

**Statement of David Cottingham**  
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**Submitted to the Senate Committee**  
**on Commerce, Science, and Transportation**  
**Regarding Reauthorization of the**  
**Marine Mammal Protection Act**  
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Thank you for providing the opportunity for the Marine Mammal Commission to share its views with the Committee regarding reauthorization of the Marine Mammal Protection Act. We recently observed the Act's 30<sup>th</sup> anniversary and took that opportunity to reflect on the statute's successes and the challenges that remain. Under the Marine Mammal Protection Act, much has improved. Many marine mammal populations have grown significantly since passage of the Act, including some stocks of large whales that had been threatened by commercial whaling. Observed dolphin mortality associated with the eastern tropical Pacific tuna fishery has been reduced from hundreds of thousands per year to less than 2,000. Nevertheless, the depleted dolphin stocks used to locate schools of large tuna do not appear to be recovering as one would expect. Other species and stocks, such as northern right whales and Hawaiian monk seals remain critically endangered. New threats to marine mammals are emerging, such as retreating ice coverage in polar areas, which is having adverse effects on habitats used by Arctic species such as the polar bear. Other possible threats require further study, such as noise in the marine environment, that may be disrupting or interfering with vital marine mammal behaviors. The Commission is in the process of planning a series of international workshops on the effects of ocean noise to identify information gaps and the actions needed to help us better understand the nature and extent of the possible impacts and to identify needed management actions.

In previous testimony concerning the Marine Mammal Protection Act, the Commission's Chairman has observed that most research and conservation actions involving marine mammals are taken in response to acute, often controversial conservation problems. Current legislation largely reflects this reactive approach to management. As we focus on past and emerging crises, we may miss opportunities to develop a more broad-based, interdisciplinary, and anticipatory approach to research and management that could enable us to identify and act to address potential conservation problems before they become serious and controversial. Along these lines, the Commission is convening a meeting of international marine mammal experts this summer to identify comprehensive research needs and to map out a long-term strategy for pursuing such projects. I would be happy to discuss these and other efforts being carried out by the Commission in furtherance of its responsibilities under the Marine Mammal Protection Act during this hearing as time permits or at another time at the Members' convenience. I now turn to the immediate task at hand, providing you with our recommendations concerning reauthorization of the Act.

The Marine Mammal Protection Act was last reauthorized in 1994, at which time Congress enacted significant amendments to the statute. While those amendments, for the most part, have improved operation of the Act, ten years of experience with implementing those provisions have uncovered certain problems that we and the other agencies charged with implementing the Act believe merit the Committee's attention during reauthorization. In large

part, the recommended amendments included in the Administration's bill were developed to address those shortcomings. The Commission participated on an inter-agency working group to develop the Administration's proposal. Passage of the bill that we and the other agencies testifying before you today have developed will lead to more effective conservation of marine mammals. Although other, technical amendments have been proposed, the key issues addressed in the Administration bill are summarized below.

The 1994 amendments added section 119 to the Act to encourage the National Marine Fisheries Service and the Fish and Wildlife Service to enter into cooperative agreements with Alaska Native organizations to conserve marine mammals, to provide co-management of subsistence use, and to authorize funding for activities under those agreements. The process has worked well, and cooperative agreements are in place with a number of Alaska Native organizations. The key shortcoming with the existing provision is that it does not provide a mechanism for true harvest management under which the parties can establish enforceable limits on the numbers of marine mammals that may be taken for subsistence and handicraft purposes or on the time and manner of taking. Having such authority would have allowed the resource agencies and Native leaders to implement responsible harvest management measures to stave off situations such as that that led to depletion of the Cook Inlet stock of beluga whales. As it was, the National Marine Fisheries Service and the majority of Native hunters had little recourse but to watch as a small group of hunters seeking financial gain overharvested the stock to the point of depletion. It was only after the Service designated the stock as depleted that it was able to establish mandatory limits on further taking by Alaska Natives. By that point, however, the population had been reduced to such low numbers that draconian measures were needed to bring about recovery of the stock – restrictions that could have been avoided if effective management could have been implemented earlier. The Administration bill includes a proposal, worked out cooperatively with Alaska Native representatives, that would cure this statutory deficiency and minimize the risk that similar situations will arise in the future.

