

**SUBMISSION TO THE EUROPEAN COMMISSION REGARDING PROPOSAL FOR THE REVIEW OF  
COMMISSION DECISION 2010/477/EU.**

We welcome the initiative to review Commission decision 2010/477/EU. Below you will find our comments on the proposed Decision, which should be taken into account to ensure the achievement of Good Environmental Status by 2020.

**1. On threshold values:**

First of all, while we recognise the advantage of setting threshold values for determining and assessing GES of pressure-based Descriptors, we strongly object to the use of threshold values in the case of state-based Descriptors, when doing so condones damage or loss of biodiversity. Allowing Member States to set a value for habitat loss is contrary to the spirit of the Directive, the 'Not Net Loss' objective of the EU Biodiversity Strategy and the objective of the Convention on Biological Diversity of halting biodiversity loss (see more details in D6 comments below).

Secondly, we welcome and support the use of regional and EU-level cooperation mechanisms to increase coherence among Member States. However, we would like to recall, firstly, that these mechanisms can take time and, secondly, that MSFD-related issues are at different stages of development in the four Regional Sea Conventions. This means that, for the second cycle of implementation (2018-2024), a number of Member States will revise their GES definitions and targets using nationally-defined threshold values and other GES-constituting elements (such as species and contaminants lists and aggregation rules). As it currently stands, the proposed text does not provide sufficient safeguards to ensure that nationally-defined elements contribute to achieving GES of all European marine waters by 2020. Specifically:

- a. Article 4 on the setting of threshold values does not ensure the use of independent scientific recommendations in the setting of threshold values and a control process to evaluate the values set by the Member States. Therefore, the following changes are proposed:

Article 4(1): *"Where Member States are required under this Decision to establish threshold values through Union, regional or subregional cooperation, those values shall:*

*[...]*

*(f) ~~make use of~~ be based on the best available science that has been recommended by an independent scientific assessment;*

*[...]"*

Article 4(4): *"Threshold values established by Member States in accordance with this Decision shall be assessed and agreed to by the European Commission as to ensure adherence to the values of this article. They ~~may~~ shall be periodically reviewed in the light of scientific and technical progress and amended, where necessary, in time for the reviews provided for in Article 17(2)(a) of Directive 2008/56/EC."*

- b. Article 4(2) on the setting of threshold values at national level does not guarantee the same level of protection as Article 4(1) on the setting of threshold values at EU and regional level.

Therefore, we propose the following changes, in line with Article 4(1):

*"[...] (c) for state elements, pressure-based threshold values as proxies.*

*Those values, or directional trends of values, shall:*

*(a) be set on the basis of the precautionary principle, reflecting the potential risks to the marine environment;*

*(b) be consistent across different criteria when they relate to the same ecosystem element;*

*(c) be based on the best available science that has been recommended by an independent scientific assessment."*

- c. Article 4(3) should focus solely on the setting of measures when threshold values are not achieved. Carrying out further research is an important aspect of the Directive but should not

be mixed with the obligation to take measures when GES is not achieved. Therefore, we propose the following changes:

*"[...] Member States shall ~~consider, as appropriate, whether~~ take appropriate measures should ~~be taken~~ under Article 13 of that Directive."*

- d. Article 4 should include a provision setting up a clear mechanism or procedure for developing threshold values and other GES-constituting elements (such as species or contaminant lists) at EU level.

## 2. On timeline:

Threshold values are now the intrinsic mechanism by which Member States are to determine GES under the proposed Decision. If there are no strict requirements for establishing these values by a certain date, Member States may indefinitely defer doing so. If Member States defer this requirement, the entire proposed GES Decision (which now heavily relies on threshold values to achieve its aims and the aims of Directive 2008/56/EC) will be significantly weakened.

- a. Article 5(1): Considering that Member States are given flexibility in the timing to set threshold values, lists of criteria elements or methodological standards through Article 5(2), we think that it is redundant to state that *"Member States shall endeavour to do so within the time-limit [...]"* and it should rather be *"Member States shall do so within the time-limit [...]"*.
- b. Article 5(2): We are concerned by the lack of clarity of the expression "as soon as possible", which gives the possibility to Member States to delay the crucial process of establishing threshold values. A cut-off date should be set or a clear process put in place in case Member States delay the process of setting threshold values, at national and regional levels.

## 3. On the use of primary and secondary criteria:

While we recognise that a clearer and simpler approach to defining GES is needed, we are concerned by the lack of safeguards regarding the use by the Member States of secondary criteria. Contrary to Article 3(1), Article 3(2) does not require Member States to provide justification to the Commission if they do not use one or more of the 'secondary criteria'.

