MARINE MAMMAL COMMISSION
4340 EAST-WEST HIGHWAY, ROOM 905
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16 March 2007

The Honorable Robert J. Portman
Director, Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Portman:

Thank you for providing the Marine Mammal Commission with an opportunity to comment on the Commerce Department's proposed bill to reauthorize and amend the Marine Mammal Protection Act (MMPA). Several additions to and changes from the previous versions of the Administration bill transmitted to Congress are being proposed. Unlike with the earlier efforts, the Department of Commerce (DOC) did not engage the other agencies responsible for administering the Act (e.g., the Fish and Wildlife Service [FWS] and the Commission) and those with related interests (e.g., the Animal and Plant Health Inspection Service [APHIS], and the Department of Justice) in discussions of these proposed changes. As a result, we have several concerns and questions regarding the DOC bill, some of which presumably could have been addressed through interagency consultations.

The Commission has tried to be thorough in its review but has focused primarily on the proposed amendments themselves, rather than on the accompanying documents that will need to be revised to conform to what ultimately is included in the Administration bill. We note, however, that some portions of the sectional analysis and the description of proposed major amendments do not accurately describe what is being proposed so further work on these documents will be needed in any case. To provide a context for our comments that helps to explain our concerns, we have chosen to annotate the redline version of the Marine Mammal Protection Act prepared by DOC, which shows how the Act would be changed under the proposed bill. Although the text of the bill and the redline version of the Act are not completely consistent, we have been told that the changes noted in the redline version of the Act best reflect the DOC proposals. Our suggested revisions and comments are noted with track changes (they should appear in blue), with comments being offset by brackets.

We have questions, concerns, and drafting suggestions regarding many of the new proposals but have major substantive problems with six of the proposed amendments. These are discussed in the order that they appear in the Act. The applicable provisions of the bill are indicated with yellow highlighting in the attached redline version of the Act.

1. Proposal to amend section 102(a)(2) to exempt taking and other activities pursuant to treaties between the United States and one or more Indian tribes.

This proposed amendment was prompted largely by the Ninth Circuit Court of Appeals ruling in *Anderson* v. *Evans*, which found that, notwithstanding the Makah Tribe's treaty that reserved whaling and sealing rights, the tribe's hunt of gray whales still required authorization under the MMPA. This does not mean that the whaling cannot occur—only that it be subject to rulemaking under section 103 of the MMPA and authorization under a permit, provided that the required

findings have been made. In fact, more than two years ago the Makah Tribe applied for a waiver seeking authorization of its whaling, a process that is still pending.

We have several concerns with the DOC proposal. Among other things, it represents a generic solution to what appears to be a somewhat specific problem. If the primary concern is to eliminate the need for the ongoing authorization process for Makah whaling, a much more focused amendment could accomplish this without opening up the possibility that other tribes might be prompted by the amendment to seek to resume long-dormant hunting of marine mammals.

Although the treaty with the Makah Tribe is the only one that specifically reserves whaling rights, several other treaties reserve customary hunting rights for the covered tribes, some of which include, or could be interpreted as including, rights to hunt marine mammals. Thus, before the Administration moves forward with a broad amendment applicable to all treaties between the United States and Indian tribes, we need to know the full extent of potential coverage. We have asked the staff of the National Marine Fisheries Service (NMFS) for such an analysis and have received only vague assurances that they do not believe many tribes would be affected. This is not adequate. What is needed is a comprehensive review of all treaties that could be covered under the proposed amendment to determine which ones might conceivably allow the hunting of marine mammals. Only if we have a thorough understanding of what tribes are potentially involved, where they would be allowed to hunt, and what species of marine mammal they historically or customarily hunted, can we assess the potential impact of the proposed amendment. For example, if the proposed amendment were enacted, could tribes in Florida begin hunting manatees?

