8 May 2020

Ms. Donna Wieting, Director
Office of Protected Resources
NOAA Fisheries
1315 East-West Highway
Silver Spring, MD 20910-3225

Re: Draft National Marine Fisheries Service Procedure 02-204-02: Guidance for Determining Negligible Impact under MMPA Section 101(a)(5)(E)

Dear Ms. Wieting:

The National Marine Fisheries Service (NMFS) is proposing to issue guidance for making negligible impact determinations (NIDs) under section 101(a)(5)(E) of the Marine Mammal Protection Act (MMPA). That statutory provision allows NMFS to authorize the taking of marine mammals from species or stocks listed as threatened or endangered under the Endangered Species Act (ESA) incidental to commercial fishing operations, if that take is expected to have a 'negligible impact' on the species or stock(s).[1] The Marine Mammal Commission (Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, offers the following comments and recommendations on NMFS's draft policy directive (02-204-02) (Draft Directive, herein).

Interpreting 'Negligible Impact' under the MMPA

The starting point for interpreting and implementing legislation should be the statutory language itself and, secondarily, any additional guidance available in the legislative history of the provision that clarifies Congressional intent. The term 'negligible impact' was introduced into the MMPA in 1981[2] to streamline the process for authorizing the taking of marine mammals in low-impact situations—section 101(a)(4) for commercial fisheries and section 101(a)(5) for other

[1] MMPA section 101(a)(5)(e): "During any period of up to 3 consecutive years, the Secretary shall allow the incidental, but not the intentional, taking by persons using vessels of the United States or vessels which have valid fishing permits issued by the Secretary in accordance with section 204 (b) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1824(b)), while engaging in commercial fishing operations, of marine mammals from a species or stock designated as depleted because of its listing as an endangered species or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) if the Secretary, after notice and opportunity for public comment, determines that—
(I) the incidental mortality and serious injury from commercial fisheries will have a negligible impact on such species or stock;
(II) a recovery plan has been developed or is being developed for such species or stock pursuant to the Endangered Species Act of 1973; and
(III) where required under section 118, a monitoring program is established under subsection (d) of such section, vessels engaged in such fisheries are registered in accordance with such section, and a take reduction plan has been developed or is being developed for such species or stock."
[2] Public Law 97-58, § 2

activities. The Draft Directive accurately reflects the available legislative history of the 1981 amendments:

> There is no definition of negligible impact in the MMPA. There is, however, a reference to negligible impact in the House of Representatives committee report for the MMPA Amendments of 1981, which is when Congress added "negligible impact" to the MMPA. The report states, "'negligible' is intended to mean an impact which is able to be disregarded." Further, the committee notes that Webster's Dictionary defines the term "'negligible' to mean 'so small or unimportant or of so little consequence as to warrant little or no attention.'" (House of Representatives, Report 97-228, Sept. 16, 1981).

Based on that guidance, NMFS adopted a regulatory definition of 'negligible impact' for activities governed by section 101(a)(5) that tracked the report language.[3] At that time, NMFS defined 'negligible impact' as "an impact which can be disregarded or which is so small or unimportant, or of so little consequence as to warrant little or no attention."[4] No regulations were ever promulgated to implement section 101(a)(4).

Congress, in an effort to reconcile the incidental take provisions of the ESA and the MMPA, amended section 101(a)(5)(A) in 1986 to allow for taking of depleted, as well as, non-depleted marine mammals incidental to activities other than commercial fishing.[5] Although there is no legislative report providing details to help interpret those amendments, Senator Danforth asked that a section-by-section analysis of the legislation (S. 911) be published in the *Congressional Record*.[6] In the pertinent portion, it reads:

> It is intended that the term "negligible impact" as contained in subparagraph (5)(A)(i) of the MMPA be determined with reference to the affected population of marine mammals, and not with reference to the effects on individual members of any population, unless the resulting impact on the populations is more than negligible. For instance, an individual whale might be affected by industrial activities so as to alter its course but that would likely result in a negligible impact on the individual and the population absent some other adverse impact. On the other hand, effects on individuals could result in a greater than negligible impact on the population depending on the number of individuals affected in proportion to the total population or the severity of the effect on each individual.
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> The term "negligible impact" as applied to populations means an impact that cannot reasonably be expected to, and is not reasonably likely to affect adversely the overall population through effects on annual rates of recruitment or survival. It is not intended that the Secretary find impacts to be more than negligible when the effect of specified activities on the population is conjectural or speculative.

[3] 47 Fed. Reg. 21248
[4] 50 C.F.R. § 228.3 (1982)
[5] Public Law 99-659, § 411
[6] 132 Cong. Rec. 31294, October 15, 1986

NMFS revised its regulatory definition of 'negligible impact' in 1989 to conform to this new Congressional guidance. The new definition, then codified at 50 C.F.R. 228.3, read: "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

The MMPA was next amended in ways relevant to this discussion in 1994.[7] Section 101(a)(4) was rewritten to eliminate the 'small take' provision for commercial fisheries. Section 101(a)(5)(D) was added to allow for the issuance of incidental harassment authorizations, which requires NMFS to make a negligible impact determination, but does not require rulemaking. Congress also added section 101(a)(5)(E) to govern the taking of endangered and threatened marine mammals incidental to commercial fishing operations.