To align the two procedures, we propose the following addition to Article 3(2):

*"[...] except where otherwise specified in the Annex.*

***Member States may consider, in justified circumstances, that it is not appropriate to use one or more of the secondary criteria. In such cases, Member States shall provide the Commission with a justification in the framework of the notification made pursuant to Article 9(2) or 17(3) of Directive 2008/56/EC."***

## 4. On descriptor 2:

Considering that criterion D2C2, a secondary criterion, must be used when it is a 'risk of not achieving or not maintaining good environmental status', we consider that it is a high enough standard to reach and therefore that the Commission should apply the precautionary principle in this instance and delete the word 'significantly' from the definition of the criterion. Member States should only have to qualify this criterion when abundance and spatial distribution of established non-indigenous species, particularly of invasive species, are contributing to adverse effects.

Therefore, we propose the following change:

*"D2C2 – Secondary:*

*Abundance and spatial distribution of established non-indigenous species, particularly of invasive species, contributing significantly to adverse effects on particular species groups or broad habitat types.”*

### 5. On Descriptor 3:

We request that the language used for criterion D3C1 on fishing mortality is brought in line with the language used in Article 2(2) of Regulation (EU) No 1380/2013 on the Common Fisheries Policy. Considering the importance of the CFP for the protection of the marine environment, it is unacceptable that the Decision should not be fully aligned to the CFP objectives.

Therefore, we propose the following change:

*“D3C1 – Primary:*

*The Fishing mortality rate of populations of commercially-exploited species is **set to restore and maintain populations of harvested species above levels which can produce the maximum sustainable yield (MSY)**, established in accordance with scientific advice obtained pursuant to Article 26 of Regulation (EU) No 1380/2013.”*

With regard to the ‘Specifications and standardised methods for monitoring and assessment’, we would like to make the following comments:

- a. In line with our proposed addition for Article 4 (see point 1.c.), we believe that there should be an appropriate control mechanism at EU level to approve the lists of commercially-exploited fish and shellfish and to give the possibility to amend them in the light of scientific and technical progress (by adding or removing species).
- b. The definition of populations (point 4.) as well as the mixed use of the terms ‘stocks’ and ‘populations’ (e.g. in points 4 and 5) are confusing. The text should either use the term ‘stocks’ or ‘population’. The CFP states in Article 4: *“(14) ‘stock’ means a marine biological resource that occurs in a given management area;”* With the linkage to the “scale of assessment” section, the current wording seems to address populations by management areas defined by ICES and to determine GES in these areas, rather than focus on the actual stock/population in question. For some species, such as Baltic salmon, the area focus does not make sense, as it would be unclear where which one of the 20 populations should be assessed. Therefore, this should be clarified. We propose to set GES at population level regardless of the area/ICES unit, beyond the definition of the CFP.
- c. With regard to point 5.c.i., commercial data are much more telling about the impact of the fishery on the population than survey data. We would like to propose to delete the phrase: *“in both cases as observed in research vessel or other surveys”* as this would open to both surveys and commercial data. We propose instead the following: *“[...] the 95th percentile of the fish-length distribution of each population, relative to the estimated 95th percentile without exploitation;”*

### 6. On descriptor 6:

We are extremely concerned with the proposal to allow Member States to define a ‘maximum allowable extent’ of habitat loss under criteria D6C4 and D6C5. We believe that this is the first time that the European Commission has so clearly sanctioned a proportion of damage to be inflicted on habitats. The implications are considerable. For example, a port development may be permitted on the grounds that it only damages X% of a national habitat. This goes against international requirements of “no net loss” of biodiversity as well as against the objectives of the MSFD itself. The MSFD requirement to achieve GES is not limited to a small proportion of habitats but to all of them. Until we can undertake considerable research on such a proposal, we can only oppose this provision and are very concerned that it might become part of EU legislation.

Furthermore, it is not clear whether the ‘maximum allowable extent’ referred to in criteria D6C4 and D6C5 is considered to be bound by the same requirement as those set for ‘threshold values’ in Articles 4 and 5 of the Decision, for instance terms of timeline and the application of the precautionary principle. If Member States are allowed to define an extent of habitat loss, they should at least be bound by the same requirements as for defining threshold values for other Descriptors.

Finally, we are concerned that only “broad habitats” are to be considered under Descriptor 6, while special predominant habitats from Annex I of the Habitats Directive (with the exception of reefs) and all the critical habitats listed by Regional Seas Conventions, such as OSPAR and HELCOM, are not. In the current version of the text, they only “may” be included where it comes to seafloor integrity and benthic habitats under Descriptor 1. We believe that they should be made a compulsory element under Descriptor 6 as well.

## 7. On descriptor 11:

With regard to criterion D11C1 and D11C2, the formulation used in Commission Decision 2010/477/EU is “[...] exceed levels that are likely to entail significant impact on marine animals.” The proposed text now states, in both criterion, “[...] exceed values that adversely affect marine animals.”

This is a crucial difference, as the burden of proof is shifted from the noise producer to the environmental proponent. Especially for cetaceans, it is highly challenging to establish incontrovertible cause-and-effect links between noise and impacts. This is because marine ecosystems are complex, the ocean is not a controlled laboratory, oceanographic features (e.g. prey abundance) change for unknown reasons, and noise can often not be isolated as the only variable causing a change.

