



Animal Welfare Institute

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BY ELECTRONIC AND REGULAR MAIL

Submitted via <http://www.regulations.gov>

Chief, Marine Mammal and Sea Turtle Conservation Division
Attn: Policy for Distinguishing Serious from Non-Serious Injuries of Marine Mammals
Office of Protected Resources, NMFS
1315 East-West Highway
Silver Spring, MD 20910

Chief:

RE: Comments on Proposed National Policy for Distinguishing Serious from Non-Serious Injuries of Marine Mammals (76 Fed Reg 42117)

On behalf of the Animal Welfare Institute (AWI), please accept the following comments on the above-referenced National Oceanic and Atmospheric Administration/National Marine Fisheries Service (hereafter NMFS) proposed National Policy and Procedural Directives (hereafter Proposed Policy) for distinguishing serious from non-serious injuries of marine mammals.

The purpose of the proposed directives is to clarify the subjective nature of 50 CFR 229.2, which defines "serious injury" as "any injury that will likely result in mortality." The proposed directives interpret "will likely result in mortality" as "more likely than not to result in mortality," or that there is a "greater than 50 percent chance" that mortality will result. The Procedural directive also details a specific process for distinguishing serious from non-serious injury for three categories of marine mammals: large cetaceans, small cetaceans, and pinnipeds.

This Proposed Policy is of significant importance for marine mammals. NMFS uses 50 CFR 229.2 to estimate annual levels of human-caused mortality and serious injury of marine mammal stocks to maintain the health and stability of the marine ecosystem. 16 U.S.C. § 1361. In doing so, the agency's goal is to obtain an optimum sustainable population within the constraints of the capacity of the habitat.

There are several instances where AWI strongly feels that NMFS could more effectively employ the precautionary principle in the process for distinguishing serious from non-serious injury of marine mammals. However, AWI also applauds NMFS for revising previous policy that

designated an entangled or hooked marine mammal as a non-serious injury if the gear was subsequently removed.

This comment letter will provide specific input on the proposed directives, the process for injury determinations and on other issues contained in the Proposed Policy.

NMFS' Mandatory Duties under the MMPA:

Congress enacted the MMPA in 1972 in response to widespread concern that large numbers of marine mammals were being killed through interactions with commercial fisheries. Congress found that "certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities." 16 U.S.C. § 1361(1). The policy behind the MMPA is that "such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population." 16 U.S.C. § 1361(2).

Congress added sections 117 and 118 to the MMPA in 1994 to address interactions between commercial fisheries and marine mammals. Section 117 requires NMFS to prepare marine mammal stock assessments for marine mammals within a fishery based upon "the best scientific information available." 16 U.S.C. § 1386(a). Section 118 addresses the taking of marine mammals incidental to commercial fishing operations and requires NMFS to classify each commercial fishery according to its rate of fishery-related injury to marine mammals. 16 U.S.C. § 1387.

Section 117 requires NMFS to "prepare a draft stock assessment report (SAR) for each marine mammal stock which occurs in waters under the jurisdiction of the United States." 16 U.S.C. § 1386(a). Each SAR must include, among other things, a minimum population estimate, an estimate of "the annual human-caused mortality and serious injury of the stock," descriptions of commercial fisheries that interact with the stock, including "the estimated level of incidental mortality and serious injury of the stock by each such fishery on an annual basis," and an estimate of the potential biological removal (PBR) level for the stock. Id.

Under Section 117, the Secretary (acting through the NMFS) must develop a program to monitor incidental taking and serious injury, and may place observers on board vessels to record mortality and injury rates, log the number of marine mammals sighted and conduct other scientific investigations. If the Secretary finds that the incidental mortality and serious injury of marine mammals by commercial fisheries has, or is likely to have an immediate and significant adverse impact on a stock or species, the Secretary must issue emergency regulations to reduce the mortality and injury rates and provide expedited review of the take reduction plans or amendments. 16 U.S.C. § 1387.

The relevant provisions of the MMPA direct the NMFS to manage serious injuries and mortalities of marine mammals incidental to commercial fishing operations. This includes, under

Section 118(f)(2) of the MMPA, the development of long and short term goals for take reduction plans with the short term goal being to maintain marine mammal bycatch below the PBR rate while the long term goal is to reduce the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations “to insignificant levels approaching a zero mortality and serious injury rate.” This latter standard allows NMFS to take into consideration “the economics of the fishery, the availability of existing technology, and existing State or regional fishery management plans.”