The 1994 MMPA amendments prompted NMFS to initiate two rulemakings. The first implemented the new incidental take regime for commercial fisheries under sections 118 and 101(a)(5)(E) (60 Fed. Reg. 45086). Those regulations included a definition of 'negligible impact' (50 C.F.R. § 229.2), but merely indicated that the term "has the same meaning as in [50 C.F.R.] § 228.3." This is understandable and appropriate, given that one of the principles of statutory construction is that a term is to be given the same meaning throughout the statute unless there is reason in the legislative history or content to indicate otherwise. The second rulemaking revised the 1989 incidental take regulations for non-fisheries activities, largely to incorporate procedures for issuing incidental harassment authorizations. Those regulations, published in 1996,[8] retained the pre-existing definition of 'negligible impact,' but recodified it as 50 C.F.R. § 216.103, where it can still be found.[9]

Given this history, it is paradoxical that the Draft Directive states, "[w]hile this [the 50 C.F.R. § 216.103 definition] is the regulatory definition for negligible impact under MMPA 101(a)(5)(A) and 101(a)(5)(D), which are not the subject of this guidance, it remains the only regulatory definition of negligible impact for implementing the MMPA and is included here to inform the discussion." In fact, NMFS has adopted a second regulatory definition of the term 'negligible impact,' found in 50 C.F.R. § 229.2, which states that it is applying an identical definition to incidental take in fisheries as the one set forth in § 216.103 for other activities. This parallel construction has been in place for more than 25 years. Thus, there is no need to draw inferences from the cited regulatory definition to inform the discussion of take incidental to fisheries; it is directly applicable by regulation.

In summary, although there are several provisions of the MMPA that employ a 'negligible impact' standard, there is a single definition of that term that has been adopted under the MMPA—the one reflected in NMFS's regulations based on the guidance provided by the Senate in 1986. However, that definition is general enough that it can apply to a variety of situations and types of taking. In this regard, the Commission agrees with NMFS's assessment that the contexts of the three

[7] Public Law 103-238, § 4
[8] 61 Fed. Reg. 5884
[9] The definition of 'negligible impact' under the incidental take regulations for commercial fisheries was subsequently amended to reference this citation (69 Fed. Reg. 6583, February 11, 2004). Nevertheless, throughout the history of its incidental take regulations, NMFS has been clear that the same definition of "negligible impact" applies to commercial fishing operations and non-fishery activities.

MMPA provisions in which the term 'negligible impact' appears differ, and that those contextual differences support variable application of the general definition. This is consistent with the guidance provided in the 1986 legislative history that negligible impact assessments consider the type of taking and severity of impacts on affected individuals. Because determinations under section 101(a)(5)(E) are based solely on incidental mortality and serious injury, each taking would, by definition, have severe consequences for each affected marine mammal. In addition, because each taking is assumed to result in the removal of the individual from the population, assessing the impacts of those takings on the species or stock through effects on annual rates of recruitment or survival is fairly straightforward. Such assessments are more amenable to quantification than are assessments of population-level impacts from sub-lethal taking and, as the Draft Directive notes, "can be evaluated using well-documented models of population dynamics."

Another key issue of statutory interpretation is the relationship between section 118, which applies generally to the taking of all marine mammals incidental to commercial fisheries, and section 101(a)(5)(E), which applies specifically to taking ESA-listed marine mammal species. Section 118(a)(2) states explicitly that, for endangered and threatened species, both sections apply.

For marine mammals for which taking in fisheries is identified as being a concern (e.g., the taking of animals from strategic stocks in Category I and II fisheries),[10] section 118 mandates that a take reduction plan be developed and implemented. The short-term goal of a take reduction plan is to reduce incidental mortality and serious injury to below the stock's potential biological removal level (PBR),[11] with a longer-term goal of reducing incidental mortality and serious injury to insignificant levels approaching a zero mortality and serious injury rate. MMPA section 118(b)(1) requires that the zero mortality rate goal be achieved within seven years of enactment.[12] Section 118(b)(2) specifies that "[f]isheries which maintain insignificant serious injury and mortality levels approaching a zero rate shall not be required to further reduce their mortality and serious injury rates further." However, it is unclear from the statutory language and the legislative history of the 1994 MMPA amendments exactly how those criteria relate to the section 101(a)(5)(E) 'negligible impact' standard.

Again we turn to one of the canons of statutory construction, the rule to avoid surplusage. That is, every provision in a statute should be given effect. None should be ignored and none should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence. In the context of MMPA incidental take provisions, this means that the negligible impact standard under section 101(a)(5)(E) must somehow differ from the PBR approach set forth

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[10] 50 C.F.R. § 229.2 provides: "Category I fishery means a commercial fishery determined by the Assistant Administrator to have frequent incidental mortality and serious injury of marine mammals. A commercial fishery that frequently causes mortality or serious injury of marine mammals is one that is by itself responsible for the annual removal of 50 percent or more of any stock's potential biological removal level."
"Category II fishery means a commercial fishery determined by the Assistant Administrator to have occasional incidental mortality and serious injury of marine mammals. A commercial fishery that occasionally causes mortality or serious injury of marine mammals is one that, collectively with other fisheries, is responsible for the annual removal of more than 10 percent of any marine mammal stock's potential biological removal level and that is by itself responsible for the annual removal of between 1 and 50 percent, exclusive, of any stock's potential biological removal level …"
[11] Section 3(20) of the MMPA defines PBR as "the maximum number of animals, not including natural mortalities, that may be removed from a stock while allowing that stock to reach or maintain its optimum sustainable population."
[12] That is, by 30 April 2001; however, meeting this mandate for all fisheries has yet to be achieved.

in section 118. Otherwise, the two provisions would be duplicative and there would have been no reason to enact a separate provision applicable only to endangered and threatened species. Moreover, common sense, the context of the MMPA, and statements in the Act's legislative history support the view that, in enacting section 101(a)(5)(E), Congress had a heightened concern for endangered and threatened species and intended that provision to be more conservative (i.e., more restrictive) than the provisions in section 118, which are generally applicable to all marine mammals. In fact, Congress went so far as to specify that the MMPA take provisions for marine mammals listed under the ESA were more precautionary than those applicable to other ESA-listed species.

