

**TESTIMONY OF  
DR. REBECCA LENT  
DEPUTY ASSISTANT ADMINISTRATOR FOR FISHERIES  
NATIONAL MARINE FISHERIES SERVICE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION  
U.S. DEPARTMENT OF COMMERCE**

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

**COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION  
SUBCOMMITTEE ON OCEANS, FISHERIES AND COAST GUARD  
U.S. SENATE**

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Madame Chair and Members of the Subcommittee, I am Dr. Rebecca Lent, Deputy Assistant Administrator for Fisheries at the National Oceanic and Atmospheric Administration (NOAA). Thank you for inviting me to testify today on the reauthorization of the Marine Mammal Protection Act (MMPA).

NOAA Fisheries 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). The MMPA provides NOAA with conservation and management responsibility for more than 140 stocks of whales, dolphins, porpoises, seals, and sea lions.

The Department of Commerce and NOAA have worked closely over the past three years with the Department of the Interior, Department of Defense, Marine Mammal Commission, and others to develop a sound Administration proposal to reauthorize the MMPA. In February 2003, we transmitted this Administration bill to Congress and I will focus my testimony today on various elements of that bill. Specifically, I will discuss improvements the bill makes to the definition of harassment, marine mammal bycatch reduction efforts, enforcement, and other important aspects of marine mammal conservation and management policy.

**The Administration's MMPA Reauthorization Bill**

***Definition of Harassment***

The definition of harassment, a critical component of the "take" prohibition, which is also defined in the Act, has broad applicability throughout the MMPA. The current definition in the

MMPA separates harassment into two levels. Level A harassment is 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."

NOAA has experienced difficulties with interpretation, implementation, and enforcement of the current MMPA harassment definition. First, the definition is limited to acts involving "pursuit, torment, or annoyance." Second, the definition is overly broad and does not provide a clear enough threshold for what activities do or do not constitute harassment. Third, the definition does not provide an adequate mechanism to address activities intentionally directed at individual or groups of marine mammals that disturb the animals. The Administration's MMPA reauthorization bill proposes revisions to the current definition that would address each of these concerns.

*Inappropriate Two-Tiered Standard:* The current definition of harassment impedes NOAA's ability to adequately enforce the MMPA's take provisions. As the definition is currently written, only those acts involving "pursuit, torment, or annoyance," terms that are undefined in the MMPA, can be addressed. Second, the agency must prove that the act has the potential either to injure or disturb a marine mammal. Thus, the current definition contains a difficult two-tiered standard that the agency must meet before it can prosecute anyone who takes a marine mammal by harassment. Amendments to the harassment definition in the Administration's MMPA bill will eliminate the phrase "pursuit, torment, or annoyance."

*Overly Broad:* The current definition of harassment is both broad and ambiguous and, therefore, it fails to create a clear threshold for acts that do and do not constitute harassment. As a result, it is difficult for the agency to prioritize its resources to deal with the types of harassment that have the most negative effects on marine mammals. We are also concerned that the existing definition could result in unnecessary administrative burdens on the regulated community. One could argue, for instance, that any activity has the potential to disturb a marine mammal by causing disruption of behavioral patterns, from humans walking along a pier near a group of sea lions causing them to stop feeding and raise their heads, to driving a ship that causes a wake that dolphins choose to swim in. As interpreted by some courts, the current definition does not distinguish biologically significant, harmful events from activities that result in *de minimis* impacts on marine mammals.

The lack of a clear threshold for harassment in the definition blurs the distinction between those activities that cause insignificant impacts and those that cause truly harmful impacts to marine mammals. This has negative consequences on marine mammals, NOAA, and the regulated community. First, activities that result in meaningful biological disturbance to marine mammals do not receive the degree of attention that they warrant. Second, NOAA Fisheries must devote resources to addressing activities and issues that result in biologically insignificant impacts on

marine mammals. Third, the lack of clarity in the definition imposes unnecessary regulatory burdens on the regulated community, who are forced to apply for authorizations for often harmless activities to prevent potential legal consequences. The Administration's MMPA bill clarifies the definition of harassment to focus the agency and the regulated community on types of harassment that result in meaningful biological disturbance to marine mammals, rather than those acts that are not likely to have biologically significant impacts on marine mammals.

