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TESTIMONY OF MARSHALL JONES, DEPUTY DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, BEFORE THE HOUSE RESOURCES SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE AND OCEANS HEARING ON H.R. 2693, THE "MARINE MAMMAL PROTECTION ACT AMENDMENTS OF 2003"

July 24, 2003

Mr. Chairman and Members of the Subcommittee, I thank you for the opportunity to provide the Department of the Interior's (Department) views regarding reauthorization of the Marine Mammal Protection Act (MMPA or Act) of 1972 and H.R. 2693, the Marine Mammal Protection Act Amendments of 2003. I am Marshall Jones, Deputy Director of the U.S. Fish and Wildlife Service (Service).

The MMPA was the first of the landmark conservation laws enacted in the 1970s; it turned thirty years old in 2002. The Act established an ongoing 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 Service, protects and manages polar bears, sea and marine otters, walruses, three species of manatees, and the dugong.

Mr. Chairman, we commend you for your continued leadership in the effort to reauthorize the MMPA, including the many oversight and legislative hearings you have chaired, and your introduction of H.R. 2693. Over the past few years, this Subcommittee has held several hearings that have served to frame the issues of importance in reauthorization, and bring forward concepts to address those issues.

The Administration strongly supports reauthorizing the MMPA. Thirty years of implementation have demonstrated the Act's effectiveness in conserving and replenishing marine mammal populations. In addition to its support of reauthorization, the Administration and its partners have identified several areas of the Act that will benefit from well-considered changes. To this end, we have crafted a comprehensive set of amendments that represents a real step forward for marine mammal conservation, as well as makes corrections and adjustments to the legislation based on our experience in implementing the Act since the last reauthorization in 1994. These amendments are contained in a legislative proposal to reauthorize the MMPA, which was transmitted by the Administration to Congress in February of this year. The proposal reflects the diligent and coordinated work of the Department, the National Oceanic and Atmospheric Administration (NOAA) in the Department of Commerce, the Marine Mammal Commission (Commission), our partners in the Alaska Native community, and other federal and non-governmental partners.

We look forward to working with you and members of the Subcommittee during this session of Congress in a dedicated effort to reauthorize the MMPA and enact amendments that improve our ability to conserve and manage marine mammals. My testimony will provide the Department's comments on H.R. 2693, focusing on issues that relate to the Service's implementation of the MMPA. My testimony will also briefly discuss, as the Subcommittee requested, the Minerals Management Service's (MMS) interaction with the MMPA.

I will first discuss some of the key amendments proposed by the Administration that are not included in H.R. 2693. These amendments were developed by the Services in the context of our experience in implementing the MMPA. We believe these amendments will enhance the effectiveness of the MMPA in its stated goals, and we urge you to consider adopting them as H.R. 2693 moves through the legislative process.

Amendments proposed by the Administration not included in H.R. 2693

Harvest Management Agreements

An important component of the Administration's reauthorization proposal is an amendment to expand the authority of section 119 of the MMPA, which relates to cooperative agreements with Alaska Natives, to authorize harvest management agreements between the Secretary and Alaska Native Tribes or Tribally

Authorized Organizations. These agreements would be designed to prevent the depletion of marine mammal stocks in Alaska and would demonstrate the commitment of the federal government to continuing to develop our important partnership with these organizations.

The MMPA prohibits the taking (e.g., harassing, hunting, capturing or killing) of all marine mammals. However, the Act provides exceptions to the prohibition. One of these exceptions allows take of marine mammals by Alaska Natives for subsistence purposes. Subsistence harvest is not subject to regulation, unless the harvested animals are from a population that is depleted, or if the harvest is wasteful.

Following the dramatic decline of Beluga whales in Cook Inlet due to over-harvest, representatives of the Native community expressed their desire to develop a cooperative management structure for regulating harvest of marine mammal stocks. In response to the interest of the Native community in developing such a harvest management structure, the responsible federal agencies, including the Service, NOAA, and the Commission, cooperatively developed a proposed amendment with the Alaska Native community. The amendment would allow regulation of subsistence take of non-depleted marine mammal stocks, and would thus provide substantial conservation benefits to marine mammals.