That point is made clearly in the legislative report issued by the House to accompany the 1994 legislation, which stated that "the 'negligible impact' standard in the MMPA is more stringent than the 'no jeopardy' standard in the ESA, and consequently provides more protection for endangered or threatened marine mammals under the MMPA than under the ESA."[13] One could argue that the PBR standard under the MMPA is akin to the no jeopardy standard under the ESA, in that it is designed to ensure that depleted marine mammal species and stocks have a high likelihood of increasing toward and eventually reaching optimum sustainable levels. Similarly, ESA section 7(a)(2) requires federal agencies to insure that their actions are not likely to jeopardize the continued existence of the species. Under implementing regulations this has been interpreted to mean that the action cannot reasonably be expected "to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species."[14] That is, the likelihood of recovery cannot be unduly compromised.[15]

The Commission also posits that the zero mortality rage goal (ZMRG) under section 118, also known as the 'insignificance threshold',[16] and the 'negligible impact' standard under section 101(a)(5)(E) can be considered equivalent. As noted above, section 118(b)(2) equates achieving the ZMRG with attaining insignificance. A workshop convened by NMFS in 1994 to develop guidance for the preparation of marine mammal stock assessments concluded that "an insignificant level of mortality is a level that has a negligible impact on the affected stock."[17] Given the delayed date for meeting the ZMRG (seven years after enactment), and the immediate need to limit taking from the most vulnerable marine mammal species and stocks, an interpretation that equates the two standards may not run afoul of the rule against surplusage.

Existing Criteria

In evaluating recovery factors to include in PBR calculations, participants of the aforementioned 1994 workshop endorsed the goal, proposed by the Commission in 1990,[18] that

[13] House Report 103-439 at p. 30.
[14] 50 C.F.R. § 402.02
[15] The Commission notes that NMFS does not necessarily abide by this position and has issued 'no jeopardy' biological opinions for some fisheries for which mortality and serious injury of listed marine mammals exceeds PBR.
[16] See definition of 'insignificance threshold' at 50 C.F.R. 229.2.
[17] Barlow, J, SL Swartz, TC Eagle, and PR Wade. 1995. U.S. Marine Mammal Stock Assessments: Guidelines for Preparation, Background, and a Summary of the 1995 Assessments. U.S. Department of Commerce, NOAA Technical Memorandum NMFS-OPR-6, 73 pp.
[18] Letter from John Twiss, Executive Director of the Marine Mammal Commission to Dr. William Fox, NMFS Assistant Administrator, dated 12 July 1990.

recovery time for a stock should not be delayed by more than 10 percent. Through simulations, NMFS showed that managing to maintain mortality and serious injury (MSI) below PBR and using a recovery factor (Fr) of 0.1 would result in a 95-percent certainty that stocks would experience no more than a 10-percent delay in time to recovery to the lower limit of the optimum sustainable population (OSP) range, namely the maximum net productively level (MNPL). As a result, the workshop recommended that a default value of Fr=0.1 should be used in the calculation of PBR for endangered species,[19] which would ensure that takes of marine mammals would not exceed negligible levels. This is consistent with Congressional intent, which is reflected in the MMPA's definition of the term "potential biological removal level" and establishes a lower bound on Fr of 0.1 for species most at risk. Importantly, NMFS, when first developing NID criteria, recognized that adhering to a strict 10-percent delay-in-recovery standard would need to be adjusted in some cases to take into account a stock's abundance trend and the reliability of the abundance and take estimates.[20]

This history is summarized in the Draft Directive as follows:

> NMFS understood that the workshop participants were recommending that total human-caused M/SI limited to a level no greater than a PBR calculated with Fr of 0.1 would be negligible; however, MMPA section 101(a)(5)(E) required a determination related specifically to the impact of M/SI incidental to commercial fishing rather than incidental to all human activities. Accordingly, NMFS proposed, and subsequently used, 10-percent of any stock's PBR as the upper limit of M/SI incidental to commercial fishing.... The rationale for this approach was that a negligible (or insignificant) level of fishery-related M/SI should be only a small portion of the maximum level of M/SI a stock could sustain.[21]

In 1999 NMFS, as part of a proposed notice to issue incidental take permits, established guidance and criteria[22] for making a NID under Section 101(a)(5)(E). Crucial to the formulation of those criteria was the meaning of the term 'negligible impact.' As part of its NID guidance, NMFS clarified that it was using the applicable regulatory definition of 'negligible impact,' i.e., "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."[23] The Commission notes, however, that the definition does not specify the levels of impact that would or would not adversely affect a stock; in other words it does not provide a quantitative definition of what constitutes a 'negligible impact.'

The current guidance employs five criteria to determine whether the take of ESA-listed species or stocks incidental to commercial fisheries has a negligible impact. NMFS uses those criteria

[19] Barlow et al. 1995
[20] 60 Fed. Reg. 45399
[21] The 10-percent of PBR guideline first appeared in NIDs made in 1995 (60 Fed. Reg. 45399).
[22] 64 Fed. Reg. 28800
[23] 50 C.F.R. § 229.2 and 50 C.F.R. § 216.103.

in its a) assessment of a stock's human-caused MSI rate relative to its PBR, and b) consideration of the stock's abundance trajectory, and the reliability of the take and abundance data, in certain circumstances.[24]

> Criterion 1 allows a finding of negligible impact for all fisheries if total MSI (MSI(t)), and therefore by extension, the total incidental take by all fisheries (MSI(f)),[25] from a given stock is less than 10 percent of the stock's PBR (i.e., the ZMRG standard[26] is met).
>
> Criterion 2 allows a finding of negligible impact if MSI(t) exceeds the stock's PBR, but the MSI(f) meets the ZMRG standard, as long as adequate management measures are addressing the non-fisheries sources of MSI.
>
> Criterion 3 allows a finding of negligible impact, "subject to review and certainty of data," if MSI(f) is less than the stock's PBR but greater than ZMRG, and if the abundance of the population (stock) is stable or increasing.
>
> Criterion 4, which is somewhat ambiguous and subjective, allows a finding of negligible impact to be made for stocks subject to two qualifications. Fisheries take can be permitted only if MSI(f) meets the ZMRG standard and, if the affected stock(s) is(are) declining despite "limitations" on MSI, "a more conservative criterion is warranted" and presumably applied. This apparently means that taking incidental to fisheries can be permitted under this criterion only if MSI(f) is less than the insignificance threshold by some unspecified amount.
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> Criterion 5 specifies that permits may not be issued if MSI(f) is greater than the stock's PBR level.

