# H.R. 4781, MARINE MAMMAL PROTECTION ACT AMENDMENTS OF 2002

# LEGISLATIVE HEARING

BEFORE THE

SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE AND OCEANS

OF THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

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# C Of N T E N T S

# LEGISLATIVE HEARING ON H.R. 4781, THE MARINE MAMMAL PROTECTION ACT AMENDMENTS OF 2002

**Thursday, June 13, 2002**
**U.S. House of Representatives**
**Subcommittee on Fisheries Conservation, Wildlife and Oceans**
**Committee on Resources**
**Washington, DC**

The Subcommittee met, pursuant to notice, at 2:19 p.m., in room 1334, Longworth House Office Building, Hon. Wayne T. Gilchrest [Chairman of the Subcommittee] presiding.

## STATEMENT OF THE HON. WAYNE T. GILCHREST, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. GILCHREST. The Subcommittee will come to order.

Good afternoon, we are convened today on a hearing on H.R. 4781, the Marine Mammal Protection Act Amendments of 2002, which was introduced on May 21st.

Mr. GILCHREST. The Subcommittee held a hearing on October 11th, 2001, which was a comprehensive review of the Marine Mammal Protection Act and the multitude of issues that may be addressed during its reauthorization. We had nearly 20 witnesses that testified at that time, and many of the recommendations are reflected in the legislation.

Among the issues that were discussed at the hearing were the increasing number of California sea lions and Pacific Harbor seals and the growing concern about the interactions with humans and listed salmon stocks, the movement of the sea otter population out of its management zone off the coast of California, the use of Take Reduction Teams to reduce interactions between commercial fishing activities and marine mammal populations, the need for a new Polar Bear Treaty and issues of concern to the environmental and public display communities. The last topic of the October 11th hearing was the use of sonar technology by the Navy, specifically the use of Surveillance Towed Array Sensor Low Frequency Array, SURTASS LFA, sonar and its impact on marine mammals.

H.R. 4781 is the starting point for reauthorizing this landmark conservation law. The purpose of today's hearing is twofold. First, we are interested in hearing whether the provisions within this legislation are appropriate, necessary or in need of further

modification. Second, I would like a better understanding of issues not addressed in the bill and to see if there are additional issues that require attention.

I look forward to hearing the testimony of our witnesses here this afternoon, and we would like to pursue the next step in conservation for the Marine Mammal Protection Act, listen to what your suggestions are, what we have put in, what we left out, how we can improve it, and we would also like to hear how all of this, how humans impacting the oceans, our efforts to protect marine mammals and our efforts to protect and defend the United States and have the military operate in an efficient, functional way, and I am sure doing its part to protect the ecosystem.

I now yield to Mr. Underwood.

[The prepared statement of Mr. Gilchrest follows:]

**Statement of The Honorable Wayne T. Gilchrest, a Representative in Congress from the State of Maryland**

Good morning, I am pleased to convene today's hearing on H.R. 4781, the Marine Mammal Protection Act Amendments of 2002, which I introduced on May 21st.

The Subcommittee held a hearing on October 11, 2001 which was a comprehensive review of the Marine Mammal Protection Act and the multitude of issues that may be addressed during its reauthorization. We had nearly twenty witnesses that testified at that time and many of their recommendations are reflected in the legislation.

Among the issues that were discussed at that hearing were the increasing number of California sea lions and Pacific Harbor seals and the growing concern about their interactions with humans and listed salmon stocks. The movement of the sea otter population out of its management zone off the coast of California. The use of Take Reduction Teams to reduce interactions between commercial fishing activities and marine mammal populations. The need for a new Polar Bear Treaty and issues of concern to the environmental and the public display communities. The last topic of the October 11th hearing was the use of sonar technology by the Navy, specifically the use of Surveillance Towed Array Sensor System Low Frequency Array (SURTASS LFA) sonar and its impact on marine mammals.

H.R. 4781 is the starting point for reauthorizing this landmark conservation law. The purpose of today's hearing is two-fold. First, I am interested in hearing whether the provisions within this legislation are appropriate, necessary or in need of further modification. Second, I want a better understanding of issues not addressed in the bill and to see if there are additional issues that require our attention. I look forward to hearing from our distinguished witnesses and I am anxious to obtain your input and suggestions.

I now recognize the Ranking Member, Congressman Underwood, for his opening statement.

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## STATEMENT OF THE HON. ROBERT A. UNDERWOOD, A DELEGATE IN CONGRESS FROM GUAM

Mr. UNDERWOOD. Thank you, Mr. Chairman. I, too, look forward to this afternoon's hearing on H.R. 4781, a bill to reauthorize the Marine Mammal Protection Act. As we have a number of witnesses before us today, I will be brief in my remarks.

Marine mammals are an important part of the ocean ecosystem and engage the public's attention and imagination like few other animals on earth. In 1972, the MMPA was enacted to provide for the protection of marine mammals and to ensure that they are maintained or restored to healthy population levels.

Since the last reauthorization of the MMPA in 1994, a number of marine mammal issues have been raised. These include the release of captive marine mammals to the wild, large increases in the number of people, whale watching, swimming and feeding with dol-

phins, and the Suarez Circus polar bears. Take reduction plans, NMFS permit, rules and petitions to list Alaskan sea otters and orca whales have also been formulated. We have also noted the possible failure of the Southern Sea Otter Recovery program, and the Navy's request for permitting to utilize the Surveillance Towed Array Sensor System Low Frequency Array.

While I am pleased this bill has addressed the concerns surrounding some of these issues, I note the need, and I mean this, to continue the dialog on remaining issues. As a member of both the Resources Committee and the Armed Services Committee, I have become critically aware of the need to balance our environmental stewardship with national security concerns.

In this regard, I feel it is important to take this opportunity to reevaluate that balance and address the issues surrounding the readiness needs of our military and our responsibility to protect marine mammals. Wise use of the oceans by humans and management of the marine mammals are important, so both humans and marine mammals can share the seas.

I would like to thank you, Mr. Chairman, for introducing a relatively straightforward MMPA Reauthorization Act. The bill provides a basic outline of concerns that need to be addressed by this Subcommittee. I thank you and your efforts to create a bill that addresses the issues raised in previous hearings and look forward to working with you on the MMPA Act Amendments of 2002.

I thank you, and I would like to ask unanimous consent to enter Mr. Rahall's statement into the record.

Mr. GILCHREST. Without objection.

Thank you, Mr. Underwood.

Mr. UNDERWOOD. Thank you.

[The prepared statement of Mr. Rahall follows:]

**Statement of The Honorable Nick J. Rahall, II, a Representative in Congress from the State of West Virginia**

I am impressed at the caliber of the witnesses that have been assembled for today's hearing on legislation to reauthorize the Marine Mammal Protection Act. High ranking officials from the Department of Defense and from the Navy have made time to address this Committee while our forces are deployed at war overseas. Thank you for your willingness to participate in the legislative process.

The military is an extraordinary branch of the government, as the increasing technology and maintenance of our world-power status is astounding in its complexity and reach in protecting American interests abroad and at home. Our preeminence as the lone world superpower is unrivaled, and a large part of this is due to the superb resources and intellect contained within the DOD and in particular within the United States Navy.

Four decades ago, many of the world's populations of marine mammals were on the brink of extinction, generally due to overexploitation by humans. Congress passed the Marine Mammal Protection Act in 1972 to recover and restore marine mammal populations and to a great extent, this Act has been a success. There are few issues that pull on the public's heartstrings as much as the protection of marine mammals.

However, in spite of the success of the Act the DOD has now begun to view the MMPA, along with other environmental protection acts, as a threat to readiness and training.

While recognizing the military's special needs, the American public expects government to comply with the laws created by Congress. I simply have to wonder what evidence exists to support the need for the world's most powerful military, lavishly funded, to be excused from the regulations that the Federal Government and everyone else has to comply with.

The Navy claims that encroachment by these laws prevents military readiness, yet a recent report of the General Accounting Office found, based on the military's

own data, that military readiness and training has not been compromised. In fact, all units have a high state of readiness and the reports are largely silent on the issue of encroachment.

In addition, the DOD and the Navy raise objections to the existing permitting regime that allows for the incidental taking of marine mammals. Yet to my knowledge, neither the National Marine Fisheries Service nor the Fish and Wildlife Service has ever denied a permit requested by the Navy for allowing the take of marine mammals.

The Navy in particular has said that the permitting process is too complicated and subject to delays. I am astounded that the same department that can plan for wars not even imagined and can deploy thousands of women and men around the world is somehow unable to navigate through the permitting process.

This is not to say that we can not make the permitting process under the Act better but it remains unclear if the solution being proposed here will really achieve that.

The Navy claims the problem is that the definition of harassment is ambiguous and not science-based and proposes to weaken the definition of harassment with one that, in my view, is no less ambiguous nor more protective of marine mammals. Rather, this proposal takes advantage of the uncertainty and lack of scientific knowledge and, if anything, will only reverse the burden of proof to the Navy's advantage.

If encroachment is truly having an effect on readiness and training, that is something we need to address. Yet neither the GAO nor the military have provided evidence that this is the case. If this is simply an opportunistic sortie of the military to provide itself with legal immunity from future lawsuits which, in effect, will put Flipper in the crosshairs, it is one which I, and I am confident many other members, would object to.

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Mr. GILCHREST. I will yield to the Chairman of the Full Committee, Mr. Hansen.

## STATEMENT OF THE HON. JAMES V. HANSEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

The CHAIRMAN. Thank you, Mr. Gilchrest. I appreciate the opportunity to be here today and thank you for inviting me, you and Mr. Underwood.

I think you have got a lot of important issues staring you in the face today, and I can understand the importance of these. I really just came over because I want to talk to one issue. I want to talk to the issue of the Marine Mammal Protection Act and the definition of harassment, and I think this is the pivotal point this is going to turn on.

I would like to read from an administration proposal which I think makes common-sense change in this definition. Now this is the quote, "This amendment would remove confusion and eliminate ambiguities found in the current definition of harassment which was added to the act as part of the 1994 amendments. The Administration's proposed definition would provide greater notice and predictability to the regulated community, while maintaining the full protective coverage of the taking prohibition."

Now I hope people realize where that came from. This request came from Secretary Bruce Babbitt and Secretary Norm Minetta on behalf of President Clinton. I bring this up today because many of my friends in the press, and some in the environmental community, have been taking some shots at the current administration and the Navy for seeking exactly the same clarification of law. I can't see a lick of difference between what was requested from the past administration and what is coming out of this administration.

I think I can say no one, not the Navy, not the current President, not the last one, wants to harm marine mammals. They all, and I hope this Committee, simply seek a standard based on sound science and actual harm, rather than fear and fundraising. As you know, in this Committee, we get more fundraising. It just amazes me. When I was first on this Committee in 1981, I had Secretary Watt come in to see me, and I had just received a letter about saving the Chesapeake Bay, your area, Mr. Chairman, and it said that Secretary Watt was just cleaning the bay, ruining it up, he wasn't doing what was right, and if you would send $10, $20, $30 to these guys, they would come to this Committee, then called the Interior Committee, and they would clean that thing up.

Secretary Watt came in to see me on another issue, and I handed him the letter, and I said, "Jim, I didn't know you were doing such a lousy job."

He said, "I have just given them $285 million. What are they talking about?"

So for just the fun of it, I sent them $10, and about 3 months later here came back a letter that said, "Due to your generosity, Mr. Hansen, we have gone before the House Interior Committee, and we have got that cleaned up." Now I was a member of the House Interior Committee, and they didn't ever come before us, and they didn't do anything on it because the money was sent from another area.

So let me just say, and I hope our members of the Committee are all very sophisticated individuals, fully realize that a lot of this fundraising is predicated on scare tactics, and I think that is a classic example. In 22 years on this Committee, I have seen that happen.

I hope the Committee looks past that kind of nonsense and looks at the science of marine mammals, look at the recommendations of our Government agencies and independent researches, and look at the critical impact our decisions have on the military readiness of those we call on to defend our freedoms to have this debate. I hope we don't get involved in any of this "harem-scarem" stuff that comes along, and I would hope that is the case because I am looking forward to your work product, Mr. Gilchrest, and seeing if we have to change it.

[Laughter.]

Mr. GILCHREST. I thank the gentleman from Utah.

The CHAIRMAN. Now you know I was just kidding.

Mr. GILCHREST. I know. I do appreciate—

The CHAIRMAN. I have great faith in this Subcommittee Chair.

Mr. GILCHREST. I appreciate the kind words about the Chesapeake Bay, and we used that money as wisely as we possibly could, and today many of the Subcommittee staff have canoed on the Chesapeake Bay to look at its clean waters. We will pursue this with all due diligence.

Before I recognize the gentleman from California, I would like to say that there is probably about a dozen seats up here so we could move some of the people from the corner, and the fire marshal won't come in and tell us we are overcrowded. So, if anybody in the back wants to come up and sit around the bottom dais here, you are welcome. There are more seats up here.

Mr. ABERCROMBIE. There seems to be some reluctance. Could you invite the sophisticated people perhaps could come up.

[Laughter.]

Mr. GILCHREST. Actually, I guess I should recognize the gentleman from Hawaii.

Mr. ABERCROMBIE. No, no.

Mr. GILCHREST. Thank you.

Mr. ABERCROMBIE. I am just so overwhelmed by Mr. Hansen's characterization of sophistication that I think I will rest on that laurel.

Thank you very much.

Mr. GILCHREST. Thank you, Mr. Abercrombie.

Mr. Pombo?

**STATEMENT OF THE HON. RICHARD W. POMBO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA**

Mr. POMBO. Mr. Chairman, just briefly, I want to thank you for holding this hearing. This is an extremely important topic. It is something that, over the past several weeks, I have had the opportunity to read quite a bit about and to gather information on. Unfortunately, I am not going to be able to stay for the entire hearing, but I would like to ask your permission and unanimous consent of the Committee to be allowed to submit a number of questions in writing at the end of the hearing.

Mr. GILCHREST. Without objection.

Mr. POMBO. I thank you very much.

Mr. GILCHREST. Thank you, Mr. Pombo.

Gentlemen, thank you for coming this afternoon. We look forward to your testimony.

Mr. Raymond DuBois, Deputy Under Secretary of Defense, Installations and Environment; Vice Admiral Charles Moore, Deputy Chief of Naval Operations for Readiness and Logistics, the annex of this Committee; Dr. Hogarth has testified so much before Congress that I think it is his second job.

[Laughter.]

Mr. GILCHREST. But, Bill, welcome back once again. We look forward to your testimony; Mr. Marshall Jones, Deputy Director, U.S. Fish and Wildlife Service, sir, welcome; and Dr. John Reynolds III, Chairman, Marine Mammal Commission, welcome, sir.

Mr. Raymond DuBois, you may go first, sir.

**STATEMENT OF RAYMOND F. DUBOIS, JR., DEPUTY UNDER SECRETARY OF DEFENSE, INSTALLATIONS AND ENVIRONMENT**

Mr. DUBOIS. Thank you very much, Mr. Chairman.

With your permission, my written statement will be submitted for the record.

I am joined, as you indicated, by Admiral Moore, and he and I will try to address the questions as they pertain specifically to the Marine Mammal Act provisions, as recommended by the Secretary of Defense and the President.

Let me begin by sincerely thanking all of the members of this Committee, especially the Chairman of the Full Committee and you, sir, the Chairman of the Subcommittee with respect to allow-

ing us this opportunity. We are very mindful of the jurisdictional issues that come before the Congress and with respect to the provisions that we have, we, the Department of Defense, have presented. I will make just a few comments about this issues, in particular, the Marine Mammal Protection Act provision.

After a considerable set of deliberations within the executive branch, represented on my left by Mr. Jones and Dr. Hogarth, as well as with CEQ and EPA, the Department of Defense came to an agreement to suggest these clarifications to six statutes. It was not, shall I say, an easy process within the executive branch. It was, however, a very healthy and a very informative process.

In terms of the Department of Defense, those six provisions, those six clarifications which we suggested on April 19th with respect to the Defense Authorization Act of Fiscal Year 2003, had to pass three very important tests in order to be suggested for legislative deliberation, and I want to make very clear that the clarification that we have requested to the definition of harassment in the Marine Mammal Protection Act was the result of the fact that, in our view, that narrow clarification, that narrow provision did, in point of fact, have, and would have, would result in, should Congress adopt it, a major positive impact to the readiness as the result of increased realistic combat training. Admiral Moore will reference, no doubt, some specifics that I think dramatically articulate the issue about readiness.

No. 2, the second test that any provision that we provided or recommended must pass was that there would be no detrimental impact in this case to the protection, and the research, and the stewardship, and the monitoring of marine mammals.

The third test was that legislation or a statutory action was the action best-suited to address the issue at hand, as opposed to administrative or regulatory actions or even, in the case of some, but not all, of the environmental statutes which we asked for clarification to, Presidential waivers or Secretary of Defense national security exemptions. And I might add here that the MMPA has neither, neither does the Migratory Bird Treaty Act, which is sometimes not noted in the debate to date.

Now, with respect to the thrust of our legislation, once these three tests were met, we narrowly tailored to only preserve the ability to provide realistic combat training on air, land, and sea spaces, if you will, those areas specifically set aside by the Congress of the United States for that express purpose, that purpose to train our soldiers, sailors, airmen and Marines in a realistic fashion, so that when they went into combat, which is where they are this very day, they didn't meet live ammunition for the first time.

The recommendations which we have made, as I indicated, are focused purely on those aspects of military activities which are unique to the military—firing howitzers, dropping bombs. No other sector of society does that, but the United States military.

We also believe that the narrow provisions which we have recommended prevent further extension of regulation, rather than, as has been characterized by some, rather than rolling back existing regulation. Now clarifying the definition of harassment under the Marine Mammal Protection Act has raised a number of questions,

but I will address that just briefly, and I want to, however, say that my colleague, Admiral Moore, will talk about the primary wartime challenges to the Navy, which I think ought to remain preeminent in our discussion today. But the proposed clarification adopts, as Chairman Hansen has so ably articulated, verbatim—verbatim—a reform proposal developed during the Clinton administration and adopted and recommended jointly by the Departments of Commerce, Interior and Defense and, as I said, applies solely to military readiness activities.

It is also a proposal, I might add, which has espoused a recommendation by the National Research Council that the currently overbroad definition of harassment of Marine mammals, which includes annoyance and potential to disturb, the National Research Council said it should be focused on biologically significant events.

Now I know the term "significant" has raised a number of questions. I am not a marine biologist. I am not a lawyer, but I can say to you that in deference to scientists and marine biologists, when I asked what term would you be most comfortable with, what term encompasses the kind of appropriate and narrow change that the Secretary of Defense would like to see, it was the National Research Council, it was the marine biology community and the scientific community which said that the "significant biologic effects" term was the term most appropriate.

Now "significant," what does it really mean? Likely to have an effect, it is important, it is noticeable, it is measurable and probably caused by something other than mere chance. Those last words I plucked from Webster's Dictionary this morning because I, too, wanted to make certain that I felt comfortable in the legislative setting using that term.

Now I think that we all recognize that criticisms of our proposal that claim that we would—we, the Department of Defense—would allow harm to marine mammals without review by the Fish and Wildlife Service and the National Marine Fisheries Service are, quite frankly, simply incorrect. Although our initiative would exclude transient and biologically insignificant effects from regulation, the Marine Mammal Protection Act would remain in full effect for biologically significant effects, not only death or injury, but also disruption of significant activities, disruption, that is to say, changes in breeding, nursing, feeding, migratory migration patterns.

The Defense Department, and specifically in this case, the Department of the Navy, could neither harm, nor disrupt, marine mammals and their biologically significant activities without obtaining, first, authorization from the Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.

I will now defer and yield to Admiral Moore, but again I would hope that we would recognize that, in point of fact over the past 8/9 years, it has been the Department of Navy and the Department of Defense that has made nearly $67 million in research investments alone for marine mammal protection and marine mammal research. This is not an insignificant amount of money. In fact, the President of the United States has requested in the Fiscal Year 2003 budget $8.2 million for marine mammal research.

In closing, sir, and members of this distinguished Committee, I only can ask that you think about the balance issue and think about the issue that we are not trying to roll back anything, but rather to achieve sort of, shall we say, the status quo, and that the military ranges which the citizens of this country, through their representatives in Congress, have set aside for these purposes are of vital importance to this country.

Thank you very much.

[The prepared statement of Mr. DuBois follows:]

**Statement of Raymond F. DuBois, Jr., Deputy Under Secretary of Defense for Installations and Environment, U.S. Department of Defense**

Mr. Chairman, members of the Subcommittee, I am pleased to have this opportunity to address this Subcommittee today to discuss the growing challenges faced by the Department of Defense (DoD) in protecting marine mammals while balancing such protection against DoD's mandate to maintain readiness, and the relationship of this effort to H.R. 4781, the reauthorization of the Marine Mammal Protection Act. As you know, DoD is undertaking a major effort to address encroachment, sustain our training and testing ranges, and maintain force readiness. The DoD Readiness and Range Preservation Initiative is a comprehensive, DoD-wide strategy intended to mitigate or resolve the adverse impacts of encroachment on training and testing lands and waters and to sustain our ranges and operating areas for the future. I look forward to discussing the goals and elements of this initiative with the members of this Subcommittee today.

Today's hearing takes particular interest in the ability of our Naval forces to train realistically while at the same time protect marine mammals. We are not asking for an exemption from our environmental responsibilities—rather, DoD is seeking to strike a sensible balance between these two national imperatives. Our existing ranges and our ability to conduct training and testing realistically and effectively are critical to the continuing readiness of our Armed Forces.

DoD is seriously concerned with sustaining quality training for all our men and women in uniform. The challenges we face in maintaining quality training and testing opportunities, and the readiness implications of these challenges, have been the subject of previous hearings, and you will hear more today.

*MILITARY READINESS AND THE CHALLENGE OF ENCROACHMENT*

As the members of the Subcommittee are aware, training of our armed forces and the testing of our systems is a complex undertaking, and their proper execution raises considerable challenges. We must also protect public safety, community welfare, and the natural heritage of our training and testing areas. These are all fundamental national priorities, of extreme importance to the Defense Department, to Congress, and to the American public. DoD works hard to ensure we meet our obligations in all these areas. But foremost in the minds of every military commander is the ultimate readiness of our men and women in uniform; it is such readiness that saves lives in combat and ultimately allows us to wins battles.

*Train as we Fight*

The most fundamental military readiness principle is that we must train as we intend to fight. Training our forces and testing our weapon systems under realistic combat conditions is not a luxury. It is a commitment to the American people. The military mission is unique—we carry out our training and testing not for profit or personal gain but to ensure the readiness of our forces. The ability of the military to fight and win our nation's wars is tied directly to readiness resulting from realistic training. There is no substitute for realistic training as there is no substitute for victory.

The land, sea, air, and space that we use to test our weapon systems and train our personnel are irreplaceable national assets. The bottom line is that our soldiers, sailors, airmen, and marines—and the equipment they go into battle with—are only as good as the fidelity of the training and testing they receive. DoD ranges are the means by which we accomplish these most fundamental readiness principles.

Ultimately, our military forces must be able to move faster, shoot more accurately, and communicate better than our enemies—that is what wins wars, and these capabilities are only achieved through rigorous, continuous, and realistic training. The United States possesses a unique military advantage over all other countries—our nation has historically shown a willingness to dedicate the air, land, sea and fre-

quency spectrum needed to keep our armed forces at peak readiness levels. The military must be able to fight and win wars on short notice—Afghanistan demonstrates this fact. Top-notch readiness requires top-notch training and testing.

*The Growing Threat of Encroachment*

There is a growing realization that our ability to train and test is being compromised by external factors. For lack of a better term, we have called this overall problem "encroachment." DoD defines encroachment as the cumulative result of any and all outside influences that inhibit necessary training and testing. Among the many things that cause it: environmental and natural resources compliance requirements that over the past 30 years have reduced range access and the flexibility required for training and testing; unplanned or incompatible commercial or residential development around previously remote ranges; the loss of bandwidth for communications and interference with the frequency spectrum that remains; increased airspace congestion that limits military aircraft access to the ranges or lengthens flying times; and the growing understanding that long-standing munitions use on our ranges can produce environmental challenges. Such encroachment is a worldwide problem, not limited to just our domestic training and testing facilities. Though the exact causes of encroachment vary from range to range and from one part of the globe to another, the effects on training and testing, both at home and abroad, pose increasing challenges to readiness.

I must emphasize, however, that DoD takes its stewardship responsibilities seriously. Environmental stewardship is essential to the Department's mission. With a mandate to train U.S. military personnel and insure they are ready to respond to any call, forces train on over 25 million acres of land and several hundred thousand square nautical miles of ocean operating areas near our coast. The men and women in uniform—as well as our civilian employees—take understandable pride in their environmental record—a record with documented examples of impressive management of critical habitats and endangered species.

In recent years, however, novel interpretations and extensions of environmental laws and regulations have significantly restricted the military's access to and use of military lands, oceans, and operating areas. It has also limited our ability to maneuver our forces and have them engage in live weapons systems training and testing, keys to the future combat readiness of the Armed Forces. Unless addressed appropriately, the military services will continue to see an erosion of the training environment. In some cases, litigation threatens to thwart the primary mission of key military facilities.

*COMPREHENSIVE STRATEGY*

Our ability to balance readiness against the environmental regulations and the press of other encroachment factors is being severely strained. In some cases, we are losing or are threatened with the loss of access to training and testing spaces we have traditionally used. Yet maintaining the readiness of our forces is one of the highest priorities of the Department. That is why it is also critical that we strive to maintain a reasonable balance between training requirements and the importance of sound environmental stewardship. The Readiness and Range Preservation Initiative is the Department's comprehensive effort to ensure that readiness is maintained in the face of encroachment. This effort consists of five major focus areas: 1) Leadership and Organization, 2) Policy and Plans, 3) Programs and Funding, 4) Outreach, and 5) Legislation and Regulation. We believe that collectively these elements represent the necessary components to a comprehensive strategy.

*Legislative and Regulatory Proposals*

Historically, specific readiness problems have been addressed at individual ranges, most often on an ad hoc basis. We have won some of these battles, and lost others. But in the aggregate we are quite literally losing ground. We no longer have the luxury of expending scarce resources to address the problem in an ad hoc manner. It is apparent that we need to deal with the many challenges that are curtailing range operations in a more comprehensive way. It is also why, this Administration, after careful inter-agency deliberation, submitted to Congress "The Readiness and Range Preservation Initiative" as part of the annual defense authorization bill. The thrust of this legislation is:

- Narrowly tailored to protect military readiness activities, not the whole scope of Defense Department activities,
- Prevents further extension of regulation rather than rolling back existing regulation, and
- Enhances the synergy between military readiness and environmental protection by including provisions encouraging creation of environmental buffer zones around military facilities.

Each of our proposals, including the provision related to the Marine Mammal Protection Act, are Limited to Military Readiness Activities. Our initiatives have been portrayed by some as attempting to "exempt" and "grant special reprieve" to DoD from environmental statutes, "give the Department of Defense a blanket exemption to ignore our laws," and violate the principle that "no government agency should be above the law." In reality, our initiative would apply only to military readiness activities. We believe we must recognize the military's unique duty to prepare for and win armed conflicts—unlike any private organization, State, or local government. The requested changes are therefore narrowly focused on "military readiness activities"—those actions necessary to discharge that duty. They will not affect DoD's compliance with environmental laws in the management of its infrastructure or industrial operations that are similar to those of private companies.

We Do Not Seek "Exemptions" from Environmental Law. Our initiative does not seek to "exempt" even our readiness activities from the environmental laws. Rather, it clarifies and confirms existing regulatory policies that recognize the unique nature of our activities. As for the Marine Mammal Protection Act, our proposal would codify the Clinton Administration's proposed policy on "harassment", which I will addresses further later in my testimony.

We Remain Committed to Environmental Compliance. There has been concern expressed that the proposed legislation foreshadowed a DoD retreat from its environmental responsibilities. DoD has no intentions of backing away from our environmental stewardship responsibilities. We remain fully committed. What we do seek are a few changes to the manner that some requirements apply SPECIFICALLY to "military readiness activities"—training our Soldiers, Sailors, Airmen, and Marines in the skills that they need. The changes are carefully focused on those actions necessary to discharge the military's unique duty to prepare for and win armed conflicts in the defense of the liberties of the Nation. With the appropriate legal and administrative framework, the goals of environmental protection and realistic military training can be reconciled. The Readiness and Range Protection Initiative does nothing more, and nothing less, than establish that framework for the 21st Century.

*"HARASSMENT" UNDER THE MARINE MAMMAL PROTECTION ACT*

The NUMBER ONE warfighting challenge for the Navy is its inability to fully train in anti-submarine warfare (ASW). In each potential theater scenario, anti-submarine warfare is the single most important concern for the Navy to accomplish its mission. The MMPA directly impacts the Navy's ability to test, evaluate, develop, and field systems and to train sailors to use those systems. As a result, the Navy is behind the power curve.

The Administration's proposed legislative clarification under the Readiness and Range Preservation Initiative would codify the National Research Council's earlier recommendation that the current overly broad definition of "harassment" of marine mammals, which includes "annoyance" or "potential to disturb," be focused on biologically significant effects. As recently as 1999, the National Marine Fisheries Service asserted that under the sweeping language of the existing statutory definition, harassment "is presumed to occur when marine mammals react to the generated sounds or visual cues"—in other words, whenever a marine mammal notices and reacts to an activity, no matter how transient or benign the reaction. During late 1999 and early 2000, the Departments of Commerce, Interior, and Defense, and the Marine Mammal Commission worked collaboratively to develop a definition of "harassment" acceptable to all affected agencies. These efforts to refine this overbroad definition led to both administrative actions and legislative reform proposals. The Administration's proposed legislation adopts this agreed upon definition of "harassment" that will help balance two national imperatives—Military Readiness and Environmental Conservation.

*Navy's Conservation Efforts*

Military commanders have done an exemplary job of protecting and restoring natural resources in areas used to train the military. As I have stated, DoD is not trying to rollback environmental oversight—we are committed environmental stewards of our natural resources, and will continue to be so.

As it relates to marine mammal protection, an example of DoD's conservation and compliance oversight effort is the Navy Policy regarding the protection of Northern Right Whales (NRWs). The Navy employs year round measures designed to protect whales and other endangered species. Shipboard protective measures include: two trained lookouts with binoculars on surface ships, one trained lookout with binoculars on surfaced submarines, extreme caution and safe speed in the consultation area, extreme caution and slow safe speed within 5 nautical miles of any Northern Right Whale sighting location less than 12 hours old.

If Northern Right Whales are sighted, speed will be reduced to a minimum at which headway may be maintained. Furthermore, vessels will maneuver to maintain 500 yards distance from observed Northern Right Whales. And even though U.S. Naval vessels represent 5% of the total ship traffic transiting the Northern Right Whales migratory route, the Navy also partially funds state Fish and Wildlife agencies' effort to patrol the Northern Right Whales migration route with light aircraft to spot and report sightings.

On 10 March 2000, the Marine Mammal Commission thanked the Navy for its continuing attention to NRWs and commented that the Navy's efforts were a noteworthy example of its attention to critical environmental protection needs.

The Navy is also using its expertise in underwater sound to detect and monitor marine mammals in several ocean regions, particularly the behavior of the large baleen whales in the North Pacific Ocean in the deep ocean basins. The "calls" of these large mammals can be detected by Navy sensors hundreds of miles away and have furnished scientists indications of sub-populations, migrations routes, and habitats. Techniques of this initial work are transitioning to other practical applications where Navy is leading development of a marine mammal census solely by detecting and processing marine mammal vocalizations. The Navy is investing $18 million over the next 3 years in marine mammal research.

The Navy also conducts ocean-going surveys to establish population densities of marine mammals in our Operating Areas. Marine Mammal Density Data (MMDD) will also include further study on assessing the impact of Navy training on protected and endangered species. This component of the Navy's current research program seeks to increase the level of knowledge of marine mammal population densities, distribution, and hearing physiology.

*Summary*

DoD firmly believes that the Administration's proposed legislative clarification to the harassment definition would not have any significant environmental impacts, while its benefits to readiness would be critical. The legislation is endorsed by the National Research Council and reflects an agreement among the affected agencies. Although excluding transient, biologically insignificant effects from regulation, the MMPA would remain in full effect for biologically significant effects—not only death or injury but also disruption of significant activities. The Defense Department already exercises extraordinary care in its maritime programs: all DoD activities worldwide result in fewer than 10 deaths or injuries annually (as opposed to 4800 deaths annually from commercial fishing activities). DoD currently funds much of the most significant research on marine mammals, and will continue this research in future.

On the other hand, application of the current hair-trigger definition of "harassment" has profoundly affected both vital R&D efforts and training. Navy operations are expeditionary in nature, which means world events often require planning exercises on short notice. This challenge is especially acute for the Atlantic Fleet, which over the past two years has often had to find alternate training sites for Vieques. To date, the Navy has been able to avoid the delay and burden of applying for a take permit only by curtailing and/or dumbing down training and research/testing. For 6 years, the Navy has been working on research to develop a suite of new sensors and tactics (the Littoral Advanced Warfare Development Program, or LWAD) to reduce the threat to the fleet posed by ultraquiet diesel submarines operating in the littorals and shallow seas like the Persian Gulf, the Straits of Hormuz, the South China Sea, and the Taiwan Strait. These submarines are widely distributed in the world's navies, including Axis countries like Iran and North Korea and other potentially hostile powers. In the 6 years that the program has operated, over 75% of the tests have been impacted by environmental considerations. In the last 3 years, 9 of 10 tests have been affected. One was cancelled entirely, and 17 different projects have been scaled back. We must work to achieve a more appropriate balance.

*CLOSING*

Sustaining military ranges and operating areas is of vital importance to the United States. So is the long-term sustainment of environmental quality. DoD is not trying to rollback environmental oversight—we are committed environmental stewards of our natural resources, and will continue to be so. These goals do not have to be mutually exclusive—in fact, some ranges can be seen as the last viable habitat for some surviving species. Mr. Chairman, we believe that military readiness can go hand in hand with environmental stewardship. Our challenge is to apply this principle to some of the unique problems associated with the MMPA and other statues addressed in our Readiness and Range Preservation Initiative. We must con-

tinue to develop and sustain partnerships in order to do this. But most of all, we must always remember that our most important priority is to maintain the best trained, best equipped, most ready, and most effective military force in the world.

DoD is committed to a comprehensive approach to addressing encroachment and ensuring sustainable ranges. We must be clear in stating that there isn't any one quick fix. Our approach, our comprehensive strategy, must include multiple components and will be implemented over years, not months. DoD supports this Subcommittee's efforts to improve the MMPA in the context of H.R. 4781. We also strongly support our proposed adjustment to the definition of "harassment" as contained in our recent Readiness and Range Preservation Initiative. Addressing the issue of harassment under the MMPA is an important piece of our overall effort to ensure our test and training capabilities remain the world's best. DoD looks forward to working with this Subcommittee and the Congress of the United States to assure our military readiness and satisfy our common goals. Thank you.

