March 26, 2012

VIA Federal eRulemaking Portal:
http://www.regulations.gov

Mr. Michael Payne
Chief, Marine Mammal and Sea Turtle Conservation Division
Attn: GAMMS
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910-3226

Re: Comments on the Draft Revisions to the Guidelines for Preparing Marine Mammal Stock Assessment Reports NOAA–NMFS–2012–0007

Dear Mr. Payne:

This letter provides the comments of the American Petroleum Institute ("API"), the International Association of Geophysical Contractors ("IAGC"), and the Alaska Oil and Gas Association ("AOGA") in response to the National Marine Fisheries Service's ("NMFS") request for information and public comment concerning the Draft Revisions to the Guidelines for Preparing Marine Mammal Stock Assessment Reports ("Draft Guidelines"). *See* 77 Fed. Reg. 3,450 (Jan. 24, 2012). Collectively, our associations' members are long-standing and active participants in oil and gas exploration and development activities. We appreciate this opportunity to provide comments on the Draft Guidelines.

Our members operate in the marine waters of the United States and have a direct interest in NMFS's management of U.S. marine mammal stocks. Assessment of marine mammal abundance and density are used by NMFS to estimate potential incidental takes resulting from oil and gas industry activities, which in turn drive mitigation measures imposed on industry operations. Therefore, the Draft Guidelines under consideration have a material impact on our industry.

I. SUMMARY OF COMMENTS

In several respects, the Draft Guidelines propose to disclose more information in NMFS's annual Stock Assessment Reports ("SARs") and to provide reasoned explanations for certain agency decisions that are reported in the SARs. At the outset, we commend NMFS for proposing to be more transparent in its annual SARs. We also respectfully offer criticism of certain other aspects of the Draft Guidelines. We genuinely intend for this criticism to be constructive and to assist the agency in revising the Draft Guidelines to be consistent with the Marine Mammal Protection Act ("MMPA").

Our comments largely focus on NMFS's proposed method for estimating the minimum population size of marine mammal stocks for which existing abundance estimates are more than eight years old. NMFS proposes to estimate the minimum population size in such circumstances by arbitrarily imposing a 10% retroactive decline for each of the previous eight years, and for each subsequent year until a new population survey is conducted. This automatically assumed decline would not take into account the specific biological, demographic, or habitat characteristics of the marine mammal stock at issue. Rather, the assumed decline would operate as a generic application based on the *largest marine mammal population decline ever observed in a single stock*. In other words, as applied in specific cases, this pre-programmed decline is not a scientifically based assumption and, instead, represents the application of a *policy* decision on the part of the agency. This is a policy decision not supported by science and not consistent with the plain language of the MMPA or Congressional intent. Marine mammal species have varying life spans, geographic regions are inherently different, and risk factors impact marine mammals in different ways, as such, a generically applied worst case scenario is simply not supportable.

In addition, the Draft Guidelines contain certain other elements that are not consistent with the MMPA. First, NMFS suggests that it may delineate marine mammal "stocks" based on concentrated patterns of human-caused mortality. However, the MMPA expressly defines the term "stock" with reference to the demographic and biological characteristics of the *species* – not human factors. Second, the Draft Guidelines propose a definition of "strategic stock" that, if applied mechanically, would be inconsistent with the MMPA and the Endangered Species Act ("ESA").[1]

Finally, NMFS's lack of marine mammal funding has led to a chronic deficiency in information about marine mammal stocks and an inability to address take reduction planning. Under MMPA, if there is insufficient funding available to develop and implement the take

[1] NMFS suggests that the Draft Guidelines are intended to "provide a uniform framework for the consistent application of the amended MMPA throughout the country." Draft Guidelines at 71. If the Draft Guidelines are indeed applied in this manner, then they constitute a final agency rule under the Administrative Procedure Act ("APA"). *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993); *Chamber of Commerce v. Occupational Safety & Health Admin.*, 636 F.2d 464, 469-70 (D.C. Cir. 1980). In this circumstance, the Draft Guidelines violate the APA because they were not promulgated in accordance with APA rulemaking procedures. *See Nat. Res. Def. Council v. EPA*, 643 F.3d 311 (D.C. Cir. 2011).

reduction planning process, NMFS is directed to give the highest priority to stocks whose level of incidental mortality and serious injury exceeds the potential biological removal ("PBR") level[2], those that have a small population size, and those which are declining most rapidly. By adopting guidelines based on arbitrarily determined and scientifically unsound assumptions built into the PBR calculations, NMFS risks being put in the position of spending its limited dollars on managing stocks that are relatively healthy but whose calculated numbers are artificially low

