

Testimony of John E. Reynolds, III
Chairman of the Marine Mammal Commission
Before the House Subcommittee on Fisheries, Wildlife, and Oceans
2 August 2007

Madam Chairwoman and members of the Subcommittee, thank you for inviting the Marine Mammal Commission to testify on H.R. 1769, a bill to amend the Marine Mammal Protection Act of 1972 to reduce predation on endangered Columbia River salmon, and, more generally, on the issue of conflicts between growing pinniped populations and dwindling salmon stocks on the West Coast.

The primary objective of the Marine Mammal Protection Act (MMPA) is to maintain the health and stability of the marine ecosystem. The Commission considers actions to recover and conserve endangered and threatened salmonid stocks in the Columbia River as furthering that objective. We strongly endorse the goal reflected in H.R. 1769 of restoring healthy salmon and steelhead runs in the Columbia River.

Although the MMPA establishes broad protections for marine mammals, those protections are not absolute, and marine mammals may be taken in a variety of instances and for a variety of purposes. Consistent with the Act's primary objective of maintaining a healthy and stable marine ecosystem, it is clear that Congress did not intend that the well-being of marine mammals would automatically take precedence over other elements of the ecosystem, particularly when other species are at risk of extinction. Regrettably, lethal removal of some marine mammals from the Columbia River ecosystem may be necessary to protect several stocks of salmonids that are at risk of extinction and that are the focus of a comprehensive conservation program already attempting to address matters relating to habitat, hydropower, hatcheries, and harvest.

The procedures and measures to address such situations can be administratively and ecologically complex and confounded by uncertainty. While different solutions may be needed in different circumstances, the Commission believes our conservation objectives will be best served if we act in accordance with several general principles. Those principles include that the responsible parties (a) be able to act quickly to minimize the impact to the fish stocks; (b) act carefully and thoughtfully to ensure that remedial or mitigation actions do not result in additional problems; (c) respond to these situations comprehensively to ensure that other known and suspected causes of reductions in fish stocks or impediments to their recovery are being addressed suitably and that the lethal takes of pinnipeds do, in fact, contribute meaningfully to the conservation of the fish stocks; and (d) remove only the minimum number of pinnipeds necessary to adequately protect the fish stocks. These principles will be applied in the face of uncertainty, and agencies should follow principles of sound wildlife management and precaution to address such uncertainties.

Prior to 1994, the only way that intentional lethal taking of pinnipeds could be authorized to protect salmonid stocks was through the MMPA's waiver process. This process remains available to those who believe that the problems associated with increasing pinniped populations are broader than the salmonid predation issue and

warrant a broader solution. However, it involves formal rulemaking and is administratively cumbersome and time-consuming. In the case of authorizing the take of pinnipeds to protect salmon at the Bonneville Dam, the process likely would be too slow to provide a suitable remedy.

The 1994 amendments to the MMPA added section 120, which enables the Secretary of Commerce to authorize the lethal removal of non-depleted pinnipeds that are having a significant negative impact on the decline or recovery of salmonid fishery stocks listed under the Endangered Species Act or approaching threatened or endangered status. Only states may apply for this intentional lethal taking authority, although they may use qualified contractors or rely on federal officials to carry out the taking. The Secretary's determination is to be based on recommendations from a task force composed of agency employees, knowledgeable scientists, representatives of affected conservation and fishing organizations, Indian Treaty Tribes, the states, and other appropriate organizations. Among other things, the task force is to recommend to the Secretary whether non-lethal alternatives to the proposed removals are available and practicable. Only individually identifiable pinnipeds that are contributing to the predation problem are subject to removal. The process set forth in section 120 has been used in only one other instance, when the state of Washington applied for authority to remove California sea lions at Chittenden (Ballard) Locks in Seattle.

The bill under consideration today, H.R. 1769, is premised on the belief that the available mechanism for authorizing the lethal removal of pinnipeds in the Columbia River is too protracted and cannot be accomplished in a timely enough manner to protect threatened and endangered salmonids in the near term (see section 2(11) of the bill). The Commission agrees with the principle of timely response but believes that in the Bonneville case, the section 120 process will be completed in time to determine whether and the extent to which lethal removal authority is warranted before the salmon runs of concern begin in 2008. That being said, the Commission would be pleased to participate in discussions regarding ways to improve section 120 to make it as effective as possible. To facilitate such a discussion, we provide the following detailed comments. However, we believe that a much more informed discussion can take place if we wait a few more months so that the Pinniped-Fishery Interaction Task Force being formed by the National Marine Fisheries Service will have had a chance to act on the section 120 application from Washington, Oregon, and Idaho, and we can see if the process has been effective and should be better able to identify any deficiencies.

