

- Is there a high likelihood that the project will be funded?
- Are the fishing restrictions associated with the DHRA designation an explicit part of the design of the project?
- Is there potential research [at some other critical stage in the idea—funding process]?

Following the review and evaluation of the DHRAs, including information provided through this notice and request, and in consultation with the Council, the Regional Administrator will determine whether the DHRAs should be maintained or removed. Removal of the DHRAs, if warranted, would be completed consistent with the Administrative Procedure Act. Additional information and a flowchart outlining how these questions should be used in the evaluation process can be found on pages 116 and 117 of Volume III of OHA2 (<https://www.nefmc.org/library/omnibus-habitat-amendment-2>).

The DHRAs are intended to allow coordinated research and to build on past studies and baselines by restricting certain types of fishing to create appropriate reference conditions in the research area and facilitate scientific study. The DHRAs are set up as general closures where project scientists determine study sites and treatments and arrange research fishing activity. The DHRAs are intended to provide opportunities for addressing the following research topics and questions:

### 1. Gear Impacts

a. How do different types of bottom tending fishing gear (e.g., trawl nets, dredges, hook and line, traps, gillnets, longlines) affect the susceptibility and recovery of physical and biological characteristics of seabed habitat, and how do these impacts collectively influence key elements of habitat including spatial complexity, functional groups, community state, and recovery rates and dynamics?

b. Are our estimates of gear contact with the bottom accurate? Can we develop trawl gear that minimizes contact on the bottom, thereby reducing the potential for gear impacts?

### 2. Habitat Recovery

a. What recovery models (e.g., successional vs. multiple-stable states) are operant in the region and how resilient are seafloor habitats to disturbance? In other words, how do seafloor habitats recover, and are there thresholds after which habitats have achieved an alternate state and are no longer capable of recovering to their previous, undisturbed condition?

b. Do “small” fishing-caused disturbances surrounded by unimpacted habitat recover more quickly and exhibit greater resilience in contrast to “large” fishing-caused disturbances embedded with small un-impacted patches?

c. When a particular area is fished for the first time vs. subsequent efforts, are these impacts equal per unit effort? Or, is the first pass over an area much more detrimental? Conversely, is there a tipping point beyond which the habitat is no longer capable of recovering?

### 3. Natural Disturbance

a. In the absence of fishing, what are the dynamics of natural disturbance (e.g., major storm events) on seafloor habitat (especially biological components) across five major grain size classes (mud, sand, coarse sand-granule, pebble-cobble, boulder) and across oceanographic regimes? In areas where natural disturbance is high, are signals of the impacts of fishing masked?

### 4. Productivity

a. How does the productivity of managed species (and prey species) vary across habitat types nested within the range of oceanographic and regional settings? How does this productivity change when habitats are impacted by fishing gear? Do durable mobile bottom-tending gear closures increase fish production? Why are highly productive areas so productive?

NMFS requests information about active and planned research in the DHRAs, the stage of the research, the role of the DHRA in the research, and the relationship of the research to the above DHRA research agenda, if any. Response to this request is voluntary. You may submit written comments via email to [Laura.Deighan@noaa.gov](mailto:Laura.Deighan@noaa.gov) with “DHRA Research” in the subject line within 30 days of this notice.

*Authority:* 16 U.S.C. 1801 *et seq.*

Dated: July 15, 2022.

**Jennifer M. Wallace,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

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**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[RTID 0648–XB958]

#### Process for Distinguishing Serious From Non-Serious Injury of Marine Mammals; Proposed Revisions to Procedural Directive (NMFS PD 02–038–01)

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; request for comments.

**SUMMARY:** The National Marine Fisheries Service (NMFS) solicits public comments on draft revisions to the Process for Injury Determination, Distinguishing Serious from Non-Serious Injury of Marine Mammals (NMFS Procedural Directive (PD) 02–038–01).