II. DETAILED COMMENTS

A. Applicable MMPA Requirements

1. Statutory language

Section 117 of the MMPA requires NMFS to, among other things, produce an annual SAR for each marine mammal stock. 16 U.S.C. § 1386. Each SAR must include a minimum population estimate ("N_{min}"), an estimate of the annual levels of human-caused mortality and serious injury, current and maximum net productivity rates, a description of current population trends, and a calculation of PBR level. *Id.* at §§ 1386(a)(2), 1386(b)(3). A stock's N_{min} is a key variable in the PBR calculation. The N_{min} must (i) be "based on the *best available scientific information* on abundance, incorporating the precision and variability associated with such information," and (ii) provide a "*reasonable assurance* that the stock size is equal to or greater than the estimate." 16 U.S.C. § 1362(27) (emphases added). The PBR is applied to categorize each stock as either (i) having "a level of human-caused mortality and serious injury that is not likely to cause the stock to be reduced below its optimum sustainable population" or (ii) a "strategic" stock. *Id.* at §§ 1386(a)(4)-(5).

2. Congressional intent

NMFS acknowledges that the Draft Guidelines represent an attempt to interpret the intent of Congress as expressed in the MMPA. A primary source of Congressional intent in this instance is the legislative history supporting the 1994 amendments to the MMPA.

Initially enacted in 1972, the MMPA has been subject to many amendments that have dramatically changed its application. Most recently, and as relevant here, Congress passed amendments to the MMPA in 1994, largely in response to *Kokechik Fishermen's Assoc. v. Secretary of Commerce*, 839 F.2d 795 (D.C. Cir. 1988). In *Kokechik*, the court rejected an incidental take permit issued to a fishing association covering marine mammal stocks for which the "optimum population size" was unknown. *Id*. at 802. Among other things, the subsequent Congressional action established the system of marine mammal stock assessment reporting that

[2] The PBR represents the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.

the Draft Guidelines purport to interpret.[3] In establishing the stock assessment reporting process, Congress recognized that a "scientific framework"[4] was needed to prioritize scarce Federal resources:

> The Commission believes that there is particular merit in the process that the Service has proposed to assess and monitor the status of the affected marine mammal stocks and to identify priority research and monitoring needs. The process will ensure critical scientific peer review and provide opportunity for public participation. Further, it will ensure that available funding and personnel are focused on the most critical problems.[5]
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> Under the National Marine Fisheries Service's proposed regime, the Service would develop and implement a long-term research program to assess and monitor the size, vital rates, and trends in all marine mammal stocks that have more than a remote possibility of interacting with fisheries. Priority would be afforded to depleted and declining stocks and to stocks with high levels of incidental take.[6]

In developing the MMPA's stock assessment reporting system, Congress recognized that stock assessments must be based on the best available scientific information. Highlighting this intent, the Department of Commerce's general counsel testified prior to enactment of the 1994 amendments that "[t]he Department believes that regulations imposed on the take of marine mammals should be based on data from careful studies of the population dynamics and other aspects of such mammals." H. R. Rep. 92-707 at 4166-67. Finally, and importantly, with respect to N_{min}, Congress intended that "[t]he stock assessment would include… [a] *realistic* minimum population size." S. Rep. No. 103-220 at 12 (1994) (emphasis added).

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[3] Marine Mammal Protection Act Amendments of 1994, Pub. L. No 103-238, secs. 10-11, 108 Stat. 532, 543-57 (codified as amended at 16 U.S.C. §§ 1386-1387) (adding sections 117 and 118 to the MMPA).

[4] *Reauthorization of the Marine Mammal Protection Act: Before the S. Comm. on Commerce, Science, and Transportation*, 103rd Cong. 24 (1993) (statement of Nancy Foster, Ph.D., Acting Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration).

[5] *Governing Interactions Between Marine Mammals and Commercial Fishing Operations: Hearing Before the H. Subcommittee on Environment and Natural Resources of the Committee on Merchant Marine and Fisheries*, 103rd Cong. 7 (1993) (statement of Robert Hoffman, Scientific Program Director of the Marine Mammal Commission).

[6] *Reauthorization of the Marine Mammal Protection Act: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 103rd Cong. 19 (1993) (prepared statement of Robert Hoffman, Scientific Program Director of the Marine Mammal Commission).

