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DATE: October 25, 2017

The Department of Commerce’s Final Report Reviewing Agency Actions as Required by Executive Order 13783, “Promoting Energy Independence and Economic Growth”

Introduction and Purpose

Pursuant to Presidential Executive Order 13783 (“EO 13783”), “Promoting Energy Independence and Economic Growth,” the Department of Commerce (“Department” or “Commerce”) is working diligently to identify and address regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation. In accordance with Section 2(b) of EO 13783, the Department provides this Final Report identifying agency actions specific to EO 13783 reform and initial recommendations regarding its efforts to alleviate burdens on domestic energy production.

This Report provides the following: (1) a description of the Department’s ongoing plan to alleviate or eliminate regulatory burdens on energy production and economic growth, including the establishment of a departmental working group to promptly address such concerns; (2) a timeline for the Department’s efforts to identify and classify discretionary agency actions that are directly implicated by EO 13783; (3) an overview of discretionary agency regulations, guidance, or policies initially identified for review; and (4) initial proposals for immediate agency action. Additionally, the Report highlights the steps that have been taken to obtain public feedback concerning Commerce’s regulatory reform efforts, as well as the Department’s plans for incorporating such feedback into deregulatory actions pertaining to EO 13783.

The Department supports the Administration’s efforts to promote the clean and safe development of our Nation’s vast energy resources and is committed to taking the actions needed to appropriately suspend, revise, or rescind burdensome regulations that unduly hinder the American people and their economic opportunity.

Section 1. Methodology and Agency Reform Efforts

On May 21, 2017, the Department issued a plan to the Director of the Office of Management and Budget (“OMB”), defining the Department’s processes for executing the regulatory review required by EO 13783. Thereafter, the Department in coordination with its Regulatory Reform Task Force (“Task Force”) conducted an initial review of all existing regulations, orders, guidance documents, policies, and other similar agency actions that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. The Task Force is now taking several initial actions to conduct reform pursuant to EO 13783.

Formation of Energy and Infrastructure Subcommittee

The Task Force identified several areas for potential reform relevant to EO 13783—*see* Section 4 of this report—all of which fall under the National Oceanic and Atmospheric Administration (“NOAA”). Accordingly, the Department and NOAA have created, in collaboration with the Task Force, an energy and infrastructure-focused subcommittee charged with identifying and recommending regulatory reforms associated with energy independence and economic growth (“Energy Subcommittee” or “Subcommittee”). The Subcommittee is (1) reviewing permitting and licensing requirements associated with NOAA’s environmental reviews; (2) collecting data regarding actual project application processing and approval times; (3) coordinating inter-agency dialogues on deregulatory efforts; and (4) obtaining public feedback on burdensome application timelines. The Energy Subcommittee includes, in addition to any other individuals deemed necessary by the Regulatory Reform Officer, the following individuals at the Department of Commerce:

Regulatory Reform Officer
Director of the Office of Policy and Strategic Planning
Deputy General Counsel
NOAA Chief of Staff
NOAA Senior Policy Advisor NOAA General Counsel
Assistant Administrator for National Marine Fisheries Services (“NMFS”)
Assistant General Counsel for Legislation, Regulation, and Oversight
Director of the Office of Business Liaison
National Ocean Service Assistant Administrator

Members of the Energy Subcommittee bring an ideal set of perspectives that will enable an effective working dialogue as the Department reviews new regulatory initiatives. The Subcommittee shall endeavor to implement new processes by which the Department conducts environmental reviews to better implement coordinated, predictable, timely, and transparent agency decision-making.

The Task Force and Subcommittee will also continue to work diligently with other Department leaders to review agency actions and programs pursuant to the requirements of EO 13783, EO 13771 (“Reducing Regulation and Controlling Regulatory Costs”), EO 13777 (“Enforcing the Regulatory Reform Agenda”), EO 13766 (“Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects”), EO 13792 (“Review of Designations under the Antiquities Act”), and EO 13795 (“Implementing an America First Offshore Energy Strategy”). Over the last eight months, Department leaders and NOAA officials assisted the Task Force with initial NOAA deregulatory proposals that were presented to Department policy officials on May 25, 2017 and that are now being executed. Many of these deregulatory efforts pertain to EO 13783, EO 13771, and EO 13766. The Energy Subcommittee is also working with the Department’s Regulatory Reform Task Force and NOAA leadership to identify more burdensome or inefficient regulations for removal or modification.

