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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
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Thank you for providing the Marine Mammal Commission with the opportunity to present its views on H.R. 2693, the Marine Mammal Protection Act Amendments of 2003, and to share its thoughts on other issues related to reauthorization of the Marine Mammal Protection Act that currently are not addressed in the bill. You also requested that the Commission provide you with an update of its progress toward convening an international conference, or series of conferences, to survey acoustic threats to marine mammals and develop means of reducing those threats, as called for under the Fiscal Year 2003 omnibus appropriations legislation enacted earlier this year.

As noted in your invitation to testify, H.R. 2693 has many similarities to H.R. 4781, which was passed out of this subcommittee during the last session of Congress. The current bill also contains several important improvements that respond to concerns expressed by the Commission and others at the 13 June 2002 reauthorization hearing. Among these are extension of the proposed amendments to section 101(a)(6) of the Act to include export authorizations that would conform with all of the import provisions enacted in 1994; provision of specific authorizations for cooperative agreements under section 119 of the Act; expansion of the proposal to include certain recreation and subsistence fisheries under the incidental taking regime established under section 118 of the Act; amendments to various provisions of Title IV of the Act to clarify that they apply to entanglements, as well as strandings; and a redefinition of the term harassment. In addition, H.R. 2693 includes proposed amendments to section 101(a)(5) of the Act that respond to problems with the existing provisions raised by the Administration earlier this year in the context of the Department of Defense's Readiness and Range Preservation Initiative.

Although H.R. 2693 includes several of the key elements contained in the Administration bill transmitted to Congress last February, it also omits some of the recommended amendments. Foremost among these is the proposal worked out jointly by the Commission, the Fish and Wildlife Service, the National Marine Fisheries Service, and representatives of the Alaska Native community to expand the existing section 119 authority to enable the parties to enter into enforceable harvest management agreements. It is not clear whether these omissions reflect determinations by the Committee that certain issues should not or need not be addressed during the reauthorization process, or whether the Committee intends to pursue these other issues, but has yet to develop specific language. We encourage the Committee to give additional consideration to including all of the Administration's recommended amendments in the legislation. Regardless of whether they represent major substantive changes, such as management of subsistence harvests, or mere technical corrections, each is expected to improve or clarify the Act. In this regard, we remain available to work with the Committee and its staff and would welcome the opportunity to provide additional explanation of the rationale behind these proposals or otherwise respond to any concerns that you may have with respect to any of the elements in the Administration's bill.

I will begin by discussing the Commission's observations regarding the provisions included in H.R. 2693.

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. We believe that other such corrections are in order, such as the deletion of section 114 and references thereto made in other sections of the Act, deletion of section 120(j), and those corrections set forth in section 520 of the Administration's proposed bill. Also, the change that would be made under section 3(b) of the bill appears to duplicate the amendment set forth in section 6(5)(B) of the bill. Presumably one of these provisions should be deleted.

Section 4 - Limited Authority to Export Marine Mammal Products

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 is section 101(a)(6), which authorizes the import, but not the export, of marine mammal products for purposes of cultural exchange and by U.S. citizens in conjunction with travel abroad. As such, the Commission agrees that an export authorization needs to be added to this section. At the previous reauthorization hearing before this Committee, the Commission recommended that the export authorization contained in H.R. 4781 be expanded to include exports of legally possessed marine mammal products by U.S. citizens traveling abroad. We are pleased that the current bill has adopted this recommendation. We are concerned, however, with the specific language of that provision. Unlike the Administration's proposal, the provision in H.R. 2693 would allow exports, but would not require that the marine mammal item exported by the U.S. citizen be returned to the United States upon completion of the travel. This could result in enforcement problems by creating a significant loophole that would allow for the export and subsequent sale of marine mammal products once they are outside the jurisdiction of the United States. In this regard, we note that, unlike the proposed cultural exchange provision, there is nothing that limits such exports to noncommercial purposes. Further, we note that the statutory definition of the term "marine mammal product" includes any item of merchandise that consists of, or is composed of, any marine mammal part, and would include items such as tanned, but unworked, seal skins; raw walrus ivory; marine mammal bones; and, perhaps, even polar bear gallbladders. This would go far beyond what was envisioned under the 1994 amendment pertaining to imports, which, as explained in the House report, was included primarily to enable U.S. citizens who obtain marine mammal handicrafts in Alaska to return home via Canada without encountering problems when they re-enter the United States.

Section 6 - Take Reduction Plans

Although structured somewhat differently than the Administration's proposal to expand the section 118 incidental take regime to include recreational and subsistence fisheries that frequently or occasionally kill or seriously injure marine mammals, this section of H.R. 2693 incorporates most of the substance of that proposal. The Commission believes that this proposal is significantly improved over the one included in H.R. 4781. This is much more comprehensive. It would include these fisheries under the section 118 incidental take authorization and, in so doing, would make them subject to the registration, monitoring, reporting, and take reduction requirements applicable to their commercial counterparts.