There also needs to be a common understanding as to what tribe members could do with the marine mammals they take and what activities other than hunting would be covered under the proposed amendment. Under the provisions applicable to Alaska Natives, the purposes for which they may take marine mammals and the allowable uses are clearly delineated. In sharp contrast, no such bounds are drawn under the proposed amendment. Could the Makah Tribe, for instance, take sea otters along the coast of Washington and sell the pelts or have them converted into coats for sale? Also, would there be any limits on the extent of taking allowed? For Alaska Natives, the MMPA specifies that taking may not be accomplished in a wasteful manner and, for depleted marine mammal species and stocks, provides a mechanism for the agencies to regulate taking. Would not similar limitations be appropriate for treaty tribes?

Any such amendment should also seek to clarify the interplay between any hunting pursuant to an Indian treaty and the international obligations of the United States (e.g., compliance with the International Convention on the Regulation of Whaling). Although the Makah Tribe was willing to allow the United States to obtain a gray whale quota from the International Whaling Commission (IWC) on its behalf, it has consistently contended that it has a right to whale absent any such authorization. This is not a pressing issue as long as whaling by the Makah Tribe (or any other tribe that might assert whaling rights under the proposed amendment) is accommodated within the IWC Schedule. However, there is no guarantee that the IWC will continue to approve Makah whaling, particularly in the prevailing atmosphere where pro-whaling parties are exploring ways to put the

United States in a position where it will either have to forego subsistence whaling opportunities or allow whaling in contravention of the IWC Schedule.

2. Proposal to expand the general authorization under section 104(c)(3) to allow research on marine mammals from non-strategic stocks without a permit, provided that there is no intentional lethal taking.

Currently, only taking by Level B harassment is covered by the general authorization. Thus, it is limited to relatively benign activities such as aerial and vessel surveys, photo-identification studies, and behavioral observations. And, even for these activities, a permit is required when marine mammals listed as endangered or threatened would be taken.

The amendments being proposed by DOC would make sweeping changes to the existing general authorization. Although the proposed authorization would apply only to non-strategic stocks, all types of taking, up to and including killing animals, would be authorized, provided that any lethal taking was not intentional (i.e., animals were not intentionally killed to collect samples, acquire data, etc.). Most types of invasive research, including capturing and restraining animals, branding, tagging, taking tissue samples, the implantation of medical and research devices into animals and other surgical procedures, the use of untested and experimental techniques, and even the captive maintenance of animals at research facilities would be allowed under the proposed general authorization.

As noted above, the proposed general authorization would apply only to non-strategic stocks of marine mammals. However, this includes the majority of marine mammal stocks (114 of 155) identified by NMFS as occurring in U.S. waters. Several of these are high-profile species that will surely garner a groundswell of opposition to any proposal to eliminate the procedural safeguards and substantive requirements provided under the permitting process. It would include, for instance, gray whales and seven other stocks of baleen whales, eight of nine stocks of killer whales, all but one of five stocks of beluga whales, six of nine stocks of bottlenose dolphins, most other small cetaceans, several stocks of beaked whales, and all pinnipeds other than the five species/stocks listed under the Endangered Species Act (ESA) or designated as depleted under the MMPA. One need only consider the history of permit-related litigation under the MMPA to gain an appreciation of how much the public cares about some of these species.

Unlike permits, determinations made under the general authorization are not subject to prior review by the Marine Mammal Commission or the public. Also, it does not appear that prior review by APHIS is anticipated when the proposed research would involve captive maintenance of marine mammals. Even the scope of the review that would be accorded to NMFS and FWS seems to be limited to a yes or no determination as to whether the general authorization applies. Although the DOC proposal to add the term "authorization" to section 104(b) suggests that the Services would continue to make humaneness determinations and could impose conditions on activities to be conducted under the general authorization, the process set forth in section 104(c)(3)(C) does not seem to provide a mechanism for doing so.