Section 120 of the MMPA sets forth explicit timing requirements that are intended to ensure a timely response. Once a state applies for authority to take pinnipeds lethally under this provision, the Secretary has 15 days in which to make a determination as to whether the application presents sufficient evidence to warrant establishing a Pinniped-Fishery Interaction Task Force to address the situation. If an affirmative finding is made, the Secretary is to establish the task force and publish notice in the *Federal Register* inviting public comment on the application. Although no specific time frame is set forth in the statute, a reasonable interpretation is that the process should proceed expeditiously and that it should take no longer than is necessary to identify task force

members, draft and publish the required notice, and provide for public comment. Depending on how they are sequenced, it should be possible to complete these steps in 60 to 90 days, allowing for a 30-day public comment period.

To facilitate a timely response, the task force is required under section 120(c)(3) to provide its recommendations to the Secretary within 60 days of its establishment. The task force also is required to review the public comments received on the application as part of its deliberations. Although the Service is not required to defer convening the task force until the public comment period has closed, the task force must consider those comments before it submits its recommendations, and it may be prudent to wait to convene the task force until after the comments are in hand. The Secretary has 30 days from receipt of the task force recommendations to approve or deny the application.

Under the statutorily mandated schedule, it should be possible to complete the process, from receipt of an application to final action, within six months. In fact, this is precisely what the National Marine Fisheries Service was able to do in the Ballard Locks case. In that instance, the Service received an application from Washington on 12 July 1994, made its initial determination and published a *Federal Register* notice seeking public comment on 2 August, convened the first meeting of the task force on 30 September, held subsequent meetings of the task force in October and November, and received recommendations from the task force on 22 November. A minority report from a subset of task force members was provided to the Service on 5 December. Although not specifically required under section 120, the Service sought the views of the Marine Mammal Commission on the recommendations and reports submitted by the task force, which were provided by the Commission in a 19 December letter. Subject to certain findings and conditions, the Service issued lethal removal authority to the state of Washington on 4 January 1995. The timing of the fish run of concern provided an impetus to complete the process by the beginning of the year.

In the present case, Washington, Oregon, and Idaho are seeking lethal removal authority for California sea lions in the Columbia River. The sponsors of H.R. 1769 have concluded that the process under section 120 of the MMPA is too protracted to protect the salmonid stocks of concern. Although the process for establishing the task force has been slower than in the Ballard Locks case, the Service has acted responsibly in proceeding as it has. The Service received the application from the states on 5 December 2006. Publication of the initial finding and a request for public comments on the application occurred on 30 January 2007. The notice provided a 60-day comment period, rather than the 30-day comment period used in the Ballard Locks case. In contrast to the process followed in the Ballard Locks case, the Service solicited recommendations for potential task force members as part of the public review process, thereby adding some delay to the establishment of the task force. The comment period closed on 2 April 2007, the Service has appointed members to the task force, and its first meeting is scheduled during the first week of September. The applicants are seeking authority to remove pinnipeds between January 1 and June 30, and the information provided with the application indicates that by the end of May virtually all sea lions have left the area around Bonneville Dam, where most of the predation reportedly occurs. Thus, even had

the Service acted more quickly, it was unlikely to have concluded the review process much before the period when lethal taking authority might have been useful in 2007. By scheduling the first task force meeting just after Labor Day, the Service should be on track to finish its review and, if warranted, issue a taking authorization before the end of the year, thereby meeting the time frame (January 1–June 30) requested by the applicants for lethal removals.

As the focus of this hearing is H.R. 1769, I do not intend to discuss the application submitted by Washington, Oregon, and Idaho under section 120 except as it may pertain to that legislation. The Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, provided comments on the application to the Service by letter of 2 April 2007. If you would like, I would be pleased to provide a copy of the Commission's comments and recommendations for the record of this hearing. I will say, however, that I believe that section 120 provides a suitably expeditious and precautionary process for authorizing the removal of problem pinnipeds in the Columbia River and that the conservation of Columbia River salmonids should not be compromised if we let that process play out rather than taking pre-emptive steps to enact site-specific legislation along the lines of H.R. 1769. In view of the fact that the process is well under way and the task force should have completed its review and formulated its recommendations by the end of 2007, we believe we have an important opportunity to learn about the efficacy of the existing section 120 process. We would expect that if important shortcomings become apparent, then all involved parties would be interested in discussing possible solutions to improve the process.