Energy Subcommittee Objectives

The Energy Subcommittee is focused on the following improvement goals to best achieve its mission. Such efforts serve as a framework for the Department as it finalizes deregulatory actions pursuant to EO 13783.

1. Creation of a network of Commerce officials to harmonize relevant deregulation initiatives
2. Communication with public stakeholders to identify burdensome and inefficient regulatory processes
3. Coordination with other agencies to facilitate a consistent and predictable regulatory environment
4. Development of new departmental analyses and standards for the cost-benefit analysis associated with agency rulemaking and guidance
5. Identification of all agency timelines for permitting, authorizations, consultations, and current agency review schedules
6. Execution of predictable schedules and guidelines, where necessary, for future permit applications, authorization, and consultation timelines
7. Implementation of monitoring programs for permit application backlogs and timeliness of agency approvals
8. Review of statutory interpretations and guidance language to ensure regulations are not overbroad facially or as applied
9. Centralized processes for efficient receipt and processing of applications for NOAA applications, permits, and other necessary authorizations

Public Engagement

In addition to collaborating with officials within the Department and in other departments, the Energy Subcommittee will work diligently to solicit public feedback to support its identification of burdensome regulatory processes and those in need of streamlining or modification. NOAA recognizes that its statutory obligations, regarding consultations and permitting, similarly interact with a variety of business sectors. Accordingly, on July 7th 2017,

NOAA published a Federal Register Notice (“FRN”) (82 FR 31576; <https://www.gpo.gov/fdsys/pkg/FR-2017-07-07/pdf/2017-14167.pdf>) soliciting public comment generally related to streamlining regulatory processes and reducing regulatory burdens in order to benefit various sectors of industry. This comprehensive FRN specifically included reference to EO 13783 and its requirements, and a request for public comment on any other regulations (unrelated to permitting/authorization) that the public may consider burdensome or inefficient. The input received informed NOAA’s assessment required under EO 13783.

The Energy Subcommittee will also continue to identify and communicate with private enterprises from various industries to better identify the Department’s inefficient and burdensome regulatory hurdles for domestic energy opportunity. The Subcommittee will focus primarily on application timelines for permitting and licensing and will work with the private sector to identify and review timelines that are fair, practical, consistent, and predictable.

Section 2. Timeline of Regulatory Review

The Task Force, with input from the Energy Subcommittee, has operated under the timetable listed below to ensure efficient progress and accountability as it has worked to prepare this Final Report for the OMB and to make final regulatory determinations in line with EO 13783 and other related presidential mandates.

- May 2017** *Submit to OMB the Department’s initial plan for regulatory reform under EO 13783*
- June 2017** *Identify NOAA’s statutory authorities and related timetables associated with permitting, authorization, and consultation requirements*
- Create an Energy Subcommittee for regulatory reform and identify initial candidates for potential regulatory removal or modification*
- July 2017** *Issue an FRN seeking public comment on regulatory burdens and streamlining needs in line with EO 13783’s objectives*
- Submit to OMB the Department’s Draft Report for regulatory reform under EO 13783*
- Aug 2017** *Coordinate regulatory review findings and reform objectives with the Departments of Interior and Agriculture, EPA, and other agencies*
- Review public comment on FRN, consolidate private sector feedback, and incorporate findings into review and analyses*
- Review timetables and backlogs associated with permitting, authorizations, and consultations*
- Oct 2017** *Finalize reform proposals and submit Final Report to OMB*

Ongoing *Bi-monthly Energy Subcommittee meetings to address candidates for regulatory reform, removal, and streamlining; coordination with the Regulatory Reform Task Force to incorporate continued Energy Subcommittee updates in the Task Force’s quarterly reports to the Secretary and ongoing deregulatory actions*