Although perhaps unintended, another possible consequence of the proposed general authorization is that it could create a *de facto* exemption from the National Environmental Policy Act (NEPA) for such authorizations and for activities carried out under the general authorization. This concern is based on the ruling in *Jones* v. *Gordon*, in which the Ninth Circuit Court of Appeals determined that the timing requirements of the MMPA permit process and NEPA could be reconciled by deferring publication of a notice in the *Federal Register*, which starts the clock for completing the review of an application. In this instance, the clock starts upon submission of a letter of intent and the agency has only 30 days in which to make its determination. We believe it highly likely that a reviewing court, applying the ruling in *Jones*, would find that that NEPA does not apply to general authorizations. This is fine as long as the general authorization is confined to Level B harassment, but if it is expanded to include invasive procedures that may result in accidental deaths of animals, such an exemption is unwarranted.

In summary, the Administration should not be promoting expansion of the general authorization to allow invasive research on most species and stocks of marine mammals, including a large number of whales and dolphins, with no opportunity for public review and comment, with limited or no authority for placing conditions on the proposed research as long as it does not involve intentional lethal taking, and arguably without review under NEPA.

3. Proposal under 16 U.S.C. § 1385 to allow the Secretary to revisit the finding on the effects of chase and encirclement in the eastern tropical Pacific tuna fishery on dolphin stocks based on "additional information."

On its face, this proposal seems reasonable. If the Secretary obtains substantial new information relevant to the finding on the effects of chase and encirclement on dolphins, the agency should be able to review its earlier finding to consider the new information. However, the proposed amendment is much too open-ended. Given the history of this issue, any proposed amendment that does not specify the questions to be resolved, the research needed to develop the additional information, and the standards that would be used to make a revised finding is likely to fall on deaf ears in Congress.

The perception among several key legislators, much of the public, and, most importantly, the courts that would likely be asked to review any new finding, is that NMFS has tried to skew its analyses of the available information to support a particular conclusion. As the district court judge who reviewed the 2002 finding stated in his opinion—

> …this Court has never, in its 24 years, reviewed a record of agency action that contained such a compelling portrait of political meddling. This portrait is chronicled in documents which show that both Mexico and the United States Department of State ("DOS") engaged in a persistent effort to influence both the process and the ultimate finding, and that high ranking-officials in the Department of Commerce were willing to heed these influences notwithstanding the scientific evidence to the contrary.

A much tighter proposal that, among other things, would require the agency to collect biologically and statistically meaningful information (including completion of the remaining research called for under the 1997 amendments) likely would get a much better reception from Congress.

4. Proposal to give the Secretary complete discretion to determine what non-commercial fisheries would be included in the section 118 incidental-take regime.

The version of the Administration bill sent to Congress in 2005 contained a similar proposal to expand coverage of the fisheries incidental-take regime to include certain non-commercial fisheries that, because of their nature or the gear they use, have more than a remote likelihood of killing or seriously injuring marine mammals. This would have been accomplished by having NMFS identify those non-commercial fisheries that result in frequent or occasional incidental mortality or serious injury of marine mammals and including those fisheries on the list published under section 118(c).

The new DOC proposal backs away from the earlier proposal in two important ways. First, for unexplained reasons, the new proposal seems to limit the expansion of section 118 to "recreational fisheries." The interagency group that developed the earlier Administration bills had considered and rejected the use of this term as too limiting because it arguably did not include all fisheries of potential concern, such as subsistence fisheries, which are neither commercial nor recreational.

Second, whereas the earlier bill had well-defined criteria for identifying non-commercial fisheries that warranted coverage under the incidental-take regime (i.e., those that qualify for listing as category I or II fisheries), the new proposal lacks any such criteria. It is important that the bill specify the standards that would be used to identify the fisheries that would be included under the regime and that those standards be tied to achieving the conservation goals of the Act.

Based on our informal discussions with NMFS staff, it appears that the proposed changes were prompted by a concern that some non-commercial fisheries that could merit listing as category I or II fisheries may not be amenable to management under section 118. The example given was the hook and line fisheries in Hawaii, which are known to cause some serious injuries and deaths of Hawaiian monk seals. These fisheries are not regulated or licensed by the State of Hawaii and involve tourists as well as local fishermen. NMFS did not see how it could manage a system that required all such fishermen to register and abide by the terms of a take reduction plan, which it presumably would be required to develop.