B. NMFS's Proposed Revisions to the N_{min} Calculation Are Contrary to the MMPA and Congressional Intent

In the Draft Guidelines, NMFS proposes to implement a default N_{min} calculation that will not result in remotely "realistic" N_{min} estimates. Currently, NMFS considers marine mammal stocks without an abundance estimate in the previous eight years as having an undetermined PBR. Understandably dissatisfied with the uncertainties presented by marine mammal stocks for which little or "stale" data is available, NMFS has attempted in the Draft Guidelines to establish a default N_{min} calculation for such stocks.

For stocks without an abundance estimate in the previous eight years, NMFS proposes to calculate N_{min} by automatically assuming, starting in year nine, a retroactive annual 10% decline in abundance for the marine mammal stock at issue for *each year* since the last abundance estimate, continuing until a new abundance survey is conducted. NMFS describes this approach as establishing a "plausible worst case scenario" and, indeed, according to NMFS, the 10% figure is based upon *the largest annual decline ever observed in any marine mammal stock in U.S. waters*. *See* Draft Guidelines at 75. This approach would effectively result in an automatically assumed 50% decrease in the stock's N_{min} after 8 years. *Id*.

Respectfully, NMFS's proposal is arbitrary, unrealistic, and unscientific. First, the MMPA does not authorize, and Congress did not intend for, NMFS to incorporate the concept of a "worst case scenario" into any element of the stock assessment process. Instead, Congress required that the N_{min} calculation provide a "reasonable assurance" that the actual stock size is greater than or equal to N_{min}. As noted above, Congress intended for this calculation to be "realistic." Rather than providing for a realistic "reasonable assurance," NMFS's proposal would establish an absolute minimum "worst case" population estimate that, under no reasonable or feasible scenario, would ever possibly exceed the actual population of the stock. NMFS would ensure this level of absolute (but unrealistic) certainty by expressly basing its calculation on an assumed decline equal to the greatest decline observed in U.S. history for a single marine mammal species. This decline would be assumed for *each year* for at least eight years and continuing for each year until a new population estimate is performed. And, this decline would be assumed despite the fact that the species at issue almost certainly would have had very different biological, demographic, and physical characteristics than the species (the Steller sea lion) for which the record-setting 10% sustained decline was observed.

NMFS's proposed approach results in a "minimum population size" that represents far more than a "reasonable assurance" of the actual population size. It is an unqualified and unrealistic *guarantee* that a given stock's actual abundance is larger than the agency's N_{min}.[7] Moreover, this pre-programmed guarantee is not based on scientifically sound assumptions and, instead, represents the application of a *policy* decision on the part of the agency. This is not what

[7] The Draft Guidelines caution that "[i]f there is evidence that stock size is stable or increasing, this approach would not be taken." However, the Draft Guidelines provide no indication of what sort of evidence would be used short of a new abundance survey, and this is left entirely to the discretion of the agency. In any event, the Draft Guidelines are clear that the 10% annual decline approach is the *default approach*.

Congress intended when it called for a "realistic" N_{min} and it is not consistent with Congress's intent as expressed in the plain language of the MMPA. In short, NMFS's proposal would unlawfully import a new "worst case scenario" provision into the MMPA. NMFS's proposal is also not faithful to the MMPA's mandate that stock assessment decisions are to be based on the best available scientific information.

Second, aside from the legal and scientific deficiencies of NMFS's proposal, a practical application of the proposed "worst case scenario" approach further reveals its shortcomings. There are numerous examples of instances in which application of NMFS's proposal would lead to arbitrary and absurd results. A few examples are as follows:

CNP Humpback Whales. As late as 2007, NMFS estimated the Central North Pacific ("CNP") humpback whale population to be 4,005, and its N_{min} to be 3,698, based on a survey that occurred in 1991-93.[8] Under the Draft Guidelines, NMFS would have calculated the CNP humpback whale's N_{min} to be 1,342 in 2002 (the ninth year after 1993). By 2007, under the Draft Guidelines, this estimate would be further decreased to 846 (again, assuming a 10% decline each year). However, NMFS completed a study in 2007 (the "SPLASH" study) that has demonstrated the CNP humpback whale population to be 7,469 to 10,103 animals, with a best model estimate of 10,103 and an N_{min} of 5,833.[9] Accordingly, application of the Draft Guidelines to the CNP humpback stock before the SPLASH study would have resulted in a minimum population estimate that was clearly inaccurate and by all accounts *not* realistic. Had the SPLASH study not been conducted, the CNP humpback whale's N_{min} would continue to be arbitrarily and unrealistically decreased by NMFS to levels below the 846 estimate.

