GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

OCT 10 2006

The Honorable Ted Stevens
Chairman, Committee on Commerce,
Science, and Transportation
United States Senate
Washington, D.C. 20510-6125

Dear Mr. Chairman:

The Department of Commerce (Department) appreciates the opportunity to provide comments on H.R. 4075, the "Marine Mammal Protection Act Amendments of 2006," as passed by the House of Representatives.

We support many of the provisions in H.R. 4075, and note with approval that the bill addresses several important programs, including take reduction planning and fisheries bycatch research, the John H. Prescott Marine Mammal Rescue Assistance Grant Program, and fines and penalties for violations under the Act. We would also like to see the Marine Mammal Protection Act reauthorization process address several other key Administration priorities, such as changes to the definition of harassment, the addition of authority for harvest management agreements with Alaska natives, and the further enhancement of enforcement capabilities under the Act. Our specific comments on individual provisions of the bill are enclosed. The Department of the Interior will be providing views separately on certain provisions of the bill that are within its jurisdiction. We look forward to working with you and your staff to accomplish our mutual goals in the reauthorization process.

The Office of Management and Budget has advised that there is no objection to the transmittal of these views from the standpoint of the Administration's program.

Sincerely,

John J. Sullivan

Enclosure

cc: The Honorable Daniel K. Inouye
Ranking Member

Specific Comments on H.R. 4075

1) Section 7 – Permit Clarifications

a. The Department opposes the change in Section 7(a)(1) of H.R. 4075, as this would require the Department to issue permits to allow nonreleasable Endangered Species Act (ESA) listed marine mammals to be retained for public display purposes without the need for a scientific research or enhancement permit. An ESA-listed species would be treated no differently than a non-listed species, thereby exempting the public display industry from the ESA and allowing them to maintain, breed, and transport (i.e., take) ESA-listed species without the need for an ESA permit.

b. The Department opposes the proposed changes to Section 104(c)(9)(A)(i) that would be made by Section 7(a)(2) of the bill regarding export of marine mammals for the purpose of public display. Registration or licensing under the Animal Welfare Act is only one of the criteria set forth in the Marine Mammal Protection Act (MMPA) (Section 104(c)(2)) for public display of marine mammals. The requirements of MMPA Section 104(c)(2) for obtaining a public display permit also include criteria that are more properly evaluated by the Secretary of Commerce.

c. The Department opposes the proposed changes to Section 104(c)(9)(B) that would be made by Section 7(a)(2) of the bill. The Department has determined that it is important for the United States to continue to have jurisdiction over exported marine mammals to ensure that the animals continue to be held for the purposes under which they were exported and in adequate facilities. The Department has also determined that letters of comity are a reasonable, but limited, means by which the intent of the MMPA is met. We therefore recommend amending the language to "(B) The Secretary *may request* through comity or any other means, that any marine mammal or its progeny be maintained for the purpose for which it was exported when located in waters or on lands that are subject to the jurisdiction of another country."

In addition, there are concerns regarding the consistency of the proposed amendment to this section with existing provisions of the Act.

d. The Department opposes the proposed change in Section 7(a)(3)(A) of H.R. 4075 as it would prevent continued monitoring of marine mammals exported and verification that the animals are being maintained for the purposes by which they were exported.

e. The Department does not support the proposed change in Section 7(a)(3)(B) of the bill, which directs the Secretary to update the marine mammal inventory annually. It has been the policy of the National Marine Fisheries Service (NMFS) that updates to the inventory be reported within 30 days of any event (consistent with the requirement that births be reported within 30 days). This approach has created an inventory that is maintained as a current and accurate database.

f. Regarding Section 7(c) of the bill, which amends when a public display permit holder must notify the Secretary of a sale, purchase, export, or transport of a marine mammal, the Department is unaware of any marine mammal holders to which this provision would apply and therefore does not believe a change is necessary.