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Mr. GILCHREST. Mr. DuBois, than, you very much, sir.

Vice Admiral Moore?

**STATEMENT OF VICE ADMIRAL CHARLES MOORE, DEPUTY CHIEF OF NAVAL OPERATIONS FOR READINESS AND LOGISTICS**

Admiral MOORE. Thank you, Mr. Chairman, members of the Subcommittee. I thank you for the opportunity to appear before you today to discuss the significant issue of significant importance to the United States Navy. As recent events make clear, our Nation requires a credible combat-ready naval force ready to sail anywhere, any time, in response to threats against the United States and our vital interests around the world.

Having recently returned from Operation Enduring Freedom, where I served as the commander of U.S. Naval Forces Central Command and commander of the United States Fifth Fleet, I can tell you firsthand that realistic training is the cornerstone to military readiness.

Currently, I am serving as the deputy chief of Naval Operations for Fleet Readiness and Logistics, and in that capacity I can tell you that our ability to realistically train is being seriously affected by the Marine Mammal Protection Act today. The definition of harassment in the Marine Mammal Protection Act is overly broad and subject to interpretation. It also requires that we seek a permit for training, testing and operations that merely pose the potential to disturb marine mammals.

The requirements of this law are making it increasingly difficult to train realistically and employ mission-essential technology. I would like to highlight an example of each of those two points.

The first aircraft carrier battle group to respond to the attacks on the World Trade Center and the Pentagon on the 11th of September was the USS Carl Vinson Battle Group. Carl Vinson Battle Group went through their training and their preparations for deployment last summer. They arrived in the North Arabian Sea, coincidentally, on the 11th of September. As the commander of all of the naval forces in the region, one of my major concerns is the readiness of our naval forces to operate inside the envelopes of potential adversary surface-to-surface missile systems. We, frequently, because of the very compact nature of the geography in the region, require our forces to operate in those envelopes.

I was horrified when I learned that the Carl Vinson Battle Group had not been able to conduct the required anti-surface missile defense training prior to their deployment, which we conduct off Point Magaoo, California. This was a result of not having a permit to conduct this training. The permit was required because of the definition of harassment in that the firing of the target drones at our ships in our battle group would cause the sea lions in that vicinity to react with what is known as startled behavior. They would notice the firing of the missiles, and there was a fear amongst individuals concerned for the sea lions that the sea lions would stampede.

We had observed the sea lions' response to the firing of the target drones for a period of 18 months and never once did we observe a single stampede. The sea lions, like human beings, I am sure, would respond by merely observing the firing of the missile as it passed overhead. But as a result, the Carl Vinson Battle Group was not able to obtain this critical training. Fortunately, we were not required to use that training during their deployment to the Middle East.

The second issue I mentioned was our ability to employ mission-essential technology. This was mentioned by the Chairman in his opening statement in regards to what we call the low-frequency active sonar. Over the past several years, our potential adversaries around the world have developed quiet diesel submarines, and these submarines are proliferating around the world. These submarines are dedicated to the purpose of impeding the closure of U.S. naval forces to potential areas of conflict. The submarines would be used to interdict naval forces as they close the potential areas of conflict that you might imagine around the world.

These submarines are very difficult to detect. They are also developing anti-ship missile capability with ranges that I will not talk about in this hearing. We can talk about them in a closed hearing or we would be happy to address the specifics in a question for the record. Suffice it to say that these submarines are equipped with missiles that have the capability to intercept our naval forces beyond our capability to detect the submarines.

So we have developed low-frequency active sonar to give us the capability to identify these submarines, locate the submarines and engage the submarines before they reach their lethal range. We have been trying to obtain a permit to employ this capability for the last 6 years. We have been in the most recent process for a period of over 2 years. We have yet to receive a permit to operate this system, although we anticipate receiving it soon.

This is a system that is already deployed by other nations, a system that is operational in the oceans around the world today. It is a system that we desperately need, and we need your assistance to modify the definition of harassment so that the permitting process will enable us to employ the LFA, as we call it, Low Frequency Active sonar.

In closing, I would just like to leave you with four points:

First, military readiness is directly tied to realistic training. Navy training is based on wartime experiences and prepares our men and women for combat. In the absence of realistic training, the complex challenges faced in today's combat environment, com-

bat that is ongoing as we speak, will become increasingly difficult to overcome.

Second, the Navy does not, in any way, seek exemption from environmental requirements. To the contrary, the Navy is proud of its stewardship of the environment and is a world leader in marine mammal research, as Secretary DuBois mentioned in his opening statement.

Third, the Navy is seeking your assistance in striking a balance between two national imperatives—military readiness and environmental conservation. These priorities, in our view, are not mutually exclusive and should not be evaluated, one against the other, in a zero sum gain. Unfortunately, application of the precautionary principle to marine mammal conservation, though well-intended, has led the Navy to dumb down our training for the sake of avoiding even the potential of disturbing marine mammals and a lengthy permitting process.

Fourth, I ask that you amend the definition of harassment in the Marine Mammal Protection Act so as to reduce its inherent ambiguity, eliminate laborious permitting procedures for military training and operations that have only a benign effect on marine mammals. While—

Mr. GILCHREST. Mr. Moore, thank you very much, but we are running a little over. We have a number of witnesses, and I want to respect their time. We will get some of the information through the process of questioning.

Thank you very much, sir.

Admiral MOORE. That was the end of my statement, sir.

[The prepared statement of Admiral Moore follows:]

**Statement of Vice Admiral Charles W. Moore, Deputy Chief of Naval Operations for Readiness and Logistics, U.S. Navy**

Mr. Chairman, members of the Subcommittee, thank you for the opportunity to appear before you today to discuss H.R. 4781, the Marine Mammal Protection Act (MMPA) Amendments of 2002.

*I. INTRODUCTION*

On behalf of the United States Navy, I recommend that your Committee and the Congress amend the definition of "harassment" in the MMPA. The current definition of harassment is overly broad and subject to varied interpretations, which has resulted in delayed deployment of mission-essential equipment and curtailment/cancellation of realistic training and critical testing. The Navy has no desire to roll back the environmental progress made over the last 20 years. Indeed, the Navy is fully committed to its environmental responsibilities; however, the shortcomings of the current definition of harassment are beginning to affect the Navy's ability to ensure our Sailors and Marines are fully prepared to carry out their combat mission. Adoption of the harassment definition, proposed by the Clinton Administration's MMPA Reauthorization Act of 2000, having been agreed upon by the Departments of Commerce, Interior, and Defense, and the Marine Mammal Commission, and more recently advanced by the Bush Administration, as part of the Administration's Readiness and Range Preservation Initiative, would balance two national imperatives—Military Readiness and Environmental Conservation.

*II. READINESS*

Our Navy must provide credible, combat-ready naval forces to sail anywhere, anytime, as powerful representatives of American sovereignty. In the weeks following September 11, naval forces were the vanguard of our Nation's efforts against terrorism. Navy and Marine Corps carrier aircraft, in concert with U.S. Air Force bombers and tankers, flew hundreds of miles beyond the sea, destroying the enemy's ability to fight. Sustained from the sea, U.S. Marines, Navy SEALS, Seabees, and Special Operations Forces worked with allies to free Afghanistan from the Taliban Regime and Al Qaeda terrorist network. Currently, naval forces engaged in the

Global War on Terrorism are deployed to multiple theaters of operation. Our mission is far from over; and as we look toward the next phases of our operations, we come before you to express our concern over ever-increasing impediments on our ability to execute our highly successful training procedures. These impediments have the potential to undermine readiness and compromise the young Sailors, Airmen, and Marines we send into harm's way.

Having recently returned from Operation Enduring Freedom (OEF) where I served as the Commander, U.S. Naval Forces Central Command, and Commander, Fifth Fleet, I know first hand that readiness is the foundation of our Fleet's war fighting capability, and I know from my years of experience that there is a direct link between Fleet readiness and training. For the Navy, this means essential testing and realistic training opportunities, in both open-ocean and littoral environments. Our Navy has developed, through years of experience, an extremely effective and proven training process that stresses our forces under combat-like conditions. This process guarantees that our naval forces are better trained in addition to being better equipped than our potential adversaries. Assured access to quality training methods, technologies, and realistic training at our Range/Operating Area (OPAREA) Complexes ensures our ability to exercise all of the individual, unit level, and multi-unit skills necessary to prevail decisively in combat.

Just like our land-based training ranges, OPAREAs in the oceans give deploying naval forces the opportunity to gain combat-like experience before actually going into harm's way. We know empirically, based on our experience during previous wars, that aviators, for example, who survive their first five decisive engagements in combat are likely to survive the war. We use training ranges, likewise, to simulate a combat-like environment in order to enhance the success and survival rate of our Sailors and Marines.

Training in the ocean environment is not a sterile, academic evolution for us. Quite the contrary, we are facing existing and emerging threats from naval forces of potential adversaries. New, quiet diesel submarines and anti-ship, submarine launched cruise missiles are being introduced. These pose a potentially formidable threat to our Sailors and Marines, who are called upon to project power from the sea or maintain open sea lanes in such places as the Arabian Gulf through which much of the world's oil flows. In order to successfully locate and defend against these threats, our Sailors must train realistically with both active and passive sonar. In executing the anti-submarine warfare mission, sonar is the key to survival for our ships and Sailors, because it is both the eyes and ears for our combatant units.

*III. BALANCING MILITARY READINESS AND THE ENVIRONMENT*

I come before you to discuss the interplay between two national imperatives: military readiness and environmental conservation. We should not view these issues in isolation from one another for they are not mutually exclusive. However, currently, they are out of balance.

Some extremely well intentioned interests advocate application of the "precautionary principle" for the protection of marine mammals. This principle holds that in the absence of evidence to the contrary, we must assume our training will adversely affect the environment—essentially requiring us in many cases to prove the negative. Although a noble goal, it has immediate and adverse consequences on our ability to prepare our young men and women in uniform for the challenge of protecting American interests both around the world and, unfortunately, in the United States itself. As applied to the Navy, the precautionary principle is a serious matter. Proving a negative is often difficult if not impossible, often leading to cancellation, curtailment or adjustment of our training to avoid even the possibility of disturbing marine mammals.

We do not seek your assistance today to exempt the Navy from its environmental responsibilities. Rather, we are merely here to seek your assistance in striking a sensible balance that will not only protect marine mammals but will also enable the Navy to train realistically. We are proud of our efforts to preserve this balance in being a good steward, especially as it relates to the protection of Northern Right Whales off the east coast of Florida, marine mammal research, and interagency cooperation to preserve the world's oceans. [1]

*IV. CHALLENGES POSED BY THE MARINE MAMMAL PROTECTION ACT*

The Marine Mammal Protection Act's (MMPA) definition of "harassment" has been a source of confusion since the definition was included in the 1994 amend-

[1] For additional examples of Navy's successful conservation efforts relating to marine mammals, see Attachment A.

ments to the statute. The statute defines "harassment" in terms of "annoyance" or the "potential to disturb," vague standards that are vulnerable to inconsistent interpretation. Due to the ambiguity of this definition, the National Marine Fisheries Service (NMFS) of the National Oceanic Atmospheric Administration in the past has interpreted a broad array of reactions that constitute harassment, noting, for example, that "[a]ny sound that is detectable is (at least in theory) capable of eliciting a disturbance reaction by a marine mammal." Also, "an incidental harassment take is presumed to occur when marine mammals . . . react to generated sounds or to visual cues." Taken literally, this would result in a "take" by harassment if the wake from a naval vessel caused a seal sleeping on a buoy to dive into the water. An interpretation this broad could result in our having to submit all our naval vessels to a lengthy permitting process for simply leaving the pier.

The vagaries of the definition of harassment noted above make it very difficult for Navy exercise planners and Navy scientists to determine if a take permit is required before commencing mission-essential training or testing. The Navy is not alone in its opinion that the lack of clarity in the MMPA has led to extremely restrictive and inconsistent interpretations of the definition of harassment. In testimony before Congress, the Assistant Administrator for NMFS stated that, "NMFS has experienced difficulties with respect to implementation and interpretation of the current definition of harassment." An example of this occurred during the review of the Navy's Environmental Impact Statement (EIS) for the USS WINSTON CHURCHILL (DDG–81) ship shock test. Trying to inject some certainty into the harassment standard NMFS has, within the rule-making process, clarified that simple, singular, reflex actions (e.g., alert, startle, dive response stimulus) by marine mammals that have no biological context, are not effects constituting harassment. Even though the Navy adopted NMFS" guidance for the CHURCHILL ship shock test ambiguity in the definition of harassment increased Navy's litigative risk. Although generally supportive of the Navy's analysis of the proposed ship-shock testing prepared under the National Environmental Policy Act, the Marine Mammal Commission (MMC) pointed out, in its letter of March 30, 2000, that in its view the Navy's assessment did not "appropriately reflect the definition of [harassment] ,.. [because] any behavioral disruption would technically constitute harassment, whether or not if affects survival or productivity" and therefore would require an authorization. MMC's interpretation of the definition illustrates the precise problem with the current definition of harassment that concerns the Navy.

Assuming an authorization is required for certain Navy training or testing, the application process requires at least four months for an incidental harassment authorization and sometimes years to complete a multi-year authorization issued under regulations, and then the contingency Letter of Authorization is effective for only one year. Time constraints surrounding the application process have proven difficult to meet for the naval service. Because naval operations are expeditionary in nature, and tied to world events, exercise planning and testing done in conjunction with training is often done on short notice. This sometimes precludes identification of training and testing platforms and locations far enough in advance to factor in the lengthy permitting application process required by the MMPA.

Examples of this dilemma can be seen in Office of Naval Research (ONR) tests designed to measure sound in the water as it relates to improving the Navy's anti-submarine warfare capabilities. Over the past several years, ONR has had to curtail or stop elements of various tests due to potential challenges linked to the MMPA's vague definition of harassment and its lengthy permitting requirements. In May 2000, for example, disagreement with the regulatory community ensued over ONR's analysis of impacts on listed marine mammals. Experiences like these led ONR, in a subsequent test, to spend $800,000 for mitigation measures to avoid even the possibility of disturbing a marine mammal.

More recently, essential anti-ship cruise missile training for the CARL VINSON Battle Group, which participated in Operation Enduring Freedom (OEF), was actually cancelled because an Incidental Harassment Authorization (IHA) was not in place to cover the "potential to disturb" harbor seals when our target drones flew over them enroute to the ships. This resulted in the deployment of three ships of the Battle Group without benefit of an anti-ship cruise missile defensive exercise. This is another example of the challenges posed by the current definition of harassment and the permitting process under the MMPA.

To date, the operational Navy has been able to avoid these challenges only by altering or "dumbing-down" its training and adopting mitigation measures that eliminate even the possibility that a training event will disturb a marine mammal, let alone harm one. In some cases, these challenges have been unavoidable; and consequently our readiness has been affected. For example, the Navy has yet to deploy SURTASS Low Frequency Active (LFA) sonar, notwithstanding an investment of

$10M in a scientific research project conducted by independent scientists, who concluded that the potential impact on any stock of marine mammals from injury is negligible, and the potential effect from significant change in a biologically important behavior is minimal.

*V. SUPPORT FOR AMENDING MMPA*

The National Research Council (NRC), which is part of the National Academy of Sciences, shares the concerns of both the Clinton and Bush Administrations, over the current definition of harassment. According to the NRC, "It does not make sense to regulate minor changes in behavior having no adverse impact; rather, the regulations must focus on significant disruption of behaviors critical to survival and reproduction, which is the clear intent of the definition of harassment in the MMPA."[2] Further, the NRC stated, "If the current interpretation of the law for level B harassment (detectable changes in behavior) were applied to shipping as strenuously as it is applied to scientific and naval activities, the result would be crippling regulation of nearly every motorized vessel operating in U.S. waters."[3] Ultimately the NRC recommends defining level B harassment in terms of "meaningful disruption of biologically significant activities," that include migration, breeding, care of young, and feeding.[4] Additional support for amending the definition of harassment is found in a report on MMPA reauthorization prepared for the 106th Congress. Some scientists, according to this report, "would like to see the definition of harassment revised to where it would be applicable only to situations where actions would reasonably be expected to constitute a significant threat to an entire marine mammal stock."[5]

During the Clinton Administration, the Department of Commerce, Department of Interior and Department of Defense, and Marine Mammal Commission. proposed a definition of "harassment," which was accepted by the Office of Management and Budget and then included in that Administration's proposed reauthorization of the MMPA in 2000. The Bush Administration's Readiness and Range Preservation Initiative reflects continuing interagency agreement on this point. It clarifies that "harassment" applies only to injury or significant potential of injury, disturbance or likely disturbance of natural, behavior patterns to the point of abandonment or significant alteration by a specific animal. As such, the Navy believes that this standard would strike the proper balance between protecting marine mammals and providing the military with sufficient flexibility to conduct training and other operations essential to national security. It is important to note that the Navy will remain subject to the MMPA for injury and behavioral changes that affect significant biological functions.

In short, amending the definition of "harassment," as proposed by the Administration, would eliminate application of the MMPA to benign naval activities that cause only minor changes in marine mammal behavior; eliminate the need for mitigation that undermines critical training in order to avoid any liability for unpermitted takes by activities having only benign effects; increase training flexibility by allowing greater use of acoustical sources, without immunizing the Navy from regulation of activities that have a significant biological effect on marine mammals; and eliminate impediments to deployment of mission-essential systems.

*VI. CONCLUSION*

The current lack of balance in the use of the term "harassment" in the MMPA has affected our ability to deploy mission-essential equipment and to train realistically for the challenges our country faces. I urge you to consider adopting the amendment to the definition of "harassment" proposed by the Administration's Readiness and Range Preservation Initiative in your reauthorization of the MMPA.

*APPENDIX A: EXAMPLES OF MARINE MAMMAL CONSERVATION*

The Navy has initiated significant actions to minimize potential harm to marine mammals and educate Sailors about marine mammals and the Navy's procedures for protecting species. Particularly noteworthy measures include training, steaming procedures, special procedures around the Hawaiian Islands, research and development efforts, and mitigation measures during ship shock trials. The following paragraphs offer some specific examples of our marine-mammals successes.

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[2] National Research Council, Marine Mammals and Low–Frequency Sound: Progress Since 1994 (National Academy Press 2000).

[3] Id.

[3] Id.

[3] Buck, E.H., Marine Mammal Protection Act: Reauthorization Issues for the 106th Congress (1999).

- Training. The Navy developed marine mammal training videos to educate personnel on their environmental protection responsibilities while at sea. Two of these videos specifically focus on procedures to avoid endangering the Northern Right Whale (NRW). To help ensure understanding of the Endangered Species Act (ESA), Marine Mammal Protection Act (MMPA), and local mitigation plans, the Navy instituted dedicated training for operational training range personnel, and afloat lookouts and bridge personnel. Afloat lookouts and bridge personnel are being trained with both the Navy marine mammal spotting training video and the Whale Protection "Wheel." Additionally, lookouts, bridge personnel, and sonar operators conduct specific training on mitigation plan actions prior to operations. Further, the Navy is including relevant ESA and MMPA topics in Navy-wide officer training curriculum.
- At–Sea Procedures. The Navy directed commanding officers at sea to report proscribed information to regional commanders, Fleet commanders, and the Chief of Naval Operations in the event of encountering a whale. The report should include the information on the location and other operational data, and provide a description of the whale in as much detail as possible (e.g., length, fin shape, color, and any other distinguishing features). The commanders also document all actions taken to avoid or mitigate close encounters.
- Special Procedures within 200 nm of the Hawaiian Islands. For all air, surface, and submarine units, special procedures associated with the endangered humpback whale exist when operating within 200 nm of the Hawaiian Islands. Humpback whales migrate in winter to Hawaiian waters and generally depart the area in mid–May. The Navy, in compliance with National Marine Fisheries Service regulations, prohibits any vessel to approach within 100 yards or any aircraft to operate within 1,000 feet of a humpback whale.
- Research and Development. The Navy is using its expertise in underwater sound to detect and monitor marine mammals in several ocean regions. This unique capability provided the first insights to the behavior of the large Baleen whales in the North Pacific Ocean, particularly in the deep ocean basins. Navy sensors can detect the "calls" of these large mammals from hundreds of miles away; five years of underwater acoustic data have furnished scientists indications of animal abundance and spawned hypotheses of sub-populations, migrations routes, and habitats. These data revolutionize the understanding of where these animals are located and when they are there. Techniques of this initial work are transitioning to other practical applications where Navy is leading development of a marine mammal census solely by detecting and processing marine mammal vocalizations. The Navy is focusing on a multi-year research and development program composed of several projects. These projects will result in a dynamic, comprehensive, global marine mammal database; the ability to detect, classify, and monitor marine mammal populations acoustically; and enhanced survey processes and predictive models. Navy continues to invest in marine mammal research.

The Navy will conduct ocean-going surveys to establish population densities of marine mammals in our Operating Areas. Marine Mammal Density Data will also include further study on assessing the impact of Navy training on protected and endangered species. This component is the Navy's knowledge advancement effort and applies the scientific knowledge gained through the Navy marine mammal R&D program to minimize potential restrictions on training. Our current research program supports primary research funded at approximately $9 million in Fiscal Year 2002 and seeks to increase the level of knowledge of marine mammal population densities, distribution, and hearing physiology.

- Safer Shock Trials for Marine Mammals. Every Navy ship type is subjected to a thorough series of tests that determine whether it can withstand the unforgiving punishment wrought by sea combat. USS WINSTON S. CHURCHILL (DDG–81), the third ship in the new Flight IIA series of AEGIS guided missile destroyers, was subjected to a shock trial comprised of three detonations off the coast of Florida. The shock trial essentially involves the detonation of 10,000 pounds of explosive charges near the ship. To protect marine life from potential harm from the explosions, the Navy developed an extensive mitigation and monitoring program that focused on marine animals. The area selected for the trials underwent extensive aerial surveys two days prior to each detonation and was found to have low marine mammal and turtle populations. On the day of each detonation, aerial surveys, shipboard monitoring and passive acoustic monitoring were conducted. If any marine animals were sighted and/or detected within two nautical miles of the charge, detonation was delayed. Immediately following each detonation and for seven days, the testing area was monitored

for a minimum of three hours each day for any signs of injured or dead marine animals. No injured or dead marine animals were observed.

- Conserving Living Marine Resources with DOC and DOT. The Office of Naval Intelligence (ONI) entered into a Memorandum of Understanding with the Departments of Transportation and Commerce relating to the enforcement of domestic laws and international agreements that conserve and manage U.S. living marine resources. ONI must monitor, collect, and report upon the identity and location of vessels that may be in violation of U.S. laws and international agreements that conserve and manage the living marine resources of the United States; sanitize information to the lowest possible level to ensure ease of dissemination to field units; and inform the U.S. Coast Guard and the National Marine Fisheries Service (NMFS).
- Northern Right Whale Migration Monitoring. The Navy, Coast Guard, and Army Corps of Engineers play a major role in protecting the Northern Right Whale (NRW), one of the most critically endangered marine mammals with only about 300 animals in the western North Atlantic. Activities include funding the Early Warning System aerial surveillance, producing awareness videos, training vessel crews on ways to operate without impacting these mammals, and preparing and disseminating the sighting reports. The Navy spends approximately $95,000 per year on just these efforts. NRWs transit through waters off of the coasts of South Carolina, Georgia, and Florida, in search of warmer, shallow coastal waters to give birth to their calves. Adult whales can reach sizes of up to 55 feet long and calves can reach sizes of 20 feet long. Since 1997, as a result of consultations with NMFS, the Navy agreed to employ year round measures designed to protect NRWs and other endangered species while operating in a special "consultation area," encompassing sea space from Charleston, SC, southward to San Sebastian Inlet, FL, and from the coast seaward to 80 nautical miles from shore. Parts serve as critical habitat and winter calving grounds and nursery areas for the migratory NRWs. The critical habitat encompasses an area from SUBASE Kings Bay, GA, to south of Naval Station Mayport, FL, including offshore shipping lanes and operating areas where Navy units conduct exercises.

The Navy has developed steps specifically designed to safeguard the whales during the calving season from December 1 to March 31. A series of Navy-developed training aids, videos, posters and other hand-out materials help educate ships' lookouts and navigators on Navy vessels and aircraft about the whale and the Navy's requirements. By its own initiative, Navy surface ships and submarines are posting vigilant lookouts and bridge watchstanders trained to identify and report NRWs. Navy vessels use extreme caution and proceed at slow safe speed during transit through critical habitat. Consistent with existing regulations, Navy vessels also endeavor to maintain a buffer of 500 yards from right whales in any area. In addition, Navy ships will not conduct north-south transits in the critical habitat area or while operating in an Associated Area of Concern, which extends another five miles eastward beyond the Federally designated critical habitat. At the Fleet Area Control and Surveillance Facility, Jacksonville (FACSFAC), a team of Navy operations specialists is the designated coordinator for operating areas and related air space and also mans the "Whale Fusion Center." The team coordinates ship and aircraft clearance into the NRW critical habitat and the surrounding operating areas based on prevailing weather, surface conditions, whale sightings, and the mission or event to be conducted. The communications network and reporting system that is in place ensures the widest possible exchange and dissemination of NRW sighting information to Department of Defense, Coast Guard, and civilian shipping vessels. Prior to entering the critical habitat, Navy ships are required to contact the FACSFAC to obtain the latest whale sighting information and must report whale sightings to the center.

The New England Aquarium (NEA) reported that this past season was a banner year for right whales with more than 16 calves documented, and acknowledged the shipping community, commercial and military for their efforts to limit the potential for ship/whale collisions. NEA gave FACSFAC particular credit for an incredible job getting the whales' locations to the people that need them.

In addition to FACSFAC's stewardship efforts, the Navy Region South East (NRSE) works in coordination with the Florida Department of Environmental Protection (FDEP), Georgia Department of Natural Resources, the New England Aquarium, the Marine Mammal Commission, and other partners within the Southeastern U.S. Implementation Team (SIT) for the Recovery of the Northern Right Whale headed by NMFS. During the 2000 to 2001 season, more than 500 whale sightings were reported to FACSFAC. During the entire 1999 to 2000 season, 52 sightings were reported to FACSFAC. NRSE and FASCFAC are also a major component of

the SIT's NRW Early Warning System (EWS). In fact, CNRSE contributes nearly $100,000 annually to support the EWS. Since 1996 there have been no whale deaths from ship strikes. Improved EWS aerial surveying, better sighting techniques, and more efficient sighting reporting procedures by FASCFAC have significantly reduced the potential for ship-whale collisions.

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Mr. GILCHREST. Dr. Hogarth?

**STATEMENT OF WILLIAM T. HOGARTH, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE**

Dr. HOGARTH. Mr. Hansen, Mr. Gilchrest, members of the Subcommittee, I am Bill Hogarth, the Assistant Administrator for Fisheries in the Oceanic and Atmospheric Administration of the Department of Commerce.

I want to thank you for inviting me to testify before the Subcommittee today on the reauthorization of the Marine Mammal Protection Act. Under the MMPA, the National Marine Fisheries Service is responsible for more than 140 stocks of marine animals. Today, I will provide comments on the Subcommittee's bill, H.R. 4781, and identify other areas of the Act that could be improved to enhance the Agency's ability to fulfill its responsibilities under the MMPA.

Mr. Chairman, we appreciate the efforts your staff has made in H.R. 4781 to acknowledge and address some of the major concerns facing marine mammal conservation and recovery today. I would like to provide comments on some of the major elements of the bill.

First, we agree with the intent of 4781 to include noncommercial fisheries in the take reduction process, but we are worried that the proposed amendments do not provide NMFS with the necessary tools to adequately address incidental takes from recreational fisheries.

Second, H.R. 4781 would require NMFS staff with specific responsibilities or expertise to serve as formal members of Take Reduction Teams. NMFS does not feel it is necessary to legally require such representation and recommends that the Subcommittee simply encourage that such staff be present and active in TRT meetings. The rationale behind this is included in my full statement.

Third, the Subcommittee's bill would require the Secretary to reconvene the Take Reduction Team before publishing any take reduction plan that is different from the draft plan proposed by the TRT. Although we feel that this amendment is positive in intent, we are concerned that the proposed language is very restrictive, and it could require the Agency to reconvene the TRT, regardless of the degree of change between the draft and proposed plans.

Fourth, NMFS agrees with the benefits of initiating a research program to investigate nonlethal methods to remove or control nuisance benefits.

Fifth, NMFS concurs with H.R. 4781 clarification that it is unlawful to release any captive marine mammal without prior authorization, keeping in mind certain exemptions that are already covered under other authorities of the MMPA.

Sixth, NMFS agrees with H.R. 4781 language that clarifies authorization for native exports. There are, however, other sections of

the MMPA that could also be affected by this proposed change. We would be pleased to work with the Committee to ensure the changes are consistently applied throughout the MMPA.

Now I would like to mention several other areas that the Agency feels warrant attention during the reauthorization process.

First, as I stated in my testimony last October, NMFS has experienced difficulties with interpretation, implementation and enforcement of the current harassment definition. We would like to work with Congress to refine and narrow the scope of the definition of harassment to better identify those activities of concern that are either directed at marine mammals or likely to cause the natural behavior patterns of marine mammals to be abandoned or significantly altered.

Second, the incidental take of marine mammals in the course of fishing operations continues to be a large source of mortality and injury to marine mammals. The development of new gear and gear development deployment technology has already proved effective at reducing incidental takes. We hope that Congress will consider and support programs that encourage and facilitate the development, testing and evaluation of new fishing gear technologies to reduce marine mammal entanglements and interaction.

Third, we are becomingly increasingly concerned about the risk that traveling exhibits pose to cetaceans. We ask that the Congress consider this issue during MMPA reauthorization.

Fourth, the Alaska Native Assistant Management System, established by 1994 amendments, would be greatly strengthened by providing mechanisms to both enforce the agreement restriction and address subsistence harvest prior to the designation of a marine mammal, the stock is depleted.

Last, we would recommend addressing the enforcement provisions of the Act which have remained unchanged since 1972. While the level of penalties of fines are appropriate in some cases, they have proven grossly inadequate in others, undermining the effective enforcement of the act. Congress may wish to address this problem by increasing penalties and other means of ensuring compliance with the MMPA.

In conclusion, the 1994 amendments to the MMPA have enabled NMFS to take significant strides forward in conservation of marine mammals. We must consider the lessons we have learned and create ways to further advance our management and protection of marine mammals.

I look forward to working with the Subcommittee to identify and formulate ways to better protect marine mammals while balancing human needs throughout the reauthorization process.

Thank you.

[The prepared statement of Dr. Hogarth follows:]

**Statement of Dr. William T. Hogarth, Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce**

Mr. Chairman and Members of the Subcommittee, I am Dr. William T. Hogarth, Assistant Administrator for Fisheries in the National Oceanic and Atmospheric Administration of the Department of Commerce. I want to thank you for inviting me to testify before the Subcommittee today on the reauthorization of the Marine Mammal Protection Act (MMPA). Additionally, I commend you, Mr. Chairman, Members

of the Subcommittee, and your staff, for all the work you have done to move forward on the reauthorization of the Marine Mammal Protection Act (MMPA).

The National Marine Fisheries Service (NMFS) administers the MMPA, the principal Federal legislation that guides marine mammal protection and conservation policy in U.S. waters, in conjunction with the U.S. Fish and Wildlife Service (FWS). Under the provisions of the MMPA, NMFS is responsible for the management and conservation of more than 140 stocks of whales, dolphins and porpoises, as well as seals, sea lions and fur seals. The FWS is responsible for the remaining marine mammal species (polar bears, walruses, manatees, dugongs, and marine and sea otters).

At the MMPA reauthorization hearing held by this Subcommittee last October, I presented the status of NMFS" implementation of the 1994 amendments and the impacts this legislation has had on marine mammal conservation and management. The 1994 amendments made comprehensive changes to the MMPA, enacting such programs as the Commercial Fisheries Incidental Take Regime; Marine Mammal Stock Assessments; Permits for Scientific Research, Enhancement, and Public Display; Incidental Harassment Authority; Cooperative Agreements with Alaska Natives; and several others that have helped our agency improve its conservation and management of marine mammal stocks. While NMFS has made considerable progress in implementing these amendments, the agency continues to investigate ways to improve protection and management of marine mammals, while allowing for commercial, recreational, scientific research, and other human activities.

Today, I will focus more closely on some of the ways that we as an agency feel the MMPA could be amended to allow us to better protect and conserve marine mammals. I will begin by providing comments on the Subcommittee's bill, H.R. 4781, the "Marine Mammal Protection Act Amendments of 2002," as requested. Additionally, I will identify some areas of the Act that could be improved to enhance the agency's ability to fulfill its responsibilities under the MMPA.

*Comments on H.R. 4781*

Mr. Chairman, we appreciate the efforts your staff has made to acknowledge and address some of the most salient concerns facing marine mammal conservation and recovery today. We have had an opportunity to review the language in H.R. 4781. Below I will provide our comments on some of the major elements of the bill.

*Take Reduction Plans*

*Adding Recreational Fisheries to the Take Reduction Process*

The 1994 Amendments established a new approach to governing the incidental take of marine mammals by commercial fisheries. While these amendments provided us with the necessary tools to monitor and reduce incidental takes from commercial fisheries, the amendments did not provide the agency with similar authority to reduce takes from non-commercial fisheries. By not addressing incidental takes in these fisheries, efforts to reduce the impact of marine mammal bycatch in commercial fisheries are undermined. Therefore, the agency feels strongly that the regime to govern fisheries interactions in Section 118 would be greatly enhanced by including non-commercial fisheries in the take reduction plan process. We agree with H.R. 4781's intent to do this.

The taking of marine mammals in the course of non-commercial fishing is a known problem in some instances. One example of the problem is situations in which non-commercial fishers use gear that is identical in design, manner, and location of deployment to commercial fishing gear. In addition to enabling NMFS to address all fishery-related sources of incidental marine mammal mortality and serious injury, expanding the take reduction program to include non-commercial fishers could provide non-commercial fisheries protection from prosecution for incidental taking that would otherwise be unauthorized.

While we agree with this bill's intent to include non-commercial fisheries in the take reduction plan development process, we are concerned that the proposed amendments do not provide NMFS with the necessary tools to adequately address incidental takes from non-commercial fisheries. The amendments would require NMFS to include incidental takes from recreational fisheries in estimates of mortality and serious injury for each take reduction plan. This information is already included in Stock Assessment Reports if available. Additionally, the amendments as written would only allow NMFS to address incidental mortality and serious injury from recreational fisheries in limited situations. Furthermore, the amendments do not subject recreational fisheries to the same requirements as commercial fisheries (e.g., registration and reporting, observer coverage, or compliance with take reduction plan regulations), which are critical components of the program. We have several ideas for ways to amend the MMPA to achieve this and would appreciate the

opportunity to work more closely with the Subcommittee on the wording in this section to resolve this matter.