Utilize Commerce economists to review and create new consistent agency standards for cost-benefit analyses, where applicable, associated with agency rulemaking and designation of marine sanctuaries

Continue working in coordination with Department offices and other agencies to determine predictable, consistent, and accountable decision-making schedules

Communicate with the public to ensure that newly proposed permitting review timetables adequately remove burdens on domestic energy production

Section 3. Identified Agency Actions for Potential Reform

Identified below are the significant areas of NOAA operations where timetables exist for licensing and permitting. Next, this report lists initial actions NOAA will undertake to improve energy and economic opportunity.

There are five main areas under NOAA statutory authority where regulatory processes may be harming energy independence and economic opportunity: (1) Endangered Species Act (“ESA”), (2) Marine Mammal Protection Act (“MMPA”); (3) Essential Fish Habitat (“EFH”) under the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”), (4) National Marine Sanctuaries Act (“NMSA”), and (5) the Federal Power Act (“FPA”). There are several instances where project application reviews and environmental evaluations falling under the above authorities involve lengthy review periods for industry projects. In many cases, consultation periods may last significantly more than two years. Accordingly, the Department through the Energy Subcommittee will identify new licensing and permitting timelines in these regulatory areas to ensure reviews are completed within two years, absent extraordinary circumstances. Current licensing and permitting timetables, and a larger list of proposed agency actions under review, are provided below.

Identified NOAA Timelines Under Review

This section outlines current timing requirements that the Energy Subcommittee will review to reduce unnecessary delays and lengthy permitting and licensing processes. Additionally, the Subcommittee will evaluate ideas for mechanisms to enforce government compliance with statutory- and agency-required deadlines.

1. Endangered Species Act (ESA)

- While not mandated by regulation or statute, NOAA’s National Marine Fisheries Service (“NMFS”), per the agency’s *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species*

Act (ESA Handbook) has a target of 30 days to determine if the Federal action agency's formal consultation request is complete.

- Informal consultation resulting in a Letter of Concurrence is available for projects that may affect, but are not likely to adversely affect, a threatened or endangered species. NMFS's goal is to either complete the Letter of Concurrence for the project, or request additional information that is necessary to complete the consultation, within 30 days. NOAA Fisheries completes approximately 1200-1500 individual informal consultations per year and completes approximately 22,000 actions through over 100 programmatic consultations (informal and formal) on an on-going annual basis. The approximate average time to review the actions included in these programmatic Biological Opinions is 10 days.

Of the informal actions not under a programmatic Biological Opinion, 36 percent are within the 30-day goal, and 61 percent are within three months. NOAA Fisheries currently has about 46 individual informal consultations that have been open for greater than 200 days as of July 31, 2017, that the agency is actively working to complete as soon as possible.

- Under the ESA and section 7 implementing regulations, a formal consultation (may affect, likely to adversely affect) resulting in the preparation of a biological opinion, is required to be completed in 150 days upon receipt of a complete request, unless the applicant agrees to a longer extension. NMFS completes approximately 315 formal consultations per year in addition to the programmatic consultations mentioned above. The approximate average time to complete a consultation is 211 days.

2. *Marine Mammal Protection Act (MMPA)*

- NMFS currently recommends Incidental Harassment Authorization (IHA) applications be submitted to NMFS 6-9 months ahead of project start dates. The average time to process IHAs is 7.5 months. Processing times are largely driven by the date the applicant indicates the authorization is needed and many are issued within the requested timeframe. IHAs are effective for one year and may only authorize harassment of marine mammals.
- NMFS recommends applications for Letters of Authorization (LOAs), which require the promulgation of regulations, be submitted 12-18 months ahead of project start dates where projects could cause "serious injury mortality, or harassment over multiple years." On average, the promulgation of regulations and issuance of the associated LOAs for the energy and other industry sectors takes 15 months. LOAs are required when there is a potential for mortality, but applicants often prefer applying for LOAs over IHAs even when there is no potential for mortality for multi-year projects, since LOAs are effective for up to 5 years.

