

## **SECTION-BY-SECTION ANALYSIS**

The purposes of this bill are to reauthorize the Marine Mammal Protection Act for a five-year period, to add provisions to govern the management of marine mammals by the Secretaries of the Interior and Commerce and Alaska Natives, and to clarify and make other enhancements to certain provisions of the Act.

### **SECTION 1. SHORT TITLE**

Section 1 sets forth the short title of the bill as the “Marine Mammal Protection Act Amendments of 2005 .”

### **SECTION 2. AMENDMENT OF MARINE MAMMAL PROTECTION ACT OF 1972**

Section 2 specifies that the amendments contained in this bill apply solely to the Marine Mammal Protection Act of 1972, as amended, unless explicitly indicated otherwise.

## **TITLE I: AUTHORIZATION OF APPROPRIATIONS**

### **SECTION 101. DEPARTMENT OF COMMERCE**

Section 101 would authorize appropriations for the Department of Commerce through fiscal year 2010 to execute its responsibilities under the Act. The authorized levels would enhance the Department’s capability to respond to the increasing demand for authorizations or permits to take marine mammals for scientific research and incidental to commercial activities other than fishing, to promote recovery of depleted stocks of marine mammals, and to expand activities under Title IV to assess the health of marine mammal stocks and of the ecosystems of which they are a component part.

### **SECTION 102. DEPARTMENT OF THE INTERIOR**

This section would authorize appropriations to the Department of the Interior through fiscal year 2010 to carry out its responsibilities to conserve and manage certain marine mammals. The requested levels would enhance the Department's capability to develop and implement management plans and incidental take regulations; determine status and trends of marine mammal populations; implement its Marking, Tagging and Reporting Program; coordinate with Alaska Natives; develop and implement international agreements to manage shared marine mammal populations; issue permits for research, enhancement, and public display; and carry out enforcement activities.

### **SECTION 103. MARINE MAMMAL COMMISSION**

This section would authorize appropriations for the Marine Mammal Commission through fiscal year 2010. The authorized levels would enable the Commission to meet its responsibilities under the Act, including carrying out targeted research activities.

## **TITLE II: ALASKA NATIVES HARVEST MANAGEMENT AGREEMENTS**

### **SECTION 201. MARINE MAMMAL HARVEST MANAGEMENT AGREEMENTS IN ALASKA**

The centerpiece of this bill is our proposal to expand on the authority of section 119 of the Act by adding a new section 119A to authorize harvest management agreements between the Secretary and Alaska Natives. Such agreements would allow for the joint regulation of subsistence harvests prior to a depletion finding. The current section 119 includes a mechanism to enable Alaska Natives to participate in research and monitoring activities related to marine mammal conservation and co-management of subsistence use and would be retained to allow for such cooperative efforts when the parties desire something less than full harvest management of a marine mammal stock. The major shortcoming of section 119 is that it does not allow for enforcement of harvest provisions other than through voluntary compliance. A harvest management agreement entered into under new section 119A would include a management plan that could restrict the harvest of marine mammals for subsistence purposes. The purpose of any such restriction is to prevent depletion of a stock or species and, as such, the management plans envisioned would cover the geographic range of an identified stock or other discrete population unit. Such provisions would be enforceable by either tribal or Federal signatories to the agreement by making violations of ordinances enacted pursuant to the agreement violations of the Act. Section 119A agreements would create a strong conservation tool that could be jointly used by Alaska Natives and the Secretaries to ensure the long-term conservation of marine mammal populations in Alaska. Recognizing that such arrangements and the structures needed to support them are beyond the scope of the current section 119, reallocation of resources may be needed for successful implementation of the new provisions.

This amendment, allowing for mutually agreeable regulation prior to stock depletion, would mark a significant change in the Act. The approach enjoys broad support within the Alaska Native community generally. The improvements offered through this amendment would enable Federal agencies and Alaska Native Organizations to develop marine mammal conservation regimes collaboratively to avert management crises that can arise under the current system, such as that involving beluga whales in Cook Inlet. In addition to giving Alaska Natives an enhanced role in management of marine mammal stocks prior to depletion, should regulation of subsistence harvest be necessary to protect a depleted species or stock, the Secretary would be required to provide any harvest management partner draft proposed regulations, a rationale for any proposed restriction of Native harvest, and an opportunity to comment prior to publication of the proposed regulations. Alaska Native representatives believe that this heightened role in the management process is an essential element of any amendment that would allow for the regulation of subsistence take prior to a depletion finding.

### **SECTION 202. CONSULTATION WITH TRIBES AND TRIBALLY AUTHORIZED ORGANIZATIONS ON DEPLETION DETERMINATIONS**

Section 202 would amend section 3(1)(A) of the Act to require the Secretary, in addition to consulting with the Marine Mammal Commission and its Committee of Scientific Advisors, to

consult with the affected harvest management partner prior to making a depletion finding for any marine mammal stock that is the subject of a section 119A harvest management agreement.