*Required NMFS Representation on Take Reduction Teams*

The Subcommittee's bill would require NMFS staff with specific responsibilities or expertise to serve as formal members of take reduction teams (TRTs). While it is useful to have such expertise available to the TRT, NMFS does not feel it is necessary to require such representation on TRTs for a number of reasons. First, NMFS already has the authority and flexibility to place representatives of Federal agencies, including NMFS, on take reduction teams when necessary. Second, TRTs as currently constructed offer a unique opportunity for public stakeholders and other entities to advise NMFS on ways to address incidental take of marine mammals. Third, NOAA General Counsel, and NMFS Regional Administrator representatives, scientists, and enforcement specialists are already actively involved in the take reduction plan development process. Finally, NMFS feels requiring this membership on teams would limit the agency's flexibility to bring in this expertise when it is most needed and could pose potential problems to the viability of the process if personnel and resources are limited. Rather than making this membership on a team a strict legal requirement, NMFS recommends that the Subcommittee simply encourage that such staff be present and active in TRT meetings, which is already the case.

*Requirement to Reconvene the TRT after Take Reduction Plan Development*

The Subcommittee's bill would require the Secretary to reconvene the Take Reduction Team before publishing any take reduction plan (TRP) that is different from the draft plan proposed by the TRT. NMFS feels this amendment is positive in intent, and believes it is important to conduct the TRP development process in as open a manner as possible. Therefore, the agency provides the TRT access to all the scientific and other information used to develop the final regulations implementing a TRP throughout the process. Additionally, the agency actively encourages TRT members to comment on the proposed regulations to implement the TRT.

Nonetheless, NMFS is concerned that the proposed language in the Subcommittee's bill is overly restrictive, as it could require the agency to reconvene the TRT regardless of the degree of change between the draft and proposed plans. Since TRTs do not submit their recommendations in regulatory form, some alteration is inevitable during this process. While changes may be substantial, the vast majority of changes made to a TRT's recommendations have been technical in nature, and therefore, relatively minor. Under the Subcommittee's proposed amendment, NMFS would be required to reconvene a TRT even for minor or trivial changes to a TRP. Such a requirement could lead to unnecessary delays in finalizing and implementing a TRP and unnecessary expense. NMFS recommends altering this section to give the agency the flexibility to either reconvene, or otherwise consult with, the team regarding changes to the TRP during the public comment period soliciting comments on the proposed TRP. This would allow NMFS to choose the most appropriate type of communication with the team depending on the nature of changes between draft and proposed TRPs, and would allow NMFS to address concerns that the TRT has with NMFS" changes before the proposed TRP becomes final. A requirement that the Secretary reconvene a TRT would intrude upon the President's management of the Executive Branch.

*Pinniped Research*

The Subcommittee's bill would require NMFS to initiate a research program to investigate non-lethal methods to remove or control nuisance pinnipeds. NMFS agrees that such a research program would be beneficial.

*Prohibition on Release of Captive Marine Mammals*

NMFS concurs with the clarification that it is unlawful to release any captive marine mammal without prior authorization, with the understanding that this provision should not include releases from temporary captivity or holding during permitted research, releases related to strandings, or releases or disentanglements from fishing gear or line which are covered under other authorities of the MMPA. Within the scientific community, the release of marine mammals held in captivity for extended periods of time is regarded as potentially harmful to both the animals released as well as the wild populations they encounter. Fundamental questions remain as to the ability of long-captive marine mammals to forage successfully, avoid predators, and integrate with wild populations. Unauthorized releases pose serious risks of disease transmission, inappropriate genetic exchanges, and disruption of critical behavioral patterns and social structures in wild populations.

*Clarifying Authorization for Native Exports*

The 1994 MMPA amendments authorized imports of marine mammal products in conjunction with travel outside the United States by a U.S. citizen, or for purposes of cultural exchange between Native inhabitants of Russia, Canada, or Greenland and Alaska Natives. However, the provision did not accommodate corresponding exports. The Subcommittee's bill would close the loop to clarify that exports, as well as imports, are permissible under the MMPA subject to certain conditions. NMFS agrees with this proposed change. There are, however, other sections of the MMPA that could also be affected by this proposed change including, but not limited to, the legal sale of handicrafts sold by Native Alaskans intrastate, but not allowed for export. We would be pleased to work with the Committee to make sure that this proposed change is consistently applied throughout the MMPA.

*Other Reauthorization Issues*

In addition to the above comments on H.R. 4781, I would like to discuss several other areas that the agency feels warrant attention during the MMPA reauthorization process. As I mentioned in my October 2001 testimony, Mr. Chairman, NMFS has been working in conjunction with the FWS, the Marine Mammal Commission, and other government agencies to develop an administration proposal to amend the MMPA. The legislation is still under administration review and awaits formal transmittal to Congress. While I can not discuss the specific contents of that bill at this time, I would like to present thoughts on some general themes that NMFS addressed throughout the development of the Administration bill.

*Definition of Harassment*

The definition of "harassment," a critical component of a "taking," has broad applicability throughout the MMPA. The definition has been formulated in two parts. Level A harassment is currently defined as, "any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild." Level B harassment is defined as, "any act of pursuit, torment, or annoyance which 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."

As I stated in my testimony last October, NMFS has experienced difficulties with interpretation, implementation, and enforcement of the current harassment definition. On one hand, activities that may be likely to disturb marine mammals are not necessarily controlled unless they are clearly acts of "pursuit, torment, or annoyance," which are not defined in the MMPA. On the other hand, one could argue that activities that have even minimal effect on marine mammals could fall under the category of Level B harassment, as this part of the definition is currently written. In effect, the harassment definition is so broad we are concerned that it could be essentially meaningless, and therefore, does not provide the public and NMFS with effective guidance on prohibited or regulated acts. The breadth of the definition also makes it difficult for the agency to prioritize its resources to deal with the types of harassment that have the most negative effects on marine mammals. Therefore, we believe there is a need to tighten the definition of harassment and reduce the ambiguity to clarify when a given activity would be considered harassment.

We have been working with our constituents and other Federal agencies to refine the definition of "harassment" to better identify those activities of concern that are either (1) directed at marine mammals such as viewing, swimming, or interacting with the animals, or (2) likely to disturb a marine mammal by causing a disruption of natural behavioral patterns to a point where such behavioral patterns are abandoned or significantly altered.

NMFS supports clarification of the definition of "harassment," such as that proposed by the Administration through the Readiness and Range Preservation Initiative contained in the 2002 Department of Defense Authorization legislative proposal. We recognize the importance of this change to ensuring the ability of our nation's military to train effectively. However, we believe that a similar clarification of the harassment definition in the Marine Mammal Protection Act should also be made that will apply broadly to all activities and operations, not merely those pertaining to military readiness.

*Traveling Exhibits*

We have become increasingly concerned about the risks posed to cetaceans by traveling exhibits. Unlike some marine mammals, such as polar bears, seals and sea lions, which spend time in both aquatic and terrestrial environments, cetaceans must remain buoyant at all times. Therefore, their health and survival depends heavily on having a continuously clean and safe aquatic environment, conditions

that are difficult to maintain when transport is so frequent. Because transporting cetaceans is difficult and risky for cetaceans, traveling exhibits would place the animals under enormous stress. We ask that Congress consider this issue during MMPA reauthorization.

*Harvest Management Agreements*

The 1994 MMPA amendments enabled NMFS to enter into cooperative agreements with Alaska Native organizations to conserve marine mammals and co-manage subsistence use by Alaska natives. NMFS believes these amendments provided a great beginning and that the program has yielded some success, evidenced by the agreements the agency has reached to co-manage subsistence harvest of harbor seals, beluga whales, and other marine mammals. Nonetheless, the effectiveness of these agreements at this point relies on voluntary compliance by Alaska natives, since there is no mechanism under the MMPA to enforce any restrictions developed through harvest management agreements for subsistence purposes. The harvest management system would be greatly strengthened by providing a mechanism to enforce subsistence harvest restrictions developed through these agreements. Additionally, the program would be enhanced by providing a mechanism to address subsistence harvest prior to the designation of a marine mammal stock as depleted. Such a change would allow for more effective use of harvest management agreements when they can help prevent future depletion of Alaska marine mammal stocks. NMFS has been working with the U.S. Fish and Wildlife Service, the Marine Mammal Commission, and Alaska natives on a proposal to address these issues. The Administration looks forward to presenting this proposal as part of its reauthorization package

*Fisheries Gear Development*

The incidental take of marine mammals in the course of fishing operations continues to be a large source of mortality and injury to marine mammals. The development of new gear and gear deployment technologies has already proven effective at reducing incidental takes. For example, the development of acoustic deterrent devices, or "pingers," has helped reduce incidental takes of harbor porpoises in New England waters. We believe programs that encourage and facilitate the development, testing, and evaluation of new gear technologies are key to reducing marine mammal entanglements while allowing fishers to operate in areas that marine mammals frequent. We hope that Congress will consider and support such programs.

*Enhancing Enforcement*

While several sections of the MMPA have been updated since the Act was first passed in 1972, some areas are extremely outdated. One such area is the penalties that may be imposed for violations of the MMPA. Currently, individuals who violate the MMPA are subject to civil penalties of up to $10,000 and criminal fines of up to $20,000. These penalties have been unchanged since 1972. While these levels are appropriate in some cases, they have proven grossly inadequate in others, undermining effective enforcement of the Act. To enhance enforcement of the MMPA, Congress may wish to consider increasing penalties and other means of ensuring compliance with the MMPA.

*Conclusion*

The MMPA has benefitted U.S. marine mammal stocks and has served as a model for marine mammal conservation and management policies and programs around the world. The 1994 Amendments have enabled NMFS to take significant strides forward in the conservation of marine mammals over the past decade. Now reauthorization is upon us again and managers, policymakers, and other interest groups have an important opportunity to consider the lessons we have learned since 1994 and come up with new and constructive ways to further advance our management and protection of marine mammals. Mr. Chairman, I look forward to working with you, the Subcommittee, and your staff to identify and formulate effective ways to better protect marine mammals while balancing human needs throughout this reauthorization process.

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

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Mr. GILCHREST. Thank you, Dr. Hogarth.
Mr. Jones?

**STATEMENT OF MARSHALL JONES, DEPUTY DIRECTOR, U.S. FISH AND WILDLIFE SERVICE**

Mr. JONES. Thank you, Mr. Chairman, for the opportunity to provide this testimony today on reauthorization of the Marine Mammal Protection Act and on some recent developments regarding an agreement between the United States and Russia on polar bear conservation.

Mr. Chairman, we appreciate your leadership and the work that has been done by your staff in introducing H.R. 4781. We strongly support the reauthorization of the Marine Mammal Protection Act and look forward to working with the Subcommittee in this effort.

I will comment here on two specific provisions of H.R. 4781 and note that in our written statement which we have submitted for the record, we have some additional comments, including several which are similar to those which you have heard from Dr. Hogarth already.

First, we support Section 11 of your bill which would allow for the import of polar bear trophies legally taken in Canada during the time period between 1994 and 1997. As a general rule, the Department of Interior would oppose legislative exemptions which would allow imports of sport-hunted trophies outside of established guidelines.

However, in this limited circumstance, we believe that the extension provision that you have included in H.R. 4781, which would allow the import of trophies taken during that 3-year interval based, at least in part, on expectations raised by a proposed rule published by the Fish and Wildlife Service would be a good thing, which would contribute to polar bear conservation.

We would note that, under your bill, imports of trophies taken after February 18, 1997, would continue to be allowed only from approved populations that meet the criteria for sustainability which were included in our regulations.

Second, Mr. Chairman, we would note that H.R. 4781 does not include a specific authorization for Section 119 of the Marine Mammal Protection Act. This is the section which authorizes us to enter into cooperative agreements with Alaska Native organizations for conservation of marine mammals taken for subsistence and handicraft purposes. I have previously testified here on how these cooperative agreements have enhanced the conservation of marine mammals and strengthened our partnerships with Alaskan Natives. So we feel it would be important to include a specific authorization in this section for funding to be directed to support these cooperative agreements with Alaskan Natives.

Mr. Chairman, more generally, as noted the last time most of us were here to testify before this Subcommittee, we have been working cooperatively between the Department of the Interior, the Department of Commerce, the Marine Mammal Commission, the Department of Defense, and other Federal agencies to identify areas of the Marine Mammal Protection Act that would benefit from well-considered changes. We continue to work on that effort and hope that there will be something that the Administration would provide to you soon.

One change under consideration would address a significant limitation in the current text of the act, the inability to manage sub-

sistence harvest of marine mammals until those stocks are designated as depleted. We agree with our Alaskan Native partners that sound management of marine mammal harvests should occur well before they are depleted, but, today, the lack of enforceable management measures on nondepleted stocks could lead to sharp declines in those stocks before we would have any ability to actually regulate that decline.

We believe an amendment which would allow active management of the harvest of marine mammal stocks is needed to ensure their continued health.

Also, Mr. Chairman, in October of 2001, I described to the Subcommittee a proposal that would provide a mechanism for Alaskan Native organizations to initiate the development of harvest management agreements related to subsistence harvest that contain management restrictions administered by either tribal or Federal signatories to the agreement, and we look forward to working with you on this.

Another area, Mr. Chairman, as you have already heard from my colleagues here on this panel, is definition of the term "harassment." We have worked hard with our Federal partners, particularly Dr. Hogarth at the National Marine Fisheries Service, and the Department of Defense, to identify ways that we could clarify that definition, not to allow activities which will result in any harm to marine mammals, but rather to focus the definition in a way that those activities which really do cause harm would be appropriately regulated and other activities which do not would be allowed.

Mr. Chairman, let me conclude my remarks by providing you with a brief update on an international agreement that represents a significant step toward the conservation of polar bears.

The United States and Russia, as you know, signed a bilateral agreement in October of 2000 for management of the polar bear population which is shared between Alaska and Chukotka in Siberia. Since then, we have drafted a legislative proposal to implement the agreement and are committed to working actively with our Russian and Native partners. A U.S. delegation just met last week in Russia, and I am pleased to say that the Russians are enthusiastic about implementing the agreement.

Finally, Mr. Chairman, I am very pleased to report today that the Secretary of State has now forwarded the agreement with his approval to the White House for the President's consideration.

Mr. Chairman, in closing, let me just emphasize our ongoing commitment to work with our Alaska Native partners to enhance their role in the conservation and management of marine mammals. Again, I commend you for your leadership in introducing H.R. 4781, and we look forward to working with you on this important work to reauthorize the Marine Mammal Act.

Thank you very much.

[The prepared statement of Mr. Jones follows:]

**Statement of Marshall Jones, Deputy Director, Fish and Wildlife Service, U.S. Department of the Interior**

Mr. Chairman and Members of the Subcommittee, I thank you for the opportunity to provide the testimony of the Department of the Interior on the Marine Mammal Protection Act (MMPA or Act) of 1972 and on H.R. 4781, the Marine Mammal Pro-

tection Act Amendments of 2002. I am Marshall Jones, Deputy Director of the U.S. Fish and Wildlife Service (Service). The MMPA establishes a Federal responsibility, shared by the Secretaries of the Interior and Commerce, for the management and conservation of marine mammals. The Secretary of the Interior, through the Fish and Wildlife Service, protects and manages polar bears, sea and marine otters, walruses, three species of manatees, and dugong.

Mr. Chairman, we commend you for your leadership in crafting and introducing a bill to reauthorize the MMPA. The Administration strongly supports reauthorizing the Act, and looks forward to working with the Subcommittee in this effort. The Administration is currently carrying out its final review of its legislative proposal to reauthorize the Act. This proposal will have provisions relating to some of the areas addressed by H.R. 4781, as well as additional provisions that we believe will benefit the conservation of marine mammals. We expect the Administration proposal to be submitted soon to the Congress for its consideration. The proposal reflects the diligent and coordinated work of the Service, the National Marine Fisheries Service (NMFS), the Marine Mammal Commission, the Navy, Alaska Natives, and others, to identify areas of the Act that might benefit from well-considered changes.

My testimony will provide comments on H.R. 4781, discuss some of the areas of the MMPA that the Administration believes can benefit from amendments, and will provide an update on the status of the U.S.–Russia Bilateral Agreement for the management of the shared Alaska–Chukotka polar bear population.

*H.R. 4781, the Marine Mammal Protection Act Amendments of 2002*

Again, we commend you Mr. Chairman, for introducing a bill to reauthorize the MMPA. My testimony will be limited to provisions which relate to the Department of the Interior, and I will defer to the Department of Commerce to present the Administration's views on other provisions.

*Section 4: Limited Authority to Export Native Handicrafts*

One of the 1994 amendments to the MMPA added a prohibition on exporting marine mammals to Section 102. At that time, certain provisions of Section 104 of the Act, which authorizes the issuance of permits for various activities, were amended to reflect the new prohibition on exports. However, other appropriate corresponding changes to ensure consistency and clarity through the Act were inadvertently not made. This has resulted in confusion for the regulated public. However, without concurrent amendment to Section 101(b), the export of a product legally obtained and possessed by a non–Native would appear to be prohibited under this section. We believe these additional inconsistencies should be corrected as well.

*Section 11: Extension*

As a general rule the Department is opposed to legislative exemptions to allow imports of sport-hunted trophies outside of established guidelines. However, in this case, the Department supports H.R. 4781's proposed amendment to extend the time-frame for such imports as established in the 1997 amendments. This would allow for import of polar bear trophies legally taken during the time period following the 1994 amendments until the implementing regulations were published in February 18, 1997.

We understand that 60–70 polar bears from currently deferred populations were taken by hunters during this period based, largely, on expectations that may have resulted from confusion caused by the Service's proposed regulations that would have allowed these imports if the regulations had been finalized as proposed. It was determined during the public comment period on the proposed regulations, however, that such imports may exceed the scope of the 1994 amendments. As a result, the Service's final rule excluded import of any polar bear trophy until such a time as the Service had approved the population from which it was taken for import. In 1997, Congress amended the MMPA to specifically allow the import of legally harvested trophies from any population prior to the passage of the 1994 amendments (April 30, 1994).

Under the current regulations, all legally acquired trophies, regardless of the date taken, may be imported from approved populations. However, the approval of a number of populations has been deferred pending receipt of additional information on the management programs and scientific data for these populations. The trophies in question were taken from these deferred populations after April 30, 1994, and before February 18, 1997, during which time the regulations as proposed would have allowed for their import. In light of this, the Department supports extending the time frame to allow these imports.

We note, however, that under H.R. 4781, imports of polar bear trophies taken since February 18, 1997, would continue to be allowed only from approved populations. U.S. trophy hunters should only take bears from those populations which

have been found to be sustainable. The February 18, 1997, final regulations establish clear importing requirements for imports of trophies. Trophies taken after that date can only be imported in compliance with those regulations. H.R. 4781 would not change this fact.

*Section 12: Polar Bear Permits*

The Department supports the proposed amendment to Section 104 which would remove the requirement to publish two notices in the Federal Register for each permit application to import trophies of "grandfathered" polar bear trophies or trophies sport-hunted from approved populations. From 1997 to 2002, we processed more than 481 applications for polar bear trophy import permits, and received no comments in response to the Federal Register notices. The proposed amendment would streamline the permitting process and reduce the administrative expense of publishing notices. The public would still be given the opportunity to comment on findings to approve new Canadian polar bear populations for import, and would continue to have access, on a semiannual basis, to current information on permits.

The Service notes, however, that there is one other subsection in the current law that requires amendment so that all subsections of the MMPA reflect the proposed change. To fully accomplish this change, the phrase ", expeditiously after the expiration of the applicable 30 day period under subsection (d)(2)," should be deleted from the first sentence of Subsection 104(c)(5)(D).

*Additional comments regarding Section 119 of the MMPA*

In previous testimony before this Subcommittee, we presented information on the value and benefits of Section 119, which authorizes the Secretaries of the Interior and Commerce to enter into cooperative agreements with Alaska Native Organizations to conserve marine mammals taken for subsistence and handicraft purposes. The Service currently has three cooperative agreements in place: (1) for sea otters, with the Alaska Sea Otter and Steller Sea Lion Commission; (2) for polar bears, with the Alaska Nanuuq Commission; and (3) for Pacific walruses, with the Eskimo Walrus Commission.

These agreements have been in place since 1997 and provide a contractual framework for accomplishing specific activities, which are detailed through "scopes-of-work" attached to the cooperative agreement. A basic benefit of these agreements and the resources they provide is improved communication, not only between the Commissions and ourselves, but also among the Commission members and hunters. This communication is crucial; marine mammals are a vitally important cultural and subsistence resource for Alaska Natives, and are visible indicators of changes in the marine environment. Given the size and remoteness of the marine systems in Alaska, monitoring the health and status of marine mammal populations is a highly challenging endeavor. Alaska Natives, as subsistence users, are often first to note changes in marine mammals that are important to assessing conditions in the marine environment. Section 119 recognizes these connections, and allows their potential benefits to be realized by providing a mechanism to access information available only to Alaska Natives.

We note that H.R. 4781 does not include specific authorizations for Section 119. Currently, the authorization language for that section provides for authorizations of $1.5 million for the Department of Commerce and $1 million for the Department of the Interior. It is important to include specifically identified authorizations for this section so that funding may be directed to support Cooperative Agreements with Alaska Natives. Including these authorizations sends a clear message to our Native constituents that we support such agreements and appreciate the accomplishments achieved to date through our existing cooperative agreements.

*Pending Administration Proposals*

The Administration is currently in the final stages of its review of a comprehensive MMPA reauthorization package. Because this bill is still under review, I cannot discuss its specific contents at this time, but I would like to present our thoughts on some general themes that the Service and other participating agencies have addressed throughout the course of developing this proposal. We look forward to working with the Committee on these issues in the future.

*Proposed Harvest Management*

We have testified twice before this Committee on the need to address subsistence harvest management issues. At the 2000 hearing, then–Chairman Young challenged those directly involved in marine mammal management in Alaska to develop a proposal supporting management of subsistence harvest by Alaska Natives. Of primary consideration in the need to address this are the limitations inherent in the current Section 119. Management strategies developed under the existing framework are

limited, as they are strictly voluntary efforts carried out on a village-by-village basis, with further limitations related to the varying levels of compliance. Currently, the MMPA does not allow enforceable harvest management until a marine mammal stock becomes depleted; both the Department and our Alaska Native partners agree that sound management of marine mammal harvests must occur prior to depletion, in order to avoid depletion. A further part of Chairman Young's challenge was to develop a proposal to be implemented at a local level. Since then, we have been working hard with our Federal and non-Federal partners to meet that challenge.

In October 2001, we described to the Subcommittee a proposal considered by this group that would provide a mechanism for Alaska Native Organizations to initiate the development of harvest management agreements containing management restrictions, related to subsistence harvest, that would be administered by either the tribal or Federal signatories to the agreement. Under this proposal, violations of the terms of the agreement, or of tribal ordinances enacted pursuant to the agreement, would be violations of the Act. We look forward to working with the Subcommittee on this important issue.

*Southern Sea Otter—Fishery Interaction Data*

Pursuant to Section 118 of the Act, the Department is interested in gathering information on fishery interactions with southern sea otters in California. It is known that southern sea otters are incidentally taken in fishing operations. MMPA reauthorization could provide an opportunity to enhance efforts to assess the impact of commercial fisheries on this threatened sea otter population.

*Research Grants*

The Administration also continues to be interested in the potential for research grants as described in Section 110(a). For example, one change to this provision that might be considered is a clarification that research grants authorized under this provision may be targeted at plant or animal community-level problems.

Community-level, or ecosystem-based, research could prove especially important in light of the significant, but poorly understood, environmental changes occurring off Alaska in the Bering Sea and Chukchi Sea regions. These environmental changes, which include rapid and extensive sea ice retreat, extreme weather events, and diminished benthic productivity, could have widespread effects. There is a pressing need to monitor the health and stability of these marine communities, and to resolve uncertainties concerning the causes of population declines of marine mammals, sea birds, and other living resources of these communities. Because residents of these regions largely depend upon marine resources for their livelihoods, research on subsistence uses of such resources, and providing ways for the continuation of such uses, should be integral parts of the effort to study these communities.

Similarly, there is concern over possible widespread changes to the California coastal marine community. These changes may be adversely affecting prospects for recovery of the threatened southern sea otter population. This community would similarly benefit from a system-wide study.

*Definition of Harassment*

Finally, the participating agencies have been looking at ways that the definition of the term "harassment," found in Section 3(18)(A) of the Act, can be clarified. The definition, added to the Act as part of the 1994 amendments, is viewed by some as ambiguous and confusing. Many also believe that it could be amended to provide greater notice and predictability to the regulated community and to improve the ability of Federal agencies to enforce the prohibition on harassment, while continuing to protect marine mammals in the wild. A new definition of harassment, developed by the participating agencies, is included in the draft legislative package currently under final review within the Administration.

*Polar Bear Bilateral Agreement with Russia*

As we reported during the October 2001 hearing before this Committee, the United States and Russia signed a Bilateral Agreement on October 16, 2000, for the management of the Alaska–Chukotka polar bear population. Since that Agreement was signed, the Department has drafted implementing legislation for the agreement and remains committed to actively pursuing this Agreement with our Russian and Native partners. Significant steps remain, however, prior to active implementation. These steps include submission of the Agreement by the Administration to the Senate, consent to the Agreement by the Senate, and enactment of implementing legislation.

Timing on these steps is becoming increasingly important as our Russian partners, and our Native partners in both Alaska and Russia, are eager to activate the Agreement. Further delays may dampen the current support and enthusiasm of our

partners. Additionally, the Agreement enjoys broad support within the Conservation community, which is also eager to see the Agreement implemented.

The benefits of the Agreement are significant, primarily to ensure long-term, science based conservation of the Alaska–Chukotka polar bear population. A particular concern addressed by the Agreement is the widely different harvest provisions and practices of the United States and Russia. Unknown (but potentially significant) levels of illegal harvest are occurring in Chukotka. While lawful harvest by Alaska Natives for subsistence purposes occurs in Alaska, as we previously discussed, United States law does not allow restrictions of this harvest unless a polar bear population becomes "depleted" under the MMPA. The Russian Federation will soon open a lawful polar bear hunting opportunity for the subsistence purposes of native Chukotkans. When this happens, there will be an immediate, pressing need for the coordination of harvest restrictions on both sides of the border to prevent an unsustainable combined harvest that could lead to the Alaska–Chukotka polar bear population becoming depleted under the MMPA and threatened or endangered under the Endangered Species Act. The Agreement will create a management framework to prevent this from happening.

*Conclusion*

Mr. Chairman, in closing I would like to again commend you for your leadership in introducing H.R. 4781. This Administration is committed to conserving and managing marine mammals by working with our partners in a cooperative fashion. In particular, I want to emphasize the commitment to continued collaboration with our Alaska Native partners to further enhance their role in the conservation and management of marine mammals. We believe that these changes will allow us to be more effective in addressing our responsibilities in marine mammal management, and we look forward to working with you and members of the Committee to enact meaningful improvements during this Congress.

Mr. Chairman, this concludes my remarks. I am happy to answer any questions that you might have.

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Mr. GILCHREST. Thank you very much, Mr. Jones.

Dr. Reynolds?

**STATEMENT OF JOHN E. REYNOLDS, III, CHAIRMAN, MARINE MAMMAL COMMISSION**

Dr. REYNOLDS. Mr. Chairman, thank you for providing the Marine Mammal Commission with the opportunity to present its views on H.R. 4781, as well as to share its thoughts on other issues that currently are not addressed in the bill. Many of my comments today will echo those of the other speakers from whom you have already heard.

The Commission generally supports the provisions included in the bill, and subject to the drafting suggestions set forth in my written statement submitted for this hearing, we recommend their adoption.

One area of concern is Section 8, which would eliminate the current statutory provision, establishing a minimum staff size for the Commission. While we appreciate the Committee's interest in providing the Commission with greater flexibility and allocating resources, we are concerned that elimination of this safeguard could undermine our ability to function effectively or to meet the demands of an increasing workload. I hope the Committee will continue its tradition of support for and recognition of the value of having a fully staffed and effectively operating Marine Mammal Commission.

While the Commission generally supports the proposed amendments included in H.R. 4781, we are concerned about what has been omitted. My written statement and previous Commission tes-

timony before this Committee have identified several other issues that we believe merit attention during reauthorization.

Some issues, such as marine mammal exports, have only been partially addressed. We agree that the provision concerning exports related to cultural exchanges is appropriate, but continue to believe that this is a broader problem that needs a more comprehensive solution. The Commission also believes that an amendment is needed to Section 102(a)(4) to clarify that any unauthorized exports, sale, purchase or transport is proscribed, regardless of whether the underlying taking constituted a violation of the act.

Another issue that has been only partially addressed is the need to expand the coverage of Section 118 to include certain recreational fisheries who use gear similar to that used by commercial fishermen and which presumably have a similar potential for incidentally taking marine mammals. Although the introduced bill would expand the scope of some take reduction plans to address taking by recreational, as well as commercial fisheries, taking by the former apparently would not be considered when determining whether fisheries related taking exceeded a stock's potential biological removal level, which triggers preparation of the plan in the first place.

Moreover, without also making recreational fisheries subject to the registration, reporting, and monitoring requirements of Section 118, it is not clear how the Secretary will be able to determine the extent and manner of taking or to design appropriate take reduction measures.

Another issue garnering considerable attention, as you have heard, is the need to amend the act's definition of the term "harassment." The Commission agrees with the other agencies appearing here today that the current definition has created difficulties related to interpretation and enforcement. We believe that clarification will be useful and encourage the Committee to revise the definition to resolve existing ambiguities while continuing to provide the necessary protection for marine mammal populations.

We specifically requested that the Commission provide its views on the bilateral agreement negotiated between the U.S. and Russia concerning the conservation and management of the shared Alaska-Chukotka polar bear population. We have already heard from Mr. Jones on that topic. The Commission also believes that the implementation of the agreement will significantly enhance our ability to conserve that polar bear population and to protect the subsistence lifestyles of Native hunters in Alaska.

We encourage the Committee to provide the responsible agencies with the authority and resources necessary to implement the agreement.

The Commission would like to reiterate the desirability of expanding the authority under Section 119 of the Act to enable the services to enter into harvest management agreements with Alaskan Native organizations. Such a provision, as you have heard, would help guarantee the conservation measures, when necessary, can be implemented before a population has been reduced to the point where it is depleted.

The Commission also continues to believe that other provisions of the Act can benefit by amendment. These are discussed in my written statement and include the following:

First, amendments to Section 118, to specify, for example, when take reduction plans need not be prepared, to clarify that participating in a Category 1 or 2 fishery without having registered constitutes a violation, and to ensure that observers monitor all covered fisheries at levels capable of providing statistically reliable information;

Second, amendments concerning the appropriateness of maintaining certain types of marine mammals and traveling exhibits and to clarify the provisions concerning export permits;

Third, amendments to update the penalty provisions of the Act and to allow the seizure and forfeiture of a vessel's catch for fishing in violation of Section 118;

And, fourth, a new authority parallel to Section 118 to focus on reducing mortalities and serious injuries incidental to activities other than commercial fisheries, such as commercial shipping and recreational boating.

In conclusion, Mr. Chairman, Congress showed remarkable vision in writing and enacting the Marine Mammal Act 3 decades ago. Although we have developed a better understanding of human impacts on aquatic ecosystems and on marine mammals and other species since then, a great deal remains to be learned. Thus, it is important that Congress continue to identify emerging issues and to help the responsible agencies to respond to them proactively before they develop into expensive crises.

Again, I appreciate the opportunity to provide testimony to the Committee and would be pleased to respond to any questions you may have.

[The prepared statement of Dr. Reynolds follows:]

**Statement of Dr. John E. Reynolds, III, Chairman, Marine Mammal Commission**

Thank you for providing the Marine Mammal Commission with the opportunity to present its views on H.R. 4781, the Marine Mammal Protection Act Amendments of 2002, and to share its thoughts on other issues that currently are not addressed in the bill. I will first discuss the provisions of the introduced bill.

H.R. 4781 addresses some, but not all, of the issues identified by the Commission in previous testimony as warranting review or revision during the reauthorization process. For the most part, we agree that the proposals included in the bill are appropriate and, except as noted below, we support their inclusion in the legislation. Specific comments on certain provisions follow.

*Section 3—Technical Corrections*

The Commission concurs that the proposed corrections are appropriate and should be made. It is unclear, however, why other technical amendments are not also being proposed. Most notable among these is the elimination of section 114 and references thereto made in other sections of the Act. Section 114, which provided an interim exemption to allow the incidental taking of marine mammals in commercial fisheries, was supplanted by section 118 under the 1994 amendments and no longer is in effect. We would welcome the opportunity to work with your staff to identify other areas where technical corrections are needed.

*Section 4—Limited Authority to Export Native Handicrafts*

As noted in previous Commission testimony, several provisions of the Act were not revised in 1994 to reflect the prohibition on exporting marine mammals that was added at that time. One of these was the cultural exchange provision (Sec. 101(a)(6)), which was also added by the 1994 amendments. As such, the Commission believes that the proposed amendment set forth in section 4 of the bill is

needed and appropriate. Nevertheless, we continue to believe that other provisions also need to be updated to account for the export prohibition. Also, there is a need to revise section 102(a)(4) of the Act, which, as amended in 1994, reinstituted an enforcement mechanism whereby the government must show that the taking underlying an otherwise illegal transport, purchase, sale, or export of a marine mammal or marine mammal product was also in violation of the Act. This problem had previously been recognized and rectified by Congress in 1981. The Commission has worked with the other responsible agencies to develop a comprehensive set of amendments to address the export issue for inclusion in the Administration bill.

There also is one drafting point concerning section 4 of the bill that we would like to call to your attention. Whereas the heading refers to the export of Native handicrafts, the provision itself is broader than that and applies to legally possessed "marine mammal products." The heading should be revised to correspond to the statutory provision so as to avoid possible confusion.

*Section 6—Take Reduction Plans*

This section adopts some, but not all, of the recommendations made in the bill transmitted by the previous Administration. In this regard, we support the Committee's recognition of the need to expand the coverage of section 118 to include other fisheries that may be having adverse impacts on marine mammals. We question, however, whether the National Marine Fisheries Service will be able to provide the information that would be required under an amended section 118 (f)(4)(B) unless the coverage under subsections (c), (d), and (e) is also expanded to provide the tools necessary to collect that information.

*Section 7—Pinniped Research*

The Commission agrees that more needs to be done to develop effective, non-lethal methods for deterring pinnipeds from engaging in harmful interactions with fishing operations. Presumably this is the focus of the proposed amendment, inasmuch as paragraph (2) of the proposed provision would require the Secretary to include representatives of the commercial and recreational fishing industries among those tasked with developing the research program. However, by referring more generally to "nuisance pinnipeds," the provision suggests that its intent is broader than just fishery interactions. It therefore would be helpful if the Committee, in its report on the bill, were to provide additional guidance as to what types of problems it expects the program to address.

