**“ Implementation of Seismic Survey  
Mitigation Measures and Protected Species Observer Program**

This NTL...clarifies how you should implement seismic survey mitigation measures, including ramp-up procedures, the use of a minimum sound source, airgun testing and protected species observation and reporting. The measures contained herein apply to all on-lease surveys you conduct under 30 CFR 250 and all off-lease surveys you conduct under 30 CFR 251.”<sup>5</sup>

.

**This ICR Should Wait Until BOEMRE Decides  
Whether or Not to Settle the New Orleans Seismic Litigation**

The litigation over GOM seismic in New Orleans federal court threatens to change current seismic regulation considerably. This case, NRDC v. Salazar, No. 2:10-cv-01882, E.D. La., is currently stayed pending settlement negotiations. The settlement stay is pursuant to a motion filed jointly by the environmental group plaintiffs, and by the government defendants, which include BOEMRE. The parties currently have until October 1, 2011, to settle the case.

Based on their pleadings, any settlement acceptable to the plaintiffs could dramatically change current GOM regulation of seismic, including information collections, and significantly increase

---

<sup>3</sup> 30 CFR 250.103, available online at <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=e1cdcc5b0f418a1ea6c08fb41d8d30cf&rgn=div8&view=text&node=30:2.0.1.2.3.1.67.3&idno=30>

<sup>4</sup> Available online at <http://www.gpo.gov/fdsys/pkg/FR-2011-07-06/html/2011-16745.htm>

<sup>5</sup> Available online at <http://www.gomr.boemre.gov/homepg/regulate/regs/ntls/2007NTLs/07-g02.pdf>

the costs, burden and efficacy of that regulation, including information collections. We note that the plaintiffs' pleadings in the New Orleans litigation are similar to the comments they filed with NMFS on BOEMRE's revised Take application for oil and gas seismic in the GOM. Their comments claim that BOEMRE's current regulation of seismic is inadequate to protect the environment, and demand much more stringent and burdensome regulation of seismic.<sup>6</sup>

The current ICR burden estimates are likely inaccurate if the NOLA litigation settles, and that probably won't be known until October 1, 2011, which is after the close of the ICR comment periods.

Consequently, CRE requests that BOEMRE defer submitting this ICR to OMB until a reasonable time after the end of the settlement stay in the New Orleans litigation. If there is any settlement, then BOEMRE should prepare new ICR/burden estimates that address the settlement, and allow public comment on the revised ICR/burden estimates before sending them to OMB.

## **BOEMRE Should Not Submit, and OMB Should Not Approve, ICRs Based on More Stringent Seismic Regulation**

### ***BOEMRE Has Repeatedly and Correctly Stated that Current Regulation of Seismic Adequately Protects the Environment***

BOEMRE's August, 2011, Supplemental Environmental Impact Statement for proposed oil and gas Lease Sale 218 in the GOM Western Planning Area ("SEIS") contains an extensive discussion of the impact of seismic on marine mammals, fish and other aspects of the environment. This SEIS reviews any new information that has become available since BOEMRE's last environmental reviews. It emphasizes "that this Final Supplemental EIS was prepared using the best information that was publicly available at the time the document was prepared."<sup>7</sup>

This BOEMRE SEIS correctly concludes that current regulation and mitigation measures adequately protect the environment from any adverse seismic impacts. For example, with regard to marine mammals this SEIS concludes:

"In addition, NTL 2007-G02, 'Implementation of Seismic Survey Mitigation Measures and Protected Species Observer Program,' minimizes the potential of harm from seismic operations to marine mammals. These mitigations include onboard observers, airgun

---

<sup>6</sup> The plaintiffs' comments are available online at [http://www.nmfs.noaa.gov/pr/pdfs/permits/boemre\\_comments2011.pdf](http://www.nmfs.noaa.gov/pr/pdfs/permits/boemre_comments2011.pdf) (scroll down to near the end of the posted public comments).

<sup>7</sup> Page iii, <http://www.gomr.boemre.gov/PDFs/2011/2011-034-v1.pdf>

shut-downs for whales in the exclusion zone, ramp-up procedures, and the use of a minimum sound source. Therefore, no significant cumulative impacts to marine mammals would be expected as a result of the proposed exploration activities when added to the impacts of past, present, or reasonably foreseeable oil and gas development in the area, as well as other ongoing activities in the area."<sup>8</sup>

This SEIS also correctly concludes:

"Marine mammals may exhibit some avoidance behaviors, but their behavioral or physiological responses to noise associated with the proposed action, however, are unlikely to have population-level impacts to marine mammals in the northern Gulf of Mexico."<sup>9</sup>

MMS/BOEMRE and the National Research Council have similarly concluded elsewhere that

"there have been no known instances of injury, mortality, or population level effects on marine mammals from seismic exposure but... the potential for these types of impacts may exist without appropriate mitigation measures. The MMS-approved seismic surveys include mitigation measures designed to reduce the potential for effects to occur."<sup>10</sup>

The referenced mitigation measures for MMS-approved seismic surveys are those conducted in accordance with NTL 2007-G02.