Although we appreciate the practical difficulties, we do not agree that such fishery interaction problems should be ignored simply because they present challenges. This is particularly true where the fishing activities are killing an endangered species such as the Hawaiian monk seal with sufficient frequency to merit listing as a category I or II fishery. As an alternative to requiring every fisherman who lives in or passes through Hawaii to register, or seeking to compel Hawaii to establish a licensing requirement that could be used identify the participants, NMFS could work with

the state to develop and require the use of alternative gear that is less likely to become imbedded in and injure monk seals, and/or establish time and area closures in areas used by monk seals. Through such measures, it should be possible to reduce take levels to a point where these fisheries would not qualify for listing under category I or II and therefore would not be subject to the incidental-take regime. In essence, the take reduction process that would be required under section 118(f) could be taken preemptively (pro-actively) to avoid having to list the fisheries in the first place.

We also note that DOC does not seem to have made changes in the sectional analysis to reflect the proposed changes in the bill. The description in the analysis sounds much better than what is being proposed because it is based on the 2005, rather than the 2007, proposal.

In light of recent interagency discussions on the proposed National Offshore Aquaculture Act about how aquaculture operations should be treated for purposes of MMPA section 118, the Commission believes that additional amendments are needed to address this issue. Currently, aquaculture operations are considered commercial fishing operations by NMFS and therefore they are covered by the incidental-take regime under section 118. However, that provision only addresses mortalities and serious injuries. It does not address sub-lethal effects on marine mammals and marine mammal populations, such as those from sounds produced by acoustic harassment devices used at aquaculture facilities. Clarification as to what "fisheries" are included under section 118 could be accomplished by changing the existing definition of the term "fishery," revising the proposed definition of the term "listed fishery," or amending section 118 itself (e.g., in section 118(a) or (c)).

5. Proposal to expand the lethal taking authority under section 120.

Currently, section 120 allows states to obtain authorization for the intentional lethal taking of pinnipeds that are preying on salmonid stocks of concern (e.g., because they are listed as endangered or threatened). This provision contains several safeguards, requiring, among other things, (1) a showing that the pinnipeds are having a significant negative impact on the fish stock, (2) that only the individual animals identified as contributing to the problem be removed, (3) the use of non-lethal alternatives if available, (4) review by a pinniped-fishery interaction task force, and (5) an opportunity for public review and comment. Although some have argued that this process is cumbersome and burdensome, if NMFS adheres to the statutorily established schedule, it should take only 105 days from the time an application is submitted until an approval or denial is issued.

The changes proposed in the DOC bill would make several fundamental changes to section 120. First, it would do away with any public review and comment or other public process. Although some such process could be established, it is not required. Second, the new provision would allow the Secretary to enter into cooperative agreements or other arrangements with states to delegate lethal removal authority to the states. Depending on the terms of such an agreement, federal agencies may not even be part of the decision-making process. The DOC proposal would also expand coverage of the lethal taking authority to include fish stocks other than salmonids, a proposal with which we agree.

For fish stocks listed under the ESA, the DOC proposal would allow lethal removal of pinnipeds if they "may be preying" on the fish. Thus, lethal removal could take place if there is merely a suspicion that pinnipeds might be feeding on the fish. This threshold is too low. Also, under subsection (c)(2) pinnipeds listed as threatened could be killed if they may be feeding on listed fish stocks. We question why threatened fish are given primacy over threatened and depleted marine mammals and believe that the proposed "may be preying" trigger for lethal removal is particularly inappropriate for such pinniped stocks. Also, the limitations set forth in subparagraphs (A) through (C) are largely illusory. If NMFS (or FWS) is meeting its responsibilities under the ESA, the requirements under subparagraphs (A) and (B) should be met in every instance. As for subparagraph (C), whether this adds much depends on what is meant by "consistency" with the recovery plan. It could mean that the plan thoroughly explores marine mammal predation issues and contains a comprehensive plan for addressing them. It also could mean that lethal removal is not inconsistent with what is in the plan. We also note that, unlike the existing provision and the other parts of the DOC proposal, paragraph (1) does not explicitly require that non-lethal alternatives be pursued before lethal removal is allowed.