*Section 8—Marine Mammal Commission*

While we appreciate the Committee's interest in providing the Commission with greater flexibility in allocating its resources to meet its responsibilities, there also needs to be a recognition that there is some minimum staff size below which the Commission is no longer able to function effectively or to meet the demands of its increasing workload. Congress previously determined that 11 was the minimum staff size below which operation of the Commission would be compromised. We trust that by proposing this amendment the Committee is not backing away from its tradition of support for and recognition of the value of having a fully staffed and effectively operating Marine Mammal Commission. The appropriation levels that would be authorized under this subsection (b) should be sufficient to ensure that the Commission will be able to continue to function effectively.

*Section 12—Polar Bear Permits*

As the Commission noted in its testimony before the Committee last October, there is little purpose served by the notice and comment requirements of section 104 as they pertain to the issuance of permits authorizing the importation of polar bear trophies from Canada. The only question for the Service to consider at the application stage is whether the bear was legally taken from an approved population. As such, the Commission supports the intent of the proposed amendment. We do, however, have two drafting suggestions. In proposed paragraph (2), the phrase "required to be" should be inserted after the words "application was" to clarify that this provision applies whenever a notice should have been published whether or not publication actually occurred. Also, a conforming amendment is needed to the first sentence of section 104(c)(5)(D) to delete the phrase ", expeditiously after the expiration of the applicable 30 day period under subsection (d)(2),."

*Section 14—Marine Mammal Commission Administration*

As indicated at the October hearing, the limitation on the daily amount that the Commission can spend on experts or consultants has effectively precluded us from using such services for some time. We appreciate the Committee's recognition of this

problem and agree that the Commission should be put on an equal footing with other agencies in our ability to make use of such services.

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Two issues not addressed in the introduced bill but on which the Chairman specifically requested testimony are the Act's definition of harassment and the bilateral agreement negotiated between the United States and Russia concerning the conservation and management of the shared Alaska–Chukotka population of polar bears.

Congress showed remarkable vision in writing and enacting the Marine Mammal Protection Act three decades ago. Since that time, scientists have come to better understand both the nature of human impacts on aquatic ecosystems and on marine mammals and other species. Although we have learned a great deal in the past 30 years, our knowledge is by no means perfect in either area. Thus it is important for Congress to continue to be proactive and farsighted. It also is important to facilitate scientific research to help clarify the nature and extent of possible impacts.

The issue of what constitutes harassment is one area where considerable uncertainty remains. In previous testimony before this Committee, the Commission has indicated that the existing definition of harassment in the Marine Mammal Protection Act has created some practical difficulties related to interpretation and enforcement. The Commission has been working with other involved Federal agencies to address these difficulties.

In October 2000 the United States and Russia concluded a bilateral agreement for the conservation of the shared population of polar bears that inhabits the Bering and Chukchi Seas. Currently, hunting on the Russian side is not allowed; however, it is believed that an unknown level of illegal taking is occurring. The ability to regulate the number of bears removed from the population is expected to take on added importance when the Russian Federation legalizes polar bear hunting, which it is expected to do shortly. Other provisions of the Agreement, such as the prohibition on taking cubs and female bears with cubs, the use of aircraft and large motorized vehicles and vessels to hunt bears, and the taking of polar bears using poison or traps, will help ensure that the United States is fully meeting its obligations under the multilateral 1973 Agreement on the Conservation of Polar Bears. Other expected benefits of the bilateral Agreement include an enhanced research effort, which is expected to improve our ability to estimate the size of the population and to determine whether the level of removals is sustainable. Before the Agreement takes effect, it must be ratified by the Senate. In addition, implementing legislation will be needed. It is expected that the Agreement will be transmitted for ratification soon. Proposed implementing legislation has been drafted and is currently undergoing review within the Administration.

Implementation of the Agreement is strongly supported by the Alaska Native community and by several conservation organizations. The Commission believes that implementation of the Agreement will significantly enhance our ability to conserve the Alaska–Chukotka polar bear population and to protect the subsistence lifestyles of Native hunters in Alaska. We therefore encourage this Committee to take all necessary action to see that this occurs.

The Commission would also like to take this opportunity to highlight another issue that has previously been aired before the Committee, the expansion of the existing authority under section 119 of the Act to enable the National Marine Fisheries Service and the Fish and Wildlife Service to enter into cooperative agreements with Alaska Native organizations. The Commission believes that such a provision, if carefully crafted, would help guarantee that conservation measures, when necessary, can be implemented before a population has been reduced to a point where it is depleted. We note that such a provision, which had been included in a working draft bill circulated by Committee staff near the end of the last session, has been omitted from the introduced bill. We hope that this does not reflect a determination that a harvest management amendment does not merit further consideration.

The Commission also continues to believe that other provisions of the Act can benefit by amendment. These are described briefly below.

*Taking Incidental to Commercial Fisheries (Section 118)*

Section 118 currently requires that a take reduction plan be developed for each strategic stock that interacts with a category I or II fishery, regardless of the level of such interactions or whether the reason the stock is considered to be strategic is largely independent of fisheries interactions. The Commission recommends that the Committee consider an amendment to specify that a take reduction plan need

not be prepared for those strategic stocks for which mortality or serious injury related to fisheries is inconsequential.

The Commission also believes that further consideration should be given to an amendment to clarify that it constitutes a violation of the Act to participate in any category I or II fishery without having registered under section 118, regardless of whether incidental takes occur. A related amendment that also needs to be considered would specify that all participants in category I or II fisheries, whether registered or not, are subject to the observer requirements of section 118. The Commission also believes that revisions to this section are needed to enable the responsible agencies to obtain reliable information on the numbers and types of fishery-related mortalities and injuries involving California sea otters.

Previous Commission testimony has noted that available funding has not always been sufficient to place observers within all fisheries that need to be monitored or to place them at levels needed to provide statistically reliable information. We again call this issue to your attention and recommend that you consider possible solutions, including securing contributions from the involved fisheries.

*Permits (Section 104)*

The draft bill has picked up on some, but not all, of the permit-related issues highlighted by the Commission during previous hearings on Marine Mammal Protection Act reauthorization. The Commission continues to be concerned about the appropriateness of maintaining certain marine mammals—most noticeably cetaceans—in traveling exhibits, which present special problems for successful maintenance. We again encourage the Committee to look at this issue more closely.

Since the hearing last October, the Commission has submitted comments on the National Marine Fisheries Service's proposed public display regulations. Among other things, the Commission's letter provides a detailed analysis of the provisions pertaining to exports of marine mammals to foreign public display facilities. The Committee may find this to be of interest and we would be pleased to provide you with a copy if you like.

In its letter to the Service, the Commission concluded that the current system does not work particularly well. Determinations of facility comparability are based exclusively on paper submissions, rather than physical inspections, as are required for domestic facilities. Foreign facilities are asked to provide a letter of comity from the host government to enable the Service to enforce the Marine Mammal Protection Act against the facility if violations occur after the animals have been exported, even though the agency has few, if any, resources available to ascertain compliance by foreign facilities. Representatives of the public display community have advocated that it is sufficient to make a determination of comparability at the time of export without any mechanism in place to ensure that the animals are well cared for once they have left the United States. We disagree, and believe, as we recommended to the National Marine Fisheries Service in our comment letter, that there is merit in convening the interested parties to review the current system with a view to identifying whether there are ways to better achieve the goal of providing reasonable assurance that marine mammals exported from the United States will be well cared for throughout the duration of their maintenance in captivity, and which realistically reflects the ability of U.S. agencies to identify and correct deficiencies at foreign facilities, while not establishing unnecessary barriers to the exchange of marine mammals among qualified facilities. We hope that this is an undertaking that the Committee will want to endorse.

*Miscellaneous Issues*

Under section 405 of the Act only donations and other monies specifically earmarked for use with respect to unusual mortality events can be placed in the Marine Mammal Unusual Mortality Event Fund. That is, funds generally appropriated to the National Marine Fisheries Service for implementing the Marine Mammal Protection Act may not be used for that purpose, even in those years when a large number of unusual mortality events might occur. The Commission again calls your attention to this issue in hopes that greater flexibility will be provided in how unusual mortality responses can be funded.

As noted in previous testimony, the penalties that may be assessed for violations of the Act have not been increased since its original enactment 30 years ago. This being the case, the maximum penalties available under the Marine Mammal Protection Act are quite low as compared to other natural resources statutes. We encourage the Committee to review the penalties available under sections 105 and 106 and consider increasing them to reflect changes in economic circumstances since 1972. The Commission also encourages the Committee to give consideration to amending

the forfeiture provisions of section 106 to allow the seizure and forfeiture of a vessel's cargo (i.e., catch) for fishing in violation of section 118.

Another enforcement-related amendment that the Committee might want to consider concerns how penalties assessed under the Act may be used. A freestanding amendment, enacted in 1999 and codified as part of the Marine Mammal Protection Act, authorizes the Fish and Wildlife Service to use fines collected under the Act for activities directed at the protection and recovery of marine mammals under the agency's jurisdiction. We believe that similar authority for the National Marine Fisheries Service would likewise benefit that agency's ability to carry out its responsibilities under the Act.

Another provision that merits revision by the Committee is section 110, which identifies specific research projects to be carried out by the regulatory agencies. The time frames for completing the existing activities set forth in this section have elapsed. As such, those provisions that are no longer operative should be deleted. In their place, the Committee should consider a more generic directive to the agencies, enabling the agencies to pursue pressing, broad-scale projects. Among the studies that might be worthwhile are an investigation of ecosystem-wide shifts in the Bering and Chukchi Seas and an examination of possible changes in the coastal California marine ecosystem that may be contributing to the recent declines in the California sea otter population.

Although the Marine Mammal Protection Act establishes explicit procedures to address lethal takes and serious injuries due to fisheries, it is important to note that there are other ways by which marine mammals are lethally taken or seriously injured incidental to human activities. The Committee may wish to consider whether activities such as, for example, boat or ship strikes of whales might be dealt with more effectively through a take reduction process or some other mechanism.

We appreciate the opportunity to provide testimony to the Committee on the Marine Mammal Commission's views on H.R. 4781, the Marine Mammal Protection Act Amendments of 2002, and would welcome the opportunity to work with the Committee and its staff during the reauthorization process.

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Mr. GILCHREST. Thank you very much, Dr. Reynolds.

Just to comment on that last, and I appreciate your recommendations, and we will continue to work with you, and I am sure we will probably adopt or put many of your suggestions into the act. The problem with marine mammals, other than commercial fishing, would then also include shipping, whether it is containers or oil tankers or bulk cargo ships, and I assume you meant those ships as well.

Dr. REYNOLDS. Yes, sir.

Mr. GILCHREST. Could you give us some idea of how to improve the reporting or protection of marine mammals. I know there is a provision that the IMO passed a few years ago regarding right whales in the North Atlantic, where there is a voluntary reporting mechanism if someone sights a right whale, they will report that.

What other provisions, you recommended it here, so I assume there is some recommendation that you would like us to use to put into the Act toward that end.

Dr. REYNOLDS. You are exactly right, and I think that the example that you gave is one of the best examples of how creative new partnerships can help address some of the issues that are starting to emerge. The intent of what I said was that there are other ways in which people incidentally take marine mammals other than through commercial fishing and that we need to recognize that, and in some cases, those other incidental takes can have very, very serious consequences at the population level.

The right whale example, as I say, is a great example, and members of the Navy, the Coast Guard, various scientists, various agency representatives worked together to develop an early warning system, and it was a great step forward to try and reduce the ex-

tent to which incidental taking of right whales, incidental collisions with right whales might further jeopardize that species. I think that is just one example of how the different stakeholders can work together.

Near and dear to my heart is another sort of example, and that has to do with the recreational side of this with Florida manatees. I am from Florida. About 80 of them a year are taken, they are killed—we don't know how many are just seriously injured—through collisions with watercraft, including both commercial and recreational watercraft. That is a pretty serious hit.

So what we are suggesting is that the Committee recognize that some fairly serious levels of take can occur incidentally to human activities and that some sort of a structure, perhaps similar to what has been developed under 118, be used to address these.

Mr. GILCHREST. Well, thank you. We will make that one of our priorities.

Dr. REYNOLDS. Thank you.

Mr. GILCHREST. Dr. Hogarth, you mentioned one of the things lacking in our bill is NMFS dealing with noncommercial fisheries. You said that NMFS lacks the tools they need to do their job to enforce the act. Can you give us an example of that and what we might put in, in order to improve that?

Dr. HOGARTH. For example, in some States right now you can fish gill nets and other commercial gear as recreational, and so under the bill, as it is now written, we are not allowed to touch those. They can be side-by-side, and we can go in and regulate the commercial gear with the Take Reduction Team, but we cannot regulate the recreational fishermen that are using commercial gear, but it is done under the auspices of being recreational.

Mr. GILCHREST. Thank you. You have some great recommendations.

Mr. DuBois, can you give us an example of what the Navy has done or continues to do in recognition of trying to avoid impacts with marine mammals in the course of training.

Mr. DUBOIS. I believe that the admiral could probably answer that better than I can, but it is true that there are a number of examples where the Navy has either deferred, canceled or postponed training exercises in order to avoid potential significant biologic events.

The Navy, as we indicated, is extremely well-versed in the migratory patterns of marine mammals and, as a practical matter, knows exactly, within a certain degree of certainty, where, let us say, humpback whales are going to migrate from the Southern Atlantic to the Northern Atlantic at certain times of the year.

Admiral, would you want to comment on any particular case?

Admiral MOORE. Yes, sir. I would comment on two areas; one would be in the conduct of operations and, two, in the area of research.

To discuss research first, as Mr. DuBois stated in his opening statement, we are investing millions of dollars into marine mammal research each year. We have, over the future year's defense plan—

Mr. GILCHREST. What is the purpose of that research, and who do you collaborate with on that research?

Admiral MOORE. The purpose of the specific one to answer your question, we are calling a marine mammal density study. This is a study that would help us determine precisely where the marine mammals are at given times of the year and what density, what populations exist. We are collaborating with the agencies represented by the gentlemen to my left. That is an area of research.

We then turn that research into information to provide to our fleet and our forces, and we conduct our training so as to optimize our chances of avoiding collisions or interfering in any way with the or having a significant effect on these marine mammals.

In regards to operations, we have a system called the Global Command and Control System Maritime. We developed it to track ships, submarines, and aircraft all over the world. We have implemented a system of tracking marine mammals. We received reports from our fleet. This goes into a system that is available to all of our naval forces and many of our allies around the world. We pass this information to the United States Coast Guard, and that information is shared with the fishing and shipping industry, in particular, our concern over the right whale, which travels on the surface, and therefore has a much heightened opportunity to suffer a collision with a ship.

So we try to get the information out to our fleet so that they know where the whales are, and we can alter course, we can change our operating areas, change our operating patterns so as to avoid impacting marine mammals.

Mr. GILCHREST. Thank you very much.

Dr. Hogarth, and perhaps Mr. Jones, and Dr. Reynolds, have you seen the Department of Defense's new definition for harassment? And if you have, would you agree that that is a reasonable change for a general change of definition for harassment or would you say that is a definition of harassment that should be specific to the Navy and not adopted in any other area.

Dr. Hogarth?

Dr. HOGARTH. We support the definition and think it should be supported to all activities. We believe that there is definitely the need for change in the definition of harassment, and we support the definition that is in the Department of Defense authorization proposal, and we think it should be extended to other activities.

Mr. GILCHREST. Thank you.

Mr. Jones?

Mr. JONES. Mr. Chairman, we would agree with that. We think that a definition which is as broad as the current definition has proved, in practice, to be unworkable and that a definition which is more precisely focused on those activities which actually cause harm to marine mammals will give more predictability to those engaged in activities, thus, they will be able to voluntarily comply. In addition, it will be easier for us to enforce when we have instances where individuals or others are involved in activities which are not in compliance.

Right now the cases are difficult to make. It is difficult for those who fall under the MMPA to know when an activity is or is not a violation, and we think this definition would improve both of those situations.

Mr. GILCHREST. Thank you very much.

Dr. Reynolds?

Dr. REYNOLDS. The Commission agrees that the definition is a real improvement, and we are supportive of it.

Mr. GILCHREST. And you are supportive of not only applying to the Navy, but in general use?

Dr. REYNOLDS. That is correct.

Mr. GILCHREST. Thank you.

The gentleman from Guam, Mr. Underwood?

Mr. UNDERWOOD. Thank you very much, Mr. Chairman, and thank you for your testimonies. I want to be able to sufficiently understand this new definition.

I understood from your responses that you are in favor of the proposal being advanced here by the Department of Defense. In addition to that, in your own testimonies—the three gentlemen that are not associated with DOD directly—I have indicated that the definition of harassment itself lacks such clarity as to be meaningless.

I guess what I am trying to understand is, from the Department of Defense's side of it, which I am sympathetic to, in general, I mean, I do not think anyone here, at least for myself I am not interested in providing more harassment to the Department of Defense activities under the name of not harassing mammals, but is it the definition is the problem, is that the issue, or is it the process of permitting, and is the permitting itself has been so convoluted and difficult? Because my understanding is that there has never been a denial of permits; is that correct?

Mr. DUBOIS. Mr. Underwood, the Navy, from time-to-time, has gone to the National Marine Fisheries Service with an application for a permit, and they have gone into discussions that extends over time about was there enough facts, enough analysis, but I think it is important to recognize here, and your question is right on target, the challenge posed, and this is where the definition and the permit pieces fit together, in my view, the challenge posed by the current definition of harassment is not that our permit application will be denied, but that the definition is so vague that we are open to legal challenge if we do not have a permit.

Navy operations, by definition, are expeditionary, which means that the world events often require planning exercises on short order. The permitting process itself can take, in some cases, at least 6 months, if not several years, to complete and typically results in mitigation measures that reduce training realism. So, as I indicated, there is a connection between the permit process and the definition. This is why, and I think you have heard unanimity here at the table, that the ambiguity, the vagueness of the definition does provide a basis for true problems when it comes to issuing a permit on the part of the Fisheries Service.

Mr. UNDERWOOD. But it seems to me that the stories or at least the evidence that is being posed here regarding this is related more to the permitting process. I understand the connection, but if there were a way to tighten the permitting process, then perhaps a lot of the activities that the Navy engages in would be, which are necessary and I support, would go on as planned. So I am just trying to get to the nub of that issue.

Mr. DUBOIS. I would defer to Dr. Hogarth in this regard, but I think that the vagueness of the definition creates the problems within the permitting process.

Mr. UNDERWOOD. Go ahead, Dr. Hogarth.

Dr. HOGARTH. The definition is very broad. I mean, it talks about such things as "any act or pursuit, torment or annoyance which has the potential to injure a marine mammal or marine mammal stock in the wild." That is Level A.

You go to a Level B harassment, "any act or pursuit, torment or annoyance which has the potential to disturb a marine mammal or marine mammal stock in the wild by causing a disruption of behavioral patterns not limited to migration, nursing, breeding, feeding or sheltering."

And so, you know, for example, a lot of people will call, if a boat is going out sightseeing and it sees a dolphin, if it turns around and comes back in circles so they can see that dolphin, is that a form of harassment?

What we are trying to say is it is so broad, it is very difficult to know when to enforce it.

Mr. UNDERWOOD. But let us say we tighten up the definition, let us say that we adopted the definition, why would we not continue the permitting process under a new definition?

Dr. HOGARTH. We will. They will still have to have permits, yes, but it will be easier to understand the conditions under which we are writing a permit. For example, we have had people to report that if a ship goes by or a boat goes by, that a dolphin went into the wake of that boat, did that cause damage to the dolphin? A lot of the public thinks it does, and we should try to keep dolphin out of the wake of boats. They will refer to this definition we have here of did that boat cause the behavior of that dolphin to change and to play in the wake and that could have impact from all of the other things—the broad definition is where we are getting into problems, as to what we enforce or what we tell the public, as a whole, and not only when we look at permits to the Navy or others. It is just a very broad definition.

Mr. DUBOIS. Mr. Underwood, just one last comment, and I think you raise absolutely, as I said, the right issue.

The permitting process, under our redefinition, if you will, of harassment will then be appropriately focused, as Dr. Hogarth has indicated, as it should be, on biologically significant effects, not whether there is potential to create insignificant effects. So, as I said, the ambiguity or the vagueness of the definition currently provides or prevents, is probably a better term, the Fisheries Service, the National Marine Fisheries Service from dealing with an appropriately focused significant biologic event.

Mr. UNDERWOOD. The issue, if we are going to discuss it in that regard, then the issue remains, in terms of we understand or perhaps maybe we can concede that the definition is broad, but to go to a new definition on the basis of what some perhaps would say is common sense, a kind of a common-sense definition is a little tricky at best, too, because we are trying to find, are we not, and I certainly hope we are trying to find a scientifically based definition of what constitutes harassment. It is not something that is

just, by definition, because, well, this is too broad, and it is too complex, and it is too cumbersome.

Well, if we are going to go to a new definition or if we are going to go to something that, for the sake of permitting, will facilitate things and will get us to avoid litigation, that we don't simply go to a new definition for those specific purposes, but we go to a different definition because they are, in fact, scientifically based.

Mr. DUBOIS. As I indicated I think in my opening remarks, we defer to the National Research Council and their interpretation of the word "scientific" in regard to this particular proposal.

Mr. GILCHREST. Thank you, Mr. Underwood.

Mr. Abercrombie, the gentleman from Hawaii?

Mr. ABERCROMBIE. Thank you, Mr. Chairman.

Look, so we can get through all of this, if you want to change it because you think it interferes with military activity, then say so. Please don't insult my intelligence by telling me that this new definition is more scientifically accurate or something like that. I am not a complete moron.

How can you possibly claim that by putting in the word "significant" and adding it to "potential" or "is likely to disturb" is more precise than the first definition? The first definition, the one that exists right now, is the more precise definition. You are making it more ambiguous by putting in this language because you don't want to say what it is you want to do, which is carry on your experiments regardless of what happens because you will define "significant" or "likely" in a way that lets you do what you want to do.

If you want to do that, say so. Surely, you cannot expect a reasonably intelligent person to assume that you have more specifically defined in the second definition by the Defense Department than you have in the existing language.

Now I don't know, Dr. Hogarth, are you a scientist by profession, as well as an administrator?

Dr. HOGARTH. Years ago, I guess.

Mr. ABERCROMBIE. OK. You seriously contend to me that the second definition is more scientifically precise?

Dr. HOGARTH. In my opinion it is, yes, sir, because the current Act does not define what pursuit, torment or annoyance is, and I think in the new definition we just say disturb or is likely to disturb a marine mammal—

Mr. ABERCROMBIE. Significant.

Dr. HOGARTH. Yes.

Mr. ABERCROMBIE. Let us just take the significant. Let me ask you something. If you go out to the U.S. Open this afternoon and you shout when Tiger Woods brings his club up to the top, is that significant or just likely to disturb?

Dr. HOGARTH. It is likely significant, it is likely to disturb. It is significant.

Mr. ABERCROMBIE. Well, let me ask you, under the present definition, then, do you suppose it has the potential to disturb him, if you shout at him, "Hey, Tiger, how are you doing?"

Dr. HOGARTH. You know it is going to disturb him, yes.

Mr. ABERCROMBIE. Well, then that is what it says already. How do you make the difference? Is it the volume of how loud you holler, "Hey, Tiger, how are you doing?"

Dr. HOGARTH. No, sir. I think, when you look at the things, the way it is written here now, that most anything, any activity could be, and we think that the word "significant" does clarify the point.

Mr. ABERCROMBIE. Let me ask you this then. Supposing you are in the humpback whale sanctuary out in Hawaii, and we are off the Island of Maui, and we go into the low-frequency experiment, and the whales who are breeding there go 50 yards to the right, at a 45-degree angle, is that significant under the second definition, significant potential to disturb or likely to disturb or is that simply the first definition potential to disturb?

Dr. HOGARTH. First off, I hope the activity doesn't take place in the sanctuary, but it would be significant, yes.

Mr. ABERCROMBIE. I would hope it wouldn't either. In fact, I will ask you that then. Do you think that then the low-frequency experiments should be forbidden in the area of the humpback whale sanctuary?

Dr. HOGARTH. That permit is under review, and I am not allowed to speak right now. We are trying to finalize that, but we are looking very closely at areas that it would be utilized in, yes, sir.

Mr. ABERCROMBIE. But, you see, here is the difficulty for us. We have to come up with a definition, Mr. Chairman, or the suggestion is we should change the definition. I am just saying has the potential to injure, to injure or has the significant potential injure. I am simply saying, as a matter of at least my understanding of the English language, it is the second definition which is more ambiguous.

The present definition says Level A, "Potential to injure—to injure or has the significant potential to injure." My understanding of the English language is the second definition is more ambiguous because you have to get into extraordinarily subjective understandings of what constitutes significant.

You see, I don't think it is a question of terms, I think it is a question of the action. We are not having a problem with terms here under the existing definition, it is what actually takes place.

Dr. HOGARTH. I think under the current definition when it says that the pursuit, torment or annoyance, is that we have to improve the intent. Under the new law it says any act, and so when you take the pursuit, torment and annoyance out, it says any act that does. You are not trying to improve the intent of a person. You know that if the act apparently does something, then it is easier for enforcement to try to prove what the intent of the person or activity was.

Mr. ABERCROMBIE. Let me ask you this: How does the word "significant," show me how the word "significant," it doesn't have to be—I am not going to just pick on you. I am going to pick on someone else. Let us see, I will pick on Dr. Reynolds instead because you are the Chairman. It is always better to pick on the Chairmen, wouldn't you agree?

Dr. REYNOLDS. Certainly.

[Laughter.]

Mr. ABERCROMBIE. Can you explain to me how, by adding the word "significant" to "potential to injure," how is that more scientific?

Dr. REYNOLDS. Could I take one step back and then come back at that?

Mr. ABERCROMBIE. Sure.

Dr. REYNOLDS. I think that the intent was—the act, as it currently exists, and the way in which we deal with harassment has been very, very tough to enforce, it has been vague, it has just been—it has created a scenario in which certain groups have been highly regulated for their activities, and that would include both the military and the scientific community and other groups are essentially unregulated.

Going back to Dr. Hogarth's example, the private citizen who is out whipping around a bunch of dolphins and their calves might or might not be doing something that you would consider significant. That person does it without any permits, without any regulation, other than possibly being caught by the relatively infrequent enforcement officer. So there are certain components that are highly regulated and others that are unregulated.

And the regulations and the regulatory, the enforcement staffs and so on, are spread pretty thin, and some of the effort has been directed at activities or some of the activities that have been construed as causing harassment have caused behavioral changes which are probably not something that is going to have a significant impact on the survival of the individual or of the population.

So I think, sir, that the intent was to focus resources, human and nonhuman resources, on the activities that are having the more serious impacts and what the NRC and others call the significant impacts.

Mr. ABERCROMBIE. I understand your struggle.

Mr. GILCHREST. Mr. Abercrombie, we will have a second round, if you would like.

Dr. Reynolds, you may finish.

Dr. REYNOLDS. Let me just finish what I was going to say, if I might.

I think that we have learned a great deal about marine mammals in the 30 years since the Act was passed. It would be an overstatement to say that we are able to diagnose everything, the impact of everything we do around marine mammals as having serious or significant impacts or not. I believe, as I said before, that focusing the definition on the significant activities is an appropriate thing to do. I think that the agencies, and Congress, and others will need to continue to work to clarify which activities truly are causing significant impacts.

I think that the science, as Mr. Hansen said, has improved a great deal, and some activities clearly do cause a significant impact; others, either alone or in tandem with other activities, I think that the science can't yet tell us exactly what is going on, but I think the intent of the step is good.

Mr. GILCHREST. I will just make a comment and ask a question, and if Mr. Abercrombie has another question or two, I will yield to you again.

The National Research Council has come up with this new definition of harassment. Many in the Administration, including those present here, have been a part of that process and have stated their agreement, categorically, apparently without hesitation, with

that change of definition. It is the intent of this Committee to do all in its power to take the next positive step in conservation for marine mammals.

It is also the intent of this Committee to work with our colleagues on other Committees to ensure the defense of this Nation is second to none in this very dangerous, critical period, which we hope will, in time, be over. There are many thousands of young men and women who are defending the Nation on foreign shores that need the training to improve and hone their skills so that they are in harm's way as little as possible.

I think that we, as a Nation, as a people, as individuals are intelligent enough, we have the capacity to be able to give the kind of training that is necessary to protect the Armed Forces from harm, and for them to defend the Nation and for us to understand the physics of the system in which the marine mammals depend, and certainly they should not be harassed or disturbed or killed or moved or anything else.

This goes to those jet-skiers in Florida that, unintentionally or not, harass a number of marine mammals and manatees down in the Florida Keys and all of the coastal areas of the United States and the international marine cargo ships, and tankers, and container ships that traverse the seas and the noise budget of the shipping industry, which has an effect and does harass marine mammals.

So just make sure that everybody knows that this Committee is going to do all in its power to take the next giant step to protect the marine ecosystem and marine mammals and work diligently with the Armed Services and the Navy, in this particular incident, to allow them to train and use their ability, with their understanding, to train in certain areas after the marine mammals have moved on or not to train in certain areas where they are cavernous, and if they go in there and there is a couple of whales in there, the whales don't have the ability to escape.

So I think there is a great deal of mechanisms, a number of things at our disposal that we can use to assure that we are successful in this process, and we will certainly look at and scrutinize the new definition of harassment. If it needs a little tweaking, we will certainly do that.

Mr. ABERCROMBIE. May I conclude then, Mr. Chairman?

Mr. GILCHREST. I will yield to the gentleman from Hawaii.

Mr. ABERCROMBIE. Thank you.

In that context, Mr. Chairman, as you know, and maybe not everybody here knows, I serve on the Armed Services Committee as well. More particularly, I serve on the Research & Development Subcommittee. For the record, for those who don't know, I have supported very vigorously the Navy's research in this area, when there was a lot of pressure, as you know, discussion about not even doing it in the first place. I very vigorously defended, I even did it to a significant level—

[Laughter.]

Mr. ABERCROMBIE. —defended the proposition that good science would help answer a lot of the ambiguity. When I say ambiguity, it is not as if the issues are ambiguous, they are not. The issues are clarity itself in my way, in my understanding of it. As I said,

I believe the problem here is less definitions, as if it were terms that we are arguing about, than it is condition. What is the condition we are addressing, that is my point, Mr. Chairman.

I do not believe that this redefinition, if you will, clarifies anything or deals with the outcome of such scientific research as has been conducted to this point. My understanding of the research, as conducted to this point, although I realize there is some arguing about it, is that there are changes that could affect possibly even survival of species, particularly where whales are concerned.

No, I am as anxious, believe me, as a member of the Armed Services Committee, I assure you, Mr. Chairman; that, whereas, many Committees vote on issues, and policies, and propositions, the Armed Services Committee literally votes every day on issues of life and death with respect to not only the members of our Armed Forces, but what members of our Armed Forces might do as a result of their sworn duty.

So I think that we exist in this planet with other creatures, and we have, at least as far as my understanding as an island person is, is that we are a creature like other creatures on the earth and are not necessarily any more entitled to foist our mistakes off on them than is as already generally thought to be the case by some.

So what I want to see here is less tweaking of definitions than a clear understanding of what constitutes our necessary duty to engage in the common defense and meet the strategic interests of this country and at the same time meet our obligations as trustees of the environment on the planet to the degree that it has been given to us to do.

So I hope we don't get side-tracked by what I consider to be a less-than-illuminating redefinition of harassment or anything else associated with this and that we move into what the Chairman said near the end of his remarks, that we make sure that we strike a proper balance with respect to understanding where the other species have their rights and their privileges on this earth.

For example, the question of breeding, that to me is a condition. You are either breeding or you are not. You are either pregnant and not prevented from having that pregnancy come to term or you are not. You either nurturing young or you not. For example, in the humpback whale sanctuary, again, as a specific example. If we can work it out that our training does not take place and jeopardize that, then that is what we should do. I am more interested in coming up with definitions of how we create proper conditions to do both training and to protect the environment than arguing over terms which don't advance that cause.

Thank you, Mr. Chairman.

Mr. GILCHREST. Thank you very much, Mr. Abercrombie.

Gentlemen, we appreciate your attendance here this afternoon and look forward to continuing to work with you.

The Subcommittee will take a 5-minute break.

[Recess.]

Mr. GILCHREST. The Subcommittee will come to order. I want to thank everybody for their indulgence and patience. If I could just make a slight recommendation that we will try to be flexible and accommodating. If everybody could try to keep their opening remarks to about 5 minutes, you will have an opportunity to fully ex-

press your opinions as we go through the question process, and your full statement will be submitted for the record. And Neil Abercrombie and I are going to read those over the next couple of days together since he can't go home to Hawaii.

We have Mr. Robert Fletcher, President, Sportfishing Association of California; Mr. Andrew Wetzler, Senior Project Attorney, Natural Resource Defense Council; Ms. Nina Young, Director, Marine Wildlife Conservation, The Ocean Conservancy; Mr. Richard Luedtke, Commercial Gillnet Fisherman, Mannahawkin, New Jersey. So they have fishermen in New Jersey, that is good.

[Laughter.]

Mr. LUEDTKE. There are a few of us left.

Mr. GILCHREST. Right on the Mannahawkin. I will ask you about that later. It is interesting.

Dr. Peter Worcester, Research Oceanographer, Scripps Institution of Oceanography, University of California, San Diego.

Thank you all very much for coming.

Mr. Fletcher, you may begin.

**STATEMENT OF ROBERT C. FLETCHER, PRESIDENT, SPORTFISHING ASSOCIATION OF CALIFORNIA**

Mr. FLETCHER. Good afternoon, Mr. Chairman, members. Thank you for inviting me to testify.

My name is Bob Fletcher, President of the Sportfishing Association of California, known as SAC. SAC is a nonprofit organization that for 30 years has been representing the interests of the sportfishing industry in Southern California. The SAC fleet of local and long-range sportfishing boats and whale watching boats carries close to 750,000 passengers a year, and the SAC bait harvesting boats provide live bait to the huge private boat fleet that fishes off Southern California in addition to the sportfishing fleet.

On October 11th of last year I testified before your Subcommittee and described in some detail the California sea lion interaction problems that the sport and commercial fishing fleets had been enduring over the past 20 or so years. I talked about the relatively few rogue or nuisance animals that have caused a great majority of the problems, and encouraged the Subcommittee to develop amendments to the MMPA that would address these issues. I also pointed out that development of a nonlethal deterrent should be a high priority.

Clearly, Mr. Chairman and members, you listened, and I want to thank you for that. H.R. 4781 raises these issues and is therefore an excellent start. I said an excellent start because Section 7, Pinniped Research in the bill, doesn't go far enough. Until there is a separate dedicated line item in funding in the NMFS budget for the development of these nonlethal deterrent devices, the programs will linger without solid direction. Until the Federal Government recognizes and accepts the responsibility that there is a successful recovery of marine mammals amidst the California sea lion and Pacific harbor seals, until that time problems will continue with these robust populations of California sea lions, and we in the sport and commercial fishing industries on the West Coast will continue to be harassed, and at times even injured by these increasingly aggressive hoards of pinnipeds.