The permit provisions of the Act were significantly revised in 1994. The package of permit-related amendments enacted at that time added a new, generally applicable prohibition to the Act – a prohibition on exporting marine mammals. Being focused on permits, however, the amendments neglected to provide exceptions to authorize marine mammals, and marine mammal parts and products, to be exported in all cases where such exports previously had been allowed. In fact, the only exceptions included in the 1994 amendments pertained to exports for purposes of public display, scientific research, and species enhancement. Exceptions authorizing exports in other situations are needed, including for handicrafts made and sold by Alaska Natives, as part of cultural exchanges among Alaska Natives and Natives from other Arctic countries, under waivers of the moratorium, etc. The Administration bill takes a comprehensive approach to this problem by including specific authority not only for exports, but related transport, purchases, and sales.

Although transfers of marine mammals currently are authorized for purposes of public display, scientific research, and enhancement to foreign facilities that meet requirements comparable to those applicable to U.S. facilities, no mechanism is in place for issuing permits to

authorize a foreign applicant to take and export marine mammals directly. That is, sections 101(a)(1) and 104(a) of the Act refer only to permits authorizing the taking or importing of marine mammals, but not exports. The amendments set forth in the Administration bill would clarify that such permits can be issued to qualified applicants. We understand that some representatives of the public display community are concerned that the Administration bill would require facilities to obtain permits for exports where one is not required now. A close examination of the proposed amendments will reveal that this is not the case. Transfers from domestic facilities to foreign facilities that meet the Act's comparability requirements would still be allowed without a permit. However, under the Administration's proposal, issuance of an export permit to a foreign applicant in the first instance would become an available option. That is, the proposed authority for issuing export permits would supplement, but not roll-back, the 1994 permit amendments.

One other problem created by the 1994 amendments related to exports pertains to the prohibition section of the Act. As originally enacted in 1972, the prohibition on transporting, purchasing, and selling marine mammals applied only if the animal had been taken in violation of the Act. Recognizing that this created untenable enforcement problems – for example, when the animal was originally taken for a permissible purpose, e.g., Native subsistence, but later transferred for an impermissible purpose – Congress amended the provision in 1981 to remove the linkage between the underlying taking and the subsequent, unauthorized act. For unexplained reasons, and perhaps inadvertently, when the export prohibition was added to section 102(a)(4) in 1994, the drafters reverted to the pre-1981 language. This has resurrected the enforcement difficulty that Congress recognized and originally fixed more than two decades ago. A similar amendment to fix the problem anew is needed now.

Another key aspect of the 1994 permit amendments was clarifying that exclusive jurisdiction for most aspects of the maintenance of marine mammals in captivity rests with the Animal and Plant Health Inspection Service under the Animal Welfare Act. One result of this shift in agency jurisdiction was the nullification of a longstanding National Marine Fisheries Service policy against authorizing traveling cetacean exhibits. Although the Animal and Plant Health Inspection Service has recognized that such exhibits pose heightened risks to the animals involved, it does not believe that it has sufficient authority to prohibit them by regulation. Because of this, and the undue risks posed to dolphins and other cetaceans in transient facilities, the Commission and other agencies recommend that these exhibits be expressly precluded by statute.

Another issue concerning captive marine mammals that merits Congressional attention is the release of long-term captive marine mammals. The release of these animals poses risks both to the animals being released and to the wild populations with which they come into contact. As such, releases should only be attempted when there has been sufficient training and health screening of the animals to be released and when an adequate monitoring program is in place. While releases arguably constitute harassment under the current definition of that term, there is a need for certainty that releases are prohibited absent specific authorization. In this regard, we note that the Administration's proposed release amendment would not apply to the return of

stranded/rehabilitated animals or to temporary releases undertaken as part of the training or deployment of marine mammals as part of the Navy's marine mammal program.

