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Dear Dr. Thomas,

Thank you for your comment letter on the National Marine Fisheries Service's (NMFS) draft procedural directive (02-204-02) Criteria for Determining Negligible Impacts under Section 101(a)(5)(E) of the Marine Mammal Protection Act (MMPA). I appreciate the time and effort the Marine Mammal Commission (hereafter the Commission) put forth to provide a summary of information related to interpreting "Negligible Impact" under the MMPA, as well as the background on NMFS' existing criteria. While your letter summarizes and discusses many aspects of the proposed Negligible Impact Determination (NID) criteria, I would like to take this opportunity to acknowledge and respond specifically to the Commission's five recommendations.

- 1. Criteria used to make negligible impact determinations under section 101(a)(5)(E) should be more stringent than the Potential Biological Removal (PBR)-linked take reduction requirement of section 118 and equally or more stringent than the 'insignificance standard' of section 118(b), the Zero Mortality Rate Goal (ZMRG, ≤ 10 percent of PBR).*

In addition to your recommendation here, during public comment three additional entities made similar comments and expressed concern that the draft directive was not precautionary enough. Conversely, three entities submitted comments that expressed concern that the directive is overly precautionary.

We appreciate the Commission's concerns that the NID criteria should be more stringent than the take reduction requirements of section 118 of the MMPA and equally or more stringent than ZMRG. I would like to clarify several issues related to this recommendation and the discussion and analysis that supports it in your letter.

First, while we have used NID criteria since 1999, these criteria were never formalized as an official agency policy. As such, to say we are "replac[ing] the existing NID guidelines with a new set of criteria" is inaccurate because these thresholds were never formally established.

Second, it is true that the Negligible Impact Threshold Total (NIT_t) is equivalent to PBR for an endangered stock if, and only if, the default Recovery Factor (F_r) is used in calculating PBR; but



in all other cases (i.e., for threatened stocks and for any endangered stock not using the default F_r), NIT_t is *less than* PBR. In addition, we have modified the directive to provide flexibility in the values used for NIF in the calculation of NIT_t so long as: (a) there is strong justification for why an alternative NIF is more appropriate, and (b) the alternative NIF used in the calculation of NIT_t does not exceed the value of the F_r used in the calculation of PBR for that stock, which further differentiates NIT_t from PBR. Thus, NIT_t , and the NID it informs, is afforded independent meaning. In contrast, your recommendation to have NIT_t be equal to ZMRG would not give the term “negligible impact” independent meaning from that of “ZMRG.” We believe the two terms are distinct.

Finally, your recommendation to have NIT_t be more stringent than the ZMRG is contradicted by MMPA Section 118(b)(2), which states that “Fisheries 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.”

For these reasons, we have not revised the directive in response to this recommendation, beyond adding flexibility in the values used for NIF in the calculation of NIT_t .

2. *The quantitative negligibility threshold should be based solely on total fisheries Mortality and Serious Injury (M/SI), i.e., the standard should not be contingent on other sources of human-caused mortality.*

In its 1999 letter to NMFS¹ regarding the incidental taking of marine mammals during the course of commercial fishing operations, the Commission recommended we determine there to be a negligible impact to ESA-listed marine mammals if the M/SI incidental to commercial fishing operations, “by itself and in combination with other sources of mortality,” would cause no more than a 10% increase in the time to recovery. This recommendation recognizes that total removals, and not just fisheries-related removals, drive the stock’s dynamics and recovery to optimum sustainable population, and we agree with this approach. MMPA 101(a)(5)(E) requires that we evaluate whether fisheries-related M/SI is negligible, but we consider total human-caused M/SI to put the fisheries M/SI in context. We believe having two thresholds is a more flexible approach, and allows us to consider the relative contribution of the fishery-related M/SI to the total M/SI. Here, an individual fishery may be above NIT_s and still have a negligible impact, as long as total human-caused M/SI is below NIT_t .

For these reasons, we have not revised the directive in response to this recommendation.