In 2001 NMFS estimated the U.S. population of California sea lions at between 204,000 and 214,000 animals. However, based on new life history data NMFS has collected, they are now saying that they underestimated the West Coast sea lion population by about a third. This will likely result in a 2003 estimate of population of well over 250,000 sea lions. Mr. Chairman and staff and members, our problem just got bigger by about a third. And that number doesn't even count the estimated 100,000 animals that live south of the U.S.-Mexican border in Baja.

I talked earlier about injuries, and as the population increases and the aggressiveness of these animals increases, the injuries will increase. Just last month a female deckhand in San Diego was walking up the dock from her boat when a 500-pound sea lion came out of the water and grabbed her by the hand, perhaps thinking he was grabbing a fish. Her finger was severely lacerated and needed medical treatment. Earlier this year a deckhand, who was scooping live bait on the bait docks, was grabbed by a sea lion and dragged partway off the dock, perhaps because the deckhand was blocking the sea lions access to the bait in the net.

Members of Congress, we have a problem and it is just going to get worse. I urge this Subcommittee to create solid incentives for the private sector development of nonlethal devices that would begin to deter sea lions. The stock has probably exceeded its historical level, and the focus should shift from protection to beginning of management of these robust populations, as well as perhaps intervention when necessary. The system, as I see it, begins to break down when it allows the management of all the prey species but totally protects and doesn't allow management of healthy populations of the predators.

I will leave you with a summary of a story one of my members related to me. A father brought his son and daughters on a half-day fishing trip. The dad hooked a nice 15-pound yellowtail. Near the end of the fight, when you could see the color of the fish below the boat, a huge black sea lion came out from under the boat and grabbed the fish. The line went limp and the arched rod shot straight back up. As the sea lion started tossing the fish around, tearing it apart, the innocent children, with tears in their eyes, asked the skipper the most common sense question: "Why can't you do something?" Because this kind of incident reoccurs constantly up and down the West Coast, SAC hopes that this Subcommittee and the Congress can do something.

In closing, as I am the only West Coast fishing industry representative here, I would like to take, on their behalf, the opportunity to urge the Subcommittee to come out and hold a field hearing on the West Coast so that the fishermen can tell you in their own words the interaction problems they are going through daily from these increasingly aggressive populations of California sea lions and harbor seals.

And I want to thank you, Mr. Chairman, for the opportunity to provide this testimony.

[The prepared statement of Mr. Fletcher follows:]

**Statement of Robert Fletcher, President,**
**Sportfishing Association of California**

My name is Robert Fletcher, and I am the President of the Sportfishing Association of California (SAC). SAC is a non-profit political organization that for thirty years has been representing the interests of the commercial passenger fishing vessel (CPFV) fleet in southern California. The SAC fleet of local and long-range sportfishing & whale watching boats carries close to 750,000 passengers a year, and the SAC bait harvesting boats provide live bait to the huge private boat fleet that fishes off the California coast.

On October 11, 2001, I testified before your Subcommittee (testimony attached) and described in some detail the California sea lion interaction problems that the sport and commercial fishing fleets have been enduring over the last twenty years. I talked about the relatively few, rogue or nuisance, animals that have caused the great majority of the problems, and encouraged the Subcommittee to develop amendments to the MMPA that would address these issues. I also pointed out that the development of non-lethal deterrent devices should be a high priority. Clearly you listened and for that I want to thank you. H.R. 4781 raises these issues and is therefore an excellent start.

I said an excellent start, because the provisions in the bill just don't go far enough. Until there is separate, dedicated line item funding for the development of these non-lethal devices in the NMFS budget, the programs will linger without solid direction. Until the Federal Government accepts responsibility for the success of the MMPA and the resulting problems associated with the robust population of California sea lions, we in the sport and commercial fishing industries on the west coast will continue to be harassed and at times injured by these increasingly aggressive hoards of pinnipeds.

To underscore the magnitude of the problem, the National Marine Fisheries Service (NMFS) recently announced that, "'the last (California sea lion) size estimate reported by NMFS in its 2001 Stock Assessment Report estimated the U.S. population at 204,000—214,000. Based on new (emphasis added) life history data that NMFS has collected on California sea lions at San Miguel Island, NMFS has advised that the previous assessment underestimated (emphasis added) the population size by about a third. A revised population estimate, which will likely show a population exceeding 250,000 (emphasis added), is expected to be reported by NMFS in next years 2003 Stock Assessment Report." Mr. Chairman and members, the problem just got bigger, by about a third, and that doesn't count an additional 100,000 sea lions south of the border!!

I talked earlier about injuries, and as the population increases and the aggressiveness of the problem animals increase, the injuries increase. Last month, a female deck hand was walking up the dock from her boat when a 500 lb. sea lion came out of the water and grabbed her by the finger, perhaps thinking she had a fish. Her finger was lacerated and required treatment. Earlier this year, a deckhand scooping bait on the bait receiver was grabbed by a sea lion and dragged part way off the receiver, because the deckhand was blocking the sea lion's access to the bait in the net. Members of Congress, we have a problem, and it is going to get worse.

Appropriation of funds to encourage private sector companies to begin work on development of non-lethal deterrent devices holds out the best hope for relief, and I urge the members of the Subcommittee to add language to H.R. 4781 to create incentives for that development. With the stock of California sea lions exceeding historic levels, the focus on these robust populations of marine mammals should shift from protection to management, and with management comes intervention when necessary. I think the system begins to break down when it allows management of prey species, but not management of healthy populations of predators.

There have been no substantive actions to address problems with California sea lions and their interaction with fishermen since the MMPA was authorized, and the time is past due when Congress should begin to focus on creative solutions to the west coast's seal and sea lion predation of anglers fish! Thank you for H.R. 4781 and please consider strengthening the language to assure private sector funding & involvement.

I'll leave you with a portion of a story one of my skippers related. A father brought his young son and daughters on a fishing trip. The dad hooked a nice 15 lb. yellowtail. Near the end of the fight, when you could see the fish below the boat, a HUGE BLACK SEA LION came from under the boat and grabbed that fish. The line went limp and the arched rod shot back up. As the sea lion started tossing the fish around, tearing it apart, the innocent ones, with tears in their eyes, asked the skipper the most COMMON SENSE question: "Why can't you do something?"

SAC hopes you can do something. Thank you for this opportunity to testify.

**Supplemental Statement of Robert Fletcher, President, Sportfishing Association of California**

Chairman Gilchrest & Members:

My name is Robert Fletcher, and I am the President of the Sportfishing Association of California, (SAC), which is a non-profit political organization representing the interests of the commercial passenger fishing vessel (CPFV) fleet in southern California. SAC represents about 175 boats operating from 23 different Sportfishing landings. Member-boats operate in all major ports between Morro Bay and San Diego, and carry close to 750,000 passengers a year on sportfishing, sport diving and natural history excursions.

Twenty-nine years after passage of the MMPA, the population of California sea lions has rebounded beyond anyone's expectations, and today the population probably exceeds historic levels. The result of this expansion has been an ever-escalating battle between sport and commercial fishermen and sea lions that the fishermen are losing. These robust populations of sea lions are constantly learning new ways to interact with the boats in the SAC fleet, and over the last few years a small number of individual animals have learned to identify the boats in the fleet. They lay in wait near the harbor entrance, and then follow these boats to the fishing grounds. It makes no difference how many moves the Captain makes, the sea lions just follow in the wake and then ambush the passengers' fish once they hook them. In total frustration, one skipper reported to the outdoor editor of the local paper that he had had great day fishing but a poor day catching, thanks to the sea lions! His report included 38 fish heads and two whole fish! Sea lions 38 - anglers 2!

Another escalating problem concerns the bait receivers, which are underwater boxes in most of the harbors along the coast where the bait companies hold their live bait for later sale to the commercial sportfishing boats, as well as the large fleet of private recreational boaters. A relatively few problem animals have learned that if they blow bubbles under these bait receivers, the bait will panic and scatter out through the openings in the boxes, and thus become easy prey. On average, the bait receiver operators indicate that less than 50% of the bait placed into the boxes is later available for sale. This problem is not an isolated one, but occurs in most harbors along the California coast. As if these losses were not enough, the harvest of live bait along the coast can be seriously affected by 'packs' of sea lions that wait until the bait is encircled in a net, then pour over the cork line and feast on the trapped bait fish, damaging most of it in the process. In other cases on these bait docks, sea lions have become so aggressive as to lunge at crewmembers in an attempt to get by them and into the nets holding bait that is being readied for sale. I have also included an article from this August's Western Outdoor News to show you just how aggressive these animals can become with recreational anglers on small boats.

So far I have talked about recreational fishing problems with sea lions, but commercial fishermen face the same conflicts and predation. Drift gill net swordfish fishermen complain that in the last few years, sea lions have destroyed more than half the swordfish in their nets before they can bring the nets on board, and these nets are being fished at times more than 100 miles offshore. Lobstermen claim that a group of rogue animals have learned that they can get a free meal if they smash the trap apart so they can get at the bait inside. At times the losses by these fishermen exceed half the traps they set out.

Set gill net fishermen fishing white seabass and halibut outside three miles have told me that on occasion they have lost their entire catch to predation by sea lions.

Finally, the salmon troll fishery in Central California, Oregon and Washington continues to have severe problems with loss of catch to sea lions. Once again a relatively small group of sea lions have learned to follow in the wake of these troll fishermen, watching the activities of the crew on deck. When they see the crewmember go to the gurney to bring in a hooked salmon, they dive down, approach the hooked fish from behind and rip it off the hook. One long-time, highly respected fisherman, Dave Danbom, told of a day where he lost 68 salmon in a row before returning to the anchorage in disgust.

Mr. Chairman, I would also like to comment on the 1999 NMFS Report to Congress on Impacts of California Sea Lions and Pacific Harbor Seals on Salmonids and West Coast Ecosystems, and specifically on several of its recommendations. I am an advisor and past Commissioner on the Pacific States Marine Fisheries Commission (PSMFC), and was involved in a cooperative effort with NMFS to develop the Report, which is an outstanding treatment of this controversial subject. By far and away the most important recommendation was that Congress, "Develop Safe, Non–Lethal Deterrents". SAC has worked for years and spent tens of $1,000s in an effort to find just such a device. So far we have been unsuccessful, although NMFS has

supported our efforts through S–K grants, and more recently our efforts and NMFS' have stalled due to the environmental communities' concern for the possibility that such a device may accidentally cause some negative impact to the pinnipeds as we attempt to redirect their attention away from our catch and gear. These are intelligent marine mammals and don't discourage easily!

Notwithstanding these problems, I strongly encourage this Subcommittee to make development of non-lethal devices a high priority, and within your fiscal limitations make funds available to create incentives for private-sector development of an effective device. I am sure the technology is out there; we just need the stimulus that Federal grants would provide. Australia has similar problems and could also bring some expertise to the table.

A second important recommendation would, "Implement Site–Specific Management for California Sea Lions and Pacific Harbor Seals." A common thread that runs through most fisheries-pinniped interactions is that a relatively few animals, rogue animals if you will, are creating the majority of the problems. Unfortunately, over time these few are teaching others to, for example, lie in wait at the mouth of spawning streams or fish ladders and "ambush" listed salmonid adults as they return to spawn; follow along behind commercial or recreational salmon boats to 'rip off' hooked fish; follow commercial passenger fishing boats as they leave the harbor and then grab and eat or damage the passengers' catch. If state or Federal resource agency officials could be given general authority for limited lethal removal in those specific areas or in those instances where a documented nuisance animal is operating, the magnitude of the interactions would decline dramatically.

Chairman Gilchrest and members, recreational and commercial fishing on the west coast provides significant economic activity for the coastal communities, but will continue to struggle as long as problem sea lions are allowed to have free rein in our coastal waters. Pacific harbor seals are a lesser problem but with populations on the increase these pinnipeds will also create difficulties, mainly in central California. I would again encourage you to become familiar with the NMFS Report on Seal and Sea Lion Impacts, as it has a wealth of timely information and well thought out recommendations that are even more on target today than when released two years ago.

I haven't touched on the Report's final recommendation, so I would like to make a few remarks on the importance of 'Information Needs' before I close. The last few years have seen a significant increase in the population of California Sea Lions and Pacific Harbor Seals, as well as reports of new levels of interactions between seals and fisheries, and some disturbing reports of cases where sea lions came close to, or did in fact, injure anglers. I had a sea lion jerk a yellowtail out of my hand as I was attempting to release it from a lure, and in the process narrowly missed being hooked myself. An angler in Monterey Bay was bitten in the forearm by a sea lion as he netted a salmon he had just brought to the boat.

This new information is critical in order to follow the changes to marine mammal populations on the west coast, as well as to better understand how these intelligent animals are learning to more effectively live off the efforts of commercial and recreational fishermen, and how they are affecting listed salmonid stocks. As a result, it is of utmost importance that Congress continues funding the collection of timely data on the status of these robust stocks, as well as collecting timely information on the kinds of pinniped-fisheries interactions that are occurring.

Chairman Gilchrest, thank you for the opportunity to provide comments to the Subcommittee on issues of such critical importance to my industry, and I will of course be glad to answer any questions that you or members may have.

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[NOTE: Attachments to Mr. Fletcher's statement have been retained in the Committee's official files.]

SPORTFISHING ASSOCIATION OF CALIFORNIA
1084 BANGOR STREET
SAN DIEGO, CALIFORNIA 92106
(619) 226-6455 FAX (619) 226-0175

ROBERT C. FLETCHER
PRESIDENT

W. A. NOTT
PRESIDENT-EMERITUS

**FISHERIES MANAGEMENT EXPERIENCE**
**Bob Fletcher, President**
**SPORTFISHING ASSOCIATION OF CALIFORNIA**
JUNE 1, 2002

I have spent my whole life in the marine fisheries arena. I was born and raised in San Diego, and grew up on, in or under California's coastal waters. I graduated from Stanford University in 1965 and then spent four years as an officer in the US Air Force, where I was awarded a Bronze Star for my time in SE Asia. After returning to San Diego I earned a Captain's license to operate sportfishing passenger boats, and spent the next 12 years as a skipper and boat owner. During that time I owned and operated two 65-foot charterboats, both named **CAT SPECIAL**. I have also fished commercially for tuna and have commercially harpooned swordfish. In 1983 I was appointed by then-Governor Deukmejian to the California Department of Fish & Game and spent the next six years as Deputy Director, and later Chief Deputy Director. During that time I represented the state on the Pacific Fishery Management Council (PFMC), and was its' Chairman for 1 ½ years. I also represented California as a Commissioner on the Pacific States Marine Fisheries Commission (PSMFC), was the first Chairman of the Klamath Fisheries Management Council, and was the California representative on the U.S./Mexico Fisheries negotiating group known by the acronym, MEXUS/PACIFICO.

In 1989 I left the DFG to return to the private sector and became the President of the Sportfishing Association of California (SAC). At present I represent close to 175 commercial passenger fishing vessels (CPFVs) berthed between the ports of Santa Barbara and San Diego. I also represent 23 SAC Landings and the majority of the live bait harvesting fleet. The Sport fleet carries close to 750,000 passengers a year on fishing, sport diving and natural history excursions. One of my key jobs with SAC is to negotiate access agreements with the Mexican government. In 1991 I was reappointed to the PFMC to serve as an At-Large member from California, and in the summer of 1995 I was elected to become the PFMC's Chairman. I was reappointed to the Council in July 1997, and completed my term as Chairman at the September 1997 meeting. I am still involved with the PSMFC as a California fisheries advisor, and with the PFMC as Chairman of the Highly Migratory Species Advisory Committee. I concluded my third term with the Council in June 2000, and retired as a voting member due to term limits. Finally, I was a member of the Marine Reserves Working Group (MRWG) for the Channel Is. until it was disbanded in late May of 2001, after failing to reach consensus. Marine Reserves are a major controversy at present, and Bob has been appointed to one of the two southern California 'Regional Committees' that will discuss implementation of the Marine Life Protection Act (MLPA).
As you can see, I've looked at fisheries management issues from all sides over a career that has spanned a lifetime. I also love to fish, when time permits!

Mr. GILCHREST. Thank you, Mr. Fletcher.
Mr. Wetzler.

**STATEMENT OF ANDREW E. WETZLER, SENIOR PROJECT ATTORNEY, NATURAL RESOURCES DEFENSE COUNCIL**

Mr. WETZLER. Thank you. And on behalf of NRDC and our over 500,000 members, I would like to thank you for inviting me to address today's panel.

Taking your admonishment to be brief to heart, instead of summing up my written testimony which I previously submitted to the Committee here, I just wanted to take this opportunity to make four points in response to the previous panel's comments on the Department of Defense's suggested alteration of the definition of "harassment."

First, with regard to the Natural Research Council, I think it is very important to point out to the Committee that the proposal before you today goes far beyond anything proposed by the National Research Committee. That proposal came from this publication, and it is important to point out two things. First, it only proposed changing the definition of Level B harassment, whereas the current proposal proposes a very significant change to Level A harassment. Level A harassment is the provision of the law that prohibits injuring, causing physical injury to marine mammals. And second, this paper only dealt with the problem of undersea noise, whereas the proposal before the Department of Defense would apply to all activities, not just undersea noise.

Second, and here I am simply echoing the comments of Congressman Abercrombie. There is no way that this can be characterized as a clarification of the law. Adding the term "significant" or "significance" to a law has never made it more clear. The reason it wouldn't make it more clear in this case in particular, and would merely add more ambiguity in our view, is that the science simply isn't there. Scientists just don't know enough about these extraordinary creatures to tell us what sorts of injuries are significant and what aren't significant. In fact, the National Marine Fisheries Service itself has struggled for years with defining the term "significance" in the Significant Adverse Impacts Clause of the Commercial Fishery Provisions of the Act.

Third, these changes to the definition of "harassment" are simply not needed. The fact is that since 1994 the Navy has never been denied a permit to conduct training exercises They have applied for some 19 permits. They have all been granted. Second, if there did arise a situation in which there was a genuine conflict between the National Marine Fishery Service and the Navy over a proposed training activity, the current law already provides an incredibly flexible provision to deal with that. In particular, Title X of the Armed Services Code allows the Department of Defense to seek an accommodation from the National Marine Fishery Service for any activity that in the Department of Defense's judgment would negatively affect readiness. And if the National Marine Fishery Service and the Department can't agree, the Department of Defense can take their complaint directly to the President. Now, to our knowledge, Title X has never been invoked by the Navy, as far as I know for any environmental law, but certainly for the Marine Mammal

Protection Act. And the reason why is that as written this law is working.

And finally, I just wanted to address a little more specifically the low frequency active sonar system, since that got some considerable attention by the previous panel. And there was a lot of talk about delays in obtaining a permit from the National Marine Fisheries Service. I think it is important to keep the timeline of this project in mind. The fact is, is that the Navy began developing the LFA system in the early to mid 1980's. It began testing the system at sea in the mid to late 1980's, and it formally acquired the LFA system for worldwide deployment no later than 1991. At no time during that period did the Navy approach for a permit, and I think to a large degree whatever delay that has occurred is largely a result of that inaction. Moreover, the Marine Mammal Protection Act itself is only responsible for a very small part of the delay. Most of the delay can be ascribed to other regulatory provisions.

And finally, I think that we need to keep in mind that LFA is in many ways a unique system. It is extraordinarily powerful. It is global in scope, and it has generated an unprecedented amount of concern, both from scientists around the world and from the public at large. And I think under those circumstances it is understandable why that particular process has taken a little bit longer.

In conclusion, Mr. Chairman, there should be no doubt that NRDC and indeed the entire conservation community strongly supports the military's efforts to protect our Nation, and we are sensitive to the issue of military readiness. We do not believe, however, the Department of defense has demonstrated that the dramatic it has proposed are either wise or necessary, nor do we believe that the Department has utilized the procedural remedies available to it under existing law.

Thank you.

[The prepared statement of Mr. Wetzler follows:]

**Statement of Andrew E. Wetzler, Senior Project Attorney, Natural Resources Defense Council**

Good afternoon. My name is Andrew Wetzler, and I serve as senior project attorney for the Natural Resources Defense Council (NRDC). On behalf of our more than 500,000 members, I wish to thank you, Mr. Chairman, and the other members of this Subcommittee for inviting me to testify on today's panel.

NRDC's position on H.R. 4781, the 2002 Amendments to the Marine Mammal Protection Act (MMPA), is well represented in the testimony submitted today by The Ocean Conservancy. I will therefore confine the majority of my testimony to the proposal, initiated by the Defense Department (DoD), to amend the definition of "harassment" in the Act—a proposal that has generated profound concern throughout the conservation community. My testimony this afternoon is supported by a broad coalition of organizations deeply concerned about its consequences for marine mammals and the marine environment and for the MMPA itself.

*BACKGROUND*

NRDC has been closely engaged in many of the issues surrounding the Defense Department's proposal. We have been active participants in the environmental review of a number of DoD activities, including SURTASS LFA ("Low Frequency Active" sonar) and LWAD ("Littoral Warfare Advanced Development"). We have helped lead discussion about the impacts and regulation of ocean noise pollution—one of the major areas compromised by the DoD proposal—having published Sounding the Depths: Supertankers, Sonar and the Rise of Undersea Noise, a comprehensive look at the problem, in 1999. Over the last several months, we have been part of a coalition of national organizations opposed to a general Defense Department effort to rollback the nation's environmental laws.

Two months ago, the proposed definition that is under discussion today was introduced by request into the House and Senate Armed Services Committees. It was introduced as part of a wider bill, called the Readiness and Range Preservation Initiative, which seeks exemptions for the Defense Department to six pieces of landmark environmental legislation: the Endangered Species Act (ESA), the Migratory Bird Treaty Act (MBTA), the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Clean Air Act, in addition to the Marine Mammal Protection Act. The approach taken by the Defense Department was to propose these exemptions, at the eleventh hour, for inclusion in the Defense Authorization Act for Fiscal Year 2003. Both process and substance have been strongly criticized by nearly every national environmental NGO, by state Attorneys General, by community groups, and by the general public.

An MMPA provision was not contained in the defense bill that passed the House, nor was it added to the version of the bill that Senate Armed Services Committee passed onto the Senate floor.

From the beginning, NRDC and its many partners have been concerned about the consequences of the proposed language for the MMPA. In brief, the Marine Mammal Protection Act is our nation's leading instrument and an international model for the conservation of whales, dolphins, sea otters, seals, manatees, and other important and vulnerable species. The provision that the Defense Department would alter, the statutory definition of "harassment," is one of the cornerstones of the statute. By altering this definition, the Department would limit the circumstances under which activities that potentially harm marine mammals—that cause them physical injury, or that impair their ability to breed, nurse, feed, or migrate—could be reviewed. It would also make the definition vague and subjective, introducing a degree of ambiguity that could severely undermine the precautionary purpose of the Act.

*ANALYSIS OF THE PROPOSED DEFINITION*

The Marine Mammal Protection Act was adopted thirty years ago to ameliorate the consequences of human impacts on marine mammals. Its goal is to "protect and promote the growth of marine mammal populations commensurate with sound policies of resource management and to maintain the health and stability of the marine ecosystem." 16 U.S.C. § 1361(6). A precautionary approach to management was necessary given the vulnerable status of many of these populations (a substantial percentage of which remain on the endangered species list or are considered depleted) as well as the difficulty of measuring the impacts of human activities on marine mammals in the wild. "It seems elementary common sense," the Committee on Merchant Marines and Fisheries observed in sending the bill to the floor, "that legislation should be adopted to require that we act conservatively—that no steps should be taken regarding these animals that might prove to be adverse or even irreversible in their effects until more is known." 1972 U.S. Code Cong. & Admin. News 4149.

Congress sought to achieve broad protection for marine mammals by establishing a moratorium on their importation and "take." The term "take" means "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(13). Under the law, the wildlife agencies may grant exceptions to the take prohibitions, provided they determine, using the best available scientific evidence, that such take would have only a negligible impact on marine mammal populations or stocks.

There are two types of general exemptions available through the MMPA, "small take permits" and "incidental harassment authorizations." Both allow assessment of an activity's potential effects on marine mammals, both afford an opportunity for public comment, and both provide for the monitoring and mitigation of biological impacts. Until 1994, the only exemptions available under the Act were "small take permits," which require the agencies to promulgate regulations specifying permissible methods of taking. In 1994, however, the MMPA was amended to provide a streamlined mechanism by which proponents such as the Defense Department may obtain rapid authorization for projects whose takings are by incidental harassment only. 16 U.S.C. § 1371(a)(5)(D). Under this provision, the responsible agency is required to publish notice in the Federal Register of any authorization request within 45 days of its receipt. Then, after a 30-day public comment period, the agency has 45 days to issue the authorization or deny it. By law, the entire process can run no longer than 120 days.

Within this scheme, the definition of "harassment" is a foundational element. It establishes the threshold for regulatory concern and describes the range of impacts (short of lethality) that the wildlife agencies must assess during the authorization process.

In 1994, Congress amended the MMPA to differentiate between two general types of harassment, a type that has the potential to cause physical injury and a type that has the potential to impact behavior of marine mammals in the wild. This definition reads as follows:

> The term "harassment" means any act of pursuit, torment, or annoyance which—
>
> (i) has the potential to injure a marine mammal or marine mammal stock in the wild; 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.

16 U.S.C. § 1362(18)(A). The "potential to injure" is designated "Level A" harassment; the "potential to disturb" is designated "Level B" harassment. Both are considered "take" under the MMPA.

*The Proposed Definition*

The Defense Department claims that the current definition is overly broad and somewhat ambiguous. In an attempt to resolve this perceived problem, it has proposed the following language:

> For purposes of chapter 31 of title 16 of the United States Code, harassment from military readiness activities occurs only when those activities:
>
> (1) injure or has the significant potential to injure a marine mammal or marine mammal stock in the wild; or
>
> (2) disturb or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavior patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering to a point where such behavioral patterns are abandoned or significantly altered; or
>
> (3) are directed toward a specific individual, group, or stock of marine mammals in the wild that is [sic] likely to disturb the specific individual, group, or stock of marine mammals by disrupting behavior, including, but not limited to migration, surfacing, nursing, breeding, feeding or sheltering.

The most salient effect of this language is to raise the threshold of regulatory concern. For Level A harassment, the proposed standard would shift from "has the potential to injure" to "injures or has the significant potential to injure." For Level B harassment, "potential to disturb" would become "disturbs or is likely to disturb"; and an addition would be made to the language governing behavioral impacts, requiring that natural behaviors be "abandoned or significantly altered" to meet the threshold level of concern (emphasis added). [1]

What primarily concerns us, however, is the uncertainty that this new language would introduce into the Act.

First, regardless of what the Defense Department may claim, adding the term "significant" to the definition would not make it more "scientific"; on the contrary, it would take the Act into a scientific and policy arena that is beset by ambiguity. NMFS has already struggled for some years with this term and has yet to define it with regard to the "significant adverse impact" clause in the Act's "incidental take" provisions for commercial fishing (16 U.S.C. §§ 1383(g)(2), 1387(g)(4)). Currently, the state of marine mammal science will not yield a practical definition of "significant potential" or of "significantly altered"; indeed, these terms are likely to generate more scientific questions than answers. [2] (By contrast, the standard in the

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[1] The third subparagraph, which establishes a somewhat more conservative standard for behavioral impacts, would apply only to activities that intentionally "take" marine mammals, not to activities that take marine mammals incidental to their operation. ("Directed activities" is a term of art conventionally used to describe whale-watching trips, swim-with programs, and other interactive or observational engagement.) This provision would not cover any of the activities for which the DoD has sought small take permits or incidental harassment authorizations under the MMPA.

[2] In a 2000 report on the effects of ocean noise pollution on marine mammals, an ad hoc committee of the National Research Council (NRC) recommended changes in the MMPA's harassment definition that, while differing from the Defense Department's, included terms like "meaningful" and "significant." Unfortunately—as the same report concluded—our understanding of how marine mammals react to ocean noise is "rudimentary." To codify a standard like "significance" given this state of knowledge would create substantial uncertainty in the law and, as discussed below, would have regulatory consequences that the NRC committee, not having any legal experts on their panel, appears to have overlooked.

current definition refers to impacts—the disruption of behavioral patterns such as migration, breathing, and nursing—that are at least reasonably verifiable.)

Second, the same is true of the term "abandonment," the meaning of which may vary according to species, gender, time scale, and behavior. Even a temporary abandonment of a nursing bout between an endangered right whale mother and its calf is likely to have more serious consequences than the temporary abandonment of a swimming path by a gray whale—but it is unclear whether either event would count as "abandonment" under the DoD's analysis. In the past, the Department has discounted the significance of behavioral disruptions (such as disruptions in breeding behavior lasting several weeks) that are less than permanent in their effects. [3]

Third, the uncertainty produced by adding these ambiguous terms would only be exacerbated by the changes proposed in the standard of probability. In the current definition, the term "potential" is clear and requires no further evaluation of the probability of an activity to injure or disturb. By contrast, the DoD's proposal, in requiring that takes be "likely" or have the "significant potential" to occur, would demand a higher degree of proof than science is currently able to provide for many types of serious impacts, such as reduced calving rates. Furthermore, the emphasis on "significant potential" and "likelihood" would ignore the degree to which many impacts (such as strandings) may be context-dependent, varying by species, gender, behavior, time-scale, and location.

Taken all together, these changes would have a debilitating effect on enforcement. Under the terms of the Act, the DoD itself would have initial authority to decide whether its activities have the "significant potential to injure" marine mammals or are likely to "significantly alter" marine mammal behavior. A great many activities could simply evade the Act's requirements by relying upon the uncertainty and ambiguity in this new language and not seeking authorization in the first place. For the public or NMFS to enforce the Act in these circumstances would be difficult.

The practical outcome is that many more marine mammals would be impacted by military activities. Potentially injurious activities that were once assessed, monitored, and mitigated under the Act would no longer enter the permit process. NMFS could not ensure that their impacts on populations or stocks would be negligible, and the possibility that non-negligible impacts will occur would substantially increase. The benefits of mitigation and monitoring—which have been effective in protecting marine mammal populations while gathering critical information on biological impacts—would be lost under the proposed definition. Overall, the result is likely to be more injury and death of marine mammals, less mitigation and monitoring of impacts, less transparency for the public and the regulatory agencies, and even more controversy and debate.

The language proposed by the Defense Department covers all activities related to "military readiness," an umbrella concept that would catch an extremely wide range of military and military-support activities whether or not they are actually performed by the DoD. But there is also a substantial danger that the proposed definition, once adopted, would be extended for the sake of consistency to other activities currently covered by the MMPA. The effect of such a move could be severe, compromising enforcement in similar ways for oil and gas production, power plant operations, and a wide range of other activities. Such a change would alter the underlying philosophy of the MMPA.

*ASSESSMENT OF NEED FOR THE PROPOSED DEFINITION*

Changing a core definition in a complex statute like the Marine Mammal Protection Act carries with it serious risks. The Defense Department, we believe, simply has not made the case that such a dramatic step is warranted.

Since 1994, when the current definition of "harassment" was adopted, the DoD has submitted approximately six applications for authorization under the Act's "small take" and approximately thirteen under its "incidental harassment" provisions. At least one application is currently pending; but of the rest—as Assistant Administrator William Hogarth noted before the House Armed Services Committee last March—the plain fact is that no application submitted by the DoD has ever been denied.

Moreover, provisions to accommodate Defense Department activities already exist within Federal law. As noted above, the DoD may receive authorization to "harass" marine mammals through a streamlined process that, by statute, can run no longer than 120 days from the time of application. The agencies are allowed 45 days to publish notice of the application in the Federal Register, 30 days to solicit comments

[3] See, e.g., Department of the Navy, Final Overseas Environmental Impact Statement and Environmental Impact Statement for Surveillance Towed Array Sensor System Low Frequency Active (SURTASS LFA) Sonar (Jan. 2001).

from the public, and another 45 days to accept or deny the application. By contrast, activities that the DoD typically submits for authorization are in development for many months or years. The DoD has not shown that an exemption process of the current length is burdensome, particularly in light of the Department's responsibilities under other environmental laws, such as the National Environmental Policy Act (NEPA), which are usually pursued concurrently.

Additional flexibility is available under the Armed Forces Code. Under the Code (10 U.S.C. § 2014), the DoD may seek special accommodation and relief from any agency decision that, in its determination, would have a "significant adverse effect on the military readiness of any of the armed forces or a critical component thereof." If the accommodations it seeks are not forthcoming, it may take its case directly to the President. These provisions have never been invoked with regard to the MMPA, presumably because the Department's requests for authorization under the Act have never been denied and because any mitigation required by the agency was adjudged not to have a significant adverse effect on readiness. (To our knowledge, the provision has not been invoked with regard to any of the other statutes that the Defense Department has recently sought exemptions from.) The Department has not shown that additional exemptions are necessary.

*The DoD's Assessment of Need*

The DoD has cited two cases in support of its position that changes to the harassment definition are needed: the SURTASS LFA case and the LWAD case. But these examples simply do not bear out the Department's claims, and we urge the Subcommittee to give them both close inspection.

SURTASS LFA (short for "Surveillance Towed Array Sensor System Low Frequency Active" sonar) is a new technology that has raised extraordinary concern in the scientific community and the general public for its potential effects on marine mammals (so much so that, last fall, this Subcommittee convened a panel to discuss the matter). The Navy began developing the LFA system in the early to mid–1980s; it began testing the system at sea in the late 1980s; it formally acquired the system for global deployment no later than 1991—and yet the Navy did not agree to prepare an Environmental Impact Statement under NEPA or fulfill its responsibilities under other statutes until 1996–97, after it had come under pressure from both the scientific and environmental communities. Contrary to what the Department has claimed (Readiness and Range Initiative Summary 3), only a small part of the delay it describes is directly attributable to the MMPA authorization process.[4] But whatever delay has occurred in this case is at least partly due to the Navy's decision, during the ten years it spent developing and testing LFA, never to apply for MMPA authorization.

The Littoral Warfare Advanced Development program (or "LWAD") is the second activity that the DoD claims has been compromised by the MMPA. Under the LWAD program, the Navy conducts tests of various systems and components used in antisubmarine warfare; nearly all of these tests have involved the use of intense active sonar (including one of the systems implicated in the unusual mass stranding of whales in the Bahamas) in coastal waters. By citing LWAD as it does, the Defense Department suggests that meeting the requirements of the MMPA has been burdensome. In fact, the Navy has not sought MMPA authorization for any of the seventeen exercises conducted under the program, despite the express recommendation of NMFS and despite numerous entreaties from the environmental community since March 2000, when the mass strandings occurred in the Bahamas. As the LWAD program has never gone through the authorization process, it is not evident what impacts the MMPA could have had in this case.