**DATES:** Comments must be received by August 19, 2022.

**ADDRESSES:** The draft revisions to the Process for Injury Determination Distinguishing Serious from Non-Serious Injury of Marine Mammals (NMFS PD 02–038–01) are available at: <https://www.regulations.gov/docket/NOAA-NMFS-2022-0043>. You may submit comments on the proposed revisions, through the Federal e-Rulemaking Portal:

1. Go to <https://www.regulations.gov> and enter NOAA–NMFS–2022–0043 in the Search box.

2. Click the “Comment” icon, and complete the required fields.

3. Enter or attach your comments.

*Instructions:* NMFS may not consider comments if they are sent by any other method, to any other address or individual, or received after the end of the comment period. Due to delays in processing mail related to COVID–19 and health and safety concerns, no mail, courier, or hand deliveries will be accepted. All comments received are a part of the public record and will generally be posted for public viewing on <https://www.regulations.gov> without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the commenter may be publicly accessible. NMFS will also accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:**

Jaclyn Taylor, NMFS Office of Protected Resources, (301) 427-8402, [Jaclyn.Taylor@noaa.gov](mailto:Jaclyn.Taylor@noaa.gov); or Phinn Onens, NMFS Office of Protected Resources, (301) 427-8402, [Phinn.Onens@noaa.gov](mailto:Phinn.Onens@noaa.gov).

**SUPPLEMENTARY INFORMATION:**

The Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*) requires NMFS to estimate the annual levels of human-caused mortality and serious injury (M/SI) to marine mammal stocks (Section 117) and to classify commercial fisheries based on their level of incidental M/SI of marine mammals (Section 118). This charge requires that NMFS distinguish between injuries that are serious and those that are not serious. However, the MMPA and its legislative history do not provide guidance on how severe an injury must be to qualify as “serious.” NMFS defined “Serious Injury” in regulations (50 CFR 229.2) as “any injury that will likely to lead to mortality.” While this definition provided guidance on which injuries should be considered serious injuries, it allowed subjective interpretation of the likelihood that an injury would result in mortality.

To promote national consistency for interpreting the regulatory definition of serious injury, NMFS convened a workshop in April 1997 to discuss available information related to the impact of injuries to marine mammals incidental to commercial operations (Angliss and DeMaster, 1998). The outcomes of the 1997 Workshop, including the development of regional techniques for assessing and quantifying the serious injury of marine mammals, helped NMFS to accomplish the MMPA’s mandates. However, through implementing workshop guidance, NMFS recognized a need for a nationally consistent and transparent process for effective conservation of marine mammal stocks and management of human activities implementing these stocks. Further, since 1997, additional information had been collected on human-caused injuries to marine mammals and survival rates of certain individuals and/or species of marine mammals.

Accordingly, NMFS convened a second workshop in September 2007 (Serious Injury Technical Workshop) to review performance under existing guidance, gather scientific information, and update guidance based on the best scientific information available (Andersen *et al.* 2008). Based on the results of the 2007 workshop and input from marine mammal scientists, veterinary experts, and the MMPA

Scientific Review Groups, NMFS developed national guidance and criteria in 2012, comprising a Policy Directive (02-038) and associated Procedural Directive (02-038-01), for distinguishing serious from non-serious injuries of marine mammals (Both directives are available at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-policies-guidance-and-regulations>). The Policy Directive provides further guidance on NMFS’ definition of “serious injury,” and the Procedural Directive describes the annual process for making and documenting injury determinations. The annual process includes guidance for which NMFS personnel make the annual injury determinations; what information should be used in making injury determinations; information exchange between NMFS Science Centers; NMFS Regional Office and Scientific Review Group review of the injury determinations; injury determination report preparation and clearance, and inclusion of injury determinations in the marine mammal stock assessment reports and marine mammal conservation management regimes (e.g., MMPA List of Fisheries, Take Reduction Teams, Take Reduction Plans, vessel speed regulations).

The injury criteria set forth in the Procedural Directive were developed separately for large whales, small cetaceans, and pinnipeds because of the differences in the source and nature of injury data for these groups. In addition, the types and impacts of injuries differ between these broad taxonomic groups. The injury determinations for large whales are largely based on an analysis of NMFS data on injury events with known outcomes (*i.e.*, survival or death of the animal), with the exception of a few criteria based on expert opinion (Andersen *et al.* 2008). In contrast, the injury criteria and determination for small cetaceans and pinnipeds are based almost entirely on expert opinion because data on documented injuries and known outcomes in the wild are not available for most small cetaceans and pinnipeds.

