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U.S. DEPARTMENT OF COMMERCE**

**ON
THE MARINE MAMMAL PROTECTION ACT
BEFORE THE**

**COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
SUBCOMMITTEE ON OCEANS, ATMOSPHERE,
FISHERIES, AND COAST GUARD
U.S. SENATE
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Chair and Members of the Subcommittee, I am Chris Oliver, Assistant Administrator for Fisheries at the National Oceanic and Atmospheric Administration (NOAA). Thank you for inviting me to testify today on the Marine Mammal Protection Act (MMPA).

Overview of the MMPA

Under the MMPA, the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS), as delegated by the Secretary of Commerce, is responsible for protecting certain marine mammals, namely cetaceans and pinnipeds, excluding walruses. The MMPA established a national policy to prevent marine mammal species and population stocks from declining beyond the point where they cease to be significant functioning elements of the ecosystems of which they are a part. The United States is a global leader in marine mammal conservation and sustainable fisheries, with U.S. fisheries abiding by some of the world's most robust conservation practices, including measures to reduce marine mammal bycatch—a global threat to many populations of marine mammals. We have experienced great success over the past 45 years with our efforts under the MMPA resulting in a number of stocks recovering to healthy levels. For example, several species of seals and sea lions have returned to their historical habitats and increased in abundance. Some populations of whales in our waters, including gray and humpback whales, have recovered to such levels that they are no longer listed under the Endangered Species Act. Under the auspices of the MMPA, Alaska natives have continued to exercise their rights to subsistence hunting of many species of marine mammals.

General Moratorium on Take and Exceptions

The MMPA provides protection for all marine mammals,¹ including a general moratorium on “take” that applies to all activities in U.S. waters and to U.S. citizens conducting activities on the high seas. The term “take” means to harass, hunt, capture, or kill a marine mammal or to attempt to engage in any of these activities. The MMPA further defines “harassment” for activities other

¹ Jurisdiction over species is split between the NMFS and U.S. Fish and Wildlife Service (FWS), with NMFS having jurisdiction for all whales, dolphins, seals, and sea lions and FWS having jurisdiction for polar bears, sea otters, manatees and dugongs, and walrus.

than military readiness and federal scientific research as “any act of pursuit, torment, or annoyance which: (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].”

In recognition of the fact that there are numerous activities that can result in “take” of marine mammals, including those with minimal impacts on marine mammals or that are in the national interest, Congress included a number of exemptions and exceptions to the moratorium, including allowing for the authorization of “incidental” take related to activities other than commercial fishing (Section 118 of the MMPA, described later, governs incidental take from commercial fishing activities). “Incidental” take may be an expected and unavoidable effect of the activity (e.g., coastal construction, oil and gas exploration, or military readiness training), but is not intentional. The MMPA contains two distinct but similar provisions, sections 101(a)(5)(A) and (D), governing the authorization of incidental take from non-commercial fishing activities. Both provisions require that an applicant submit a request for authorization containing specific information.

Sections 101(a)(5)(A) and (D) of the MMPA direct the Secretary of Commerce (as delegated to NMFS) to authorize, upon request by U.S. citizens who engage in a specified activity within a specified area, the incidental take of “small numbers” of marine mammals.² Such incidental take is to be authorized, provided that the take (i) will have a “negligible impact” on the species or stock(s) and (ii) any adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant) could be mitigated. NMFS has defined “negligible impact” in 50 C.F.R. 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival. The authorization must prescribe mitigation requirements sufficient to effect the “least practicable” adverse impact on the affected marine mammal species and stocks and their habitat. Monitoring and reporting requirements must also be included in the authorization. There are also some differences between the two provisions:

Incidental Harassment Authorizations: Section 101(a)(5)(D) provides an expedited process by which authorization of incidental take may be issued through incidental harassment authorizations (IHAs), which does not require promulgation of regulations. IHAs require one 30-day public comment period, are valid for a maximum of one year, and are typically issued for shorter-term actions. IHAs may not be issued when the activity has the potential to result in death of a marine mammal.