3. *Essential Fish Habitat (EFH) under Magnuson-Stevens Fishery Conservation and Management Act*

- The Magnuson Act requires federal agencies to consult with NMFS on actions authorized, funded, or carried out by such agency that may adversely affect any identified essential fish habitat. By regulation, NMFS identified five different methods in which this consultation may

occur including through existing environmental review procedures, general concurrences, or programmatic consultations. If those options are not appropriate, an agency may engage in either abbreviated or expanded consultation.

- An abbreviated consultation is available if that action does not have the potential to cause substantial adverse effects on EFH and requires an agency to initiate consultation 60 days before it must make a final decision. If so, NMFS' Conservation Recommendations must be issued within 30 days of initiation of consultation. Initiation generally occurs when NOAA Fisheries receives an EFH Assessment from a Federal agency.
- An expanded consultation is required if there is a potential to cause substantial adverse effects on EFH and requires an agency to initiate consultation 90 days before it must make a final decision. NMFS's Consultation Recommendations must be issued within 60 days of initiation of consultation. As mentioned above, initiation generally occurs when NOAA Fisheries receives an EFH Assessment from a Federal agency.
- Federal action agencies must respond in writing to Conservation Recommendations within 30 days after receipt from NOAA.

4. National Marine Sanctuaries Act

- NOAA requires project permit applications under the NMSA to be submitted no less than 30 days ahead of project start dates.
- NOAA requires 90 days for completion of consultations where project applications require the collection of sensitive species or where requests may require the National Ocean Service ("NOS") to undertake certain National Environmental Policy Act ("NEPA") requirements.
- NOAA requires project applications that may need issuance of environmental impact statements ("EIS") to be submitted no less than 12 months in advance.

5. Federal Power Act Licensing

- NMFS provides fishway prescriptions and recommendations when non-federal hydropower projects receive a new license from the Federal Energy Regulatory Commission (FERC). Federal Power Act permitting timelines are established by FERC.
- NMFS is not required to issue fishway prescriptions, but when prescriptions are issued they are mandatory and must be included with the FERC project license.
- NMFS must issue preliminary fishway prescriptions within 60 days of FERC's issuance of a "Notice of Ready for Environmental Analysis" designation on license applications.
- NMFS modified (final) fishway prescriptions must be made within 60 days of the close of the comment period on FERC's draft NEPA document.

Regulations and Policies for Review and Streamlining

A. Regulations

NMFS recommendations and proposals related to streamlining under the ESA, MMPA, and MSA (in relation to EFH) implementing regulations listed below are contained in Section 4 of this report.

1. *Marine Mammal Protection Act; Title 50, Chapter 2, Subchapter C, Part 216 — Regulations Governing the Taking and Importing of Marine Mammals*

These regulations implement the Marine Mammal Protection Act (MMPA) of 1972, 86 Stat. 1027, 16 U.S.C. 1361-1407, Pub. L. 92-522, which, among other things, restricts the taking, possession, transportation, selling, offering for sale, and importing of marine mammals. 50 CFR Part 216, Subparts A to E are not expressly required by statute but are used in the orderly issuance of authorization of take of marine mammals under the MMPA.

2. *Marine Mammal Protection Act; Title 50, Chapter 2, Subchapter C, Part 217 — Regulations Governing the Take of Marine Mammals Incidental to Specified Activities*

All of the regulations in Part 217 implement the incidental take provisions of the MMPA as described above through the implementing regulations 50 CFR Part 216, Subpart I. These sections include provisions requested by public applicants applicable to the take of marine mammals. Examples related to the energy sector include: seismic surveys in Cook Inlet, Alaska (50 CFR 217.140-150); and construction and operation of a LNG port in the Gulf of Mexico (50 CFR 217.151-158). The regulations applicable to energy sector projects respond to applicants seeking to ensure compliance with the MMPA in conducting their activities.