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[24] The NID criteria published at 64 Fed. Reg. 28801:
"NMFS has adopted the following criteria for making the negligible impact determination under section 101(a)(5)(E) of the MMPA:
1. The threshold for initial determination will remain at 0.1 PBR. If total human-related serious injuries and mortalities are less than 0.1 PBR, all fisheries may be permitted.
2. If total human-related serious injuries and mortalities are greater than PBR, and fisheries-related mortality is less than 0.1 PBR, individual fisheries may be permitted if management measures are being taken to address non-fisheries-related serious injuries and mortalities. When fisheries-related serious injury and mortality is less than 10 percent of the total, the appropriate management action is to address components that account for the major portion of the total.
3. If total fisheries-related serious injuries and mortalities are greater than 0.1 PBR and less than PBR and the population is stable or increasing, fisheries may be permitted subject to individual review and certainty of data. Although the PBR level has been set up as a conservative standard that will allow recovery of a stock, there are reasons for individually reviewing fisheries if serious injuries and mortalities are above the threshold level. First, increases in permitted serious injuries and mortalities should be carefully considered. Second, as serious injuries and mortalities approach the PBR level, uncertainties in elements such as populations [sic] size, reproductive rates, and fisheries-related mortalities become more important.
4. If the population abundance of a stock is declining, the threshold level of 0.1 PBR will continue to be used. If a population is declining despite limitations on human-related serious injuries and mortalities below the PBR level, a more conservative criterion is warranted.
5. If total fisheries related serious injuries and mortalities are greater than PBR, permits may not be issued."

[25] The labels MSI(t) and MSI(f) are used for the sake of brevity herein; they are not labels used by NMFS.

[26] 69 Fed. Reg. 43338.

Thus, current guidance, with some qualifications, effectively allows for three possible outcomes.

1) All fisheries can be authorized if: MSI(f) < ZMRG (Criteria 1, 2, and 4).
2) All/some fisheries[27] can be authorized if: PBR > MSI(f) > ZMRG and the stock is stable or increasing (Criterion 3).
3) No fisheries can be authorized if: MSI(f) > PBR: (Criterion 5).

Although Criteria 1 and 2 make reference to MSI(t)(see footnote 24), whether a fishery can be permitted effectively depends only on the level of MSI(f).

On 8 May 2013, using the 1999 criteria, NMFS published a proposed negligible impact determination for three stocks of large whales taken by a drift gillnet fishery off the West Coast.[28] In its 25 July 2013 letter commenting on that proposal, the Commission identified certain problems with the 1999 NID criteria,[29] primarily that they were unclear (e.g., it is not apparent whether Criterion 4 is based on MSI(t) or MSI(f)), and did not cover all possible situations (e.g., none of the criteria address the situation in which MSI(t) is less than PBR but greater than ZMRG), leaving NMFS in some cases without clear guidance on how to make a NID. The Commission recommended that "NMFS, in consultation with the MMC, review its negligible impact determination criteria and their application, and take the necessary steps to establish improved criteria that are clear, logical, internally consistent, and cover all probable scenarios." NMFS, when it issued the 2013 incidental take permit, agreed with the MMC's assessment and recommendations. In response, NMFS initiated a review of the NID criteria in 2015, a process that led to the recent release of the Draft Directive for public comment. The Draft Directive identifies several problems associated with the application of the 1999 NID criteria, including that PBR is unavailable for some stocks, some combinations of MSI(t) and MSI(f) relative to PBR are not covered, and aspects of some of the criteria are unclear and possibly contradictory.

Proposed NID Guidelines

NMFS, in the Draft Directive, proposes to replace the existing NID guidelines with a new set of criteria that it believes will be more logically consistent, cover all scenarios, and apply to individual fisheries. The proposed new guidelines contain two thresholds: the total negligible impact threshold (NIT(t)) and the single-fishery negligible impact threshold (NIT(s)). For a given marine mammal stock, NIT(t) represents the maximum MSI(t) (i.e., from all anthropogenic sources) and NIT(s) the maximum MSI by a single fishery (MSI(s))[30] that NMFS would consider to be negligible under MMPA section 101(a)(5)(E). These thresholds are applied to make a NID as follows:

[27] The wording is not clear and could be interpreted to mean that all fisheries could be permitted or just individual fisheries.
[28] 78 Fed. Reg. 26751
[29] Letter available at: http://www.mmc.gov/wp-content/uploads/potfisheries_072513.pdf
[30] The labels MSI(t) and MSI(s) are used for the sake of brevity herein, and to be consistent with NMFS's NIT(t) and NIT(s) labels; they are not labels used by NMFS.

1. If, for a given stock, MSI(t) is less than or equal to NIT(t), then that removal level would be considered negligible, and by extension, any part of that take that is due to fisheries interactions would be considered negligible, and a NID could be made for all fisheries that take that stock. This is referred to as the Tier 1 analysis.
2. If, however, MSI(t) is greater than or equal to NIT(t), then the total take would not be considered negligible, and a Tier 2 analysis would be used to determine whether the MSI for an individual fishery (MSI(s)) is less than or equal to NIT(s), in which case a NID specific to that fishery could be made.

The thresholds are calculated from the same components that are used in the PBR calculation:

$$NIT(t) = N_{min} \cdot 0.5R_{max} \cdot NIF(t), \text{ and}$$

$$NIT(s) = N_{min} \cdot 0.5R_{max} \cdot NIF(s),$$

where N_{min} is the minimum stock abundance, R_{max} is the maximum net productivity rate, and NIF(t) and NIF(s) are 'negligible impact factors' similar to the 'recovery factor', Fr, used in the PBR formula, corresponding to NIT(t) and NIT(s), respectively. NMFS proposes using a value of 0.1 for NIF(t), which is equivalent to the default value used in a PBR calculation for an endangered species, which NMFS has shown by simulation is a level of MSI expected to result, at most, in a 10-percent delay in a stock's time to recovery. Based on those simulations, NMFS proposes to use a value of 0.13 for NIF(s), which corresponds to no more than a 1-percent delay in time to recovery. In the Draft Directive, NMFS argues that it should be able to "authorize fisheries that are only minimally contributing" to MSI(t) when all sources of MSI combined exceed NIT(t).