The centerpiece of the 1994 amendments was the adoption of a new regime to govern the incidental take of marine mammals by commercial fisheries. By focusing on whether or not the catch is sold, however, the amendments created a situation where certain "recreational" fishermen, who fish in the same areas as commercial fishermen, use identical or similar gear, and target the same species, are not covered under the regime simply because they choose to keep the fish for their own use. The Administration proposal would address this incongruity by expanding the current regime to include not only commercial fisheries, but recreational fisheries that take marine mammals frequently or occasionally (category I or II fisheries). In this way, these fishermen would be covered under the section 118 taking authorization and would be accountable for implementing take reduction measures and for meeting the reporting and other requirements applicable to their commercial counterparts. The Administration bill also includes proposed amendments to section 118 designed to improve the operation of the take reduction process.

Another important change to the Marine Mammal Protection Act enacted in 1994 was the addition of a statutory definition of the term "harassment." That amendment was intended to bring greater certainty to determining what would and would not constitute a taking by harassment. However, that amendment has not had the desired result. Some argue that the definition is too narrow in that it requires an underlying "act of pursuit, torment, or annoyance" to constitute harassment. Others observe that the definition is too broad in that it arguably includes acts with any potential to disturb a marine mammal. The Administration proposal would address both of these concerns. First, it would expand the definition to clarify that it includes any act that has, or can be reasonably be expected to have, certain impacts. Second, the proposed definition would raise the threshold for Level B harassment to the point where disturbance would have to occur or be likely to occur. In addition, the Administration proposal contains a new subpart that would address activities directed at marine mammals (e.g., intentional pursuit or close approaches) that are likely to cause disturbance, regardless of whether the response is significant or not.

There are also provisions of the Act apart from those amended in 1994 that need to be revisited during the reauthorization process. For instance, certain provisions have not been updated to reflect changed circumstances since they were originally enacted 30 years ago. Foremost among these are the penalties and fines available under the Act, which have not been increased since originally enacted in 1972. The Administration proposal would bring the Marine Mammal Protection Act penalty provisions into parity with those under other natural resource statutes and reflect changed economic circumstances since the early 1970s.

Likewise we advocate updating a spending limit peculiar to the Marine Mammal Commission. Section 206(4) of the Act authorizes the Commission to secure the services of experts or consultants, but limits the amount that can be spent to \$100 per day. That limit essentially precludes us from obtaining these types of services in today's economy. To address

this problem, the Administration bill would eliminate the \$100 limit and put the Commission on an equal footing with other Federal agencies when it comes to procuring such services.

The Marine Mammal Commission also believes that there is a need to improve enforcement efforts under the Marine Mammal Protection Act. In this regard, the Administration proposal would tighten the harassment definition to make cases based on directed taking easier to prove. The Administration bill would also allow the National Oceanic and Atmospheric Administration to retain fines collected for violations of the Act, which could be used to offset enforcement expenses. This is something that the Fish and Wildlife Service is currently authorized to do. In addition, the Administration bill would direct the National Marine Fisheries Service and the Fish and Wildlife Service to pursue cooperative agreements with State law enforcement agencies to improve local enforcement efforts under the Marine Mammal Protection Act.

Another major challenge under the Marine Mammal Protection Act reflected in the Administration bill is securing the recovery of highly endangered species, such as the northern right whale. The North Atlantic stock, which numbers about 300 individuals, remains vulnerable to extinction due, in part, to ship strikes and entanglement. The Administration bill highlights the ship strike issue as one requiring priority attention. One of the difficulties impeding progress in addressing this source of mortality is a lack of agreement concerning the existing legal authorities that can be brought to bear on the issue. In this regard, the Marine Mammal Commission has just entered into a contract for an independent assessment of what can be done under current legislation and existing international agreements to address this problem.

That concludes my testimony. I would be pleased to respond to any questions that you may have.