Incidental Take Regulations and Letters of Authorization: For actions with the potential to result in the death of a marine mammal, authorization must be issued through section 101(a)(5)(A), which requires promulgation of regulations and issuance of associated letters of authorization (LOAs). LOAs may be valid up to 5 years (versus a 1-year IHA) and are often used for actions without potential mortality in order to provide greater administrative efficiency and regulatory certainty for applicants with multi-year projects,

² The small numbers and certain other provisions in sections 101(a)(5)(A) and (D) were modified for military readiness activities.

such as coastal infrastructure projects. The LOA process includes incorporating input from two public comment periods, one on an early notice of receipt of the application, and one on NMFS' proposed regulations under which an LOA would be issued. Typical LOA applicants include the military and transportation agencies (either at the federal or state levels).

Some of the activities for which NMFS regularly receives requests for incidental take authorizations include: coastal construction (e.g., pile driving), oil and gas exploration (e.g., seismic surveys), military testing and training (e.g., active tactical sonar and explosive detonation), renewable energy site characterization (e.g., active sonar and impulsive sources), and biological research that disturbs pinnipeds on a beach. Short-term, one-time activities carried out by non-Federal entities are typically covered by 1-year IHAs, whereas incidental take regulations are typically used to cover activities that last more than a couple of years, are ongoing, and/or are managed by Federal agencies. Also, activities with the potential to result in mortality of marine mammals may only be covered under incidental take regulations.

MMPA section 101(a)(5)(E) allows NMFS to authorize, under certain conditions, the incidental taking of marine mammals from a species or stock, designated as depleted because of its listing under the Endangered Species Act (ESA) of 1973 (19 U.S.C. 1531 et seq.), in the course of commercial fishing operations. This authorization can only be issued if NMFS determines the incidental mortality and serious injury will have a negligible impact on the affected species or stock; a recovery plan has been developed or is being developed; if required, a monitoring program has been established; and a take reduction plan has either been developed or being developed for the species or stock.

Commercial Fisheries Interactions

Section 118(c)(1) of the MMPA requires NMFS to annually classify commercial fisheries into one of three categories according to the level of incidental mortality or serious injury of marine mammals: I) "frequent" incidental mortality or serious injury of marine mammals, II) "occasional" incidental mortality or serious injury of marine mammals, and III) "remote likelihood of or no known" incidental mortality or serious injury of marine mammals. For some fisheries classified in Categories I and II, NMFS works collaboratively with the commercial fishing industry and other stakeholders to identify measures to reduce serious injury and mortality from commercial fisheries on marine mammals to sustainable levels.

Section 118(f) of the MMPA directs NMFS to develop and implement Take Reduction Plans to prevent the depletion and assist in the recovery of certain marine mammal stocks that are killed or seriously injured in commercial fisheries. Each Plan is designed to minimize mortality and serious injury through regulatory or voluntary measures. NMFS convenes stakeholder-based teams that are charged with developing consensus recommendations to reduce incidental mortality and serious injury of particular marine mammal stocks in specific U.S. commercial fisheries, initially to below the stock's potential biological removal level, and ultimately to insignificant levels approaching a zero mortality and serious injury rate.

Subsistence Use of Marine Mammals

Section 119 provides for cooperative agreements with Alaska Native Organizations to conserve marine mammals and provide co-management of subsistence use. Co-management promotes full and equal participation by Alaska Natives in decisions affecting the subsistence management of marine mammals (to the maximum extent allowed by law) as a tool for conserving marine mammal populations in Alaska. Agreements may involve: 1) developing marine mammal co-management structures and processes with federal and state agencies; 2) monitoring the harvest of marine mammals for subsistence use; 3) participating in marine mammal research; and 4) collecting and analyzing data on marine mammal populations.