Under the proposal, harvest management regimes would be initiated and developed using existing governmental authorities of Tribes and Tribally Authorized Organizations. If the responsible federal agency agrees to, and adopts, a harvest management regime, the agency would be authorized to make assistance available to implement and enforce the management provisions. The proposal provides new responsibilities and a meaningful role for the Native community in resource management.

The proposed amendment requires that harvest management plans be designed to maintain a sustainable harvest. Each plan must describe the following: the entities involved in developing the plan; the geographic scope of the plan; enforcement authorities; the biological and management basis for harvest restrictions; the duration of the agreement; and the agreement's review provisions. Entities eligible to enter into such agreements are specifically defined as "Alaska Native Tribes or Tribally Authorized Organizations." The intent of this definition is to specifically identify the types of organizations that are qualified, because implementation would rely on existing Tribal authorities, rather than creating new federal authorities.

A harvest management agreement would initially be negotiated between the appropriate federal agency and the eligible entity. Public involvement would then be solicited through a notice and review process. The proposed amendment specifically identifies the existing authorities for these provisions and makes clear that this approach creates no new sovereign, Tribal authorities.

We believe that this amendment will create a strong conservation tool to ensure the long-term conservation of marine mammal populations in Alaska. The amendment's cooperative approach will facilitate partnerships to avert management crises that can arise under the current system. Without the proposed amendment, additional species may become depleted through excessive subsistence harvest. Activities by some individual hunters could continue to create conflict that the community would like to address but cannot under current law. We have worked closely with Alaska Native representatives on this proposal and strongly endorse its enactment.

Southern Sea Otter - Fishery Interaction Data

Southern sea otters are incidentally taken in fishing operations, but the extent of this take is not known. Pursuant to Section 118 of the Act, which addresses the take of marine mammals incidental to commercial fishing operations, the Department would like to gather information on fishery interactions with southern sea otters in California. MMPA reauthorization provides an opportunity to address this need by providing for enhanced efforts to assess the impact of commercial fisheries on this threatened sea otter population.

The Administration's MMPA reauthorization proposal includes an amendment to section 118(a)(4) of the Act that would require the Secretary of Commerce to include information concerning California sea otters in the list of fisheries published under section 118. In addition, California sea otters would be included in determinations pursuant to section 118(d) of the Act regarding establishment of monitoring programs and placement of on-board observers on fishing vessels to monitor interactions and assess the levels of mortality and serious injuries in the population.

Presently, section 118 specifically excludes California sea otters from the incidental taking authorization, and nothing in this amendment is intended to change that. The proposed language is solely intended to enhance

efforts to assess impacts that commercial fisheries may be having on this threatened sea otter population in order to provide a more informed basis for recovery efforts.

Research Grants

The Administration also continues to be interested in the potential for research grants as described in Section 110(a) of the MMPA. A proposed amendment to this section would reauthorize research grants, and would make clear that grants under this provision may be targeted at plant or animal community-level problems (i.e., ecosystem problems).

The Secretaries would be given flexibility to determine which research projects to fund. However, the proposed amendment highlights the following ecosystems as high priorities for research grants.

Bering Sea - Chukchi Sea Ecosystem - The Bering and Chukchi Seas have extensive, shallow shelves and, as a result, are some of the most productive areas in the world's oceans. These regions offshore of Alaska are undergoing significant environmental changes, including rapid and extensive sea ice retreat, extreme weather events, and diminished benthic productivity. Such dynamics are likely having ecosystem-wide effects. As such, there is a pressing need to monitor the health and stability of these marine ecosystems and to resolve uncertainties concerning the causes of population declines of marine mammals, sea birds, and other species. As residents of the region largely depend upon marine resources for their livelihood, research on subsistence uses of such resources and ways to provide for the continued opportunity for such uses must be an integral part of this effort.

California Coastal Marine Ecosystem - The southern sea otter, listed as threatened under the Endangered Species Act, has been experiencing an apparent population decline since the mid-1990s. The reasons for the decline, however, remain uncertain. Possible reasons include: introduction of new or unusual diseases; exposure to new or higher levels of chemical pollutants; incidental take in new or relocated fisheries; and decreases in key prey species due to temporary El Niño effects, long-term climate fluctuation, or otter densities exceeding carrying capacity levels within their current range.