The DOC proposal also would allow states to designate other fish species as species "of concern." Once designated, lethal removal of pinnipeds (other than those listed under the ESA) actually preying on such fish would be allowed, provided that non-lethal deterrence has been tried unsuccessfully or has been determined not to be feasible. Our main criticism of this proposal is that no criteria or processes are set forth for making determinations that a fish species merits designation as being "of concern." Without such criteria or processes, a state could, for instance, designate a species simply because competition with pinnipeds is viewed as limiting sport fishing opportunities. We do not think that such a balancing of priorities among species should be made without the involvement of federal resource agencies and without public review. We also have concerns about who will make determinations as to whether non-lethal deterrence is feasible and what criteria will be used. Sometimes such alternatives are available (e.g., capturing and holding pinnipeds in captivity for the duration of a fish run) but may be viewed as not being feasible because of the costs and time involved. Determinations as to what is or is not feasible will vary depending on who is making the decision.

DOC also proposes to add a new paragraph to section 120 to allow lethal removal of pinnipeds that "interfere with lawful human activities." These are subject to certain limitations such as requiring that the animal(s) to be killed are "repeat offenders" that have been undeterred by non-lethal measures or that have been deterred, but only temporarily. This is a sweeping proposal that, when invoked, would always place the competing human interest above the life of the animal, even when that interest were recreational or the nature of the conflict were based more on inconvenience to than prevention of the human activity. For instance, it could be used to authorize killing a sea lion that sometimes hauls out on a dock, temporarily impeding access by people. Or, if a community were to decide that its citizenry should be able to use a beach that is also used by seals as a haul-out site, those seals arguably could be killed if they do not respond to attempts at deterrence. Other scenarios are also conceivable, such as a sea lion that repeatedly takes fish off a sport fishing line.

In each case, a balancing of societal interests must be made. For species conservation, such balancing is fairly straightforward, as reflected in the existing provisions of section 120. If a pinniped from a healthy stock is eating fish from an endangered, threatened, or declining run to the point that it is adversely affecting the fish stock, conservation of the fish stock should take priority. However, it is much more difficult to balance the value of a particular lawful human activity against the life of a marine mammal. The outcome will vary depending on who is doing the balancing, how important they view the human activity to be, and how serious or substantial they perceive the interference or inconvenience to be. Because such determinations are situation-specific and involve value judgments as much as factual determinations, we think that it is wholly inappropriate to establish a system that allows the intentional killing of marine mammals where public review and involvement in the decision-making process are not required. In this regard, we note that the existing waiver provision of the MMPA could be used to authorize the lethal removal of pinnipeds in such conflict situations or, more generally, to cull stocks determined to be overpopulated, provided that the affected population is at its optimum sustainable level and will not be disadvantaged by the removals.

6. Proposal to exempt activities under Title IV from all other requirements of the MMPA and from all requirements of the Endangered Species Act and Animal Welfare Act.