**SECTION 203. COOPERATIVE ENFORCEMENT AUTHORITY**

Section 203 would amend section 107(a) of the Act to allow the Secretary to use the personnel, services, and facilities of Alaska Native Tribes or Tribally Authorized Organizations to assist in enforcing the provisions of this title, particularly with respect to harvest management agreements entered into under section 119A.

**SECTION 204. CONFORMING AMENDMENTS**

Section 204 would amend: (1) section 101(b) of the Act to allow restrictions to be placed on the taking of marine mammals by Alaska Natives under the provisions of a section 119A harvest management agreement; and, (2) sections 119(a) and (b) to ensure that appropriate, representative tribal entities are eligible for cooperative agreements under that section.

**SECTION 205. AUTHORIZATION OF APPROPRIATIONS FOR COOPERATIVE AGREEMENTS UNDER SECTION 119**

Section 205 would extend the authorization of appropriations for cooperative agreements under section 119 at levels that enable the Departments to continue activities related to current cooperative agreements.

**SECTION 206. EFFECT ON SOVEREIGN AUTHORITIES; DISCLAIMER**

Section 206(a) would clarify that nothing in the new section 119A would either expand or diminish those sovereign authorities currently held by Alaska Natives. Section 206(b) would clarify that nothing in the new section 119A would expand or diminish the authority of Alaska Natives to regulate persons other than those for which they currently have jurisdiction under existing law. Neither provision would be codified as part of the MMPA, but as part of the public law that would serve to explain the intent of section 119A.

**SECTION 207. DEFINITION OF TRIBALLY AUTHORIZED ORGANIZATION**

Section 207 would amend section 3 of the Act by adding a new paragraph 32 to define the term “Tribally Authorized Organization.” This definition would clarify that a party to an agreement under amended section 119 or the new section 119A can include an organization consisting of representatives of Federally recognized Tribes who are authorized by their tribal governments to enter into a harvest management agreement or cooperative agreement. This definition would ensure that such organizations possess the tribal governmental authority necessary to adopt appropriate harvest management ordinances under section 119A or conduct activities under existing section 119.

### **TITLE III: CULTURAL EXCHANGE AND EXPORT**

The Marine Mammal Protection Act Amendments of 1994, as part of a package of permit-related amendments, added a prohibition on exporting marine mammals. Although some provisions of section 104 of the Act were amended to reflect this new prohibition, corresponding changes were not made elsewhere in the Act. In some cases this has led to confusion. The amendments included in this title would revise the relevant prohibition and identify clearly those instances when export, transport, sale, or purchase of a marine mammal or marine mammal product is, or may be, authorized.

#### **SECTION 301. EXPORT PROHIBITION**

Section 301 would amend section 102(a)(4) of the Act by deleting subparagraphs (A) and (B). Deletion of subparagraph (A) is needed to clarify that the Secretary need not show that the underlying taking of a marine mammal or marine mammal product was unlawful, in order to bring a case for an otherwise unlawful transport, purchase, sale, or export. This amendment would bring the provision into conformance with an amendment enacted in 1981 to clarify that unauthorized transports, purchases, or sales constitute violations regardless of whether the taking had been legal. As noted in the Committee report accompanying the 1981 amendment, enforcement difficulties are particularly troublesome in the context of taking for subsistence purposes, where the taking itself may be legal, but the subsequent use of the marine mammal may not be.

Deletion of subparagraph (B) is needed to clarify that marine mammals may be transported, purchased, sold, or exported for purposes other than public display, scientific research, or enhancing the survival of a species or stock. Such purposes would include the export of legally possessed items incidental to travel abroad, cultural exchanges, sales of authentic handicrafts made by Alaska Natives, or commercial activities authorized by a waiver of the Act's moratorium. All such transports, purchases, sales, or exports would remain subject to the other provisions of the Act.

#### **SECTION 302. PERMITS**

Section 302(a) would amend section 101(a) of the Act to provide that permits may be issued under section 104 to authorize the export, as well as the taking or import, of marine mammals for the specified purposes.

Section 302(b)(1) would amend section 104(a) of the Act to clarify that permits issued under that section may authorize not only the taking and importation of marine mammals, but also exportation and transport. In addition, the amendment would specify that the purchase or sale of marine mammals may be permitted, except under permits authorizing the importation of polar bear trophies imported from Canada (section 104(c)(5)), the taking of marine mammals for commercial or educational photography (section 104(c)(6)), or the taking of marine mammals incidental to fishing operations (section 104(h)). Paragraphs (2)-(5) of section 302(b) would make corresponding changes to other provisions of section 104, except that section 302(b)(3)(D) would amend section 104(c)(2)(B) of the Act to clarify that exports pursuant to a public display permit are authorized only if the requirements set forth in section 104(c)(9) have been met.

### **SECTION 303. CONFORMING AMENDMENT TO SECTION 103**

Section 103 of the Act authorizes the Secretary to prescribe regulations with respect to the taking and importation of marine mammals if certain findings are made. Among other things, such regulations may waive the otherwise applicable moratorium on taking or importing marine mammals. Section 303 would add a new sentence at the end of section 103(a) to specify that such regulations may also authorize the export, transport, purchase, or sale of marine mammals or marine mammal products. Individual permits authorizing such acts could be issued under section 104, provided that such permits were consistent with the regulations, as required by section 104(b)(1).