This charge requires that NMFS be able to distinguish serious injuries from those that are not serious. NMFS has defined “serious injury” in regulations (50 CFR 229.2) as “any injury that will likely result in mortality.” NMFS convened a Serious Injury Technical Workshop in September 10-13, 2007, with the primary objectives to: 1) review the recommendations and guidance from a 1997 workshop;¹ 2) review new information obtained since the first workshop; and 3) discuss the use of, and necessary changes to, existing guidance for distinguishing serious from non-serious injuries.

NMFS makes clear in the Proposed Policy that it intends to clarify and provide justification for its interpretation of the regulatory definition of serious injury as any injury that is “more likely than not” to result in mortality, or any injury that presents a “greater than 50 percent chance of death to a marine mammal.” 76 Fed Reg. 42117.

Process for Distinguishing Serious from Non-Serious Injury of Marine Mammals:

AWI recommends that NMFS employ the precautionary principle more thoroughly in the proposed process for distinguishing serious from non-serious injury of marine mammals and in addressing uncertainty in calculating likelihood of mortality. The precautionary principle in this case encourages policy makers to err on the side of caution and assume harm in the absence of scientific consensus on a given issue or when the sample sizes used to, for example, prorate the seriousness of the injury are so small as to not be statistically significant. AWI strongly supports the precautionary principle embodied in the Marine Mammal Protection Act to avoid activities that harm or can potentially harm and seriously injure marine mammals. The principle advocates taking anticipatory, protective management action in the absence of complete proof of harm.

As an initial matter, AWI is concerned about the decision by NMFS to use “greater than 50 percent” as its criterion for determining if a serious injury will result in mortality. It would appear that this criterion is arbitrary without any substantive analytical support. NMFS must explain the basis for its selection of this particular criterion and why, for example, it chose not to set the mortality criterion at 40 percent. A lower mortality criterion for determining when an

¹ Based on the results of a 1997 workshop discussing the impacts of injuries of marine mammals incidental to commercial fishing operations (Angliss and DeMaster, 1998) and specific regional experience with injury events, NMFS Regional Offices and Science Centers developed regional techniques for assessing and quantifying the serious injuries of marine mammals. Although these regional techniques helped to accomplish the MMPA’s mandates, NMFS recognized the need for a nationally consistent and transparent process for effective conservation of marine mammal stocks and management of human activities impacting these stocks.

injury would be properly designated a serious (and therefore likely to result in mortality) would lead to more injuries being classified as serious and, hence, would be more precautionary.

AWI submits the following comments and recommendations on NMFS' Protected Resource Management Process for Distinguishing Serious from Non-Serious Injury of Marine Mammals:

Large Cetacean Injury Categories and Criteria:

Unlike the small cetacean and pinniped categories, this category contained more examples that either qualified as “serious injury,” “non-serious injury,” or “prorate.” There were no “case-specific” categories. NMFS implies that the “prorate” category effectively represents the “case-specific” designation.

However, if NMFS was employing the precautionary principle, many, if not all of the non-serious injury designations would be case-specific to allow the discretion to designate an injury as serious if the circumstances warranted. For example, the “*Superficial Laceration*”² is considered a non-serious injury, but can be designated as a serious injury if there is an indication that the marine mammal’s health has significantly declined as a result of the entanglement. This is an example of a designation that is actually case-specific even though it is designated in the guidelines as a non-serious injury.

Furthermore, this same example raises another concern regarding when the injured marine mammal is observed. For example, a whale with a superficial laceration observed weeks or months after the injury can be designated as a “serious” injury depending on the whale's condition. However, if observed only days after the injury, the animal’s injury can be designated as a “non-serious injury” even though the whale may eventually die as a result of the injury. This is antithetical to achieving a zero mortality and serious injury rate. If the precautionary principle was applied in this particular policy, then some or all of these marine mammals with a superficial laceration would be designated as having a serious injury. From a management perspective, it makes more sense to assume the worst than to assume the best.

In regard to the designations that are prorated, the proration formula is based on a relatively small sample size. Category L6b,³ for example, is prorated using a .20 figure (1 out of 5 whales that qualifies under this category will die). Given the small sample sizes that the rates are based on, NMFS should utilize the precautionary principle and develop the proration amount (e.g., .20) and then double, triple, or even quadruple it in order to determine what proportion of animals affected should be declared to have a serious injury likely to result in death. This would reflect a far more precautionary approach and, though, it may ultimately over-estimate the number of large whales with serious injuries (and therefore likely to die), such a conservative approach is

² National Marine Fisheries Service Protected Resource Management Process for Distinguishing Serious from Non-Serious Injury of Marine Mammals, § VII. E. L5b, http://www.nmfs.noaa.gov/pr/pdfs/serious_injury_process_draft.pdf, pg. 14 (July 2011).