As with the current criteria, the proposed criteria can be stated simply.

1. All fisheries can be authorized if: $MSI(t) \leq NIT(t)$ (i.e., PBR for an endangered stock)
2. Individual fisheries can be authorized if: $MSI(t) > NIT(t)$ and $MSI(s) < NIT(s)$

The proposed guidelines differ in several important ways from the 1999 NID criteria (i.e., the criteria currently in use; compare formulae above with those for the current criteria on page 7).

1. In both cases, taking incidental to all fisheries can be authorized if MSI(t) (and therefore MSI(f)) is less than a specified threshold. Importantly, however, the proposed threshold is up to 10 times less conservative than the current threshold. The current threshold allows a fisheries-wide finding of negligible impact to be made, without other considerations, only if MSI(f) is less than 10 percent of PBR (i.e., it meets the ZMRG standard). In contrast, the corresponding threshold in the proposed criteria, NIT(t), is 10 times higher (i.e., equivalent to PBR for an endangered species calculated using an Fr of 0.1). For threatened species, for which higher Fr values are used to calculate PBR, the difference would be less, but still substantial.

2. Currently, if MSI(f) is greater than PBR, then no incidental take permit can be issued to any fishery. Under the proposed guidelines, if MSI(f) is greater than NIT(t), which is possible in cases where MSI(t) is greater than NIT(t), then individual fisheries could still be authorized if their MSI(s) were considered negligible; however, in such cases, the negligible impact threshold would be NIT(s) rather than NIT(t).
3. The current guidelines, unlike those being proposed, address situations in which MSI(f) is less the PBR, but greater than ZMRG. In that 'gray area,' the current guidelines allow fisheries take to be authorized only if the stock's abundance trend is steady or increasing, and then "subject to individual review and certainty of data" (per current Criterion 3). In such situations, under the proposed guidelines, taking incidental to all fisheries could be authorized, with one exception,[31] regardless of stock status, abundance trend, or data reliability.

Analysis and Discussion

The Commission is concerned with several aspects of the proposed revisions to the NID criteria put forward in the Draft Directive. First, they stray from the provisions and intent of the MMPA in at least two important ways by:

1. establishing equivalent, or even less stringent, criteria for authorizing fisheries take of endangered and threatened marine mammals under section 101(a)(5)(E), than those applying generally to all marine mammals under section 118; and
2. establishing criteria that do not comport with the language of section 101(a)(5)(E).

Second, the proposed criteria would mean the taking of ESA-listed marine mammals could be authorized in situations where impacts would not obviously be 'negligible', and could create counter-intuitive and/or inequitable outcomes.

Reconciling section 101(a)(5)(E) and section 118

As discussed previously, section 101(a)(5)(E) was enacted to provide additional scrutiny of fisheries that take endangered and threatened marine mammal species and stocks, and additional protections for these, these species and stocks, which are most at risk. If all that Congress intended in enacting the 1994 MMPA amendments was to provide protections for ESA-listed species equivalent to those afforded all marine mammals under section 118, two separate provisions would not have been needed. Rather, to give each provision force, as required by the rule against surplusage, the quantitative standard of 'negligible impact' should differ from the standards applicable under section 118. Common sense dictates that the separate standard applicable exclusively to endangered and threatened marine mammal species be viewed as more stringent than that applied generally to all marine mammals. This is not the case under the proposed guidelines.

In proposing to make a negligible impact finding for all fisheries when MSI(t) is below NIT(t), NMFS essentially is applying a PBR standard, at least for endangered species. By equating the negligible impact standard with the PBR-driven take reduction goal under section 118, the

[31] The proposed guidelines include an exception for stocks "failing to recover for reasons unrelated to known human-caused M/SI … [in which case] a NID analysis cannot be conducted…."

proposed criteria would make section 101(a)(5)(E) superfluous and run counter to the legal mandate to give effect to every provision. Even more troubling is that under the NMFS proposal, the negligible impact standard would become less stringent than the generally applicable requirements under section 118. Achieving ZMRG is a requirement of section 118(b), and NMFS has, through regulatory interpretation, established that it is met when MSI(f) has been reduced to 10 percent of PBR, but the proposed negligible impact criterion that would be applicable across fisheries is an order of magnitude higher. This defies a common-sense view of how Congress intended the two incidental take provisions applicable to commercial fisheries to be integrated. As discussed above, the terms 'insignificant' in section 118(b) and 'negligible' in section 101(a)(5)(E) are essentially equivalent. Thus, NMFS's interpretation of the 'negligible' standard should be at least as stringent as its regulatory definition of the 'insignificance threshold,' under which ZMRG is set at 10 percent of PBR. Further, NMFS states in the Draft Directive that:

> MMPA 101(a)(5)(E) authorizations are required for fisheries with frequent or occasional incidental M/SI of marine mammals (i.e., Category I or II fisheries in the MMPA List of Fisheries (LOF)). Authorizations are not required for fisheries involving a remote likelihood of or no known incidental taking of marine mammals (i.e., identified as Category III fisheries in the LOF).[32]

Thus, it is reasonable to conclude, given that incidental take permits are not required for Category III fisheries, that having "a remote likelihood of" take, i.e., take by Category III fisheries, would constitute a negligible impact. NMFS has defined the term 'remote likelihood'[33] for purposes of identifying Category III fisheries as MSI(s) for that fishery being less than 1 percent of PBR, which by any definition that has been put forward by NMFS would be considered negligible. That is, unless there are other, significant sources of removals or additional stressors on the species or stock, MSI at this level cannot "reasonably [be] expected to, and is not reasonably likely to, adversely affect

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[32] Although perhaps technically correct, this is an oversimplification of the regulatory provisions applicable to Category III fisheries. As reflected in the Draft Directive, the regulations governing the taking of endangered and threatened marine mammals, codified at 50 C.F.R. § 229.20, include different procedures for those fisheries required to register under section 118(c) (i.e., Category I and II fisheries) and Category III fisheries. Incidental take permits are issued to Category I and II fisheries for which the required findings are made. In contrast, no permits are issued to Category III fisheries. Rather, the regulations specify that they are not subject to the penalties of the Act, provided that the required determinations (including a finding of negligible impact) have been made and published in the Federal Register and participants timely report any incidental mortality or injury of a marine mammal. So, while no incidental take permit is issued to Category III fisheries, they still must meet the substantive requirements applicable to Category I and II fisheries.