To facilitate future discussions on how section 120 might be amended to improve its effectiveness, I will now turn my attention to some of the Commission's specific concerns with the provisions of H.R. 1769, beginning with procedural issues. Chief among these is the threshold determination that would be made by the Secretary under proposed section 120(k)(1)(A). The Secretary would be required, within 90 days of enactment of the legislation, to determine whether "alternative measures to reduce sea lion predation of salmonid stocks in the waters of the Columbia River or its tributaries listed as threatened or endangered under the Endangered Species Act...adequately protect the salmonids from California sea lion predation." As this provision is drafted, we interpret it to require the Secretary to assess the effectiveness of *all* alternative measures, including those available under the existing provisions of section 120. We believe that looking at the existing process as one of the alternatives is appropriate to ensure that lethal taking is, in fact, necessary and that an expedited procedure is needed. If limited to a 90-day review, the Secretary may be unable to make an informed judgment because it may not yet be apparent what measures are likely to be adopted under section 120 or how effective they are likely to be until the task force has completed its work. Furthermore, under existing section 120(c)(5), the task force process is an ongoing, iterative one. The task force is directed to evaluate the effectiveness of any authorized lethal taking or alternative actions and, if it believes that the measures have been ineffective, it shall recommend additional actions to eliminate the predation problem. As such, any assessment of the effectiveness of alternative measures available under the existing provisions of section 120, particularly early in the process, could be highly speculative.

If, on the other hand, Congress does not expect the Secretary to consider the existing section 120 process as one of the possible alternative measures, this should be clarified in the legislation.

Presumably, the authors of H.R. 1769 do not believe that the section 120 process is sufficient or they would not be proposing this bill. However, if decision-makers are required to stay within the 90-day limit for making the determination proposed in H.R. 1769, they may be unintentionally predisposed to reach a pre-ordained or possibly unsupported result, one that could increase the likelihood of an error in judgment and possibly result in litigation, causing unnecessary delay to an already difficult management challenge. If Congress believes that the alternative process currently available under section 120 of the MMPA does not adequately protect salmonids in the Columbia River from predation by sea lions, this should also be reflected in the legislation, rather than tasking the Secretary with making an unnecessarily hurried determination without the benefit of all relevant information and perspectives.

The Commission also questions some of the intricacies of the authorization process proposed in H.R. 1769. The bill provides considerable detail concerning who may apply for lethal taking authority, to whom that authority may be delegated, how many permits each eligible entity may obtain, how many sea lions may be killed under each permit, how often those permits may be used, how long a permit remains valid, etc. When one multiplies out the variables, it is possible that authority could be granted to kill hundreds of sea lions a year and up to 60 animals in any 14-day period. However, these numbers are misleading because proposed section 120(k)(4)(B) caps annual removals at one percent of the stock's potential biological removal level. The potential biological removal level for California sea lions is currently 8,333, so the annual taking limit would be 83 animals. As such, it is not clear why each of the six eligible entities would need an unlimited number of permits if a total of nine (authorizing up to 90 total lethal takings) would more than allow the permitted removals.

Similarly, it is not clear whether the delegation of permit authority under proposed section 120(k)(5) merely provides an available alternative for carrying out the authorized removals, or whether Congress expects permit holders to delegate their authority to the identified Commissions. If the former, it is possible that eight different entities could be removing sea lions at any given time, creating concerns about coordination and presenting the possibility that, unless a real-time accounting and reporting system is established, the annual limit on removals could be exceeded. If the latter, it is unclear why six separate entities would need to be able to secure authorizations if they will essentially be funneled to two other organizations to implement.

We also note that the lethal removal authority that would be created under H.R. 1769 is intended to be temporary—it would expire five years after enactment. When one reads findings (11) and (12) in section 2 of the bill in conjunction with one another, it appears that the authors of the bill believe that the basic problem with the existing section 120 process is that it cannot be implemented quickly enough and that an alternative

procedure is needed on an expedited, but temporary basis. As explained above, we do not agree that the existing process is inherently too slow to be responsive to such situations. Furthermore, it appears that the ongoing review of the application from Washington, Oregon, and Idaho will be completed in time to have lethal taking authority in place by the time the applicants have requested (i.e., when the 2008 fish runs begin), if it is determined to be warranted. Also, if the intent behind H.R. 1769 is to provide an expedited alternative as an interim measure, it is not clear why this is needed for five years. Surely, even under the worst of circumstances, the existing process could be completed well before then.