Hawaii Pelagic False Killer Whales. In 2002, NMFS completed a survey of the Hawaiian EEZ from which it estimated the Hawaii pelagic false killer whale stock to be 484 animals, with an N_{min} of 249. Under the Draft Guidelines, in 2011, NMFS would have calculated the N_{min} for this stock to be 96. However, NMFS recently completed a new survey of the Hawaiian EEZ in which *six times* as many groups of false killer whales were observed than in the previous survey. Based on this new survey, NMFS has preliminarily estimated this stock to be 1,700 to 1,900 animals. While the "official" new estimate has not yet been released, clearly the new N_{min} will be many times greater than 96. Again, in the absence of a new survey, the Hawaii pelagic false killer whale stock's N_{min} would represent a highly innacurate population estimate that is many hundred percent smaller than the stock's actual population size.

"Ice Seals". The "ice seal" species (ringed, ribbon, bearded, and spotted seals) do not have recent population surveys because they are very difficult to survey based on their locations

[8] National Marine Fisheries Service, Alaska Fisheries Science Center, NOAA Technical Memorandum: NMFS-AFSC-180, *Alaska Marine Mammal Stock Assessments, 2007* at 164 (2007).

[9] National Marine Fisheries Service, Alaska Fisheries Science Center, NOAA Technical Memorandum: NMFS-AFSC-223, *Alaska Marine Mammal Stock Assessments, 2010* at 191 (2011).

(the Arctic and/or the Bering Sea), their widespread numbers, and their large ranges.[10] All of these animals are believed to occupy the entirety of their respective historical ranges and to be high in abundance. However, very little recent data exists with respect to these species. Again, application of the Draft Guidelines for these species results in N_{min} estimates that are not remotely accurate:

- Ribbon seals in the Bering Sea were estimated to number 90,000-100,000 in 1981. Aerial surveys were conducted in portions of the eastern Bering Sea in spring of 2003 and, according to NMFS, data from these surveys are currently being analyzed to construct estimates of abundance for the eastern Bering Sea. In the interim, a provisional estimate of 49,000 ribbon seals in the eastern and central Bering Sea was reported by NMFS.[11] NMFS reports that the estimate of 49,000 is "consistent with historical estimates," but the current productivity or population trend is unknown. *Id*. Under the Draft Guidelines, NMFS would have applied the retroactive presumptive decrease of 10% annually in 1990 (the ninth year following the 1981 estimate). In 2012, approximately 31 years later, the original population estimate (90,000-100,000 animals) would be reduced to 3,434-3,815. As far as we know, there is no scientist who believes that the Bering Sea ribbon seal stock numbers anywhere near as low as 3,815 animals.[12]

- In 1992, NMFS reported spotted seals to number approximately 59,124.[13] Under the Draft Guidelines, in 2012, this number would be reduced to 7,687 animals. Again, we are not aware of any scientist who believes that the ribbon seal stock is anywhere near as low as 7,687 animals.[14] Application of the Draft Guidelines to ringed or bearded seals would result in similarly absurd results.

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[10] *See* National Marine Fisheries Service, Alaska Fisheries Science Center, NOAA Technical Memorandum: NOAA-TM-AFSC-206, *Alaska Marine Mammal Stock Assessments, 2009* at 64-5 (2009).

[11] National Marine Fisheries Service, Alaska Fisheries Science Center, NOAA Technical Memorandum: NOAA-TM-AFSC-206, *Alaska Marine Mammal Stock Assessments, 2009* at 64-5 (2009).

[12] This calculation is based on the actual population estimate (not the minimum population estimate) because the N_{min} was not calculated in the most recent ribbon seal SAR. The N_{min} calculation would result in an even lower number than the 3,434 – 3,815 estimate.

[13] National Marine Fisheries Service, Alaska Fisheries Science Center, NOAA Technical Memorandum: NOAA-TM-AFSC-206, *Alaska Marine Mammal Stock Assessments, 2009* at 64-5 (2009).

[14] This calculation is also based on the population estimate (not the minimum population estimate) because the N_{min} was not calculated in the most recent spotted seal SAR. The N_{min} calculation would result in an even lower number the 7,687 estimate.