³ *Id.* at pg. 15.

more sensible from a management perspective versus misclassifying animals as having non-serious injuries who then subsequently die.

Small Cetacean Injury Categories and Criteria:

In this case, if the precautionary principle were used, more of the “case-specific” designations would qualify as serious injuries. Some examples of case-specific designations that could and should qualify as serious injuries include:

- Visible blood loss;
- Hooks in any body part but hooks are removed or pull out;
- Hooks in appendage or body without trailing gear;
- Gear wrapped and loose on any body part;
- Body trauma not covered by any other criteria;
- Loss or disfigurement of a dorsal fin;
- Partially severed flukes not transecting midline;
- Partially or completely severed or fractured pectoral fins; and
- Social animals separated from group and/or released alone post-interaction.

Blood loss, for example, should be classified as a serious injury because if a small cetacean is seen bleeding, unless that animal is followed for sufficient time to determine if the blood loss does stop, there is no way for NMFS to know if the bleeding will stop based on a single observation. Furthermore, how can the loss of a dorsal fin, partially severed fluke, and/or partially or completely severed pectoral fin be considered a *non-serious* injury? The precautionary principle, if applied, would compel NMFS to determine that if there is an animal with any gear wrapped on any part of his/her body, the gear will become restrictive and/or will otherwise hinder the animal, constituting a serious injury. In other words, NMFS should err on the side of caution in assessing injuries and include any uncertainties as serious injuries.

Pinnipeds Injury Categories and Criteria:

Though the specific categories for pinnipeds are somewhat different than those for small cetaceans, they are sufficiently similar such that AWI’s previous comments regarding large and small cetaceans also apply to the pinniped categories.

General Discussion & Recommendations:

In addition to considerations regarding the proposed process for distinguishing serious from non-serious injury of marine mammals, there are broader fundamental issues that NMFS should examine as it finalizes this Proposed Policy. Of particular importance is the serious injury standard of 50 CFR 229.2 being exclusively tied to mortality. AWI has the following substantive concerns regarding the regulation, including but not limited to the following:

- NMFS should develop procedures within this Proposed Policy to identify mortalities that are human-caused but are less obvious to detect than in the case of direct physical contact. For example, did the individual die of a human-caused disease? Did human-

generated noise generate a behavioral response that resulted in mortality? Did human-generated noise result in chronic hearing damage that resulted in death? Did the individual's ingestion of human-generated debris result in mortality? NMFS should define the cause of mortality when dealing with these less obvious cases.

- NMFS should provide procedures for addressing the threshold issue of what constitutes an injury before a determination of whether a serious injury has occurred can be made. Is any detectable or measurable harm an injury? If the definition of injury is restricted to measurable tissue damage, how does this Proposed Policy account for the modern problem of internal injuries such as hearing damage?
- NMFS should take into account harm and serious injury that does not necessarily result in mortality, such as impairment of an individual's reproductive success. The Supreme Court has recognized impairment of reproduction as harm to an individual under the Endangered Species Act (ESA).⁴
- NMFS should take into consideration the species' status (i.e. whether they are endangered, threatened, a candidate species, or if using criteria developed by the International Union for Conservation of Nature, critically endangered, endangered vulnerable, near threatened, etc.) in assessing serious and non-serious injuries. A mortality rate threshold may need to be lower for populations of more imperiled species (i.e., from a population perspective, any injury to a North Atlantic right whale could be classified as more serious than a similar injury to a common dolphin). NMFS should provide decreased thresholds (lower than a 50 percent chance that an injury will result in mortality) for listed species according to the severity of their imperiled status. In other words, when assessing the likelihood that an injury to a listed marine mammal if a lower threshold was used (e.g., 30 percent) more types of injuries would qualify as "serious injuries" and likely to result in mortality thereby satisfying the precautionary principle. Candidate species for listing under the ESA should be afforded a lower threshold than abundant species; species listed as threatened under the ESA should be given a lower threshold than unlisted species; and federally endangered species should receive a lower threshold still.
- NMFS should take into account the reproductive status of the species and time during the gestation cycle when injury occurs. If a serious injury occurs to an animal that is known to be or subsequently determined to be pregnant or postpartum, for management purposes should that be counted as a single mortality or two mortalities? NMFS should consider this issue as it continues with the process to complete this Proposed Policy.
- Regarding situations where there is a relationship between an anthropogenic event, for example a ship strike and the death of a marine mammal, NMFS should define exactly what constitutes a significant amount of time between the event and death.