Under the existing section 120 process, a key substantive finding to be made is whether pinnipeds are having a significant negative impact on the decline or recovery of the salmonid stocks of concern. This provision is not carried over into H.R. 1769. Rather, it seems to be taken as a given in the proposed legislation. The Commission believes that this is an important finding and that all of the factors impeding recovery of the stocks, as well as all of the actions to bring about recovery of the stocks, should be considered. As recognized in section 2(5) of H.R. 1769, predation by sea lions is but one of the factors impacting salmonid populations in the Columbia River. While it is clear in this case that considerable effort has been expended to protect these fish stocks from other risk factors, we believe that it is necessary to consider all the available information to make informed judgments about risks posed by pinniped predation and measures to protect the fish stocks. That is, it is worth assessing how significant predation is when compared to those other factors and considering additional actions that would address those that present equivalent or greater threats to salmonids as part of the legislation. This is exactly what would be done by the task force established under section 120. We recognize that efforts are being made to address other factors in this case, but it is conceivable that in other situations considerable numbers of sea lions could be killed with virtually no benefit to the fish stocks. Such a situation would neither promote recovery of the fish stocks nor facilitate the ecosystem restoration being sought.

It also seems that both this legislation and the application from the three states assume that any salmonids taken by sea lions in the Columbia River system are from one of the threatened or endangered stocks. This may be the case, but if possible it should be substantiated with sufficient, suitable information. In this regard, we call your attention to a statement made on page 14 of the states' application that fishery strategies have been adopted to target healthy populations and hatchery fish while minimizing or avoiding incidental impacts to listed natural populations. The applicants indicate that winter and spring sport and commercial fisheries below Bonneville Dam are selective for marked hatchery fish and must release wild fish unharmed. While sea lions cannot be expected to be similarly selective, these statements suggest that hatchery-produced fish and fish from healthy populations are present in the Columbia River coincident with observed sea lion predation and may account for some portion of the reported predation. The Commission believes that this is an issue that the Committee should seek to resolve and factor in as it considers the proposed legislation.

The Commission agrees that any new legislation should be structured to ensure that removals are limited to the minimum number of individuals necessary to address the predation problem. We call your attention to the findings of a report on pinniped predation in the Bonneville Dam Tailrace between 2000 and 2004 published by the Army Corps of Engineers. That report, by Robert J. Stansell, states that “[m]ore than 50% of the individuals appear to take two or less salmon each season...” and concluded that “it is evident that a few individuals account for the majority of the fish caught.” Such observations surely are relevant to the development of measures consistent with the principles of protecting fish stocks while avoiding unnecessary lethal removals.

One of the safeguards included in the existing provisions of section 120 is that only individual pinnipeds identified as feeding on listed salmonids are targeted for lethal removal. We are aware that NMFS has concerns about the implementation of this requirement. We wonder what type of documentation the Committee expects permit holders to develop in this regard and how temporally or spatially related the observation of predation should be to the removal. For instance, would removal be authorized for a sea lion seen preying on a salmonid in a previous year or in a part of the river where predation is not considered to be a significant problem? It would be helpful if such issues were addressed in the legislative history of the bill.

On a more specific issue, the Commission does not know the source of the abundance figure of “greater than 300,000” for California sea lions included in the bill and believes that this number is an overestimate of their actual abundance. The Commission believes that the stock assessment report prepared by the National Marine Fisheries Service under section 117 of the MMPA reflects the best available scientific information concerning the size of the stock. The draft stock assessment made available by the Service for comment in May 2007 estimates the abundance of California sea lions at 238,000. In the absence of better information, we believe this is a more appropriate figure to use.

In conclusion, the Commission supports the special attention being given by this Subcommittee to fish conservation in the Columbia River including the possibility of selective removal of sea lions that are contributing to the problem. However, we do not believe that H.R. 1769 provides a sufficiently robust process for this purpose. If in the following year we learn of shortcomings in the ongoing section 120 process, then the Commission would be pleased to participate in further discussions to address those shortcomings. At present, review and consideration of the application seeking pinniped removal authority submitted by Washington, Oregon, and Idaho is far enough along that the Commission believes that process should be concluded before Congress acts on alternative legislation. We remain open to further discussions.