*Lack of Emphasis on Directed Impacts:* The third tier of the harassment definition contained in the Administration's MMPA bill makes it explicit that activities that are likely to disturb marine mammals that are directed at individual or groups of marine mammals, such as closely approaching, touching, or swimming with dolphins in the wild, are considered harassment. Members of the public and commercial operators who intentionally interact with wild marine mammals either by boat, in the water, or on land disturb the natural behavior of the animals. They also do a great disservice to these animals over time by habituating them to humans and vessels. In addition, humans who attempt to closely approach, chase, swim with, or touch wild marine mammals place themselves at risk since wild animals are unpredictable and can inflict serious injury if threatened or afraid.

Overall, NOAA feels the proposed definition of harassment contained the Administration's MMPA bill will apply a clearer standard of harassment to the entire regulatory community and result in more meaningful protections for marine mammals. Additionally, the proposed definition conceptually mirrors recommendations by the National Research Council (NRC) for regulations that are based on the potential for a biologically significant impact on marine mammals. In 2000, NRC pointed out flaws in the current definition of harassment, contending that since science is improving in terms of its ability to distinguish between activities that have significant negative effects and those that have insignificant effects on marine mammals, the harassment definition should be amended to reflect this. The harassment definition contained in the Administration's MMPA bill will achieve this goal of focusing on activities that will result or could result in significant biological impacts on marine mammals.

### ***Marine Mammal Bycatch Reduction Initiatives***

The incidental take of marine mammals in the course of fishing operations continues to be a large source of marine mammal mortality and serious injury. The 1994 amendments to the MMPA outlined an effective approach to monitoring and addressing the incidental take of marine mammals by commercial fisheries. The Administration bill contains several amendments to strengthen these provisions and marine mammal bycatch reduction efforts generally.

First, the bill proposes to expand the MMPA's Section 118 marine mammal bycatch reduction requirements to non-commercial fisheries that have frequent or occasional takes of marine mammals. Non-commercial fisheries, including recreational fisheries, often use identical gear to commercial fishing gear and deploy it in the same manner as commercial fishermen. Nonetheless, the MMPA currently only authorizes the agency to place observers and use the take

reduction process outlined in Section 118 of the Act to monitor and address marine mammal bycatch resulting from commercial fisheries. The Administration bill amends Section 118 to enable NOAA Fisheries to monitor and address all important fishery-related sources of marine mammal bycatch. In addition, by including non-commercial fisheries under this regime, the Administration bill would provide a simpler mechanism than currently exists under the law to offer non-commercial fishermen that take marine mammals protection from prosecution for incidental takes.

Second, the Administration bill aims to improve information on marine mammal bycatch by directing the agency to explore new technologies to provide statistically reliable data on marine mammal bycatch levels. This is important due to the fact that observer programs are expensive and not always feasible.

Third, the Administration bill directs the Secretary of Commerce, acting through NOAA Fisheries, to create opportunities, such as mini-grant programs, to encourage development of fishing gears and methods that reduce marine mammal bycatch. 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, called "pingers," has helped reduce incidental takes of harbor porpoises in New England waters.

Fourth, in the spirit of advancing fishing gear innovation, the Administration bill requires NOAA Fisheries to include technical liaisons with expertise in commercial fishing practices as members of take reduction teams (TRTs). These liaisons will work with TRT members on the latest advancements in gear technology that reduce marine mammal bycatch.

### ***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 remained unchanged since 1972. While these levels may be appropriate in some instances, they have proven grossly inadequate in others, undermining effective enforcement of the Act. To enhance enforcement of the Act, the Administration bill would authorize the Secretary to impose a civil penalty of up to \$50,000 for each violation. Fines of up to \$100,000 for each criminal violation would also be available in suitable cases.