NMFS has pointed out that

"to date, there is no evidence that serious injury, death, or stranding by marine mammals can occur from exposure to airgun pulses, even in the case of large airgun arrays."<sup>11</sup>

With specific regard to seismic effects on sperm whale foraging--an issue emphasized by the environmental groups in their Take comments and in the New Orleans litigation--NMFS' recent biological opinion concluded:

"An experimental study of sperm whale reactions to seismic surveys in the Gulf of Mexico was conducted, along with a study of the movements of sperm whales with satellite-linked tags in relation to seismic surveys (see Jochens and Biggs 2003; 2004; Jochens *et al.* 2006; Jochens 2008). Data show that during two controlled exposure experiments with exposure to seismic pulses at received levels up to 148 dB re 1  $\mu$ Pa

---

<sup>8</sup> Page 4-150, <http://www.gomr.boemre.gov/PDFs/2011/2011-034-v1.pdf>

<sup>9</sup> Page 4-145, <http://www.gomr.boemre.gov/PDFs/2011/2011-034-v1.pdf>

<sup>10</sup> See, *e.g.*, Outer Continental Shelf Oil & Gas Leasing Program, 2007-2012 Final Environmental Impact Statement, page V-64 (MMS April 2007), available online at <http://www.boemre.gov/5-year/2007-2012DEIS/VolumeII/5and6-ConsultationPreparers.pdf>

<sup>11</sup> 75 FR 49795-96 (Aug. 13, 2010), available online at <http://edocket.access.gpo.gov/2010/2010-19962.htm>

(rms) over the octave band with most energy, there was no indication of avoidance of the vessel or changes in diving behavior (Jochens *et al.* 2006; Jochens 2008). In addition, Madsen *et al.* (2006) report that seven of eight tagged sperm whales continued to perform foraging dives throughout exposure to seismic airguns at levels up to 147 dB (rms) (the eighth whale remained resting at the surface during exposure). Although the sample sizes for these findings are small, the results are consistent with those off northern Norway by Madsen *et al.* (2002). Jochens *et al.* (2006) report that visual observations of sperm whale clusters during seismic studies in the Gulf indicated no significant responses in terms of (1) heading relative to seismic surveys, (2) time spent at the surface during surveys, and (3) surfacing rate from two hours before and after seismic survey lines within 100, 50, or 25 miles. Although these studies suggest that sperm whales did not exhibit horizontal avoidance of seismic activity, few exposures occurred above 160 dB pk-pk (or approximately 144 dB rms), and further research is needed to examine avoidance at higher received levels (Jochens *et al.* 2006). Jochens *et al.* (2006) also speculate that sperm whales in that area may have some level of habituation to airgun sounds.

These studies suggest that sperm whales exhibit considerable tolerance of seismic sources (e.g., no apparent disruption of behaviors such as foraging or calling), or possibly some degree of habituation.”<sup>12</sup>

\*\*\*

“The evidence available leads us to conclude that exposure to seismic pulse energy from the proposed seismic activities is not likely to cause a reduction in an individual whale’s growth, survival, annual reproductive success, or lifetime reproductive success (i.e., fitness). As a result, we do not expect the proposed action to have an effect on the extinction risk of the population(s) these individuals represent or the whale species these population(s) comprise.”<sup>13</sup>

NMFS’ conclusions are consistent with the results of recent controlled sound exposure experiments on a sperm whale, which concluded:

“In neither CEE [controlled sound exposure experiment] did this individual appear to demonstrate obvious behavioral responses, as seen in the dive profiles below; no clear changes in the production of echolocation clicks were observed in either case.”<sup>14</sup>

---

<sup>12</sup> NMFS Biological Opinion on [USGS Geophysical Survey in Gulf of Alaska](#) (June 2011), pages 73-74.

<sup>13</sup> *Id.*, page 86.

<sup>14</sup> Biological and Behavioral Response Studies of Marine Mammals in Southern California, 2010 (“SOCAL-10”), Project Report, 26 February 2011, page 24, available online at [http://www.sea-inc.net/resources/SOCAL10\\_final\\_report.pdf](http://www.sea-inc.net/resources/SOCAL10_final_report.pdf)

In sum, the best available evidence, as repeatedly assessed by BOEMRE, demonstrates that current regulation of seismic, such as NTL 2007-G02, adequately protects the environment.