3. *Federal Power Act; Title 50, Chapter 2, Subchapter C, Part 221 — Conditions and Prescriptions in FERC Hydropower Licenses*

50 CFR Part 221, Subparts A and B are joint regulations with the U.S. Department of Agriculture (USDA) and the U.S. Department of Interior (DOI) that contain rules of practice and procedure applicable to hearings mandated by statute, while Subpart C helps implement the Federal Power Act fish passage alternatives process.

4. *National Marine Sanctuaries Act; 15 CFR Part 922.10-11 — National Marine Sanctuary Nomination Process*

These rules invite communities across the nation to nominate places in the U.S. marine environment and Great Lakes for consideration as national marine sanctuaries. The nomination process embodied in these rules establishes a careful evaluation process for public nominations and looks at, among other things, whether nominations have special historical or ecological significance, any potential threats and impacts facing marine resources, and whether the location has other important economic uses.

5. ***15 C.F.R. Part 930 — Federal Consistency with Approved Coastal Management Programs***

These rules arise under the Coastal Zone Management Act (CZMA), which encourages coastal states to be proactive in managing natural resources for their benefit and the benefit of the Nation. "Federal Consistency" is part of the CZMA that provides states with a mechanism to coordinate with federal agencies on actions that impact the coastal zone, which may include actions related to domestic energy development. These rules provide the procedural framework for a state's application of its Federal Consistency authorities.

B. Policies and Guidance

Over the years, NMFS has also developed or helped develop a number of policies and guidance materials which have some relation to the domestic energy sector. Most of these do not have a direct relationship with the energy sector, but are more general in nature – such as guidelines on ESA consultations or hydropower licensing jointly developed with FERC. A number of these also facilitate or streamline interagency coordination to mitigate any potential impacts on affected sectors (including energy). Such policies are also identified in the list below:

1. ***Endangered Species Act; Title 50, Chapter 4, Subchapter A, Part 402 — Interagency Cooperation — Endangered Species Act of 1973, as amended***

This part interprets and implements sections 7(a)-(d) [16 U.S.C. 1536(a)-(d)] of the Endangered Species Act of 1973, as amended (ESA). It is not expressly required by statute but considers the orderly implementation of Section 7 of the ESA, which requires interagency consultation.

2. ***Magnuson-Stevens Fishery Conservation and Management Act; Title 50, Chapter 6, part 600 — Magnuson-Stevens Act Provisions***

While 50 CFR Part 600, Subparts J and K, are not expressly required by statute, the MSA requires regulatory guidelines that assist the regional Fishery Management Councils in the consideration of actions to ensure fish habitat conservation. For purposes of EO 13783, these parts address EFH coordination, consultation, and recommendation. In particular section 600.925 addresses Federal agency EFH consultation and therefore touches on the domestic energy sector. These guidelines in particular provide flexibility to entities dealing with EFH through enabling programmatic EFH consultations, better integrating EFH with NEPA obligations, and enabling the combination of EFH and ESA consultations to streamline the permitting process.

3. ***Policy Directive (PD) 02-301-22, Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act***

This interagency Agreement was designed (1) to improve coordination of the agencies' compliance with the Endangered Species Act (ESA) for actions authorized, funded, or carried out by the Environmental Protection Agency ("EPA") under sections 303(c) and 402 of the Clean Water Act

(CWA); and (2) provide mechanisms for improved interagency cooperation, thereby enhancing protection and promoting the recovery of threatened and endangered species and their supporting ecosystems.

4. *Pinniped and Cetacean Oil Spill Response Guidelines of 2015*

These Guidelines were developed to direct and inform response activities for pinnipeds and cetaceans. They provide a foundation for coordination and communication between local, state, and federal oil spill response agencies and the marine mammal conservation, research and welfare communities (including marine mammal stranding networks and research scientists). While relevant to the energy sector, they help ensure an efficient and effective response by the relevant agencies and communities in the unlikely event of an oil spill.

5. *PD 02-110-18, Guidance for Treatment of Climate Change in NMFS Endangered Species Act Decisions*

While not specifically directed at the energy sector, this Guidance has broad application across sectors in regards to consultation processes, as it was developed to treat climate change consistently in agency decisions related to the Endangered Species Act. The Guidance ensures that NMFS takes a consistent, efficient, and legally defensible approach in management processes.