The Administration bill would also aid enforcement efforts by explicitly stating that individuals who interfere with on-board investigations by enforcement agents or submit false information are in violation of the MMPA.

### ***Ship Strikes***

Ship strikes continue to be a leading source of mortality of the critically endangered North Atlantic right whale and other large whales. Between 1970 and 2000, there were 48 known right whale mortalities, of which 16 were due to ship strikes. The Administration bill would authorize the Secretary to use the various authorities available under the MMPA to reduce the occurrence of ship strikes of whales and to encourage the development of methods to avoid ship strikes.

### ***Stranding and Entanglement Response***

NOAA Fisheries scientists must often respond immediately to marine mammal stranding and entanglement events to attempt to rescue and rehabilitate animals in jeopardy. These events provide NOAA Fisheries opportunities to save individual animals, as well as conduct close-up research on animal behavior, biology, and physiology. The MMPA currently provides for a comprehensive program to address stranded marine mammals, but does not specifically give NOAA Fisheries the authority to address marine mammals that have become victims of entanglement in fishing gear or other materials. The Administration bill would add a definition of entanglement to the Act and would require NOAA Fisheries to collect information on rescue and rehabilitation of entangled marine mammals in addition to stranded animals. The bill would also specifically enable the Secretary to enter into agreements with individuals to respond to entangled marine mammals in addition to stranded marine mammals.

### ***Harvest Management Agreements***

The 1994 MMPA amendments gave NOAA Fisheries and the FWS authority to enter into cooperative agreements with Alaska Native organizations to conserve marine mammals and co-manage subsistence use by Alaska Natives. These amendments provided a great beginning and the program has yielded some successes, evidenced by the agreements that we have 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. Additionally, the other provisions of the Act enable effective regulation of subsistence harvest only after designation of a marine mammal stock as depleted. The Administration bill would authorize co-management partners to develop a management plan through which cooperative agreements could be enforced. Thus, it would enable the parties to effectively manage subsistence harvest prior to a depletion finding and ensure the greatest conservation benefit to the marine mammal stock.

### ***Release of Captive Marine Mammals***

The release of long-captive marine mammals without proper preparation and a sound scientific protocol is regarded by the scientific community as potentially harmful to both the animals released, as well as the wild populations they encounter. Fundamental questions remain as to the ability of marine mammals that have been held in captivity for extended periods 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. The Administration bill would explicitly prohibit the release of captive marine mammals without prior authorization, with limited exceptions.

### ***Traveling Exhibits***

We remain concerned about the risks posed to cetaceans by traveling exhibits. Unlike some marine mammals, such as 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 frequent. Because transporting cetaceans is difficult and risky, traveling exhibits would place these animals under enormous stress. The Administration bill would reinstate the ban on traveling exhibits for cetaceans, originally instituted in the mid-1970s.

### ***Export Provisions***

As part of a package of permit-related amendments, the 1994 MMPA amendments added a prohibition on exporting marine mammals. However, the language of this prohibition has created some difficulties in enforcement and inconsistencies with other provisions of the MMPA, especially provisions related to permits. Therefore, the Administration bill would revise the export prohibition to address enforcement difficulties and provide comprehensive clarification of circumstances in which not only the taking and import, but also the transport, purchase, sale, and export, of marine mammals is authorized.

### **Conclusion**

The MMPA has served as a sound model for marine mammal conservation and management policies and practices around the world. Reauthorization of the MMPA provides the opportunity to further strengthen the conservation and recovery of marine mammals. I look forward to working with Members of the Subcommittee, your staffs, and other interested members of the public to meet the challenges that face us in better protecting marine mammals, while balancing human needs throughout the reauthorization process.

This concludes my testimony. Thank you again for the opportunity to testify before your Subcommittee today. I would be happy to answer any questions you may have on the Administration's MMPA reauthorization bill or any other related matters.