NMFS solicited public comment on both the policy and procedural directive (76 FR 42216; July 18, 2011) and the directives were finalized in 2012. The NMFS Policy Directive specifies that NMFS should review both the Policy and Procedural Directives at least once every five years, or when new information becomes available, to determine whether any revisions to the Directives are warranted. The review must be based on the best scientific information available, input from the

MMPA Scientific Review Groups, as appropriate, and experience gained in implementing the process and criteria. If significant revisions are indicated during the review, NMFS will consider making these available for public review and comment prior to acceptance.

In 2017, NMFS initiated a review of the Policy and Procedural Directives and invited subject matter experts from within NMFS to identify necessary revisions based upon the best scientific information available. The review suggested that, in general, the national guidance is meeting its objectives of providing a consistent, transparent, and systematic process for assessing serious from non-serious injuries of marine mammals. However, there was enough substantive feedback to warrant revising the Procedural Directive.

Through the review process, several topics were identified by an internal NMFS Working Group to help concentrate the proposed revisions to the Procedural Directive. Revisions primarily focused on the pinniped and small cetacean sections (Section VIII and IX respectively) and included the creation of a new case specific harassment category (P16) for pinnipeds and expanding existing subcategories (S15a and S15b for small cetaceans) using the best scientific information available. NMFS has also clarified criteria associated with some small cetacean injury categories, including those involving lip and mouth hookings. To inform these proposed revisions, NMFS conducted literature reviews, sought input from several researchers with long-term longitudinal data sets, and solicited individual expert opinion from experts familiar with small cetacean injuries (including anatomists and veterinarians). Further, NMFS included potential risk factors that may lead to the development of capture myopathy in certain individuals, and a list of observable external physical signs that may lead to capture myopathy. This information on capture myopathy is included as an appendix to the Procedural Directive. In addition to the taxa specific revisions, some minor edits were made to improve readability and clarity and to clarify the determination process and reporting procedures. The proposed revised Procedural Directive is available at: <https://www.regulations.gov/docket/NOAA-NMFS-2022-0043>. NMFS solicits public comments on the proposed revisions.

**References**

- 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. U.S. Dep. Commer., NOAA Tech. Memo. NMFS–OPR–39. 94 p.

Angliss, R.P. and D.P. DeMaster. 1998. Differentiating Serious and Non-Serious Injury of Marine Mammals Taken Incidental to Commercial Fishing Operations. NOAA Tech Memo. NMFS–OPR–13, 48 p.

**Catherine Marzin,**

*Deputy Director, Office of Protected Resources, National Marine Fisheries Service.*

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BILLING CODE 3510–22–P

## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

[Docket No. PTO–P–2022–0023]

#### Request for Comments on Director Review, Precedential Opinion Panel Review, and Internal Circulation and Review of Patent Trial and Appeal Board Decisions

**AGENCY:** Patent Trial and Appeal Board, United States Patent and Trademark Office, U.S. Department of Commerce.

**ACTION:** Request for Comments.

**SUMMARY:** The United States Patent and Trademark Office (USPTO or Office) seeks public comments on practices and policies for the review of Patent Trial and Appeal Board (PTAB or Board) decisions. The USPTO has implemented a number of processes that promote the accuracy, consistency, and integrity of PTAB decision-making in Leahy-Smith America Invents Act of 2011 (AIA) proceedings. The USPTO plans to formalize those processes through notice-and-comment rulemaking. To inform such rulemaking, and to inform any modifications to the interim processes pending formalization, the USPTO seeks public comments. Specifically, the USPTO seeks input on the current interim Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office (Director) review process that allows a party to request Director review of a PTAB final written decision in inter partes review (IPR) or post-grant review (PGR) proceedings, and also provides the Director the option to sua sponte initiate the review of any PTAB decisions (at the Director's discretion), including institution decisions and decisions on rehearing. The USPTO also seeks input on the Precedential Opinion Panel (POP) process. Finally, the USPTO seeks input

on the current interim process for PTAB decision circulation and internal PTAB review. These processes, implemented by the PTAB prior to issuing decisions and implemented without Director input, are modeled after practices of the U.S. Court of Appeals for the Federal Circuit.