6. *PD 03-201-13, Finding with Minerals Management Service (now BOEM) Regarding EFH Consultations*

This procedure, under the Habitat Conservation and Restoration Policy on Essential Fish Habitat (EFH), provides that BOEM may choose to use the NEPA process by submitting to NMFS programmatic, lease sale, or project-specific environmental impact statements (EISs) or environmental assessments (EAs), as appropriate, in lieu of stand-alone EFH assessments. Alternatively, BOEM may use the consultation procedures outlined in the EFH regulations (50 CFR 600.920) if BOEM decides that for a given project the processes do not allow for efficient completion of EFH consultation. It provides permitting and licensing efficiencies for the energy sector.

7. *PD 03-401-03, Interagency Task Force Report on NEPA Procedures in FERC Hydroelectric Licensing*

The guidance in this report identifies opportunities for streamlining the NEPA aspects of the FERC hydroelectric relicensing process as it relates to interagency coordination.

8. *PD 03-401-04, Guidelines to Consider for Participating in the Alternative Licensing Process*

FERC developed an alternative pre-filing consultation process for hydropower license applicants that utilizes a more collaborative approach than required in the standard pre-filing consultation process and streamline the environmental review process. These guidelines were developed to implement that process, in particular by helping applicants and agencies negotiate and come to

consensus as appropriate on issues.

9. PD 03-401-05, *Anatomy of Trackable and Enforceable License Conditions*

This directive suggests how to better integrate and coordinate FERC relicensing requirements with CWA Section 401 conditions and Coastal Zone Management Act (“CZMA”) certification when States have the lead responsibility to achieve consistency, improve communications, reduce duplication, and ensure best use of relevant expertise throughout the process. It provides for the use of a consistent approach and format for license conditions for licensees and applicants.

10. PD 03-401-06, *Coordination of FERC Licensing and ESA*

This directive provides five flow-diagrams that outline the coordination between agencies for ESA consultation with the FERC pre-filing, post-filing, routine 10(j), and post-licensing processes; along with an outline of the entire traditional licensing process.

11. PD 03-401-07, *Interagency Task Force Report on Improving Coordination of ESA Section 7 Consultation with the FERC Licensing Process*

The guidance in this interagency report describes procedures to coordinate and integrate the ESA consultation process with the FPA licensing process and addresses post-licensing consideration of ESA issues. This general guidance is for applicants, FERC staff, and resource agency staff who are engaged in either the traditional or alternative licensing process, subject to any modifications that may be required to address the particular circumstances of each proceeding.

12. PD 03-401-09, *Interagency Task Force Report on Improving the Studies Process in FERC Licensing*

This interagency report identifies salient issues associated with identifying and conducting studies in the traditional licensing process and recommends specific steps to address these issues. While the report provides some basic guidelines on how to identify resource issues and conduct studies during the pre-filing stage, it is primarily focused on dispute resolution and post-filing studies, and streamlines the hydropower licensing process.

13. NOAA Acoustic Technical Guidance

EO 13795 called for a review of the 2016 Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing and directed the Secretary of Commerce to consult with the appropriate Federal agencies to review it, and then take all steps permitted by law to rescind or revise it, if appropriate. To assist the Secretary in carrying out this directive, NMFS held a 45-day public comment period to solicit comments on the Technical Guidance for consistency with the EO’s policy. NMFS has completed its review and analysis of these public comments. NMFS hosted an in-person meeting with Federal agencies on the afternoon of September 25, 2017, at the NOAA headquarters campus in Silver Spring, MD, to collect additional comments. Representatives (both program directors and subject matter experts) attended from the following agencies: U.S. Navy, U.S. Air Force, U.S. Army Corps of Engineers

(USACE), Bureau of Energy Management (BOEM), U.S. Geological Survey (USGS), Department of State, National Science Foundation (NSF), and National Park Service (NPS). NMFS will prepare a report and recommendations for the Secretary of Commerce who will make a final decision on whether to rescind or revise the Technical Guidance, if appropriate.