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*

¹ Letter from John Twiss, Executive Director of the Marine Mammal Commission to Dr. William Fox, NMFS Assistant Administrator, dated 12 July 1990.

growth relative to the maximum to be expected given the size of the stock, and expected trends in fisheries impacts and population growth).

We agree with this recommendation and have modified the directive to allow for qualitative consideration of other factors when the appropriate M/SI estimate is slightly below or above the negligible impact threshold(s). The text in the directive now reads:

“There may be circumstances, such as when the M/SI estimate is slightly below or slightly above the negligible impact threshold(s), where the analyst may deviate from the determination that would be dictated by strictly adhering to the NIT thresholds. Such deviations may be due to the consideration of additional factors affecting the likelihood or impact of the incidental M/SI such as data uncertainty and reliability, information on the population trend, and expected trends in commercial fisheries impacts including implemented or concurrently implemented management measures aimed at reducing M/SI below the threshold.”

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).*

We appreciate the concern regarding additive impacts from individual fisheries that, cumulatively, may have a non-negligible impact. We recognize that there may be rare cases where the total M/SI from commercial fisheries that is determined to be negligible for individual fisheries (i.e., each fishery individually was below NIT_s) could exceed NIT_t in aggregate. However, when we make negligible impact determinations and issue 3-year section 101(a)(5)(E) authorizations, M/SI will continue to be monitored and management action implemented if warranted. For example, if the combined fisheries-related M/SI exceed NIT_t , a take reduction team may be convened and we may develop regulations to reduce M/SI below PBR for one or more fisheries that kill or injure the stock and to ultimately achieve ZMRG. Thus, while the concern the Commission and others raise is valid, in rare circumstances when this might occur we have additional regulatory tools, in particular those under MMPA Section 118, to address the issue. Furthermore, the directive specifically notes that fisheries should not be redefined or split on the MMPA List of Fisheries (LOF) solely for purposes of making a negligible impact determination, and based on the current LOF, the scenario of concern appears unlikely to occur.

For these reasons, we have not revised the directive in response to this recommendation.

5. *Negligible impact determinations cannot be made when the PBR framework is inapplicable (i.e., when the stock is declining).*

As noted in the draft directive, the simulations and methodology used to determine NIF for NIT_t and NIT_s assume stocks conform to the underlying assumptions of PBR; that is, depleted stocks should show growth, some fraction of which can be removed without preventing recovery. In

this way, the NID analysis framework proposed in the draft directive may, in some cases, not be appropriate for stocks that are not increasing, have uncertain population trends, or do not conform to the PBR framework. However, we recognize that there may be circumstances in which a NID is possible for such stocks (e.g., a population that has reached carrying capacity). The MMPA does not require stocks to be increasing, have known population trends, or conform to the PBR framework in order for a NID to be made. Given this, and keeping in mind that the proposed NID analysis framework assumes stocks conform to the PBR framework, we have modified the directive to clarify the language regarding the assumption of conforming to the PBR framework, and to provide more flexibility to consider an alternative approach when a stock does not conform to this framework. The directive now reads:

“The model simulations supporting the negligible impact thresholds (see section 5.3, Development of the Two NIT Thresholds) inherently assume that the ESA-listed stock’s dynamics conform to the underlying assumptions of PBR; that is, depleted stocks should show growth, some fraction of which can be removed without preventing recovery. However, there are some circumstances where an ESA-listed stock does not conform to the PBR framework, if, for example a stock is failing to recover for reasons unrelated to known direct human-caused M/SI (e.g., Cook Inlet beluga whales). In such cases, the NIT criteria and following NID process may still be appropriate, but the analyst should consider how the stock’s not conforming to the underlying assumptions of PBR affects the NID analysis and whether an alternative approach is necessary.”

I appreciate the Commission’s recommendations as they have helped us improve the directive to its final form, and look forward to our continued work together to recover, conserve, and protect marine mammals.

Sincerely,

Donna Wieting