## **TITLE IV: FISHERIES INTERACTIONS**

### **SECTION 401. TUNA-DOLPHIN PROVISIONS**

Section 401(a)(1) would amend section 101(a)(2)(B)(iii) of the Act to correct inaccurate and misleading language. The change would specify that a nation harvesting yellowfin tuna from the Eastern Tropical Pacific (ETP), in order to export that tuna or tuna products to the United States, must provide evidence that the aggregate dolphin mortality and stock-specific dolphin mortality attributed to its vessels do not exceed the limits established by the International Dolphin Conservation Program (IDCP). This correction is needed to clarify that the U.S. Government will base embargo decisions on the dolphin mortality attributable to a nation's fleet (i.e., the number of dolphins killed in the course of tuna fishing, and not the actual mortality limits assigned to the fleet.)

Section 401(a)(2) would amend section 101(a)(2)(C)(i)(II) to clarify that the Secretary will only accept a nation's documentary evidence for exporting yellowfin tuna or yellowfin tuna products to the United States if such information can be used to track and verify the "dolphin safe" status of the tuna pursuant to the Dolphin Protection Consumer Information Act (DPCIA). The sole purpose of the tracking and verification system is to allow the Secretary to examine the documentary evidence provided to assess the tuna's status as dolphin-safe. The current language could be misinterpreted to mean that the system is to be used for ascertaining compliance with all aspects of the regulations adopted domestically to implement the DPCIA, only some of which are applicable to foreign fishing operations.

Section 401(a)(3) would amend section 101(a)(2)(F) to remove references to exceptions that expired in 1991 and 1994. Also, the proposed amendment would incorporate the definition of "large-scale driftnet" from the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1802), which includes the internationally accepted 2.5 kilometer standard length, rather than the 1.5 mile standard currently referenced in this section. (Note that 2.5 kilometers equals 1.553 miles.) The Magnuson-Stevens Fishery Conservation and Management Act and the Agreement on the International Dolphin Conservation Program (AIDCP), to which the United States is a signatory nation, both recognize the 2.5 kilometer standard. When the MMPA was amended in 1997 to implement the AIDCP, the large-scale driftnet definition was not properly

incorporated. This amendment would make the MMPA consistent with both other domestic law and the international standard.

Section 401(b)(1) would amend subsection (b)(2) of the Dolphin Protection Consumer Information Act (16 U.S.C. § 1385) to specify that the driftnets being referred to are “large-scale driftnets” as the amended driftnet definition would reflect. This amendment is proposed for the same reasons outlined in the paragraph above.

Section 401(b)(2) would amend subsection (c)(1) of the Dolphin Protection Consumer Information Act (16 U.S.C. § 1385) to conform the definition of the terms “large-scale driftnet” and “driftnet fishing” used in this provision to the definition of “large-scale driftnet fishing” in the Magnuson-Stevens Fishery Conservation and Management Act and the proposed definition of “large-scale driftnet” in section 101(a)(2)(F) of the MMPA. This amendment is proposed for the same reasons as outlined two paragraphs above.

Section 401(b)(3) would amend subsection (c)(2) of the Dolphin Protection Consumer Information Act (16 U.S.C. § 1385) to conform the definition of the “Eastern Tropical Pacific (ETP)” to that used in Annex I of the Agreement on the International Dolphin Conservation Program (AIDCP) which extends only out to the 150°W meridian. The definition of the ETP currently in the MMPA was drawn from the general permit issued to the American Tunaboat Association in 1984, which was superseded by the International Dolphin Conservation Program Act in 1997. Inasmuch as there have been no sets on dolphins in the area west of 150°W longitude in over 20 years, redefining the ETP to comport with the AIDCP definition is not expected to have any effect on dolphins. The current disparity in the definitions complicates tuna tracking requirements and can subject U.S. vessels fishing on tuna not associated with dolphins in the western Pacific to unnecessary restrictions.

Section 401(c) would amend section 303(a)(2)(B) to correct three errors apparently made in amendments to the MMPA incorporating the International Dolphin Conservation Program Act (IDCPA). The first amendment, to clause (v), refers to a procedure used during the course of tuna fishing in which the net is “backed down” to allow for dolphins to escape before the net is brought aboard. The amendment would specify that the time by which the backdown procedure must be completed is 30 minutes after sundown, not 30 minutes before sundown.

The original sundown set prohibition was enacted by the United States for its fleet in the 1980's upon a determination that sundown sets were responsible for a disproportionate share of the total dolphin mortality. Based on studies and review of observer data, the National Marine Fisheries Service (NMFS) determined that sets in which high levels of mortality occurred extended into the dark, when rescuers could no longer see dolphins in the net. Again, based on observer records, NMFS found that there is sufficient light for sets that begin sack up (the process of rolling in the net) a half hour after sunset to complete the procedure without posing undue risk to encircled dolphins. All dolphins must be out of the net prior to sack up. Sack up and loading of captured tuna onboard the vessel can occur in the dark without any threat to dolphins. This measure was adopted by the international fleet as one of the dolphin conservation measures

incorporated in the La Jolla Agreement, and subsequently the binding international agreement which implements the Panama Declaration.