Pinniped Removal Authority

Section 120 allows NMFS to authorize the intentional lethal taking of individually identifiable pinnipeds that are having a significant negative impact on the decline or recovery of salmonid fishery stocks which have been listed as threatened or endangered species under the ESA. The authorization applies only to pinnipeds that are not listed under the ESA or designated as a depleted or strategic stock under the MMPA. Pursuant to the MMPA, a State may request authorization to lethally remove pinnipeds. NOAA shares concerns about the impact robust populations of pinnipeds throughout the West Coast are having on ESA-listed salmon and steelhead stocks. We welcome the opportunity to work with Congress to improve the process.

Marine Mammal Commission

Title II of the MMPA established the Marine Mammal Commission to provide independent oversight of the marine mammal conservation policies and programs being carried out by federal agencies. As directed by the MMPA, NMFS consults with the Commission on certain actions and the Commission regularly reviews our actions and provides recommendations to NMFS.

Marine Mammal Health and Stranding Response Program

Title IV of the MMPA authorizes the Marine Mammal Health and Stranding Response Program (MMHSRP), which mandates:

- emergency preparedness and response for stranded, entangled, distressed, imperiled, or dead marine mammals;
- scientific investigations into the overall health of marine mammal populations in the wild and causes of marine mammal illness and death; and
- administration of the John H. Prescott Marine Mammal Rescue Assistance Grant Program to help fund non-Federal organizations that participate in the Marine Mammal Stranding Network community.

International Whaling Commission and Aboriginal Subsistence Whaling

The U.S. has been an active member of the International Whaling Commission (IWC) since its establishment in 1948 under the International Convention for the Regulation of Whaling. At the IWC, there are three types of whaling considered: commercial, scientific, and aboriginal subsistence whaling (ASW). In 1986, the IWC implemented a global moratorium on commercial whaling. The moratorium on commercial whaling does not apply to ASW or scientific research whaling. Since 1977, ASW has been regulated by catch limits established by the IWC. Today, the IWC governs aboriginal whaling by its member countries by specifically identifying stocks subject to ASW, establishing principles governing such whaling, and, since 1982, by requiring that overall catch limits be set for such whaling on such stocks on the basis of

scientific review by the IWC Scientific Committee. To initiate the catch limit-setting process, Contracting Governments, acting on behalf of aborigines in their respective nations, make a proposal to the IWC based on subsistence needs and available science. The existing catch limits for ASW were adopted in 2012 by the IWC and are set to expire at the end of 2018. The U.S. and the Russian Federation will again jointly propose updated catch limits for bowhead and gray whales on behalf of their native groups at the upcoming September 2018 biennial IWC meeting. Domestically, for bowhead whales, the U.S. co-manages its catch limits through a cooperative agreement with the Alaska Eskimo Whaling Commission. These protections and exceptions are consistent with NOAA's duty to protect cetaceans, such as whales, under the MMPA.

What's working?

Incidental Take Provisions: NMFS' successful implementation of the incidental take provisions of the MMPA (sections 101(a)(5)(A) and (D)) has allowed numerous activities critical to the U.S. economy and national security to proceed in compliance with the MMPA, while also ensuring protection of marine mammals and subsistence uses and providing for the collection of important marine mammal data that is used to inform agency decisions. For example, between 2009 and 2012, NMFS issued 11 five-year incidental take regulations to bring the Navy into MMPA compliance for *all* of its major training and testing activities in the U.S. EEZ. In continued close coordination with the Navy, these actions were combined into five regulations for the second five-year round and we are working on the third round now to provide MMPA-compliant continuity of critical military readiness activities. Protective measures for marine mammals have continued to evolve and improve and the required Navy monitoring program, which includes extensive collaboration with NMFS scientists, has greatly increased our understanding of marine mammals and the effects of Navy activities.

Research Permit Provisions: NMFS' successful implementation of the research permit provisions of the MMPA has allowed research critical for responsible management decisions to move forward in compliance with the MMPA, while minimizing impacts to marine mammals. For example, the biopsies and tagging permitted under these permits provide important information about genetics, physiology, dive profiles, daily/seasonal movement patterns, and specific responses to certain stressors in controlled exposure experiments. These data are necessary to understand marine mammal population structure, life history, and how different stressors impact individuals, which is in turn critical for minimizing impacts and making responsible management decisions.

