

**WRITTEN TESTIMONY OF  
JAMES LECKY  
DIRECTOR, OFFICE OF PROTECTED RESOURCES  
NATIONAL MARINE FISHERIES SERVICE  
NATIONAL OCEANIC AND ATMOSPHERIC  
ADMINISTRATION  
U.S. DEPARTMENT OF COMMERCE**

**LEGISLATIVE HEARING ON H.R. 946,  
THE “ENDANGERED SALMON PREDATION PREVENTION ACT”**

**BEFORE THE  
COMMITTEE ON NATURAL RESOURCES  
SUBCOMMITTEE ON FISHERIES, WILDLIFE, OCEANS AND INSULAR AFFAIRS  
UNITED STATES HOUSE OF REPRESENTATIVES**

**June 14, 2011**

**Introduction**

Good morning, Chairmen Hastings and Fleming and members of the Subcommittee. I am Jim Lecky, Director of the Office of Protected Resources in the National Oceanic and Atmospheric Administration’s (NOAA) National Marine Fisheries Service (NMFS). Thank you for the opportunity to present NOAA’s views on California sea lion predation on at-risk, threatened, or endangered salmon and steelhead and H.R. 946, which would establish a temporary permitting procedure for allowing the removal of California sea lions to protect salmonids in the Columbia River. While I have been in my present position since 2004, I spent nearly 30 years working for NOAA on marine mammal and endangered species issues in our Southwest Region and am very familiar with problems associated with increasing seal and sea lion populations, including the ongoing predation of threatened and endangered salmonids in the Columbia River and its tributaries.

NOAA is responsible for protecting most marine mammal populations along the west coast under the Marine Mammal Protection Act (MMPA) and for promoting the recovery of threatened and endangered species under the Endangered Species Act (ESA), including listed salmon and steelhead trout, collectively called salmonids. The MMPA and ESA are strong conservation laws, but the MMPA does not provide flexible tools for dealing with species whose populations have reached healthy levels and that are creating conflicts with, among other things, conservation efforts for ESA protected species. Therefore, NOAA appreciates the Chairs’ acknowledgment of the seriousness of this issue and the opportunity to explore development of additional tools for efficient and effective resolution of such conflicts.

In my remarks today, I will describe the ecological and management context that currently exists, NOAA’s previous experience in addressing the conflict with increasing populations of pinnipeds under existing authorities, and NOAA’s comments on H.R. 946.

## **Ecological and Management Context**

I am pleased to report that the MMPA has been successful at recovering most stocks of seals and sea lions along the west coast to optimum sustainable levels. California sea lion numbers have increased from the few thousands in the 1920s to more than 238,000 today. An analysis of pup counts in California through 2005 suggests the population likely achieved its maximum net productivity level in 1997 and may currently be at or near its carrying capacity. Populations of harbor seals and elephant seals are healthy and, in the Pacific Northwest, while the Eastern stock of Steller sea lions is listed as threatened under the Endangered Species Act, we have seen steady improvements in it.

After breeding in southern California rookeries, male California sea lions migrate north in search of food. Some of these animals feed along the California coast while others disperse as far north as Alaska. During winter and spring, more than 1,000 California sea lions may be found near the mouth of the Columbia River. Some of these animals make their way up the Columbia River to Bonneville Dam (nearly 150 miles upriver) feeding on spring smelt and salmonid runs. Some feed on listed salmonids at Willamette Falls where there have been aggressive interactions with recreational fishers targeting hatchery fish.

In contrast to robust west coast seal and sea lion populations, many west coast salmonid populations have declined from historic levels. Of 52 recognized population groups of salmonids spawning in California, Oregon, Idaho, and Washington, 28 are listed as threatened or endangered under the Endangered Species Act, 13 of which spawn in the Columbia River or its tributaries. These salmonid populations are at risk because of multiple threats: habitat loss and degradation, harmful hatchery practices, predation and competition, and harvest. All threats must be addressed to recover listed salmonids in the Columbia Basin. Our recovery approach has been to seek reductions in mortality from all sources, with the goal of reducing overall mortality to the point that each species can survive and recover.

