

would be very informative to the regulated community and would facilitate the development of additional public comments that would be helpful to NMFS as it revises and refines the Draft Guidance.

2. NMFS can improve the usefulness of the Draft Guidance and enhance the regulated community's ability to meaningfully comment by providing for public review a draft of the "user guide" that will inform and assist NMFS's implementation of new acoustic criteria. The draft of this implementation guide should be provided for review and comment along with the second version of the Draft Guidance.

3. The Associations support NMFS's determination that the proposed SEL_{cum} metric will be applied to discrete activities/sources and not used to accumulate sound exposure for multiple activities occurring over the same time period. The Draft Guidance also states that application of the proposed criteria "do[es] not represent the entirety of the impact assessment" and explains that other qualitative factors will be considered. However, the Draft Guidance provides little discussion or explanation of how these qualitative factors will be considered, the relative weight given to the factors, or how the factors will be implemented. We encourage the agency's consideration of qualitative factors in a manner that adds flexibility to the regulatory process. In addition to providing more discussion of these qualitative factors, it would be helpful for the Draft Guidance to include an explanation of the important role served by currently implemented mitigation and monitoring measures, which have been proven to substantially avoid and reduce incidental take.

4. The Draft Guidance does not address a significant category of Level B take (i.e., behavioral harassment). The vast majority of offshore oil and gas incidental take authorizations involve Level B take in the form of behavioral modification. It would greatly improve the regulated community's ability to meaningfully assess the implications of the proposed criteria if the Draft Guidance included an explanation of how the proposed acoustic criteria will be implemented in the absence of new criteria applicable to Level B behavioral harassment. Again, this will be an area for which flexibility is important.

5. It is not clear from the Draft Guidance whether NMFS intends there to be five different mitigation zones for five different functional hearing groups or whether NMFS will prescribe the most precautionary mitigation zone based on the most sensitive species but applicable to all marine mammals in the area. Both of these potential options present concerns. On the one hand, the application of multiple radii for different species will be operationally challenging to implement. If NMFS is considering the implementation of varying exclusion zones, then this approach may also require changes to the standards applicable to observer programs and additional training of protected species observers. As further addressed in the Appendix (¶ 6.1.3), it is also not clear how NMFS will address effects at multiple depths under this approach. On the other hand, prescription of a single mitigation zone based on the most sensitive species but applicable to all marine mammals in the area would not be consistent with the best available science. It would be helpful for NMFS to provide a clear description of how it

foresees the proposed criteria translating into specific operational mitigation and monitoring requirements.

6. The Draft Guidance appropriately recognizes that TTS is not an “injury,” but addresses TTS as a form of Level B harassment separate from behavioral modification. The Draft Guidance states that TTS “will be addressed for purposes of take quantification” after NMFS develops guidance for behavioral modification and that, in the meantime, “the TTS thresholds presented represent the best available science and will be used in the comprehensive effects analyses under the MMPA and the ESA and may inform the development of mitigation and monitoring.” However, it is not clear from the Draft Guidance as to how NMFS will specifically address TTS in the permitting process before behavioral modification criteria are finalized. For example, it is unclear as to whether NMFS is now going to require the use of three separate take thresholds (for PTS, TTS, and behavioral modification) and, if so, how NMFS will ensure that the permitting and implementation processes do not become too burdensome and complex. The Draft Guidance should more fully explain how these issues will be addressed.

7. It is not clear from the Draft Guidance whether or where NMFS will require sound source verification (“SSV”). In the experience of the Associations’ members, SSV poses a complicated and unnecessary burden on operations because the results of SSV are highly variable due to constantly changing conditions in the water column. If SSV is intended to be part of the standard protocol in the implementation of the proposed criteria, then it is important that the regulated community have the opportunity to provide informed input on this potential requirement. Specific recommendations regarding SSV are provided in the Appendix (§ 6.1.2).

8. The Draft Guidance addresses a complex subject, and this is reflected in an equally complex proposed approach with several options provided to applicants. The complexity of the proposed approach will result in increased time and expenses for applicants, as well as potentially strain the limited resources of specialized modeling firms. Additionally, the complexity of the Draft Guidance could create confusion among public stakeholders, possibly leading to mistaken interpretations or public statements regarding the purpose and intent of the Draft Guidance. More clarity on the purpose of the Draft Guidance, and how it will be implemented, would enhance both the regulatory and public perception aspects of the Draft Guidance.

9. In determining PTS and TTS onset levels, NMFS adopts two methodologies for determining quantitative factors that can be considered in conjunction with utilizing the numeric acoustic threshold levels: a marine mammal weighting function and an alternative acoustic threshold level. In so doing, NMFS recognizes that the applied weighting function will likely result in a lower estimate of take, but that the new methodology “might extend beyond the capabilities of some applicants” (i.e., smaller operators). This system could have inequitable results for operators who, for either cost or time reasons, may not be able to use the more complicated applied weighted factor methodology. It would be helpful for the Draft Guidance to