There are, however, some differences between the proposed amendments in H.R. 2693 and the Administration's proposal that merit discussion. For example, section 404(h)(5) of the Administration bill would add the word "commercial" to section 118(c)(3)(E) to clarify that this provision applies only to category III commercial fisheries. By not incorporating such a change to this subparagraph, H.R. 2693 *could* be interpreted as including non-commercial fisheries (other than those listed under section 118(c)(1)(A)(i) and (ii)), thereby allowing incidental taking by participants in those fisheries, but also requiring those fishermen to report any incidental marine mammal mortalities or injuries that may occur. Although we have no objection to placing such a requirement on those non-commercial fisheries not included on the expanded list of fisheries, this may not have been the intent of the drafters of the bill.

Consistent with the Administration's proposal, H.R. 2693 would amend subparagraphs (A) and (B) of section 118(d)(4), which pertain to priorities for placing observers on vessels engaged in category I and II fisheries, to apply to both commercial and non-commercial fisheries. No similar amendment to subparagraph (C) is included in the bill. Presumably this third-tier criterion should similarly factor in taking from all category I and II fisheries, not just commercial fisheries.

The proposed expansion of section 118 to include some recreational and subsistence fisheries has ramifications for other provisions of the Act as well. Recommended changes to these other provisions that we believe should be made to conform them to the proposed amendments to section 118 are set forth in section 404 of the Administration bill. We believe that the Committee should give further consideration to including these conforming amendments as it considers H.R. 2693. For example, unless section 101(a)(5)(E) is modified, there would be no mechanism for authorizing the incidental taking of marine mammals listed under the Endangered Species Act by non-commercial fishermen, even when such taking would have a negligible impact on the species.

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 constitutes "nuisance pinnipeds" and the types of problems it expects the program to address.

Section 8 - Marine Mammal Commission

We appreciate the Committee's interest in providing the Commission with greater flexibility in allocating its resources to meet its responsibilities. However, the appropriation levels that would be authorized under subsection (c) should be made consistent with the levels contained in the President's Budget.

As reflected in the Administration bill and past Commission testimony, 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 welcome the amendment in subsection (b), which will put the Commission on an equal footing with other agencies in our ability to make use of such services.

Section 10 - Polar Bear Permits

As the Commission has noted in previous testimony before the Committee concerning reauthorization of the Marine Mammal Protection Act, 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 (3), 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 11 - Captive Release Prohibition

This provision is patterned on a proposed amendment contained in an earlier version of the Administration bill. Since that time, the Administration has tried to tighten-up its proposal to clarify that it applies only to marine mammals maintained in captivity at a facility and that it does not apply to temporary releases of marine mammals for military and research purposes by the Department of Defense. We suggest that the Committee consider including similar limitations in its proposal.

Section 12 - Stranding and Entanglement Response

This section incorporates most of the provisions pertaining to Title IV of the Marine Mammal Protection Act recommended in the Administration bill. As such, it is a welcome addition to the House bill as compared to the bill introduced in 2002. The one substantive difference is the omission in H.R. 2693 of the amendment proposed in section 511 of the Administration bill. This amendment to section 405 of the Act would provide the National Marine Fisheries Service the flexibility to use other funds appropriated under the Act, not just those specifically earmarked for addressing unusual mortality events, when needed to respond to such events. We believe that this is a worthwhile amendment and encourage the Committee to give it additional consideration.

Section 13 - Definition of Harassment

The proposed redefinition of the term "harassment" in H.R. 2693 is similar, but not identical, to that included in the Administration bill. As such, there are elements with which we agree, but parts that we think may cause problems if enacted. For example, for an act to constitute Level A harassment under the introduced bill, there must be "the probability" that a marine mammal or marine mammal stock will be injured. The inclusion of this threshold suggests that it must be more likely than not that an injury will result from the particular action being considered. That is, if

there is a 25 percent chance that a marine mammal will be injured by exposure to a particular stimulus, a one-time exposure would not necessarily be considered harassment, even though the risk of injury is substantial. As such, we recommend replacing the word “probability” in the Level A harassment definition with a more inclusive phrase such as “significant potential,” as used in the Administration's proposal.