Over the years, NOAA has worked diligently with states and others to explore non-lethal methods for deterring pinnipeds from preying on listed salmonids. Unfortunately, these efforts have yielded limited success. Congress recognized the limits of non-lethal deterrence in passing the MMPA amendments of 1994. These amendments included MMPA section 120, which allows states to apply for authority to lethally remove California sea lions or Pacific harbor seals to protect at-risk salmonid populations. These amendments also required NMFS to prepare a report to Congress describing the impacts of pinniped predation on the recovery of threatened and endangered salmonids and more broadly on coastal ecosystems of Washington, Oregon, and California. NMFS completed the scientific investigation and submitted its report to Congress in February 1999.

The report to Congress described the potential for pinniped impacts on the decline or recovery of at-risk fish stocks in Washington, Oregon, Idaho, and California and the expanding pinniped conflict with human economic and recreational activity in the affected areas. As a result of these findings, NMFS recommended that Congress amend the MMPA to include a site-specific management regime including the use of lethal and non-lethal removal of California sea lions and harbor seals. It also suggested further investigation of non-lethal deterrence methods and the

collection of information needed to allow more informed decision-making for appropriate conservation of pinnipeds and other living marine resources.

NMFS has testified before this Subcommittee three times in support of the recommendations of the 1999 report. Joe Scordino (retired, Deputy Regional Administrator, NMFS/NWR) represented NMFS at a hearing in Washington, D.C., in October 2001, and I represented NMFS at a field hearing in San Diego, CA, in August 2003. In addition D. Robert Lohn testified to this Subcommittee in 2007 on H.R. 1769, a bill similar to H.R. 946 being discussed today.

### **Reducing Sea Lion Predation on Salmonids: History to Present**

In addition to the 1994 Amendments allowing lethal removal of pinnipeds (Section 120), the MMPA includes two potential alternatives for authorizing lethal taking of marine mammals in response to marine resource management challenges such as those I have described. Section 101 provides authority for the Secretary to waive the take moratorium and adopt suitable regulations to permit taking by lethal methods, through a formal rule-making process. Section 109 provides Secretarial authority to transfer management authority to a state on its request. A state receiving management authority for marine mammals from the Secretary must have adopted a management plan that could include lethal taking, approved by the Secretary prior to the transfer of management. Congress adopted Section 120 as a more streamlined approach to dealing with circumstances such as the one at Bonneville Dam.

Under section 120, NMFS has received two applications from states to lethally remove California sea lions to protect at-risk salmonids. In 1994, the State of Washington requested authority to remove selected sea lions to protect a small winter-run steelhead population that migrated into the Lake Washington drainage at the Ballard Locks in Seattle, WA. NMFS and the States attempted to protect the steelhead run using non-lethal deterrence and conducted predation monitoring activities for nearly a decade prior to the 1994 amendments. The States submitted an application under the new section and NMFS convened a Pinniped–Fishery Interaction Task Force to consider the application. Following Task Force recommendations, NMFS and the States continued a number of non-lethal deterrence actions such as acoustic barriers, flow modification, trap and hold, and trap and haul before March of 1996 when NMFS approved the States’ request for lethal removal of five specific animals. None of those animals was lethally removed but three were relocated to Sea World of Orlando, FL, for permanent captivity and public display. California sea lion predation events on steelhead returning to Lake Washington subsided following the 1996 steelhead return due to the removal of the worst offending animals, continued implementation of a non-lethal deterrence strategy, and the collapse of the steelhead run, which has not yet recovered. Over the past several years, NMFS has received anecdotal reports of sea lion predation on Chinook salmon at the Ballard Locks but there have been insufficient resources available to implement systematic monitoring to quantify the extent of the impacts to this ESA listed run.

In November 2006, the states of Oregon, Washington, and Idaho applied to NMFS for authority to lethally remove California sea lions at Bonneville Dam to protect threatened or endangered salmonids in the Columbia River. The states’ application noted that sea lion predation on salmonids at the dam is a relatively recent phenomenon with only occasional sightings of sea

lions at or near the dam prior to 2000. In 2000, predation events began to increase and have been documented since 2002 when 30 California sea lions were identified feeding at the dam. Between 2002 and 2006 the estimated California sea lion predation on salmonids at the dam increased annually from just over 1000 to about 3000 fish.

In addition to reviewing the pinniped salmon conflict, the states' application also described many other efforts, for which hundreds of millions of dollars have been spent, to provide a comprehensive recovery strategy for salmonids in the Columbia River basin. These efforts include harvest reduction, hydroelectric system modification and mitigation, habitat improvement, predator controls, and hatchery reform.