***BOEMRE Should Not Submit, and OMB Should Not Approve,  
ICRs For More Stringent Seismic Regulation  
Because Such ICRs Would Not Be Necessary  
For Proper Performance of BOEMRE's Functions***

OMB cannot approve an ICR unless BOEMRE demonstrates that the information collection is necessary for the proper performance of BOEMRE's functions, which in this case is regulation of offshore seismic to protect the environment. OMB's ICR regulations state:

“OMB shall determine whether the collection of information, as submitted by the agency, is necessary for the proper performance of the agency's functions.”<sup>15</sup>

Another ICR regulation requires that BOEMRE allow public comment on whether this ICR is necessary “for the proper performance of the functions of the agency,” before BOEMRE sends the ICR to OMB.<sup>16</sup>

When BOEMRE sends this or any other ICR to OMB, BOEMRE must “certify (and provide a record supporting such certification)... that the proposed collection of information...is necessary for the proper performance of the functions of the agency.”<sup>17</sup>

BOEMRE has repeatedly and correctly concluded that current regulation of offshore seismic adequately protects the environment and, therefore, adequately performs BOEMRE's functions and duties. Consequently, any ICR for more stringent regulation of offshore seismic would violate the PRA's ICR requirements, and should not be approved, because the ICR would not be necessary for the proper performance of BOEMRE's functions.

***BOEMRE Should Not Submit, and OMB Should Not Approve,  
ICRs For More Stringent Seismic Regulation  
Because Such ICRs Would Not Meet IQA Guideline Requirements***

BOEMRE's IQA Guidelines require that BOEMRE demonstrate that its ICRs comply with IQA Guidelines:

---

<sup>15</sup> 5 CFR 1330.5(e).

<sup>16</sup> 5 CFR 1320.8(d)(1)(i)

<sup>17</sup> 5 CFR 1320.9(a).

“[F]or all proposed collections of information that will be disseminated to the public, [BOEMRE] will demonstrate in its PRA clearance submissions to OMB that the proposed collection of information will result in information that will be collected, maintained, and used in a way consistent with OMB’s, DOI’s, and [BOEMRE’s] information quality guidelines.”<sup>18</sup>

BOEMRE’s IQA Guidelines expressly state that IQA Requests for Correction can be filed on proposed ICRs:

“This section addresses Requests for Correction concerning information on which MMS has sought public comment (e.g., ... a request for comments on an information collection request subject to the Paperwork Reduction Act (PRA))”<sup>19</sup>

In fact, BOEMRE’s IQA Guidelines arguably allow BOEMRE to reject an IQA Request for Correction filed on a final ICR, if the IQA issues could have been raised in comments on the proposed ICR but weren’t.<sup>20</sup> Consequently, CRE has no choice but to raise these information quality issues at this time.

BOEMRE’s IQA Guidelines require that BOEMRE’s ICRs provide accurate information.<sup>21</sup> Any new ICRs for more stringent seismic regulation would violate IQA Guidelines because BOEMRE would have to certify that the ICRs, and therefore the regulations, are necessary for the proper performance of BOEMRE’s functions. As demonstrated above, that certification would be inaccurate.

## RECOMMENDED ACTIONS

BOEMRE should clearly state that it is not submitting any ICRs for seismic regulation that are more stringent than current regulation, including NTL 2007-G02.

---

<sup>18</sup> BOEMRE IQA Guidelines, Part IV, available online at <http://www.boemre.gov/qualityinfo/PDF/MMSQualityInfoGuidelines-Final.pdf>

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* The relevant part of BOEMRE’s IQA Guidelines states, “This section addresses Requests for Correction concerning information on which MMS has sought public comment (e.g., ... a request for comments on an information collection request subject to the Paperwork Reduction Act (PRA))....[BOEMRE] may also reject a Request for Correction with respect to information in a final rule, final EIS, or other final document, if there was an opportunity for public comment or participation and interested persons could have requested the correction of the information at the proposed rule stage.”

<sup>21</sup> *Id.*, Part VI.



BOEMRE should defer submitting this ICR to OMB until a reasonable time after the end of the settlement stay in the New Orleans litigation. If there is any settlement, then BOEMRE should prepare a new ICR/burden estimates that addresses the settlement, and allow public comment on them, before sending the ICR to OMB.

We thank you for the opportunity to submit these comments, and look forward to your response.

A handwritten signature in black ink, appearing to read "Jim Tozzi". The signature is stylized with a large, looped "J" and a distinct "Tozzi" at the end.

Jim Tozzi  
Member, Board of Advisors