Like the existing definition of Level B harassment and that recommended by the Administration, the proposal in H.R. 2693 contains a list of behaviors that, if disrupted to the extent specified, would constitute harassment. We are concerned, however, that the list of specifically identified behaviors in the House bill does not include sheltering, which is an element of both the existing definition and the Administration’s proposal. For example, the resting behavior of spinner dolphins in Hawaii, in secluded, inshore areas clearly fits within the notion of sheltering. It is not as clear that such behavior would be encompassed by the terms “care of young, predator avoidance, or defense,” which are the closest associated terms under the proposed harassment definition in H.R. 2693. Further in this regard, we note that the terms “care of young,” “predator avoidance,” and “defense” included in the proposed definition of Level B harassment are not very precise terms. Absent clarification, their inclusion in the definition may lead to implementation difficulties and, perhaps litigation.

We are also concerned about the “potential to disturb” threshold set forth in the second clause of the proposed harassment definition. The agencies that developed the Administration’s proposed definition rejected this language as being overly broad, inasmuch as it would include even a very remote possibility that disturbance might occur. We believe that the standard included in the Administration proposal, “disturbs or is likely to disturb,” provides a more appropriate delimitation concerning what activities should be covered under this part of the harassment definition.

The Commission is pleased that the Committee has recognized the value of including a directed taking provision in the definition of Level B harassment, as recommended by the Administration. Absent this second prong, it would be much more difficult, if not impossible, for the regulatory agencies to bring enforcement cases in response to activities that traditionally have been considered harassment. Even in a case when a marine mammal had been intentionally pursued, the government, to prevail, would need to show not only that the animal was disturbed by the pursuit, but that the resulting disruption was somehow “biologically significant.” For example, is the disturbance that results from chasing a dolphin along a beach for a few hundred yards with a jet ski biologically significant? Arguably not. Nevertheless, it should be considered harassment.

We are concerned, however, about the inclusion of the phrase “is likely to impact the individual” in this second part of the Level B harassment definition (clause iii). It raises a possible defense in a traditional harassment case that, even though a marine mammal was clearly disturbed by the directed activities of the defendant, the disturbance somehow did not have any impact on the health or well-being of the animal. It may be that the intent of the provision is to include all directed activities that are likely to disrupt one of the listed marine mammal behaviors. If this is the case, it should be clarified, either in the statutory language or the accompanying legislative report.

Section 14 - Incidental Takings of Marine Mammals

The first three parts of the section parallel amendments to section 101(a)(5) of the Act proposed by the Administration in the context of the Department of Defense's Readiness and Range Preservation Initiative. They address the so-called "small numbers" and "specified geographical region" limitations of those incidental taking provisions. Recognizing that any incidental taking authorizations issued under section 101(a)(5) would still require a negligible impact determination, the Commission has no objection to these amendments.

The fourth paragraph of this section introduces a new element to section 101(a)(5) -- a general authorization for certain activities that will have a negligible impact on the affected marine mammal stocks. The Commission supports the idea of including a general authorization provision for certain types of activities that have low-level impacts on marine mammals that do not merit the more rigorous authorization processes established under section 101(a)(5)(A) and (D). We are concerned, however, that the proposed general authorization included in H.R. 2693 is overly broad and apparently would include all activities that currently receive authorizations under the existing provision (*i.e.*, those determined to have a negligible impact).

Before we can comment further, additional description of the proposal is needed. For example, how would the general authorization relate to the existing authorization provisions? Existing section 101(a)(5)(A), which requires the issuance of regulations, allows for the authorization of all types of incidental taking (including mortalities), provided that a negligible impact finding is made and certain other requirements are met. Section 101(a)(5)(D) provides a streamlined, notice-and-comment procedure for takings by harassment. It would follow that a general authorization would apply to some further subset of activities, such as those that involve taking only by Level B harassment, or those that so clearly meet the negligible impact requirement that a more involved authorization process is not warranted. If this is the intention of the provision, we do not think that it is reflected in the language of the bill. Even if the provision were limited to takings by Level B harassment, we may have concerns about using a truncated authorization procedure, inasmuch as the proposed redefinition of that term under section 13 of the bill, would include only biologically significant disruptions of marine mammal activities. That is, there would no longer be a *de minimus* aspect to Level B harassment that would warrant a general authorization of all such activities.

We are also concerned with the extent of the information that those seeking coverage under the general authorization would be required to submit. For instance, there is no requirement that the "applicant" provide a description of the activities that will be conducted. Without such information, it is not clear how the Services can determine whether the activities fit within the scope of the general authorization.

Depending on what activities and levels of taking would be included under the general authorization, we also may have concerns about the anticipated public involvement in the authorization process. Currently, all incidental take authorizations under section 101(a)(5) are subject to substantial public notice and review requirements. Although the public apparently would have such opportunities at the stage where the general authorization and implementing regulations are issued, no similar opportunity appears to be provided for determinations as to whether specific activities fit within the scope of the general authorization. This could be a major shortcoming of the

proposal if negligible impact determinations will be deferred until specific activities are reviewed at this later stage.