Section 4. Initial Proposals

The Regulatory Reform Task Force, its Energy Subcommittee, and NOAA engaged in a review of the abovementioned areas of agency action to identify and revise requirements that are creating burdens on energy independence and economic opportunity. This also included the analysis of comments received in response to an FRN soliciting views on regulatory burdens and streamlining. Regardless of the completion of this report, the Department is continuing to communicate with the public and private stakeholders, under the guidance of the Secretary and the Regulatory Reform Officer, to mitigate regulatory burdens and streamline processes not only for the energy sector, but also for other sectors which may be impacted by the same regulatory processes.

The Department's review has led to the following proposals, most of which have broad application to other industry sectors.

1. Centralized Monitoring and Accountability for Permitting, Authorizations, and Consultations

NMFS will designate an officer within its Headquarters (HQ) Office of Protected Resources to track consultation, authorization, and permit compliance times. This officer will also be available should a permit applicant have concerns regarding the process that it feels is not being adequately addressed by NMFS' Regional Offices. The HQ Officer will create appropriate compliance reporting documents and provide reports to the Assistant Administrator for NMFS (NMFS AA), a member of the Energy Subcommittee, regarding the timeliness of permitting and consultation activities. Specifically, the NMFS AA will be notified of any:

- a) case whereby it has taken NMFS longer than 60 days to notify an applicant regarding the completeness of a package seeking initiation of consultation under the ESA;
- b) case whereby it has taken NMFS longer than 90 days to finalize an informal consultation under the ESA following receipt of a complete initiation package;
- c) case whereby it has taken NMFS longer than 270 days to finalize a formal consultation under the ESA following receipt of a complete initiation package;
- d) case on a request for an Incidental Harassment Authorization under the MMPA taking longer than 12 months;
- e) case on a request for a Letter of Authorization under the MMPA taking longer than 18 months; or
- f) case regarding Essential Fish Habitat under the Magnuson-Stevens Fishery Conservation and Management Act taking longer 30 days if the action is not likely to have a substantial adverse impact on EFH and within 60 days or an agreed upon amount of time with the action agency.

The NMFS AA will determine whether additional action is necessary to facilitate timeliness and accountability within the NMFS permitting process. As a member of the Energy Subcommittee, the NMFS AA will report to the Energy Subcommittee on progress towards more timely and responsive processing. Additionally, NMFS will incorporate average permit and consultation times and backlogs into annual operating plans and budget justification materials.

2. Review of ESA Informal Consultation Deadlines

The ESA sets forth specific deadlines for conducting formal consultations under Section 7 of the ESA. However, there is no specific deadline in statute or regulation for informal consultations, which are appropriate for actions that may affect but are not likely to adversely affect a listed species or its designated critical habitat. Further, NMFS has not provided for itself or applicants any guidance on how long an informal consultation should take. Moving forward, NMFS will consider issuing a policy establishing that informal consultations should be done within 60 days from the receipt of an adequate request for the initiation of informal consultation and that informal consultations not completed within 60 days will be brought to the attention of the NMFS AA for appropriate action as described in in the above paragraph.

3. Improvements in Timely ESA Consultations

As indicated above, NMFS processes ESA actions through three types of consultations: informal consultations, formal consultations, and programmatic consultations covering thousands of projects that might otherwise be a mixture of formal or informal consultations if addressed individually. NMFS completes 1200-1500 individual informal consultations per year and approximately 315 formal consultations. In addition, NMFS addresses approximately 22,000 actions through over 100 programmatic consultations. The approximate average time to review actions covered by programmatic consultations is 10 days. For informal consultations, 36% are currently completed within 30 days and 61% are completed within 90 days. There are approximately 46 informal consultations that have been open for over 200 days. The average time to complete a formal consultation is 211 days.

There are numerous reasons for the existing delays in processing both formal and informal processing consultations, including budget and staffing issues. Nevertheless, NMFS has committed to an average national 25% improvement in processing time for informal consultations through reducing unnecessary review steps in the informal consultation process, increasing the use of programmatic or batched consultations, increased tracking and workforce management to improve timeliness, and potentially seeking legislative amendments to improve efficiency.