2) Section 8 – Fines and Penalties
H.R. 4075 would increase maximum civil penalties under the MMPA to $20,000 from $10,000; maximum criminal fines to $30,000 from $20,000; and maximum vessel penalties to $35,000 from $25,000. Increases in the Act's fines and penalty allowances are warranted, as these penalties have not been increased since the Act was enacted in 1972 and the current relatively low levels undermine the enforcement capabilities of the Act. While the Department appreciates the bill's attention to the need to enhance enforcement of the MMPA, higher allowable fines and penalties are necessary and will better serve to discourage MMPA violations. We propose amounts in the Administration's bill that would increase maximum civil penalties to $50,000, maximum criminal fines to $100,000, and maximum vessel penalties to $50,000. We believe these levels would be more appropriate to deter violations of the Act.

3) Section 10 – Fisheries Gear Development
The Department supports the fisheries gear development provisions in Section 10 of H.R. 4075. The Administration included similar provisions in its proposed MMPA reauthorization bill. We recommend also including in this section the provision in the Administration's bill (Section 516(a)(2)) that enables the Department to establish a voluntary fishing gear buy-back program pursuant to a take reduction plan (TRP). We included this provision because it is important to have a range of management options to consider throughout the TRP process—including those that promote the reduction of fishing effort in overcapitalized fisheries.

Additionally, we are concerned that the prescribed administrative and fishing grant caps included in H.R. 4075 would undermine our ability to effectively implement this program. We would like to discuss this issue further with Congressional staff.

4) Section 12 – Take Reduction Plans
a. The Department supports the expansion of the TRP process, including the List of Fisheries, to include recreational and other non-commercial fisheries. We recommend deleting the phrase, "within 90 days after the enactment of the Marine Mammal Protection Act Amendments of 2006," and instead allowing the agency to include new information on recreational fisheries in the regular annual update of the List of Fisheries, as appropriate.

Furthermore, in Section 12(a) of the bill, the reference to MMPA Section 114 and the August 1994 List of Fisheries is outdated. The reference should be to MMPA Section 118 (16 U.S.C. §1387) and the latest List of Fisheries published under that section.

b. The Department recommends clarifying Section 12(a)(20) of H.R. 4075 so that the requirement to reconvene a take reduction team (TRT) to explain differences between a published TRP and the TRT's recommendations applies only when the changes between the two are substantial. Because TRTs do not submit their recommendations in regulatory form, some alteration is inevitable during this process, although the majority of changes made to a TRT's recommendations are usually minor. Without this qualification, the provision could be unnecessarily burdensome, as it could require the agency to reconvene the TRT regardless of the degree of change between the plans and could lead to unnecessary delays in finalizing and implementing a TRP, and unnecessary expense to the agency and TRT members.

c. The Department supports amendments in H.R. 4075 that would extend deadlines throughout the TRP development process. The TRP process relies on extensive stakeholder involvement and necessarily involves the intensive analysis of marine mammal abundance and bycatch data, as well as the effect of management alternatives on marine mammal bycatch levels. Since all the stages involved in take reduction planning are time-intensive, the extension of statutory deadlines would help the agency and TRT members meet the statutory goals of Section 118 (16 U.S.C. §1387) in a more reasonable time frame.

5) Section 13 – Pinniped Research

H.R. 4075 would establish a small grants program to develop safe, non-lethal methods to remove pinnipeds from certain conflict situations or control nuisance pinnipeds. The Department welcomes additional consideration of non-lethal nuisance pinniped control methods. However, decades of experience among federal and state managers have demonstrated that non-lethal deterrence will not likely solve many management problems over a long period because pinnipeds often become accustomed to deterrence measures. Accordingly, in its 1999 Report to Congress required by MMPA Section 120(f), NMFS recommended a framework for site-specific management of pinnipeds in addition to directed research on deterrence measures. The framework for site-specific management included streamlined procedures for allowing lethal removal of California sea lions and Pacific harbor seals under certain conditions. Pinnipeds continue to prey on threatened or endangered salmonids and other fish along the west coast (with increasing damage to endangered salmonids at Bonneville Dam). NMFS' 1999 Report to Congress discusses difficulties in implementing the existing provisions of MMPA Section 120. The Department would welcome an opportunity to work with Congress to investigate more effective ways to control damage by pinnipeds.