That the Defense Department has not demonstrated the need for major changes in the law is consistent with a current study, whose preliminary results were announced on May 7, 2002, by the General Accounting Office (GAO). The GAO's initial conclusions were that commanders throughout the Armed Forces continue to report a high level of combat readiness, and that the Defense Department has documented neither the training impacts nor the costs associated with meeting its stewardship responsibilities.

Rather than pursue broad legislative change, the need for which has not yet been demonstrated, the Department might look at non-legislative alternatives to further streamline the administrative process under MMPA and other laws. For example,

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[4] That is, as opposed to the requirements set by other statutes. We recognize that the MMPA process has taken longer than usual in this case; one likely reason for this, however, is the extraordinary number of substantive comments that NMFS received from marine scientists during the public comment period, which we believe is appropriate for a controversial new technology that is slated for global deployment.

Assistant Administrator Hogarth, in his March testimony, emphasized the value of taking a programmatic approach to environmental consultations. Such an approach would afford the DoD even more flexibility and would provide NMFS with adequate time to carry out its administrative responsibilities. To the extent this approach is adopted, Dr. Hogarth said, "the implications of the [MMPA] permit process should be minor."[5] NRDC and other groups have been making similar appeals to the Armed Forces for a number of years. To facilitate planning, for example, we proposed two years ago that the Navy work in collaboration with the National Marine Fisheries Service to identify areas of high biological productivity or significance and find acceptable seasonal or geographic alternatives. Non-legislative approaches may be available that both protect the environment and improve efficiency, and we would welcome the opportunity to work collaboratively to this end.

*CONCLUSION*

In April, a broad coalition of national environmental organizations sent a letter to House members on the exemptions proposed the Defense Department. That letter included the following statement: "We firmly believe no government agency should be above the law—including the laws that protect the air and water in and around our military facilities, the health of the people who live on bases and nearby, and America's wildlife and public lands. Eliminating environmental and public health protections would likely create more, rather than less, controversy for the Department of Defense."

NRDC supports the military's efforts to protect national security and is sensitive to the issue of military readiness. We do not believe, however, that the Defense Department has demonstrated that the dramatic changes proposed are necessary or that it has utilized the procedural remedies available to it under existing law. Adopting a substantially flawed change in the harassment definition would be disastrous for marine mammals and would severely diminish any chance of constructive dialogue on other conservation issues. NRDC, together with other groups, supports a process in which all stakeholders can work together to develop creative and collaborative solutions. We strongly urge that interest groups and the military are given the opportunity to work constructively on non-legislative alternatives before any fundamental changes are contemplated for a complex, important, and popular law.

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Mr. GILCHREST. Thank you very much, Mr. Wetzler.

Ms. Young.

## STATEMENT OF NINA M. YOUNG, DIRECTOR, MARINE WILDLIFE CONSERVATION, THE OCEAN CONSERVANCY

Ms. YOUNG. Mr. Chairman, members of the Subcommittee, thank you for the opportunity to present our views on the Marine Mammal Protection Act and H.R. 4781. My testimony today is on behalf of the Ocean Conservancy and 15 other environmental organizations representing the Marine Mammal Protection Coalition.

The Ocean Conservancy believes that in the sweeping changes made in 1994, Congress refined the Act and brought it closer toward achieving its goals of protecting and recovering marine mammal populations. In our view, problems often stem, not from the Act itself, but from the Agency's failure to implement the Act fully and effectively, compounded by a chronic lack of resources for effective implementation.

While we welcome H.R. 4781 and commend the Subcommittee for its work on the bill, we urge the Subcommittee to seize a unique opportunity to craft a truly visionary reauthorization bill that will tackle the emerging issues and threats to marine mammals. The problems are becoming more complex, encompassing competition with commercial fisheries, habitat degradation from

[5] Available at this time in transcript form from www.house.gov/hasc/openingstatementsandpressreleases/

marine pollution and sound, natural phenomenon such as climactic regime shifts, long-term problems such as global climate change. The MMPA must evolve from focusing on marine mammal stock structure and abundance estimates to assessing marine mammal health and ecosystem health. Existing statutory tools must be enhanced to establish a dedicated research program into marine mammal health and the threats posed by contaminants and sound.

Any reauthorization bill must not only preserve but also build on the gains secured in 1994. In our written testimony we provide a section by section comments on H.R. 4781, as well as additional language for this section, and other provisions that would make the statute more effective. In our view, any MMPA reauthorization bill must prevent the weakening to the definition of a harassment, safeguard the zero mortality rate goal, strengthen the penalty and enforcement provisions and deter violations of the act, protect and strengthen the act's co-management provisions to allow co-management of nonstrategic stocks, and increase the authorized appropriation levels overall, but specifically for Section 117, 118 and the Health and Stranding Response provisions. Congress should further refine Section 118 to address problems relating to fishers obtaining the required authorization, placement of observers on vessels that have not registered, the need for fees to increase observer coverage, and the inclusion of noncommercial fishing gear which has the potential to take marine mammals.

The Subcommittee should also consider providing the Secretary with the ability to authorize take reduction teams for fishery interactions involving competition with prey and other human-related threats such as shipping. We support H.R. 4781's proposed amendment to provide research for nonlethal control of nuisance pinniped. We recommend, however, that the bill be amended to require the Secretary to develop a research plan to guide research, clarify that the testing of safe, nonlethal deterrents shall provide for the humane taking of marine mammals in accordance with the act, and include the conservation community in the development of the research program. In addition, it should require the Secretary to make the annual report to Congress available for public review and comment, and authorize the Secretary to accept contributions to carry out this section.

We oppose the Polar Bear Import Provision Permit, as it would establish a blanket exemption to the notice and comment requirement and institute a dangerous precedent under which permits can be issued or denied without the much-needed public scrutiny.

The Department of Defense's proposed amendment to the MMPA's as that of the Clinton Administration bill's definition to harassment would significantly raise the threshold for securing authorization to conduct activities that have the potential to harass marine mammals. We oppose this amendment and believe that it would result in increased injury or death to marine mammals. We understand that the Administration had an MMPA Reauthorization Bill pending, and we look forward to reviewing and providing our comments on the bill to the Administration and the Subcommittee. However, we believe that encouraging all interest groups to engage in a multi-stakeholder process to develop a noncontroversial and forward-thinking bill, would provide the greatest

benefit to marine mammals. We respectfully urge Congress to work with all affected parties to this end.

In the meantime, the MMPA already has the tools that it needs to protect marine mammals. Its implementation could be greatly enhanced if Congress would fund the statute at its authorized levels, and the agencies work cooperatively with environmental, scientific and fishing communities to improve the act's implementation.

Thank you.

[The prepared statement of Ms. Young follows:]

**Statement of Nina M. Young, Director, Marine Wildlife Conservation, The Ocean Conservancy**

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to present our views on the Marine Mammal Protection Act and H.R. 4781. My name is Nina M. Young; I am the Director of Marine Wildlife Conservation for The Ocean Conservancy.

*I. SUMMARY STATEMENT*

The Ocean Conservancy (formerly the Center for Marine Conservation) played a leadership role in the development of the 1994 amendments to the Marine Mammal Protection Act (MMPA or Act), especially those governing the incidental take of marine mammals in commercial fisheries. The Ocean Conservancy believes that, in the sweeping changes made in 1994, Congress refined the Act and brought it closer toward achieving its goal of recovering marine mammal populations. The MMPA is an international model for effective conservation and protection of marine mammals. In our view, problems with the MMPA often stem not from the Act itself, but from the agencies' failure to implement the Act fully and effectively, compounded by a chronic lack of resources for effective implementation.

While we welcome H.R. 4781 and commend the Subcommittee for its work on this bill, we urge the Subcommittee to seize the opportunity to craft a truly visionary reauthorization bill that will tackle the emerging threats to marine mammal conservation. The problems facing marine mammals are becoming more complex and complicated. They encompass competition with commercial fisheries, habitat degradation associated with sound production and pollution, natural phenomena such as climatic regime shifts, and long-term chronic threats such as global climate change. The MMPA must evolve from merely looking at marine mammal stock structure and abundance to assessing marine mammal and ecosystem health. Tools that already exist in the MMPA such as Title IV—(Marine Mammal Health Stranding and Response) must be enhanced to establish a dedicated research program encompassing marine mammal health and the threats posed by contaminants and noise.

Any reauthorization bill must not only preserve, but also build on the gains that were made in 1994. In our view, an effective reauthorization bill will: prevent the weakening of the definition of harassment; safeguard the zero mortality rate goal; strengthen the MMPA penalty and enforcement provisions to deter violations of the MMPA effectively; improve the implementation of the take reduction team process; expand authority under Section 118 (16 U.S.C. § 1387) to allow the Secretary to authorize take reduction teams for fishery interactions involving prey related issues and other human-related threats (i.e. ship strikes); protect and strengthen the Act's co-management provisions to allow co-management of non-depleted species/stocks; increase the authorized appropriation levels for the Act overall, and specifically the health and stranding response provisions; and devise and implement a research plan to develop safe non-lethal deterrents to prevent marine mammals from interacting with fishers gear and catch. In written testimony submitted to the Subcommittee on April 6, 2000 and October 11, 2001 we offered amendment language to address these issues.

We understand that the Administration has a MMPA reauthorization bill pending at the Office of Management and Budget. We look forward to reviewing and providing our comments on that bill to the Administration and the Subcommittee. We believe that encouraging all interest groups to engage in a multi-stake holder process to develop a non-controversial and forward thinking reauthorization bill would provide the greatest benefit to the resource and the nation. We respectfully urge Congress to work with all affected parties towards this end.

In the meantime, the MMPA already has many of the tools it needs to protect marine mammals. Its implementation could be greatly improved if Congress would fund the statute at its authorized levels. Additionally, the National Marine Fisheries Service (NMFS) and the Fish and Wildlife Service (FWS) should work with the environmental and scientific communities and the fishing industry to undertake needed research and improve the MMPA's implementation.

Our comments are organized as follows: first, we provide our section-by-section comments on H.R. 4781 as well as additional language for these sections that would make the statute more effective. Next, we address the problems with the Department of Defense's proposed amendments to the definition of "harassment." Finally, we provide additional proposed amendments to ensure that the statute achieves its goal of marine mammal protection and conservation.

*II. DETAILED COMMENTS ON H.R. 4781*

*SEC. 4. LIMITED AUTHORITY TO EXPORT NATIVE HANDICRAFTS*

The Ocean Conservancy supports these provisions to clarify that Native handicrafts can be exported by a Native of Canada, Greenland, Russia, or by an Alaska Native as part of a cultural exchange. This resolves a problem created by the 1994 amendments, which allowed a Native of Canada, Greenland, or Russia to import marine mammal products into the United States as part of personal travel or a cultural exchange, but failed to address the export of those products at the end of the travel. Similarly the 1994 amendment introduced uncertainty regarding the export of Alaska Native handicrafts under similar circumstances.

*SEC. 5. AUTHORIZATION OF APPROPRIATIONS*

The Ocean Conservancy encourages the Subcommittee to further increase the authorized appropriation levels for both the Department of Commerce and the Department of Interior, to enhance implementation of the MMPA through improved marine mammal stock assessments and health-related research, increased staff resources to process scientific and small take permits, finalize regulations to implement take reduction plans within the timeframe stipulated in the Act and oversee the implementation of such plans, comply with the mandates of Title IV (Marine Mammal Health and Stranding Response Program), and increase observer coverage of Category I and II fisheries.

The Ocean Conservancy believes that the authorization level for the Department of Commerce to carry out the implementation of Sections 117 and 118 (16 U.S.C. §§ 1386–87) is woefully inadequate. For example, Section 117 calls for NMFS and FWS to produce stock assessment reports that include a description of the stock's geographic range, a minimum population estimate, current population trends, current and maximum net productivity rates, optimum sustainable population levels and allowable removal levels, and estimates of annual human-caused mortality and serious injury through interactions with commercial fisheries and subsistence hunters. The data in these reports are used to evaluate the progress of each fishery towards achieving its goal of zero mortality and serious injury. NMFS has defined a total of 145 cetacean and pinniped stocks in U.S. waters: 60 stocks in the Atlantic Ocean and Gulf of Mexico; 54 along the Pacific Coast of the continental United States and Hawaii; and 31 in Alaska and the North Pacific.

NMFS must also continue to fund established take reduction teams until they achieve their goals under the MMPA. Additionally, NMFS should convene several other take reduction teams, including a reconstituted Atlantic Offshore Take Reduction Team. The table below, from NMFS" website, provides a breakdown of cost for the various stages of a take reduction team process. Based on this information, the agency is spending approximately $5 million per year on take reduction teams. Most of the teams are in the monitoring and follow-up stage, with the exception of Bottlenose Dolphin Take Reduction Team, which just submitted its consensus plan in May. Therefore, we recommend that the Subcommittee increase the annual authorization for Sections 117 and 118 to $35,000,000.

| Generalized Take Reduction Process | | | |
|---|---|---|---|
| **Stage** | **Element** | **Time** | **Cost (not including NMFS salaries)** |
| Pre-team data collection | Abundance surveys | 1-3 surveys | $350K per survey |
| | Mortality estimates | 3 years of observer coverage | $850K per year per fishery |
| | Stock structure data | 1-3 surveys | $350 K per survey |
| | Fishery characteristics data | | |
| Active TRT | Contracting | 2-2 ½ years (if mortality is >PBR, teams have 6 months to submit plan to NMFS once team is convened) | $500K (4-5 meetings) |
| | Hiring facilitator | | |
| | Assembling team | | |
| | Meetings/travel costs | | |
| TRP Development and Implementation | Proposed rule | 6 months (legally is 60 days) | Staff resources |
| | Final rule | 6 months (legally is 90 days including public comment period) | Staff resources |
| TRP Monitoring and TRT Follow-up | Mortality estimates | 3-5 years of observer coverage | $850K per year per fishery |
| | Reconvening teams | As necessary | $100K per meeting |

The Marine Mammal Health and Stranding Response Program under Title IV (16 U.S.C. §§ 1421- 21(h)) should retain its own separate authorization provision within H.R. 4781, rather than be included in the base authorization. See 16 U.S.C. § 1421(g). Title IV is critical to the recovery and health of marine mammal populations. To date, the Marine Mammal Health and Stranding Response Program has greatly improved the response to routine strandings of marine mammals and unusual mortality events. Nevertheless, unexplained die-offs of marine mammals have continued on almost an annual basis along the United States coastline, and the wildlife agencies' response to these die- offs has been hampered by a lack of funding. Without adequate funding, the agencies cannot be proactive, develop a strong marine mammal health assessment program, support volunteer stranding networks, or develop accurate baseline information on stranding rates, contaminants, disease, and other factors related to detecting and determining causes of unusual mortality events. Furthermore, the lack of funds hinders these agencies' ability to fully develop and implement contingency programs to respond to die-offs or oil spills, and subsequently determine the cause of these die-offs that are potential indicators of the health of the marine environment. We recommend that the Subcommittee provide a separate $5,000,000 annual authorization to NMFS for Title IV, a specific annual authorization of $500,000 to the Marine Mammal Unusual Mortality Event Fund, and $500,000 annually to the Secretary of Interior to carry out this Title.

*SEC. 6. TAKE REDUCTION PLANS*

We support the amendments to Section 118(f) and 118(j) of the MMPA in H.R. 4781. We believe that the amendments to Section 118(f) will significantly improve the take reduction team process and the plans that it develops. The amendment to Section 118(j) will provide NMFS with the ability to work cooperatively with various user groups to undertake the necessary measures to implement this Section effectively in the event there are insufficient Federal funds to conduct research or observer programs.

The bill, however, is not sufficiently comprehensive in its approach to improving Section 118 (16 U.S.C. § 1387). Congress should seize this opportunity to refine this section to address problems that have arisen related to fishers obtaining the required authorization, placement of observers, increased observer coverage, the need for funding for observer coverage, and the inclusion of recreational fishing. The Ocean Conservancy offers the following suggestions.

Some non-commercial fisheries use gear similar or identical to commercial fishing gear and, as a result, are taking marine mammals at rates potentially equal to or greater than rates of incidental bycatch commercial fisheries. However, according to NMFS, there are currently no mechanisms to address this take within the MMPA's incidental take provisions. As a matter of equity, and for purposes of effective marine mammal conservation, non-commercial fisheries that employ gear similar to commercial fishing gear and that have the same potential to take marine mammals should not be exempt from the Act. Therefore, The Ocean Conservancy supports amendments to include these fisheries under the provisions of Section 118. However, we are concerned that the amendment proposed in H.R. 4781 may not include all the references necessary to bring this subset of non- commercial fisheries under the authority of Section 118. We look forward to working with the Subcommittee revise the language in H.R. 4781 to achieve this objective.

*Section 118(c): Registration and Authorization*

The MMPA requires vessels engaging in Category I and II commercial fisheries to register with the Secretary to receive authorization to engage in the lawful incidental taking of marine mammals in that fishery. The MMPA provides the Secretary with the authority to place observers on commercial vessels engaging in Category I and II fisheries, and vessels that have received authorization to engage in these fisheries are obligated to take observers on board.

During several take reduction team negotiations, NMFS has remarked on instances where vessel owners have refused to allow observers on their vessels without adverse consequences. NMFS Enforcement has indicated that its efforts to enforce the Act are constrained because NOAA's Office of General Counsel has narrowly interpreted the term "engaged in a fishery" under Section 118(c)(3)(C) to mean engaged in the fishery on the day that a refusal to take an observer occurs. The MMPA should be amended to clarify the obligations of vessel owners in Category I and II fisheries to carry observers if so requested, and to provide NMFS with the explicit authority to punish violations of the observer requirements. The Act should also be amended to define the term "engaged in a fishery." (See Attachment at A–1 and A–2).

Congress should also strengthen the incentives for fishers to register under this section by allowing NMFS to seek forfeiture of the catch and to assess a substantial fine against the vessel for any fishing operations conducted in the absence of the required authorization. In addition, the fine currently stipulated in the Act for failure to display or carry evidence of an authorization is not a sufficient deterrent to noncompliance. (See Attachment at A–3).

*Section 118(d): Monitoring Incidental Takes*

Nearly every take reduction team recommends increased observer coverage. Funds for monitoring programs have been limited; generally, only fisheries experiencing frequent interactions with marine mammals have received priority for observer program coverage. Former NMFS Assistant Administrator Penny Dalton noted in her June 29, 1999, testimony before the House Resources Committee that: "Funds for monitoring programs have been limited; therefore, only fisheries experiencing frequent interactions with marine mammals have generally received priority for observer program coverage. In 1997, approximately 1/5 of the U.S. fisheries having frequent or occasional interactions with marine mammals were observed for these interactions. These large gaps in our knowledge of fisheries' impacts to marine mammal stocks makes it difficult to develop appropriate management measures." In most cases, shortfalls in program funding often result in diminished observer coverage. Consequently, The Ocean Conservancy strongly believes that the Secretary should have the discretion to assess fees, as needed, to initiate and implement an observer program, particularly for those fisheries that request such a program. (See Attachment at A–4).

NMFS has raised concerns regarding whether the agency has the authority to place observers on vessels in Category I and II fisheries that have not registered and obtained a marine mammal incidental take authorization. The Ocean Conservancy believes that the MMPA should be amended to clarify NMFS" authority to place observers on any vessel engaging in a Category I or II fishery, regardless of

whether the owner or master of the vessel has registered. (See Attachment at A–5).

*Repeal of Section 114*

Given that Section 118 is fully functional, there is no longer any need for the interim exemption for commercial fisheries provided for in Section 114 (16 U.S.C. § 1383a). Therefore, Section 114 should be deleted and the necessary technical and conforming amendments made to other provisions in the Act.

*SEC. 7. PINNIPED RESEARCH*

Pinnipeds have never been the primary cause of a salmonid decline, nor has it been scientifically demonstrated that they have been a primary factor in the delayed recovery of a depressed salmonid species. Studies show that salmonids make up only a small percentage of pinniped diets, and that habitat loss is a primary factor in salmonid decline. Nonetheless, in 1994, the environmental community, the fishing industry, and Congress provided NMFS with the tools in Section 120 of the MMPA to address the issue of pinniped predation on threatened and endangered salmonid stocks.

Sections 109 and 120 (16 U.S.C. §§ 1379, 1389) offer effective and precautionary approaches to protecting pinnipeds, salmonid fishery stocks, biodiversity, and human health and welfare. Consequently, there is no need to amend the MMPA to allow a blanket authorization for the intentional lethal removal of pinnipeds by state and Federal resource agencies. Nor do we believe that such a blanket authorization would be acceptable to the public.

Non-lethal deterrents hold the most promise to resolve the problems of "nuisance" animals and should be the first line of defense. NMFS has failed, however, to publish final guidelines on acceptable non-lethal deterrents. NMFS has also failed to give sufficient priority to dedicated research into the development of safe and effective non-lethal deterrents. Development of such deterrents will aid in reducing not only predation on threatened and endangered salmonid stocks, but also other conflicts between pinnipeds and humans.

The Ocean Conservancy supports H.R. 4781's proposed amendment to provide for research into non-lethal removal and control of nuisance pinnipeds. We recommend, however, that this section of the bill be amended to: (1) require the Secretary to develop a research plan to guide research on the non-lethal removal and control of nuisance pinnipeds; (2) clarify that the development and testing of safe, non-lethal removal, deterrence and control methods shall provide for the humane taking of marine mammals by harassment, as defined by Section 3(18)(A)(ii) of the MMPA; (3) include other organizations and individuals—such as the conservation community—in addition to representatives of commercial and recreational fishing industries, in the development of the research program; (4) require the Secretary to make the annual report to Congress available to the public for review and comment; and (5) authorize the Secretary to accept contributions to carry out this section. (See Attachment at A–6).

*SEC. 8. MARINE MAMMAL COMMISSION*

The Ocean Conservancy opposes H.R. 4781's proposed provision related to the Marine Mammal Commission striking the language in Section 206(5) (16 U.S.C. § 1406(5)) that states: "except that no fewer than 11 employees must be employed under paragraph (1) at any time." Removing this lower threshold may provide some members of Congress with an incentive/rationale to decrease appropriations and, in turn, staff capacity on the Marine Mammal Commission. The Marine Mammal Commission plays a crucial role in the oversight and implementation of the Act and should be empowered to expand its authority to promote and undertake visionary dialogues and strategic thinking that will advance the purposes and policies of the Act. The Ocean Conservancy supports the authorization of appropriations proposed for the Marine Mammal Commission provided in H.R. 4781.

*SEC. 9. SCRIMSHAW EXEMPTION*

The Ocean Conservancy supports this provision, which extends the permits for individuals with pre- ESA ivory, to allow them to continue to possess, carve, and sell the ivory until 2007.

*SEC. 10. EMERGENCY ASSISTANCE FOR SUBSISTENCE WHALE HUNTERS*

The Ocean Conservancy supports this provision as a mechanism to ensure that whales that are struck in legal, authorized aboriginal hunts are landed and not lost.

*SEC. 11. EXTENSION*

The proposed provision in this section does not appear to correspond to the Section of the Act cited.

*SEC. 12. POLAR BEAR PERMITS*

In 1994, Congress provided for the issuance of permits authorizing the importation of trophies of sport-hunted polar bears taken in Canada, subject to certain findings and restrictions. The amendments required the public to be given notice prior to and after issuance or denial of such permits. H.R. 4781 proposes to change this public notification process to a semiannual summary of all such permits issued or denied. The Ocean Conservancy opposes this provision, as it would establish a blanket exemption to the notice and comment requirement and institute a dangerous precedent under which permits could be issued or denied without much-needed public scrutiny. The public comment process surrounding the issuance of a permit to import polar bear parts is needed to provide public oversight to verify that a permit is tied to tagging that clearly demonstrates when, and from what stock, the polar bear was taken. Rather than removing the public comment process, FWS should work to ensure that these provisions are effectively enforced and do not result in the illegal take or a negative change in the status of stocks that are currently depleted.

*SEC. 13. CAPTIVE RELEASE PROHIBITION*

Section 13 amends section 102 of the Act to clarify that the MMPA expressly prohibits any person subject to the United States' jurisdiction from releasing a captive marine mammal unless specifically authorized to do so under sections 104(c)(3)(A), 104(c)(4)(A), or 109(h). The Ocean Conservancy supports H.R. 4781's proposed provisions prohibiting the release of any captive marine mammal unless authorization has been received. We are sensitive to the potential harm that might result, in the absence of mandatory precautionary measures established as conditions of a captive release permit, to the animals released and to wild populations they encounter, through disease transmission, inappropriate genetic exchanges, and disruption of critical behavior patterns and social structures in wild populations. However, Section 13(3)(6) appears to set a different jurisdictional standard for the release of captive marine mammals than for other activities subject to the permit requirement of the MMPA. We believe this provision should be applied in the same manner as all other prohibitions under the Act. (See Attachment at A–7).

*SEC. 14. MARINE MAMMAL COMMISSION ADMINISTRATION*

We support this provision. The per diem rate in the Act is too low. Consequently, this provision precludes the Marine Mammal Commission from securing the services of most experts and consultants. By removing this restriction, the Marine Mammal Commission will be brought under the government-wide restrictions for the payment of experts and consultants.

*III. PROPOSED MODIFICATIONS TO THE DEFINITION OF HARASSMENT*

The Department of Defense has proposed a bill containing a provision that would amend the MMPA's definition of harassment. This amendment, similar to one advanced by the Clinton Administration in its MMPA Reauthorization Bill, which was also opposed by the environmental community and was never pursued by the previous Administration, would severely undermine the precautionary nature of the Act, and significantly raise the threshold that triggers a party's obligation to secure authorization to conduct activities that have the potential to harass marine mammals. The proposed definition would not only increase injuries and deaths of marine mammals, but also diminish transparency, result in a loss of scientific research and mitigation measures, require the agency or the party requesting the authorization to make difficult, if not impossible, scientific judgments about whether a given activity is subject to the Act's permitting and mitigation requirements, and impair enforcement of the Act.

*Background*

Congress sought to achieve broad protection for marine mammals by establishing a moratorium on their importation and "take." Take is defined by statute as any act "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal." See 16 U.S.C. § 1362(13). The MMPA allows the relevant Secretary to grant exceptions to the take prohibitions, by issuing either a "small take permit" or "incidental harassment authorization" if the best available scientific evidence reveals that such take would not disadvantage a specific marine mammal population.

Specifically, Section 101(a)(5)(A), 16 U.S.C. § 1371(a)(5)(A), of the MMPA authorizes the Secretary to permit the taking of small numbers of marine mammals incidental to activities other than commercial fishing (covered by other provisions of the Act) when, after notice and opportunity for public comment, the responsible regulatory agency (NMFS or FWS) determines that the taking would have negligible effects on the affected species or population, and promulgates regulations setting forth permissible methods of taking and requirements for monitoring and reporting. It generally takes the agency 240 days or more to promulgate regulations. In addition, Section 101(a)(5)(D), 16 U.S.C. § 1371(a)(5)(D), provides a more streamlined mechanism for obtaining small take authorizations when the taking will be by incidental harassment only. Under this provision, the Secretary is required to publish in the Federal Register a proposed harassment authorization within 45 days after receipt of an application. Following a 30-day public comment period, the Secretary has 45 days to issue or deny the requested authorization.

*Definition of Harassment—The 1994 Amendment*

In 1994, Congress amended the MMPA to differentiate between two types of harassment—Level A and Level B. The definitions are as follows:

(A) The term "harassment" means any act of pursuit, torment, or annoyance which "

(i) has the potential to injure a marine mammal or marine mammal stock in the wild; 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.

(B) The term "Level A harassment" means harassment described in subparagraph (A)(i).

(C) The term "Level B harassment" means harassment described in subparagraph (A)(ii).

16 U.S.C. § 1362(18).

*The Department of Defense's Proposed Definition*

The Department of Defense claims that the definitions of Level A and Level B harassment added to the MMPA in 1994 are overly broad and somewhat ambiguous. In an attempt to resolve this perceived problem, and to circumvent its obligations under Section 7 of the Endangered Species Act and the preparation of environmental impact statements under the National Environmental Policy Act, the Department of Defense has proposed the following definition:

For purposes of chapter 31 of title 16 of the United States Code, harassment from military readiness activities occurs only when those activities:

(1) injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild; or

(2) disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavior patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering to a point where such behavioral patterns are abandoned or significantly altered; or

(3) is directed toward a specific individual, group, or stock of marine mammals in the wild that is likely to disturb the specific individual, group, or stock of marine mammals by disrupting behavior, including, but not limited to migration, surfacing, nursing, breeding, feeding or sheltering.

*Problems with the Proposed Definition*

For Level A harassment, the proposed definition shifts from "has the potential to injure" to "injures or has the significant potential to injure." For Level B harassment, "potential to disturb" becomes "disturbs or is likely to disturb"; and an addition is made to the language related to behavioral disruptions, requiring that natural behaviors be "abandoned or significantly altered" to meet the threshold of concern.

Its effect will be that more marine mammals will be adversely affected by military activities. Many activities, which were once permitted, monitored, and mitigated under the Act, would no longer require a permit. Consequently, these activities will have a greater likelihood of causing marine mammals to abandon nursing, feeding, and breeding activities. Moreover, adding the term "significant" does not create a more scientifically based definition. NMFS has struggled with the term "significant" and has yet to define it with regard to the "significant adverse impact" clause within the incidental take provisions for commercial fishing. Currently, the state of marine mammal science will not yield a clear definition of "significant potential" or of "sig-

nificantly altered;" instead, it is likely to generate more scientific questions than answers.

Similarly, what constitutes "abandonment" will vary according to species, gender, time scale, and behavior: any abandonment of a nursing bout between an endangered right whale mother and calf is likely to have more serious implications than the temporary abandonment of a swimming path by a gray whale. The result of the Defense Department's proposed amendment is likely to be less protection of marine mammals, less transparency, less mitigation and monitoring of impacts, and even more controversy and debate.

The Ocean Conservancy does not believe that the current definition of harassment is either overly broad or ambiguous. The term "potential" is clear and requires no further evaluation of the significance of an activity's impacts or the likelihood of injury or disturbance. It is protective of the species, requiring only the disruption of behavioral patterns such as migration, breathing, nursing, breeding, feeding, or sheltering—impacts that are reasonably verifiable—rather than significant alteration of these behaviors, to trigger the Act's prohibitions.

In addition, small take permit and incidental harassment authorization mitigation measures and monitoring requirements have been effective in protecting marine mammal populations while gathering critical information on the impacts of a particular activity on marine mammals. In many cases, these benefits would be lost under the proposed definition. It would raise the regulatory threshold and create ambiguity to such a degree that many activities could simply evade the requirement to obtain an authorization for species take.

We are sensitive to the issue of military readiness. We do not believe, however, that the Department of Defense has demonstrated that these changes are necessary or even that it has exhausted all possible procedural remedies. Given the significant risks of changing the harassment definition, The Ocean Conservancy and other interest groups should be given the opportunity to work constructively with the committees of jurisdiction to address the concerns of all parties. Adopting a significantly flawed change in the harassment definition in the Defense Authorization Bill would not only be disastrous for marine mammals, but also set a double standard that exempts the military from MMPA requirements that all other Federal, state, and private actors must follow. If enacted, this amendment would severely diminish any chance of constructive dialogue on other conservation issues. We strongly recommend that Congress refrain from amending one of the most important provisions of the MMPA through another statute, and only address this issue as part of an overall MMPA reauthorization package, within the House and Senate committees of jurisdiction, after significant discussions with other Federal agencies, scientists, and conservation groups.

*IV. OTHER PROPOSED AMENDMENTS*

*Penalties and Cargo Forfeitures*

The Ocean Conservancy believes that Section 105, the civil and criminal penalty provisions of the Act (16 U.S.C. § 1375), should be updated to reflect current economic realities. The existing penalty schedule, enacted thirty years ago and unchanged since enactment, sets penalties that are low enough to be viewed by some violators as an acceptable cost of doing business, thus undermining effective enforcement. Congress should amend Section 105 of the Act to authorize the Secretary to impose a civil penalty of up to $50,000 for each violation, and a fine of up to $100,000 for each criminal violation. (See Attachment at A–8 and A–9).

The Ocean Conservancy also believes that NMFS should be authorized to retain any fines that have been collected for violations of the MMPA to be used in the administration of its activities for the protection and conservation of marine mammals under its jurisdiction. Therefore, we propose that Congress add a provision to the Act to parallel 16 U.S.C. § 1375a, which authorizes FWS to use collected fines for its marine mammal conservation activities. (See Attachment at A–10)

Additionally, with respect to Section 106 (16 U.S.C. § 1376), to increase compliance with the MMPA by ensuring that penalties will deter future violations of the statute, we propose an amendment to authorize the Secretary to impose a civil penalty of up to $50,000 against vessels used to take marine mammals and vessels that fish in violation of the provisions of section 118 of the Act. Finally, section 106 should be amended to allow for the seizure and forfeiture of a vessel's cargo for fishing in violation of the provisions of section 118. (See Attachment at A–11)

*Interference with Investigations and Observers*

The MMPA currently contains no specific prohibition against activities that undermine the effective implementation and enforcement of the Act. Individuals who refuse to permit boardings, who interfere with inspections or observers, or who in-

tentionally submit false information may not be subject to prosecution under the MMPA, as such activities are not specifically prohibited. To address this long-standing deficiency within the MMPA, we recommend changes to the statute patterned on similar provisions currently found in the Magnuson–Stevens Fishery Conservation and Management Act (16 U.S.C. § 1857). (See Attachment at A–12)

*Title IV—Marine Mammal Health And Stranding Response*

*Use of the Emergency Response Fund*

In 1994, Title IV, Marine Mammal Health and Stranding Response, was amended to allow funds from the Unusual Mortality Event Fund to be used for the care and maintenance of marine mammals seized under section 104(c)(2)(D) (16 U.S.C. § 1374(c)(2)(D)). The Marine Mammal Unusual Mortality Event Working Group opposes the use of these funds for this purpose, as does The Ocean Conservancy. This situation could rapidly deplete funds that are needed to respond to unusual mortality events. The need for funds to provide for the care and maintenance of seized marine mammals should be addressed in either the Animal Welfare Act or in another provision of the MMPA. Furthermore, potential contributors to the fund might be deterred by this provision due to the controversy surrounding marine mammals in captivity. The Ocean Conservancy recommends that this provision in Section 405(b)(1)(A)(iii), 16 U.S.C. § 1421d (b)(1)(A)(iii), be deleted. (See Attachment at A–13).

*Improve Response to Marine Mammal Entanglements*

Each year, an ever-greater number of marine mammals becomes entangled in fishing gear and other marine debris. It is important that NMFS and FWS have the explicit authority to collect information on these entanglements. Disentanglement has proven an effective mitigation measure for humpback whales, northern fur seals, California sea lions, and Hawaiian monk seals, and has proven to be significant to the survival of the North Atlantic right whale. These efforts promote the conservation and recovery of these species and should continue as a matter of priority. To improve efforts to monitor and respond to entanglement threats to marine mammals, The Ocean Conservancy proposes that Title IV, 16 U.S.C. §§ 1421–1421h, be amended as outlined in the attachment. (See Attachment at A–14 through A–18).