This correction is also necessary to make the MMPA consistent with the provisions of the IDCPA and with the pre-1997 provisions of the MMPA itself. In 1998, the United States became a signatory to the Agreement on the International Dolphin Conservation Program (AIDCP), which specifies that the backdown procedure is to be completed no later than 30 minutes after sundown. The 1997 amendments to the MMPA were meant to incorporate this standard but inexplicably failed to do so. This amendment would make the MMPA consistent with the agreed to, and widely practiced, international standard.

The second amendment, that to clause (x), is a grammatical correction to insert two words apparently omitted from the provision as enacted in 1997. This would clarify that experimental fishing may be authorized to test new tuna fishing techniques that do not require the encirclement of dolphins.

The third amendment, that to clause (xi), is intended to fix a spelling error whereby the word “intentionally” was erroneously inserted as “internationally”. This correction is needed because the word “internationally” as it currently appears makes no sense in the sentence.

Section 401(d) would amend section 307(a)(2) to provide the correct cross-reference to section 101.

## **SECTION 402. FISHERY INTERACTION PROVISIONS**

Section 402(a) would amend section 118(c)(3)(A) of the Act to clarify that it is a violation to engage in a category I or II fishery without having registered under paragraph (2) of that subsection. Although such a prohibition seemingly exists under current section 118(c)(3)(C), the proposed amendment would eliminate any ambiguity regarding this important aspect of the incidental taking regime. Further, the requirement that owners of registered vessels carry an observer if requested to do so by the Secretary would be amended to clarify that this requirement applies to all participants in category I and II fisheries. The proposed amendment would also place all of the prohibitions currently in subsection (c) into a single subparagraph to eliminate the possible confusion caused by having them set forth in three separate subparagraphs.

Section 402(b) would delete subparagraphs (B) and (C) of section 118(c)(3) because, under section 402(a) of the bill, those provisions would be incorporated into subparagraph (A).

Section 402(c) would amend section 118(f)(1) to eliminate the requirement that a take reduction plan be developed for each strategic stock that interacts with a category I or II fishery. Some stocks are considered strategic solely because they are listed as endangered or threatened under the Endangered Species Act, not because of a high incidence of fishing-related mortality and serious injury. The proposed amendment will eliminate the requirement that a take reduction plan be developed for those strategic stocks for which fishing-related mortality and serious injury are determined to be having a negligible impact. Such a change will better allow the agency to focus its resources and effort on those stocks that are being negatively affected by fisheries.

Sections 402(d) and (e) would amend sections 118(f)(6)(A)(i) and (ii) to make grammatical amendments needed to reflect the proceeding changes.

Section 402(f) would amend section 118(f)(6)(A) by adding a new provision requiring that a technical liaison with commercial fishing expertise be assigned to each take reduction team. This change is needed to enhance communication among the take reduction team members with respect to fishing practices and gear, such that all participants fully understand current practices and can make informed recommendations regarding any proposed changes. Additionally, the liaison would help to ensure that as many stakeholders as possible are well informed and are able to participate in the take reduction process.

Section 402(g) would amend section 118(f)(7)(B) by adding a new provision to require that take reduction teams be reconvened or consulted during the public comment period regarding proposed regulations and any deviations from the team's recommendations. In the past, a take reduction team would submit its final recommendations and then the agency would formulate regulations to implement those recommendations. Since teams do not submit their recommendations in regulatory form, some alteration is inevitable during this process and, at times, the agency has made substantial changes. This amendment is designed to ensure that the teams have an opportunity to respond as a group to any alterations made to their recommendations before regulations become final.

### **SECTION 403. EXPANSION OF FISHERIES INCLUDED IN THE INCIDENTAL TAKE PROGRAM**

The following suite of changes is designed to expand the scope of the section 118 incidental take program to include non-commercial fisheries which NMFS determines have frequent or occasional marine mammal mortality or serious injury associated with their operations. These amendments would not affect non-commercial fisheries whose activities have a remote likelihood of interacting with marine mammals.

Section 403(a) would amend section 3 of the Act by adding a new subsection (30) to define the term, "listed fishery" to include those fisheries included on the list of fisheries published pursuant to section 118(c)(1). This change is needed to correspond to other proposed amendments which would expand the coverage of the incidental take program to include some non-commercial fishing activity. Listed fisheries would include not only commercial fisheries, but also any non-commercial fisheries listed as Category I or II fisheries.