**DATES:** *Comment Deadline Date:* Written comments must be received on or before September 19, 2022, to ensure consideration.

**ADDRESSES:** For reasons of Government efficiency, comments must be submitted through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). To submit comments via the portal, enter docket number PTO–P–2022–0023 on the homepage and click “Search.” The site will provide a search results page listing all documents associated with this docket. Find a reference to this Request for Comments and click on the “Comment Now!” icon, complete the required fields, and enter or attach your comments. Attachments to electronic comments will be accepted in ADOBE® portable document format or MICROSOFT WORD® format. Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

Visit the Federal eRulemaking Portal ([www.regulations.gov](http://www.regulations.gov)) for additional instructions on providing comments via the portal. If electronic submission of comments is not feasible due to a lack of access to a computer and/or the internet, please contact the USPTO using the contact information below for special instructions regarding how to submit comments by mail or by hand delivery, based on the public's ability to obtain access to USPTO facilities at the time.

**FOR FURTHER INFORMATION CONTACT:** Kalyan Deshpande, Vice Chief Administrative Patent Judge; Amanda Wieker, Acting Senior Lead Administrative Patent Judge; or Melissa Haapala, Vice Chief Administrative Patent Judge, at 571–272–9797.

**SUPPLEMENTARY INFORMATION:**

#### Background

##### *Development of This Request for Comments*

On September 16, 2011, the AIA was enacted into law (Pub. L. 112–29, 125 Stat. 284 (2011)). The AIA established the PTAB, which is made up of administrative patent judges (APJs) and four statutory members, namely the USPTO Director, the USPTO Deputy

Director, the USPTO Commissioner for Patents, and the USPTO Commissioner for Trademarks. 35 U.S.C. 6(a). The Director is appointed by the President, by and with the advice and consent of the Senate. 35 U.S.C. 3(a)(1). APJs are appointed by the Secretary of Commerce in consultation with the Director. *Id.* 6(a). The PTAB hears and decides ex parte appeals of adverse decisions by examiners in applications for patents; appeals of reexaminations; and proceedings under the AIA, including IPRs, PGRs, covered business method (CBM) patent reviews,<sup>1</sup> and derivation proceedings, in panels of at least three members. *Id.* 6(b), (c). Under the statute, the Director designates the members of each panel. *Id.* 6(c). The Director has delegated that authority to the Chief Judge of the Board. See PTAB Standard Operating Procedure 1 (Rev. 15) (SOP1), Assignment of Judges to Panels, <https://go.usa.gov/xtdt2>.

35 U.S.C. 6(c) states that “[o]nly the Patent Trial and Appeal Board may grant rehearings” of Board decisions. In *United States v. Arthrex, Inc.*, the U.S. Supreme Court (Court) held that the Appointments Clause of the Constitution (art. II, sec. 2, cl. 2) and the supervisory structure of the USPTO require that the Board's final decisions must be subject to review by the Director, a principal officer of the United States. See *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1986 (2021). The Court determined that “35 U.S.C. 6(c) is unenforceable as applied to the Director insofar as it prevents the Director from reviewing the decisions of the PTAB on his own.” *Id.* at 1987. The Court explained that:

this suit concerns only the Director's ability to supervise APJs in adjudicating petitions for inter partes review. We do not address the Director's supervision over other types of adjudications conducted by the PTAB, such as the examination process for which the Director has claimed unilateral authority to issue a patent.

*Id.* The Court thus held that the Director has the discretion to review IPR final written decisions rendered by APJs, and, upon review, the Director may issue decisions on behalf of the Board. *Id.* at 1988.

On June 29, 2021, the USPTO implemented an interim process for Director review. At that time, the interim Director review process provided that the Director may initiate Director review of any PTAB final

<sup>1</sup> Under section 18 of the AIA, the transitional program for post-grant review of CBM patents sunset on September 16, 2020. AIA 18(a). Although the program has sunset, existing CBM proceedings, based on petitions filed before September 16, 2020, remain pending.