Therefore, we propose the following changes:

D11C1 “[...] do not exceed values that **are likely to** adversely affect marine animals.”

D11C2 “[...] do not exceed values that **are likely to** adversely affect marine animals.”

In the ‘Methodological standards – Use of criteria’ the sentence “(a) for D11C1, the duration per calendar year of impulsive sound sources [...]” should be changed with “(a) for D11C1, **the proportion of days within a calendar year of impulsive sound sources [...]**” to reflect the formulation used in Decision 2010/477/EU. Duration may not be as important as one sudden noise event, as shown by human reactions to in-air noise. Even one brief noise event during sleep can cause stress reactions that affect cardiovascular health.

With regard to the scale of assessment, it is important that the scale of assessment used is ‘individuals’, so that impacts on individuals’ welfare be addressed. As such, a biological response indicator should be developed (in parallel to the two existing ones) to ensure impacts at individual or population level are addressed. Biological response indicators could include measures of loss of habitat due to noise, physiological stress measurements, or other reliable measures of noise impacts on individual or population health.

With regard to ‘Specifications and standardised methods for monitoring and assessment’:

- a. For D11C1: a data registry for anthropogenic noise activities should be established, ensuring that data of ongoing and planned activities are included in this registry.
- b. For D11C2: Limiting monitoring to just two third-octave bands, 63 Hz and 125 Hz, is problematic and may be inappropriate, especially for shallow water areas. The full spectrum should ideally be used, or at least under 500 Hz for long-range shipping. Full spectrum monitoring is rarely more onerous than monitoring the two 1/3-octave bands. Therefore, we propose the following change:

*“Member States ~~may also decide at regional or subregional level~~ are strongly encouraged to monitor ~~for additional frequency bands~~ the full frequency spectrum.”*

- c. Finally, for both D11C1 and D11C2: It is vital for the GES process that the mapping of noise activities, including overlaying with areas of particular protected status (species, etc.) be conducted.

#### SUMMARY:

We recognise that the proposed draft Decision is an improvement upon Decision 2010/477/EU by providing for a clearer and simpler approach to the determination and assessment of GES. We welcome the greater importance given to regional and EU-level processes, thus increasing chances of a coherent implementation of the MSFD. However, we are concerned that the search for clarity and simplicity risks lowering the overall level of ambition of the Directive. We therefore urgently request you to consider the following:

1. Include a clear safeguard mechanism for the setting of threshold values: The revised Decision relies extensively on the setting of ‘threshold values’ as the intrinsic mechanism by which Member States are to determine GES. In the present text, there is neither an independent process that is established to recommend these values, nor is the European Commission empowered to review and agree to these values. Furthermore, Member States are left to put forward these values without any clear guidance on timeline. The use of the expression ‘as soon as possible’ leaves far too much room for interpretation and a cut-off date is essential to ensure that Member States do not indefinitely delay doing so. Finally, the application of the *precautionary principle*, as per Article 4(1), should also apply at national level and not just at regional/EU level, reflecting the potential risks to the marine environment, the need to be *consistent* across different criteria when they relate to the same ecosystem element, and the necessity to make use of *best available science*.
2. Include a control mechanism in case Member States decide not to use secondary criteria: The current text gives a large degree of discretion to Member States in the selection and use of secondary criteria. This is not compensated by an appropriate control mechanism that would guarantee that this selection is made in the circumstances foreseen by the Decision, i.e. as complement to a primary criterion or when the marine environment is at risk of not achieving or not maintaining GES. This is particularly worrying when considering that certain Descriptors are now covered only by secondary criteria. At least, Member States should be required to provide the Commission with a justification for their selection, as is foreseen in Article 3(1) for the primary criteria.
3. Ensure that the revised Decision is fully coherent with other EU policies and objectives: Inconsistencies have been identified, which are extremely worrying at this late stage in the process. Specifically, the language used for criterion D3C1 on fishing mortality needs to be brought in line with the language used in Article 2(2) of the CFP Regulation. We also strongly object to the possibility given to Member States to define a ‘maximum allowable extent’ of habitat loss under criteria D6C4 and D6C5. Allowing Member States to set an acceptable level of habitat loss is contrary to the spirit of the Directive, as well as to the ‘Not Net Loss’ objective of the EU Biodiversity Strategy and the objective of the Convention on Biological Diversity to halt biodiversity loss.

Finally, we have come to understand that the ongoing public consultation is a mere ticking box exercise without any scope for the responses to be taken on board in the final text. While we appreciate the efforts made by the Commission to organise in March 2016 a stakeholder consultation involving the observers of the MSCG, this cannot be seen as a replacement for an open public consultation. We request an evaluation of how the feedback collected during the public consultation is reflected in the final Decision.