4. Improvements in Timely MMPA Authorizations

As indicated above, it currently takes NMFS an average of 7.5 months to take final action on a request for an Incidental Harassment Authorization under the MMPA and between 12-18 months to take final action on a request for a Letter of Authorization under the MMPA. As with the ESA consultations, NMFS has committed to improvement in the processing time for these applications through more efficient use of Categorical Exclusions under the National

Environmental Policy Act, more standardized guidance to applicants, waivers of certain review processes for low impact actions and other actions including potentially seeking legislative amendments to improve efficiency. NMFS is also considering guidance that clarifies how and when staff should record the date on which the agency determines the “adequacy and completeness” of an incidental take authorization application, and will analyze its time frames for reviewing incidental harassment authorization applications. This guidance would add additional certainty for geophysical oil and gas exploration.

5. ESA Pre-Listing Conservation Actions

In January 2017, the U.S. Fish and Wildlife Service finalized a policy on voluntary pre-listing conservation actions, with the intent of facilitating mitigation in advance of listing a species under the ESA. Qualifying projects may receive credits that can be sold or transferred, thereby creating a market for regulatory compliance similar to that conducted for wetland mitigation under Section 404 of the Clean Water Act. NMFS was an early participant in the drafting group that developed the policy but ultimately decided not to issue a similar policy at that time. However, now that the FWS has been in place for several months, NMFS commits to consulting with FWS on the effectiveness and utility of their policy and initiating the process to create a similar policy.

6. Comprehensive Compensatory Mitigation Policy

In addition to pre-listing actions, NMFS is committed to fully implementing the concepts of mitigation banking and crediting in ESA and other contexts. Last year, the FWS proposed a comprehensive mitigation policy to address mitigation banking and crediting across all of their authorities. They have not yet finalized this policy. While NMFS has not proposed a similar comprehensive compensatory mitigation policy, NMFS is continuing to expand its commitment to conservation banking. For example, in California, NMFS is a party to the US Army Corps of Engineers Sacramento District in Lieu Fee program. This program offers permittees an in-lieu fee option to satisfy their compensatory mitigation obligations under the Clean Water Act, the Rivers and Harbors, Act, the ESA, and other laws. NMFS will continue with regional or local efforts of this type while updating its existing conservation banking guidance and developing its own national comprehensive compensatory mitigation policy.

7. Implement Standards for a Thorough Cost-Benefit Analysis to Be Conducted before National Marine Sanctuaries Are Designated under the NMSA

The National Marine Sanctuaries Act and NEPA allow for a cost-benefit analysis to be conducted before marine sanctuaries are designated under the NMSA. The NMSA designation standards (Section 303) require a socioeconomic analysis, including benefits and impacts to existing activities and uses of an area considered for designation. Additionally, the Regulatory Flexibility Act requires an economic analysis to evaluate impacts of national marine sanctuary regulations on small businesses. Under Section 4(a) of Executive Order 13795, NOAA will work with the Department of the Interior to ensure a full accounting of any energy or mineral resource potential within the proposed sanctuary designation area. The Energy Subcommittee recommends that the Department work with Department economists and OMB to implement improved standards to adequately assess the potential costs and benefits to business communities,

infrastructure, and the environment before sanctuaries are designated.

8. Consider Use of Endangered Species Committee to Streamline the Application Process

Section 7(e) of the ESA authorizes the Endangered Species Committee (“ESC”) to review and exempt certain actions from the ESA’s requirement that agency actions not jeopardize the continued existence of listed species. The statutory process is cumbersome and time consuming adding an additional lengthy process after action agencies have already gone through the consultation process. The Department of Commerce agrees to work with the Department of Interior and the Fish and Wildlife Service to determine whether changes to the joint regulations or the joint Section 7 handbook could streamline this process. Commerce recognizes that the statutory provisions might constrain flexibility on this endeavor but nevertheless commits to reviewing the issue.

CC: The Honorable Mike Pence, Vice President, United States of America
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