Proposed amendments to section 401 of the MMPA would add a new exemption provision. Although we have some questions, comments, drafting suggestions, and technical concerns about the first part of proposed section 401(c), we have more general substantive concerns about the breadth of the exemption being proposed. As for the proposed exemption from the permitting requirements of the MMPA and ESA, we question whether this is needed. Most of these sorts of activities fit within the scope of section 109(h) of the MMPA and can be conducted without a permit. To the extent that they involve research that does not fit under the section 109(h) authority, a permit can be issued using expedited procedures under section 104(c)(3)(A). Similarly, expedited permit procedures are available under section 10(c) of the ESA in "emergency situations" where the health or life of a listed animal is threatened. It is not apparent to us why these authorities do not give NMFS and FWS sufficient flexibility to provide for timely responses to strandings, entanglements, and unusual morbidity and mortality events. Furthermore, the proposed exemption seems to apply to all "studies regarding the health of marine mammal populations," as long as they are conducted by a person designated by the Secretary and they are carried out in collaboration with the Marine Mammal Health and Stranding Program, regardless of the urgency of the studies and without any finding that meeting the permitting requirements of the Acts would limit or compromise the research. If a permit exemption is included in the Administration bill, it needs to be much more narrowly drawn.

The proposed exemption from the permit requirements of the Animal Welfare Act (AWA) is nonsensical, inasmuch as no such permits are required. Presumably, DOC is referring to the AWA licensing requirements for exhibitors and/or the requirements pertaining to the review of certain types of research by Institutional Animal Use and Care Committees (IACUCs). If it is the licensing requirements, an amendment to section 109(h), or section 403, rather than section 401, would be more appropriate, in that those sections pertain not only to emergency response but also to the

long-term maintenance of stranded animals undergoing rehabilitation. However, we would not support an amendment that would exempt rehabilitation facilities from AWA requirements without a clear indication of what alternative care and maintenance standards would be established. If it is the IACUC requirements, some exemption for emergency research might be appropriate, but a blanket exemption from these requirements for all studies related to the health of marine mammal populations is much too broad.

The breadth of the proposed permit-related amendments, and the problems associated with them, pale by comparison with the proposal to exempt all activities carried out to implement Title IV from all of the requirements of the MMPA, the ESA, and the AWA. In fact, this broad exemption makes the more tailored exemptions related to taking and permitting largely irrelevant. This proposal should not even be considered unless alternative procedures and requirements pertaining to the conduct of research, the maintenance of animals in captivity, and the humane treatment of marine mammals are also being proposed for the exempted activities. We would prefer an approach that identifies and targets the specific provisions of the three Acts that are viewed as posing problems for responses to strandings, entanglements, and unusual morbidity and mortality events. We would welcome the opportunity to work with NMFS staff to draft such an amendment.

It seems as though the proposed reporting requirement is intended to ensure that the Secretary adopts appropriate procedures for implementing the health and stranding response program and measures for the humane care and treatment of marine mammals. If this is the case, it is not clear why these are not being proposed as substantive requirements in their own right, rather than assuming that such measures will somehow flow from the reporting requirements. Moreover, to the extent that NMFS intends to establish alternative procedures and requirements for the health and stranding response program, these should be developed and in place before the proposed exemption from the otherwise applicable provisions of the MMPA, ESA, and AWA becomes effective.

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On a more general note, we are concerned that many of the proposals included in the DOC bill are not really necessary. They tend to pull attention away from the substantively important provisions in the bill by cluttering it up with proposals that have little or no substantive effect. Moreover, we are concerned that some of these well-intentioned "clarifications" may create new and unintended ambiguities where none currently exist. In interpreting the meaning of a statutory provision, a court looks not only at the explicit language of the provision and its legislative history as set forth in congressional committee reports, but also at the context of the provision within a bill. For example, some may wish to achieve greater certainty by adding specific activities (e.g., feeding) to the Act's definition of harassment. In doing so, however, one runs the risk that a reviewing court will find that activities not so enumerated are outside of the definition, based on the reasoning that, if Congress saw a need to be so specific in some instances, it must not have intended to include other similar types of activities or it would have included them as well. Every time we propose a cosmetic change to the Act, we run the risk that a court will interpret it in a way that we might not

like or did not intend. After all, why would Congress bother to amend longstanding language if it did not mean for the change to have a substantive effect?

Thank you for the opportunity to comment on the proposed bill. Please let me know if you would like additional explanation of any of our comments.

Sincerely,

Timothy J. Ragen

Timothy J. Ragen, Ph.D.
Executive Director

Attachment