These ecosystems are of great importance to marine mammal populations and would benefit from system-wide studies.

H.R. 2693, the "Marine Mammal Protection Act Amendments of 2003"

Again, we commend you Mr. Chairman, for introducing a bill to reauthorize the MMPA. My comments on H.R. 2693 are limited to provisions which relate to the Department of the Interior, and the Department of Commerce and the Marine Mammal Commission will present the Administration's views on other provisions.

Section 5: Miscellaneous Authorizations of Appropriations

The Service appreciates that Section 5(c) of H.R. 2693 includes specific authorizations for Section 119 of the MMPA. These authorizations are important because they make clear that funding may be directed to support Cooperative Agreements in Alaska. As we have stated in previous testimony before this Subcommittee, the Service recognizes the accomplishments achieved to date through our existing cooperative agreements and hopes to continue participating in these important agreements.

Section 10: Polar Bear Permits

As we stated in previous testimony before the Subcommittee on June 13, 2002, as a general rule the Department is opposed to legislative exemptions that allow importation of sport-hunted trophies outside of established regulations. However, in this case, the Department supports the bill's proposed amendment to extend the time-frame for such importations as established in the 1997 amendments. This would allow for the importation of polar bear trophies legally taken in Canada during the period between enactment of the 1994 amendments and the issuance of final the implementing regulations on February 18, 1997.

We note with approval, however, that under H.R. 2693, 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 importation requirements for trophies. Trophies taken after that date can only be imported in compliance with those regulations. H.R. 2693 would not change this fact.

The Department also 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 polar bear trophies. The Administration's proposal contains a similar amendment. The Service has processed on average 90 applications for polar bear permits annually for the past six years 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.

Since H.R. 2693 would no longer require the publication of Federal Register notices for each individual application, the Service notes 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)," would need to be deleted from the first sentence of subsection 104(c)(5)(D).

Section 13: Definition of Harassment

In revising the definition of harassment, the Administration's goal is to provide a definition that is more enforceable and that would provide greater notice and predictability to the regulated community by presenting a clear threshold for what activities do or do not constitute harassment, without compromising the conservation of marine mammals. For Level B, for example, the Administration bill moved from including any activity that has the "potential" of disturbing a marine mammal, to an activity that is "likely" to disturb. The concern was that arguably many activities could have the potential, no matter how remote, of causing a negative response, whereas likelihood indicates a level of certainty that the event actually will occur. Thus, the regulated public will better be able to gauge when they should apply for an incidental take authorization. Also, likelihood is a legal standard that already appears elsewhere in the statute (e.g., the standard for issuing an enhancement permit and the section 118(c) commercial fisheries list) and is recognized in common law.

Mr. Chairman, we appreciate your efforts to address the difficulties with the existing harassment definition through MMPA reauthorization. The amendment to revise the definition in H.R. 2693 is similar in concept to the Administration's proposed amendment. Both versions focus on those activities that would cause disruption of key biological behaviors, whereas some have suggested that the current definition could include activities that cause any negative behavioral reaction, no matter how temporary or how minor. We also agree that the definition should apply to "any act" rather than the current statutory definition, which is limited to acts of "pursuit, torment, or annoyance."

However, we are concerned with some of the terms in the proposed definition in H.R. 2693. For example, H.R. 2693 uses the term "probability" in Level A harassment and we are concerned that this may create standard that would not apply to some activities that may have negative impacts on marine mammals. We are also concerned about the "potential to disturb" threshold in the second clause of the proposed harassment definition in H.R. 2693. The Service and the other agencies involved in developing the Administration's proposed definition considered this language to be overly broad. We believe that the standard included in the Administration proposal, "disturbs or is likely to disturb," provides a more appropriate standard for what activities would be covered under this part of the harassment definition. We would welcome the opportunity to explore these issues and concepts with your staff as you work to craft a definition that meets our mutual goals of providing a clear, focused definition that adequately protects marine mammals.