Western Arctic Bowhead Whales. The last abundance data for the Western Arctic bowhead whale stock was collected in 2001, and NMFS estimated N_{min} to be 10,545.[15] Application of the Draft Guidelines in 2012 would result in an N_{min} of 3,309. However, the Western Arctic stock is considered to be increasing in the presence of known take, and the actual stock is almost certainly greater than 10,545 animals today.[16] *Id.* In all of the examples above, the N_{min} calculated under the proposed "worst case scenario" approach would result in estimates that are far lower than a "realistic" estimate that provides "reasonable assurance" of a stock's minimum size.

C. NMFS's N_{min} Proposal Would Have Negative Unintended Policy Consequences

Under Section 118, NMFS must establish take reduction teams for each "strategic stock" of marine mammals that interacts with a Category I or II commercial fishery within 30 days of issuing a SAR that indicates that a stock is "strategic." 16 U.S.C. § 1387(f)(6). Take reduction teams are charged with developing regulatory and voluntary measures to reduce levels of incidental mortality and serious injury to marine mammals from commercial fishing operations. *See* 16 U.S.C. § 1387(f)(2)-(6). The orchestration of take reduction teams is very costly and time intensive. If there is insufficient funding available to develop and implement the take reduction planning process, NMFS is directed to give the highest priority to stocks whose level of incidental mortality and serious injury exceeds the PBR level, those that have a small population size, and those which are declining most rapidly. *Id.*

In enacting the 1994 MMPA amendments, Congress clearly intended that the SAR framework should help federal agencies to "prioritiz[e] the use of Federal resources."[17] This intent is particularly apt today in light of NMFS's serious funding problems. For example, in 2008, the Government Accountability Office ("GAO") reported that "NMFS officials told GAO [that] they are aware of the [MMPA] data limitations but lack funding to implement their plans to improve the data." The GAO then identified 14 stocks of marine mammals which met the requirements for establishing a take reduction team, but for which NMFS had failed to comply

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[15] National Marine Fisheries Service, Alaska Fisheries Science Center, NOAA Technical Memorandum: NMFS-AFSC-223, *Alaska Marine Mammal Stock Assessments, 2010* at 219 (2011).

[16] Again, although the Draft Guidelines suggest that "[i]f there is evidence that the stock size is stable or increasing" then the new methodology would not be applied, it is unclear what methodology would be used. Draft Guidelines at 11. It is unclear, however, what evidence is necessary before the default would not be applied. As currently proposed, application of a default calculation that most certainly would not produce a realistic assessment of a stock's minimum population size in almost all cases would be applied routinely.

[17] Reauthorization of the Marine Mammal Protection Act: Before the S. Comm. on Commerce, Science, and Transportation, 103rd Cong. 24 (1993) (statement of Nancy Foster, Ph.D., Acting Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration).

with the statutory requirements.[18] NMFS's lack of marine mammal funding has led to both a forty year, chronic deficiency in information about marine mammal stocks as well as an inability to address take reduction planning.[19]

We respectfully suggest that assuming an arbitrary 10% annual decline calculation, a deliberate shift away from the use of "best available science" requirement, will not cause Congress to provide millions of dollars of funding to NMFS to carry out marine mammal stock assessments and fund take reduction teams.[20] Instead, the result of applying the Draft Guidelines as currently proposed will be that many stocks will have unrealistically low PBRs, resulting in more "strategic stocks," resulting in more stocks being added to the list of marine mammals for which a take reduction team is required. NMFS will be left with the task of prioritizing a long list of strategic stocks requiring take reduction teams, but many of the strategic stocks on that list will not be "strategic" at all due to the application of an unrealistic, scientifically unsound assumption that was built into the PBR calculation.

D. NMFS's Determination of a "Stock" Must Be Based on Species Characteristics

In the Draft Guidelines, NMFS suggests that it may delineate marine mammal stocks based upon human factors such as incidental take as a result of human-caused mortality. Specifically, NMFS explains:

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[18] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-78, National Marine Fisheries Service: Improvements Are Needed in the Federal Process Used to Protect Marine Mammals from Commercial Fishing, Executive Summary (2008).

[19] In the most recent governmental review of the MMPA, the GAO stated that:

> significant limitations in available information make it difficult for NMFS to accurately determine which marine mammal stocks meet the statutory requirements for establishing take reduction teams… NMFS told us that funding constraints limit their ability to gather sufficient data. For example, in a 2004 study, NMFS identified the actions and resources needed to improve the marine mammal stock assessment data that support MMPA decisions; however, [in 2008] officials told us that they have not received the resources necessary to complete the actions identified in the report.