After receiving the states' 2006 application, NMFS, as required by section 120, provided notice of the states' application, convened a Pinniped-Fishery Interaction Task Force, and complied with other applicable laws (e.g., National Environmental Policy Act (NEPA) and Endangered Species Act (ESA)). Due to the seasonal commitments of potential Task Force members, various procedural requirements and requisite environmental analyses, NMFS was not able to complete the section 120 process in time for the 2007 spring Chinook salmon run. In the fall of 2007, the Task Force recommended approval of the lethal removal application, with a minority dissenting vote, and NMFS completed the authorization process prior to the start of the 2008 spring Chinook salmon run.

Since then, the number of California sea lions at the dam has averaged about 75 animals per year and they have been observed eating an ever-increasing number of salmon below the dam, with an estimated high of 5,000 salmon taken by California sea lions in 2010 (total estimated predation by all pinnipeds at Bonneville Dam in 2010 was over 6,000 salmon). Although the percentage of the runs consumed annually varies with run size, the estimated number of individual fish taken has generally increased each year since 2005. I note that this estimate of predation is based on documented predation events observed from the dam structure. Thus, the 2010 mortality estimate attributable to California sea lions at the dam is not an estimate of the total predation, but observed predation, on salmonids by California sea lions in the Columbia River. California sea lions have been reported feeding on salmonids along the entire main stem of the Columbia River and in several tributaries from its mouth to the Dalles Dam, 191 miles from the ocean. However, predation rates have not been quantified except in the area visible from Bonneville Dam and the estimate only represents the observed area. Systematic observations of predation elsewhere in lower Columbia River to identify the animals involved or to quantify the impacts of predation have not been done. The lower Columbia River up to the Dalles Dam is a huge area and systematic observation of the entire area would be an extremely difficult and costly venture.

NMFS, the U.S. Army Corps of Engineers (which operates Bonneville Dam), the states, and the Columbia River Intertribal Fish Commission and their member Tribes have aggressively employed non-lethal deterrence methods to protect salmonids near the dam since 2006. From March 2008 when the section 120 removal authorization was issued to the states through 2010, 37 individually identified California sea lions were removed to permanent captivity or humanely killed. Nevertheless, predation continued to increase.

After the close of the 2010 season, NMFS reconvened the Task Force to evaluate the effectiveness of the removal program and consider information accumulated since the program's initiation. Following its review, the Task Force concluded that the program had not been sufficiently successful at reducing pinniped predation on salmonids and made several recommendations to improve the effectiveness of the removal program.

The section 120 process has proven litigious. After the issuance of the removal authorization in 2008, the Humane Society of the United States filed a complaint in the U.S. District Court in Oregon. Plaintiffs contended that NMFS violated the MMPA, NEPA, and the Administrative Procedure Act (APA) when it authorized the lethal removal of individually identifiable California sea lions. In particular, plaintiffs argued NMFS' decision was factually indefensible and inconsistent with other agency decisions under NEPA and the ESA involving salmon (specifically fishery harvest and hydropower operations), and that NMFS failed to provide an adequate explanation under the APA as to why sea lion predation was significant as defined under the MMPA, whereas take by fisheries and hydropower operations was insignificant as defined under other applicable laws (e.g., NEPA).

In November 2008, the district court upheld NMFS' lethal removal authorization and NEPA analysis. Plaintiffs appealed and on November 23, 2010, the Ninth Circuit issued a partially favorable decision to plaintiffs. The Ninth Circuit held, for purposes of the MMPA authorization, that NMFS failed to provide a satisfactory explanation concerning two main points: (1) the seemingly inconsistent findings that sea lion predation is significant for purposes of the MMPA, but similar or greater levels of take of the same salmonid populations by other activities -- such as fishery harvests in the Columbia River -- are not significant under NEPA; and (2) the agency's failure to explain adequately what the court viewed as the agency's implicit finding that a California sea lion predation rate of greater than 1% results in a significant negative impact on the decline or recovery of salmonid populations. Despite the adverse MMPA decision, the Ninth Circuit upheld the NEPA analysis. The Ninth Circuit directed the district court to vacate the decision authorizing lethal removal and remanded it to NMFS "... to afford the agency the opportunity either to articulate a reasoned explanation for its action or to adopt a different action with a reasoned explanation." *HSUS v. Locke*, 626 F.3d 1040, 1053 (9<sup>th</sup> Cir. 2010).