Section 14: Incidental Takings of Marine Mammals

H.R. 2693 amends the MMPA's provisions that authorize incidental takings of marine mammals that may occur during otherwise lawful activities. Under the current law, the Secretary may authorize take of small numbers of marine mammals in a specified geographic region if the Secretary determines that such take will have no more than a negligible impact on the marine mammal species or stocks, and will not have an unmitigable adverse impact on subsistence harvest of those species or stocks. H.R. 2693 amends this provision by removing the terms "small numbers" and "specified geographic region."

We note these changes are consistent with the Administration's Readiness and Range Preservation Initiative (RRPI) amendment to the MMPA contained in its proposed National Defense Authorization Act for Fiscal Year 2004. However, the RRPI language pertains only to military readiness activities. We support ensuring

that there is a single standard for all regulated entities. Both the RRPI and H.R. 2693 retain the negligible impact standard, which is key to ensuring that authorized take has a minimal effect on these species. Furthermore, under this amendment, incidental take authorization can still only be granted if the take will not have an unmitigable adverse impact on the availability of the marine mammal species or stocks for subsistence uses. These standards are important to ensuring that take authorizations do not degrade the ability of the Service to effectively conserve, protect, and/or restore marine mammal populations.

H.R. 2693 also adds a new general take authorization process. This language is new to us, and we respectfully request more time to analyze its implications, and would like to meet with your staff to discuss the purpose of the amendment. We did, in our initial analysis of this general authorization language, identify one concern. The amendment requires the Secretary to issue implementing regulations for this general authorization no later than 120 days after enactment. We are concerned that this statutory deadline could result in ineffective and ill-conceived regulatory language.

Technical Issues Related to H.R. 2693

Section 4 of H.R. 2693, as proposed, may inadvertently confuse the regulated public by changing one aspect of the MMPA's import/export provisions, without making similar necessary changes elsewhere in the statute. The Administration's proposal contains additional technical corrections that ensure consistency throughout the statute.

An additional provision in the Administration's proposal that we believe is critical, but that is not included in H.R. 2693, would amend 102(a)(4) of the MMPA. This provision makes clear that the Service can prosecute an unlawful transport, purchase, sale, or export of a marine mammal or marine mammal product, without having to first demonstrate that the original take of the marine mammal was not lawful.

The Minerals Management Service's Interaction with the MMPA

As noted above, at the Committee's request the Department offers the following comments on the MMS's interaction with the MMPA.

MMS is the Nation's manager of energy and non-energy mineral resources on the Outer Continental Shelf (OCS). MMS has the responsibility to ensure environmentally sound exploration, development, and production activities on the OCS. That responsibility is carried out, in part, by managing operations for the continued protection of marine mammal species under the MMPA. In its efforts to ensure the protections required under the MMPA, MMS analyzes impacts, designs mitigation and monitoring guidelines, and defines how activities are to be carried out to minimize the potential for harassment or injury to marine mammals. As noted above, the proposed changes to the definition of harassment provide more clarity, which facilitates MMS' efforts and provides a greater level of certainty and predictability to the regulated community. MMS also identifies, funds, and participates in research necessary for the protection and enhancement of protected marine mammal species and their habitat, and provides the information necessary for NOAA or the Service to issue small take authorizations and promulgate regulations.

While MMS has coordinated with the Service and NOAA for decades on matters related to the MMPA and the Endangered Species Act, in the past two years it has enhanced its communication and coordination with the Service, NOAA, and with industry. For example, an Interagency Agreement with NOAA to conduct marine mammal surveys was modified to bring together an international team of experts which included both researchers and industry representatives to develop new field methods and a research protocol for controlled exposure experiments on sperm whales in the Gulf of Mexico. This renewed focus on improved collaborative efforts has improved MMS's working relationship with the Service and NOAA on MMPA issues, and has established a process that works well for the federal agencies as well as the regulated public.

Conclusion

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

Nation our shared commitment to conserving marine mammals. We believe that H.R. 2693 and the Administration's proposed amendments provide the Department with a solid foundation from which to proceed.

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