*Deterrence of Marine Mammals*

Although Section 104(a)(4)(B) (16 U.S.C. § 1371(a)(4)(B)) requires the Secretary to publish a list of guidelines for safely deterring marine mammals the Secretary has failed, to date, to comply with this provision. Both The Ocean Conservancy and the fishing industry continue to be extremely frustrated by the lack of statutorily-required guidelines for non-lethal deterrents. Moreover, because NMFS cannot enforce guidelines, The Ocean Conservancy recommends that the statute be amended to require NMFS to promulgate regulations that delineate acceptable methods of safely deterring marine mammals, including threatened and endangered marine mammals. Our proposed amendment establishes that the Secretary's regulations on the use of non-lethal deterrence methods shall be mandatory, with penalties prescribed for using non-approved methods. The proposed amendment also establishes a process whereby parties may petition to have additional methods of non-lethal deterrence reviewed and approved by the Secretary. The burden of proof to demonstrate that the proposed non-lethal deterrence method is safe and effective shall be on the proponent of the method. (See Attachment at A–19).

*Cumulative Takes*

The Ocean Conservancy is concerned that applicants may be using the streamlined mechanism for authorizing incidental takes by harassment for a period of up to one year to avoid the assessment of the cumulative impacts of such activities over time. Applicants may segment long-term activities into one-year intervals, seeking a separate authorization for each, or may seek separate authorizations for each of several similar or related activities. By themselves, these activities may have only negligible impacts, but may be of significant detriment when viewed cumulatively. Therefore, we recommend that Section 101(a)(5)(D)(i) be amended to ensure authorized activities have a negligible impact, taking into account cumulative impacts of related activities in the authorized period as well as in subsequent years. (See Attachment A–20).

*Subsistence Hunting of Marine Mammals*

*Subsistence hunting and management of strategic stocks*

The management history of the subsistence harvest of beluga whales in Cook Inlet illustrates the need for proactive Federal intervention and management to avoid a marine mammal species becoming eligible for listing as depleted under the MMPA. The purpose of the definition of "strategic" marine mammal stocks in Section 3(19), 16 U.S.C. § 1362(19), is to identify unsustainable levels of take so that appropriate action can be taken to avoid listing that stock as depleted under the MMPA or as threatened or endangered under the ESA. While The Ocean Conservancy does not oppose subsistence use, we believe that, in those cases where marine mammal stocks are designated as strategic, the Federal Government should be given the discretion to intervene and work with Native communities to monitor and regulate harvests to ensure the long-term health of the stock and sustainable subsistence harvests. Therefore, we propose that Section 101(b), 16 U.S.C. § 1371(b), be amended to allow the Secretary to prescribe regulations governing the taking of members of a strategic stock by Native communities. (See Attachment A–21).

*Co-management of strategic and depleted stocks*

While The Ocean Conservancy does not oppose subsistence hunting when conducted in a sustainable manner, we believe that future co-management agreements should generally be limited to stocks that are not strategic or depleted. We are concerned that there is inadequate infrastructure within the Native communities to support co-management of strategic or depleted stocks. We generally support co-management of all non-strategic stocks, as long as the co-management agreement considers the entire range of the stock, includes all Alaskan Natives that engage in subsistence use of that particular marine mammal stock, and contains provisions for monitoring and enforcement. We believe that the agencies and Alaskan Natives involved in drafting a co-management agreement should consult with the conservation community during the drafting process, to ensure transparency of that process. Before a co-management agreement is finalized, or final implementing rules or regulations are published, the public must be afforded an opportunity for notice and comment. A co-management agreement should provide for revocation of the agreement, tie violations of the agreement to the penalty provisions of the Act, establish emergency regulations in the event that mortality and serious injury of a marine mammal stock is having or is likely to have a significant adverse impact on the stock, and provide grants for research, monitoring, and enforcement of the agreement. (See Attachment at A–22).

*V. SOUTHERN SEA OTTERS*

The FWS efforts to recover the southern sea otter (Enhydra lutris nereis), found mainly off the central California coast and listed as threatened under the Federal Endangered Species Act (ESA), have not been successful. The southern sea otter population steadily increased between the mid- 1980s and 1995, but since 1995, the population has declined by 9 %. The current population is over 2,100 individuals, a drastic decline from an estimated historical population of 16,000–20,000 animals. The greatest extant threats to the subspecies include oil spills, infectious disease, water pollution, and fishing gear and nets.

In accordance with the Translocation Law (Public Law 99–625 (1986)), in 1986, FWS began an experiment to move (translocate) a number of southern sea otters to San Nicolas Island off of Santa Barbara—south of their current range—in an attempt to create a viable second colony. The goal was to minimize the chance that the entire subspecies could be wiped out by an oil spill along the central California coast. FWS estimates that the translocated colony on San Nicolas Island currently numbers less than 25 sea otters. The Translocation Law also created an otter-free zone to protect shellfish fisheries from sea otter competition, as these areas were devoid of otters at the time of the law's passage. Despite their declining population, a group of predominantly, male sea otters have seasonally expanded their geographical range into this otter-free zone. Moreover, new information on sea otters discovered since the Translocation Law's enactment demonstrate that its statutory provisions are no longer in the southern sea otter's best interests.

In 2000, FWS found in a biological opinion that the removal of sea otters from the Southern California "otter free management zone" would jeopardize their "continued existence" and that allowing the southern sea otter to expand its range is "essential to the species' survival and recovery." Furthermore, FWS has completed a Draft Evaluation of the Southern Sea Otter Translocation Program, in which the agency proposes to designate the translocation a failure, and has initiated development of a Supplemental Environmental Impact Statement (SEIS) to reevaluate the translocation program. Given the decline in the southern sea otter population, The

Ocean Conservancy concurs with the biological opinion and believes that moving any animals out of the management zone would likely result in mortality that would further impede recovery, in violation of the ESA.

Preventing further range expansion will limit the natural growth rate of the mainland population. Access to historical habitat may halt the population decline, prevent nonspecific resource competition, and decrease the potential for disease by providing more space. Therefore, The Ocean Conservancy supports declaring the translocation a failure, eliminating the management zone, allowing the existing population at San Nicolas Island to remain, and allowing sea otters to naturally expand their range.

In the past, The Ocean Conservancy and Friends of the Sea Otter have engaged in discussions with the fishing industry about how to recover the southern sea otter while working to ensure the sustainability of commercial shellfish fisheries. Several conservation organizations would be interested in resuming this dialogue with the fishing industry to continue to explore potential areas of common ground that we have identified that, utilizing the existing statutory and regulatory framework would promote both the recovery of the southern sea otter and healthy fisheries. In the meantime, we urge Congress to refrain from amending the MMPA, and to direct FWS to expeditiously complete its reevaluation of the translocation. We also request that Congress provide funds to undertake activities that the environmental community and the fishing industry have identified as beneficial to the sea otter recovery and fisheries.

*VI. CONCLUSION*

The Ocean Conservancy believes that the MMPA has made significant progress in conserving marine mammals and that the statute is at a unique stage in its evolution. With no pressing deadlines or urgent problems to address with respect to the MMPA, Congress the opportunity to craft narrowly focused amendments to improve the implementation and enforcement of the current Act, as well as to adopt new provisions that will begin to address the emerging threats to marine mammals. We urge the Subcommittee to work with all interest groups and agencies to draft a progressive reauthorization bill. We look forward to participating in this effort.

ATTACHMENT A

*SEC. 6. TAKE REDUCTION PLANS*

*Section 118(c): Registration and Authorization*

A–1: At Section 118(c)(3)(C) amend paragraph (C) to add clause (iv) as follows:

"(iv) fails to take an observer when requested to do so by the Secretary."

At the end of Section 118(c)(3)(C), delete "clauses (i) and (ii)" and insert "clauses (i), (ii), and (iv)."

A–2: At Section 3 of the Act, insert a new definition (28) as follows:

"(28) The term 'engaged in a fishery' means to have a valid permit issued by the Secretary in accordance with the Magnuson–Stevens Fishery Conservation and Management Act (16 U.S.C. §1801 et seq.) or the State for any of the fisheries listed under Section 118(c)(1)(A)(i), (ii), or (iii)."

A–3: At Section 118(c)(3)(C) insert after the phrase "clauses (i), (ii), and (iv)" the phrase: "shall be subject to the penalties, fines and forfeiture under Sections 105 and 106 of this title, and for violations of clause (iii) shall be subject to a fine of not more than [$100.00] $5,000.00 for each offense."

*Section 118(d): Monitoring Incidental Takes*

A–4: At Section 118(d) insert a new paragraph (11) as follows:

"(11) The Secretary may establish a system of fees to pay for the costs of implementing an observer program established under this section."

A–5: At Section 118(d) insert a new paragraph (8) as follows and renumber paragraphs 8 and 9 as 9 and 10:

"(8) The Secretary may require that an observer be stationed on a vessel engaged in a fishery listed under subsection (c)(1)(A)(i) or (ii) which is not registered under subsection (c)."

*SEC. 7. PINNIPED RESEARCH*

A–6: Amend Section 120 by adding at the end the following:

"(k) RESEARCH ON NONLETHAL REMOVAL AND CONTROL.—(1) The Secretary shall develop a research plan and conduct research on the nonlethal removal, deterrence, and control of nuisance pinnipeds. The research plan shall include a review of measures that have been taken to effect such removal, the effectiveness of these measures, and shall propose research to

test new technologies to deter nuisance pinnipeds and their impacts on the ecosystem. The development and testing of safe, non-lethal removal, deterrence and control methods shall provide for the humane take of marine mammals by harassment, as defined at Section 3(18)(A)(ii) of this Act.

(2) The Secretary shall include, among the individuals that develop the research program under this subsection, the Marine Mammal Commission, representatives of academic and scientific organizations, environmental groups, commercial and recreational fisheries groups, gear technologists, and others as the Secretary deems appropriate.

(3) The Secretary is encouraged, where appropriate, to use independent marine mammal research institutions in developing and in conducting the research program.

(4) The Secretary shall, by December 31 of each year, submit an annual report on the results of research under this subsection to the Committee on Resources of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate.

(5) The Secretary shall make the report and the recommendations submitted under paragraph (4) available to the public for review and comment for a period of 90 days.

(6) For the purposes of carrying out this section, the Secretary may accept, solicit, receive, hold, administer, and use gifts, devices, in-kind contributions, and bequests.

(7) There are authorized to be appropriated to the Secretary $1,500,000 annually to carry out the provisions of this subsection.

*SEC. 13. CAPTIVE RELEASE PROHIBITION*

A–7: Modify new paragraph (6) in Section 102(a) of the Act by inserting after the word "marine mammal" the phrase "on the high seas, or for any person to release any captive marine mammal in waters or on lands under the jurisdiction of the United States."

*IV. OTHER AMENDMENTS*

*Penalties and Cargo Forfeitures*

A–8: Modify Section 105(a)(1) to read as follows:

"(a)(1) Any person who violates any provision of this title or of any permit or regulation issued thereunder, may be assessed a civil penalty by the Secretary of not more than [10,000] $50,000 for each such violation, except as provided in Section 118. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. Each unlawful taking, importation, exportation, sale, purchase or transport and each day on which unlawful fishing is conducted in violation of section 118 (c)(3)(C) shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary for good cause shown. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action."; and

A–9: Modify Section 105 (b) to allow a criminal fine: "not more than [$20,000] $100,000 for each such violation . . . ."

A–10: Amendment to 16 U.S.C. § 1375a:

Insert "of the Interior" after "Secretary" and renumber as subsection (a);

Insert subsection (b) as follows:

"Hereafter, all fines collected by the National Marine Fisheries Service for violations of the Marine Mammal Protection Act, 16 U.S.C. § 1361 et seq., and implementing regulations shall be available to the Secretary of Commerce, without further appropriation, to be used for the expenses of the National Marine Fisheries Service in administering activities for the protection and recovery of marine mammals under the Secretary of Commerce's jurisdiction, and shall remain available until expended."

A–11: Amend Section 106(b) s follows:

(a) by adding in subsection (a) the phrase "or in fishing in violation of section 118(c)(3)(A)(i), (iii), or (iv)" after "that is employed in any manner in the unlawful taking of any marine mammal";

(b) by adding in subsection (a) the phrase "or unlawful fishing" after "in connection with the unlawful taking of a marine mammal";

(c) by adding in subsection (b) the phrase "or in fishing in violation of section 118(c)(3)(A)(i), (iii), or (iv)" after "that is employed in any manner in the unlawful taking of any marine mammal"; and

(d) by striking in subsection (b) "$25,000" and inserting "$50,000".

*Interference with Investigations and Observers*

A–12: Amend Section 102 (16 U.S.C. § 1372) as follows:

(a) redesignating subsection (d), (e), and (f) as (e), (f), and (g) respectively; and

(b) adding a new subsection (d) to read as follows: "(d) Obstruction of Investigations.—It is unlawful for any person to"

(1) refuse to allow any person authorized by the Secretary to enforce this title to board any vessel or other conveyance for purposes of conducting any search or inspection in connection with enforcement of this title;

(2) assault, resist, oppose, impede, intimidate or interfere with any person authorized by the Secretary to enforce this title, who is conducting any search or inspection in connection with enforcement of this title;

(3) resist a lawful arrest for any act prohibited under this title;

(4) interfere with, delay, or prevent, by any means, the apprehension or arrest of any person, knowing such person has committed any act prohibited by this title;

(5) knowingly and willfully submit false information to any person authorized by the Secretary to implement or enforce the provisions of this title, or

(6) to assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with, or attempt to assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with, any observer on a vessel under this Act, or any data collector employed by the Secretary or under any contract to any person to carry out responsibilities under this Act.

*Use of the Emergency Response Fund*

A–13 Delete Section 405 (b)(1)(A)(iii).

*Improve Response to Marine Mammal Entanglements*

A–14: Section 402(b)(1)(A) (16 U.S.C. § 1421a(b)(1)(A)) is amended by inserting the words "or entangled" after the word "stranded".

A–15: Section 402(b)(3) (16 U.S.C. § 1421a(b)(3)) is amended by inserting the words "or entanglements" after "strandings" and by inserting the words "or entangled" after "stranded".

A–16: Section 403 (16 U.S.C. § 1421b) is amended by revising the title of the section to read "Stranding or Entanglement Response Agreements" and in subsection (a) by inserting at the end of the sentence "or entanglement.".

A–17: Section 406 (16 U.S.C. § 1421e) is amended in subsection (a) by inserting the words "or entanglement" after "stranding".

A–18: Section 409 (16 U.S.C. § 1421h) is amended by adding at the end a new subparagraph as follows:

> "(7) The term 'entanglemenT' means an event in the wild in which a living or dead marine mammal has gear, rope, line, net, or other material wrapped around or attached to it and is."

(1) on a beach or shore of the United States; or

(2) in waters under the jurisdiction of the United States (including any navigable waters).".

*Deterrence of Marine Mammals*

A–19: Amendments to Section 101(a)(4), 16 U.S.C. § 1371(a)(4):

In first sentence of subparagraph (B), strike "a list of guidelines for use in" and insert "final regulations to implement this paragraph. Such regulations shall include permissible measures for." Strike "safely deterring" and insert "the safe and nonlethal deterrence of". In second sentence of subparagraph (B), strike "the Secretary shall recommend" and insert "the final regulations shall prescribe." Strike "which may be used to nonlethally deter" and insert "specific nonlethal measures that may be used to deter such". Strike third sentence of subparagraph (B).

Strike existing subparagraph (C), and insert new subparagraph (C) as follows:

After the effective date of the final regulations referenced in subparagraph (B), it shall be a violation of this chapter for any person to use a measure to deter marine mammals pursuant to subparagraph (A) that is not listed in such regulations. Violations shall be subject to the penalties prescribed in Sections 105 and 106.

Insert new subparagraph (D) as follows, and renumber existing subparagraph (D) as subparagraph (E):

Any person may petition the Secretary pursuant to 5 U.S.C. § 552 to add a nonlethal marine mammal deterrence measure to those listed in the final regulations referenced in subparagraph (B). The burden of proof shall be on the petitioner to demonstrate that the petitioned measure is safe and effective. If the Secretary finds, based on the best available scientific information, and after notice and opportunity for public comment, that the petitioned measure is a safe and effective means of

non-lethal deterrence of marine mammals, he shall amend the final regulations referenced in subparagraph (B) to add such measure to the list of permissible measures and shall promptly publish notice of his action in the Federal Register.

*Cumulative Takes.*

A–20: Insert a new 101(a)(5)(D)(i)(I) as follows:

"(I) Will have a negligible impact on such species or stock, with consideration given to all related activities, including all activities that may occur beyond the 1 year authorization period, that may cumulatively result in more than a negligible impact."

*Subsistence Hunting and Management of Strategic Stocks*

A–21: In the last paragraph of Section 101(b), insert the phrase "or strategic" after the word "depleted".

*Co-management of Strategic and Depleted Stocks*

A–22: Strike subsection (a) of Section 119 and all that follows and insert the following:

"(a) IN GENERAL.—The Secretary may enter into co-management agreements with Alaska Native Organizations to conserve and manage species or stocks of marine mammals through the regulation of subsistence use by Alaska Natives. Any agreement not in existence as of the effective date of this Act shall not apply to species or stocks designated as strategic or depleted under this Act, or to species or stocks listed as threatened or endangered pursuant to the Endangered Species Act. Agreements in existence as of the effective date of this Act that otherwise satisfy the requirements of this Section may be renewed.

(b) MANAGEMENT PLAN REQUIRED.—Agreements shall include, at a minimum, a management plan that—

(1) identifies the signatories to, and the stock or species and areas covered by the plan; provided that each Alaska Native Organization that engages in subsistence use of the affected stock or species within the area covered by the plan is a signatory to the agreement;

(2) is based on biological information and traditional ecological knowledge;

(3) provides that any harvest of a stock or species covered by the plan be sustainable and designed to prevent such populations from becoming depleted or strategic;

(4) has a clearly defined process and authority for enforcement and implementation of any management prescriptions; and

(5) specifies the duration of the agreement and sets forth procedures for periodic review and termination of the agreement.

(c) PROCEDURAL REQUIREMENTS.—In formulating and implementing agreements under this section, Alaska Native Tribes and Tribally Authorized Organizations shall comply with provisions of 25 U.S.C. § 1302; except that the penalties set forth in section 105 of this Act (16 U.S.C. § 1375) shall be applicable to violations of Tribal regulations or ordinance promulgated to enforce agreements entered into under this section.

(d) VIOLATION. "The breach of any provisions of a cooperative or co-management agreement shall be deemed a violation of this title and shall be subject to penalties under this Act. Any vessel used in such violation shall be subject to the forfeiture provisions of Section 106 of this Act.

(e) PROHIBITION.—It is unlawful for any person within the geographic area to which a co-management agreement adopted pursuant to this section applies, to take, transport, sell, or possess a marine mammal in violation of any regulation or ordinance adopted by an Alaska Native Tribe or Tribally Authorized Organization that is a signatory to the agreement for that stock or for a specific portion of the geographic range of that stock or species.

(f) REVIEW AND REVOCATION OF MANAGEMENT PLANS——

(1) The Secretary shall conduct a review of the management plan every three years or at least annually for a stock for which significant new information is available.

(2) The Secretary may revoke the management plan if the actions of the Alaska Native Organizations that are parties to the plan are not in accordance with the terms of the co-management agreement or the requirements of this Act; provided that the Secretary shall give such Alaska Native Organizations an opportunity to correct any deficiencies identified by the Secretary within 60 days from the date of receiving notice of such deficiencies from the Secretary.

(g) PUBLIC NOTICE AND REVIEW.—The Secretary shall, prior to approval and signature of a co-management agreement under this section provide public notice and an opportunity for public review and comment on the draft agreement. Further-

more, the Secretary shall, prior to publication of final regulations implementing any such co-management agreement, provide public notice and an opportunity to comment on the draft regulations.

(h) EFFECT OF DESIGNATION OF A STOCK AS DEPLETE OR STRATEGIC.—In the event the Secretary determines that a species or stock subject to a co-management agreement is strategic or depleted, the Secretary may prescribe regulations pursuant to Section 101(b) of this Act.

(i) EMERGENCY REGULATIONS. "

(1) If the Secretary finds that the mortality or serious injury of marine mammals subject to a co-management plan is having, or is likely to have, an immediate and significant adverse impact on a stock or species, the Secretary may make an emergency depleted listing and remove this species or stock from management under a co-management plan.

(2) Emergency regulations prescribed under this subsection—

(A) shall be published in the Federal Register, together with an explanation thereof;

(B) shall remain in effect for not more than 180 days; and

(C) may be terminated by the Secretary at an earlier date by publication in the Federal Register of a notice of termination, if the Secretary determines that the reasons for emergency regulations no longer exist.

(3) If the Secretary finds that the species or stock continues to be subject to an immediate and significant adverse impact, the Secretary may extend the emergency regulations for an additional period of not more than 90 days or until reasons for the emergency no longer exist, whichever is earlier.

(j) GRANTS.—Agreements entered into under this section may include grants to Alaska Native Tribes or Tribally Authorized Organizations for, among other purposes—

(1) collecting and analyzing data on marine mammal populations;
(2) monitoring the harvest of marine mammals for subsistence use;
(3) participating in marine mammal research conducted by the Federal Government, State, academic institutions and private organizations; and
(4) developing, implementing and enforcing marine mammal co-management agreements and plans."

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Mr. GILCHREST. Thank you very much, Ms. Young.

Mr. Luedtke?

## STATEMENT OF RICHARD LUEDTKE, COMMERCIAL GILLNET FISHERMAN, MANNAHAWKIN, NEW JERSEY

Mr. LUEDTKE. Thank you, Mr. Chairman and members of the Subcommittee.

I am a full-time gillnet fisherman. I keep my 40-foot boat docked in Barnegat Light, New Jersey. I have one crewman who helps me fish for monkfish, skate, croaker, weakfish, bluefish and bonito, usually within 25 miles of the beach. The fact that I am here when I could be working should tell you how important the Act is to me and to other commercial fishermen from New Jersey and around our country.

As a veteran of two take-reduction teams for harbor porpoise and bottlenose dolphin, I live with the results of the Marine Mammal Protection Act every day. I know firsthand the difficulties we have working under conservative laws protecting mammal and fish stocks. Mr. Chairman, your bill H.R. 4781 starts to address some of the improvements we need in the act.

First, the bill requires consideration of both commercial and recreational impacts on marine mammal populations. This will allow all parties to share in the conservation burden.

Second, the bill requires that National Marine Fishery Service use fishery scientists in the TRT process. This will allow for a more comprehensive science-based approach.

Third, the bill supports research, education and outreach programs and prevents publication of a final TRT plan that is different from the TRT agreement, without first discussing the differences with the TRT. This will improve plan results and keep all the stakeholders involved in the entire process.

These are good proposals, Mr. Chairman, but we need more help from Congress if we are going to make a more meaningful difference. First, the Agency should consider the benefits that mammal stocks get from extreme restrictions on fishermen under State and Federal fishery management plans.

Second, the Agency must use updated stock assessment information, Mr. Chairman. We just had a situation with the bottlenose dolphin TRT where the stock assessment was of poor quality and nearly 8-years-old. We were still forced to use this information despite the fact that a brand new stock assessment already indicated the stock was large, possibly 4 times greater than previously thought. The Office of Protected Resources should have made a more appropriate science-based decision regarding the use of the new information, rather than allow a push for more fishing restrictions with the old data.

Third, the bill should address stakeholder participation on the Regional Scientific Review Groups. Fishermen do not currently have a representative on the Atlantic Group, but there is an animal rights group serving on it. In fact, it is the same group that told the TRT they threatened to sue the Secretary over bottlenose dolphin conservation. Now, you might not believe this, Mr. Chairman, but that same environmental group is now giving scientific advice to the bottlenose dolphin TRT while serving as a stakeholder on that very TRT. This is just one example of the kind of treatment commercial fishermen are receiving under this act.

Finally, we have to address the zero mortality rate goal, or ZMRG. It may be the worse provision in the entire act. To begin with, PBR is calculated very very conservatively and is supposed to allow mammal stocks to achieve optimum sustainable population or OSP levels. if this is the major goal in the act, then what is the scientific basis for having ZMRG in the Act at all? The simple answer is that there is no real scientific reason for ZMRG. The truth is that ZMRG is being used by some environmental groups and the Office of Protected Resources to apply pressure during the TRT process for more restrictions on commercial fishing. Whether ZMRG is defined as 10 percent, 20 percent or 30 percent of PBR does not matter. If ZMRG remains in the Act it will continue to be used to further restrict commercial fishing. ZMRG will also expose the government to lawsuits from extreme conservation groups who work very hard to use this process to stop commercial fishermen from bringing seafood to market and taking care of our families.

Mr. Chairman, these changes that I am suggesting will help commercial fishermen cope with the burdens of protecting all marine mammals and fish stocks to their maximum population levels in the same ocean at the same time where we fish for a living. These changes will not be initiated by the Agency. These changes will only occur because Congress recognizes the problems and provides the right leadership.

I hope we can use this opportunity to address some of these concerns.

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to share my Marine Mammal Protection Act thoughts with you today. Please feel free to contact me if there is anything else I can assist you with. Thank you.

[The prepared statement of Mr. Luedtke follows:]

**Statement of Richard Luedtke, Commercial Gillnet Fisherman, Mannahawkin, New Jersey**

Mr. Chairman and Members of the House Subcommittee on Fisheries, Conservation, Wildlife and Oceans, I thank you for the opportunity to appear before you to discuss H.R. 4781, the "Marine Mammal Protection Act Amendments of 2002."

I am a New Jersey native, fishing gillnets commercially for the past 16 years from the Viking Village Commercial Dock in the Port of Barnegat Light. I own a 40-foot fishing vessel which I use to fish for monkfish, croaker, weakfish, bluefish and bonito. I am an active member of the Garden State Seafood Association (GSSA) and supporter of the Monkfish Defense Fund (MDF).

My home State of New Jersey ranks 4th among the 14 East Coast states in terms of commercial seafood harvest value, estimated at nearly $91 million. The total annual revenue attributed to New Jersey's commercial fleet is $600 million. The Viking Village Dock handles approximately 5,000,000 pounds of seafood products each year, landed from 30 commercial fishing vessels including gillnetters, scallopers, and longliners. These seafood products are valued at nearly $15 million.

I developed a considerable amount of experience with the MMPA process during the past few years. I currently serve on two East Coast MMPA Take Reduction Teams (TRT's) for harbor porpoise and bottlenose dolphin. Since the TRT negotiations focus primarily on gillnet interactions with marine mammals, I serve as a representative of all New Jersey gillnet fishermen, working closely with fishermen and State biologists and managers from entire coast.

I am interested in improving the quality of the science and our ability to minimize interactions with marine mammals, to the extent that it is possible. I recently volunteered to participate in a gear research program with the National Marine Fisheries Service (NMFS) using specially designed mesh that may enhance net detection and avoidance by marine mammals.

In addition, I intend to participate in a fishery survey with the MDF, NMFS, Rutgers University (NJ) and the State of Massachusetts to characterize the directed monkfish gillnet fishery and provide a clearer picture of monkfish stock abundance.

Mr. Chairman, my experience with the MMPA and fisheries management process, combined with my commercial fishing background, allows me to provide this Subcommittee with useful insights on H.R. 4781 and the MMPA reauthorization.

On behalf of commercial fishermen in Barnegat Light, NJ, I provide oral comments and the written testimony that follows with your approval for the record, and ask for your leadership to help resolve some of the Act's more challenging issues.

As an East Coast fishermen, I do not consider it appropriate for me to address certain sections in H.R. 4781, including exportation of native handicrafts (Sec. 4), appropriations (Sec. 5, 207), MMC (Sec. 8, 14), polar bear permits (Sec. 12) and captive release programs (Sec. 13). Therefore, the majority of my comments will focus primarily on Section 6—"Take Reduction Plans" and related issues.

*H.R. 4781*

Mr. Chairman, I thank you for taking the initiative to introduce H.R. 4781. The bill starts to address some issues of concern to the commercial fishing industry, including a requirement for other parties to share in the conservation burden; enhanced communication between NMFS" fisheries and protected species managers; promotion of research, education and outreach programs; and assurances that NMFS cannot publish a TRT that is different from the negotiated TRT plan with out first consulting the TRT. Though we have additional concerns not addressed in H.R. 4781, each of these current provisions will improve the MMPA process.

*Sec. 6. Take Reduction Plans*

*Consideration of Other Sources of Mortality...*

As with fisheries regulations, it is reasonable that all responsible parties share in the conservation burdens and benefits. H.R. 4781 requires that marine mammal

mortality resulting from interactions with recreational fishing gear be considered in the TRT process.

There is compelling evidence in the NMFS" observer database, stranding network information, and anecdotal reports that in some areas on the east coast, recreational gear interacts with certain marine mammals stocks. In addition to mortalities resulting from common hook and line gear, there are also indications the recreational use of commercial fishing gear (i.e. gillnets, crab pots) results in marine mammal interaction and mortality events.

Since the Act currently focuses only on commercial fishing interactions, commercial fishermen are accountable for the total mortality reduction required to achieve PBR, even if animals are taken by non-commercial gear. It is very possible that in certain instances, especially with coastal bottlenose dolphins in the Mid- and South Atlantic regions, commercial fishermen are carrying the entire burden for all mortality reductions. Including the impacts of recreational gear on protected species is a positive step forward if all parties are to participate in the conservation process.

It is also important to note here that local media typically do not discern between gear types when reporting stranding information, thereby promoting the public's misperception of who is actually responsible. This provision in H.R. 4781 may help promote increased awareness in reports published by the media.

*TRT Participation By Fishery Scientists and Representatives of the RA's...*

Currently there is no evidence of internal agency communication between fishery scientists and protected species management units. This is unacceptable because of the close linkage between fishery management regulations and mammal conservation measures.

H.R. 4781 would require the NMFS have representatives at the TRT that are versed in fishery science and that represent the NMFS Regional Administrator. These requirements will help ensure that new fishery restrictions designed to protect marine mammals are consistent with standing fishery management plans. It should also allow for consideration of the mammal protections provided by fishery plans, reducing instances of excessive restrictions on the commercial fishermen.

A recent example of the need for this provision comes from the bottlenose dolphin TRT process. The recent closure of the directed spiny dogfish fishery provided significant savings to bottlenose dolphins. However, the NMFS and some members of the TRT were not initially receptive to estimating the "credit" for the mortality reductions resulting from the closure of the fishery. Though credit was eventually calculated and accepted by the TRT, it was not without great difficulty. H.R. 4781 will make this process much smoother during the next TRT negotiation.

*Promoting Observer, Research, and Education and Outreach Programs...*

All efforts to fine tune observer coverage and improve communication regarding marine mammal protection are welcome. Members of the commercial, recreational, and environmental industries, as well as members of the general public must understand this process if it is to be successful.

Observer programs can and should, be focused in areas with higher levels of interactions, research efforts will enhance our understanding of stock size and measure the success of TRT plans, education and outreach programs will generate support and understanding for conservation programs. These are all necessary and welcome components of the TRT process currently in H.R. 4781.

*OTHER IMPORTANT MMPA ISSUES*

*Consider the Benefits of Fishery Management Plans...*

Often times, management measures contained in fishery management plans may provide conservation benefits to marine mammals. Time/area closures, gear restrictions, and quota adjustments are just some of the actions that may contribute to protections for marine mammal species. These benefits must be quantified by the agency and included in the TRT process.

As I stated earlier, one of the key elements in the Bottlenose dolphin TRT negotiation was the impact of the closure of the directed spiny dogfish gillnet fishery. It was clear that closing the fishery would result in significantly less mammal-gear interactions. However, it was exceedingly difficult to secure consideration of this major fisheries action in the TRT process.

In a second example, the final Take Reduction Plan for Harbor Porpoise included a gillnet fishery closure off New Jersey during February 15th to March 15th. The Monkfish Fishery Management Plan also contained a spawning closure whereby fishermen were required to take a 20-day continuous block out of the fishery during April 1 and June 30. This combination of management measures effectively resulted in a double closure of 50 days during one of more productive fishing seasons.

Furthermore, under the fishery management plan, monkfish gillnet fishing effort was reduced from unlimited year-round fishing to a mere 40-days per year for each limited entry permitted vessel. This reduction in gillnet fishing effort was immediate and significant. Here again, fishermen were not credited in the Take Reduction Plan with the management measures developed under the Federal fishery management plan for monkfish.

*Require Updated Stock Assessment Information...*

NMFS should be required to use the most updated, relevant stock assessment information for each TRT. Despite the fact that the Act already contains some assessment provisions and the agency has internal guidelines regarding this requirement, we just went through a bottlenose dolphin process where the TRT was forced to decide on serious fishing restrictions based on an incomplete assessment done nearly 8 years ago, while a more comprehensive updated assessment indicated the dolphin stock could be as much as 4-times larger then previously thought.

The new assessment was judged by staff from the Office of Protected Resources to be too preliminary and therefore, off limits to the TRT. Rather then delay the TRT process for a short period until the new assessment could be made final, the TRT was forced to move forward with fishing restrictions based on the inferior assessment.

We should not be in a position where MMPA deadlines become more critical then using the best information possible. How can the Federal Government be permitted to use the MMPA to put more restrictions on someone's income when new information suggests the restrictions may not be necessary to achieve PBR?

*Balanced Stakeholder Participation on Regional Scientific Review Groups...*

On paper, the Act currently allows for a balanced representation of viewpoints on the Regional Scientific Review Group. Unfortunately, this is not the actual case on the East Coast.

There is no representation of the commercial fishing industry on the Atlantic Review Group. In fact, there has been no commercial representation during the entire bottlenose dolphin TRT process. This is critical since commercial fishermen can provide expertise on commercial gear technology and report actual on-the-water observations.

However, the conservation industry has been represented on the SRG throughout the entire process. To make matters worse, the same environmental group that reportedly threatened to sue the Secretary of Commerce for failing to protect bottlenose dolphins is serving on the Scientific Review Group that is charged with giving advice to the bottlenose dolphin TRT!

Clearly, this is an example of poor judgement on the part of the NMFS Office of Protected Resources. While we fishermen do not begrudge anyone serving on the SRG's, we do respectfully request that Congress make certain that we provide for a balanced viewpoint.

*Strike the ZMRG Provision...*

ZMRG may be the most problematic provision in the current law. The Act requires incidental takes to "be reduced to insignificant levels approaching a zero mortality and serious injury rate.—(Sec. 1371(a)(2)). Despite the fact that the ZMRG is not clearly defined in the Act, it is already being used in the TRT process as open justification for increasing restrictions on commercial fishing.

It is no longer sufficient to achieve PBR through the TRT process. Instead, the agency and the conservation industry are using ZMRG to demand increased restrictions on fishermen to achieve some assumed minuscule level of PBR.