Take Reduction Teams: During the past 20 years, NMFS has convened nine teams charged with reducing the mortality and serious injury of marine mammals from 35 stocks and 30 commercial fisheries. Take reduction planning and monitoring would not be possible without strong collaboration between NMFS and its partners, including the fishing industry, scientists, environmental groups, and other government agencies. Throughout this experience, we have learned which factors are optimal for establishing and working with teams to ensure those teams have the best chance for successfully reaching consensus. We have achieved the MMPA goals for reducing mortality and serious injury of several stocks to below each stock's potential biological removal level, such as beaked whales in California, harbor porpoise in New England, and insular false killer whales in Hawaii.

Marine Mammal Health and Stranding Response Program (MMHSRP): For the last 26 years, the MMHSRP has been highly successful in developing public-private partnerships to provide emergency response to live or dead marine mammals, and to investigate the health of marine mammal populations in the wild. Over 100 partners comprise the National Marine Mammal Stranding Network and each member plays an important role in helping NMFS meet our Congressional mandates. The Network responded to more than 56,800 stranded animals in the past decade alone. Valuable data collected from stranded animals are used for informing marine mammal stock assessment reports, identifying key species recovery activities, monitoring ocean health, and identifying natural and manmade causes of stranding, illness, and death in marine mammals around the United States.

Since 1992, NMFS and the National Marine Mammal Stranding Network have identified, responded to, and investigated 65 marine mammal unusual mortality events, including three concurrent large whale mortality events currently ongoing along the Atlantic coast. In responding to over 770 entangled large whales over the past 10 years, our marine mammal entanglement response partners have collected important information to help fishery managers determine the types of gear causing entanglements, which allows development of appropriate mitigation measures by NMFS in partnership with the fishing industry.

Interventions by stranding and entanglement responders also significantly improve health and welfare of individual animals, often times relieving anthropogenic caused injury. Biomonitoring and scientific investigations by the MMHSRP and our partners have increased baseline scientific information, as well as improved conservation and management of these protected species. For example, the invaluable long-term data from stranded animals in the Gulf of Mexico was essential in evaluating the impact of the 2010 Deepwater Horizon oil spill and the subsequent development of the Damage Assessment and Restoration Program.

Program-Based Streamlining Efforts

In 2017 (in response to the issuance of multiple Executive Orders prioritizing the reduction of regulatory burden), NMFS specifically committed to decreasing processing times for typical MMPA incidental take authorization requests. To accomplish this, we have accelerated the development and application of certain targeted program improvements and NMFS brought in needed additional temporary staff to assist in further implementing these improvements.

BASELINE METRICS: Based on project tracking information compiled (and quality control-checked) from January 2011 through the end of December 2016 (6 years) the length of time between the day the application was received and the day a final decision was effected, average processing times were as follows:

- IHAs (172) – 7.5 mo.
- Regulations (23) – 21.5 mo.

IMPROVEMENT: Recent reporting indicates that for authorizations issued from mid-December 2016 through November 2017 (time within which NMFS has begun implementing new streamlining measures), average timelines were shortened as follows:

- IHAs (28) – 6.6 mo.

- Regulations (7) – 14.4 mo.

NMFS will continue to collect data to track the impacts of our streamlining efforts.

Successful Measures: Upon committing to a reduction in MMPA processing timelines in 2017, NMFS developed a Streamlining Implementation Plan that summarized current timelines, specifically identified steps in the MMPA process where efficiencies could be gained and laid out process improvement actions or procedures that could be developed and implemented. Following are some of the new measures that NMFS has developed and begun implementing that increase efficiency and help decrease processing time:

- NEPA Categorical Exclusions: We developed and began implementing (in 2017) Categorical Exclusions for MMPA incidental take authorizations that have been found not to have a significant effect on the environment, which has saved significant analysis, writing, and review time for NMFS staff.
- NOAA General Counsel (GC) Review Waivers: We recently began implementing legal review waivers for agreed-upon low impact/low controversy actions not expected to be at risk of litigation, which saves time in processing authorizations. Following successful implementation, we are expanding the scope of the waivers this year to further increase efficiency.
- Templates and Standardized Language: The 2017 development of more templates and standard language to address established topics has decreased analyst writing time.
- Assessment of When Authorizations are Needed: We have been taking a closer look at when MMPA authorizations are actually required (e.g., in some cases take might be unlikely or could be avoided by feasible mitigation) and working with potential applicants more actively to appropriately identify when authorizations are needed. We have returned multiple applications in the last year and averted the need to process overly precautionary applications through discussions, saving significant time for applicants and NMFS staff. Additional external guidance is under development.
- Renewals and Extensions of IHAs: We have developed a proposed process wherein a 1-year extension or renewal of an IHA could be allowed in specific circumstances without an additional public comment period. In January 2018, we published the first proposed notice of an IHA where NMFS included notice and the opportunity to comment on the possibility of a one-year renewal.
- Early Review Teams: We have developed and begun implementing mechanisms to help ensure earlier identification and resolution of difficult issues with applicants and other NMFS offices, which facilitates a quicker process and reduces confusion and burden.

Moving Forward: In addition to the actions noted above that NMFS has begun successfully implementing, we are working on additional methods, guidance, and procedures that will further increase efficiency and reduce burden on the applicant, including several measures recommended by the Marine Mammal Commission. Some of these efforts, which provide guidance to potential applicants, necessitate extensive coordination with other agencies. We are also working on new guidance to identify the information needed for an application to be considered “adequate and complete,” which was recommended by a recent GAO audit to help us better track processing timelines. That guidance also is expected to help applicants develop better

applications, thereby reducing the need for and time spent obtaining additional information to conduct our analyses.

Implementation Challenges and MMPA Ideas Under Consideration

NMFS and the public have encountered challenges in implementing or complying with the MMPA. The Administration is committed to improving and streamlining regulatory processes, and we are in the midst of an interagency discussions to determine the best means of supporting this agenda in the context of the MMPA. Summarized below are a subset of ideas we are considering that could reduce unnecessary burden and improve implementation of the MMPA while ensuring appropriate protection for marine mammals; this list is not exhaustive and is subject to change. We also are continuing to work with other agencies, including the Department of Defense and the Bureau of Ocean Energy Management and the U.S. Fish and Wildlife Service within the Department of the Interior, on other proposals for streamlining implementation of the MMPA and ESA for oil and gas activities and G&G permitting specifically. We would welcome the opportunity to further discuss any of these with the Committee.

1. Remove the 5-year limitation on Incidental Take Authorizations under 101(a)(5)(A)
Under current law, NMFS cannot authorize incidental take of marine mammals under incidental take regulations for longer than 5 years at a time.
2. Increase the maximum time period for an incidental harassment authorizations (IHA)
IHAs, the expedited process for authorizing harassment only, are currently limited to 1 year.
3. Remove the “small numbers” requirements in incidental take authorizations
For all but military readiness activities (which were exempted from this requirement via the NDAA of 2004), NMFS may authorize take of only small numbers of marine mammals.
4. Remove the “specified geographical region” requirement in incidental take authorizations
NMFS may authorize take in a single incidental take authorization only if it is within a specified geographic area. However, there may be circumstances where the impacts of an activity on marine mammals is similar across multiple regions.
5. Clarify the authority to issue renewals of IHAs
NMFS recently implemented a programmatic procedure to allow one-year renewals and is tracking performance metrics to assess the impacts of change on both the agency and permittees.

Conclusion

The MMPA has served as a sound model for marine mammal conservation and management policies and practices around the world but has posed challenges for certain types of activities. I look forward to working with Members of the Subcommittee, your staffs, and other interested

members of the public to meet the challenges that face us in better protecting marine mammals, while balancing human needs.

This concludes my testimony. Thank you again for the opportunity to testify before your Subcommittee today. I would be happy to answer any questions you may have.