U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-78, National Marine Fisheries Service: Improvements Are Needed in the Federal Process Used to Protect Marine Mammals from Commercial Fishing, 6-7 (2008).

[20] As stated succinctly by Thomas Eagle, the NMFS fishery biologist charged with implementing the 1994 amendments to the MMPA, "NMFS' budget is finite, and its responsibilities under the MMPA are extensive." Decl. of Thomas Clifton Eagle, *Strahan v. Linnon*, 1998 U.S. App. LEXIS 16314 (1st Cir. 1998) (No. 94-11128-DPW) (going on to explain the process for prioritizing the creation of TRT teams).

> [C]oncentrated [human-caused] mortality (of a large magnitude) could lead to population fragmentation, a reduction in range, or even the loss of undetected populations, and would only be mitigated by high immigration rates from adjacent areas…. In particular, where mortality is greater than a PBR calculated from the abundance just within the oceanographic region where the human-caused mortality occurs, serious consideration should be given to identifying an appropriate stock in this region.

Draft Guidelines at 73. However, the plain language of the MMPA does not permit the determination of stock status based on human-related factors. The MMPA defines "population stock" or "stock" as "a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature." 16 U.S.C. § 1362(11). Accordingly, when delineating "stocks" for purposes of the MMPA, NMFS can only consider the demographic and biological characteristics of the species at issue. Carving out "stocks" in areas where human-caused mortality is high, as NMFS proposes, would violate the MMPA.

E. NMFS's Proposed "Strategic Stock" Definition Should Not Be Mechanically Applied

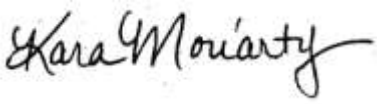
The MMPA provides that a "strategic stock" is, among other things, one "which, based on the best available scientific information, is declining and is likely to be listed as a threatened species under the Endangered Species Act of 1973 within the foreseeable future." 16 U.S.C. § 1362(19)(B). In an apparent attempt to interpret this definition, the Draft Guidelines suggest that a "strategic stock" is a stock that "is declining and has a greater than 50% probability of a continuing decline of at least 5% per year." Draft Guidelines at 82. However, in reality, a stock that "has a greater than 50% probability of a continuing decline of at least 5% per year" would not necessarily qualify as "threatened" in all cases. Rather, the determination of "threatened" status under the ESA requires a species-specific analysis of specific factors that are expressly set forth in the ESA. While NMFS may have the discretion to develop a general guideline for determining "strategic" status, NMFS may not, without violating the MMPA, mechanically apply the "strategic stock" definition set forth in the Draft Guidelines.

Again, we offer the comments above in the spirit of constructive criticism and request that NMFS will revise the Draft Guidelines to address the serious deficiencies we have addressed above. Although we understand that many of the concepts addressed in this comment letter are directly applicable to commercial fisheries, we are very concerned that the inaccuracies that will surely result from application of the Draft Guidelines as proposed will have negative effects on the incidental take authorization processes applicable to the oil and natural gas industry, which has invested significant resources in developing and applying scientifically-grounded methods for estimating, monitoring, and minimizing marine takes .[21] We therefore appreciate this opportunity to comment on the Draft Guidelines.

[21] In making negligible impact determinations, NMFS has considered the following factors:

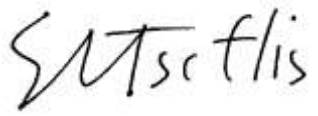
(continued . . .)

Sincerely,



Kara Moriarty
Alaska Oil and Gas Association

Andy Radford
American Petroleum Institute



Sarah Tsoflias
International Association of Geophysical Contractors

(. . . continued)

> (1) The number of anticipated injuries, serious injuries, or mortalities;
> (2) The number, nature, and intensity, and duration of Level B harassment (all relatively limited);
> (3) The context in which the takes occur (i.e., impacts to areas of significance, impacts to local populations, and cumulative impacts when taking into account successive/ contemporaneous actions when added to baseline data);
> *(4) The status of stock or species of marine mammals (i.e., depleted, not depleted, decreasing, increasing, stable, impact relative to the size of the population)*;
> (5) Impacts on habitat affecting rates of recruitment/survival; and
> (6) The effectiveness of monitoring and mitigation measures.

See e.g., 77 Fed. Reg. 4,765, 4,786 (Jan. 31, 2012) (emphasis added) (listing the above factors); 76 Fed. Reg. 77,782, 77,805 (December 14, 2011) (same); *see also* 76 Fed. Reg. 69,958 (Nov. 9, 2011).