Section 403(b) would amend section 118(a)(1) to specify that the provisions of section 118 apply to incidental taking of marine mammals while participating in a listed fishery. Further, amendments would be made to section 118(c)(1) to specify that categories I and II on the list of fisheries are to include all fisheries (including non-commercial fisheries) that fit within the criteria set forth in subsections (c)(1)(A)(i) and (ii). However, category III would continue to include only commercial fisheries. These changes would ensure that non-commercial fisheries that kill or seriously injure marine mammals on an occasional or frequent basis are included in the list of fisheries, but would not require that other non-commercial fisheries be listed. This

distinction is designed to limit the scope of fisheries included under the incidental take program and avoid unnecessary regulation of non-commercial fisheries that have only a remote likelihood of taking marine mammals.

Additionally, changes would be made to section 118(c)(2)(A) to expand those eligible for an incidental take authorization to include any vessels (not just commercial vessels) engaged in category I or II fisheries. Finally, a related change to section 118(e) would specify that any operator of a fishing vessel subject to section 118 must report all incidental mortalities.

Overall, this suite of changes would require all vessel owners and operators subject to section 118 to obtain an authorization to lawfully participate in listed fisheries. Participants in listed non-commercial fisheries would be required to register their vessels, carry observers if requested and able, and otherwise comply with the requirements of section 118, just like commercial fishers. These requirements would only apply to non-commercial fishers participating in fisheries listed as category I or II fisheries.

These amendments are needed to address the taking of marine mammals by fishers who currently fall outside the coverage of the section 118 incidental take program. The taking of marine mammals in the course of non-commercial fishing is a continuing problem in several areas of the country. The responsible agencies need the authority to track and monitor these fisheries to ensure that they are not adversely affecting marine mammal stocks. By excluding these fisheries from the section 118 program, incidental takes in these fisheries and efforts to reduce the impact of marine mammal by-catch in fisheries are undermined. These amendments would ensure that non-commercial and commercial fishers participating in similar fisheries are treated similarly under the law. Finally, non-commercial fishers currently lack any protection from prosecution for incidental takings, but under this new regime, they would receive that protection in return for abiding by the existing registration, reporting and take reduction requirements.

#### **SECTION 404. CONFORMING AMENDMENTS TO THE EXPANSION OF FISHERIES INCLUDED IN THE INCIDENTAL TAKE PROGRAM**

Section 404 would amend sections 101, 102, 104, 109, 111, 115, 117, 118 and 407 to reflect the inclusion of some non-commercial fisheries under the section 118 incidental take program. The term “commercial fishing operation” is proposed to be replaced in many places by the phrase “engaging in a listed fishery” to identify that provisions once applicable only to commercial fisheries would now apply to this group of newly defined “listed fisheries”. For the same reason, the term “commercial” is deleted in numerous places to identify that either “listed fisheries” or all fisheries are meant to be addressed. These amendments are conforming in nature and are meant to accompany proposed changes to subsections 118(c) and (e).

#### **SECTION 405. STRIKING OF SECTION 114**

Section 405 would amend section 114 of the Act by striking the section entirely. Section 114 was enacted in 1988 to establish an interim exemption to govern the taking of marine mammals incidental to commercial fishing operations by persons using vessels of the United States and vessels with valid fishing permits issued by the Secretary under the Magnuson-Stevens Fishery

Conservation and Management Act. Section 118, enacted in 1994, replaced the interim program under section 114 with a permanent program for governing such incidental taking. Thus, section 114 is no longer needed. Section 114 should be reserved to accommodate future amendments, rather than eliminating it entirely and renumbering subsequent sections of the Act.

**SECTION 406. CONFORMING AMENDMENTS TO THE STRIKING OF SECTION 114**

Section 406 would amend sections 102 and 118 of the Act to remove all references to section 114. These are purely technical amendments needed to avoid any confusion that might otherwise be created by the deletion of section 114.

**SECTION 407. GULF OF MAINE HARBOR PORPOISE**

Section 407 would amend section 120(j) of the Act to remove the entire subsection. The purpose of this subsection was to allow the Secretary to expedite the preparation of a stock assessment for the Gulf of Maine stock of harbor porpoise and to delay the date by which the incidental mortality and serious injury of this stock was to be reduced below its potential biological removal level. The operative dates for these provisions have passed and they are therefore no longer needed.

**SECTION 408. CALIFORNIA SEA OTTER FISHERY INTERACTIONS**

Language to amend section 118(a)(4) of the Act would require the Secretary to include information concerning California sea otters in the list of fisheries published under section 118, and include this species in determinations pursuant to section 118(d) of the Act regarding establishment of monitoring programs and placement of on-board observers on fishing vessels to monitor interactions and assess the level of mortalities and serious injuries to the population caused by fishing operations. Presently, section 118 specifically excludes California sea otters from the incidental taking exception, and nothing in this amendment is intended to change that. The proposed language is intended to enhance efforts to assess impacts that commercial fisheries may be having on this threatened sea otter population in order to provide a more informed basis for recovery efforts.

**SECTION 409. ALTERNATIVE OBSERVER PROGRAM**

Section 409 would amend section 118(d)(5), to direct the Secretary to explore the use of new technologies for alternative monitoring of fisheries. Observer programs are designed to gather data on marine mammal takes to provide essential information to take reduction teams and for regulatory programs. Low levels of observer coverage can compromise this effort and is likely to result in inadequate information thereby undermining the NMFS' ability to fashion effective regulations. There are many instances where it is either not practicable or possible to place an observer on board a fishing vessel. This situation leads to reduced monitoring coverage and inadequate data collection. The development of alternative remote monitoring systems would allow for expanded coverage and improve data collection.