[33] 50 C.F.R. § 229.2: "Category III fishery means a commercial fishery determined by the Secretary to have a remote likelihood of, or no known incidental mortality and serious injury of marine mammals. A commercial fishery that has a remote likelihood of causing incidental mortality and serious injury of marine mammals is one that collectively with other fisheries is responsible for the annual removal of:
(1) Ten percent or less of any marine mammal stock's potential biological removal level, or
(2) More than 10 percent of any marine mammal stock's potential biological removal level, yet that fishery by itself is responsible for the annual removal of 1 percent or less of that stock's potential biological removal level. In the absence of reliable information indicating the frequency of incidental mortality and serious injury of marine mammals by a commercial fishery, the Assistant Administrator will determine whether the incidental serious injury or mortality is 'remote' by evaluating other factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, and the species and distribution of marine mammals in the area or at the discretion of the Assistant Administrator."

the species or stock through effects on annual rates of recruitment or survival."[34] Conversely, Category I and II fisheries, which do require incidental take permits under section 101(a)(5)(E), and which are more likely to have non-negligible impacts, are identified as those having MSI(s) levels greater than or equal to 50 percent of PBR, or between 50 and 1 percent of PBR, respectively. Again, this would mean that NMFS is proposing NID criteria for section 101(a)(5)(E) that are less stringent than the take reduction provisions of section 118.

In addition to the problems with respect to statutory interpretation noted above, this incongruity between the thresholds that would be applied by NMFS under the two sections creates logical inconsistencies. Under section 118, a stock taken by a Category I or II fishery requires a take reduction plan that reduces MSI to insignificant levels (ZMRG). However, under the proposed NID criteria, if MSI(t) is less than NIT(t), then all Category I and II fisheries, regardless of their individual take levels (MSI(s)), would be found to have a 'negligible impact' and qualify for incidental take permits. In such a case, NMFS would, under section 101(a)(5)(E), be permitting a fishery as having a 'negligible impact,' while at the same time, under section 118, be telling the fishery that its impact was not 'insignificant' and that it had to take further actions to reduce its take.

Section 101(a)(5)(E)

Section 101(a)(5)(E)(i) specifies that:

> "… the Secretary shall allow the incidental … taking by persons using vessels …, while engaging in commercial fishing operations, of marine mammals from a species or stock designated as depleted because of its listing as an endangered species or threatened species … if the Secretary determines that—
>
> (I) the *incidental mortality and serious injury from commercial fisheries* will have a negligible impact on such species or stock…." (emphasis added).

Subclause (I) clearly states that the negligibility standard is based on MSI "from commercial fisheries." The Commission believes that the most parsimonious interpretation of this provision is that Congress meant for negligible impact determinations to be based on the impacts from MSI in all commercial fisheries collectively (i.e., MSI(f)). Others have suggested that because individual fisheries are the subject of authorizations,[35] the standard used in making these determinations should be the MSI associated with each fishery individually (i.e., MSI(s). Again, the Commission turns to the legislative history to try to resolve any perceived ambiguity. In this case, the House report on the 1994 MMPA amendments states that section 101(a)(5)(E) "authorizes the Secretary to issue permits for incidental takes by fishermen."[36] This suggests that MSI from all commercial fisheries, rather than taking attributable to particular fisheries, needs to be considered.

Given the use of the plural form "fisheries" in section 101(a)(5)(E)(i)(I), the provision that invokes the negligible impact requirement, the Commission believes that the better interpretation is that an incidental take permit can be issued only if the total MSI from commercial fisheries

[34] Excerpt from definition of 'negligible impact', provided above and in regulation at 50 C.F.R. 216.103
[35] Section101(a)(5)(E)(ii) states, for example, that "…the Secretary shall publish … a list of those fisheries for which such determination was made…" and "[v]essels engaged in a fishery in the notice…."
[36] House Report 102-438 at p. 30.

combined (MSI(f)) is negligible. Although NMFS in the Draft Directive proposes to create an initial evaluation criterion based on MSI(t), other criteria would allow the authorization of incidental take by some fisheries but not by others when overall MSI exceeds the NIT(t). The Commission can envision situations in which MSI(f) exceeds the fisheries-wide negligibility threshold, but incidental MSI in one or more fisheries is sufficiently low that, when considered individually or even in aggregate, the take could be considered negligible. The Commission agrees that a sensible policy in such cases would be to allow those fisheries to be permitted, which is not possible under the current NID guidelines. However, NMFS in the Draft Directive is proposing the creation of such a policy without providing a firm foundation based in the provisions of the MMPA.