AWI supports NMFS' recommendation to omit successful mitigation efforts in calculating which fisheries cause serious injuries but requests that this policy change be expanded as specified below. As a result of the 2007 workshop, NMFS revisited whether marine mammals that are

⁴ *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 at 710 (1995).

successfully disentangled or dehooked at a later date or time should be considered when classifying fisheries on the List of Fisheries (LOF). Previously, if an entangled or hooked marine mammal was determined to be seriously injured from the entanglement or hooking but was later successfully disentangled or dehooked and determined to have only non-serious injuries once the gear was removed, the interaction was not included as a serious injury in the SAR because the animal was not removed from the population. As a result, the interaction was not used when classifying fisheries on the LOF, which further skewed the agency's data away from protecting marine mammals from threatening conflicts with fishing vessels. 76 Fed Reg. 42117.

This previous approach does not accurately reflect the overall impact of commercial fisheries on marine mammal populations because, by not including disentangled animals in the number of seriously injured animals resulting from interactions with commercial fishing gear, it does not account for all serious injuries inflicted on marine mammals by commercial fishing. Further, this previous approach can lead to an underestimation of total serious injury and mortality of marine mammals because it relies on opportunistic detection and post-interaction intervention by NOAA to mitigate injury effects. AWI additionally requests that NMFS expand its policy so that any animal that is classified as a "serious injury," even if that animal has been successfully disentangled or dehooked, be retained in any and all subsequent reports including, but not limited to, LOFs and SARs.

In addition, in accounting for small cetacean events where the severity of an injury cannot be determined, AWI commends the decision to assign all remaining CBD cases to be the same determination as for the majority of similar assignable cases.

However, on balance, NMFS should redefine "serious injury" of marine mammals in the context of the current planning process to encompass the types of injuries enumerated above. In addition, NMFS should consider issuing regulations pursuant to Section 118(f) of the MMPA imposing any necessary measures (e.g. gear modifications) so as to reduce or eliminate the risk of serious injury and mortality to marine mammals from any such fisheries.

Conclusion:

AWI supports the Proposed Policy as it seeks to clarify the definition of serious injury under 50 CFR 229.2. However, to ensure the credibility and strength of this standard, NMFS should employ the precautionary principle in its interpretation of what should be considered a serious injury and address broader issues associated with the serious injury standard being exclusively tied to mortality. Specifically, NMFS should:

- Re-define "serious injury" to broaden the type and severity of injuries that would qualify as "serious";
- Lower the threshold for measuring when an injury "will likely result in mortality," both for unlisted and listed species; and
- Make the process of determining when a "serious injury" has occurred less arbitrary by carefully defining procedures as outlined above.

AWI has provided input on many, if not all, of the other options, suggestions, and concepts raised by NMFS in its proposed Policy and Procedural Directives. Thank you in advance for providing this opportunity to comment on this Proposed Policy and for considering these comments. Please send any future correspondence or information about this Proposed Policy to: Tara Zuardo, Wildlife Program Associate, Animal Welfare Institute, 900 Pennsylvania Ave., SE, Washington, DC 20003.

Sincerely,



Tara Zuardo
Wildlife Program Associate

Resources:

Andersen, M.S., K.A. Forney, T.V.N. Cole, T. Eagle, R. Angliss, K. Long, L. Barre, L. Van Atta, D. Borggaard, T. Rowles, B. Norberg, J. Whaley, and L. Engleby. 2008. Differentiating Serious and Non-Serious Injury of Marine Mammals: Report of the Serious Injury Technical Workshop, 10-13 September 2007, Seattle, Washington. NOAA Technical Memorandum NMFS-OPR-39. 94.

National Marine Fisheries Service Policy for Distinguishing Serious from Non-Serious Injury of Marine Mammals (DRAFT) at http://www.nmfs.noaa.gov/pr/pdfs/serious_injury_policy_draft.pdf (July 2011).

National Marine Fisheries Service Procedure for Distinguishing Serious from Non-Serious Injury of Marine Mammals (DRAFT) at http://www.nmfs.noaa.gov/pr/pdfs/serious_injury_process_draft.pdf (July 2011).