**TITLE V: OTHER AMENDMENTS**

**SECTION 501. POLAR BEAR PERMITS**

In 1994, Congress added a provision to the Act to allow for the issuance of permits authorizing the importation of polar bear trophies taken in sport-hunts in Canada if certain findings have been made. The 1994 amendments specified that applications for such permits did not require review by the Marine Mammal Commission, but retained the requirements for public notice prior to and after issuance or denial. The Fish and Wildlife Service has processed more than 100 applications for polar bear permits annually for the past four years. Although notice of each application has been published in the *Federal Register*, no comments have been received.

The proposed amendment to section 104(d) would streamline the permitting process and reduce the administrative expense associated with publishing two notices for each application to import a trophy of a polar bear taken before the enactment of the 1994 Amendments or from an approved population. Since findings that allow for multiple imports were made after public comment, the approval of individual permits is largely a pro forma administrative process — an import is allowed if the particular bear was taken legally from an approved population. To ensure that the public continues to have current information on these types of permits, the Service would be required to make available semiannually a summary of all such permits issued or denied.

#### **SECTION 502. CAPTIVE RELEASE PROHIBITION**

Section 502 would amend section 102 of the Act to clarify that the release of captive marine mammals is expressly prohibited unless authorized by a permit issued under section 104 or pursuant to the provisions of section 109(h). The prohibition is intended to apply to marine mammals maintained in captivity at a facility and not animals incidentally or accidentally captured in nets and subsequently released on site. An exception to the prohibition would be made to allow for the temporary release of marine mammals by the Department of Defense for military and research purposes if the animals involved are maintained under the authority of 10 U.S.C. § 7524, are the progeny of marine mammals maintained under that authority, are excluded from the Act by being pre-Act animals, or are the progeny of pre-Act animals. This will allow the Department to continue operation of its marine mammal program without securing additional permits.

Within the scientific community, the release of marine mammals maintained in captivity for extended periods of time is widely regarded as potentially harmful to both the animals released and those wild populations they encounter. Fundamental questions remain as to the ability of long-captive marine mammals to forage successfully, avoid predators, and integrate with wild populations. Moreover, release creates the risk of disease transmission, inappropriate genetic exchanges, and disruption of critical behavioral patterns and social structures in wild populations. The proposed amendment would help ensure that the necessary safeguards are in place prior to release.

This amendment is consistent with the past views of Congress. In the legislative history accompanying the 1995 Defense Appropriations Act, Congress stated that, “given the potential for ‘takes’ under the Marine Mammal Protection Act or the Endangered Species Act, the conferees direct that in no case shall any release be attempted unless authorized by a scientific

research permit issued by the Secretary of Commerce under the appropriate statutory authority.” See Conference Report on H.R. 4650, 140 Cong. Rec. 9607, 9643 (Sept. 26, 1994).

### **SECTION 503. PENALTIES**

Section 503(a) would amend section 105 by expanding the penalties that may be imposed for violations of the MMPA. Currently, persons who violate the MMPA are subject to civil penalties of up to \$10,000 and criminal fines of up to \$20,000. Vessels employed in the taking of a marine mammal may be assessed a civil penalty of up to \$25,000. These penalties have been unchanged since the MMPA was first enacted in 1972. While appropriate in many cases, these statutory maximums have proven grossly inadequate in several others, undermining effective enforcement of the Act. As proposed, the amendment would authorize the Secretary to impose a civil penalty of up to \$50,000 for each violation, and a fine of up to \$100,000 for each criminal violation.

Additionally, the amendment would impose new penalties and fines for any offense in which a dangerous weapon is used or in which bodily harm to an enforcement officer is caused or threatened. This change mirrors enforcement language in the Magnuson-Stevens Fishery Conservation and Management Act, which provides for enhanced penalties for harm done to fisheries enforcement officers. Similar penalties should also apply to officers enforcing the MMPA. Finally, this amendment would strike the phrase “except as provided in section 118” in section 105(b) because the referenced penalty provisions in section 118 would be stricken. Section 503(b) would amend section 118(h) to indicate that violations of that section are subject to penalties under sections 105, 107, and, in some cases, section 106 without condition. Further, reference to section 118(c) is stricken to conform to other proposed changes.

### **SECTION 504. VESSEL FINES AND CARGO FORFEITURE**

Section 504 would also increase the penalties that may be imposed for violations of the MMPA. In addition to the penalties available under section 105 of the Act, section 106 authorizes the Secretary to impose a civil penalty of up to \$25,000 against a vessel that is used in the taking of a marine mammal. This penalty has been unchanged since the MMPA was first enacted in 1972. As proposed, section 504 would amend section 106 of the Act, to authorize the Secretary to impose a civil penalty of up to \$50,000 against a vessel used to take a marine mammal, and vessels that fish in violation of the provisions of section 118 of the Act (as amended by section 402). In addition, section 106 would be amended to allow for the seizure and forfeiture of a vessel’s cargo for fishing in violation of the provisions of section 118.