Lack of flexibility

A major shortcoming of the proposed criteria is the nearly complete elimination of consideration of the context in which removals from a species or stock would occur. The Commission agrees that there are probably situations in which the level of MSI from a fishery is so small that it can be considered negligible to the species or stock even if total human-caused removals from that population exceeds PBR. However, this should not be a one-size-fits-all approach as NMFS is proposing. There are several relevant factors that the agency should consider in determining, on a case-by-case basis, whether MSI from a fishery would have a negligible impact. As recognized in the current negligible impact criteria, these include a species' or stock's abundance, trend, and reproductive potential. The extent to which non-fisheries MSI exceeds PBR and how intractable these other sources of removals are to reduction also are relevant, although presumably such factors will at some point be reflected in abundance trends and other parameters. That is, whether a fairly low MSI from a fishery (e.g., < 0.10 of a stock's PBR) is negligible depends on what else is going on with the species or stock. It may be negligible if other sources of MSI are just slightly above PBR, but not if they are several times higher. At some point, even a small addition to removals from a species or stock (e.g., <0.01 of its PBR) could become the proverbial straw that breaks the camel's back. It all depends on the context. In addition, such evaluations should go beyond merely considering direct removals and the ability of the species or stock to rebound. As recognized under section 101(a)(5)(A) and 101(a)(5)(D) of the MMPA, sub-lethal forms of taking may also impacts that are more than negligible. As such, the full scope of stressors faced by a species or stock should factor into determining whether the take in a particular fishery, when added to that baseline should be considered negligible.

The Draft Directive proposes to allow NMFS to make a NID for a fishery with an MSI(f) that "slightly exceeds the negligible impact threshold" if there is a "reasonable expectation [that] implemented or concurrently implemented management measures…will [reduce] M/SI below the threshold within the timeframe of the authorization." The Commission recognizes the value of retaining some flexibility and allowing other factors, beyond strictly quantitative thresholds, to be considered when conducting a NID analysis and agrees that discretionary factors are most appropriate when there are only slight deviations from the otherwise applicable standards. However, the Commission does not understand why such flexibility is being proposed for just one scenario and only in one direction—to allow a NID to be made when, with strict adherence to the otherwise applicable criteria, one could not be made. Flexibility should also be built into the criteria to enable NMFS to consider all relevant factors and to withhold a negligible impact finding in marginal cases

based on those factors. In addition to the factors identified in the previous paragraph, NMFS should assess the degree of 'data certainty' and data reliability, the likelihood that MSI has been significantly under- or over-estimated, and the possibility that recent changes in the fishery, environmental conditions, or the distribution of the stock could result in an increase or decrease in take levels.

Illogical and inequitable criteria

The Commission appreciates that the proposed criteria are, in some ways, simpler and more consistently quantitative than the current criteria. However, the Commission believes that the negligible impact threshold for any given fishery should continue to be set at some very small percentage of NIT(t) or PBR, particularly if these criteria are reserved for situations when the impact of overall MSI from fisheries is not considered negligible. Following this approach would be consistent with 1) past application of the term 'negligible' to fisheries incidental take and its relationship to the ZMRG and insignificance threshold under section 118 and 2) the default use of 0.1 as the Fr value for endangered species. The fishery-specific threshold, NIT(s), appears to meet these criteria roughly, although it appears to be slightly less stringent than the section 118 ZMRG threshold. The revised criteria effectively create two separate thresholds for deciding if the impact of a given fishery is negligible or not, depending on the level of MSI(t). It is unclear why the more stringent threshold, NIT(s), does not apply throughout the NID criteria, instead of being contingent on MSI levels from other sources. This problem can be illustrated by three hypothetical scenarios.

1. Consider two cases in which several fisheries take marine mammals from an endangered species or stock. In each, all but one fishery have MSI(s) levels that are less than NIT(s), while the remaining fishery's MSI(s) equals 50 percent of NIT(t) (i.e., it would exceed the NIT(s) threshold in the proposed criteria).

    a. In the first case, MSI(t) for the species or stock is slightly less than NIT(t). Under the proposed guidelines, all of the fisheries would meet the NID criteria and could be issued an incidental take permit (Tier 1), including the fishery whose MSI(s) is 50 percent of NIT(t).

    b. In the second, MSI(t) is slightly greater than that NIT(t), and all fisheries could be permitted except for the fisheries with the highest MSI(s), which exceeds NIT(s) (Tier 2).

    The impact of these fisheries on the species or stock would be the same in each case, but for the one fishery its impact is clearly much greater than the fishery-specific threshold being proposed. However, in first case the fishery with the highest MSI(s) level would be permitted, but in the other it would not, entirely because of slightly differing levels of other sources of MSI. In effect, the revised criteria create two very different negligible impact conclusions even though the underlying patterns are not very different. This is because different thresholds for making a NID would be germane in the two cases—NIT(t) in the first case where total MSI(t) does not exceed NIT(t), and NIT(s) in the second case where MSI(t) does exceed NIT(t).

    To better appreciate this logical inconsistency, consider a situation in which the

exceptional fishery in the first case is responsible for most of the MSI(t) (for example, MSI(s) = 90 percent of NIT(t)), and in the second case it is responsible for just a small fraction of the total (for example, MSI(s) = 15 percent of NIT(t)). In this situation, the fishery with an MSI(s) that is close to, but below NIT(t), would be permitted, but a fishery with an MSI(s) one-sixth as large and close to NIT(s) would not be permitted if NIT(t) were exceeded, even by a small amount. In such a case, application of the proposed criteria to fisheries in similar situations, each taking the same species or stock could experience, could experience very different outcomes that would seem illogical and arguably inequitable.

2. Consider a scenario in which the MSI(t) of a given species or stock is attributable entirely to 11 different fisheries, each of which is responsible for a level of MSI(s) that is approximately 10 percent of NIT(t). In this case, MSI(t) would exceed NIT(t) but, because the contribution of each individual fishery would be less than NIT(s), all would individually qualify for a NID under the proposed criteria. Logically, however, they should not qualify collectively (e.g., under the current criteria, or according to the intent of section 101(a)(5)(E)). This is a classic cumulative impacts problem, in which individual impacts are not considered large enough to warrant action individually, but the sum of those impacts is. The Commission recognizes that although this example is somewhat contrived to illustrate the point, such a scenario is still possible. More realistically, MSI(s) levels would vary among fisheries, with some being above NIT(s) and some below. In that case, some fisheries could not be authorized, but the rest, potentially representing the majority of the impact, could be authorized.