On May 12, 2011, NMFS, having considered the available information accumulated since 2008 and its previous effects analysis under NEPA and the ESA, and following the appellate court's instruction, reissued its lethal removal authorization. The terms and conditions of the current authorization are virtually the same as those in the 2008 authorization.

The spring Chinook salmon run past Bonneville Dam began several weeks late in 2011, but increased rapidly beginning April 25. California sea lions also arrived at the dam later and in smaller numbers than in recent years. Non-lethal deterrence measures were implemented through most of the 2011 season. Predation numbers were lower than the previous year for the first time since 2005. On May 18, 2011, following receipt of the re-issued authorization the States successfully captured one of the individually identifiable California sea lions that was authorized for removal and it was humanely killed. NMFS' and the States' efforts to control California sea lion predation at Bonneville Dam has once again been challenged by the Humane

Society of the United States. A lawsuit was filed on May 19, 2011, in the U.S. District Court for the District of Columbia. Similar to the previous litigation, the Humane Society asserts that NMFS, in issuing the section 120 authorization, violated the MMPA, NEPA, and APA.

## **H.R. 946**

Representative Hastings and his colleagues introduced H.R. 946 in March 2011. This bill is a modified version of Representative Baird's H.R. 1769 introduced in the 110th Congress and to H.R. 6241, introduced in the 109<sup>th</sup> Congress. Several aspects of H.R. 946 are consistent with our 1999 Report to Congress. The bill identifies and aims to address the complicated and controversial wildlife management conflict we face on the Columbia River today. It correctly recognizes: the limitations of non-lethal methods to protect salmonids from sea lion predation; the enormous investment that many agencies, organizations, and the public have made to conserve and recover at-risk salmon and steelhead populations in the Columbia River basin; and that the Columbia River Intertribal Fish Commission and their member Tribes should be included in addressing this conflict.

We appreciate the bill's attempts to streamline procedures necessary to take action. Our goal is a delicate balance between protecting marine mammals under the MMPA and recovering ESA-listed salmonids. With that in mind, we are careful in how and when we take action to lethally remove California sea lions to protect listed salmonids. From experience, however, we note that we have faced numerous challenges with the requirement regarding individual identification of sea lions foraging on salmon. This requirement is extremely difficult given the enormity of the Columbia River basin and encumbers the ability to remove the animals and provide efficient and effective protection for salmon. This requirement would also be extremely difficult to meet if it is determined that broader action is needed elsewhere in the Columbia River basin. We also do not support the exemption from NEPA. We found the environmental review process valuable when reaching our determination at Bonneville Dam and would support legislative solutions that allow adequate time to complete an environmental review. We would be happy to further discuss this and potential solutions with the Committee at your convenience.

The bill would also require NMFS to make a determination that non-lethal measures are ineffective – following a public review and comment period – and then require each permit holder to duplicate that determination for each sea lion prior to removal. It is not clear why the permit holder determination is necessary when NMFS would have already made such a determination. Indeed, NMFS has already made such a determination in its 2008 section 120 decision documents regarding California sea lions at Bonneville Dam.

The bill also requires NMFS to prepare a report to Congress on the need for additional legislation. This requirement should be made precatory, to respect the President's prerogatives under the Recommendations Clause. As previously described, NMFS prepared such a report in 1999. California sea lion predation on salmonids at Bonneville Dam has become a significant problem since the report was completed.

Besides the streamlining concerns noted above, there are a few operational challenges in the bill and some provisions are confusing. Coordinating the activity of permit holders also seems

difficult in that multiple permits may be issued to six different “eligible entities” but each entity may use only one permit during any 2-week period. Tracking such a system would be difficult.

## **Conclusion**

The MMPA has provided strong protections for all marine mammals, regardless of their population status, for more than 30 years. The Administration believes that in some cases lethal removal may be necessary to manage pinniped-fishery conflicts, and that such management is not inconsistent with the purposes and policies of the Act. We appreciate this bill’s recognition of that need and stand ready to work with the Committee to address our concerns with the bill.