### **SECTION 505. MARINE MAMMAL COMMISSION ADMINISTRATION**

Section 206(4) of the Act currently limits the amount that the Marine Mammal Commission may compensate experts or consultants to \$100 per day. This limitation, in today’s economy, precludes the Commission from procuring the services of virtually all experts and consultants. Section 505 would remove this restriction and place the Commission under the government-wide limitations on pay for experts and consultants.

### **SECTION 506. ENFORCEMENT**

Section 506 would amend section 107(b) by requiring the Secretary to take steps to enter into cooperative enforcement agreements with states. This change is needed to provide for more local enforcement of the provisions of the MMPA.

**SECTION 507. INTERFERENCE WITH INVESTIGATIONS AND AUTHORIZED ACTIVITIES**

Section 507 addresses a long-standing deficiency within the MMPA. This provision would add a prohibition against activities that undermine the effective implementation and enforcement of the Act. Individuals who refuse to permit boardings by enforcement agents, interfere with inspections or stranding response, or intentionally submit false information, currently may not be subject to prosecution under the MMPA, as such activities are not specifically prohibited. In one recent case, NOAA was unable to take action under the MMPA against a scientific research permit holder that deliberately provided false information to law enforcement personnel in an effort to shroud illegal conduct. Such activities frustrate law enforcement actions needed to ensure compliance with the statute.

Section 507 would correct this deficiency, amending section 102 to prohibit a variety of activities that inappropriately frustrate reasonable implementation and enforcement of the Act. Specifically, section 102(d) would render it illegal to refuse a lawful vessel boarding, interfere with an authorized search or inspection, submit false information, or interfere with activities authorized under title IV of the Act. This proposal is patterned largely upon similar provisions currently found in the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1857(1)) and the National Marine Sanctuaries Act (16 U.S.C. § 1436(3)).

**SECTION 508. AUTHORIZATIONS FOR MARINE MAMMAL HEALTH AND STRANDING RESPONSE**

Section 508 authorizes appropriations for the Department of Commerce to execute their responsibilities for responding to unusual marine mammal mortality events.

**SECTION 509. STRANDING AND ENTANGLEMENT RESPONSE**

Section 509(a) would amend section 402(b)(1)(A) to add a requirement that the Secretary of Commerce collect information on practices and procedures regarding the rescue and rehabilitation of entangled marine mammals. Currently that Act requires that only information on stranded marine mammals be collected. It would be useful to expand this requirement to include entangled animals so that rescuers remain informed about the most effective practices and procedures for disentanglement operations.

Section 509(b) would amend section 403(a) by specifying that agreements under section 112 may authorize the taking of marine mammals in response to entanglements as well as strandings. This change is needed so that the Secretary may enter into agreements with any person to respond to entanglement situations.

Section 509(c) would amend section 406(a) of the Act to clarify that the liability coverage provided to those individuals authorized to respond to strandings also applies to those authorized to disentangle marine mammals from fishing gear and other materials. This clarification is

needed to ensure that individuals acting as agents of the Federal Government during disentanglement efforts are provided with the same indemnification as those responding to strandings.

**SECTION 510. ENTANGLEMENT DEFINITION**

Section 510 would amend section 409 of the Act to define the term “entanglement”. This definition relates to the proposed amendments that would expand the coverage of certain provisions to include entanglements in addition to strandings.

**SECTION 511. UNUSUAL MORTALITY EVENT FUNDING**

Section 511 would amend section 405(c)(2) to expand the sources of funding available to the Marine Mammal Unusual Mortality Event Fund. Currently, only money donated or specifically earmarked for unusual mortality response can be added to the Fund. This may be problematic in years when there are several mortality events requiring action. By limiting the Secretary’s ability to allocate funds appropriated generally for the purposes of implementing the MMPA, the current language prevents greater flexibility in allocating resources.

**SECTION 512. MARINE MAMMAL RESEARCH GRANTS**

Section 110 of the Act authorizes the Secretary of Commerce and the Secretary of the Interior to make grants or otherwise fund research relevant to the protection and conservation of marine mammals. During previous reauthorizations of the Act, this section was amended to identify specific research projects to be undertaken. Under the statutorily specified time frames, all of those projects should now have been completed. Accordingly, the proposed amendments would delete the provision applicable to those projects.

In light of the proposed deletions to section 110, section 512 of the bill would amend section 110(a) to clarify that research grants under this provision would be targeted at ecosystem-level problems. That is, section 110 grants would be issued for broad-scale ecosystem studies or to investigate related components of marine ecosystems, such as seabirds, that may be facing threats similar to those faced by marine mammals, and which may have a bearing on marine mammal conservation.