This is ironic since we are told PBR is designed to achieve the optimum sustainable population size for marine mammal populations. This is one of the most important goals in the MMPA. If PBR is constructed to allow mammal stocks sufficient protection to achieve OSP, what then, is the scientific justification for ZMRG? Clearly, there is no scientific justification for ZMRG. It appears to us that ZMRG is a philosophical concept rather than a sound wildlife management principle.

Furthermore, if left in the Act, we are concerned ZMRG will be the target of future legal action by more extreme elements within the conservation industry. We are already facing a rapid increase in the number of marine resource-related lawsuits. It is simply a matter of time before ZMRG is brought before the courts in an effort to restrict commercial fishing for little or no biological benefit to marine mammal stocks. Congress should do the right thing and remove ZMRG from the Act. This action will protect the Secretary of Commerce, the integrity of the TRT process, and your fishing communities, while still allowing sufficient protection for mammal stocks.

*MMPA REAUTHORIZATION RECOMMENDATIONS*

Please accept the following recommendations on H.R. 4781 and the MMPA reauthorization:

(1) Maintain the following provisions in H.R. 4781:

- Consideration of recreational fishing gear impacts on marine mammals
- Participation on TRT's by NMFS" fisheries scientists and representatives of the RA
- Promote observer, research, education and outreach programs
- Require NMFS to consult with TRT if final plan is different from original TRT plan

(2) Require NMFS to consider the benefits of fishery management actions on marine mammal stocks in the TRT process;

(3) Require NMFS to use the best scientific information in the TRT process, especially in instances where an updated assessment may be fourth coming and the current assessment is of poor quality and outdated;

(4) Require NMFS to ensure that all TRT constituent groups be represented on the Scientific Review Group;

(5) Remove the "ZMRG" provision from the MMPA.

Mr. Chairman, I ask that you kindly accept my written testimony for the record. Thank you for the opportunity to share my concerns and ideas with your Subcommittee.

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Mr. GILCHREST. Thank you very much, Mr. Luedtke.

Dr. Worcester?

**STATEMENT OF PETER F. WORCESTER, Ph.D., RESEARCH OCEANOGRAPHER, SCRIPPS INSTITUTION OF OCEANOGRAPHY, UNIVERSITY OF CALIFORNIA, SAN DIEGO**

Dr. WORCESTER. Mr. Chairman, Committee members, I am a research oceanographer at the Scripps Institution of Oceanography. I am a physical oceanographer, whose career has been devoted to the development of acoustic remote sensing techniques in order to study large-scale ocean structure and circulation.

I am here to discuss the impact of the Marine Mammal Protection Act on oceanographic research using acoustic methods and to suggest amendments to the Act intended to facilitate the constructive use of sound in the sea while providing all appropriate protections for marine mammals. Any discussion of the subject has to start from one basic fact, and that basic fact is that the ocean is largely transparent to sound, but it is opaque to light and radio waves. And what that means is that all of the things that we do in the atmosphere using light and radio waves have to be done in the sea using sound.

A few examples might help. Such things as assessing fish stocks, measuring ocean bathymetry, communicating under water, transmitting data from subsea instruments, navigating under water, profiling ocean currents, and measuring large-scale ocean temperature and currents, all rely on the use of sound. Sound in the sea is not just noise. It is used for a wide variety of valuable and important purposes.

A second key fact that has to be kept in mind in discussing the scientific use of sound in the sea is that it is a minor component of human-generated undersea sound. I think there is widespread agreement that the noise radiated by ships—and here I am using the term "noise" quite carefully—is the dominant source of human-generated undersea sound.

With all of that said, what is the problem? The problem is that the current regulatory procedures are so complex, so fraught with

delays, so costly, both in time and money, and relatively uncertain in their outcome, that it discourages, actively discourages researchers from obtaining the necessary authorizations for conducting oceanographic research using acoustic methods. This is stifling a wide variety of valuable oceanographic research.

I would like to give you an example from a project in which I am involved called the North Pacific Acoustic Laboratory. As one of the components of this project, we sought the authorizations needed to operate a low-frequency sound source off the north shore of Kauai. I suspect Mr. Abercrombie is quite familiar with this project.

The source had previously been operated for 2 years as part of the Acoustic Thermometry of Ocean Climate Project, which included an extensive marine mammal research program. The short summary of that research is that subtle effects were detected and it is not surprising that large whales could hear the source, but none of the marine mammal experts involved in the program tells that the observed effects were biologically important or significant. Given that, we started the process of seeking the required authorizations to continue to operation of the source in the spring of 1999. We finally completed the process and were able to resume transmissions in late January of this year. It took nearly 3 years out of my life and cost in excess of half a million dollars to get the required permits. I believe, or at lest I hope, that this is an extreme example. Nonetheless, I think it is clear that is simply impractical for a single researcher or a small research group to undertake such an effort. I personally would be unwilling to dedicate another 3 years of my life to such an effort. I also doubt that any funding agency would readily undertake such an effort again. Research dollars are simply in too short a supply.

So what is the solution? I would like to suggest a three-pronged approach, and these are outlined more fully in my written comments.

First, the definition of "research" for which scientific research permits can be issued should be broadened to include all legitimate scientific research activities rather than being limited to research on or directly benefiting marine mammals. Further, the scientific research permit procedure should be simplified and streamlined.

Second, the definition of "Level B harassment" should be modified to focus on biologically significant disruption of behaviors critical to survival and reproduction, that is, should be focused on adverse impacts rather than just detectible changes in behavior.

Finally, the Act should be modified to provide for categorical exclusions, allowing for the operation of oceanographic instrumentation that is in widespread and routine use. Such exclusions, of course, should take into account the appropriate conditions required to protect marine mammals.

The above suggestions are intended to facilitate the constructive use of sound in the sea for scientific research, while providing all appropriate protections for marine mammals.

Thank you.

[The prepared statement of Dr. Worcester follows:]

**Statement of Dr. Peter F. Worcester, Research Oceanographer, Scripps Institute of Oceanography**

Oceanographers use sound in the sea for a wide variety of purposes, including, for example, assessing fish stocks, measuring ocean bathymetry, communicating underwater, transmitting data from autonomous instruments to the surface, navigating underwater, profiling ocean currents, and measuring large-scale ocean temperature variability. I believe that oceanographers will always depend on acoustic methods, for the fundamental reason that the ocean is largely transparent to sound, but opaque to light and radio waves. This means that all of the tasks for which we use light or radio waves in the atmosphere must be done using sound in the sea.

Although scientific use of sound in the ocean is a minor component of human-generated undersea sound (compared to shipping, for example), the current regulatory structure makes obtaining the necessary authorizations for conducting ocean acoustic research so arduous that it is having a chilling effect on the field.

There are several laws that are relevant to the use of sound in the sea, most notably the National Environmental Policy Act (NEPA), the Marine Mammal Protection Act (MMPA), and the Endangered Species Act (ESA). I will focus my comments in this testimony on H.R. 4781, the Marine Mammal Protection Act Amendments of 2002.

The impact of the existing regulatory structure on marine research been discussed in a number of contexts, including two recent National Research Council reports:

> National Research Council (NRC). 1994. Low–Frequency Sound and Marine Mammals: Current Knowledge and Research Needs. National Academy Press, Washington, D.C.
>
> National Research Council (NRC). 2000. Marine Mammals and Low–Frequency Sound: Progress Since 1994. National Academy Press, Washington, D.C.

Although I am not in agreement with all of the conclusions in these reports, they provide an important service in considering how the MMPA could be modified "for facilitating valuable research while maintaining all necessary protection for marine mammals." (NRC, 1994)

*Scientific Research Permits*

The MMPA currently provides a relatively streamlined permit procedure for scientific research "on or directly benefiting marine mammals." Any other scientific research falls under the Incidental Harassment Authorization (IHA) procedure or the lengthy rule-making procedure leading to a Letter of Authorization (LOA). NRC (1994) recommends that the regulatory structure be altered to:

- Broaden the definition of research for which scientific permits can be issued to include research activities beyond those "on or directly benefiting marine mammals." The population status of the species and the kind of "take" should determine the number of allowable takes, and the same regulations should apply equally to all seafaring activities.

NRC (2000) similarly states that "the MMPA and NMFS regulations should include acoustic studies in the regulatory procedures related to approvals for harassment during scientific research."

Although broadening the definition of research for which scientific permits can be issued would be an important step toward helping facilitate valuable marine research, the existing procedures for obtaining Scientific Research Permits are still quite burdensome for individual researchers. The procedures should be further simplified and streamlined. NRC (1994) concurs, stating that "the lengthy and unpredictable duration of this process can create serious difficulties for research." One possible approach to streamlining the SRP process is to decentralize permitting authority to regional offices or committees. NRC (1994) suggests one method for doing so:

- Consider transferring some aspects of the regulatory process to less centralized authorities patterned after the IACUCs [Institutional Animal Care and Use Committees] that regulate animal care and safety in the academic and industrial settings.

Decentralization would help avoid the time delays associated with any process centered in Washington, D.C.

*Definition of Level B Acoustic Harassment*

The 1994 amendments to the MMPA included a definition of harassment as "any act of pursuit, torment, or annoyance which:

> Level A—has the potential to injure a marine mammal or marine mammal stock in the wild; or

> Level B—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."

This definition of harassment in the MMPA is unfortunately somewhat ambiguous and has in the past been interpreted at times to mean that any detectable change in behavior constitutes harassment. NRC (1994) notes that as "researchers develop more sophisticated methods for measuring the behavior and physiology of marine mammals in the field (e.g., via telemetry), it is likely that detectable reactions, however minor and brief, will be documented at lower and lower received levels of human-made sound." NRC (2000) concludes that it "does not make sense to regulate minor changes in behavior having no adverse impact; rather, regulations must focus on significant disruption of behaviors critical to survival and reproduction." NRC (2000) suggests that Level B harassment be redefined as follows:

> "Level B—has the potential to disturb a marine mammal or marine mammal stock in the wild by causing meaningful disruption of biologically significant activities, including, but not limited to, migration, breeding, care of young, predator avoidance or defense, and feeding."

The National Marine Fisheries Service recently stated that it "considers a Level B harassment taking to have occurred if the marine mammal has a significant behavioral response in a biologically important behavior or activity." ("Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Operation of a Low Frequency Sound Source by the North Pacific Acoustic Laboratory; Final Rule," Federal Register, Vol. 66, No. 160, Friday, August 17, 2001, Rules and Regulations, p. 43442.) This is close to the definition recommended by NRC (2000). Nonetheless, it would be helpful for a revised definition of Level B harassment to be codified in the MMPA, focusing on the significant disruption of behaviors critical to survival and reproduction.

*Categorical Exemptions*

As noted above, underwater sound is routinely used by oceanographers for a wide variety of important purposes. The MMPA does not seem to have anticipated that the provisions of the Act might be applied to instrumentation that is in wide-spread and on-going use, and it does not include a mechanism for allowing for such on-going uses other than through exemptions that must be applied for on a case-by-case basis. The National Marine Fisheries Service should clarify its position on the use of a wide variety of routinely used sound sources, and/or the Act needs to be modified to provide for the issuance of categorical exclusions allowing for the use of instrumentation that has the potential for taking by harassment in situations in which the taking will be unintentional and will have a negligible impact on the affected species and stocks. NMFS should be tasked with issuing regulations providing categorical exclusions for uses of sound that meet appropriate criteria. Such regulations could include provisions excluding critical habitat from the categorical exclusions, if appropriate.

*Conclusions*

Both marine mammals and people use sound in the sea for a wide variety of purposes. The suggestions provided above are intended to facilitate the constructive use of sound in the sea, while providing all appropriate protections for marine mammals.

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Mr. GILCHREST. Thank you very much, Dr. Worcester.

Dr. Worcester, or Dr. Worcester, since you raise the issue of the complicated process that researchers have to go through in order to get a permit to deal with the Marine Mammal Protection Act, and you made some recommendations on changes in that, and listening to the first panel, do you have an opinion on the National Research Council's proposal to change the definition of "harassment?"

Dr. WORCESTER. Yes, sir, I do. In fact, in my written testimony I support changing the definition of "Level B harassment" to that given in the NRC report issued interested year 2000. I think they did a careful job of considering that issue.

Mr. GILCHREST. So can you give us some idea from your experience as to whether or not if we confine the change of the definition let's say to Level B and not Level A, do you have an opinion on the word "significant" as it used in the change?

Dr. WORCESTER. Yes, I do. And this issue of course came up before. I think the key point here, and what the NRC tried to do, as I understand it, is to differentiate between changes in behavior that were just detectable from ones that caused an adverse impact that affected behaviors that were important to survival, reproduction, feeding, to the survival of the species. And they used the term "significant" in that sense. I think the language they did in choosing the term "significant" helps do that. I personally think that the current language, which has often been interpreted to mean any detectible change in behavior, on the face of it is scientifically a little silly because it means that, as marine mammal researchers become more and more adept at detecting subtle changes in behavior, the threshold for when the Act would apply would continue to drop. And so that to me doesn't make much sense. It should be changes that matter to the animals.

Mr. GILCHREST. So you are saying, setting aside the full context of the proposal that the Navy gave us this morning, and focusing on Level B, you are saying that the change from the NRC is a more suitable definition that clarifies the issue of harassment to marine mammals?

Dr. WORCESTER. Yes, sir, I believe it is.

Mr. GILCHREST. Mr. Wetzler, can you comment on that?

Mr. WETZLER. Yes, I would be happy to. I think that there are three things to note about that response. First of all, with all due respect to National Research Council, the folks that put together that language did not include any policy experts or people familiar with drafting legislation or of course any attorneys, and I think that is reflected in the choice of the word "significant."

Mr. GILCHREST. Would you agree then if they just did it from a scientific perspective, that looking at it from their view, that "significant" was the appropriate word?

Mr. WETZLER. I am not a scientist, so I can't really address from that point of view.

Mr. GILCHREST. What we need to hear then is mix the nonscientists like you and I, with the scientists, and come up with an appropriate word that will more clearly define how we can reduce or eliminate totally our harassment when there is going to be harm to the animal.

Mr. WETZLER. Well, I do think that your question goes to the second point I was going to make, which is we need to look at the changing, at the definition of "harassment" in the context of the way this Act functions. A lot of our environmental laws—the Endangered Species Act is a good example—functions in kind of a two-tiered approach. First as a very low threshold an Agency has to grip, and once they trip that threshold, they are then required to go ask for a permit. But in order to be denied the permit, there has to be a higher threshold. So for instance with the Endangered Species Act, if a Federal Agency is going to take an action that may affect a species, then it has to do something called consultations,

but as a general matter their actions are only prohibited if the activity would cause a species to be more likely to go extinct.

That is not the way the MMPA works. The way that the Marine Mammal Protection Act works is it is the applicant himself or herself who makes the initial determination about whether or not they need to seek a permit. So in other words, if you were to add the word "significant" into the definition even of Level B harassment, you would be asking the Navy or Scripps to make the first determination whether they thought that the activity was significant. And if they didn't think it was significant—and that we are all aware of how vague and flexible and ambiguous a word like "significant" can be—if they didn't think it was significant, they wouldn't have to seek a permit.

And a very good example of that, to go back to the military, is something called the ELWAD program, under which the Navy has conducted 17 tests since 1997 of very intense low-emit frequency sonar systems right off the coast of the United States as a general matter, and they have not once, not in one case, sought a permit under the MMPA. And so I think that the reason the definition is brought is a good one.

Mr. GILCHREST. Well, I thank you for that response. I will tell you that we have traveled to Woods Hole to take a look at their assessment of the full range of sonar frequencies used by the Navy, and their impact or potential impact on the full range of marine mammals. So we are trying to stay tuned in to this process. But I will just close—and I apologize for coming back to Dr. Worcester, but I can't help but wonder what you just thought of Mr. Wetzler's statement.

Dr. WORCESTER. In the permitting process that we went through for NPAL, there is frequent confusion between the language "biologically significant" and "statistically significant." And that to me is what is at the heart of this. The experts doing the research on whether or not the sound source was affecting marine mammals were able to measure statistically significant effects. I mean they could tell that the behaviors differed in a way that was statistically meaningful from the normal behaviors. On the other hand, the changes in behaviors were so subtle, were so small, that they uniformly felt there was no biologically significant effect. In other words, that those changes in behavior—for example, north of Hawaii the humpbacks, when the source is transmitting, tend to just stay submerged slightly longer and to transit slightly further underwater when the source was on. If one were to anthropomorphize it, you could almost say they were wondering, going, "Say, hey, Mabel, what was that," try to hear it better.

But I think this is a key point is to distinguish between "biologically significant" and "statistically significant" we are trying to get at, meaningful changes versus just detectible changes, and perhaps the language should specify "biologically significant." I don't know, but I think it is a meaningful term.

Mr. GILCHREST. Good suggestion. Thank you very much.

I will yield to the gentleman from Hawaii.

Mr. ABERCROMBIE. I am going to follow up on that, doctor, and I appreciate your specificity here as opposed to some of the more vague terminology we were dealing with in the first panel. And you

heard how upset I was by this kind of changes that are suggested as if it was to be more precise than the first term, the first set of terms, which seemed to me to be infinitely more precise than what is being suggested to us. And the reason that I take such umbrage with that and am so concerned about it is we, no pun intended by definition, have to pass legislation, and when we pass the legislation we put words on paper, they have significant consequences, much of which you are dealing with, and I can tell in frustration for 3 years trying to get a permitting process, because people are able to constantly refer to words, and in this instance it would appear to figure out how many angels are dancing on the head of a pin.

Now, that is great if you are a theologian and people make their living as theologians discerning that, but for purposes of scientific principle being applied or for the practical application of a scientific experiment, we don't want to engage in that. So I think you helped clear the air significantly for me by bringing up the phrase—and I am probably saying words to the effect a little bit here I tried to write down what you were saying—adverse impacts as opposed to technical changes in behavior. And I wrote underneath the word for myself, "survival." And then I wrote "biological significance" versus "statistical significance."

And perhaps if you can remember back to the first panel, I got in an argument about term versus condition, that we were arguing about terms, all of which are subject to—especially the way they were being put in these definitions—can be infinitely argued about as opposed to addressing specific conditions.

Now, the reason I am going through all that preamble, I want to refer you back to the existing definitions that are in law right now. Here is what I have down. I am speaking to you as a legislator rather than a theologian now. "Potential to injure," that is pretty clear to me, "potential to injure." I focus on the word "injure" because there is always a potential. When you stand up you can fall down. You walk out the door and there is water on the floor, you can slip and fall. But we know there is an injury. I focus on the Level A harassment as injure.

And the Level B harassment, it says, "Potential to disturb causing disruption," and it says to me this is biologically significant. Migration, breathing, nursing, breeding, feeding and sheltering. They have very specific connotations in my mind, and I have a damn good idea of what that means, and it is certainly not ambiguous to me.

Now, just changing a pattern, you may recall I asked somebody before, what if they moved off 50 feet on a 45-degree angle? That to me probably does not have much—and for a few hundred yards or something, then comes back. That is not interfering with migration, it is not a disruption of a behavioral pattern with respect to breathing, nursing, breeding, feeding or sheltering.

My point is, if we went from, maybe tightened up this definition that is already there by making it clear that we are talking about survival, we are talking about biological—and that we are maybe further defining these words like migration and nursing and breeding. In terms of biological significance, wouldn't that help clear away all of this debris that is in the way of permits being given

and scientific research being carried out, so we actually know what we are doing where the mammals are concerned?

Dr. WORCESTER. I think the difficulty is that the current language has very commonly been interpreted to mean any detectible change in behavior.

Mr. ABERCROMBIE. Yes, I understand that. That is why I am asking you. Do you think it would be possible for us to tighten up the existing definition by perhaps, say, adverse impacts, using the phrase "adverse impacts" to make more clear that we are taking about survivability, we are talking about biological changes that are more than just detectible but reach the level of adverse impact.

Dr. WORCESTER. Absolutely.

Mr. ABERCROMBIE. Now, let me take it as an example because you are familiar with it, now the humpback whale migration and the breeding, right, in that area around Hawaii. If we could show that during that period of time—and I hate to say it, but we would probably have to do an experiment, and you were doing this kind of thing to find out whether breeding patterns were changed. We would have to try to figure out whether or not babies were being born, whether there were changes or they stopped coming or something like that. If we found that out, then we could maybe associate that with the utilization of the low frequency activity. That is what I am trying to get at. If that was shown to be the case, then couldn't we say, well, look, during that time you can't do this, you're going to have to figure out some other way to try to detect the quiet diesel engines on submarines.

Dr. WORCESTER. Yes. I think if I understand your suggestion, it is that the definition be changed to make clear that it is an adverse impact.

Mr. ABERCROMBIE. Right. I am trying to get to conditions because if we just stick with terms, there is going to be an endless legal battle going on, over and over again, as to what constitutes significant, what constitutes—what is it alternative—I forget the other part of it, but the definition being proposed by the DOD seems to me to resolve nothing because it doesn't go to specific conditions, and it seems to me you have given us a ray of sunshine here that may actually penetrate the water, in the sense of saying adverse impact—now I am not sufficiently sophisticated right now to be able to come up with that at the moment, but I know where I want to go with it, and what I am asking you is, is do you think we could craft such a refinement of the definition, that perhaps that ambiguity might disappear or disappear sufficiently for you to be able then to move this permit process along?

Dr. WORCESTER. I think the answer is yes.

Mr. ABERCROMBIE. Because I think you are going to get swamped by theologians if we just put the second definition. If the Chairman just accepted the second definition on face value right today, I don't think we're going to be any further ahead, and I don't think you are going to be able to get anything less than your 3-year approach.

Dr. WORCESTER. Yes. One thing I should make clear is I had not seen the definition of Level A and Level B harassment proposed until this morning. I am not a member of the Administration.

Mr. ABERCROMBIE. What was your first impression in terms of—did it lessen the ambiguity or did it give another level of it or an-

other context within which the same kinds of arguments could be made?

Mr. GILCHREST. If I could just interrupt just for a second, Level A, "injures or has the potential to injure," which is what is in existing law. The proposal for a change would be—

Mr. ABERCROMBIE. "Significant potential to injure."

Mr. GILCHREST. "Significant potential to injure."

Mr. ABERCROMBIE. Right, would add the word "significant" to it. I realize that. And I am saying that that to me doesn't lessen the ambiguity at all. In fact, if it was of a lawyerly bent, I would rejoice at the opportunity to harass.

[Laughter.]

Dr. WORCESTER. The part of the definition that I was advocating a change to was Level B actually, and where the NRC put the moral equivalent of "significant," they said meaningful was not before potential but before disruption. If I may, perhaps it would be useful to read that. The NRC's recommendation for Level B was, "as the potential" to disturb a marine mammal, a marine mammal stock in the wild, by causing meaningful disruption of biologically significant activities, including but not limited to, migration, breeding, care of young, predator avoidance or defense, and feeding. And they in fact omitted sheltering because it is such a vague term that it has no scientific meaning.

Mr. ABERCROMBIE. Yes, I can see that. But you yourself said if we anthropomorphize, which the word meaningful to me does, we might as well be in Toad Hall if you are going to use the word meaningful.

Dr. WORCESTER. There may be a better way to do this. The key thing here I think is to distinguish between detectible changes and adverse changes.

Mr. ABERCROMBIE. Right.

Dr. WORCESTER. And I am not a lawyer either.

Mr. ABERCROMBIE. And I think "statistical" makes—that is very helpful in that sense. I am thinking of it in my background as a sociologist, when you move from anecdotal to statistical, you are dealing—at least where you are talking about the human condition—with something that can be measured, a standard can be set, as opposed to simply anecdotal recitations.

Mr. GILCHREST. Mr. Abercrombie, we will have a second round.

Mr. ABERCROMBIE. Thank you.

Mr. GILCHREST. Since you live in Hawaii.

Mr. ABERCROMBIE. You may be surprised, doctor, but you have been very helpful. I know you may not think so, but this I think is very, very helpful.

Thank you, Mr. Chairman.

Mr. GILCHREST. You are welcome. And I also think you would make a great theologian, Mr. Abercrombie.

[Laughter.]

Mr. GILCHREST. I just have a couple more questions. I know the hour is late. The situation with California sea lions as described by Mr. Fletcher and our attempt to resolve that issue. I would like to ask Ms. Young to give us any advice that you might have on that situation in California with the sea lions, and both the recreational and the commercial fishing activities.

Ms. YOUNG. Thank you, Mr. Chairman. I think that Mr. Fletcher and I are not too far apart on this issue. We both agree that there really hasn't been a dedicated—and not only dedicated, but a funded effort to come up with nonlethal deterrents. And one of the things that I see in the bill that is lacking is that before we go out and just throw money at the problem, I think we should sit down with scientists, fishermen, the agencies, the conservation community, and let's all agree on what the plan is. Let's look at what has worked in the past.

Mr. GILCHREST. Can this be done by the Ocean Conservancy having a meeting? Do we need some type of an authorization for a study which would include those agencies? What is your recommendation for us? I think that is a great idea.

Ms. YOUNG. I recommend that you just require that the agencies develop a research plan first, and that research plan be crafted in consultation with those various interest groups. I think agreeing to the plan will then negate any possible litigation later by somebody who says, "Wait, we don't agree on this particular research project because we think it is going to be harmful to the animal." So at least getting everybody on the same page and then moving forward.

And what we feel is also very important is that once you have everybody agreeing to a plan, allowing the ability for not only the government to put money forward, but my organization or Mr. Fletcher's organization to put money forward toward that research to ensure that it is completed. And that is something again that I would like to see added to the bill.

But the initial point is get everybody involved, decide upon what the plan is, and move forward, and allow everybody to contribute to that plan.

Mr. GILCHREST. Thank you very much. Excellent recommendation. I am going to hesitate to ask you about the definition of harassment, maybe talk about that at some other time.

But, Mr. Fletcher, a comment of Ms. Young's recommendation?

Mr. FLETCHER. Mr. Chairman, I am always available to sit down and assist in the development of research plans. I do want to point out that we had what we thought was a potentially effective nonlethal deterrent ready for testing in—

Mr. GILCHREST. What was that?

Mr. FLETCHER. It was a pulse power unit that was developed in San Diego. It was a patented technology that was developed that we had received a SK grant through the National Marine Fishery Service.

Mr. GILCHREST. What is the status of that right now?

Mr. FLETCHER. We were attempting to get a Coastal Commission Consistency Determination, actually NMFS was, and that was denied because there hadn't been research on the effects on marine mammals, especially sea lions, of this particular technology. So that happened a couple years ago. NMFS took the money that we had gotten that was going to be used for testing the device to do the research, and that research is completed, and now we are looking for money once again to try to go back through the process to get the consistency determination so that we could begin to at-sea testing. If we could get some strong voice of support from Congress

and perhaps some funding that would be made available, we would certainly be involved and be willing to be involved in this research plan development. But this unit is still there and could help.

Mr. GILCHREST. It would be fitted on each boat? Is that how it would work?

Mr. FLETCHER. Ultimately it could become a permanent part of the vessel similar to a fathometer with a transducer. The company envisions that that could happen over time if they would receive funding.

Mr. GILCHREST. It would send out a pulse that would keep seals and sea lions away?

Mr. FLETCHER. There would be a pulse that would be controlled by the captain when sea lions approached and came around the vessel and began to interact with the fishermen.

Mr. GILCHREST. Thank you.

Mr. WETZLER. Mr. Chairman, if I could make a quick comment about that?

Mr. GILCHREST. Yes.

Mr. WETZLER. Because it is an issue that my office actually worked on. We had opposed the deployment of the pulse power device, which is an underwater acoustic device, that sends out a very, very pulse of sound, acts more like dynamite really than anything else. And the reason we opposed it was because we thought that it hadn't been tested in the lab and there was a significant potential that it would deafen the sea lions.

And all I want to say is that I just think before Congress makes a judgment about the efficacy of that device, it is very important to examine whatever research has been done in the interim.

Mr. GILCHREST. Thank you very much.

Mr. Luedtke, we haven't asked you any questions here this afternoon, but you performed admirably for your profession.

[Laughter.]

Mr. GILCHREST. And I am going to hesitate to ask you about a change in the definition of harassment, but we appreciate you coming here this afternoon, and we will look into the issues that you addressed here as well, and to make sure that there is a better cooperation and connection between you and your colleagues and NMFS and the other scientific people that make these assessments and evaluation. And good luck when you travel up the New Jersey Turnpike to go home.

Mr. LUEDTKE. Route 95.

Mr. GILCHREST. Route 95.

Mr. Abercrombie, any more questions?

Mr. ABERCROMBIE. Yes, just a couple, please.

Mr. Luedtke, I actually did want to ask you something along these lines. By the way, your testimony was terrific. Thank you very, very much. Your work with your father over all those years while you were in high school and beyond obviously paid off in someone who is very, very thoughtful and cares an awful lot about not only what he does, but the world in which he does it, which is the sea, and I congratulate you. I am sure he would be very proud of what you are doing and what you did in this testimony.

Mr. LUEDTKE. thank you.

Mr. ABERCROMBIE. You said, "I am interested in improving the quality of science and our ability to minimize interactions with marine animals." And you have heard this, you know I have been concentrating on this definition thing, and the reason that I concentrate on it so much, I will reiterate to you, is because when we pass this stuff it takes on a life of its own, and so we want to be as clear and as precise in terms of our intent as we can.

When you heard me and others talking about this question about injury, as opposed even to potential injury, because I agree with what was said here, that if as we get more scientifically sophisticated, we can probably take that definition about what is potential down to a very, very low level, to where it becomes meaningless in terms of what would actually happen to fisheries, for example. So if you are trying to figure out what you can deal with in a commercial sense with fisheries, if we tightened up the definition along the lines that Dr. Worcester was talking about, adverse impacts, actual injuries, changes in migration, changes in patterns so that you might not know where the fishery was going to be most beneficial to you, would that be helpful? Do you think if we tightened up this definition about what harassment is, and to actual conditions as opposed to more words out there that can be interpreted by anybody any way they please?

Mr. LUEDTKE. Yes, I would like to see it tightened up. I think that would be helpful. As far as the definition as it is now, I think that it is just so vague, in that it could be interpreted that if a jet ski passes by a mile away, could that have an adverse effect on them? Well, maybe down the road we find out that it does, but by—

Mr. ABERCROMBIE. I am smiling because I can tell you if a jet ski—I hate those damn things.

[Laughter.]

Mr. ABERCROMBIE. And I think they ruin Hawaii. And we have got little sections out where they have them, but you can hear them everywhere if you are swimming or whatever. You can't tell me it isn't—we got along without them for millions of years.

[Laughter.]

Mr. GILCHREST. We can include that term in the Marine Mammal Protection Act.

[Laughter.]

Mr. ABERCROMBIE. Yes, I am for that. You put that in, I will go along with anything. But I appreciate that. Thank you very much.

Dr. Worcester, I want to ask you one last time. On the 3 years, I have read through your testimony again, and I am trying to figure—oh by the way, I want to congratulate you. I don't know if everybody else has seen Dr. Worcester's testimony, but despite all the harassment he received for 3 years, I think that is a particularly jaunty picture that you have there, doctor.

[Laughter.]

Mr. ABERCROMBIE. So you obviously haven't been disturbed or frustrated to the point where you wanted to quit. I think that is pretty good. I hope I can look that way at the end of this hearing.

[Laughter.]

Mr. ABERCROMBIE. But can you explain a little more clearly to me—it is not that clear from the testimony—as to why it took the

3 years, even though there were more hoops to go through, and you suggest various ways like decentralizing and so on to speed up the process. How would the decentralizing of the permitting process actually be faster than the 3 years you expended? Why did it take 3 years?

Dr. WORCESTER. The reason it took 3 years actually has to do with the details of the law. As you say, it is what the law says. It is not necessarily what makes sense. Because the project was going to last for longer than 1 year, it did not qualify for the Incidental Harassment Authorization Procedure.

Mr. ABERCROMBIE. OK, I see.

Dr. WORCESTER. And we did not qualify for the scientific research permit procedure because it wasn't research on marine mammals. All of that was one component of the program.

Mr. ABERCROMBIE. Or directly benefiting them.

Dr. WORCESTER. Or directly benefiting them. So the only option left was the letter of authorization procedure, the full-blown rulemaking procedure, which involves lengthy periods for public comment. It requires NMFS to actually write and publish rules specific to the operation of that source. It is the application of a procedure that, in my mind, seemed to have been designed to apply to a class of activities, that they now had to do it for this one project. That was part of the reason why it took so long.

The other part was that we were required to go through the full-blown environmental impact statement process, which is again a very time-consuming—

Mr. ABERCROMBIE. Wasn't the experiment itself designed to find out what the environmental impact would be? How can you do an environmental impact statement about an experiment which by definition is an environmental impact statement inquiry?

Dr. WORCESTER. We of course already had a great deal of information from the previous stage, the ATOC phase, in which we had done a total of 2 years of research at each of two sources, expended a total of—

Mr. ABERCROMBIE. That is what I am driving at, is that you already had the information that was available, and in effect, what you were doing was providing the impact statement.

Dr. WORCESTER. I am not sure I understand the question. I mean we had done the research to show that the impact, if any, was very small, so why we had to go through a full EIS procedure is not something I would—

Mr. ABERCROMBIE. That is my point. It would seem to me that all that was being involved here was—literally, Mr. Chairman, harassment, because—and I mean it, is that this is another way of saying we don't like what you are doing in the first place, and so what we have found is a way to prevent you from going ahead with it in the hope that all of this will disappear, or we can fend it off for a long time. And I don't think that is the way to resolve the issue.

I do think that the existing definition—I have concluded, Mr. Chairman, that the existing definition needs to have—not necessary considerable, but very precise refining, but I don't think that the proposed definitions from the Defense Department adds anything of value in that regard.

And then I think the other thing we need to do is to take a look at whether or not we can write something in legislation regarding research activities and the permitting process that will actually address the conditions under which the permitting takes place and the scientific research takes place, that will get us the kind of information that will help us all in the end to understand what it is we need to do with regard to our fellow creatures in the ocean and to be proper stewards and partners with them. Thank you.

By the way, I think both panels were excellent, Mr. Chairman. I commend you and the staff on that, and I am very, very grateful to all of you for helping us. We are going to do the best we can. I know under Chairman Gilchrest for whom I have enormous admiration, this is a very difficult process, and I will say for the record he is the soul of patience and has enormous concern for everybody's—not their opinion, anybody can have an opinion, any idiot can have an opinion and generally they do, but very few people—I think what we have a right to expect is good judgment, and I have great confidence in the Chairman's ability to put that good judgment into legislation.

Mr. GILCHREST. Thank you very much, Mr. Abercrombie. And we will take your suggestions and recommendations and thoroughly evaluate them as we move through the process.

And I also want to thank the panel for their patience and for their statements and for their recommendations, and we will pursue those as well, and I look forward to speaking to many or all of you again very soon.

The hearing is now adjourned.

[Whereupon, at 4:58 p.m., the Subcommittee was adjourned.]

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