3. Consider a scenario in which most of the MSI is due to take by a single fishery, and the remainder is due to other human-causes (e.g., ship strikes). Assume that the five-year average of MSI(f) fluctuates around 0.9NIT(t) plus or minus 0.05 (i.e., it approaches, but never exceeds NIT(t)), and that non-fisheries MSI fluctuates from zero to 0.2NIT(t)—MSI(t) would thus fluctuate between 0.85 and 1.15NIT(t). Although the single fishery's impact on the stock would be fairly constant, under the proposed criteria that level would switch between being considered negligible and non-negligible based primarily on relatively minor variations in the level of non-fisheries take. In one instance the fishery could be permitted, but in the next review, perhaps not, if, for instance, one more death due to ship strike had been detected in the intervening three-year period. Arguably, however, the fishery's impact on the marine mammal stock had not changed.

These scenarios illustrate a somewhat perplexing aspect of the proposed guidelines. Both the Draft Directive and past guidance from Congress, the Commission, and NMFS itself recognize that negligible impact determinations are to be made relative to demographic parameters (e.g., abundance, mortality rates, and fecundity rates, which together determine rates of increase or decrease in abundance). In other words, the 'negligibility' threshold in section 101(a)(5)(E), or for that matter, the 'insignificance threshold' in section 118, should be tied explicitly to appropriate values for one or more demographic parameters or functions of those parameters. Accordingly, in the proposed guidelines, the 'negligible impact' threshold is based on the population growth rate, specifically to delay in time to recovery (not greater than 10 percent), a standard that adheres to this

principle. Thus, the proposed Tier I analysis makes a determination based on whether MSI(t) is greater or less than NIT(t), which is linked to this 10-percent-delay-in-recovey standard. However, if MSI(t) is greater than NIT(t), then a second standard is used to decide whether a NID can be made.

That second standard, NIT(s), is also designed to ensure that time to recovery is not significantly delayed, in this case, by more than one percent. Thus, there are two negligibility standards, which differ by nearly an order of magnitude. The actual impact of fishing on population growth rate does not change because other factors are also affecting the rate. The relative importance of MSI(f) may change, but not its absolute importance. The negligibility threshold should be defined in terms of fisheries take, and there should be just one threshold. The Commission agrees with the logic that if total MSI is negligible (i.e., MSI(t)<negligibility threshold), then all fisheries MSI impacts must also be negligible. But, it does not make sense, following the proposed guidelines, that if non-fisheries take is large enough such that MSI(t)>NIT(t), then for the take by an individual fishery to be negligible it must much lower (i.e., less than NIT(s)).

The Commission believes that NMFS is in effect proposing two different types of thresholds – a 'negligible impact threshold' and 'negligible contribution threshold.' The first determines, in the manner as argued in this letter to be appropriate, whether the total impact is negligible or non-negligible with respect to time to population recovery. The second, in a case where the total impact in non-negligible, determines whether individual fisheries account for a negligible or non-negligible proportion of the total impact (i.e., whether their individual contributions to the total impact are negligible or not). However, the Commission does not agree that a 'negligible contribution threshold' should be based on the same demographic metric (delay in time to recovery). There should be just one such threshold, which determines whether whatever impact is being considered has a negligible or non-negligible impact on the stock's demography. Whether one component of the total impact contributes significantly to that impact is a different issue. It could for example, be a small, perhaps arbitrary percentage of the total (e.g., five or one percent), or it could depend on the magnitude of the total impact. If the total impact was so large that it threatened the likelihood of recovery, then applying an arbitrary percentage could allow the impact from a single fishery to be unacceptably large (e.g., it could tip the abundance trend from positive to negative). For example, if a 'negligible contribution threshold' was defined to be five percent of PBR (or NIT(t)), then the permittable impact would increase from 0.05PBR to 0.25PBR if MSI(t) increased from being equal to PBR to five times PBR. While it may seem reasonable to consider an increased impact of 5 percent of PBR as negligible when MSI is close to PBR, and the stock is presumably increasing at near its maximum rate given its size, it would be difficult to justify concluding that the impact is negligible when MSI is equivalent to 25 percent of PBR and the species or stock is recovering at a very slow rate.

Recommendations

In 2013, the Commission recommended that NMFS "establish improved criteria that are clear, logical, internally consistent, and cover all possible scenarios." NMFS agreed with that recommendation, at least in part, and undertook a process that led to development of the Draft Directive. As detailed in this letter, the Commission is concerned that the NID guidelines proposed

in the Draft Directive suffer from a number of problems and overall, are not an improvement on the existing criteria. The Commission recommends that NMFS, at a minimum, revise the proposed NID guidelines and criteria, to meet the following conditions:

1. criteria used to make negligible impact determinations under section 101(a)(5)(E) should be more stringent than the PBR-linked take reduction requirement of section 118 and equally or more stringent than the 'insignificance standard" of section 118(b), ZMRG (≤10 percent of PRB);
2. the quantitative negligibility threshold should be based solely on total fisheries MSI, i.e., the standard should not be contingent on other sources of human-caused mortality;
3. negligible impact determinations should be allowed to take other factors into account (e.g., data uncertainty or reliability, population size (abundance), rate of population growth relative to the maximum to be expected given the size of the stock, and expected trends in fisheries impacts and population growth).
4. individual fisheries may be permitted even if the total fisheries impact is non-negligible, so long as the aggregate impact of fisheries that would be permitted does not exceed the 'negligibility threshold' (ZMRG); and
5. negligible impact determinations cannot be made when the PBR framework is inapplicable (i.e., when the stock is declining)

The Commission recognizes that these recommended conditions may require refinement and elaboration, to ensure that they comport with the MMPA as fully as possible, and are logically consistent and equitable. The Commission appreciates the opportunity to provide feedback and recommendations to NMFS regarding the Draft Directive, and stands ready to work with NMFS to refine the recommended conditions as necessary and to develop conformable guidelines and criteria.

Sincerely,

Peter O. Thomas, Ph.D.,
Executive Director

Cc: Dr. Shannon Bettridge, Chief, Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, NOAA Fisheries