While the Secretaries would be given flexibility to determine which projects to fund, among those currently considered to have high priority are the following:

Bering Sea - Chukchi Sea Ecosystem Study – The Bering and Chukchi Seas have extensive, shallow shelves and, as a result, are some of the most productive areas in the world’s oceans. These regions offshore of Alaska are undergoing significant environmental changes, including rapid and extensive sea ice retreat, extreme weather events, and diminished benthic productivity. Such dynamics are likely having ecosystem-wide effects. As such, there is a pressing need to monitor the health and stability of these marine ecosystems and to resolve uncertainties concerning the causes of population declines of marine mammals, sea birds, and other living resources of that marine ecosystem. As residents of the region largely depend upon marine resources for their livelihood, research on subsistence uses of such resources and ways to provide for the continued opportunity for such uses must be an integral part of this effort.

California Coastal Marine Ecosystem Studies – The California sea otter, listed as threatened under the Endangered Species Act, has been experiencing an apparent population decline since the mid-1990s. The reasons for the decline, however, remain uncertain. The possibilities include introduction of new or unusual diseases, exposure to new or higher levels of chemical pollutants, incidental take in new or relocated fisheries, and decreases in key prey species due to temporary El Niño effects, long-term climate change, or otter densities exceeding carrying capacity levels within their current range.

### **SECTION 513. TRAVELING EXHIBITS**

Section 513 would amend section 102 of the Act to prohibit traveling exhibits of cetaceans. Under a policy implemented by NMFS, permits for such exhibits were prohibited from the mid-1970s until the passage of the 1994 amendments to the MMPA. After the 1994 amendments, NMFS' jurisdiction over captive marine mammals was severely limited, thus voiding its traveling exhibit policy.

Recognizing the heightened risks posed to cetaceans by traveling exhibits, this amendment would statutorily reinstate the ban on such exhibits. This would help ensure that these animals are not exposed to undue levels of stress associated with frequent transport and subsequent acclimation periods.

### **SECTION 514. DEFINITION OF TRAVELING EXHIBITS**

Section 514 would amend section 3 of the Act by adding a new subsection (31) to define the term “traveling exhibit.” This definition relates to the amendment proposed in section 513, which would prohibit traveling exhibits of cetaceans.

### **SECTION 515. HARASSMENT DEFINITION**

Section 515 would amend section 3(18)(A) of the Act by changing the definition of the term “harassment.” This amendment would remove confusion and eliminate ambiguities found in the current definition of harassment, which was added to the Act by the 1994 amendments. The Administration's proposed definition would provide greater notice and predictability to the regulated community and improve the enforceability of the prohibition without compromising conservation measures. The new language would define level A harassment as “any act” (as opposed to acts of “pursuit, torment or annoyance”) which injures or has a high potential to injure a marine mammal. Level B harassment would be defined to include “any act” that either disturbs or is likely to disturb a marine mammal's natural behavior or is directed towards a specific individual or group and is likely to cause disturbance by interrupting natural behavior.

### **SECTION 516. FISHERIES GEAR DEVELOPMENT**

The incidental take of marine mammals in the course of fishing operations remains a large source of marine mammal mortality and injury in many fisheries. Increasingly, new gear technologies are being looked to as a means of reducing entanglements and allowing fishers to continue operating in areas frequented by marine mammals. The amendments proposed to section 111 would call on the Secretary to launch a new gear development and evaluation effort, establish a voluntary gear buy-back program, enhance coordination with other nations, and create

a new mini-grant program to foster small scale gear development projects. These new initiatives would help to encourage new research and speed the development of new gear technologies. Additionally, if a buy-back program were to be initiated, NMFS would take steps to ensure that any gear taken out of use not re-enter another fishery.

**SECTION 517. SHIP STRIKES OF WHALES**

Section 517 would amend section 112 by adding a new subsection that provides that the Secretary of Commerce use existing authorities under the Act to reduce the occurrence of the striking of whales by ships. In recent years, we have come to understand that ship strikes constitute a significant impediment to the recovery of certain species of marine mammals, most notably the endangered northern right whale. Although the MMPA contains general authorities to protect marine mammals from ship strikes, this amendment would highlight the Act's intent and focus its authority to address this specific issue.

**SECTION 518. USE OF FINES**

Section 518 would amend 16 U.S.C. § 1375a to include a new paragraph granting the National Oceanic and Atmospheric Administration the same authority currently available to the U.S. Fish and Wildlife Service to use fines and penalties collected pursuant to the MMPA for conservation and recovery activities. The Secretary could use any available monies from fines or penalties to enhance its marine mammal programs. This amendment is further designed to make the provision consistent across the two agencies, since both are charged with ensuring the conservation of marine mammals.

**SECTION 519. CONFORMING AMENDMENTS TO THE TABLE OF CONTENTS**

Section 519 would update the table of contents to reflect revisions and additions to section titles within the Act. These technical amendments are needed to conform with the title changes such that the table of contents accurately catalogues the sections of the Act.

**SECTION 520. TECHNICAL CORRECTIONS**

Section 520 would make four minor grammatical corrections to sections 3, 107, 109 and 112. These changes are intended to correct drafting errors made with previous amendments to the bill.