6) Section 15 – Stranding and Entanglement Response

a. The Department supports inclusion of a definition of "entanglement" and clarification that NMFS' programs should address marine mammal entanglement events in addition to stranding events.

b. The Department is concerned that the proposed change in the cap on administrative program expenses from 6 percent to 5 percent may result in inadequate funds to carry out important program functions such as monitoring and site visits, depending on what amount of funding is appropriated.

7) Section 17 – Polar Bears

The Department defers to the Department of the Interior for views on Section 17 of the bill.

<u>Other Important Amendments</u>

While H.R. 4075 addresses many of the Department's concerns with regard to the MMPA, the Administration's bill contains several other amendments that we recommend including in reauthorization legislation. These amendments (with references to the appropriate section numbers in the Administration's MMPA bill) would:

- Authorize appropriations to the Department of Commerce, the Department of the Interior and the Marine Mammal Commission for carrying out their functions and responsibilities under the Act (Sections 101, 102, and 103).
- Amend the definition of harassment to clarify, provide greater notice and predictability, and enhance enforceability without compromising conservation. Specifically, the Administration proposes to: a) eliminate the terms "pursuit, torment or annoyance" modifying "any act" in the first sentence of the definition; b) focus on activities that result in biologically significant impacts; and c) explicitly include activities that are directed at marine mammals in the wild within the harassment definition (Section 515). We also note that following enactment of the National Defense Authorization Act in 2003, the MMPA contains two definitions of Level A harassment and Level B harassment. Adopting the Administration's bill language would ensure a uniform definition across all regulated communities, and we ask that Congress act to eliminate this potential source of confusion.
- Authorize harvest management agreements between the Secretaries of Commerce or the Interior and Alaska natives prior to a marine mammal stock being designated as depleted (Section 201).
- Provide a comprehensive solution to the problems created by the enactment of an export prohibition under the 1994 amendments to the Act, rather than the more limited approach reflected in H.R. 4075, which only addresses these problems in MMPA Section 101(a)(6) (Sections 301, 302, and 303).
- Direct the Secretary of Commerce to explore the use of new technologies for alternative monitoring of fisheries to enhance data collection on marine mammal bycatch events (Section 409).
- Prohibit traveling exhibits of cetaceans (Sections 513 and 514).
- Require the Secretary of Commerce to include information concerning California sea otters in the List of Fisheries published under Section 118(c) (16 U.S.C. §1387(c)), and include this species in determinations regarding establishment of monitoring programs to assess the level of mortalities and serious injuries caused by fishing operations (Section 408).
- Enhance enforcement efforts by (a) the use and funding of cooperative enforcement agreements with states (Section 506); (b) authorizing the use of tribal resources as well as Federal resources to enforce the MMPA (Section 203); (c) authorizing the Secretary to seize the cargo or vessel of vessels that fish in violation of the provisions of the Act (Section 504); and (d) explicitly prohibiting a variety of activities that interfere with investigations and enforcement of the Act (Section 507).
- Clarify and strengthen several provisions that would enhance implementation of the Dolphin Protection Consumer Information Act (Section 401).
- Provide greater flexibility in allocating resources to the Marine Mammal Unusual Mortality Event Fund (Section 511).
- Identify clearly when the export, transport, sale, or purchase of a marine mammal or marine mammal product is, or may be, authorized (Section 301).

Additional Concerns

While not included in the Administration's MMPA reauthorization bill, the Department also supports including provisions that would repeal the "small numbers" and "specified geographic

region" language from Section 101(a)(5) (16 U.S.C. § 1371(a)(5)). By extending the repeal of this language, enacted by the National Defense Authorization Act for military readiness activities, to all activities that require authorization under this section, this provision would allow NMFS to apply a consistent standard to all activities. These amendments would maintain current protections for marine mammals because the agency would still be required to determine that an activity will have a negligible impact on the affected species or stocks of marine mammals, and the applicant must still provide information to the agency regarding the location of the activity. As a result, the inclusion of such language would not decrease the level of protection provided to marine mammals under the MMPA.