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The issues not addressed in H.R. 2693 that we believe merit consideration by the Committee as it considers reauthorization of the Marine Mammal Protection Act are, by and large, those included in the Administration bill transmitted to Congress earlier this year. A brief summary of those provisions follows.

As previously discussed before this Committee, we and others believe that there is a need to expand the existing authority of section 119 of the Act to enable the National Marine Fisheries Service and the Fish and Wildlife Service to enter into cooperative harvest management agreements with Alaska Native tribes and Native organizations authorized by those tribes. The Commission believes that such a provision, if carefully crafted, would help guarantee that conservation measures, when necessary, can be implemented before a marine mammal population has been reduced to a point where it is depleted. We note that such a provision, although generally supported by diverse constituencies, 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.

In addition to the proposal to expand the section 118 incidental taking regime to include some non-commercial fisheries, which has been adopted in H.R. 2693, we believe that certain other clarifying amendments to this section are in order. 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 proposed by the Administration 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.

The draft bill has picked up on some, but not all, of the permit-related issues highlighted by the Commission and others 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. Further, we believe that sections 101(a)(1) and 104 of the Act need to be amended to specify that export permits can be issued directly to foreign facilities.

We also are concerned that the current system for authorizing exports of marine mammals to foreign facilities does not work particularly well. We believe, as we recommended in a 3 April 2002 letter commenting on the National Marine Fisheries Service's proposed public display permit regulations, that it would be useful if Congress and the interested parties reviewed the current system to identify whether there are better ways to 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 that realistically reflect 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.

There is also a need to review the issue of exports in contexts other than permits and cultural exchanges. For example, the Act's waiver provisions under section 103 do not specifically provide for the authorization of exports. Likewise, section 101(b) of the Act, which relates to taking by Alaska Natives, authorizes the manufacture and sale of traditional handicrafts, but does not specifically authorize exports of such items.

On a related point, we continue to believe that there is a need to revise section 102(a)(4) of the Act, which, as amended in 1994, reinstated an once-jettisoned impediment to effective enforcement of the Act. That section requires the government, in an enforcement proceeding under the provision, to show not only that the transport, purchase, sale, or export of a marine mammal or marine mammal product was unauthorized, but also that the taking underlying such actions was in violation of the Act. This problem had previously been recognized and rectified by Congress in 1981. The Commission urges the Committee to remedy this problem once again.

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 circumstances 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 review 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.

As noted above, section 405 of the Act allows appropriations to be placed in the Marine Mammal Unusual Mortality Event Fund only if specifically earmarked for use with respect to unusual mortality events. Thus, funds generally appropriated to the National Marine Fisheries Service for implementing the Marine Mammal Protection Act may not be used for such purposes, even in years when a large number of unusual mortality events might occur. The Commission recommends that greater flexibility be provided in how unusual mortality responses can be funded.

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.

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The Commission appreciates the inclusion in our FY 2003 budget of an appropriation to conduct "...an international conference, or series of conferences, to share findings, survey acoustic 'threats' to marine mammals and develop means of reducing those threats while maintaining the oceans as a global highway of international commerce." Since the appropriation passed in March, we have been busily working on this important project.

We have met with Senate and House to solicit their advice and to clarify the intent behind the legislative directive. We have also met with a wide range of affected interests such as the oil and gas industry, oceanographers from major research institutions, the environmental community, and Federal agencies including the National Science Foundation, the Minerals Management Service, the Navy (both its operations and research components), the National Marine Fisheries Service, the Coast Guard, and the State Department. From these meetings, we developed a good understanding of potential environmental threats that might be caused by sound in the oceans and how to produce a series of reports to address research priorities and appropriate mitigation measures. We hope the reports will be useful to Congress, federal agencies, and the public.

We plan to hold a series of policy dialogues in which various interests will participate. We entered into an agreement with the U.S. Institute for Environmental Conflict Resolution (also known as the Udall Center) in Tucson, Arizona, to assist us with the dialogues. We are about to select a team of professional facilitators to help with the dialogues. We are exploring whether there will be a need to charter the group holding the dialogues as a federal advisory committee under the Federal Advisory Committee Act. We will hold the first meeting of the group as soon as possible,

probably early in 2004.

We appreciate the Committee staff's help in discussing this project as it has evolved. We will remain in contact with them as we progress.

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This concludes my testimony. The Commission appreciates the opportunity to provide testimony to the Committee on H.R. 2693, and to update you on our progress in convening the conferences called for under the Commission's FY 2003 appropriation. I would be pleased to try to answer any questions that you may have.