

Appendix D

STATEMENT OF THE MARINE MAMMAL COMMISSION

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Submitted to the House Committee on Resources,
Subcommittee on Fisheries Conservation, Wildlife and Oceans
for the Hearing Regarding Reauthorization of the
Marine Mammal Protection Act
13 June 2002**

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 (§§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, reinstated 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 circum-

stances 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.